IN THE COMPETITION APPEAL TRIBUNAL

Case No 1032/1/1/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd & 24th September, 2004

Before:
MARION SIMMONS QC (Chairman)
DR. ARTHUR PRYOR CB
MR. DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

APEX ASPHALT & PAVING COMPANY LIMITED — Appellant

and

OFFICE OF FAIR TRADING — Respondent

Mr. Daniel Beard (instructed by Messrs. Wright Hassall) appeared for the Appellant.

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

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MAIN HEARING

INDEX

THE CHAIRMAN: Good morning. To start with can I thank everyone, including Mr. Price, for the skeleton arguments which were very helpful. Arising out of those skeleton arguments, first of all, the burden and standard of proof. I think it might be helpful if we indicated where we provisionally stood on that you knew and whether it is necessary to make any further submissions.

Our present view is that the test to be applied is the test set out by Lord Nicholls in *Re: H*, and it is the passage cited by Lady Justice Butler-Sloss in *Re: U* which you provided us at divider 2, p.4 in second and third paragraphs. We actually have *Re:H*. If that is the submission you were going to make to us then there is no need to make any further submissions on that. If you do not agree with the way we were going to proceed then we are happy to hear submissions.

MR. BEARD: Madam, in relation to that, perhaps this is a matter that can be picked up in due course when I come to deal with the applications of the legal principles to the particular evidence and whether or not this has any significant impact on the way in which this is to be dealt with.

THE CHAIRMAN: I think that would be very useful, and really why you say that it is not compelling, cogent, or however one puts it.

MR. BEARD: Precisely.

THE CHAIRMAN: It is that test, and then the question is looking at the evidence.

MR. BEARD: Yes, that is accepted.

THE CHAIRMAN: We are not clear as to whether or not it is still in issue as to whether the instigator of the relevant fax was Briggs or Apex. It may not make any difference, I do not know, but it looks from the OFT skeleton that it was still in issue, but we were not sure from your skeleton whether it was still in issue.

MR. BEARD: Well Apex have always put forward their position as to how the fax came to be sent. However, the question for the Tribunal is, of course, whether or not the Decision, which says that it does not matter either way, is valid. So in those circumstances it is appropriate for Apex to deal with (a) the way in which the Decision is put; and (b) whether or not, on its account, the arrangements that the OFT allege occurred, and were in place, actually constituted a concerted practice, and in doing that it is necessary to look at both ways around that.

THE CHAIRMAN: So long as we are not going to have to decide which one it is because we would not have the material to decide it because we would not have seen the parties.

MR. BEARD: That is obviously an issue as to how the Tribunal should approach this looking at the way in which the OFT set its Decision. The OFT said it did not matter and Apex is challenging that Decision and saying well, it may matter, and furthermore it has put forward its ----

THE CHAIRMAN: Well what happens if it may matter? What is the consequence of that?

MR. BEARD: I am sorry, Madam?

THE CHAIRMAN: What is the consequence, do you say, if it may matter? If we decide that it may matter then what is the consequence – do we remit it to the OFT so that ----

MR. BEARD: Well that is a matter that can be dealt with in due course. The question here is whether or not the Decision is flawed.

MR. WARD: Could I clarify the OFT's position?

THE CHAIRMAN: Yes.

MR. WARD: Our case is really as in our skeleton, that whoever it was that instigated the fax a breach of Article 81 is made out. If you agree with that then you uphold the finding of the breach and then there are consequences perhaps of penalties.

THE CHAIRMAN: Yes, that is why I was saying what happens if we do not uphold that and we think it does matter then what happens?

MR. WARD: It may depend on what exactly you find, because if you find that it does matter and the OFT has got it wrong in finding that it did not matter, then you may have to quash the Decision. But we respectfully submit that it is very difficult to see how that could be. You have a fact finding and a primary role, you are not a Judicial Review Court – you can look at the evidence and we say you do not need to decide this point because which ever is correct there is still a breach of Article 81.

THE CHAIRMAN: But normally, in our fact finding role rather than the one we normally have witnesses – you are agreed there are not witnesses here, I assume? We gave the opportunity and it was not taken up, so there are no witnesses, we cannot hear, we can only do it on the documents which we see, which is your interview and ----

MR. WARD: The "Mr. C" witness statement. We are content for it to be decided either way.

MR. BEARD: And the material put forward by Apex.

THE CHAIRMAN: That is what I am saying, and the material put forward by Apex.

MR. BEARD: But of course Apex's primary case in relation to the first finding of infringement relating to the Frankley/Harborne Hill contracts is that it does not matter either way, so to that extent I suppose there would be a concurrence between the OFT and Apex, but only to that extent and there are further arguments where it says it does matter.

THE CHAIRMAN: The Rule 14 Notice point, the procedural point. In your skeleton you boldly say – if I can put it that way – that it is mandatory. The question is whether it is "mandatory" or "directory". The Tribunal would find it of some assistance if you directed us to the authorities you rely on for showing that it is mandatory.

MR. BEARD: Madam, without wishing to pre-empt the submissions that will be made, the question of whether or not the requirements set out in Rule 14 are mandatory, are an obligation, will depend on the analysis of statutory framework that one is dealing with.

THE CHAIRMAN: Are you saying that because the words used are mandatory words, it is therefore mandatory?

MR. BEARD: It is not only the words used. Of course the words used are important in understanding whether or not a provision is to be treated as mandatory, but it is also the framework in which one is understand those words.

MR. WARD: May I again say something about the OFT's position?

THE CHAIRMAN: Yes.

MR. WARD: We of course, like you, alighted on the word "mandatory" in the skeleton argument, and I will be handing up an additional authority *R v. Immigration Appeal Tribunal, ex parte Jeyeanthan* where Lord Woolf gave an analysis of the difference between mandatory and directory and what the consequences our. Our submission will be that the core issue is what is the intention of Parliament as to the appropriate remedy for a breach of this. What should be the consequence of a breach of Rule 14(3) – not whether it is mandatory or directory, but what consequence should flow? Our submission will be there should be no consequence in this case.

THE CHAIRMAN: That is what I had in mind, and we had not been shown the authorities.

MR. WARD: I can hand it up now, if that is convenient.

THE CHAIRMAN: No, that it is fine, when ever is the appropriate time. I assume you have already provided it?

MR. WARD: Oh yes it is called *Jeyeanthan*.

THE CHAIRMAN: Yes, I know the case. Yesterday, in the letter that we wrote, we referred to A11 in the evidence bundle – I call it "A" because it is the Apex evidence bundle, RG1.

MR. BEARD: I am sorry, madam, I am not quite sure what you are referring to.

THE CHAIRMAN: We had a response from the OFT – we wrote a letter to all the parties.

MR. BEARD: I am sorry, my instructing solicitors have not had it either, I have not seen this letter.

MR. PRICE: Do you want to look at my copy? [Laughter]

THE CHAIRMAN: Would you mind showing Mr. Beard?

MR. PRICE: If I can find it, certainly.

THE CHAIRMAN: It was copied to Apex and to Mr. Price.

MR. WARD: (After a pause): I am pleased to say we had a discussion about this anyway yesterday morning – some of this.

THE CHAIRMAN: Before you received our letter!

MR. WARD: Yes, like you, in reading the evidence yesterday I realised that the rather important interview of Mr. "C" was missing and that divider 6 was a little bit confusing.

THE CHAIRMAN: Yes.

MR. WARD: So we do have ----

THE CHAIRMAN: We have been provided with the documents last night. We received the documents. All that I was going to ask was in relation to the RG1, where it said "Malc. Can you phone Gary", because "Malc" appears in the other contracts we just wanted to make sure that the Malc there was probably Mr. Woffindin.

MR. WARD: Well other than provide you with a copy of the "post-it" which I think we have ----

THE CHAIRMAN: You do not know?

MR. WARD: I do not think I can add anything – I will pursue this further before the hearing closes.

THE CHAIRMAN: Yes, all right. In relation to divider 6 where we had the wrong document, we now have the right one.

MR. WARD: You do have, I hope, the transcripts in the interview with Mr. "C".

THE CHAIRMAN: We now have the transcript of the interview with Mr. "C". We were very confused, having read the whole of the other one, as to why it was relevant.

MR. WARD: Well it possibly has to do with Apex and Briggs.

THE CHAIRMAN: Yes.

MR. WARD: Apologies for that, obviously, it was just a mistake in putting the bundle together.

THE CHAIRMAN: Right, we need to remove those.

MR. WARD: Yes, and insert the documents which came last night.

THE CHAIRMAN: Yes, which I think has been done for us. Those were the points that we thought we would refer you to before you started so you knew what was in our minds. The only outstanding point is the timetable for today. I do not know if you have agreed something between you?

MR. BEARD: We have had a discussion between us. I anticipate being probably slightly longer than this morning dealing with my submissions in three parts. First, dealing with the FHH

contracts infringement, secondly dealing with the Dudley contracts' infringement; and thirdly, turning to deal with the fine issues.

In dealing with the first of the infringements, the FHH contracts, I intend to go through the relevant case law relating to concerted practices, highlight the key ingredients that make out concerted practice, show why the OFT failed to do this, and because that process will be referring to case law, but my learned friend is also referring to it in his skeleton, I anticipate that I will be slightly longer than he may be in dealing with the law, and certainly, as I say, I imagine I will go on beyond lunch time to cover all of the three areas in my submissions.

THE CHAIRMAN: Right, and you are going to take most of the afternoon?

MR. WARD: I am somewhat in Mr. Beard's hands as to how he chooses to open the case. Obviously, you have a fairly full skeleton from the OFT.

THE CHAIRMAN: Yes.

MR. WARD: I am not going to read that out to you, but I hope what I am going to do is to distil the important points and put what we say the evidence really says and why the evidence is cogent. I had in mind that if Mr. Beard sits down at a quarter to three I might well go into tomorrow, but it would be unusual if I were longer than he were.

THE CHAIRMAN: Take it as it comes, but I think we should have the objective of trying to finish today.

MR. BEARD: Yes, that is undoubtedly what we had in mind when we were discussing this. Obviously if the Tribunal has questions and so on, it may be that either things can be circumvented and things will be shorter than anticipated, or indeed that it might require further reference to case law or relevant documents and so on.

THE CHAIRMAN: I think the objective should be that we try and finish today, or at least get to a position where we will finish within a half hour tomorrow morning.

MR. BEARD: Certainly.

MR. WARD: From your questions, Ma'am, and you have obviously had a chance to look at the papers reasonably thoroughly, I anticipate therefore that going through the evidence is not a good use of the Tribunal's time?

THE CHAIRMAN: I think directing us as to how you interpret the evidence, what you say is important, would be of use – on both sides – but going through the skeletons word for word, I think we have all read them.

Before you start. Mr. Price, from your skeleton you do not make any submissions in relation to concerted practice?

MR. PRICE: No.

THE CHAIRMAN: We appreciate that if Apex succeeded on the argument they would want to succeed on the argument, and therefore what you are doing is adopting whatever Mr. Beard says.

MR. PRICE: Yes, Ma'am.

THE CHAIRMAN: If, when you listen, at the end you wish to say anything about it particular to your case, or how you would like it put, then of course you will have that chance tomorrow.

MR. PRICE: Thank you.

THE CHAIRMAN: But otherwise we will assume that you are adopting everything that Mr. Beard says on that point.

MR. PRICE: Thank you.

MR. BEARD: Madam, Members of the Tribunal, before I begin submissions there were one or two minor housekeeping issues from my side. In the bundles of authorities there is what is referred to at tab 12 as an extract from the *Cimenteries* case. That is a very, very brief extract – it is understandable, given the size of the *Cimenteries* case, which is an epic tome, however, it was felt useful to provide a little fuller extract of that case and therefore I hand up five versions of that. [Documents handed to the Tribunal] Whilst I am at it, there is also an additional authority that Apex will refer to, it is the *Pernod-Ricard* Decision of the CAT, with which the Tribunal may be very familiar. It is suggested that that is included, perhaps, at tab 25 in the third bundle of authorities.

THE CHAIRMAN: There is one member of this Tribunal who was on that Tribunal.

MR. BEARD: Yes, there is a certain familiarity with that Decision. It was thought appropriate to deal with it. That authority – I have obviously provided it to my learned friend already – is germane to the questions about the interpretation and consequences of the requirements of Rule 14 and, in particular, the extent to which Community Law principles relate to notification of proposals to fine are relevant. Since the end of that Judgment is, in effect, a s.16 in that regard I thought it was helpful if that was available to the Tribunal.

As I said, the intention is to deal with the submissions in relation to each of the discrete infringements, and one of the points that will be emphasised is, of course, that these are discrete infringements. They involve different parties in each case. The allegation of the OFT is not some grand "I'll scratch your back if you scratch mine" type of arrangement, and that is important in considering the background and the extent to which inferences can be drawn from relevant evidence. It is simply not good enough to say "Well, we are concerned about activities in the roofing industry in the West Midlands and elsewhere, it all

smells rather bad. In th1ose circumstances we think there is something nasty going on" but without going through and identifying what the ingredients of concerted practice are, and ensuring that those ingredients have been fulfilled in a particular case.

In dealing with the FHH contracts, the first infringement that the OFT found in relation to Apex, there are two key points that Apex will emphasise, two key issues, ingredients that the OFT has failed to make out. The first is that it has failed to show that there was practical co-operation and, secondly, it has been confused about the extent to which one refers to the object of conduct and how that is relevant to a finding of concerted practice. In dealing with the FHH contracts I will also turn to the issues relating to burden of proof, and the points that the Tribunal has already raised, although in simple terms Apex will be relying on the *Napp* formulation which, in its view, echoes what is dealt with in *Re: U*, and it will apply the principles both in relation to the ingredients required for a concerted practice, and issues relating to burden of proof in assessing whether or not the OFT has made out the relevant standard on essentially the two pieces of evidence it relies upon, namely the fax and the interview with Mr. "C".

THE CHAIRMAN: Are you saying there is a difference between *Napp* and *Re: H*?

MR. BEARD: No. In relation to the Dudley contract, the second infringement, the submissions will, of course, be broken down into two parts. It has been referred to as "procedural" argument, but it is the arguments relating to Rule 14 and, in dealing with that, I will touch upon my learned friend's reference to *Jeyeanthan* and it may be that further authority will be required to be referred to in that context but, of course it has not been heard on what basis the OFT relies specifically on *Jeyeanthan* so it may be that that is a matter that is better dealt with in reply.

In dealing with that I will consider both the domestic and, as I said, the EC Law approach in those circumstances, and then I will go on to deal with the substantive issues relating to whether or not there was an infringement, whether or not a concerted practice could be found in that particular case, and then I will pick up the issues relating to the inadequacy of reasoning which will come out at those two sets of submissions in relation to the discrete infringements. Finally, I will turn to deal with the issues relating to the quantum of fine in each case, and the failure of the OFT either to take into account the impact (or lack of it) on consumers and customers, and the failure properly to take into account the limited duration of the relevant discrete infringements.

If I may turn to the first infringement, the Frankley/Harborne Hill contracts, and I will refer to those as "FHH", if I may. The finding is, of course, of a concerted practice. It is

noticeable in the Rule 14 Notice that the emphasis was on an allegation of an agreement existing between Briggs and Apex if one looks at annex 2 of the Notice of Appeal (p.30) – it is perhaps not necessary to turn it up – there is reference to the finding of an agreement, or a proposal to make a finding that there was an unlawful agreement, and indeed there is reference to relevant case law relating to findings of agreements, in particular the *Sandoz v Miller* cases. Of course, by the time we came to the Decision the OFT had moved well away from that. It did not allege that there was an agreement between Briggs and Apex, it had moved to the position that there was merely a concerted practice. As I say, one of the criticisms Apex has of the OFT's approach is that it appears to be sliding from a situation where it says "We think there was an agreement here" in fact, it cannot make out an agreement. It moves to a position where it is saying it is concerted practice, but in doing so it fails to analyse what are the requirements of a concerted practice when one is proving that alone. Apex says that the OFT's approach is inadequate, failing to ensure that it is analysed specific ingredients in the case.

I realise that the Tribunal is cryingly familiar with the requirements of the Chapter I prohibition and, in particular, s.2, but in moving to analyse what the ingredients of the concerted practice are it is worth bearing in mind that s.2(1) of the Competition Act says: "Subject to section 3…" which is of course the exemption provisions –

> "…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 in the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the …"

relevant provisions. From that basic definition there are three important points to be drawn out. First, and most obviously, the Chapter I prohibition and, indeed, Article 81 refers to and prohibits multi-lateral arrangements, at least bi-lateral arrangements. Secondly, one of the species it prohibits is concerted practices, and the term itself is important. Thirdly, as is clear from s.2(1)(b) it is necessary in order to find an infringement that an agreement, or a decision of an association of undertakings, or a concerted practice has, as its object or effect the prevention, restriction or distortion of competition. The reason I emphasise that, although it is utterly obvious from the text, is because it is an additional requirement. You must prove the concerted practice and then show it has an anti-competitive object, or an

anti-competitive effect. As I said in outline, one of Apex's key concerns and objections to the Decision is that the OFT has conflated that requirement with the ingredients for a concerted practice. It has to find a concerted practice first and then identify an anti-competitive object or effect.

That analysis is in particular borne out in *Bayer AG v Commission of the European Communities*, which is at tab 19 in bundle 2 of the authorities. Tab 19 is the report of the Court of First Instance in this case. Tab 20 is the report of the ECJ on a further appeal in the case. For the these purposes I am going to refer to the CFI Judgment, and the ECJ does nothing to diverge from anything said by the CFI in relation to the issues to which I am about to refer.

This was a case concerning the drug Adalat. Adalat was a drug that was considered extremely important and very, very successful for the Bayer group – it related to cardiovascular treatment. Drug pricing across the Community varies enormously because of the Health Service regimes that exist in each country. As it happened, because of the regime that exists in the UK, Adalat was very highly priced in the UK. The result was that wholesalers in other Member States who were getting hold of Adalat, and particular wholesalers in Spain, were finding that actually rather than selling to the Spanish it was far more profitable to export the amounts of Adalat they were receiving from Bayer, ship them over to the UK, make an enhanced profit by selling them to the NHS – what is generally known as parallel importing into the UK.

Of course, that was of concern to Bayer who wanted to ensure that there was substantial sales to Spain and also substantial sales in the UK, that it was sending through wholesalers presumably at a higher price. So Bayer spotted that wholesalers in Spain were buying vast quantities of drugs and shipping them to the UK. It monitored the levels that had been purchased by these wholesalers and reduced the quantities of drug that it was providing to its Spanish wholesalers, essentially preventing them from shipping those sorts of quantities abroad. The Commission thought that this was one of the great cardinal sins of European Competition Law, and it was undermining the internal market because it was precluding parallel imports and it found that there was an unlawful agreement between Bayer and its wholesalers, because essentially the wholesalers were being forced, effectively, to consent, acquiesce to Bayer's strategy of not allowing extensive parallel export into the UK.

The Commission Decision in that regard was overturned by the CFI and that Appeal was upheld by the ECJ. The important passage to which I would refer is at paras. 63 and 64

of the Judgment, at p.3407. At para.63 it rehearsed Article 85(1) now Article 81(1) which is in identical terms, effectively to the Chapter I prohibition barring the reference to effect on trade between Member States. Then it says:

> "It is clear from the wording of that article that the prohibition thus proclaimed concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings, decisions by associations of undertakings and concerted practices."

Then at 69:

> "It follows that the concept of an agreement…"

because that is what was being dealt with in this case:

> "…within the meaning of Article [81](1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, in the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intentions."

So first of all in *Bayer* re-emphasis of basic ingredients of arrangements that will infringe 81(1) and by virtue of s.60 of the Competition Act, of course, Chapter I, and then a specific exposition of the analysis of an agreement, and what the ingredients for an agreement are.

If I can then turn to the case law concerning the concept of a concerted practice, I will turn first to tab 5 which is referred to generally as the "*Dyestuffs*" case. It is the ICI cartel case – *Imperial Chemical Industries Ltd. V Commission of the European Communities*. It is perhaps worth observing just at the outset, before going through the various authorities, that there are some common themes that will spring out. First, in all of these cases where the ingredients for a concerted practice are analysed, you have major cartels involving commodity products, so sugar, plastics, dyestuffs – there are various other cases relating to steel etc, that we have not burdened the authorities bundles with. Those arrangements have generally existed over prolonged periods, there have been large numbers of players although that is clearly not necessary, but those players have participated in the relevant arrangements. They have actually done things, and that is going to be an important part of what Apex says is necessary to find a concerted practice. It should be noted that in most of these cases the analysis of concerted practice is wrapped up with findings of agreements as well.

So turning to "*Dyestuffs*" itself, at p.648 you can see the background to the findings in this case. What was concerning the Commission, and indeed the parties in the market, was the fact that during the mid-60s there had been three uniform price increases by all the

parties alleged to be involved in the dyestuffs cartel over the course of about three years. They were very significant increases, all the prices went up by 15 per cent. in 1964, then they went up around 10 per cent., and towards mid-October 1967 they went up between 8 and 12 per cent. across the Community. So here we have practical action by each of the players alleged to be part of the cartel. The question was, were they doing this unilaterally as part of individual pricing decisions, or was there some unlawful arrangement between them?

The arguments of the parties are set out at paras.51-63, where they say actually we had good reason to set these prices as we did because there was a degree of price leadership in the market, as soon as we saw prices moving we would then move ours to compete in this commodity market. It is then in considering this behaviour by the parties that the Court lays down the test that has been relied upon by the OFT in its finding of concerted practice, it has been referred to by it in the skeleton argument, and indeed is the basic definition of a concerted practice that is subsequently referred to in a large number of authorities.

Paragraph 64:

"Article 85 draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object [*of the term 'concerted practice*] is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

Paragraph 65:

"By its very nature, then, a concerted practice does not have all the elements of a contract but may *inter alia* arise out of coordination which becomes apparent from the behaviour of the participants."

So when you have behaviour, as you have here, parallel price movements across the markets by all players it may be possible to conclude that there is coordination that constitutes concerted practice where that behaviour exists. Notably at 66 it says:

"Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.

"67 This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilise prices.."

Then at 68:

"Therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question."

So if one has that sort of behaviour then one can analyse the market to see whether one can infer that there was a concerted practice, but the predicate is that there was that behaviour.

In the skeleton argument submitted by Apex there has been an attempt to distil from that basic definition propositions that must be fulfilled in order for there to exist a concerted practice. (p3, para.4 of the skeleton). First of all there must be at least two undertakings involved. Not only is that obvious from the requirement of bilateral or multilateral involvement in any infringement of Chapter 1 of Article 81, but it is also obvious from the notion of cooperation or consultation. You cannot do it on your own.

The two parties must cooperate. That is crystal clear from the requirements of para.64. The cooperation between those two parties must be practical, that is specified in para.64. In other words, you must involve actions on both parts. That is the only meaning that can sensibly be attributed to the notion of practical cooperation. The results of those actions must substitute for the risks of competition, that is clear from the final part of para.64- all the coordination:

"…knowingly substitutes practical cooperation between [*the parties*] for the risks of competition."

The fifth proposition can also be drawn out of that sentence – the actions of the parties must be causative, they must cause the result by which the risks of competition are substituted. It is necessary to show a causal link. Finally, each party must know that its actions contribute to an outcome which substitutes for the risks of competition. That is obvious from the reference to "knowingly substitutes practical cooperation".

So those are six minimum ingredients that are going to be required for any Regulator to make out an infringement of the Chapter I prohibition, because those are the minimum ingredients for a concerted practice. There is then the further question of whether or not that concerted practice has as its object or effect the prevention, restriction or distortion of competition. That is not the only analysis of the ingredients required for concerted practice.

At tab 24 of the authorities bundle the Tribunal will have seen the article from Oliver Black relating to the interpretation of, I think he would say the true conditions ----

THE CHAIRMAN: Is he an authority?

MR. BEARD: It is certainly not binding, Madam. It was thoughtful helpful to include this since it is one of the few contributions to the discussion of what is involved in a concerted practice that actually exists in the literature. It was put in the bundle of authorities for convenience. Without rehearsing Mr. Black's arguments in detail, at p.222 Mr. Black considers what a concerted practice is, what must be required of parties or what must be proved by a Regulator in order for a concerted practice to be found, and the definition in *Dyestuffs* is obviously the starting point. As quoted in the skeleton, he considers that the terminology of *Dyestuffs* is not particularly helpful since it uses synonyms for the notion of concertation. He describes in fact the notion of knowing being "pleonastic", which both my learned friend and I had to go and look up – it just means it falls from the notion of cooperation, i.e. you could not cooperate unknowingly.

The key point that will be drawn from this article and analysis is that Black suggests that a further requirement of any concerted practice is that there must be mutual reliance between the parties. He distinguishes that quite carefully from there being mutual obligations between the parties, but he does emphasise a need for mutual reliance. In other words, I have to be relying on you to do X when I do Y in order for there to be a concerted practice. Otherwise, he considers that any analysis of concerted practice could allow parallel behaviour to be caught – parallel behaviour albeit taking into account information that existed in the market – and it would be wrong for that sort of behaviour to be caught by the definition of "concerted practice" as it has been expounded in *Dyestuffs* and subsequent cases. His conclusion is that this is helpful because it shows how you can have a notion of concerted practice which is neither an agreement nor, for instance, collective dominance, tacit collusion – call it what you will – in oligopolistic markets and therefore it gives it a meaning which does not unnecessarily overlap with other concepts which are current in competition law for preventing unlawful and anti-competitive behaviour. But as has been made clear in the skeleton argument, given the way in which the OFT has approach this matter particularly in relation to the FHH contracts, it does not appear necessary in order to show that the OFT's Decision is wrong to deal with the requirement of the mutual reliance.

The next case to which I will turn is *CoÖperative Vereniging "Suiker Unie" UA and others v Commission of the European Communities*, which is at tab 6 in the bundle. Again, this is a pan European cartel which was encapsulated in the phrase "chacun chez soit", in

other words it was a cartel involving all of the major sugar producers cross what was the Community at that time, essentially carving up the Community into its separate Member States and maintaining their positions within their home country and excluding other importers to a greater or lesser extent.

Page 23 of the Decision, and unfortunately this is one of those Decisions that has been copied from a website where all of the text is capitalised which I find is fantastically awkward to read. From para.126 in particular through to para.130 there is a summary of what it was that was going on which had caused such concern to the Commission.

> "127. The practices, for which the applicants or some of them are blamed, can be subdivided into three groups of actions or omissions.
>
> "128. The first complaint made against them is that they channelled very nearly all exports in the Netherlands to specific consignees or destinations, namely Netherlands producers, [*of sugar*] certain industries, which these producers had permitted them to supply, and for denaturing or export at a later date to third countries."

In other words, it was an arrangement whereby if you were going to import into the Netherlands you had to import to a Netherlands sugar producer rather than importing to customers which enabled partition in the market, and these were reciprocal arrangements.

> "129. Further they are blamed for having refused to supply operators wishing to import sugar into a neighbouring Member State.
>
> "130. Finally the Commission made the complaint against RT, [*Raffinerie Tirlemontoisei*] on the one hand and SU [*Suiker-Unie*] and CSM [*Centrale Suiker Maatschappij*] on the other hand, that they respectively compelled Belgian and Netherlands' dealers to adopt their policy."

Then there is discussion of the evidence, which in particular included evidence from third party importers in Holland talking about the activities of Raffinerie Tirelmontoisei. Then at paras. 167 onwards there is a consideration of the existence of concerted practices. It is important to note at para.167 that all these findings, looking at the documentary evidence, show that the applicants in fact behaved in the ways alleged by the Commission.

> "168. It can therefore be taken for granted that almost all the exports in the Netherlands of RT and the producers which it controls were channelled to Netherlands sugar producers, the Milk Products or Chemical Industries or for denaturing, that RT hardly ever supplied the long established customers of the

Netherlands producers and that it forced Belgian dealer-importers to adopt this policy of channelling deliveries to specific consignees."

And it goes on looking at the relevant material until it comes to para. 173, where he is dealing with an objection that actually there was not a pre-existing plan between all of these parties to divide up the market, so that each controlled its own home market, and said:

"173. The criteria of coordination and cooperation laid down by the case-law of the court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.

"174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

"175 The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors."

It is para. 174 that the OFT places a great deal of weight on. Here it is important to note, of course, that what the court was talking about was mutual conduct – exchanges of information, the setting of targets, restrictions being enforced – that resulted in concrete behaviour on the market by all of the participants and in those circumstances to turn round and say "We did not have a plan at the outset, we did not have a concrete plan about precisely who was going to do what, where, that we then rolled out" clearly was no defence to the fact that there existed a concerted practice. However, it is important not to read para.174 and in particular the last part of it in isolation, because if one reads the requirements of independence as strictly precluding:

"…any direct or indirect between operators the object or effect thereof is either to influence the conduct upon the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

That phrase could apply to unilateral conduct, because clearly you could have contact by one operator to another, that operator is contacting the second with the intent of distorting competition – for instance, fixing prices, targets, what have you – and in those circumstances would have fulfilled all the requirements of 174 but would clearly not have been an infringement of Chapter I or Article 81. So it is dangerous to read 174 alone, and that is reinforced by the fact that in paras.25 to 28 of *Suiker Unie* (p.12) the *Dyestuffs* formulation is reiterated, and it is reiterated, as can be seen from para. 25, as the basic manner in which one defines a concerted practice. In other words, for all the emphasis that is being placed on *Suiker Unie*, and it is referred to subsequently in the case law, it is approving the basic definition that is set out in *Dyestuffs* and it is essentially saying that you do not have to have a pre-ordained plan to be worked out in order for you to fall foul of Article 18 or Chapter I as being party to a concerted practice. But it cannot be saying more than that in circumstances where you have arrangements being implemented, participation by undertakings in complicated cartel activities, and it is that that is being found to be concerted practice – alongside various agreements.

Taking the various cases in chronological order, I will just turn briefly to the Woodpulp 2 case – *A. Ahlström Osakeyhitiö and Others v Commission of the European Communities* which is at tab 23 of the authorities bundle. This case tends to be better known for the fact that it concerned a finding of infringement against undertakings none of whom were based in the European Community. It is better known for its consideration of the extra territorial effects so-called, of Community Competition Law.

Here again, as can be seen from paras. 35 through to 37, what had been found by the Commission was that there had been concerted action by undertakings in Canada, US, Finland and Sweden relating to prices for bleached sulphate wood pulp, which I believe was and is used in the newspaper industry. In considering whether or not in particularly quarterly price announcements made by the various parties infringed Article 81 of the Treaty the court rehearsed the definitions from *Dyestuffs* and *Suiker Unie* (in particular at para. 63). They then went on to emphasise in relation to the evidence put forward by the Commission (at para.71):

"71. In determining the probative value of those different factors…"

these were the factors that had been identified by the Commission. in particular the quarterly price announcements and the simultaneity of price announcements, and changes in pricing, they should be treated as proof of concertation. Here the court was saying the definition is set out in *Dyestuffs*, and in order for you, Commission, to prove a concerted

practice you must show that the only plausible explanation of the conduct in question – so again here we have conduct on the market – the only plausible explanation was concertation. The placing weight on the need for the Commission to prove fully that in fact a concertation had existed. If, on the evidence, one could look round and say "in fact that did not amount to concertation" that would not be sufficient. In relation to the definition of I do not think Wood Pulp 2 takes matters much further than that.

The next case to deal with is *Enichem Anic v Commission*. Again, a case upon which the OFT places fairly substantial weight. It is at tab 7 in the bundle. The background to the case is set out at p.4165. It is related to the polypropylene market in the late 70s where there appears to have been over capacity, and various very large chemical companies were implicated in arrangements which are set out in para.8 particularly in that:

> "— contacted each other and met regularly (from the beginning of 1981, twice each month) in a series of secret meetings so as to discuss and determine their commercial policies;
>
> "— set 'target' (or minimum) prices from time to time for the sale of the product in each Member State of the EEC;
>
> "— agreed various measures designed to facilitate the implementation of such target prices, including (principally) temporary restrictions on output, the exchange of detailed information on their deliveries, the holding of local meetings.
>
> "— introduced simultaneous price increases implementing the said targets;

and shared the market by allocating quotas amongst each other. So the accusations covered perhaps all of the most serious infringements of Chapter I or Article 81.

In paras. 40 and 41 the court considered the Judgment of the Court of First Instance in this case, this was an Appeal, in relation to the application of 85(1) and referred to various of the cases to which I have already referred and in particular *Suiker Unie* at para. 41. It noted at para.42 that Anic had taken part over a period of years in an integrated set of schemes constituting a single infringement which progressively manifest itself both in unlawful agreements and unlawful practices. That was the accusation that was being made. Then at para. 93, at p.4196, the court turned to deal with Anic's claim that:

> "… the Court of First Instance erred in law by holding that, once Anic's participation in the regular meetings of polypropylene producers had been proved, it could not assert that it had not subscribed to the price initiatives which had been decided on, planned and monitored at those meetings, without providing any

evidence to corroborate that assertion. That approach involves a manifest reversal of the burden of proof…"

and then:

"… thus freeing the Commission from its burden of finding any other corroborating evidence of the undertaking's conduct."

In other words, Anic was saying "Well, we did go along to these meetings. We were party to the exchanges of information, we swapped our information with others, we were at the meetings where targets were set, but you have not proved that we actually did anything subsequently – for instance, raising our prices in accordance with the targets that were set or restricting our output. In those circumstances you have not made out the infringement."

In paras. 98 and 99 the ECJ cites the Judgment of the Court of First Instance and says:

"98. The Court of First Instance considered, at paragraph 198 of the contested judgment, that the Commission was entitled to treat the common intentions existing between Anic and the other polypropylene producer, which related in particular to price initiatives, as agreements within the meaning of Article 85(1) of the Treaty.

"99. It is settled case-law that, for the purposes of applying Article 85(1) of the Treaty there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition."

So here was a finding of a concurrence of wills which constituted an agreement and it had the object of limiting competition. Then, at para.102 onwards:

"Anic criticises the Court of First Instance for having wrongly rejected its complaint that the infringement had not been legally characterised as either an agreement or a concerted practice within the meaning of Article 85 of the Treaty."

The Court rejected that saying that you can have a situation where a whole set of arrangements mean that you have both components of agreement and of concerted practice. In particular at para. 109 to 111 it talks about the way in which the inference can be characterised.

"109. The Court observes first of all that, at paragraphs 198 and 202 of the contested judgment, the Court of First Instance held that the Commission was entitled to categorise as agreements certain type of conduct on the part of the undertakings concerned, and, in the alternative, as concerted practices certain other forms of conduct on the part of the same undertakings. At paragraph 204, the Court

of First Instance held that Anic had taken part in an integrated set of schemes constituting a single infringement which progressively manifested itself in both unlawful agreements and unlawful concerted practices."

"110. With regard to the conduct categorised as concerted practices, namely the regular meetings of polypropylene producers and Anic's communication to ICI at the end of October 1982 of is aspirations in terms of sales volumes for the first quarter of 1983, the Court of First Instance based its finding, in paragraph 201, on the assertion that following the concerted action decided upon at the meetings of the polypropylene producers Anic was bound to take account, directly or indirectly, of the information obtained during the course of those meetings in determining the policy which it intended to follow on the market. Similarly, according to the Court of First Instance, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by Anic about the course and conduct which it had itself decided upon or which it contemplated adopting on the market.

"111 At paragraph 205, the Court of First Instance held that the Commission was entitled to characterise that single infringement as 'an agreement and a concerted practice'…"

Anic challenged that approach in a number of ways, both in association of agreement of concerted practice and the very basic understanding of a concerted practice, and at para.115 the Court is seen referring to cases to which I have already referred and talking about knowing substitution of the risks of competition by practical cooperation between parties as being necessary to show concerted practice. It refers to *Suiker Unie,* Wood Pulp, *John Deere* which was a case about information swapping between tractor part manufacturers and tractor manufacturers, whether or not those arrangements amounted to concerted practice.

Then at para. 118:

"It follows that, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings concerting together conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."

In other words, there are two stages. It then concludes in para.119:

"The Court of First Instance therefore committed an error of law in relation to the interpretation of the concept of concerted practice in holding that the undertakings

collusive practices had necessarily had an effect on the conduct of the undertakings which participated in them.

"120. It does not, however, follow that this cross-appeal should be upheld…

Then the next para:

"121. For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements…"

So in other words, the arrangements between the parties to swap information, to set targets and so on, that were undertaken at these various meetings -

"… and remaining active on the market .."

in other words, they were still producing and selling the polypropylene that was subject of the discussions and exchange of information at the meetings.

"… on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance."

So the fact that there had been prolonged, regular detailed meetings at which this information was swapped between the parties, Anic and the other parties were exchanging price sensitive information, setting targets doing various things that the Commission considered was controlling the way in which the polypropylene market operated, those steps, taken over a long period, meant that you could presume that when Anic continued to act there was an effect on its behaviour in the market, and on the behaviour of others.

In the most recent skeleton there has been reference to "particularly when they concert together on a regular basis" as being not showing that it is necessary for there to be concertation together over a long period in order for this presumption to arise. To some extent Apex accepts that. There may be circumstances where one can presume effects from concertation, but clearly the degree to which that presumption can be drawn will depend on how long and the nature of the concertation – how long the concertation has been going on and the nature of the concertation. What is absolutely clear is that that is nothing to do with defining the concerted practice. What this is talking about is whether or not, once you have a concerted practice, it can be said to have an anti-competitive effect, and that is made clear because para. 121 starts off: "For one thing…." there is this presumption. Paragraph 122 –

"For another, a concerted practice, as defined above, falls under Article 85(1) of the Treaty even in the absence of anti-competitive effects on the market.

"123. First, it follows from the actual text of Article 85(1) that, as in the case of agreements between undertakings and decisions by association s of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.

"124. Next, although the concept of a concerted practice presupposes the conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition."

In other words, there must be behaviour but it is not going to be automatically presumed that that has an effect just because it is behaviour that is sufficient to show a concerted practice.

"126 The Court of First Instance therefore rightly held, despite faulty legal reasoning, that, since the Commission h ad established to the requisite legal standard that Anic had participated in collusion for the purpose of restricting competition, it did not have to adduce evidence that the collusion had manifested itself in conduct on the market."

In other words, the object alone of these arrangements would be sufficient. What is clear is that there had to be that relevant conduct, that relevant practical cooperation between the parties.

I will deal briefly with two more recent cases, the *Hüls v Commission* which is found at tab 13 in the authorities' bundle. Here again we are back with polypropylene. The background is set out at para.3. This again is an Appeal from the Decision of the Court of First Instance, and related to a system whereby which target prices were being set. It is the same arrangements that are in issue and are set out in para.7. Here Hüls was another of the parties, and it is clear from para.21 that it was involved in price initiative setting, from para.24 that it was involved in measures designed to facilitate the implementation of those price initiatives. It was involved in setting target tonnages and quotas – para. 27, and indeed para. 30.

Then at para. 155 the Court recognises, and sums-up:

"Hüls had participated in the meetings between undertakings of a manifestly anti-competitive nature, it was for Hüls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."

In other words, there is no good turning up at these meetings, exchanging the information, being party to the setting of the relevant tonnages, the output restrictions, disclosing your policies, and then saying "We did not do it for any sort of anti-competitive reason". You are engaging in conduct that can fall within the scope of the Chapter 1 of the Prohibition and Article 81.

In paras 158 through to 162, we see the definitions from *Suiker Unie*, from Wood Pulp, with *Deere* and Dyestuffs being reiterated once again.

> "161. It follows first, that the concept of a concerted practice, as it results from the actual terms of Article 81(1) EC, implies, besides undertakings concerting with each other, subsequent conduct on the market, and a relationship of cause and effect between the two."

It then refers again to the Anic "presumption" as I refer to it. Then at paras.163 to 165 it emphasises that you can have anti-competitive object.

At tab 14 there is the *FHB case* 2002. At p.9 a list of the behaviour that was at issue between members of the pre-insulated pipes' industry.

> "— dividing national markets
>
> "— allocating markets to particular producers
>
> "— agreeing prices
>
> "— allocating projects"

and protecting cartels from a substantial non-member.

At para.215 it says that the Appellant here, Henss/Isoplus participated on numerous occasions in the exchange of information on market share. In other words, it was swapping its information with others. Then we have the quote from Anic and Hüls that in those circumstances an effect can be presumed. At para.223 there is the reference again to the fact that you cannot exculpate yourself from conduct – exchanging information, setting targets – unless you make it clear to others that that is precisely what you are doing.

Finally, in this context, I will turn to the case of *Aalborg Portland* to be found at tab 3 of bundle 1 of the authorities. This was the Appeal to the ECJ from the epic CFI Decision in *Cimenteries* relating to pan European cement cartel, in relation to both white and grey cement. At para.15 the behaviour of the various parties is described. Again, there were meetings, information exchanges, setting of targets, prices, etc.

In para. 30 of the OFT's skeleton this case is referred to as demonstrating that tacit approval, or passive modes of participation in a concerted practice are sufficient to mean that an individual party is involved in an unlawful infringement of Chapter I. The first and

most obvious point to make is how one distinguishes tacit approval that does not result in conduct from "not approval" is one that the OFT never answers. But more particularly, *Aalborg* does not in any way depart from the previous case law. It does not alter the requirements that are set out in *Dyestuffs* that must be fulfilled in order for a concerted practice to be found. It cites various of the cases to which I have already referred, including *Hüls* and *Anic*. In para. 78 it says:

> "..it should be for the party or the authority alleging an infringement of the competition rules to prove the existence thereof."

Then at para. 79:

> "Although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned…

At para. 80:

> "In the Cement Decision, the Commission concluded that there was a cartel in the cement sector in which, it claimed, 42 undertakings and associations, including the present appellants, had participated. That decision was essentially upheld by the Court of First Instance, which, in the exercise of its power to review the Commission's findings as to the degree of the undertaking's involvement and participation in the cartel, amended the fines. Apart from alleging errors of law and in the reasoning in the judgment under appeal, the appellants essentially dispute the Court of First Instance's findings concerning their participation in the cartel and the degree or duration of that participation.
>
> "81. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel."

Again, nothing new or surprising there.

> "Where the participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."

But those meetings, the participation in them, was setting the targets, it was exchanging the information. There was conduct by all of the parties at the meetings, they are not caught by this infringement decision.

"82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.

"83. The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk

"84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement..

"85. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting."

The first thing to note is, of course, this is in relation to agreements; and secondly, it does not change the need for proper participation in a concerted practice.

So the principles that I set out at the outset, that I have set out in the skeleton, are borne out by the case law as it exists relating to concerted practices. You must have two undertakings. There must be practical cooperation by both, a form of conduct – that is clear from *Anic* and all of the other cases – but it may not be necessary to show an anti-competitive effect. It is enough to show an anti-competitive object. If you are in need of showing an anti-competitive effect, you may be able to rely on presumptions, but both of those principles arrive once you have found that there is a concerted practice.

So when, in his skeleton argument, it says in the heading to para.40: "There is no requirement to act on a concerted practice" the OFT is correct in its careful use of the preposition, because if there is a concerted practice you do not have to have acted on it. The

object of the concerted practice may be sufficient, but you do need action to constitute the concerted practice. This makes sense not only from the term "concerted practice" itself, but also from the notion of "cooperation" just in its ordinary meaning.

If I take an analogy, if I want to play tennis it requires a minimum degree of cooperation from at least one other person. If I say that I am going to be at the tennis courts at 3 o'clock, my friends who I happen to have around might come out with rather different reactions. Now, Jane might say "I want nothing to do with your tennis. I want nothing at all to do with you" and in fact she steps out into the street and says "I am going to make clear to the world that I want nothing to do with tennis", and she actively distances herself from my statement that I will be at the tennis courts at 3. I think the OFT accept that Jane is not going to be cooperating, there is no cooperation of a practical sort at all.

The next person that I mention the fact that I will be at the tennis courts at 3 to ignores me and just keeps reading the paper. He does not turn up at 3 o'clock when I turn up at the court. It is unclear whether the OFT thinks he is cooperating, but clearly, on an ordinary meaning of the term, he is not.

The third person says "In principle, I am interested in playing tennis". I say I will turn up at 3 o'clock at the courts and I do. He does not. Again, there is no cooperation here. Certainly, there is no sense of practical co-operation. It is only if the person turns up, ready, willing equipped, that you have anything approaching practical cooperation that would be analogous to that which is required for a concerted practice. Indeed, risking stretching the analogy, the additional ingredient is required showing object or effect of anti-competitive behaviour, that can be compared with the fact of playing a game or not. If playing tennis is an anti-competitive behaviour, the fact that you both turn up at the court at 3 o'clock may be sufficient to constitute a concerted practice, and one that infringes Chapter I because it has an anti-competitive object.

On the other hand, if playing tennis is the sort of conduct that is not considered to have an anti-competitive object then you would actually have to have evidence of the game in order for the case to be made out that there was an infringement under Chapter I prohibition. But that does not avoid the fact that you need that prior degree of cooperation, practical cooperation, as set out and required by the *Dyestuffs* case.

Turning to the facts in relation to the FHH contracts and, in particular, the facts referred to and relied upon by the OFT in its Decision. There are two pieces of evidence which are referred to – p.29 of the Decision – evidence of agreements or concerted practice. Paragraph 61 is the fax from Apex to Briggs.

"These are your figures inclusive of contingencies for the two projects…"

of FHH (Frankley/Harborne Hill). Undoubtedly Apex provided figures to Briggs on that fax. Mr. "C" from Briggs:

"… we were asked to do a cover for a couple of schools that Apex roofing knew about that were coming out to tender … The jobs or the enquiries [*from the relevant authorities*] duly hit my desk and remained there until this fax came through…[*the fax above*] … we looked at the specification required for the job."

We thought the figures were too high and decided we were not going to put in a tender. Now when it comes to analysing those facts at p.60 of the Decision. At para.188 the text of the fax is repeated. The OFT says that there is no legitimate reason for Apex to send Briggs these figures. Then the text of the record of the interview with Mr. "C" is repeated. The OFT says:

"The OFT finds that the these extracts from Mr. C's interview, when considered together with the figures that Apex actually faxed to Briggs, demonstrate that Briggs received the figures from Apex that Briggs had proposed to submit to BCC in relation to the Frankley and Harborne Hill contracts."

That assumption is not borne out. There is no indication in the material that Briggs had proposed to Apex. Then at 191:

"The OFT considers that the evidence set out at paragraphs 188 to 190 demonstrates that a concerted practice to provide non-competitive prices such that Briggs would not win the contracts was in place between Apex and Briggs in relation to tenders… The fact that Briggs did not put in a tender for the Frankley and Harborne Hill School contracts because it thought that the prices Apex gave it were too high does not change the fact that the existence of the concerted practice that the OFT has found, the object of which was that Briggs would put in a bid but not win the contracts."

The OFT then goes on in its conclusions, para.196 onwards, and at para.200:

"…therefore, the OFT concludes that there was a concerted practice between Apex and Briggs having the object of providing none-competitive prices in relation to the tenders submitted for work in relation to, first, Frankley School and, second, in relation to Harborne Hill School such that Briggs would pout in a bid but not win the contracts."

Reading that again, there was a concerted practice that Briggs would put in a bid but would not win the contracts.

"The OFT considers that the collusion relating to the contract for Frankley High School and the collusion relating to the contract for Harborne Hill School constitute a single infringement because the participants made a single collusive arrangement for both schools."

But nowhere does the OFT set out what the cooperation was, what the practical cooperation was that Briggs actually undertook. Indeed, it is difficult to see how it can do so because, on the OFT's case Apex wanted Briggs to lodge a cover bid and it sent figures accordingly, but Briggs simply did not do so. It did not play ball. It did not turn up at the tennis court. There as no cooperation, there was no practical cooperation. The OFT refers to the object of contact between Apex and Briggs being anti-competitive, but really the object it is talking about is the object of Apex. There is no evidence as to the object of Briggs. Indeed, talking about the object of Briggs' action is difficult, in fact, to articulate, because the object of Briggs' action was not what Apex wanted, on the OFT's case, Briggs did something completely different – it did not lodge a bid at all. There is no evidence that Briggs was intending to lodge a bid, nothing put forward by the OFT in that regard. There is nothing suggesting Briggs changed its position. There is nothing in the interview material that suggests that Briggs was intending to lodge a bid. There is nothing that can be read from the material in the interview that Briggs was intending to lodge a bid, and there is nothing in the fax sent from Apex indicating that Apex was somehow threatening Briggs not to lodge a bid. On the contrary, on the OFT's case, Apex wanted Briggs to lodge a bid.

So, even on the OFT's account it were true that, for example, Briggs had recognised that in principle it would consider lodging a bid, that alone does not make out a concerted practice. That is no more making out the relevant ingredients of a concerted practice than my friend who says "Well in principle I will play tennis this afternoon", and then does not appear. It simply goes back to the very basic ingredients set out in *Dyestuffs* – there was not the relevant practical cooperation. As a result, the idea that result of the actions of the parties substituted for the risk of the competition and caused a substitution, and they each knowingly contribute to it, cannot be made out.

In the OFT's analysis, they are either presuming that a concerted practice exists and then saying the object of it was anti-competitive because there is something funny about one party sending to another figures relating to a tender, or, they are treating an anti-competitive object which they attribute to Apex as sufficient to prove a concerted practice overall. But as the case law makes clear you have to prove the concerted practice first.

The skeleton, at para.42 onwards, talks about the conduct of Briggs being sufficient to prove a concerted practice. First it does so by reference to the *Anic* presumption. But as has been clear – I hope – from the submissions previously made, that presumption is not one relating to a presumption that there is conduct on the market sufficient to show the concerted practice, that is a presumption as to whether the concerted practice has an anti-competitive effect. The analysis of *Anic*, *Cimenteries*, *Hüls* and *FHB* in this context – yes, all those cases are to the same effect, but they do not do the work that the OFT wants them to do in relation to the operation of this presumption. It was here that they refer to the absence, pointed out by Apex, of regular meetings over time in which there was a meaningful exchange of evidence, to say this is a subset of concerted practices and the presumption does not only apply to those.

That is true, but the presumption will apply to arrangements undertaken where there has been participation, where there has been co-operation - insert "may apply" in those circumstances where there have not been regular meetings, where in particular there was not a mutual exchange of I think it may be information but it may be evidence, as quoted at para. 43. But that does not get away from the fact that you need practical co-operation and it was that that was being highlighted by Apex in its submissions in the reply. It was saying not that it is only if you have exchange of information over three years or over five years that this presumption operates, it is that you must have acts of participation to the extent of actions being performed, exchange of information, agreement to target, what have you. The same is true of the *Hüls* and *HFB* cases. The presumption is all the more true where the undertakings concert together on a regular basis over a long period, as was the case here. Apex accept it is all the more true that if people are participating in a concerted practice that in those circumstances where they have been doing it over a longer period it is more likely to be appropriate to presume that there was an anti-competitive effect. So when the OFT tries to effectively pass the baton back to Apex by saying that once this presumption arises it is for Apex to prove to the contrary that it was not party to a concerted practice it is actually jumping ahead. It would be if the OFT approved a concerted practice then in those circumstances, if the various bases were the presumption were made out, then it has to be said the presumption is much less likely to operate where you have not had regular meetings and there has not been a persistent course of conduct, but in those circumstances then it may be for Apex to deal with rebutting that presumption. Just to re-emphasise that point, at tab 20 the case of *Bayer* in the European Court sets out the position explicitly and therefore may be a useful point of reference.

As I have said, this is an Appeal from the Court of First Instance Decision to which I referred the Tribunal at the outset. In it there was contestation that the operation of the so-called *Anic* presumption was essentially reversing the burden of proof. At para.62 p.14 of 28, after dismissing an admissibility point:

> "… it should be noted that, in *Anic Partecipazioni*, contrary to what BAI is suggesting, the Court of Justice did not modify the principle that, where there is a dispute as to the existence of an infringement of the competition rules, it is for the Commission to prove the infringement which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement.
>
> "63. In *Anic Partecipazioni*, it was established that an agreement, within the meaning of Article 85(1) of the Treaty, had been concluded at a meeting between various participants. The Court therefore held that an undertaking which had participated in that meeting had to bear the burden of proof if it subsequently wished to argue that it did not intend to participate in the implementation of that agreement thus established. It follows that the reversal of the burden of proof in that case took place after the existence of an agreement formed at a meeting between three undertakings had been established. Moreover, the possibility open to the undertaking concerned, which bore the burden of proof, was to withdraw from the agreement which had been established and not to deny its very existence. Therefore, BAI cannot validly rely on the judgment in *Anic Partecipazioni* in support of its second plea…"

As I say, after having tried to rely on presumption, it then relies on inferences drawn from the evidence. First, it is important to re-emphasise that it is not enough to infer that there might have been anti-competitive objects. It is necessary for the OFT to indicate how – whether directly or by inference – it has shown practical cooperation. Without going through para. 48 through to para. 51 line by line, the simple point is that you are not going to be able to show by inference that there has been co-operation when the evidence clearly shows that Briggs did not co-operate. If it were possible to infer from a simple receipt of information the relevant bid figures in the fax that the undertaking was party to concerted practice, because that information could, for example, be taken into account in future by the recipient party, then unilateral acts would clearly be caught by a Chapter 1 prohibition which, as identified at the outset, would be wholly wrong and, to be fair to the OFT, it accepts that unilateral acts should not be caught by the Chapter 1 prohibition. But, although

it states that, the corollary of its reasoning in relation to these facts are such that it is effectively undermining the statement that it previously relies upon.

The third point to be emphasised is that there has been no evidence put forward to show that there has been any impact upon behaviour. There was no evidence that, but for the fax coming across, Briggs was going to bid. So the fax and the interview where Mr. "C" says "We have been asked by Apex to cover a couple of jobs and we have received a fax, but we did not do anything with it, is not sufficient in any circumstances to cross the relevant threshold of any burden of proof because it does not show that the relevant ingredients of the requirements for a concerted practice have been made out.

There are, of course, further arguments in relation to the reasons why the FHH contract arrangements that the OFT allege do not constitute an unlawful concerted practice, but before I turn to them it is perhaps worth now pausing to canvass the issues relating to burden of proof, since the argument dealt with up to now is less reliant on precisely what the burden of proof is – in subsequent arguments it may be more germane. But as set out in the skeleton argument of the Appellant (p.6 para.20) the Appellant accepts and adopts the approach to burdens and standard of proof that has been set out at paras. 91 to 113 of the *Napp* Judgment by the CAT. It has quoted here the relevant passages - para.104 of the CAT Judgment recognising that we are dealing here with a civil standard, the preponderance or balance of probabilities. It then follows in para.108 referring to *Re: H*, to which Madam, you referred at the outset, saying:

> "… that strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved, even to the civil standard."

Then at para.109:

> "It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be."

It is accepted, of course, that the OFT can rely on inferences, but it must justify them and ensure that they cross the relevant threshold. At the outset, Madam, you referred to tab 2, *Re: U* and referred to *Re: H*, quoting Lord Nicholls:

> "Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as

contempt of court applications, but I can see no reason for thinking that family proceedings are, or should be, an exception."

Then:

"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 in 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."

One can try and blow tissue paper between *Napp* and *Re: H*, but it is a rather difficult exercise. The Appellant sees no difference in practice between the *Re: H* standard that is being discussed here by Lord Nicholls, and that articulated by the CAT, and the observation by the CAT in para. 108:

"Indeed, whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is likely to be the same."

That is not saying we move somehow by some tacit shuttling somewhere to a higher standard. What we are saying is that because of the seriousness of the infringements, the penalties being imposed in those circumstances you need to be sure that the balance of probabilities has been crossed, as set out in ----

THE CHAIRMAN: I do not think you should use the word "sure".

MR. BEARD: It is dangerous to try and paraphrase these texts. The point being made is simply that in practice where you have a situation where a serious infringement is being alleged, in those circumstances the analysis that is being set out by the CAT says that in practice you are likely to have been able to pass both anyway. The difference between the two thresholds is largely illusory, as was being suggested to the Court of Appeal in *Re: U* and in respect of which the Court of Appeal was saying that that was inappropriate.

THE CHAIRMAN: The emphasis in relation to the complexity or seriousness of the allegation goes to the quality of the evidence.

MR. BEARD: Yes.

THE CHAIRMAN: The test is a civil standard ----

MR. BEARD: Yes.

THE CHAIRMAN: -- which is satisfied on the preponderance of probabilities.

MR. BEARD: Yes. It cannot be moved away from, that was the clear ruling of the CAT in any event.

THE CHAIRMAN: Well there is no difference between us on this.

MR. BEARD: I do not understand there to be.

THE CHAIRMAN: Or difference between you.

MR. BEARD: No. This is one of the issues that was canvassed in the issues document and there was agreement about it.

Having regard to the time, it may actually be more sensible to deal with further arguments relating to Briggs after I have talked about the position in relation to the Dudley contracts, since the further arguments in relation to Briggs deal with the extent to which if it could be said that there was somehow practical cooperation nonetheless that fell short of there being a concerted practice.

THE CHAIRMAN: Can I just stop you one moment. One of the things I intended to ask you – if you look at divider 1 in the evidence, and this may or may not be relevant, you will see that the estimated tender sum is blanked out.

MR. BEARD: Yes.

THE CHAIRMAN: We do not know whether that is blanked out for the purposes of this hearing, or whether it has been blanked out because the OFT did not know that sum. If the OFT knew that amount then I think we would like to see a copy or know what that figure is. It is not blanked out in the other contract.

MR. BEARD: I think it may be because some of it was actually lodged and was successful.

THE CHAIRMAN: No, I think, if you look at the other contracts, if you look at 8 for example, it is a tender selection list, so it is before the tender and they have an approved budget and an estimated tender value. It is the sum which, I will call him the "employer", tests the tender against.

MR. BEARD: Yes. That may well be right.

THE CHAIRMAN: It may be totally irrelevant, but it might be relevant if the OFT had the sum.

MR. BEARD: It might be. Perhaps more importantly in this case is the fact that there were four other bidders who actually put in sums, and there is no allegation that there was anything untoward about the sums that they put in, and Apex beat all of them. So in those circumstances even if an optimistic local authority had thought that the estimate might be lower, or a pessimistic one thought it would be high, it is not clear that that would have any real significance.

THE CHAIRMAN: Well we do not know what the sum is.

MR. BEARD: I do not know whether we have seen that. It may be something that the OFT can more quickly ----

THE CHAIRMAN: I do not think you had better say what the sum is.

MR. WARD: I do not know. Nobody in the room knows the answer to the question, but we will try and find out.

THE CHAIRMAN: I thought I would raise it now because then you can find out over the short adjournment.

MR. BEARD: As I say, I will come back to further arguments relating to the FHH contracts, but before I move to Dudley, it should be said that on the basis of the analysis that has been set out thus far, if it were Briggs that asked for the figures, or Apex that asked for the figures, it makes no difference because you still lack the requisite ingredient of a concerted practice.

THE CHAIRMAN: That is because you say that Briggs would have had to have acted on it?

MR. BEARD: Briggs has to do something, yes. The ingredients are two undertakings cooperating, practical cooperation.

THE CHAIRMAN: But if Briggs asks for the figures, is that sufficient for practical cooperation?

MR. BEARD: No, because you have no practical cooperation in relation to the matter with which you are concerned, the lodging of the bids.

THE CHAIRMAN: If you tested that for a moment, if Briggs asked Apex for the figure, and Apex gives the figure and Briggs then makes a decision as to whether or not to put in a tender – forget about covering – would you not have some practical cooperation?

MR. BEARD: The hypothetical is that Briggs takes it into account and bids?

THE CHAIRMAN: Or does not bid – it was going to compete, possibly, but it decides that no, it is not going to put in a tender because, for whatever reason, it has decided not to put in tender.

MR. BEARD: It is difficult to understand how the two things are linked. If someone provides you with figures that are above what they are going to bid and you do not know to what extent, it does not tell you anything.

THE CHAIRMAN: Well, you may know, for example, that it is likely that he is going to put in, in this case it is 5 per cent. so let us just say 10 per cent., and you work that out and you think "Can I go lower than that?" You say "No, I cannot", and therefore you decide not to put in a bid because you are not going to get it you think, and you will leave it. If they want to put in at that level then they can have it, you are not going to make a sufficient profit.

MR. BEARD: The suggestion then is that Briggs asks Apex for the figures with a view to suggesting to Apex that it will cover the bid, but it is actually lying to Apex ----

THE CHAIRMAN: Effectively.

MR. BEARD: -- when it asks, and it is lying by saying "Well, we think that they might give us a cover if we plead with them and we can treat that as information upon which we can then act, and that that alone on the part of Briggs is sufficient to constitute practical cooperation with Apex, even though it is something completely different from what it was that we were purporting to ask Apex to provide us with. That is the scenario. So we are saying "Even though I lied to you we are actually cooperating." Am I understanding correctly, Madam? I am sorry, I do not mean to be obtuse.

THE CHAIRMAN: Well, does it matter? Briggs phones Apex and says to Apex "What figure would you like us to put this in at?" It does not say "We want to cover…" or whatever, but your implication would be that that must be, the only result could be a cover. Anyway, Apex then gives them the figure and that allows Briggs to work out what the likely Apex figure is and therefore decides not to bid because they do not want to go below that figure.

MR. BEARD: Again, it is difficult to see what the practical cooperation of Briggs is with Apex. It is unclear how one characterises that as cooperation between the parties in those circumstances. It is also difficult to see how that sort of scenario could be derived from the material that we are talking about here – certainly, it is no part of the case. Further, it would seem odd to say that that was practical cooperation that was substituting for the risks of competition in those circumstances, because the dissembling by Briggs was to enable it to compete more effectively against Apex, that would have to be the corollary.

THE CHAIRMAN: Well it has decided not to compete, whereas if it had some information which made it decide not to compete.

MR. BEARD: Had some information ….

THE CHAIRMAN: The information being that it deduced from the figure that Apex gave it Apex's likely figure.

MR. BEARD: As I say, the simple answer is it is difficult to see how that is practical cooperation in those circumstances. If that is the OFT's case – of course, that is not what they said in the Decision. They said that it does not matter one way or the other who asked for what. We said that does not hang together because there is no practical cooperation. If instead they are saying that actually it does matter, because if Apex provided the material without Briggs having answered, then that is not practical cooperation. But if Briggs asked, but asked Apex on the presumption that they indicated to Apex that they were not going to enter a competitive bid, because presumably Apex would not ever provide that information, on the basis that they were intending to compete, but wanted to indicate to Apex that they did

not want to compete, Apex say that they have said to us they do not want to compete, by implication. We will cooperate with them in the sense of providing them with the information that they want, which will not be our bid. They then do not enter a bid, having seen those figures, because although previously they thought they might do, actually they have seen that they would be beaten by competition effectively. So the OFT would then be saying you have cooperated to the extent that someone lied to you and because of their lying you did something that we ordinarily would not expect to see in the market.

THE CHAIRMAN: Because you have to be independent. You are not supposed to have any of this information.

MR. BEARD: You are not supposed to have any information at all?

THE CHAIRMAN: Well the Codes tell you that.

MR. BEARD: And although you have entirely different intentions in relation to these matters, effectively you have seen the bid prices early, and you have withdrawn, and because of that competition, because of that you have acted in substitution with pressures of competition.

THE CHAIRMAN: Yes.

MR. BEARD: I see problems with making out that case in relation to each of those ingredients, and it perhaps illustrates a further difficulty in trying to understand what the reasoning of the OFT is in its Decision, if that is the way that it interprets the material that it relies upon, because quite how it gets that interpretation from the statement of Mr. "C" – presumably that is the only piece of information we are dealing with – that Apex ask them whether they would do a cover, it is very difficult to understand indeed, because that is the evidence that they rely upon. So apart from struggling to see precisely how each of the ingredients is ticked off – practical cooperation, substitution for competition – it is difficult also to see how that fits with getting over the relevant burden of proof on the material that they rely upon.

Perhaps that is something that I can revert to after the short adjournment.

DR. PRYOR: If I may just follow up on that point, we are looking here at a set of facts in the West Midlands, which perhaps are of a rather more modest character than many of the examples you have been quoting to us this morning. The facts rely essentially upon the nature of a tender process conducted by a local authority, and the essential feature of that process is the expectation on the part of the authority that it would receive in response to its tender a number of independently articulated bids formulated by contractors wholly independently of each other because that is the nature of a tender process – it is designed to produced competition in a very structured way.

What is suggested here, and indeed in preparing these bids, a number of these operators are in some circumstances obliged to give a certification, or a confirmation that they have not had any contact with each other in the preparation of these bids – that may or may not be a factor in the particular contract we are talking of here, but it certainly is a factor in some of these contracts in relation to that area. Underneath that, such a confirmation is no more than an articulation of just what I was saying, the desire that there should be a fully competitive process between people designed at the end of the day to identify the contract who was prepared to make the most cost-effective bid from the standpoint of the customer, and the contractor may decide that bid would indeed be a loss making bid if he has the will to do so. But the whole essence of the process at the end of it is the element of the independence of formulation of those bids. It does seem to me we move – in the light of the one element of evidence which is admitted, which is the fax from Apex – into a situation where there has been some departure from that expectation and, in a sense I think that is where I at least still have some uncertainty of mind as to what the motivation behind that can properly be expressed to be, because the very use of the language in that fax, your figures, accompanied by language such as "Have a nice holiday, Malc." etc. would indicate that is not exactly a wholly out of the blue communication but is actually part and parcel of an ongoing process of contact, and this is an action within that ongoing process.

It is a little difficult for me at the moment to see how that process does not actually represent an attempt to seek an interference in this competitive process as I have described it, by inducing an action on the part of the other party which would not be what that party might otherwise have done. I quite accept that you are right in saying obviously that it did not in the end produce a bid from Briggs, but the loser at the end of the day possibly was the authority which did not receive five competitive bids, because it was presumably open to all parties if they were not prepared to put in a bid, to say so at the beginning, and to allow another bidder, therefore, to come forward and become a participant in that process.

In essence, my sense is that bringing it down to the level of West Midlands, rather than *Suiker* and *Cimenteries* is to try and address this question of whether Apex in that case did or did not represent an attempt to falsify that process of free competition between those who were participating in the process.

MR. BEARD: Just dealing with the matter perhaps slightly in reverse. The first point is the OFT's analysis is that Apex did attempt to get Briggs to do something untoward, and it may be that there are issues relating to compliance with tendering processes, but those are

different issues from those that had to be dealt with in the context of an infringement. To some extent those issues have to be set to one side, in particular an attempt to engage in anti-competitive behaviour that would infringe Article 81 and Chapter I is clearly not an infringement so if, as you say, sir, the action of Apex was an attempt to undermine this process, as the OFT are suggesting, that does not mean that it was an infringement of the Chapter I prohibition. That may mean that you say "Well, this smells" and you say "This seems to be part of an ongoing process but this is a situation where it is necessary for the OFT in making a finding of infringement to show in its Decision how it is that the requirements for proving a concerted practice have been made out. Whilst, of course, the realm of West Midlands roofing is rather different from pan European cement, polypropylene, whatever else, cartel activity, the legal principles that apply are the same. The OFT must go through that process, and it must tick those boxes. It may think that there are people out there trying to do the very things that we do not want them doing, but there is no offence of an attempt to breach Chapter I.

Insofar as the OFT have made out a case of attempt, it has not made out a case for Chapter I infringement. So it has certainly not made out any case of ongoing contact. The most it has said is, there must be a previous contact between Apex and Briggs, because Apex said it will be sending a fax. There is no suggestion in the Decision that there is some wider scheme at work here. In answer to the question that perhaps underlies your line of question, sir, is why would Apex be doing this? The same question arises in relation to this infringement, the FHH contracts, the Dudley contracts, and potentially Mr. Price's case. The reasons are clear. The reasons were set out in some detail in response to a request from the OFT in particular, following the oral hearing, and that is if you, as a contractor, do not respond to invitations to bid the likelihood of you being invited to bid in the future will be significantly reduced. The OFT say in the Decision that you will not be struck off the approved lists that these local authorities have. The approved lists of contractors are very long and, it is true, that just not responding to a particular tender may not mean you are going to be struck off, although I will refer the Tribunal later to letters in which that is actually threatened.

The suggestion that one can simply decide that within a day or two of the tender being sent, and these tenders are being sent to people who have not indicated at any time that they are interested in that particular job – they are just on the list and they are invited to tender. They receive these tenders and often the letters will say something like "We draw within two days, let us know if you are not going to tender within two days". Once you

receive a tender like that, dealing with a large building and possibly substantial roofing works, it may be imperative not only that you find out something about the building but you actually go and survey, you actually go and estimate it. You may not know whether or not it is the sort of job you can take on given your staff, given your experience with materials. The idea that one can turn this round within two days is really not a sensible suggestion in these circumstances. There may be occasions where one can refuse, and they do see occasional instances of people pulling out of tender processes immediately, but that is commonly not the case. This evidence, that was specifically asked for by the OFT, is nowhere referred to in the Decision.

So, sir, in respect of your questions, yes, it is perfectly appropriate to distinguish between the broad pan-European cartels and what has been happening in the West Midlands but not in terms of legal principle. Secondly, showing an attempt, however much that might be something the Tribunal does not like to see, however much it is something that the OFT does not like to see, that does not constitute an infringement, and the OFT must make sure that it ticks all the boxes – it has not done so here – and underlying the question of motivation, which is not necessary, certainly for the analysis of the relationship with Briggs that we are talking about here, but that motivation is a real problem for participants in this market, that Apex has put forward detailed material in response to the OFT's request – it was entirely ignored in the Decision – and it says that explains why it did what it did in these particulars, discrete circumstances, and the OFT has put forward no evidence, it is not part of its case, that this is part of some broader scheme whether between the two parties, or between other parties elsewhere in the industry.

I hope that picks up the range of questions. If there are matters I did not deal with perhaps, sir, you can refer me back to them.

DR. PRYOR: Thank you.

THE CHAIRMAN: The cases you have referred to us are not tendering cases?

MR. BEARD: They are not tendering cases, no.

THE CHAIRMAN: I do not think there are any tendering cases – it is a new area.

MR. BEARD: Strangely enough, yes. We have looked and tendering cases are not one would like to say common, but they do not seem to exist, and so this is undoubtedly a significant departure from the core case law that deals with concerted practices on any account.

THE CHAIRMAN: So we can see from the cases what the Court has thought about what ingredients are necessary to have a concerted practice for the purposes of parallel imports. We have, by analogy, to try and work out what a concerted practice is for the purposes of a

tendering process. It may be obvious if you have two parties and they agree to get agreement. You may not have a formal agreement, but there may be sufficient there to say there is an agreement – "You put in that tender". "I will not put in that tender" – a nice, obvious case. But the question is what does concerted practice mean in this area? I have not gone back to look at the dictionary to see what "concerted" means, for example.

MR. BEARD: What is interesting is the fact that the definitions given do not just refer to concertation, they refer to practical cooperation, and without wanting to seem contrary, Madam, it is not correct to say that one is reasoning by analogy here. Of course by the operation of s.60 this Tribunal is bound by the Judgment of the ECJ and CFI in interpreting the term "concerted practice" since it is clearly the same term that is used in 81(1) – I do not think there is any disagreement between OFT and Apex on that. So to that extent where the Court sets out principles is not a matter of identifying analogous principles for a different field, those principles set out what constitutes a concerted practice. If that means that certain behaviour relating to tendering does not fall within those requirements, so be it, but this Tribunal is bound by those principles. That being said, of course, there is the question of how one transposes principles, and applies them to different situations. Of course, that is what we are endeavouring to do here. There is no issue taken with it, and the exercise, which I have tried to undertake this morning, of distilling out what the principles are and what the requirements that are corollative of the principles set out by the ECJ and CFI has endeavoured to set out a rubrick – these are the principles that are neutral, that have to be ticked off if you are going to show a concerted practice. It does not matter if it is sugar, or salt, or steel, or any other sort of commodity. It does not matter if it is setting prices, it does not matter if it is exchanging information, limiting out put, rigging bids, those principles must be applied, and those boxes must be ticked.

The point may be that for the OFT to try to apply those principles in this field is more complicated than they initially envisaged and, certainly, in terms of the reasoning in the Decision, there is no recognition of the fact that here we are dealing with an area where none of the factual precedents – of that is not an oxymoron – deal with this sort of situation. There are no attempts to try and distil out the relevant principles, and then to try and apply them across, and that is at the core of the challenge to the adequacy of the reasoning here as much as anything else. Simply listing the evidence, re-listing it in your analysis and then saying "Well I stands to reason that this amounts to an infringement" by citing some standard paragraphs from one or two of the key original Judgments is simply inadequate here, because it is very, very difficult to understand how the OFT have reached their

relevant conclusions. That to some extent can be seen from the defence in the skeleton which has tried to expand upon the reasoning – such as it is – exists in the Decision, but nonetheless it begins to open up different lines of supposed attack and create different issues that Apex then has to deal with – precisely the sort of thing that is not intended should be permitted in these sorts of proceedings.

Does that assist you, Madam, in dealing with the question that you particularly raised?

THE CHAIRMAN: Yes, thank you.

MR. SUMMERS: Mr. Beard, you have placed a great deal of emphasis on the importance of submitting tenders and the serious consequences of withdrawing from tenders or declining to submit tenders. In this instance the firm decided not to submit at tender, to decline, at a very late stage in the process. Would you wish us to draw any conclusions, inferences from that, in relation to receipt of the fax?

MR. BEARD: It is not immediately obvious what the relevant inferences would be in those circumstances.

MR. SUMMERS: For a firm to have, shall we say, a period of a month in which to tender and then to decide at the very last minute not to tender and to decline, might be considered unusual.

MR. BEARD: It might be considered unusual. I can see that there may be ----

MR. SUMMERS: And that decision might have been spurred, of course by the receipt of knowledge about other competitors' views of what the price of that tender might be.

MR. BEARD: There are two points to be made in relation to that. First, in relation to Briggs, which is a very large, vertically integrated company, it may be that these considerations weigh less heavily and that in those circumstances it may decide that it can simply adopt a different position in relation to these matters – I am simply not in a position to comment on that.

Secondly, it does not take the OFT's case any further forward because there is no suggestion that Briggs was actually going to bid in this case at any time. There is no basis upon which any inference could be drawn that it was, in fact, going to bid in the circumstances, and the OFT has not pointed to any such basis. So in those circumstances the notion that an inference could be drawn to the contrary would be to extrapolate a very long way from a very, very thin basis in these circumstances. The evidence that has been put forward is in relation to the motivation of this particular company and it refers to motivation of other companies in this market.

THE CHAIRMAN: There actually may be some evidence effectively that the inference should not be drawn because if they were going to tender they would have gone out and priced the job, surveyed the job, and they have not done that or there is no evidence of that.

MR. BEARD: There is certainly no evidence of that.

THE CHAIRMAN: And it looks as if they did not – does he not say he left it on his desk?

MR. BEARD: Yes, whether or not that means that they necessarily did not, one would suppose not ----

THE CHAIRMAN: There is no evidence that they did.

MR. BEARD: But again it is one of these areas where one is fishing around and it is very difficult to draw conclusions one way or another, and it really is not for Apex to try and draw those sorts of conclusions. It is for the OFT to spell out what it is that it is inferring from this very limited material that leads it to a conclusion that there was a concerted practice, and it is simply failing to do that.

I was about to turn to the Dudley contract.

THE CHAIRMAN: Shall we do that at 5 past 2?

MR. BEARD: That would seem sensible, Madam, yes.

(Adjourned for a short time)

MR. BEARD: Madam, just before the short adjournment, I was turning to the Dudley infringement. I will deal first with procedural issues, and then come on to the substantive matter. The first issue is: can the OFT impose a fine on Apex in relation to the Dudley matter and, indeed, could it reach a conclusion that there had been an infringement?

Obviously the key issue here, as has been aired in the relevant pleadings previously, is whether or not the breach of Rule 14 that has occurred in relation to both the specification that there will be an infringement decision and, more particularly, that a fine will be imposed. Does that mean that the OFT was entitled either to make an infringement decision or, more particularly, was it entitled to impose a fine?

The arguments of Apex in relation to the proper interpretation of Rule 14 are set out initially in para. 28 at p.11 of the Notice of Appeal and in particular paras.29 and 30 refer to the relevant ingredients of Rule 14(1) and 14(3) – if I could just rehearse them. If the Director proposes to make a decision that the Chapter I prohibition has been infringed he shall give written notice to each person who that Director considers is a party to the agreement, or is engaged in the conduct as the case may be, which that Director considers has led to the infringement.

Then 14(3):

"A written notice given under paragraph (1) … above shall state the fact on which the Director relies, the matters to which he has taken objection, the action he proposes and his reasons for it."

As is set out in the Notice of Appeal those requirements are to be construed strictly, being as they are requirements in relation to a notice that is a significant step to a finding of infringement and the potential imposition of a penalty which is an exceedingly serious matter, and has been recognised indeed, to amounting to a criminal charge for the purposes of Article 6 of the European Convention on Human Rights. Indeed, the strictness of the interpretation of the obligations on the OFT (as it now is) in relation to Rule 14 are, to some extent, emphasised by the simple fact that regulations 25 and 26 of the Rules are the only provisions setting out derogations from the requirement of service of written notices upon particular persons specified in Rule 14, and those pertain to the service of Rule 14 Notices on associations of undertakings and then gives alternative provisions in Rule 26 in relation to the giving of notices, and timing, and it is in particular circumstances where the Director (and now the Office) face particular difficulties with service of such Notices.

So the wording of the relevant provisions imposes an obligation "shall state", "shall serve". The structure of the arrangements specifically provide that there is a statutory provision covering situations where it may not be possible for the Director, and now the OFT, to comply with these matters. They pertain to the key step in relation to a very serious allegation and, in those circumstances, the Appellant here maintains that it is not open to the OFT to miss out some part of those requirements and then subsequently maintain that he can make a decision in relation to the very matters which have not been dealt with in the Rule 14 Notice. Rule 14 requirements, the obligations on the Office of Fair Trading, are strict and they are imposed in order to ensure that the recipients are able to consider all of the relevant matters being alleged against them in the round, in writing, at one time and can make written representations thereafter, and, if they wish, oral representations. These were matters set out in the Notice of Appeal, no issue has been taken by the Office with that basic analysis of Rule 14 Notice.

It is clear from the Decision, which is found at annex 1 to the Appeal, and in particular at p.73.

THE CHAIRMAN: What are you referring us to?

MR. BEARD: I am referring to the Decision, Madam.

THE CHAIRMAN: At p.73?

MR. BEARD: I am moving on from p.73, through the Dudley contracts' issues to the relevant tables, p.100. At the bottom of the page – under the section "Decision" – there we see Howard Evans, Solihull, Apex and General Asphalte are to be subject to an infringement decision and indeed, subsequently it becomes clear a fine in relation to what we have been referring to as the "Dudley Contracts – Hob Green, Wollescote, Christchurch and the essential schools. However, if one moves to appendix 2 at p.73, this is the Rule 14 Notice, where one sees the OFT proposed action, so fulfilling the heading specified in Rule 14.

"The OFT proposes to make a Decision that the parties listed at para.3 above have infringed the Chapter 1 prohibition in relation to [the various contracts] as set out in the table below."

Then in 333, which is particularly important:

"The table below shows each infringement that each party was involved in, the length of each infringement, and a summary of the way in which the length of infringement was calculated."

It is clear that this table is setting out that the OFT proposes to impose fines, financial penalties, in relation to each of the parties in respect of a particular contract mentioned in the table. That is made explicit further down in para.336, and in particular 341.

"The OFT proposes to impose a penalty on the parties listed at paragraph 3 above."

It does so only in relation to the tabulated infringements in para.333.

At the outset, Madam, the Tribunal raised the question of whether or not the requirements for Rule 14 are to be treated as mandatory or directory, and whether or not there is relevant authority. The position of Apex is not that one tries to distinguish in the English Common Law between mandatory or directory provisions per se, although the language may be useful in certain circumstances. The question is, is the requirement an obligation such that where it is not being complied with, in this case is the non-compliance in particular an indication of intention to fine; that the subsequent decision taken, in this case by the OFT, can be allowed to stand.

In considering that question, it is not simply a matter to be left neutrally as a matter of English law, but it is also important to consider relevant Community Law. To that end I passed up the copy of the CAT in *Pernod-Ricard* at tab 25 with which Mr. Summers will be no doubt much more familiar than the rest of us.

THE CHAIRMAN: Are you going to deal with the English law?

MR. BEARD: Yes, I will come back to the English law, if I may, because when considering the English law it is going to be important to bear in mind what the Community law has said

and, furthermore, the English law analysis must be secondary to the Community law in these circumstances in any event. If a s.60 operates to incorporate Community procedural law, and that procedural law, for example, precludes the imposition of fines that have not been mentioned in the equivalent document at a Community level, the Statement of objections, then the notion that somehow when interpreting the domestic statutory provisions it is appropriate to say, "Ah, well, that matter can simply be overlooked", it would be wrong to just try and look at that in isolation in terms of English law, because Community law would be operative.

THE CHAIRMAN: On that basis you need some rule in Community law that says these are the requirements.

MR. BEARD: Yes.

THE CHAIRMAN: Have you got that?

MR. BEARD: That is what I am moving on to. I was just referring to *Pernod-Ricard* to act as a bridging case, saying that s.60 does not just apply to substantive matters, but corresponding questions under s.60 apply to procedural issues as well.

THE CHAIRMAN: Right, well take it as you wish.

MR. BEARD: Page 52 of *Pernod-Ricard*, headed "Procedural Issues." Here the consideration was whether or not a Rule 14 Notice should have been disclosed to a third party. But in the course of the analysis of that question at page 64 onwards and, in particular, from para.224, an analysis is given to the impact of Community law in relation to this question.

At para.228 the CAT notes that this question arises against the background of the existence of s.60 of the Act, which is reproduced in that paragraph.

"(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions rising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community."

Then at 229:

"Taking section 60(1) first, the questions that rise in this case are whether Pernod had (a) a right to be heard on the matters set out in the Rule 14 notice and (b) a right to have the opportunity to comment before the OFT decided not to take its complaint any further. The "corresponding question" under Community law is, in our view, what are the principles of administrative fairness which apply in relation to competition, i.e. in the sphere covered by the competition rules of the Treaty? Thus,

although the question with which we are dealing does not relate directly to competition, as would for example a question covering the scope and meaning of the Chapter II prohibition, it seems to us that the question at issue does arise in relation to competition within the meaning of section 60(1), at least indirectly, since it concerns the procedural principles to be applied in the application and enforcement of the competition rules.

It goes on in para.230 to discuss the notion of any relevant differences.

"… there is nothing in the Act or the Director's Rules which *prevents* the participation of the complainant."

Then it looks at sub-section (2) of section 60, which I did not read out, but it refers specifically:

"(2) At any time when the court [or this Tribunal] 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 of community law.

It is the clause that makes ECJ, CFI jurisprudence binding.

The conclusion, having canvassed these issues, to deal with procedure and matters of fairness, administrative fairness, is the conclusion at 234 that:

"In all these circumstances, we are of the view that, by virtue of section 60 of the Act, we should resolve the questions before us in the same way as they would be resolved under Community Law in an equivalent situation."

So when dealing with procedural issues relating to the availability of the Rule 14 notice, the equivalent document being a Statement of objection to Community law, that in those circumstances this Tribunal should apply the same law as the Community.

The relevant law relating to the imposition of fines following on from the Statement of objections is set out first of all in tab 21, but I can move along from that to tab 20 of the bundle, in the case of *Compagnie maritime belge*. This was a large liner conference infringement. There are in fact two documents here. The first is the opinion of the Advocate

General, which runs to 43 pages. It is not that to which I am going to refer, it is the court Judgment that follows on from that, which is in the same tab.

This was a case in which various members of trade associations had been (it was found by the Commission and upheld by the Court) engaging in unlawful practices contrary to Article 86 in particular and that therefore they were going to be fined. They had received statements of objections. It is notable that the trade associations had no legal personality, and the operative parties were their members, the major shipping lines. There were clear statements of infringement in the Statement of objections, and it was clear that fines were to be imposed. However, the specific undertakings who were members of the trade associations, and who had been engaging in the relevant practices, in part through the medium of their trade associations, said that it was not right that they should be fined. That might come as some surprise. Their objection was that although their conduct had been referred to in the Statement of objections, and what was objectionable about their conduct and the conduct of them through their trade associations had been highlighted, that they had not specifically been mentioned as being persons in relation to whom a fine was proposed.

At p.21, para.139, various of the major shipping lines, including Compagnie maritime belge said:

> "…the Court of First Instance erred in law when it confirmed that the Commission was entitled to impose on them individual fines whereas, in the statement of objections, the Commission threatened to impose fines on Cewal…"

which was the trade association of which they were members, which did not, as I say, have a legal personality.

> "… and not on any one of its members."
>
> "Findings of the Court
>
> "142 It is settled case-law that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. The essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings."

And it refers to *Musique Diffusion Française and Others v Commission*, which is the case which appears at tab 21 of this bundle.

> "143. It follows that the Commission is required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed.

"144. It is clear that a statement of objections which merely identifies as the perpetrator of an infringement a collective entity, such as Cewal, does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually if infringement is made out. Contrary to what the Court of First Instance held, the fact that Cewal does not have legal personality is not relevant in this regard."

In other words, although they were specified in the statement of objections, although their behaviour was seen to be infringing, the fact that in the statement of objections it was not specified that a fine was to be imposed upon them meant that a fine could not be imposed and the fine was quashed.

THE CHAIRMAN: But the reason for that is that the requirement to a fair hearing means that you have the *audi alteram partem* rule, and you have a right to address the points, and if you are told that the trade association is going to be fined, then it is the trade association that addresses the points and not you, and therefore you have not had the right to a fair hearing.

MR. BEARD: Well, there are two points. First, what it is saying here is even if you are mentioned in the statement of objections, in respect to a pattern of conduct which you committed and you were involved in through your trade association, which has no legal personality, so it is not like there was another undertaking in the colloquial sense of the term, there was no limited company, there was no incorporated association operating there. In those circumstances, the fact that you are not mentioned in relation to fines means that a fine cannot be imposed upon you, and it sees that as a strict element, but what, Madam, you refer to as *audi alteram partem*.

THE CHAIRMAN: Who put in a response in this case?

MR. BEARD: The response – to the statement of objections?

THE CHAIRMAN: Yes.

MR. BEARD: I do not know the answer to that question.

THE CHAIRMAN: Well I think it is relevant, because I think it is probably the trade association and not the individuals.

MR. BEARD: Whether or not the trade association and not the individuals put in a response the point is that when the Commission came to make a decision it imposed a fine on individuals.

THE CHAIRMAN: Absolutely, but they had not told the individuals they were charged, they had told the trade association they were going to be charged.

MR. BEARD: They told the trade association they were going to be fined.

THE CHAIRMAN: Yes, and not the individuals, the individuals therefore have not had an opportunity to put in individual responses.

MR. BEARD: With respect, Madam, that does not necessarily follow. They may well have put in responses, I do not know the answer to that question, they may not. Furthermore, it is clear from the content of the Decision, that what was being talked about was behaviour by the individual, so they were well aware that they were being implicated in matters which resulted in fines, albeit fines that in the statement of objections were being specified as imposed on the trade association. I do not think it would be possible to get hold of the statement of objections itself – it is possible to have the Decision. I have copies of the Decision, it is not in the bundle, but I could provide it to the Tribunal if that would be of assistance – the EC Decision.

THE CHAIRMAN: It is not in the Judgment?

MR. BEARD: The Decision of the Commission is quite a lengthy document, it is actually longer than the Judgment itself. The conclusion of the contested Decision is set out at p.7 of 25. In Article 1 it says:

> "The Cewal, Cowac and Ukwal shipping conferences and the undertakings that are members thereof, a list of which is attached as Annex 1 to this decision, have infringed Article 85(1) of the EC Treaty."

So by the time of the Decision it was clear that the matter was being dealt with in the round, and it is noticeable that in the Appeal, it is not being suggested elsewhere in the Appeal as far as I am aware that the undertakings did not know what the allegations of impropriety were against them. All they were saying was "We were not specified as being persons in respect of whom a fine was going to be imposed."

THE CHAIRMAN: I understand that. What I would like to know is who put in the response?

MR. BEARD: I am not sure. I can look in the Commission Decision to see whether there is any specific reference to that but, Madam, the fact the response may have come from the trade association, which of course would be a response on behalf of its members, does not change the clear statement of principle that is set out in 143.

THE CHAIRMAN: I think you are missing my point. If the situation is that the response was from the trade association then the fact was that the individuals were never given an opportunity to respond independently. If they were never given an opportunity to respond independently then they would not have been given a fair hearing. They would not have

known that they were in line of fire for a fine and therefore that they needed to respond individually.

MR. BEARD: There are two points to make. If, Madam, that were correct, one would expect to see a challenge by the individual undertakings to the findings of infringement against them.

THE CHAIRMAN: They may not have.

MR. BEARD: I am sorry, Madam?

THE CHAIRMAN: They may not have challenged that.

MR. BEARD: No.

THE CHAIRMAN: … challenged the fine.

MR. BEARD: But if, Madam, your reasoning is correct, that the key to the analysis here is because the individuals did not put in responses to the allegations of infringement against them, that was the crucial deciding factor as to whether or not it was right to impose fines upon them. One would expect the court to have concluded that the findings of infringement themselves could not be sustained, because they would not have been alleged against the individual undertakings. But that is not the reasoning that is given in those paragraphs of the Judgment **there**.

THE CHAIRMAN: I am not sure that follows, but let us go on.

MR. BEARD: Madam, since a fine can only flow from the existence of an infringement it would be the predicate of any challenge that if they had not received the relevant notice and they had not been given a fair hearing in relation to the infringement, that was something ----

THE CHAIRMAN: They may have accepted that they had infringed, but they got out on a technicality.

MR. BEARD: Well it would be the same technicality obviously in relation to infringement and fine, and therefore it would seem unusual, but I will nonetheless check the position in order to assist.

The other case in this connection is the case of *Cimenteries* which is referred to in extracts in tab 12, which is in the second bundle of authorities. This is essentially the converse situation. Here was a situation set out in paras.17 to 19. If the Tribunal were to turn on to p.651.

THE CHAIRMAN: What paragraph is that?

MR. BEARD: It is 478 and it is 480 that I wish to refer to, the paragraph under the not hugely clear.

THE CHAIRMAN: 478 – I think it is two pages from the end of what you handed in this morning.

MR. BEARD: Yes.

THE CHAIRMAN: We only have one page in the file.

MR. BEARD: Yes, I am sorry.

THE CHAIRMAN: It is all right, I just want to be sure we are looking at the right thing.

MR. BEARD: Yes, this is in fact *Cimenteries* in its entirety, I think.

THE CHAIRMAN: No, I do not think it is.

MR. BEARD: I think it is an unnecessary waste of forest.

THE CHAIRMAN: Oh, that is. 478.

MR. BEARD: Yes. (After a pause) It is perhaps useful just to read the preliminary observations at 475.

THE CHAIRMAN: I do not think we have those.

MR. BEARD: Yes, it is just the other side of the page.

THE CHAIRMAN: That is 475.

MR. BEARD: Yes. The allegation that is then made is by the trade associations of the cement producers complaining that the statement of objections did not specify them as being subject to proposed fines, but the Commission went on and imposed fines for participation in the Cemburo agreement, not only on the undertakings but also on the trade associations to which the contested decision was address. It considers it necessary to fine the trade associations so as to dissuade them from taking the initiative in or facilitating such restrictive agreements and practice in the future. The three associations in question say they were not notified during the administrative procedure of the Commission's intention to impose fines on them. That is the only allegation being dealt with here, not that they did not know about infringements. At 480 the court points out that the Commission is not entitled to impose a fine on an undertaking, or an association of undertakings without it having previously informed the party concerned, during the administrative procedure that it intended to do so.

So again, it is a very, very specific statement that if you are going to impose a fine on an undertaking you must inform it in the course of the administrative procedure.

THE CHAIRMAN: What about the last sentence?

MR. BEARD: I am sorry, I was going to read on.

THE CHAIRMAN: "In cases where…"

MR. BEARD: Yes.

"In cases where, after service of the SO the Commission decides to impose a fine that has not been mentioned in the SO it must serve on the undertaking or the

association of undertakings concerned a supplement to the statement of objections. It observes the procedural rules applicable to any SO."

So it is clearly saying there that you must let them know, and it is leaving open the possibility that there may be procedural steps that you can take in order to deal with these matters if it has been missed out. But nevertheless, what he is saying is that the obligation is strict under community law, albeit that if you miss that then you may be able to rectify it.

THE CHAIRMAN: But this is not saying any different from the obligation under English law or in any case where there is a charge, the charge must be put to you. It is Strasbourg law, it is a fair trial.

MR. BEARD: Well it is saying more than that in that it is saying even if you know about the infringement allegations, there must be specification of the proposed fine against you, and it is for that reason that I am placing emphasis on the ----

THE CHAIRMAN: Specification of the proposed fine or the fact that you may be fined?

MR. BEARD: The proposal that you will be fined.

THE CHAIRMAN: Right. Not the specification?

MR. BEARD: No, sorry, I did not mean in terms of gravity or seriousness. I will come on and deal with that, because that is an issue raised in the *Corus* case, which the OFT referred to, that is different. So these two cases make out a strict obligation. It is accepted that there may be means of correcting it under Community law, but what that does not say is when and how that would have to be done. In fact, perhaps whilst we have that bundle open I can turn to *Corus* and deal with that case now. This is the case that the OFT refers to now in its skeleton argument in relation to these matters. It is a relatively recent case. There is no suggestion of criticism for their not having dealt with it before.

THE CHAIRMAN: Where is it?

MR. BEARD: Tab 17, I am sorry, it is in the same bundle.

THE CHAIRMAN: Yes.

MR. BEARD: This relates to behaviour of British Steel in relation to various other steel makers. The first passage to which I draw the Tribunal's attention is at para.144, which is page 25 of 38 in the top right hand corner. Here we have a paragraph of the Judgment clearly accepting the prior case law of, in particular, *Musique diffusion française v Commisison*, *Compagnie Maritime Belge Transports and Others v Commission* relating to what must be included in the statement of objections. So it is a reiteration of the points I have already made in particular relating to the requirement to specify a fine. In this case what was being alleged by Corus was that it is not fair to impose a fine on us because you have not told us in the

statement of objections how serious you think our behaviour was. You have not spelled out the gravity of the fine you intend to impose. What is important, perhaps, is to refer to the final sentence of that para:

> "The Commission is therefore under an obligation, in order to respect the rights of defence of the addressee, to give, on the basis of the evidence available to it, a sufficient indication, at the statement of objections stage, of the duration of the alleged infringement, its gravity and whether the infringement was committed intentionally or negligently."

So the question really here was, was the indication that there would be a fine imposed on Corus, which there is no issue about, it was included. Was it a sufficient indication and what was said by Corus, as reflected in para.151 on the following page:

> "In the SO, the Commission confined itself, in points 153 and 154 thereof, to stating that it intended imposing a fine, referring to the terms of Article 15(2) of Regulation No17. It is true that it stated in the SO, in point 147, that there as a market-sharing agreement which gave rise to an appreciable restriction of competition. However, it must be pointed out that that statement does not enable it to be ascertained whether, in the Commission's view, the infringement was 'serious' or 'very serious' within the meaning of the Guidelines."

Then it says well actually the situation here was that it did not set out in sufficient detail the seriousness of the fines to be imposed and therefore it is vitiated by that defect. That related to the seriousness of the fine, and the Court goes on to conclude that it is still entirely proper for a fine to be imposed upon Corus in the circumstances.

In other words, Corus knew that there was a proposal to impose a fine upon it, and in the circumstances to turn around and say "Well, it is not fair to impose a big fine on us, or a fine at all" which is what Corus was saying, "even though we have been told about the fine", just because you were not told how serious the fine was going to be is not sufficient justification for quashing the fine. That is an understandable conclusion in the circumstances, but first of all it does not cut across the fundamental proposition as set out in particular *Compagnie maritime belge* and also in the *Cimenteries* cases, that where you have indicated to an undertaking that you are going to fine it, you cannot just go ahead and impose a fine. That fine will be quashed. That is what happened in both of those cases.

It is notable that none of the OFT's submissions directly with *Compagnie maritime belge*, although it has been referred to in the materials. Instead it says things like "There was no prejudice to the Appellant". That proposition is not accepted and I will return to it. But

that in and of itself does not excuse the breaching of the rule contrary to the requirements of Community procedural law that are set out in those cases, and are set out in emphatic terms, and by virtue of s.60 must be applied here.

Furthermore, it does not deal with the language, structure, seriousness of the provisions in the Statute and the approach that should properly be adopted to their interpretation.

Madam, in relation to further submissions in respect of the case law, my learned friend, I understand, has copies of *Jeyeanthan*, which I do not know whether he is intending to refer to or not in this connection. That leaves me in something of a difficulty in dealing with it because I have not heard precisely what is going to be said in respect of it. In the circumstances I would suggest that this is a matter that might be better dealt with by me in Reply when I have heard what the OFT submissions on the application of *Jeyeanthan* are.

THE CHAIRMAN: How are you going to deal with your submission, this is mandatory under English law in any event?

MR. BEARD: Well the submission made by Apex is that one looks at the statutory framework, the seriousness of the provision and in those circumstances it imposes a clear obligation in respect of Rule 14.

THE CHAIRMAN: The case law in England clearly shows that the fact that it says "shall" does not mean necessarily that it is mandatory and you have to follow it. It depends on the way the court interprets the legislation as to whether it classifies it in any event as mandatory or directory.

MR. BEARD: That is undoubtedly true, but I think the case law to which my learned friend is referring goes slightly further than that, because there is obviously an issue as to how one interprets the word "shall" because there are odd circumstances where words like "shall" in fact mean "may", and words like "must" just mean "may". In these circumstances, for the reasons I have articulated in respect of the statutory framework, that is not appropriate ----

THE CHAIRMAN: But the cases that deal with "mandatory" and "directory" are cases which are all "shall" are they not?

MR. BEARD: Yes, that is true – well, in the main they are, I am not sure actually that all of them are.

THE CHAIRMAN: And have been interpreted that the court had to consider whether it was a mandatory requirement, or a directory requirement.

MR. BEARD: Actually, the *Jeyeanthan* line of case law says that if you categorise an obligation as mandatory or directory that may not be a good starting point and in fact it is only a

starting point and therefore one has to look more broadly at the circumstances and the issue that one is dealing with and in that case it was to do with immigration procedure. The case which was the foundation of this line of analysis where Lord Hailsham, I think it was, gave a detailed speech dealing with these matters, actually deprecated trying to distinguish mandatory and directory. The reason that there is a temptation to use the term "mandatory" is that it carries with it the sense that an authority is obliged to do it and if it fails to do so it cannot rely on that failure subsequently, and actually it cannot cure that failure subsequently in many circumstances. That is why it was said in those cases that, in fact, one did not want to talk in terms of mandatory because "shall" looks mandatory anyway. You asked yourself a different question, whether or not the matter could be cured? But in doing that one assessed whether it was appropriate to treat an obligation as a strict obligation in any event. So it is not just a matter of "Oh well, are there methods of cure?" It is that there are certain provisions that are strict in their obligation and cannot be cured.

THE CHAIRMAN: And you say this is one of them?

MR. BEARD: And I say this is one of them.

THE CHAIRMAN: And what is your authority for that?

MR. BEARD: There is clearly no authority on Rule 14, because it has never previously been interpreted.

THE CHAIRMAN: No, what is your authority for saying that under English law you can have a strict – I appreciate you say that these cases say that under EC law ----

MR. BEARD: And they are binding, yes.

THE CHAIRMAN: Right, assume that we do not follow that, and we say that is not what these cases say. What these cases say is what I have been putting to you. Then you fall back on English law and you say what is the position in English law? Now, if you are saying to me, as you have said in your skeleton, that it is mandatory then the ----

MR. BEARD: Well it is an obligation on the OFT, and it cannot go on and impose a fine in circumstances where it has not proposed to do so in the Rule 14, because, as I say in the skeleton, you cannot have a situation where the OFT effectively circumvents the clear requirements of Rule 14. Rule 14 is an obligation which requires the OFT to set out clearly and fully what its case is, what the nature of the infringement is, and whether it is going to impose a financial penalty. If the OFT are concerned about any part of that, prior to making a decision that will just render Rule 14 as nought.

THE CHAIRMAN: But you could have a supplementary Rule 14 Notice.

MR. BEARD: That may be possible, that is not what has happened here. Unfortunately, it has not been ruled out that there are other procedural steps that could be taken. There is no supplementary Rule 14 Notice, and how that could be put forward in these circumstances is a question that would have to be dealt with, depending on what was actually put forward in a supplementary Rule 14 Notice, because there might be circumstances where it will be said, "Hang on, you have already dealt with all these issues precisely in a previous Rule 14 Notice, in those circumstances it is unfair just to recycle them." But I do not want to presume that that prevents supplementary Rule 14 Notices being issued.

THE CHAIRMAN: But what is being said is that the e-mails etc., amount to a supplementary Rule 14 Notice.

MR. BEARD: First of all, the OFT has never joined issue with the fact that the interpretation of Apex is that Rule 14 is a whole and entire obligation. You have to put forward all these matters that you are dealing with in relation to a particular set of facts in a single written Notice. That was set out in the Appeal notice and it has never been joined issue with by the OFT. I do not know whether or not they are now saying that by implication, by reference to the e-mails, in fact that is not the case. But it is also noticeable that nowhere has it been referred to that the e-mails constitute supplementary Rule 14 notices. That is not the language that the OFT has used. An additional point to be made is that when one actually looks at those e-mails nowhere in them does it say "We propose to impose a financial penalty on Apex in respect of the Dudley contracts."

If the failing of the OFT is not setting out that it proposes to impose a financial penalty, even if they are right that they can piecemeal and amend these things, and somehow this rather casual way of dealing with matters – not even in formal notices – constitutes some sort of supplementary Rule 14, they have not actually done it in this case in relation to the fine. In those circumstances it rather ill behoves the OFT to say "We have cured these problems." One of the points that is highlighted in the skeleton argument is that nowhere has the OFT suggested how it is and when it is that they can cure things. Does it mean that they can cure an error in a Rule 14 Notice at any time, because clearly they think they can cure a fault in a Rule 14 notice after a person receiving a Rule 14 Notice has put in submissions. Ordinarily, one would think that was wholly inappropriate, and the OFT have given no justification why they think they can do that – why they can wait, see what someone says and think oh well, we may have missed something, let's go back and add to it. Does that mean they can do that in relation to infringements, if they have dealt with factual matters in a Rule 14 Notice? Does that mean they can actually add to the factual

matters dealt with in a Rule 14 Notice, because clearly they think it means that they can add to the question of whether or not they are proposing to fine in relation to matters which they have clearly – and I do not dispute this – referred to in their factual exposition and analysis earlier on in the Rule 14 Notice. I am not denying that the analysis of the Dudley contract refers to matters and refers to Apex, that is not Apex's case. It is not denying that is name is mentioned there, but the question for Apex is that faced with a Rule 14 Notice in which it is not said that there is a proposed infringement decision and it is not said that there is any intention to fine it in relation to these matters. What is Apex supposed to do? Is it supposed to go along to the OFT and say "We think you may have missed something against us, we would like to open ourselves up to a wider fine". Clearly that is not appropriate – certainly not in relation to matters for the purpose of Article 6 are to be treated as a criminal charge.

THE CHAIRMAN: I do not think that is being suggested. I think what is being suggested is that they can put in a supplementary statement.

MR. BEARD: Yes, I can see that that is part of what is being said.

THE CHAIRMAN: I can see your point, which is an interesting one, as to at what time can they do that?

MR. BEARD: And in relation to what matters.

THE CHAIRMAN: Yes, because can they do that after the response has been put in?

MR. BEARD: Yes. It might have been different if they had done it two days afterwards. That is not to say that anything that they have actually provided would have stopped the gap that they perceive here, because we say it does not. But the situation might have been different if, two days later, they said "well, actually…" but to leave it until we put in our submissions – and the reason I raise the hypothetical of what is Apex to do, is that it is a practical problem. You receive a Rule 14 Notice, in it are suggestions that you are going to be punished. There are, put it at best, ambiguities in the way in which ----

THE CHAIRMAN: You certainly are not expected, for my part at the moment you would not be expected to say "Wait a minute, you have forgotten that sentence", because that would be incriminating yourself, so that cannot be right, so let us not explore that.

MR. BEARD: No, the reason I raise it is because that raises the difficulty of when it is that it is appropriate for OFT to be adding to or changing the contents of a Rule 14, because prior to those submissions going in the situation might be different, because prior to the respondent putting those submissions in he can turn round and say "If you are going to try and add to these matters, give a supplementary Rule 14 in relation to these same issues, well then it is

just a matter of time. We have not prejudiced ourselves in any way because we have not put anything in yet.

THE CHAIRMAN: You are going to come on to this, where do you prejudice yourself in this case?

MR. BEARD: The difficulty with prejudice is that we face a Rule 14 in which the Appellant takes a decision as to how he is going to put his case given what is alleged against him. It is now said that there are further matters relating to fines that he is subject to. Now it may well be that in certain circumstances the strategic decisions that might be made in relation to how you put your case are the same, but in many circumstances that would not be the case and it would be inappropriate in this Appeal for Apex to be saying what it might have done in relation to a hypothetical Rule 14 Notice, with which it was served, which included a proposition that it was going to be fined, because it is clearly open to Apex to say "We are not going to face an adverse decision in relation to this, and even if we are going to face an adverse decision in relation to it we are not going to face any fines. In those circumstances we are not going to say anything about this." That enables them to take a different line potentially in relation to the submissions they put in at that stage, but it would be wrong for me here, to be spelling out what else they would have done, or how they would otherwise have behaved in relation to this appeal.

The OFT will no doubt turn around and say "This is just a matter of hypothetical prejudice. You are just being righteously indignant about the fact that you have not been able to do these things and, after all, you put in further submissions", and look at those further submissions. Well there is something slightly remarkable about the OFT's line on this, because the OFT is saying "You put in submissions in relation to what you saw in the e-mail. The fact that you made those submissions without prejudice to this procedural point which was clearly spelled out does not make any difference to us. You clearly knew what was going on sufficiently. That will do, there is no prejudice, there is no infringement. First, that is an unfair presumption to draw. The fact that we are in a position where we have to give two separate sets of submissions in relation to matters raised at different times in relation to the same issues does potentially prejudice us.

Secondly, the repercussions of the OFT's argument will be quite remarkable, because if any potential recipients of a Rule 14 Notice in future think that the OFT have made a procedural mistake, they will be very, very ill-advised to put forward any submissions, because if they do then the OFT is saying, essentially, "We can say that you have solved the problem. There is no prejudice because you put in those further

submissions." Well, anybody who has any doubts about the procedural propriety of the OFT's approach is now going to say "That is not worth the risk any more, because we are going to be faced with an argument that there was no prejudice to us. That is clearly a very strange argument for the Regulator to be putting forward, because the result is going to be they are not going to hear from people who have any doubts about their procedure. It has to be borne in mind it is the perception of the Appellants, or the recipients of the Rule 14, not the OFT, which is going to dictate whether or not submissions are put in, and the result is going to be that you are not going to get responses to Rule 14 Notices where anyone has any doubts about procedure, and it will only come out for the first time before the CAT. That seems to be a remarkable position for the Regulator to take, but equally it rather gives the lie to why the OFT's position is not correct in these circumstances.

THE CHAIRMAN: Could it be tested at the time that the Regulator says "We made a mistake, we left this out. We now want to put in a further statement".

MR. BEARD: In other words, there is an Appellant who has not yet received a decision ----

THE CHAIRMAN: Well no, an Appellant ----

MR. BEARD: Or potential Appellant, sorry.

THE CHAIRMAN: Yes. He receives a notification from the OFT that there are other matters and, just assume they try and put in a supplementary Rule 14, you are saying they cannot do a supplementary Rule 14, so just assume they put in a supplementary Rule 14. They head it "Supplementary Rule 14", and they put in the various things and the person who is the equivalent of Apex who receives this says "Wait a minute, this is going to prejudice me, I am not going to put anything in". At that stage could they test that in the courts by ----

MR. BEARD: There are two points. Why would they do that?

THE CHAIRMAN: Because otherwise they ought to be responding to it.

MR. BEARD: Well if they do not respond to it, what do they lose in those circumstances?

THE CHAIRMAN: If they should have responded to it.

MR. BEARD: But there is no obligation on you to respond to a Rule 14, you are trying to avoid the decision.

THE CHAIRMAN: They get a decision against them and a fine.

MR. BEARD: Well yes, they might do.

THE CHAIRMAN: And then they say "That should not have happened because I had all this information which the OFT ought to have taken into account and they failed to because I did not put the relevant information in", and so where do you get to then? You may get here on an Appeal?

MR. BEARD: You might, but there are two questions. One is we are asking ourselves whether or not the OFT can take the steps it has done in these circumstances. The point that is being raised is that the OFT have nowhere justified why it is that they can do these things. It should be made clear that Apex is not saying that it is never possible that there a supplementary Rule 14 can be given. What Apex is saying is that the OFT must justify the circumstances in which they can do this, and they have not done that here. They have not fulfilled the requirements of Rule 14. With the notion of the supplementary Rule 14 comes a rather more extensive obligation to provide a full written notice – certainly in my experience the OFT have never served a Rule 14 Notice by e-mail, they are always very careful to ensure that they are properly served on the relevant addresses of people that they know and, indeed, where you are dealing with other situations such as associations of undertakings and so on, of course Rules 25 and 26 dictate precisely how they serve these matters.

But those issues aside, it is dangerous, I would submit, to begin to try to work out whether or not it is strategically possible, probable or obligatory for any party that considers that the OFT may have erred in the way that it dealt with the Rule 14 Notice, to take action at that stage as to whether or not the OFT has acted properly, because one can envisage a wide range of situations where it would not be in the interests of someone that considered the OFT may have acted improperly against them – procedurally improperly – at the Rule 14 stage to say "We will wait and see." We are not going to try and up the ante with the OFT by trying to take some preliminary point with them or, more particularly, take it to court. Quite how that would be dealt with, whether or not if falls within the jurisdiction of the CAT, presuming that it does, turning up before the CAT before any decision has been made against them, so they have not actually suffered any adverse finding there. You can see a wide range of circumstances where a claimant is going to think that is just not sensible in all these circumstances. "We do not know the OFT are actually going to do anything against us. We fear they might".

THE CHAIRMAN: Well they have told you that they propose to in this supplementary, or whatever we call it, they said "We propose to take action against you, we propose to fine you".

MR. BEARD: Yes, but that is not the only way in which the OFT might fail to ----

THE CHAIRMAN: Well just assume that is in this case.

MR. BEARD: There maybe circumstances in which it would be appropriate to consider taking action against them in relation to those matters, but equally again it might be better to see

we will wait and see, because the fact that it is a supplementary Rule 14 does not mean that it is going to end in an adverse decision. It may be that other information is coming forward about, for example, the nature of the market that is being dealt with, or changes in the market that you are aware of mean that you think "I am not worried about these things." It can be the specific circumstances. The danger is that here we are beginning to canvas the whole range of possible procedural avenues that can and cannot be fulfilled in these circumstances and how it is (or is not) appropriate for particular companies in these hypothetical situations to deal with it.

As I say, it is not Apex's submission that there are no circumstances in which supplementary Rule 14 Notices can be put forward – far from it.

THE CHAIRMAN: So what is your submission?

MR. BEARD: The submission here is that the e-mails provided did not constitute curative Rule 14 statements. The OFT has not justified why it is that it is entitled to give such statements in any event after submissions have gone in. You cannot simply presume that because you put in submissions in relation to those matters on a without prejudice basis that somehow you are acquiescing to their conduct and there is no prejudice to you in having to put forward those two sets of submissions. In this case in particular, in relation to the fine matters, there is nothing in any of those e-mails which says "We are proposing to impose a financial penalty on you", and so they are continuing to fail to deal with the matter even on their own case.

MR. SUMMERS: Mr. Beard, is it part of your argument that the other parties who were fined, but did not know what was going on, were in any way prejudiced by not knowing that Apex had been fined and not knowing that these side discussions were going on with the OFT, and the outcome of them? You spoke earlier about them being informed in the round at the same time.

MR. BEARD: The other parties?

MR. SUMMERS: The people who were being fined, who knew they were being fined.

MR. BEARD: Obviously Apex was amongst them in relation to other matters, but in relation to Dudley you are asking whether or not the other three parties were prejudiced?

MR. SUMMERS: Were their rights in any way prejudiced by not being made aware of the fact that Apex was omitted from the list of those about to be fined?

MR. BEARD: I do not think I am in a position to comment on whether or not other parties would consider that they were prejudiced – that may or may not be the case. It is very difficult for

Apex to say anything about it. The nature of the prejudice will depend on the particular circumstances with which you are dealing, I quite understand that.

MR. SUMMERS: If, therefore, you were going to issue a supplementary Rule 14 would it, in your view, therefore be important that that should have gone to the other people as well?

MR. BEARD: I do not know that Apex makes any submission in relation to that. The question of hypothetically how the OFT cures defects in Rule 14 Notices, and when it is able to do so if it identifies them, is a broad question, and one that is not the purposes of Apex's submissions to try and solve. You can see that there might be a wide range of considerations, and it might be that in certain circumstances it is appropriate to serve supplementary Rule 14 Notices on another party if such a notice is appropriate for a party that has not previously been mentioned or implicated.

THE CHAIRMAN: That is not your case here.

MR. SUMMERS: It is not your case.

MR. BEARD: But it would be wrong to say that is a generalised proposition. It is just that there might be circumstances.

However, the point here is that the OFT has not made any attempt to justify why it is entitled to do this, why it is entitled after we have put in our submissions to say "Oh no, actually we forgot something, we wanted to fine you some more."

THE CHAIRMAN: You are emphasising the fact that that this was done after you put in your submissions.

MR. BEARD: I am emphasising the fact that it was put in after submissions, the fact that the OFT have not tried to justify it and in relation to the fine I am also emphasising the fact that it has never been proposed. So quite how they say that that particular defect was cured on their own case is something that we still struggle to understand. So there are a range of procedural issues that arise here, and they arise only in circumstances where it is considered appropriate where a cure is possible. We say here certainly what was done did not constitute a cure, and that is all we need to say here. We do not have to say what the nature of the cure could have been, and when the OFT can cure what and how.

I have not specifically referred the Tribunal to the e-mails, they do appear at various places, but in particular they are actually appended to the Notice of Appeal at annex 4.

THE CHAIRMAN: We possibly ought to look at them while you are addressing us on this.

MR. BEARD: Certainly. Annex 4 of the Appeal ----

THE CHAIRMAN: Do you know which bundle it is in?

MR. BEARD: Yes, at the Appeal bundle it is bundle 1.

THE CHAIRMAN: 2?

MR. BEARD: Well 2 is the public version.

THE CHAIRMAN: Yes, well we can look at the public version.

MR. WARD: It is also in the factual material bundle at tab 23.

MR. BEARD: Thank you.

THE CHAIRMAN: I have it in the private confidential bundle.

MR. BEARD: Well let us work from that.

THE CHAIRMAN: There is obviously nothing in there that is going to be crossed out. Apparently there is no confidentiality.

MR. BEARD: No, I was just checking with my learned friend I do not want to be referring to things that I had understood were public. Unless he indicates to the contrary I will treat them as such.

THE CHAIRMAN: I understand that there is nothing in them, it is the way that the bundles have been set up.

MR. BEARD: I see, I am most grateful. It is perhaps sensible to work backwards. 27th November is the first. I will not read them out unless the Tribunal wishes me to do so.

THE CHAIRMAN: No. (Pause for reading)

MR. BEARD: Then the first page of the e-mails is the one of 3rd December.

THE CHAIRMAN: Can we just at the summary table of infringement?

MR. BEARD: Yes, it is appendix 2 to the bundle, at p.73. That is the important table where ----

THE CHAIRMAN: They are missed out.

MR. BEARD: Well no, Apex is there, but it is not as if Apex was served with a Rule 14. Apex is specifically there, but what is not there is any reference to the Dudley contracts.

THE CHAIRMAN: Yes, you have been missed out in relation to Dudley contracts.

MR. BEARD: Yes, that is clearly what the OFT considered, yes.

THE CHAIRMAN: Where in the Rule 14 Notice does it deal with fines in relation to all the other matters?

MR. BEARD: It is just there in that section, p.73.

THE CHAIRMAN: That is where it deals, so it is satisfactory. Had there been a box here which had said "Apex/Dudley" that would have been satisfactory?

MR. BEARD: Yes, it would be difficult for Apex to turn around and say no, we are not referred to there.

THE CHAIRMAN: So if what they had said in the e-mail of 27th November is that you should have been in a box under "Summary of Infringements by party", and you were not – forgetting about your point about timing – and if they had prepared a little box ----

MR. BEARD: If the OFT had made it clear that it was proposing to impose a fine, whether it does it by boxes or however it does it ----

THE CHAIRMAN: Why are you saying that the 27th November e-mail does not do that?

MR. BEARD: If one looks at 27th November and 3rd December e-mails, what they say is "Apex was involved in an infringement of the Chapter I prohibition in relation to the Dudley Schools contracts. If that cures the issue ----

THE CHAIRMAN: I must be looking at something different from you.

MR. BEARD: 27th November.

THE CHAIRMAN: "I write to confirm our conversation."

MR. BEARD: Yes.

THE CHAIRMAN:

> "The OFT's allegation is that Apex's involvement in Dudley Schools' contract is set out in detail in the evidence, and analysis of findings contained in paragraphs 273 to 299 of the Rule 14 Notice."

MR. BEARD: Yes.

THE CHAIRMAN:

> "Thus, although the summary table of infringements by a party in the Rule 14 did not list Apex's name next to the Dudley School contract, the OFT considers that its allegations relating to Apex's involvement in those Dudley contracts are nevertheless clear from the Rule 14 Notice."

MR. BEARD: Yes.

THE CHAIRMAN: Is it not saying that Dudley should have been listed under Dunlop?

MR. BEARD: Whether it means it should be listed or not, it is saying "We see Dudley schools as being an infringement by Apex in respect of which we intend to take a decision". He does not say "We propose to fine."

THE CHAIRMAN: But where does it say in relation to the other contracts "We propose to fine"?

MR. BEARD: I am sorry, I am misunderstanding you.

THE CHAIRMAN: Where in the Rule 14 Notice in relation to the Frankley contract, or the Smallwood Heath School contract, or Yardley Wood, or any of those, does it say "And we propose to fine you, General Asphalte", or "you Howard Evans"?

MR. BEARD: If one reads para.333, it is actually not very clear but giving the OFT the benefit of the doubt on the interpretation of 333 where it says:

> "The duration of infringements in cartel cases may be important in so far as it relates to the penalty that may be imposed for the infringements in question. The duration is less important in this case because the duration of each infringement calculated by the OFT is less than a year. The table below shows each infringement that each was involved in, length of each infringement calculated by the OFT in a summary way …"

So what that was read as saying was "The proposed action is to impose penalties and we are referring to the duration of those penalties in this table."

MR. WARD: 341 is also helpful.

MR. BEARD: Well 341 is the paragraph I returned to earlier which says: "The OFT proposes to impose a penalty on the parties listed in paragraph 3 above", which is the outline paragraph. Apex, of course, takes no issue with that fact, because of course what was being said in para. 333 was "We are going to impose a fine on you". They were proposing to do that, there is no doubt about that.

Apex was clear, having read that paragraph, that it was going to face a fine in relation to the FHH contracts. It did not dispute that. But the fact that it was mentioned at the outset as a party that is going to be fined does not mean that where you are dealing with separate discrete infringements, there is no proposed fine indicated in relation to that separate discrete infringement that Apex should somehow assume that in fact it was ----

THE CHAIRMAN: For the time being I accept that proposition.

MR. BEARD: The point is that the e-mails are even odder in a way, because if that was OFT's concern, knowing that this was to do with Dudley Schools, it should have spelled that out absolutely explicitly.

THE CHAIRMAN: Can we just have a look at this in slightly different detail?

MR. BEARD: Of course.

THE CHAIRMAN: All that the 27th November e-mail says is that you should have been in the table under Dudley Schools. It does not say – or does it – the period of the infringement or the method of calculation?

MR. BEARD: It clearly does not talk about the period of infringement or the method of calculation because it does not talk about fines at all.

THE CHAIRMAN: Yes, but had it originally been in this box that would have been sufficient, and being in this box it would have had the period, duration of infringement, and method of calculation.

MR. BEARD: If it had been there, but how is Apex supposed to read that across when those bits of the boxes ----

THE CHAIRMAN: I am not suggesting Apex should, this is a point for you.

MR. BEARD: I am sorry?

THE CHAIRMAN: A point in your favour.

MR. BEARD: Absolutely, it is just a very bizarre thing to have done, to try to use some sort of shorthand which never refers to fines, does not set out the very things which when reading the Rule 14 Notice itself would have implied to the reader that these were the parties who were going to face financial penalties. Apex was simply entitled to read these at face value saying "We are implicating you in an infringement", no more than that. As has been said, we do not consider these sufficient cure, even if a cure is permitted, but it certainly does not set out in a written notice that fines were proposed in relation to the infringement. Whether or not you should treat e-mails as a written notice is perhaps a further issue, but it is not being said that e-mails are not writing, in fact that is probably clear from the interpretation, whether or not they constitute a written notice is perhaps open – certainly the OFT, as far as I am aware, does not treat them as such normally.

Madam, I do not know whether you or other members of the Tribunal have any further questions relating to the e-mails?

THE CHAIRMAN: No.

MR. BEARD: I am obviously conscious of time, but it is important in moving to deal with the substance of the Dudley contracts that I properly set out the material that Apex relies upon that goes in many respects to deal with the question I was asked earlier in respect of motivation for communications, because here it is not at issue that Apex asked for figures for Howard Evans, and Howard Evans provided them, and Apex launched those bid figures. But if I may take the Tribunal to annex 5 of the Appeal bundle, if the Tribunal still has it open. Supplemental responses, the first half of which deals with the comments about the errors in Rule 14. Starting at p.3 para.3, Apex set out in some detail the market background to the particular transactions in question, and in particular the use of Vedag Villas approved contractors for the work in question., because those Vedag Villas materials, produced by a German manufacturer, have been imported for many years by Howard Evans and indeed it is understood by Apex that Howard Evans has had the sole distributor rights for Vedag

Villas in the UK. But in the late 90s there was a move by Evans to make the Vedag Villas product more widely available, and Howard Evans itself established an approved list of contractors who were suitable for providing the services of using Vedag Villas roofing material – the bitumen felt roofing – to various sorts of private and, indeed, public undertakings.

As a result – as set out at 3.7 – Apex and indeed potentially others, but indeed Apex felt that it was at a significant competitive disadvantage in any potential bidding situation as compared with Howard Evans, perhaps not surprisingly since it was the importer and indeed the approved contractors in all these circumstances. Apex makes it clear that it had won no contract for Vedag Villas' work where Howard Evans has also tendered, although it has won two contracts for Vedag Villas' work where Howard Evans was not involved – relatively small contracts. Apex actually tries to suggest to any person tendering specifying Vedag Villas that there might be other suitable materials because of this problem. In the circumstances, when Apex heard from not Dudley but Howard Evans – Simon Levitt-Dunn who advised that he was preparing for some work tenders at Dudley who were on both Dudley's approved list of contractors and on the Vedag Villas materials contractors list – Apex obviously was not going to object to itself being included, but when it received the tender documents from Dudley Apex decided it was not going to carry out a full estimated exercise, partly because Howard Evans were going to be involved, and secondly because it already had very significant work and therefore as reflected in the Rule 14 Notice Apex contacted Howard Evans to ask for some prices. This goes back to the point raised earlier, why on earth did Apex do this when, on the face of it, it could simply decline to tender.

There we look at the problem that Apex has emphasised in a number of solutions to the Office, that although public authorities have approved contractor lists, when it comes to offering tenders they will only do so to perhaps six of its approved contractors. You go and look at the contract forms, one of which we were looking at briefly earlier. It says six will be asked, there must be a minimum of five – sometimes it is fewer, but it is four to six contractors.

Some organisations operate a sort of rotation system, but Apex's experience is that actually there is a very significant discretion with the person within the public authority putting out the tender as to who the six people are that are going to be sent the tender documents. That is inevitably going to be the case. If you have a list of tens of contractors – or even over a 100, you have to pick amongst them. That is going to have a discretionary element and where the discretion of an individual officer is involved, clearly there is

considerable scope for that officer to be influenced by the past actions of a potential contractor, and they may well be reluctant to ask a contractor who has decided not to tender in the past, partly because it creates a hassle of cancelling the thing, putting the thing out to tender, and potentially because if rejection happens at such a time as it becomes difficult to get a further tenderer, you can actually fall below the relevant levels that the councils and public authorities have for numbers of tenders for any particular project.

In those circumstances there was a significant concern at Apex that if it did not return a tender in these circumstances at a realistic level that it would end up being in a position where it would be less likely to be able to compete in future for Dudley for council work. It wanted to be able to compete in the future, it had difficulties with this particular job and therefore it thought the best way to ensure that it would not be effectively relegated down the list of potential selected tenderers in future was to ensure that some sort of bid was put in. It needed to be realistic, since the business of actually estimating, going and calculating how much it would realistically cost to do a bid is itself expensive, time consuming and burdensome for a business, it essentially asked someone else, who was already doing this work, to give it ball park figures. Obviously, since that person was going to bid for the contract, they actually carried out the work, they obviously were not going to give them figures at a lower level. The OFT seemed to be sceptical of this account, notwithstanding the fact that it is entirely consistent and coherent, and at the oral hearing actually asked for further material and if you were to turn to tab 6 of the bundle, you will see that Apex actually responded. We are still in the appeal bundle, annex 6.

During Apex's oral hearing, 19th December, Apex was asked to put forward any evidence it had in support of its contention that not responding and lodging bids when invited to tender could result in further invitations not being extended. Apex then goes on to draw that distinction between being struck off an approved list and being far less likely to be invited to tender in the future. It says it believes that this is well understood in the industry and attached letters from a series of public authorities, setting out the principles that would apply in relation to tendering. So there is a letter from Wolverhampton City Council, or a letter from Birmingham, and a letter from Bristol. At 2.3 of this document, on p.2, it emphasises that the text of these letters clearly indicate that failing to return a tender is treated seriously and it has a detrimental effect on the relationship between the authority and the contractor if they do not return tenders. It also emphasises in particular at 2.3.2 that these tenders are often sent without any prior warning, so that you may have your whole workforce booked up for some time in advance, a tender arrives and yet you are expected to

be able to deal with it instantaneously. In fact, the Bristol City Council letter goes rather further than Apex has been particularly saying which is that you will be less likely to be invited to tender. It says:

> "Failure to acknowledge or subsequently not return a tender could result in your suspension or withdrawal of approved status."

So there there is further Damaclean sword – not only are you less likely to have a discretion to invite you tender operated in your favour, but you may be struck off the list entirely if you do not return the tender. It is true, certainly in relation to Birmingham and Wolverhampton, if not explicitly in relation to Bristol, that the recipient of the tender is offered two working days to decline that tender. But as is set out in para 2.4.1 through to 2.4.4 that, in practice, is extraordinarily difficult to do. The idea that one can receive a tender on day one and by day three the thing has been read, digested, considered, and assessed in such a way that acceptance or declining, but taking further steps in relation to tender can be made, is somewhat unrealistic. As is said by Apex, it is not always possible to determine from a perusal of the tender document the full extent of the work necessary. Many of these projects are refurbishment projects for which site visits are essential. Those site visits and the estimating effort involve, the demand for those estimating services far outstretch the ability of Apex or indeed others to supply. It is just physically impossible to do it. In addition, third parties may influence whether or not a tender can be returned. For example, if a material is specified in a tender you may think I would like to be able to tender, but actually it could be risk because it may be that by the time I actually have to put in my figures I am not going to have had a proper response – a clear response – from the special material manufacturers, and I am simply not willing to take the risk at that point of bearing the cost of the materials from these people, who have not given me a clear estimate, in all the circumstances.

So against the background where these tenders are increasingly complex and the amount and extent of information that has to be submitted has increased. The importance of being able to put in realistic bid figures is all the greater in all the circumstances if you are not to lose the potential ability to compete for this sort of work in future. If I just refer briefly to the document from Birmingham, it says in its final paragraph, four pages on from the end of those written submissions:

> "If, when you receive these documents, unforeseen circumstances now prevent you from submitting a competitive tender you must immediately inform the officer named above. Immediate notification will not adversely affect future invitations."

The clear concern being for people like Apex that if you notify later, waiting to see whether you can actually pitch for a bid, waiting to see whether you have the estimating services available to you, waiting to see whether or not you can get sensible prices on materials can be a very significant detriment, and in those circumstances the concern is that it is unlikely to be economic to compete for a bid but nonetheless it is of significant concern if you cannot put some sort of tender in so that you lose the opportunity to compete in future when you may be able to put in a real competitive bid that will be able to win a particular contract which will be of great benefit both to you and to whom ever you supply the services.

None of that evidence, although it was specifically asked for by the OFT, that sets out the background, the market background, with specific examples of why it is a party in this industry might have a motivation to ask another party for figures, none of that is referred to in any way. Indeed, if one compares the relevant paragraphs of the Rule 14 Notice, with the Decision what one sees is essentially a reiteration of the points in the Rule 14 Notice. In that Decision the relevant paragraphs in the Rule 14 are 275 and in the Decision 114 and 349 – I will not take the Tribunal to them. Those paragraphs are written as if none of this evidence had ever crossed the OFT's threshold. None of it is dealt with. There is no reason in relation to it. There does not appear to be a flicker of acknowledgement in the Decision, notwithstanding that this was provided at the OFT's request. Not only does this illustrate the inadequacy of reasons, but it also points to errors in the conclusion that the OFT reached to the effect that asking for and receiving figures from Howard Evans amounted to a concerted practice.

Clearly, in asking for figures from Howard Evans, Apex was asking for figures with no intention to lodge a bid that could win it the work. In those circumstances, obtaining those figures and lodging them, the action of Howard Evans providing those figures, and Apex lodging them as the bid does not substitute for the risk of competition. There is no negative impact on competition where Apex, by asking the figures, had already taken its decision that it was not going to compete in the particular tender. It is not perhaps necessary to go back through in detail the particular list of requirements, but it is noted that out of *Dyestuffs* Judgment comes the conclusion that the cooperation between two parties must be practical, i.e. involving action on both parts. The result of those actions must substitute for the risks of competition. Well there is no substitution for the risk of competition here, because Apex was not seeking to compete, and there is no evidence that Howard Evans' behaviour has been in any way altered by this approach. It still had to

outbid the others. There is no difference between this and Apex simply saying "I am not bidding here" to Howard Evans.

Furthermore, as made clear this morning, apart from going through and identifying the specific requirements of the concerted practice that must be fulfilled, it is also necessary to show that either the object or the effect of the concerted practice was anti-competitive. The OFT has not descended into doing this here, because it has not dealt with the account of motivation that Apex has put forward. Apex's motivation was actually to ensure that in future it could enhance competition in relation to bids and tenders put out by public authorities. It was not the object of Apex's request, or acknowledgement of the bid, to act in an anti-competitive manner. It had decided it was not going to bid, that had already happened. In order to be invited to compete again it tried to get hold of realistic prices that would give it that opportunity to compete in future. It was not trying to set anybody else's prices and, as I say, there is no suggestion that Howard Evans was changing its position in relation to its prices here. But, in any event, the key point is that the request and the lodgement were not with anti-competitive objects. But if they were not with anti-competitive objects, what was the effect? Well here we do not have any finding as to what the anti-competitive effect was.

If one looks at the Decision in question, in particular at p.90 of the Decision, which is annex 1 in the Appeal bundle, this is the analysis of the evidence. First at 331 we have the fax from John Roper at Howard Evans to [… of Apex], who set out the figures which were later bid in. Then at 333 there is text of the interview with Mr. G at Howard Evans:

"In relation to the faxes quoted at 329 and 331 Mr. G. stated:

> "To the best of my knowledge I did send them. I cannot remember when I sent them. The four schools, we had done some budget pricing and kept them…The figures I worked out at slightly over hours for each contractor … It was all a bit of a rush. I would have sent the fax to Apex and Solihull very soon after producing the prices on the front of RG3."

So here we have a statement that Howard Evans had already prepared their prices when they sent these faxes out. There is no indication as to why it is that Howard Evans' prices would have been any different had it not been the case that Apex had asked for these figures.

Then in the conclusion on the contract, which starts at 355, the OFT accept in relation to Dudley schools:

"…it is not material to the finding of the existence of an agreement or concerted practice that it was Apex who requested figures, for its own benefit, from Howard Evans.

"…the OFT considers that where there is contact between two parties that influences one party's conduct on the market, there is a knowing substitution of practical cooperation…" etc

That, of course is the phrase referring to whether or not there is a concerted practice, so that cannot be talking about the effect of the concerted practice.

"The OFT considers that Apex's request … is clear evidence of contact between Howard Evans and Apex that influenced Apex's conduct on the market and that there was therefore a concerted practice between these parties."

Well insofar as they are talking about competitive effect Apex was not going to bid, it was not bidding in.

"357. The OFT does not find it necessary to consider whether there was an agreement in relation to this contract.

"358. On the basis of the evidence analysed at paragraphs 329 to 339 above and the admissions of Howard Evans … the OFT considers that there was a concerted practice to provide non-competitive prices … It should be noted the OFT considers that collusion relating to the contract for the Christchurch and Church of the Ascension School and the collusion relating to the contract for the Hob Green and Wollescote Schools constitute a single infringement because the participants made a single collusive arrangement for both contracts."

Those are the conclusions. So the question of where the OFT finds the anti-competitive effects here remains open.

I am conscious of the time, Madam, I am sorry to have run on somewhat. The procedural issues took a little longer than anticipated. Before I move to some general comments about the reasons for the fines, perhaps now is an opportune moment just to go back to the issues raised by you before lunch in relation to the Briggs' contract. In relation to the FHH contracts, and dealing with the suggestion that it was Briggs that asked Apex for the figures and then did not lodge them, first of all it is, of course, important to note that OFT has said that that does not matter. On that basis, it is of course entirely right that if the OFT said it does not matter and we can prove that it does and on one version of the facts that they rely upon that they are wrong, then that is sufficient for that decision.

But just moving on to their analysis of the situation here, it was at Briggs request. The OFT seem to some extent to want their cake and eat it, because they are relying upon material put forward by Apex in their submissions and, in particular, a statement provided by [… of Apex] which appears at the back of annex 3 of the Appeal bundle.

THE CHAIRMAN: Is it in the evidence bundle? I have it but I am looking at the non-public version. It is not in the public version.

MR. BEARD: Is it not?

THE CHAIRMAN: It may be you will have to be careful with this.

MR. BEARD: Yes. I am not quite sure again why this is treated as confidential. Well, I think it may be the name at the bottom of the list that is actually the confidential bit, it is not actually the name of the person giving the statement, because I think the name at the bottom betrays a code used by the OFT for public documents, so it may be that we do not have concerns, but there are concerns about it.

THE CHAIRMAN: Well you had better be careful when you read it.

MR. BEARD: I was not going to. I was going to suggest that you read it and I do not have to run any risks of implicating people. It is particularly the final three paragraphs.

THE CHAIRMAN: (After a pause) Yes.

MR. BEARD: What is being said there is Apex saying Briggs called saying "We are not bidding" at the last minute "but could we have some figures to submit?" It is that that the OFT relies upon as its alternative case. Apex takes that request at face value and provides the figures, but they are then not lodged. As I indicated before lunch that means that there was no practical cooperation in the sense required by *Dyestuffs* – no more than any unilateral action in response to a request would be. Secondly, there is no substitution for the risks of competition by this action. Thirdly, it is unclear on what basis it could be said that the cooperation was done knowingly by Apex, given that Briggs did not act in the way that was expected, and fourthly, the question arises whether or not it could be said that Briggs's request had an anti-competitive object as set out in the analysis of the Dudley contract, but it is the first point that is perhaps the most important here.

The point of importance is where the OFT is relying on this evidence and saying "Well, Briggs cooled" I has to also accept that Briggs said he was not bidding, he was not doing anything. You cannot just pick and choose with this – it has to take one view or the other, because it has not produced any other evidence. We put this forward.

In relation to the hypothetical case that, Madam, you put forward just before lunch, the sort of Briggs was lying. So Briggs asks for figures, but actually he is doing that with a

cunning ulterior motive of getting information out of Apex that it will then use to inform its conduct. Apart from that being no part of the OFT's case, so far as it can be discerned from the Decision, there is absolutely no basis for that analysis given the evidence that the OFT are relying upon in relation to this alternative scenario, because Briggs said that they were not bidding and then asked for a cover bid, decided it was too high and did not bid.

Secondly, it would be deeply perverse to analyse any sort of situation like this where Briggs has given evidence that the reason he did not put in his bid was that the figures were too high. If it was doing it for an ulterior motive one would have thought that that would have been a precise trigger for them trying to bid.

Thirdly, and this is a point I highlighted before lunch, it is very difficult to see how one can consider these arrangements cooperation in any meaningful sense. It is no more cooperation if you invite someone into your office and they steal a piece of paper and then rely upon it, the sense in which you cooperated with one another is an analogy with the situation where someone asks for something in essentially a deception, because clearly the indication of why they are asking for it is that they are not bidding, apart from any evidence, and then they use it for entirely different purposes. But the notion that there is a cooperation between the two parties, and certainly a practical cooperation, seems very difficult to ascertain.

Fourthly, the idea that there is a knowing substitution for competition in these circumstances is distinctly strange, since what each party thinks it knows is very different, and it is unclear that Apex in providing these figures could ever be said to be contributing to result where it is knowingly substituting for competition in acting as I does. So there are a range of ways in which one might analyse that hypothetical situation. But more importantly it is simply miles away from the very evidence that the OFT is actually relying upon to put forward an alternative case that it never properly explored in the Decision and has only been raised subsequently, because of course in the Decision it said that it did not matter.

Of course, in addition to those points in relation to the lack of cooperation that it has adverted to in relation to the FHH contracts Apex will also submit that the points I referred to earlier about the lack of substitution for competition, the lack of knowledge and lack of anti-competitive object, and the attendant lack of evidence of effect are also germane to the FHH contracts. However, the primary submission on its case is that it simply did not tick the relevant boxes.

Referring briefly to the contention that the OFT's decision is inadequately reasoned, the very fact that it is necessary to explore case law in the way that it has been explored by

Apex to try to identify the relevant ingredients of a CP, to consider how those requirements can be analysed in respect of the relevant evidence, to consider whether or not the alleged concerted practice did or did not have an anti-competitive object or effect simply highlights the fact that the reasoning in the Decision – and even an expansion of that reasoning in the subsequent pleadings and submissions in writing by the OFT – are simply inadequate in extending the notion of a concerted practice quite radically, at the very least, from the case law which has dealt with these matters, and the learning so far as it exists and, in particular, I refer to the Black article where these concepts have been analysed.

Turning finally to issues relating to fines, which perhaps can be dealt with relatively quickly. The two omissions by the OFT relate first to their failure to consider the impact, or lack of impact, of either infringement upon consumers; and secondly, the lack of consideration of the short duration – below a year – of these particular alleged infringements.

In relation to the impact upon consumers, the OFT Guideline 423, which is in bundle 2 of the authorities at tab 15. I will not rehearse the steps taken in detail, but in relation to step 1, the starting point, at para.2.5:

> "It is the Director's assessment of the seriousness of the infringement which will determine the percentage of "relevant turnover" which is chosen as the starting point for the financial penalty. When making his assessment, the Director will consider a number of 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."

In the Decision when it comes to talk about the level of fines being imposed there is simply no reference to the question of whether or not the infringements in question have had an impact on consumers – it is just not there. There is no analysis of whether or not there was, and could have been a real effect.

If you take, for example, the conclusions reached in respect of the FHH contracts, of course, first of all there is no evidence that Briggs wanted to bid, or particularly there were four other bids lodged and there is no allegation that there was any collusion, undue cooperation, infringement of competition law in relation to any of those four bids – Apex beat all of them in obtaining the contract. In the circumstances, the question of the impact upon the purchaser of those services from Apex is one that is difficult to see in the case. Certainly, if the OFT is going to say "Well actually, there was a real impact here and it was

a substantial impact, at least mention and analysis of these facts should have been undertaken". They are not. It is not sufficient for the OFT simply to assert as it does in its defence and its skeleton argument that actually it had considered these matters in dealing with step one and it refers to the fact that it considered that these infringements were individual and discrete. But those words, which it refers to in particular in the skeleton argument at para.99 tell us nothing about the impact on consumers. You could have an individual refusal to supply that was in breach of Chapter I or Chapter II that could destroy a person's business and be highly detrimental to both the customer and his eventual consumers. It is an individual offence, it has an enormous impact potentially. In contrast, you could have non-discrete events, a chain of events that have very, very little impact. It is simply referring to terminology that is not germane to the question which the OFT itself says it must consider because it is an important consideration when setting the fine.

In the circumstances, in failing to consider the lack of impact of that infringement and indeed of the infringement committed in relation to the Dudley contracts, the OFT has missed the proper consideration of an important factor and it has done so to the detriment of Apex – the relevant fine should accordingly be reduced. As for duration, there is really no attempt to suggest that the limited duration of the contracts have been dealt with. The skeleton argument again refers to these terms – "Ah well, if they were individual and discrete infringements" – the fact, as set out in the reply, that in *Aberdeen Journals* it was noted that where infringements are less than a year there should be a concomitant reduction in any fine imposed. That is not a matter to which the OFT apparently directed its mind in this Decision. It is not open to the OFT to say "Although we did not mention it we have been thinking about these things", particularly since the evidence it gives for it, as I say, are these words "Well, we considered that they were individual and discrete infringements." They say nothing once again about whether or not there has been a concomitant reduction in the level of fine because the infringement was less than a year. In those circumstances again there should be a significant reduction in the level of either fine, both fines if they are to be imposed, for having failed to reduce the fines imposed in each case in accordance with the duration of the infringement in question.

> The statement at para.106 of the skeleton argument, that the penalty imposed:
>
> "…must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct."

That of course is accepted.

"The policy objective of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements."

Again, that is not something with which Apex is disagreeing. But it does say that where its own guidance and the case law of the court, in particular *Aberdeen Journals*, make these matters clear that these issues are ones that should have been taken into account. The OFT simply cannot overlook them and having failed properly to consider them, there should be attendant reductions in the fines imposed.

I realise I have run well beyond the time I anticipated it would take and I apologise for that. I hope I have dealt with the number of questions you have raised. If the Tribunal has any questions?

THE CHAIRMAN: We will reserve our position overnight, but for the moment no.

MR. BEARD: I am most grateful.

THE CHAIRMAN: How do we want to proceed – it is a quarter past four going on for twenty past four? You probably have some idea how long you are going to be.

MR. BEARD: Yes.

THE CHAIRMAN: I am not saying you are going to be ten minutes!

MR. WARD: Well Mr. Beard did cover a lot of the law which was very helpful. In some respects we hope we have fairly short answers – good or bad – to those points. I would be surprised to be more than a couple of hours, but he has been all day, he has put some rather complex arguments and I do want to try and unravel them. I would be very surprised if we are not finished by lunch with Apex and then in respect of Mr. Price's Appeal, of course I do not know how long he might be, but I will be saying that really what I say about Dudley applies to Mr. Price, I expect to be very short.

THE CHAIRMAN: Well subject to what happens tomorrow, Mr. Price has indicated he is not dealing with concerted practices, he has left that to Mr. Beard.

MR. WARD: Yes.

THE CHAIRMAN: And therefore it is only on the question of fines, which appears to be quite a short point. How long do you think you will be?

MR. PRICE: Moments.

THE CHAIRMAN: Moments.

MR. WARD: So we may be able to deal with that Appeal very quickly then.

THE CHAIRMAN: So are we safe starting at 10.30, or should we be starting at 10?

MR. WARD: I am sure we are safe starting at 10.30.

MR. BEARD: Unless my learned friend has some very surprising things to say I cannot believe I am going to be very long in reply, although I am very conscious of the fact that I got my time estimate thoroughly wrong all the way through the day.

MR. WARD: Well I hope nothing I say will take you by surprise!

THE CHAIRMAN: Right, 10.30.

(Adjourned until 10.30 a.m. on Friday, 24th September 2004)

Friday, 24th September 2004

THE CHAIRMAN: Good morning.

MR. WARD: Good morning, Madam. What I wanted to do by way of a few opening remarks was to put the issues that have arisen into context, and look at the kind of competition problem which was really thrown up by this case, because of course, as the Tribunal noted yesterday, this is about a competitive tendering process the essence of which is that each bidder should decide independently on its best price in the knowledge that all the other bidders are working independently to give their best price. The intended result of that is that the public authority can then choose between the bids knowing that each has been formulated in conditions of competition. It is potentially a very pure form of competition, but it is absolutely critical of course that the bids are independent, and that is why the tender documentation at tab 15 (I will not take you there but just to note) on the Dudley contracts specifically requires the bidders to certify that they have acted independently. Of course, the language of the sugar case, which we looked at many times yesterday, is that each party must determine independently the policy he intends to adopt on the market. Here we are in a slightly different situation because it is accepted by Apex that cover bidding went on – indeed it went on on a widespread basis and if I could just show you the response to the Rule 14 Notice, which is annex 3 to the Notice of Appeal.

You will see at para.5.6, (p.7) Apex avers that it has been common practice for firms to request the price from other firms to enable them to put in a tender in circumstances where they had no interest in winning the tender. Then at the bottom of that para. it says:

> "In such circumstances rather than guessing at a price which could either prove to be uncommercial relative to other bids and again lead to relegation from approved tender lists, or be competitive in circumstances where the undertaking does not want to win the particular job in question, firms would prefer to request the price from another bidder in order that the bid is realistic."

So they accept entirely that this is all going on and, indeed, a rather startling submission was made yesterday that this is actually pro-competitive. I am going to deal with that in a little detail later on, needless to say. We respectfully submit that this kind of contact actually strikes at the heart of the competitive process which tendering is supposed to embody and again, picking up the language of the ECJ, it substitutes the risks of independent competition for cooperation. How does that happen, because there is a broad thrust in Mr. Beard's challenge that it does not carry out this substitution at all, and although there is contact there is no detriment to the competitive process. So what I wanted to do was just list

a number of ways in which the competitive process is undermined by this process of cooperation – or may be underlined. Most obviously it might allow a bidder to win with a high price than would have otherwise have been the case. So one bidder may actually knock out all of the other bidders and then know it is safe in the knowledge of the levels of bid they are going to put in and that bidder may be able to put in a bid higher than would have otherwise been the case. That is the most stark example. Mr. Beard will immediately say that none of these cases are like that – which they are not.

THE CHAIRMAN: But we have object.

MR. WARD: Indeed. Alternatively, as in the Briggs' case – in the Briggs' case we only know that Apex gave a false bid to one of the bidders, Briggs. We do not know about the other bidders at all, there is no evidence there. So what effect does that have? It might be that the only bidder you need to knock out is the only bidder that you know will beat you. Here we know that Briggs is the large, vertically integrated undertaking. You will have seen from the Decision that Briggs was involved in many infringements of this kind. It might be that by knocking out Briggs you knock out the only person who actually matters. Briggs may be, if you like, the Kelly Holmes of this enterprise. If you get the person who is going to run the 800 metres race then you can be sure that you will then come first.

Of course, Apex says "We cannot be sure that that actually happened at all. There is no evidence that Briggs was going to be the winner, or even that that is why it was done". But that is why we have to look at this a little bit harder, because there are all sorts of other ways in which this practice substitutes for the risks of competition. First, concentrating on what was actually said in defence of Apex position it reduces the risk that an undertaking will fall out of favour with the employer for failing to put in a bid. Now, this is the crux really of the Apex defence of Dudley, but it puts this in in order to make sure it stays on the employer's list. But that, of course, is fundamentally anti-competitive for a number of reasons. Apex (or whoever it is) stays on the list despite the fact it did not actually want to bid for this contract. So in very simple terms it substitutes the risk arising from competition that it might have been dropped by Dudley and what it obtains are the fruits of cooperation, namely, a false bid which keeps Dudley happy, and keeps it on Dudley's list.

There are more ways in which this represents the switch from competition, or the risk of competition to cooperation because, of course, the obvious consequence of this is to give a distorted picture to Dudley of how many of the approved bidders on its list are actually able to bid for any one of these contracts. The Dudley contract makes the point very vivid, because there were five bidders and three of them we know were cover bids. So

Dudley thought it was getting five bona fide bids. Actually, it was getting at most two, one of which was put in in the knowledge of the covers, so it may have only had one legitimate bid. But there is more here, there is another sense in which this substitutes for the risk of competition, because the avowed purpose of this exercise is to keep the companies like Apex on the list, but the authorities operate a maximum, they do not want 50 bidders for each contract, they only want five or six. So the effect of this is to squeeze out others who might potentially replace Apex on that list.

What you have is an illusion created that the bidders who were on the Dudley list, or whoever the employer may be, are able to bid for all these contracts, no fresh bidders are required, and those potential fresh bidders are kept out. Just to state the obvious, this places the potential fresh bidders, who may be honest, at a serious competitive disadvantage – they cannot even break into the magic circle of bidding. If they do break in then, of course, they will face the circle of cover bidding which already exists.

MR. BEARD: Madam, if I may. None of these matters that are being raised now have been raised in the Defence, or indeed previously set out by the OFT, and this does place Apex in something of a difficulty. This discussion of precisely how it is that the local authorities' bidding lists would operate and the extent to which people could or could not enter those bidding lists and the opportunities to bid, and the impact thereof are things that the OFT have never mentioned before in any of their decision texts, or indeed in their subsequent submissions. That puts Apex in an extremely difficult position in trying to deal with any of these matters. Mr. Ward may say "Oh this all stands to reason and it flows obviously from what the OFT has set out", but that is far from the case. He is making submissions about how these tender processes work in practice.

MR. WARD: With respect, what I am doing is answering the completely new point yesterday that this was pro-competitive. My analysis is one of the logic of the tendering process. I am not making submissions about the evidence. I am not even making submissions about what actually happened in this case. I am answering the point that it is inherently pro-competitive to enter into a cover bidding process.

MR. BEARD: That was not the submission that was made yesterday, needless to say.

MR. WARD: Well it certainly is how it sounded. I wanted to move on to another related point. It was suggested that it was somehow novel in competition law that bid rigging might be contrary to Article 81 or Chapter I of the Competition Act. I would just like to show you very briefly, the passage of Whish which suggests that that perhaps is not the case. It is at tab 9 of the first authorities bundle. This is where Professor Whish is discussing the various

types of breaches of Article 81 that may arise, and he has a section here on collusive tendering. If I may I will just read briefly from this passage.

> "Collusive tendering is a practice whereby firms agree amongst themselves to collaborate over their response to invitations to tender. It is particularly likely to be encountered in the engineering and construction industries where firms compete for very large contracts; often, the tenderee will have a powerful bargaining position and the contractors will feel the need to concert their bargaining power."

That is not this case, of course.

> "From a contractor's point of view collusion over tendering has other benefits apart from the fact that it can lead to higher prices: it may mean that fewer contractors actually bother to price any particular deal … so that overheads are kept lower. It may mean that a contractor can make a tender which it knows will not be accepted (because it has been agreed that another firm will tender at a lower price) and yet which indicates that it is still interested in doing business, so that it will not be crossed off the tenderee's list."

That, of course, is precisely what has happened in this case. Then just over the page you will see – I am not going to read it – that Professor Whish refers to various Commission decisions in this field. We have not shown them to you because they are not actually relevant to the facts of this case at all – none of these are cover bidding cases – so I am not going to overstretch the point, I hope, but simply to say there is nothing new, exotic, or ground breaking about the suggestion that bid rigging is a breach of Article 81.

You will see from our skeleton – I will not take you to it – that the OFT Guidelines on Chapter I also refer to this kind of bid rigging as a possible breach.

Finally, before I move on, just to echo something that you said, Madam, a few minutes ago, it is not of course necessary for the OFT to prove any of those potential anti-competitive effects actually took place. It is sufficient that there is the substitution for the risks of competition of cooperation, and that at least the object was anti-competitive and that, of course is the basis of the Decision.

With that I would like to turn to the big question before you today, which is what actually constitutes a concerted practice. In short, we say the answer is very clear from the passage from the Court of Justice's jurisprudence, and the CFI's jurisprudence that we have referred to in our skeleton, particularly at para.11 of our skeleton. You were shown these passages yesterday, but I will just remind you now. These are propositions that Mr. Beard took you to yesterday, he took you through the cases which obviously saves a great deal of

time. But these are the classic statements by the court of what is required for a concerted practice. Our submission is that your task is simply to apply these principles to the facts, and really the big disputed issue of fact is whether there is practical cooperation. That is really what it boils down to. I am not suggesting Mr. Beard has waived his rights to argue about any of the others, but that is the crux of our case, and I will come on to that in particular in a moment. Before I do, I want to make five points which are fundamental to understanding how these well worn dicta actually apply.

First, whilst it is true that they are derived from cases concerning large ongoing cartels in major commodity markets, these principles apply equally in the present case – that is only to state the obvious. The reason why all these cases are of that kind is simply that it reflects the Commission's prosecuting priorities. Its concern is with major cartels, that is where it puts limited resources, and those of course are the cases where big fines materialise, and appeals get as far as the ECJ, so that is why all the cases are of that kind.

Secondly, and relatedly, it is not necessary that there should be an ongoing course of conduct. One rigged bid is actually enough, and we can see that from the court's Judgment in *Aalborg*, which is at tab 3 of the first authorities' bundle. It is actually para.258. Paragraph 258 simply states the probably obvious proposition:

> "An infringement of Article 85(1) of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct."

Of course infringement of Article 85(1) – now 81(1) – could be a concerted practice or an agreement. So a single instance can be enough if the ingredients for concerted practice are actually made out.

Thirdly, whilst all concerted practices require cooperation that does not need to consist of a mutual exchange of information, or anything of the kind. There can be a concerted practice that one party can fix its prices. By way of illustration of that I hope obvious point we have the *Dyestuffs* case, which Mr. Beard took you to yesterday, where if you recall there were three suspiciously parallel price increases in the *Dyestuffs* industry and the Commission and the Court upheld his view, and concluded it was a concerted practice. I will just show you very briefly a passage from the facts that you did not see yesterday, which is at p.658 of the ----

THE CHAIRMAN: Where?

MR. WARD: It is tab 5 of the first bundle, and it is p.658 of the report, para. 99 and onwards, where it says:

"Viewed as a whole the three consecutive increases reveal progressive cooperation between the undertakings concerned.

"In fact, after the experience of 1964 when the announcements of the increases and their application coincide, although with minor differences as regards the range of products affected, the increases of 1965 and 1967 indicate a different mode of operation. Here, the undertakings taking the initiative, BASF and Geigy respectively, announced their intentions of making an increase some time in advance, which allowed the undertakings to observe each other's reactions on the different markets, and adapt themselves accordingly."

Then over the page:

"101 By means of these advanced announcements the various undertakings eliminated all uncertainty between them as to their future conduct and, in so doing, also eliminated a large part of the risk usually inherent in any independent change of conduct on one of several markets."

The point here is only this, that in this case there was a kind of one way flow of price rigging information, on the occasion at least of these last two increases. There still needed to be cooperation, and I will come back to what that means in this case. It is not our case, and it never has been our case, that unilateral conduct gives rise to a concerted practice, and that is my fourth proposition.

When you return to the pleadings and the skeleton arguments in this place you will see Apex repeatedly talks about unilateral conduct and suggests that the OFT's case is that unilateral conduct can suffice, particularly in the Briggs' case. But that is not our case and it never has been. We accept, unequivocally that there must be practical co-operation.

The fifth of my five propositions is that practical cooperation does not need to extend to actually putting the concerted practice into effect. So if there is a concerted practice to raise prices, for example, the fact that the prices never get raised does not mean that no breach of the competition rules has occurred. As authority for this, I think, uncontroversial proposition if I may I will ask you to turn to *Anic* which is at tab 7 of the first authorities' bundle, and para.99 at p.4197.

THE CHAIRMAN: We were referred to it yesterday.

MR. WARD: I think you were, yes. I hope you will forgive me for referring to it again.

"It is settled case-law that, for the purposes of applying Article 85(1) of the Treaty, there is no need to take account of the concrete effects of an agreement once it

appears that it has as its object the prevention, restriction or distortion of competition."

And then the same point is made at para.122 in respect of the concerted practice, where it says:

"… a concerted practice, as defined above, falls under Article 85(1) of the Treaty evening the absence of anti-competitive effects on the market."

What we will talk about a little bit later is the extent to which any conduct on the market has to be shown, because there is some difference materialising between us as to whether that matters at all. But I will come back to that. But I thought now it might be helpful if we turned to the evidence in relation to FHH. That, of course, is in the factual material bundle. First, I can answer a question that you raised yesterday about the document at tab 1, which is that the estimated tender sum was indeed blanked out by the OFT and I actually have un-blanked out copies which I can hand up if that would be of assistance. You will just see the figure there in the third line. [Document handed to the Tribunal]

THE CHAIRMAN: Thank you.

MR. WARD: I am not really going to address this other than just the note you will see echoing something I mentioned earlier – the recommended number of tenders is six with a minimum of four. You will have seen the date in the top right hand corner – "2nd July 2001".

Over the page at tab 2 is the invitation to tender, but then the document that really matters is at tab 3, which is this fax that you have already seen of 30th August 2001. I just note that the closing date for the tender was 4th September 2001. You have read this fax before, of course. Apex have presented this case largely as if this is the only piece of evidence at all of the concerted practice, and it is largely suggested – at least sotto voce – that the OFT's case fails because this is just a unilateral fax. I think in the skeleton it talks about an invitation to buy encyclopaedias. Of course, if that was right this fax had been sent out of the blue, or into a vacuum – to change metaphors – then that would not be a concerted practice because it would be unilateral. But there is much more to the evidence than that.

First, there is a clue even in the fax itself which the Tribunal pointed to yesterday, which is in the last line of the fax, where it says: "Many thanks and have a good holiday". That strongly suggests that this is not the first contact between the sender and the sendee. So far so good, but so far not very much you may say. Then we have the question of how the fax was sent in the first place, and there are two alternative accounts of this as you know. But the OFT's submission is that on either account it is clear that there was practical

cooperation. So if I may, I will start with Briggs's account and say why we say there is practical cooperation here. For that we need Mr. "C's" interview which is now, I hope in the bundle at tab 6. The important pat for present purposes starts at the last two paragraphs on p.3. In particular, picking up the fourth line of that second to last paragraph:

> "With reference to two tenders for Birmingham CC [blank] referred to a fax dated 30th August 2001 timed 14.30 to [blank] from…"

I think we should now refer to him as Mr. C also – I will out of an abundance of caution.

> "… which was handed over to the legal representative. [blank] was asked to explain the circumstances of how he came to have the fax. He said 'We were asked to do a cover for a couple of schools that Apex Roofing knew about that were coming out to tender. We said 'okay' they were Firestone jobs which is an EPDM Rubber job. We are on the Firestone list but do little or nothing for Firestone. We said 'okay'. "

So, so far on this version of events Briggs has been asked to do the cover and has said 'yes, we will engage in bid rigging'.

Moving on, it says: "The jobs or inquiries duly hit my desk." So obviously it had already said "okay" before the tenders even materialised because he says "duly hit my desk".

> "…and remained there until this fax came through with our prices to put in."

Then he says: "We were rather shocked at the value." And of course, he then explains why they did not put the figures in, but I am going to come back to that because I want to just pause there for a moment because on this version of events what we have is contact from Apex saying "Would you put in a cover bid?" Briggs saying "Yes, okay, that's fine", and then Apex sending the prices. In our submission that is cooperation. It is practical cooperation. It was not an unsolicited mailshot.

What Apex say about this, Mr. Beard said yesterday in particular, is that none of this goes anywhere because it is clear that Briggs was not going to put in a bid anyway. So there may be cooperation but it is not substituting the risks of competition. That is because, it does say in fairness, that is a fair reflection of what the interview says in the next paragraph which I did not actually take you to. But, if I may, I will explain why we submit that that is a substitute for the risks of competition. From Briggs's point of view it substituted either the cost of making its own bid, or the risk of not making a bid and being dropped from the list – that is why it went along with the plan. The plan did not materialise, but that is why it cooperated, that is what it gained from the cooperation.

From Apex's point of view it had good reason to think it had effectively eliminated one of the potential four or five competitors from the bidding process and, of course, it had found out – or had confirmed – that Briggs was amenable to bid rigging if it did not already know that.

I can put the point also to a slightly higher level of generality which, in my submission, is equally valid. Apex then knew what Briggs was minded to do instead of being in the dark and acting independently, which is what the tender process intended. Whilst Apex may or may not have faced real competition from the other bidders on which there is no evidence, it did not face the risk of competition from Briggs because it had substituted cooperation for that competition.

Very importantly, the fact that Briggs did not enter a bid is actually immaterial thus far, because what we have is cooperation. It is not cooperation that led to the execution of the proposed concerted practice, but it was cooperation instead of competition nevertheless. Just to complete the picture, the object or effect of this contact was to influence Briggs's conduct on the market and on the part of Briggs to reveal to Apex the course it intended to take – just filling in the language of the court's task.

Apex's account is, of course, different, and for that we need to go back to the Appeal bundle, and in particular annex 3 to the Appeal bundle where we have Apex's response to the Rule 14 Notice, but we can really go straight to the appendix to that which s Mr. "C's" witness statement, which again you were shown yesterday. It is towards the end, I am afraid it is not paginated – in my copy anyway. This, of course, is Apex's Mr. "C", and not Briggs's Mr. "C". Just to remind you of what you have already seen, it is the last three paragraphs of the statement:

> "On the morning of Thursday, 30th August I was telephoned by Briggs's employee, whose name I cannot recall, and asked if we were tendering for two Firestone projects at Frankley and Harborne Hill. He went on to say that due to staff holidays and other inquiry commitments they would not be able to submit by the return date and Birmingham City looked unkindly on tenders that were not returned by the due date after accepting the invitation to tender. I was asked to send the figures to [blank] and duly did so as per the fax message dated 30th August 2001 at 13.30 hours."

So of course the difference is on Apex's version Briggs asked them for the figures, but not vice-versa. But actually it makes no difference at all, because on either view you have a request from somewhere that figures be provided, figures then being provided and then, of

course, Apex ultimately entering its own figures that were lower, and winning the contract. But the point is only this, when Apex sent the fax – even on its own account – it was not an unsolicited invitation to subscribe to the Encyclopaedia Britannica. It knew that Briggs wanted the fax. To put the matter in plain English, the parties cooperated with each other over the figures to be entered by Briggs. That, we submit is practical cooperation.

Just to anticipate something I am going to come back to in more detail a little bit later, one of the things Mr. Beard has said repeatedly is that all practical cooperation has to be action, and I have shown you that action does not have to be implementing the concerted practice, fixing the prices. But the cooperation here for Briggs consisted in what it said to Apex about its willingness to go along with this plan, on either view.

The way in which that cooperation substituted the competition is exactly the same as I outlined when I was talking about the Briggs' version of events – it simply applies *mutatis mutandis*, so I will not go through it again. But this, of course, is not the end of the story and actually it is not the end of Apex's attack, because Apex's attack really is focused on what happened next – or really what did not happen next, because of course Briggs did not enter the figures. For an explanation as to why we look again at Mr. "C's" interview, which is at tab 6 of the factual bundle. Picking up the story where we left off, Briggs said "Okay" to the proposal, and then when the fax came through "…we were rather shocked at the value" – I am at the top of p.4.

> "It is a lot of money and we looked at the specification required for the job and the roof areas involved on a roof plan that had been supplied, and I went and saw my boss and we looked at it carefully together again. We did not actually sit very comfortable with the figures that we got to submit because it was too high. I believe [blank] had a conversation with somebody at Apex, the manager there, and it was <u>duly</u> decided that we were not going to put in a tender, so we did not actually put a tender bid in at all, it was just an absolute "no tender" as far as we were concerned, because we thought they were having a laugh with the figures. We did not return the price at all."

So what happened here is at the bottom of p.3 of his interview, Briggs says "okay" to the bid rigging. The tender comes in and then the prices come in and they do not like the prices. They are worried, it seems, that they are going to be conspicuous in essence. Then it was duly decided, i.e. because of the prices that they would not put the bid in. In a nutshell, what Briggs said was "yes" to bid rigging, but "no" to these particular figures. So what Briggs did, in ordinary language, was to cooperate with the proposal from where ever it

came, that there should be a fixed bid by Briggs on this occasion. But it stopped before executing that proposal.

This is not a mere attempt at practical cooperation. It was practical cooperation but just did not go as far as putting the figures in. A mere attempt would have been if the first request for cooperation had been ignored or reversed, or if the fax had gone perhaps to the wrong number, that conceivably might have, if the fax had been unsolicited. But here, long before the arrangement broke down, the parties had actually cooperated.

THE CHAIRMAN: Before you go on, what it says is "I believe whoever it is had a conversation with Nick, somebody at Apex."

MR. WARD: Yes.

THE CHAIRMAN: "… a manager there, and it was duly decided that we were not going to actually put a tender in."

MR. WARD: Yes.

THE CHAIRMAN: So is it your case that there was an agreement not to put a tender in?

MR. WARD: I do not put it as high as that. It is possible, but I do not need to put it that high. I respectfully agree that the words could bear that construction, but I am not resting my case on that because it is not entirely clear. Apex may have said "Please do, please do", but then even so they decided not to – it may have happened.

MR. SUMMERS: Mr. Ward, may I just ask – are you producing any evidence of a site visit, or is this decision not to put the figures in, or just simply feeling that they are too high, is that purely based on a professional instinct, as it were.

MR. WARD: I have nothing to go behind this interview at all. So exactly why Briggs thought the figures were too high I cannot say. I cannot add anything to these words. What I have submitted is that this interview, which is criticised and contested, is not actually very important because the damage had already been done by the prior cooperation which had already taken place.

I want to turn to something which we mention in our skeleton and which Mr. Beard picked up on, which was this question of whether there can be passive cooperation. If you remember there was a passage from the *Aalborg Portland* case, which I will take you back to, if I may, in file 1 of the authorities. Mr. Beard criticised our reliance upon this passage. I want to make clear the extent to which we do actually rely on it. *Aalborg Portland* is at tab 3 of the first authorities' bundle. I want to start at para.79, which is at p.22 of 65 or p.18 of the report. You were shown this yesterday, but I just want to make clear what we are saying about it. You will see that the sub-heading above 78: "Establishment of the liability of the

undertakings." You will recall that this case is actually the Appeal from the *Cimenteries* Decision.

> "79. Although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged."

Then moving on to para. 81:

> "81. According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel."

So what is being envisaged there is where say, for the sake of argument, six undertakings around the table, some undertakings speak up and reach an agreement – "we all agree that we will divide up supply to France" - and one undertaking may remain silent, but nevertheless it has to explain what it was doing there, is the effect of this, because it goes on to say:

> "Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."

In other words, that it was nothing to do with the illegal agreement, it was just sitting taking notes.

> "82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.
>
> "83. The principles established in the case-law cited at paragraph 81 of this judgment also apply to participation in the implementation of a single agreement. In order to establish that an undertaking has participated in such an agreement, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in

pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.

And then this is the piece that we have relied on:

"84. In that regard, a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement.

"85. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting."

These dicta are not addressed to our situation. That I entirely accept immediately, because what they are dealing with, albeit at a high level of generality, is essentially meetings where unlawful arrangements are entered into, so the infringing party has at least taken the positive step of going to the meeting. So when your competitors say "we're having a round table" and you turn up you are at risk you may say. That is, of course, not exactly what happened here. The reason we rely on this is actually to show how little is required to cross the threshold from lawful unilateral conduct to unlawful concertation of some kind.

The real question you are asked to decide in this case is one of degree where, on the one hand, we have wholly unilateral conduct which we all agree is completely lawful. On the other hand we have implementation of an unlawful arrangement, which I think Mr. Beard will agree, of course is unlawful, and it is where on that spectrum this case lies. Is this enough to constitute practical cooperation? That is really the question. It is somewhere between the two. I have explained why we say even this kind of degree of cooperation very importantly substitutes for the risk of competition but this case, we respectfully submit, is of some help by showing how sensitive the court is to any suggestion of involvement by a party in a multi-lateral arrangement – I do not put it any higher than that. I am not making a simple point of "oh well, this is passive participation by merely receiving the fax", which I think Mr. Beard might be suggesting is our case. I do not need to put my case as high as that, because in this case there is much, much more than that.

I want to move on now and ask the question: "Is there another ingredient in the concerted practice that we have not yet addressed?" in terms of conduct on the market

because this really is about the case of *Anic* which I am going to come to in a moment, but before I do I need to make some preliminary points. Mr. Beard suggested that the OFT had got in a muddle, and *Anic* and cases about conduct on the market were really about whether the agreement had any anti-competitive effect. But he is still saying that there has to be conduct, because he uses the word "action" now instead of "conduct". He is saying there has to be action and there has not been enough action in this case, but we respectfully submit that this is actually a case of trying to have your cake and eat it, forensically. I would like, if I may, to show you the Notice of Appeal because this is really where this whole line of argument in this Appeal flows from – it is actually para.1 of the Notice of Appeal. This is where Mr. Beard, in the Notice of Appeal sets out what he then said were the ingredients of a concerted practice. He quotes from Bellamy & Child, it says that it is clear from the case law that in order to show a concerted practice, it must be shown that there has been positive contact and that contact involves cooperation that is contrary to the normal competitive process, and that that contact has the effect of altering the commercial conduct of the undertakings – so what one might call loosely the effect of conduct on the market.

We met that plea, among other things, by reference to *Anic*. One reason which we did, I frankly own up, is because of what Bellamy & Child actually says. If you turn to tab 18 in the second authorities' bundle you will find an extract from Bellamy & Child and at p.67 para.2-044 is the passage that was quoted in the Notice of Appeal. You will see (a), (b), (c) and then (d) which was not raised, and I can see why, but "(c) this had an effect on its conduct" and this is the basis of the case that was put against us.

Then if you turn on a few pages to para.2-050 "Proof of resulting conduct", this is developed by the learned authors:

> "Although, as explained above, conduct of the undertaking caused by the concertation is a distinct ingredient of the concerted practice, this generally does not present difficulties of proof. When an undertaking remains active on the market it is presumed to take into account the information exchanged with its competitors, subject to its proving the contrary". [footnote 92, *Anic*, *Hüls* etc.]

I am not trying to make just some crude pleading point here – I am really not. There is a much more serious point, which is that Mr. Beard's case has all been about whether there was a sufficiency of action on the part of Briggs. That is really the nub of the case on the FHH contracts. He has asserted that action is needed, and we have met that assertion through the *Anic* line of cases. We have said "yes" you need practical cooperation, but that

does not have to manifest itself on action on the market because of what *Anic* says. Then yesterday, Mr. Beard tried to persuade you that *Anic* was dealing with something completely different. Now, to some extent this may come down to a matter of semantics, and I agree that actually the cases are not terribly clear about where *Anic* comes in, and the burden of proof on the OFT is, of course, to prove everything. It does not really matter for us where it comes in. What I am trying to make clear is that there is not an extra action stage in concerted practice over and above what is dealt with by the *Anic* line of authorities.

I would like, if I may, just to show you *Anic* again very briefly, which is at tab.7 of the first authorities' bundle. The passage in question is para. 118 onwards, which starts on p.4203 of the report. You have seen all this before but I would like to make a number of points on it as we go through it. Paragraph 118 on its own is potentially misleading because it says:

> "It follows that, as is clear from the very terms of Article 85(1) of the Treaty, a concerted practice implies, besides undertakings' concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two."

So you might be forgiven for reading that and thinking oh you do have to show that the concerted practice was put into effect, but I have already shown you that that is not the case, but let us read on and see what it actually says here:

> "119. "The Court of First Instance therefore committed an error of law in relation to the interpretation of the concept of concerted practice in holding that the undertakings collusive practices had necessarily had an effect on the conduct of the undertakings which participated in them.
>
> "120. It does not, however, follow that this cross-appeal should be upheld…"

Then at para.121 is what we have called the *Anic* presumption, although the presumption is in a number of other cases as well. Because for one thing, subject to proof to the contrary, which it is for the economic operators to produce, there must be a presumption that the undertakings participating in concerting arrangements, and remaining active on the market, take account of the information exchanged with their competitors when determining their conduct, particularly when they concert together on a regular basis. Now, the obvious commonsense in that is that when parties exchange either price information – or a willingness to exchange price information, as happened in this case – they are telling each other something about their party's position in an ongoing sense. In other words, Briggs learns about Apex's bidding range. Apex learns about Briggs's amenability to price rigging

and so on and so forth. This is all developed in our skeleton, but I am not going to take time with it, because the presumption simply stands. It has not been rebutted. In his skeleton argument Mr. Beard said this really did not apply to one-off arrangements. We submitted, and I think he has accepted the force of this, that this says particularly when they concert on a regular basis and, moreover, the further cases we referred to in our skeleton, go a little further than that. For your note, it is para.44 of the skeleton where, in the *Hüls* and *FHB* cases it says the presumption is all the more true where undertakings concert on a regular basis. I am not taking you to those cases because my understanding is that Mr. Beard accepted in principle the presumption could apply in a one-off case. What he said was it could not apply as strongly. Of course, I accept there is force in that point, but the presumption will be weaker in a one-off case than where there is a very, very long line of well established conduct. But nevertheless, nothing at all has been advanced to rebut the presumption. The strategy instead has been to say the presumption does not apply. So however weak it is (or is not) it is unrebutted.

THE CHAIRMAN: when you say "weaker presumption", is it a weaker presumption or less good evidence to rebut it?

MR. WARD: The latter is strictly more accurate, undoubtedly. But here there is no evidence to rebut it, none at all, so actually it is a moot point. For your note the case law is there in my skeleton. Moreover, in the skeleton we have essentially expanded our argument and said even if there was not a presumption it is satisfied here. If you need that it is there, but I am not going to take time on that now.

If I may, I will now turn to Dudley – substance before procedure. Here, just to remind you of the evidence, there is no dispute about any of the evidence. Apex ask Howard Evans for a price, Apex had no intention of lodging a winning bid. Howard Evans supplied the price, it also supplied prices for two of the other three bidders. Apex entered the price, Howard Evans entered a lower price, and Howard Evans won the contract. Here what we say is there is obviously contact. There cannot be any dispute about that. There is practical cooperation, asking for a price, providing a price, entering the price, that has to be practical cooperation on any view. That practical cooperation substituted for the risks of competition, really for the reasons I have set out in opening. In short, Apex did not face the competitive risks of pricing its own bid, winning a contract it did not actually want or, most plausibly perhaps, losing its price in Dudley's list of invitees.

From Howard Evans' point of view the risk of competition from Apex was substantially reduced, previously it did not know what Apex was going to do, now it did

know what Apex was going to do and, of course, it learned of Apex's amenability to enter in a rigged bid. Just to complete the test, the object or effect of the contract was to influence Apex's conduct on the market, on the part of Howard Evans, and on the part of Apex it was to reveal to Howard Evans the course of conduct it intended to take. In other words, to enter a rigged bid.

I have already said in opening why we do not accept that any of this could possibly be described as "pro-competitive." But let us take a step back from that for a moment. Even if these arrangements had a truly benign reason for them. Let us say, for example, it was to save a personal friend from financial ruin, which one would probably think was understandable and meritorious in itself, but that does not affect the illegality of the means. You may have a perfectly proper and lawful end in mind, to help somebody, but undertake an illegal means to achieve that end. It simply does not matter whether or not this is an unlawful concerted practice and anyway, for the reasons I have given, in truth, even the end that Apex had in mind was frankly disastrously anti-competitive.

Again, just to complete the picture, and to pick up something I touched on earlier, I think Mr. Beard's argument was there was no negative impact on competition here, because Apex had already decided not to bid and I have really already dealt with this, but very briefly there are all sorts of adverse effects on the risks of competition that arise out of simply putting in rigged bid. That is what I talked about in opening. Whether those risks actually materialise does not matter at all. The only question is whether the object of the concerted practice is anti-competitive. It clearly was.

I was going to turn now to the question of procedure, Rule 14, and what it all means. There is no doubt that the OFT made a mistake here. It should have put "Dudley" in the box in para. 333 of the Rule 14 Notice – is it helpful to turn it up, I suspect not.

THE CHAIRMAN: It might be.

MR. WARD: Then I shall. It is in the Appeal bundle, it is annex 2, p.73, para.333. Of course, Mr. Beard showed you all of this yesterday. The mistake is very obvious now, where it says in the box: "Summary of infringement by party, Apex" it refers to Frankley and Harborne Hill, it does not say anything about Dudley. Although it does refer to Dudley in the case of Howard Evans, if you turn the page you will see, Howard Evans is at the bottom of p.75, and then the Dudley contracts are referred to as infringements on the next page, the last contracts next to Howard Evan's name. Do you have that?

THE CHAIRMAN: Yes.

MR. WARD: Hob Green, Wollescote, Christchurch, and Church of the Ascension. Those are the Dudley contracts. You have seen from the e-mails that the OFT just got this wrong. It meant to put it in and it failed. The primary question for you is whether this justifies allowing the Appeal, which would only mean remitting the Appeal on this point, and sending it back to the OFT for further action. That is the question, whether that legal consequence flows from this undeniable act in the sense that it should have been in the box. There are submissions in my skeleton to the effect that Rule 14 was complied with, but I am just going to assume against myself that that is not right, because it was definitely was a mistake to not put it in the box. We submit that it cannot possibly justify returning this case to the OFT for further action because there has been no unfairness whatsoever, and the rights of the defence have been fully respected.

The reason is, as you saw from the e-mails yesterday, the OFT realised there was something odd about the fact that Apex had not made any submission on the Dudley contract. They contacted it and gave it the opportunity to make submissions.

Just to pick up a preliminary point that Mr. Beard made yesterday, he said "Well, in other words, we have lost out on what would have been a good ground of appeal, because we took up this opportunity to say something, and that will encourage other people to say nothing. That is actually not our case. Our case is it is the opportunity that matters in the sense that if I chose to say nothing today, even when invited to do so by you, I could not very well then appeal to the Court of Appeal and say I had not had a fair trial. What matters from the point of view of procedural fairness, is that the opportunity is given and, as Mr. Beard said, there is no obligation to respond to a Rule 14 Notice any more than there is an obligation to respond to the Statement of Objections. But you have the right to be heard, whether or not you choose to exercise it.

The only reason why, for present purposes, it really matters that Apex did exercise that right is I removes any doubt that might otherwise have been as to whether it fully understood the position. We can resolve that question from the supplementary Rule 14 Notice, which is annex 5 to the Notice of Appeal.

THE CHAIRMAN: Rule 14 response?

MR. WARD: I am sorry, Rule 14 response, there is no supplementary notice – wishful thinking! That is annex 5 to the Notice of Appeal. You will see that this document contains representations in relation to the action the OFT proposes to take, as set out in the Rule 14 Notice dated 13th August. These representations are supplemental to those made by Apex,

the November representations Then in 1.2 it points out the omission in the Rule 14 Notice and then at 1.3 it says:

> "The OFT has subsequently indicated by telephone and e-mail that, although section 4 of the Rule 14 Notice and in particular the summary table of infringements did not list Apex's name in connection with the Dudley Schools' contracts, the OFT is nevertheless proposing to take action against Apex in relation to Apex's involvement in those contracts. In the circumstances the OFT has allowed Apex a further period of time in which to make written representations…"

and then it goes on and makes the representations although, in fairness, firstly reserving its rights and saying it is all without prejudice to its rights to bring precisely the kind of appeal which it now brings. But I am making a more limited point at this stage. What this shows is that whatever criticisms may or may not be fairly raised at the way the OFT handled the error, Apex knew all about it – they fully understood what the mistake was, and they fully understood the opportunity that they had been given. Mr. Beard has not actually suggested the contrary in fairness. So there was a clear opportunity to remedy the problem and Apex indeed exercised their right to use that opportunity. But there is another opportunity that Apex has had to deal with that fault, and that is the Appeal before you, because of course – as you know better than anyone – this is not a Judicial Review, or a limited appeal on law only, it is a full opportunity for the Appellants to advance any arguments they wish, including new arguments of course.

THE CHAIRMAN: That is a bit circular, is it not, bootstrap, because if you were not entitled to put it in then they would not have to answer it.

MR. WARD: Well that is true, but the point I am making is, having made clear that this was alleged, the problem with that, according to Apex is, well this has prejudiced our rights to the defence. What I am saying is it has not prejudiced it because we made the allegation and now they have had a chance to answer it. It is a completely different position if, in fact, Apex was prejudiced by this error. If, in fact, it had not had a chance to address you on this, or even address the OFT on this, that would all be different, because then the rights of the defence would have been impaired, and the rights of the defence might have been impaired if there was some tension between the two halves which made it awkward to respond to it in separate bites, rather than in one go. But actually, what we are talking about is two discrete infringements, Dudley and FHH. The facts are not connected – the type of infringement is the same, the legal basis of the infringement is essentially the same, but there is no

conceivable tension between the two, and there is no conceivable prejudice in having to answer the two separately.

Mr. Beard suggested, I think, yesterday, well there might be prejudice, but it is a bit unfair to ask me to explain what that prejudice is because that might be giving away essentially the privilege sequence of how we put our defence together. One sees the force of that point, but it only goes so far. It would be credible if there was any credible conceivable prejudice in the rather unusual circumstances of this case, where you had just got two separate infringements. In those circumstances we respectfully suggest it does not show any prejudice which could, in itself, justify saying as a matter of substance, the rights of the defence have not been respected.

Turning then to the legal analysis, does the law somehow compel a different conclusion even if, as we submit, there is no unfairness. In our skeleton we referred to *Napp* in this regard. It is para.77 of our skeleton. It may actually be helpful to have it out, if that is convenient.

THE CHAIRMAN: Yes.

MR. WARD: In para. 77 we set out the effects of *Napp* which dealt essentially with this issue – not the same defects I should say immediately, but defects in a Rule 14 Notice. The Tribunal on that occasion dealt with it really under three heads. It looked at the position in Community law, it looked at the position in Human Rights law, and then it also looked at the position in Common law. It started with Community law, and he Tribunal said:

> "We accept that under the case law of the CFI the European Commission's obligation to put to the defendant the essential facts on which he relies is a fundamental part of the rights of the defence, breach of which can result in an annulment of the decision."

And jus to emphasise that wording: "… put to the defendant the essential facts on which he relies." We did that, albeit not clearly enough in the Rule 14 Notice at the outset. Then, if you turn the page of the skeleton:

> "… not every breach of the right to be heard in the administrative procedure will necessarily led to annulment of the decision …"

We say this is exemplified by this very recent case from July of *Corus UK Ltd v Commission*, where the CFI said yes, there is a defect in the Statement of Objections which is, of course, equivalent. It did not indicate the provisional classification of the gravity of the infringement committed, but it did not annul the Decision, because it said:

"155 …It is not appropriate for the Community judicature to annul Community measures on the basis of omissions in a preparatory document such as a statement of objections, which have no repercussions on the defence of the undertakings concerned…"

Obviously, that is what we say in this case.

"156 In this case Corus expressly put forward arguments in its reply to the SO … in order to play down the gravity of the infringement committed …"

In other words, it answered the very point which it said was unclear, just as in this case.

"157 Consequently, Corus has not demonstrated in what way the conduct of the administrative procedure and the content of the contested decision might have been different regarding the gravity of the infringement, and therefore, the amount of the fine, if the Commission had specified, in the SO, the degree of gravity which it attributed to the infringement …"

In other words, what difference would it have made?

"158 Finally, it must be observed, for the sake of completeness, that that conclusion is supported by the fact that Corus put forward before the Court, arguments which were substantially the same as those appearing in its reply to the SO, in order specifically to challenge the appraisal of the gravity of the infringement … The Community judicature enjoys unlimited jurisdiction to reappraise the amount of fines imposed …It follows that, if a party considers that one of the factors relating to that issue was incorrectly dealt with by the Commission, it can put forward all arguments capable of supporting that view before the Court."

That is the point I have already made in this case.

Mr. Beard sought to answer this by arguing (I think) that where what you are talking about is a failure to identify that a penalty may be imposed, the obligation is strict and it just does not matter whether there is any remedy to the defect. If the defect has occurred it is fatal. I hope I am not caricaturing his argument, but whether or not that is his argument, I want to show you that the cases do not say that. The first place we must look is at the cement case at First Instance, *Cimenteries* which appears at tab 12, bundle 2. It is the passage that Mr. Beard showed you yesterday, starting at para.477. It says that certain parties complain that the Commission did not state in the SO that it intended to impose fines on trade associations. Well that is a rather similar point, I accept. But then look at the way the argument then develops at 479:

"The parties assert that they were not notified during the administrative procedure of the Commission's intention."

So they were not notified at all, it is not just on the SO, it said they were not notified. Now that is not the same as our case. Picking it up at 480:

"The Court points out that the Commission is not entitled to impose a fine on an undertaking, or an association of undertakings without it having previously informed the party concerned during the administrative procedure."

That, of course, we entirely accept. If you are not told that there is going to be a fine it cannot be imposed. Here, of course, they were told, albeit late.

THE CHAIRMAN: He says "too late".

MR. WARD: He says "too late", but that, in my submission only goes to the question of prejudice. If he had been prejudiced that would be a cogent submission – or maybe, depending on the facts. But there is no prejudice.

THE CHAIRMAN: What would have happened if you had made the decision in relation to everybody else, and in relation to the one you had, and then you suddenly realise and ----

MR. WARD: Well there may be all sorts of problems there which I am a bit reluctant to try and think through out loud about eventually having two sets of decisions out of the same set of facts. May I at least think about that?

THE CHAIRMAN: Can you think about it?

MR. WARD: But that is not what happened here at all.

THE CHAIRMAN: No, I know.

MR. WARD: That is a more difficult case.

THE CHAIRMAN: I was wondering what "administrative procedure" means.

MR. WARD: Well administrative procedure – sorry – in this context, there is a well established distinction, actually it is explained in *Napp* between the administrative phase, which is the Commission's investigation and imposing the Decision, and the then the Judicial phase, which is the Appeal. That is in *Napp* I will show you the passage.

THE CHAIRMAN: Well that is what I would have thought, that is why I am wondering, if you make the decision in relation to everybody else what happens?

MR. WARD: I would like to reserve my position on that, but that is a very different situation. I will come back to you, if I may, on that – perhaps I will think about it while Mr. Beard is replying and give you an answer.

Back to the text. It says:

"The Court points out that the Commission is not entitled to impose a fine without it having previously informed the party …"

and of course, we are saying we did inform the party. So it is not just the absence from the statement of objections. Then it says that the statement of objections must make it possible for the parties to understand the case, and so on and so forth. But then at the end here it says – as Mr. Beard showed you yesterday:

"In cases where, after the service of the SO, the Commission decides to impose a fine that has not been mentioned in that SO it must serve on the undertaking or the association of undertakings, a supplement to the SO that observes the procedural rules applicable to any SO."

What we have done in this case is not a formalised additional SO or anything of the kind, or something that is headed at the top "Supplemental SO". That is, we say, only a question of form, not an issue of substance. I entirely accept it has not happened, but this does give Mr. Beard a problem, if his submission is that it has all got to be in the Statement of Objections first time around. It is difficult to reconcile that with even the possibility that there could be a supplemental notification of this kind.

THE CHAIRMAN: I think yesterday his submissions eventually were that it was too late once he had put in his response.

MR. WARD: To which we simply say whether that is so can only be a question of whether the party is prejudiced. If the party is prejudiced, then it may be too late, but that is not this particular case. So there, just to go to the conclusion on this ground of Appeal, which is at 487:

"By not requesting the parties during the administrative procedure to submit their observations on the possible exercise of its power to impose fines under Article 15(2) the Commission infringed an essential procedural requirement."

So the infringement was not the failure to put it on the SO, it was a failure to notify them, or to invite them to submit their observations. In this case the Office did indeed do exactly that, once it recognised the mistake it invited the observations to be submitted. So we do submit that that case does no help.

The next case relied on is *Compagnie maritime belge* which is at tab 20 in the third bundle. The question you asked about this case yesterday, Ma'am, is whether or not the parties ever received the statement of objections, because what happened here was the fine was placed on the trade association but not on the individual members of the trade association, and you asked whether or not it was ever received. Mr. Beard and I are agreed

that it is clear that it was sent, but it is not clear whether they ever responded. But it actually does not matter I am pleased to say because we can see, in fact, from the Decision that the basis of the Decision was that they were prejudiced. One way or another the parties were prejudiced. We can see this first of all from the Advocate General's opinion.

THE CHAIRMAN: Paragraph?

MR. WARD: Page 37 of 43, and I starts at para.173:

> "173. The appellants assert that the Court of First Instance has erred in law in upholding the entitlement of the Commission to impose fines on them notwithstanding that the statement of objections only threatened to impose fines on Cewal but not on any of its members."

Then we can skip the Court's finding, and then they say why this is bad news for them at 174.

> "174 The appellants contend that if the Commission were not minded to impose fines on Cewal because it lacked legal personality, it should have told them that the fines would be imposed on them. They point to the following prejudice which, in their opinion, flowed from this omission:
>
> " – if the fine had been imposed on Cewal it cold only have been based on Cewal's turnover and not those of its members."

In fact, if you delve into the facts further it turns out that one of these members, CMB, was particularly big and had a particularly big turnover, and it reckoned that the fine was four times bigger, or something, than it would have otherwise been. So they say "This is not fair because we did not know what kind of fine we were dealing with".

Then if you look at para.177:

> "It is common case that a copy of the statement of objections was sent to the appellants, albeit only three months after it was sent to Cewal. The real issue, however, is whether the appellants were properly put on notice, by the copy of the statement of objections which they eventually received along with a cover letter which added noting to the contents of that statement, that they could individually be subjected to fines which the statement expressly envisaged imposing only on Cewal, with all the consequences that would follow…"

Then at para.180 the Director General says:

> "…the failure to notify the individual members of Cewal of this exposure to fines is not a merely formal defect. CIMB, in particular, is in a position to point to concrete prejudice. The appellants have pointed out in their reply, without being contradicted

on this point by the Commission, that, if the turnover of Cewal members on their routes in question … were taken as the relevant turnover figure for the purpose of calculating the fine … it would not have exceeded one quarter of the actual amount. In so far as the Commission intended to allocate the fines on the basis of individual responsibility those undertakings should have been notified that they, as distinct from Cewal, were liable to be fined."

THE CHAIRMAN: So what they got, if they got anything, was the notice which said it was going to be Cewal, not that it was going to be them, so they were never in a position to put in representations as to the amount of the fine.

MR. WARD: Exactly, as to their individual positions, and they may have been swayed as well ---

THE CHAIRMAN: They never actually got any notice.

MR. WARD: They never got any notice. They may have also been swayed by the fact that "well, we are not too worried about Cewal for all sorts of reasons, whereas we would be much more worried if it were us – our shareholders might be more worried", but that is all speculation

THE CHAIRMAN: But the submissions may be totally different ----

MR. WARD: Exactly.

THE CHAIRMAN: -- in relation to your own business than in relation to a contribution to a trade association.

MR. WARD: That is exactly it. So we say therefore that in this case there is an argument based on prejudice which was accepted. We can see this echoed in the Court's Judgment - moving on now to p.22 of 25, really towards the end of this divider, the last few pages. Under "Arguments of the appellants" at para.138 and in the next few paragraphs we see exactly the same argument being ventilated in a much more compressed form.

"138 The appellants submit, first, that the Court of First Instance erred in law in accepting all the factors which the Commission took into account in order to determine the amount of the fines imposed."

"140 Furthermore, the fact that the fines were imposed not on Cewal but on some of its members constitutes a breach of their fundamental rights. The amount of the fine was to be calculated on Cewal's turnover and not on that of its members."

So that is the submission. Then the findings of the court at 142:

"142 It is settled case-law that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. The essential procedural safeguard which the statement of objections

constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings."

That is really what it is all about. Then over the page it says:

"143. It follows that the Commission is required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed."

We have already seen from the *Cimenteries* case that the possibility that that is done subsequently is not ruled out. What I submit is that given the emphasis in all of these Judgments on the substance of the right to be heard it would be nothing less than bizarre if the Court of Justice were fixated on a formality. What it is concerned with is has there been due process? If there has not then it has to go back. So that is the Community law position – we submit anyway.

Then there is the slightly vexed question of English law – what role, if any, does it play in this Appeal? Mr. Beard's submission, of course, has been that s.60 applies and you have to take the Community law approach on the basis of *Pernod-Ricard*. It is, of course, important to remember that Rule 14(3) does not have a direct equivalent in the legislation of the Community, in the sense that there is no rule in Regulation 17 or in the new Regulation 1 of 2003, which is equivalent. But we accept, of course, that the rights of the accused mean that you must be told if you are going to be fined – we of course accept that. So, as a matter of substance, there is an equivalent rule of principle. But, as I hope I have demonstrated, that rule of principle is only that you must be told of the allegation – and if it is not in the statement of objections the first time around it is all too late. To that extent we do say, yes, of course we submit follow the Community case law on this.

Even if s.60 were not there one would say that the context of Rule 14 is obviously equivalent, the draftsman obviously had in mind something equivalent to what is in Community law, and it would be very surprising indeed if there were an alternative approach. This is rather difficult because I do not think Mr. Beard or either of us really wants to advance a case on English law. I have advanced the case of *Jeyeanthan* which I will hand up just so that you can have it, because this does say that what one has to look at is the intended consequences. [Document handed to the Tribunal] I am not going to take you through it, Ma'am, because you have indicated that you are already aware of what it says. It does say that the real issue is not does it use the word "shall" or "must". The issue is what would the legislature have intended as the consequence of breach. If this is relevant at all then the answer is it cannot have intended that it would go back. It cannot have intended that a mere matter of form rather than substance would have led to the matter

being remitted automatically, even if there had been no adverse consequences. But it is not my case that *Jeyeanthan* is the answer on its own. My case is that the approach as in *Napp* is correct, where one looks first at the Community position and then perhaps says "Does English law add anything?" In my respectful submission it does not.

I am going anticipate slightly what Mr. Beard is going to say, because he did kindly give me copies of what he is going to refer you to, and he is going to say to you (I think) something along the lines of well if it is procedural fairness it is all very important, and it must be mandatory and there can be no breach – or something along those lines. What I submit is what makes this case perhaps different is any unfairness has been remedied, certainly if there was unfairness it would be a different argument. That is all I am going to say, unless I can assist further, on Dudley procedure.

THE CHAIRMAN: Can I just ask you one thing. If you go back to para.333, there are three boxes.

MR. WARD: Yes.

THE CHAIRMAN: The second box is headed "Period and duration of infringement"?

MR. WARD: Yes.

THE CHAIRMAN: And the third box is "Method of calculation …"

MR. WARD: Yes.

THE CHAIRMAN: Now, we know the e-mail says that it should have said "Dudley" ----

MR. WARD: Yes.

THE CHAIRMAN: -- in these contracts, in para.333. So on that basis the introduction to para.333, the 20 lines or something that had started, applied to Dudley. What is not there and what is not in the e-mail is what would be in those two boxes.

MR. WARD: I have two answers to this. The first answer is that information is actually in the Rule 14 Notice already because a concerted practice involves two parties, that is elementary. It can only be the same concerted practice, and we can find this information in the part which refers to Howard Evans. If you turn the page ----

THE CHAIRMAN: What you refer to as ----

MR. WARD: It is what I referred to earlier.

THE CHAIRMAN: And it means exactly the same?

MR. WARD: Well it can only be, I mean anything else would be just unintelligible. So that is the answer of form. But the answer of substance is that we know that Apex were not in any sense prejudiced by this omission, even from the e-mail. It ha not complained about it at all, when they made their submissions. If there had been any doubt about it you can be sure

it would have featured somewhere in this appeal and it obviously has not. So it is not surprising that Apex's advisers were able to read this and understand what the infringement was that was being alleged. Would it be convenient to now move on?

There are two more matters that I have not dealt with, but I will deal with them as briefly as I can. The first is reasons. The complaints on reasons is essentially that the argument has been much expanded in the pleadings and indeed before you today – and so it has. There is no question that it has, but we respectfully submit that that is entirely legitimate. This is not a Judicial Review. This is essentially an occasion for the Tribunal to assess the evidence for itself. We have referred in our skeleton to *Napp* – I need not take you to it, I know it is familiar – a full review on the merits conducted by reference to witnesses and documents under the discretionary control of the Tribunal. So the question for you is were there infringements, and if so are the penalties appropriate? How the OFT reason is not really the issue with respect. It could be in a case where the Tribunal was in no position to substitute its own Judgment, because on occasions this Tribunal has remitted matters back to the OFT for consideration, but that is not this case. You have everything you need to substitute your own view – or uphold the OFT's view, as the case may be. But in any event, without going into the detail of it our case has not changed fundamentally. We are alleging the same things, we are relying on the same four propositions of law. To the extent that it has developed, it is largely in legal submission in answer to the case which has been advanced by Apex.

Turning if I can then to penalties. What is argued is that the penalty is excessive, because two matters were not taken into account. My answer to this, in short, is that there is no reason at all to reduce the penalty yet further. I would like to start by having a look at the Decision itself and also having a look at what the OFT's guidance (the DGFT's guidance then) says about the approach to penalties. It may be helpful to have both open. The guidance is at tab 15 of the second authorities' bundle and I will start with that, if I may. As I am sure it is very well known to the Tribunal, there are of course five steps in the imposition of a penalty under this guidance, and I want to start by focusing on step 1, which is at paras.2.3 and 2.4 of the Guidance. It says:

> "2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated by applying a percentage rate to the "relevant turnover" of the 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…"

and so on. There is no dispute about any of that.

"2.4 The actual percentage rate which will be applied to the "relevant turnover" will depend upon the nature of the infringement. The more serious the infringement, the higher the percentage rate is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements caught under the Chapter I prohibition."

Then it says something about Chapter II which we need not concern ourselves with, but picking up again, at the bottom of the page:

"The starting point for such activities and conduct will be calculated by applying a percentage likely to be at or near 10% of the "relevant turnover" of the infringing undertakings."

So this is a case which we submit is akin to price-fixing or other cartel activities. It is not strictly price fixing, it is bid rigging, but it is not very different. But actually, what we see when we turn to the Decision itself is that the starting point, in fact, was 5 per cent. The reasoning for that is at paras. 384 to 392 of the Decision. You will see, just following briefly – there is no need, perhaps, to read it all now – it says:

"Calculation of the Penalties.

"Step 1 – starting point."

And it records that it can be up to a maximum of 10 per cent. and then it moves on and considers the nature of the product, the structure of the market, the market share of undertakings involved and entry conditions, where in particular it notes that none of the parties has a leading market share you will see in the middle of that paragraph. Then it goes on to "Effect on competitors and third parties". This, I think it would be helpful to read, if I may, because this is really the contested part.

"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 is a widely encountered phenomenon in the roofing industry. The Parties' infringements gave purchasers of flat-roofing services that there was more competition in the tender process related to a specific contract than there actually was."

That was, of course, one of the points I made in opening.

"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.

"391 The OFT considers 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. On the basis that the market is fragmented and that none of the Parties has a leading market share and the fact that he 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 5 per cent…"

So, in other words, it says it is a fragmented market, you do not have much market power, they are only discrete infringements, they are not an overall system infringement, it is only 5 per cent.

If we can then look back at the Guidance and at what it is we are said to have overlooked. It is para.2.5 of the Guidance we need to turn to.

"It is the Director's assessment of the seriousness of the infringement which will determine the percentage of "relevant turnover" which is chosen as the starting point for the financial penalty"

and that is obviously exactly what happened in the passage I just referred to.

"When making his assessment, the Director will consider a number of 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."

What it is said against us is that 5 per cent. is too high, because that is multicant position, because there is no reference to consumers. That is the argument. Our answer to this is that

there is nothing in this sentence in the Guidance to justify reducing the fine in this case. Because although the word "consumers" is not used, the considerations that matter here are dealt with. The word "consumers" is not to be found in the Decision – I can assure you.

THE CHAIRMAN: Why I am looking is "third parties".

MR. WARD: Third parties are referred to, at least in the heading – it says in 390 "…Effect on competitors and third parties." But the issue of substance here is this: the "consumers" for these purposes are the local authorities. This is not a distribution case with end consumers, and therefore the effect on the local authorities is "how pernicious is this cartelisation, and has it really enabled price fixing in effect?" In other words, the local authorities end up paying more. Those are the effects on consumers primarily. What is said here is that they are individual and discrete infringements, the market is fragmented, nobody has a leading share. Although it does say on the other hand it gave the purchasers there was more competition than there was it has assessed the effect on those purchasers of this agreement. It does not use the word "consumers", I entirely accept that.

THE CHAIRMAN: Hold on, if you look at 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".

MR. WARD: Yes – in the passage that I have referred to.

THE CHAIRMAN: Yes.

MR. WARD: It does not use the word "consumers", it does use the word "third parties", but it has looked at the impact of this concerted conduct on the market place, and it has reached a balanced view which is that it is bad but it is not the worst we have seen. That is why we came down to 5 per cent.

THE CHAIRMAN: Paragraph 2.5 of the guidelines where it says: "and the effect on competitors and third parties" – full stop.

MR. WARD: Yes.

THE CHAIRMAN: "The damage caused to consumers" i.e. "third parties" I am reading it ----

MR. WARD: Yes, I think so.

THE CHAIRMAN: "… whether directly or indirectly will also be an important consideration".

MR. WARD: That, I submit, is dealt with in here, because the consumers are the third parties who are the local authorities, and no, the "C" word – consumer – is not used. I entirely accept that, but does this give a reason to reduce the fine yet further down from 5 per cent.?

In my submission not. In truth we submit it is a low starting point in a case of this kind. There is no factor of substance rather than fraud which has been overlooked.

More or less the same goes for the next point on the penalty, which is duration. What is said here is that the penalty was not expressly reduced to take account of the fact that duration was under a year. Just before we put the Guidance away, you will see at para.2.7 it says:

> "The starting point may be increased to take into account the duration of the infringement. The penalties for infringements which last for more than a year may be multiplied…"

and so on. You will see that it says nothing about reduction for infringement in the Guidance. For that we have to look to the case law, which I will show you in a moment. So the Guidance only talks about increasing it.

For the case law we have to go to bundle 2 – *Aberdeen Journals* - tab 11. *Aberdeen Journals* is a case about abuse of dominance, advertising in local newspapers. Basically, the allegation was that one newspaper had deliberately incurred losses in its pricing over a period of time, and that was found to be an abuse of dominance. The question which arose, with which we are concerned, is whether the fact that this went on for less than a year entitled the participant in this arrangement to a reduction in the fine. We can pick it up at para.498 of the Decision, at p.145, where the Tribunal says:

> "We also note that Step 2 of the Director's *Guidance* permits the Director to increase the starting point under Step 1 to take into account the duration of the infringement, in particular where the infringement has lasted more than one year. However, there is no comparable provision in the *Guidance* at least explicitly enabling the Director to take into account a duration of less than one year. Although in this case the short duration may be partly taken into account indirectly, in the reduction of the penalty for mitigating factors made by the Director under Step 4, we think some more explicit recognition should be made of the fact that the infringement in this case, as found by the Director, lasted only for one month."

What the Tribunal is saying here is that on the facts of this particular case, *Aberdeen Journals*, there needed to be a further reduction to reflect the fact that this abuse of dominance lasted only for a month. In other words, the advertising market was distorted only for a month whilst they pursued this unlawful pricing policy. It is not saying that in all cases this has to happen – that is the first point. It is just a case on its facts, although obviously it opens up that possibility, I entirely accept that.

Here, we have a very different kind of case, because in one sense you can say what the duration of these infringements was, from the first point of contact to the last point of contact and the Decision gives a number of days for this. But in a sense that is a little artificial, because really the infringement in these two cases is the discrete bidding arrangements that were entered into. We are not alleging, as in *Aberdeen Journals*, a sustained period of unlawful bidding, which you could imagine might have been alleged. You can see that Briggs's involvement in this arrangement was so widespread that one might have imagined Briggs facing an allegation of that kind in a different case. That is not this case. It is about two discrete infringements. But that fact is taken into account in the Decision in the passage I have already read to you. Just to remind you of what it says, it is at para.392 ----

THE CHAIRMAN: "..individual, discrete infringements."

MR. WARD: Yes, and this was one of the reasons why the starting point was set as low as 5 per cent. So the question is really only this: is there any reason for the Tribunal to further reduce the penalty to take account of the fact that the OFT does not explicitly address *Aberdeen Journals* in stage 2, which is really the point. But that again is a point of form, not substance. In my respectful submission that would be a form of almost double recovery – it is double recovery in reverse. That would be double counting for the same point, which is this was not sustained conduct, it was two isolated instances of conduct. There is no duration point which is not exhausted by the fact that we are dealing with discrete bid rigging rather than anti-competitive conduct sustained over a period – as was in Aberdeen Journals.

THE CHAIRMAN: Are you going to deal with para. 393.

MR. WARD: Yes, absolutely, it deals there with the Guidance, which talks about increasing the penalty only for duration, because it says:

> "The starting point may be adjusted to take into account the duration of the infringements for infringements which last for m ore than one year."

which is the guidance I have already shown you. Then it says well it did not last more than one year so therefore we do not increase the duration. Of course, I put my hands up and say it does not say "and we do not reduce it either because we have already dealt with it above", it does not. That is a point of form, not substance, that is the submission.

The submission is the point of substance is dealt with in setting the starting point as low as 5 per cent., and these are discrete infringements.

THE CHAIRMAN: If it has already taken into account 392, it does not say that ----

MR. WARD: Yes, that would have been much more elegant if it had done so. But then the question for you, as a Tribunal, is only should you reduce the matter further, or increase it as you prefer. But the issue here is do you reduce it further? Is there something of substance which ought to have led to lower fine than was actually imposed.

THE CHAIRMAN: Do we have the power to go both ways?

MR. WARD: Yes, you do.

THE CHAIRMAN: Increase as well?

MR. WARD: You do. We say the point of substance is already taken care of.

THE CHAIRMAN: What you are saying is the 5 per cent. is the right amount?

MR. WARD: I am not advocating that it should be raised, I am saying it is sufficient, but I am meeting the case that it should be further reduced. I am not advancing a case that you ought to increase.

Unless I can assist further, those are the OFT's submissions.

THE CHAIRMAN: (After a pause) You are still thinking about the other matter?

MR. WARD: Yes.

MR. BEARD: Madam, I am conscious of the time.

THE CHAIRMAN: Yes, do you want five minutes, or are you happy to go on?

MR. BEARD: I will go on and see if we can get it done by lunch time, that is probably best for all concerned. I do not know whether it is of any consolation to the Tribunal but there are a large number of the points made in relation to the FHH contracts, and in particular the analysis of a concerted practice on which there is not a disagreement between Apex and the OFT now that the Office has set out more clearly what it considers to be the ingredients. Mr. Ward set out five points and in respect of each of those points I think as they are put baldly there is no disagreement. The case law that he uses to underpin them, and the analysis of it, there are disagreements about, and I will come to those in due course. We also agree that the key issue in relation to the FHH contracts is the question of whether or not there was practical cooperation in these circumstances. With respect to Mr. Ward it is this point which is essentially the central paradox of the OFT's case that he has not dealt with. How can you have a concerted practice i.e. practical cooperation, where there was no action on the part of one of the two alleged parties? His answer, in passing, seems now to be that saying something is equivalent to doing it.

First of all, that account does not work in relation to the OFT's primary account of what happened in FHH which was that Apex was asking Briggs to lodge a bid because there was no two-sided selling there. But in any event, when he moves on to deal with what he

says is the "Apex" case – as he refers to it – that Briggs asked Apex, he says the fact that Briggs might have indicated to Apex that it might be willing to lodge cover bids is sufficient to show that there is behaviour on both parts. That simply is not sufficient. It does not fulfil the ingredients of practical cooperation on both parts as required by *Dyestuffs*. I will not refer the Tribunal back to the case law in relation to that, but it is clear that the propositions that Apex set out – six propositions – do not appear to be challenged by the OFT and in that regard it is not sufficient for him to be saying that there was a statement. Because, if one goes back, for example, to the tennis match analogy, what Mr. Ward is saying is that if one of my friends says "In principle I am willing to play tennis, and I say "I am going to the courts at 3 o'clock", and I turn up at the courts, that is practical cooperation between us. That is not practical cooperation ----

THE CHAIRMAN: I do not think he does say that.

MR. BEARD: That is the corollary of what he is saying, because he is saying Briggs have said "In principle we are willing to accept cover bids. Apex send a fax. The equivalent is my friend saying "I am interested in playing tennis", my saying "I will turn up at 3 o'clock", and doing it. I turn up at the court at 3 o'clock, but as with Briggs, my friend does not come through – he does not turn up at the court, Briggs does not lodge the bid. There is no practical cooperation even on that case.

THE CHAIRMAN: Can we just look at what he says, because that is not disputed, is it?

MR. BEARD: I am sorry, what ---

THE CHAIRMAN: What he says he does when he gets the fax?

MR. BEARD: What Briggs says he does when he gets the fax? Yes, he looks at it and he says "These figures are too high, I am not going to lodge these figures."

THE CHAIRMAN: And speaks to you?

MR. BEARD: In his interview that is what he says.

THE CHAIRMAN: And that is not contested?

MR. BEARD: He speaks to us and says these figures are too high, I am not going to lodge them. The fact that he says that to us is neither here nor there. It is like him saying "Actually I am not going to turn up at the tennis". How again is that practical problem ----

THE CHAIRMAN: "I am not going to lodge them, and I am not going to bid".

MR. BEARD: That again is a question of practical cooperation. Bearing in mind that this scenario only arises when the OFT takes the evidence that Apex puts forward, that Briggs approached it and said it was not going to bid. So that is the starting point there. Briggs said it was not going to bid, but it will listen to cover bids. Apex sends that. Briggs says "Well

actually I am not going to bid", in other words, "I am going to maintain the position I had before, I am not going to cooperate with you". That is precisely analogous to the situation in relation to my friend who says "In principle I am interested in playing tennis" not turning up. That is not practical cooperation. The OFT's case then has to become just "saying" that I am interested in principle is sufficient. Then it is saying it becomes "doing", and that is not sufficient.

Mr. Ward referred to the *Dyestuffs* case and said information in that case was only moving in one direction. That is not strictly correct because, of course, the information was being provided by a number of parties. They were putting it out and it was being taken into account by the other parties. There were exchanges of information. So in one sense information was moving in one direction from each party, but it is not correct to say that there was only one direction of flow of information. It is clear from *Dyestuffs* that here we had meetings and exchanges of information, swaps. The central paradox that Mr. Ward has not dealt with in relation to the FHH contracts is that you cannot have a concerted practice unless both parties are acting.

I entirely accept that there is a further question about whether that concerted practice has an anti-competitive object or effect. In so far as he is referring to the *Anic* case law we have no difference between us if that is what he is saying. If, on the other hand he is saying actually *Anic* is telling us that somehow you can presume the concerted behaviour beforehand – which I do not think he is saying – then we would have an issue. Bu the presumption in *Anic* is about the effect of the concerted practice on the market, and we accept that that exists. But we say in relation to the FHH contract "You do not have the prior ingredients".

The *Aalborg* case, to which Mr. Ward refers, talking about passive cooperation, he says "I am not trying to suggest that passive cooperation is enough". Well clearly it is not because practical cooperation is required. In *Aalborg* they are talking about the participation of people in those meetings, and it is not a matte of sitting at the side. Those meetings are meetings setting targets, exchanging information. That is clear from the great history of the *Cimenteries* cartel cases. Furthermore, that case is dealing with agreements. It is not dealing with concerted practices in the passages he was dealing with. We accept that there might be different issues on relation to an agreement, but that is not the subject of this Appeal.

In so far as he is saying that that just shows how little is required, that is precisely what Apex is concerned about in relation to this Decision, that the OFT has been too casual in looking at case law that refers to agreements and saying that it looks like this sort of

arrangement might infringe, and simply transferring that initial analysis, that they relied upon the Rule 14, across into the Decision where they move from talking about an agreement to dealing with a concerted practice and making a finding of infringement on the basis of concerted practice. That was wrong because you have to go through and make out those individual ingredients that we have already adumbrated.

Mr. Ward also talked, in relation to Briggs and also to the Dudley contract, about how the conduct in question, bid-rigging, fell foul of the Community law, and actually this was not a particularly radical application. It is accepted that Apex that bid-rigging can fall foul of the 81 prohibition and the Chapter 1 prohibition. But where that is dealt with in the text book particularly is where a party wants another to lodge a cover bid so that it will win, and that is the orthodox way in which one would expect bid rigging to operate. But of course in relation to Dudley, and in relation to Apex's accounts at BFHH contracts, what is being said here is rather different. There was an entirely different motivation. It was not getting someone else to lodge a cover bid, it was getting figures so that you could lodge a cover bid for an ulterior purpose, which is to make yourself available for further work. Mr. Ward has now said that that in itself is anti-competitive because of the impact it has on the tendering process, the way in which the lists are being distorted, and so on. This is a part of the case that is entirely new. It has not appeared in any of the documents – let alone the Decision. There is no articulation of how this happened, and it is a practical effect that Apex is entitled to look at and consider whether or not that that flows as a matter of logic, which it does not accept, or as a matter of accept which you would have to analyse. It is not in a position, when it comes to the Reply, to deal with these matters. It should be noted, of course, in relation to the FHH contract that it has always been the OFT's case that this simply does not matter. It does not matter which way the invitation came, it does not matter who asked who for what. Now, the OFT seems to be placing a great deal more weight on Apex's own account. But it wants to pick and choose between the evidence. It wants to say that Briggs asked for the cover prices, but then does not want to accept the evidence that Briggs made it explicit that it was not wishing to bid, because that is relevant to the analysis, particularly in relation to the Dudley contract and whether or not there was a substitution of competition.

Again, Mr. Ward tried to draw inferences from the fact that there is a wish of "happy holidays" in the fax. But of course if one reads the statement of what we are now referring to as "Apex's Mr. "C"", it is clear that he was previously an employee of Briggs, and clearly knew people there and, furthermore, that when the person in question rang he

was talking about people going on their summer holiday – that is explicit in the statement. So to try and read something into that is simply selectively ignoring the bits of Apex's evidence, which it cannot ignore, if it is going to run its case on that basis. But, as I say, on either account, there is simply not the practical cooperation that is needed for a concerted practice.

If we turn now to procedural matters in relation to the Dudley contracts. First of all dealing with the EC law issues, Mr. Ward has said that notifying somebody that you are proposing to fine them, that is not a strict requirement if you do not suffer any prejudice by reason of not being told". That is essentially what his case boils down to, and I say that because if you breach that requirement but you are not suffering prejudice, he says that can be dealt with, it can be swept up during the course of an Appeal. First of all he refers to the *Cimenteries* case – and it should be noted that Mr. Ward has referred to who received the statement of objections and who replied in CMB, but in *Cimenteries* all the undertakings and all the trade associations received statements of objections and all those parties also replied to them. So all of the parties, both trade associations and undertakings, were well aware that they were being accused of infringements, and the court went on to hold that by failing to set out that fines were proposed in relation to the trade associations meant that fines could not be imposed upon them. The fact that the statements of objection were received and replied to I do not think is at issue, we discussed this earlier today – the references are para. 476 to 478 of *Cimenteries* at tab 12.

It is true that in those cases it said there maybe circumstances in which that can be cured by a supplemental statement of objections. Well, Mr. Ward was quite careful not to look again in any detail at the e-mails, but even if those e-mails can be read as supplementary Rule 14 Notices – which we do not accept and I will come back to – they do not deal with the fine issue. They do not say "We propose to impose a fine". At most they say "We intend to make a finding of infringement". Mr. Ward, ingeniously says "Well it refers to Apex appearing in the table at 333, and although it does not refer to penalties at any time or indeed duration, Apex could read across to Howard Evans and realise that the duration and basis for the method of calculation of any fine could be found there, and therefore that is sufficient notice". Well that is not sufficient in these circumstances. To read Rule 14 as allowing you to provide a written notice which does not set out that a fine is exposed explicitly, that requires you not only to read into that a supposed notice, but also to read into it in connection with a table which refers to other people is simply stretching the notion of what constitutes a cure well beyond the point where the elastoplast will work,

particularly in that case where you are talking about allegations relating to Howard Evans, which was found to have entered into unlawful infringing practices with three other parties. The fact that Howard Evans is mentioned in that table, and General Asphalte and Solihull, referring to their particular discrete, separate arrangements, does not mean that even on that basis Apex would think "Ah well, we have distinctly been missed out".

THE CHAIRMAN: Can we look at the supplementary response and how that was dealt with?

MR. BEARD: Certainly. The core of the supplementary response was "We are dealing with this on a without prejudice basis.

THE CHAIRMAN: Yes, but in relation to the point you are making what was said in the supplementary response?

MR. BEARD: Nothing was said in relation to these points, because none of that account that Mr. Ward has put forward had been put to us at that point. It said that the OFT was proposing to take action.

THE CHAIRMAN: What about para.7.8?

MR. BEARD: It was well recognised that there might be a risk, and this was the only opportunity that was being given, but this goes back to the point that was being made earlier. If you are making without prejudice submissions, are you now going to be hoist by effectively your own petard because you looked at this material and thought "I do not know what is going to happen but I fear the worst in these circumstances, I am going to say something."

THE CHAIRMAN: But your submission was that they did not know, under the e-mail, that there would be a penalty. All they knew was that they may be got on an infringement.

MR. BEARD: They did not know.

THE CHAIRMAN: Paragraph 7.8 specifically says ----

MR. BEARD: Yes, "… any penalty imposed."

THE CHAIRMAN: Yes.

MR. BEARD: But it does not say that they know that there is going to be a penalty imposed.

THE CHAIRMAN: But they were able to meet it because they made their submissions. It was not that they were not able to make submissions.

MR. BEARD: They made some submissions in that, yes, that is not denied in any way. That is not the point that is being made here. What was being said was "We understand that you are saying you are entitled to take action against us in relation to the Dudley infringements in your e-mails. We do not accept that you are in any way. We think you have got it wrong, and you cannot cure it in this way. Nonetheless, we are going to put in submissions in relation to what you have explicitly said to us, that you think you can find an infringement

against us, and we are not stupid, we realise that, given the way that you have dealt with the matter, you might be thinking about putting a penalty on us. We do not know and we are not going to ask you. It is not for us to ask these things. We have put our case, you are not entitled to do it, but we are going to put in some submissions in those circumstances." The fact that those submissions go in is not any basis for Mr. Ward saying "Oh there is no prejudice", because in contrast to the situation, for example, in *Corus* here you have a situation where the proposed cure came after the response was lodged to the Rule 14 Notice, the statement of objections. Mr. Ward is going to come back, I understand, on dealing with the situation that if the whole Decision had been taken then the situation may be more difficult.

THE CHAIRMAN: He has not said what he is going to submit.

MR. BEARD: No, he has not said that, he has said he might come back – I am not trying to put him to any response. But it is difficult to see precisely why Mr. Ward considers that to be more difficult on his account of the authorities, because if it is the case that we could put submissions into the Rule 14 Notice, and then no-one notices that Dudley has been missed out until the Decision occurs, and they impose a Decision and then they say "Actually, we missed something out, we missed out the matter in relation to Dudley and we would like to cover that now. You put in submissions before, you cannot really have any prejudice to dealing with these new points now because, after all, they were mentioned in the Rule 14 Notice, although we did not say we were going to do anything, and we did not say we were going to put anything in the Decision. In those circumstances we are going to press on regardless and you cannot raise issues of prejudice." So if Mr. Ward comes back and says "Oh no, there is a problem here" he is going to have to refer to a formal issue – his arguments about prejudice cannot operate.

It is interesting, in fact, the weight that Mr. Ward placed on the need to show prejudice is not actually borne out by the case law that you referred to, because if one looks at the *CMB* case, the paragraphs that he referred to, it identifies that *CMB* itself had given evidence of prejudice, but it does not then say "Oh, not only is *CMB* going to be faced with a fine", he says "All of those undertakings that were not referred to are going to be faced with a fine." The Advocate General's opinion, to which Mr. Ward referred, said that *Compagnie maritime belge* in particular can point to prejudice, but it did not say that it was a predicate of the conclusion that prejudice must be shown in those circumstances, and that is not the analysis of the court from para.141 onwards. In any event, as has been said, you

do suffer prejudice if not least the difficulty of taking strategic decisions about how you are going to plead to these matters when you are faced with a Rule 14 Notice.

The extent to which you can tailor your submissions to two discrete events and infringements that are alleged against you will depend on a whole range of factors. Mr. Ward says they are discrete but there are common elements. That is precisely the sort of difficulty that any potential respondent to a Rule 14 Notice is going to be faced with and that does prejudice them. It is perhaps relevant, not only to note that EC law but also just to turn briefly to the English law in so far as that might assist in analysis these sorts of situations and how the English courts have dealt with them. Rather than referring to particular authorities I have copies of an extract, which I have provided to my learned friend, of the recent edition of Wade & Forsyth on Administrative Law which is, amongst its other benefits, extraordinarily recent, 2004.

I quite accept that my learned friend is not placing weight on the mandatory directory distinction. It is language that has been used in case law, and this section of Wade talks about what happens when you have a breach of a statutory requirement. It says at the outset:

> "Acts of Parliament conferring in conferring power on public authority very commonly impose conditions about procedure, for example, by requiring that a Notice be served or that an action should be taken within a specified time, or that decisions should state reasons. If the authority that fails to observe such a condition is its action ultra vires? The answer depends on whether the condition is held to be mandatory or directory."

So initially Wade & Forsyth adopt the distinction.

> "Non-observance of the mandatory condition is fatal to the validity of the action. If the condition is held to be merely directory its non-observance will not matter for this purpose."

In other words, it is not every omission or defect which entails the drastic penalty of invalidity. It is important to note this because the distinction between mandatory and directory has arisen in administrative law, because you can end up in these strange situations where if someone has committed a procedural flaw that nobody notices, a case can trundle up through the Appeal process, is noticed at the second level appeal, and then everyone turns around and says "Oh no, the whole thing is an absolute nullity" and the cards lie where they fall, at which point the courts have turned around in various cases and said "Well, hang on a second, absolute nullity, a sort of non-existence of the event is

unrealistic in these circumstances, given what has happened." That is what they are talking about there.

Then it says:

> "The distinction is not quite so clear cut as this suggests since the same condition may be both mandatory and directory, mandatory as to substantial compliance, but directory as to precise compliance…"

and gives some examples. In the next paragraph:

> "Sometimes the legislation makes it plain what the effect of non-observance may be, but more often it does not."

Then it says:

> "The court must determine the question. This the court does by weighing the inconvenience of holding the condition has been effective, against the inconvenience of insisting upon it rigidly."

The notion of convenience it then goes on to expand.

> "It is a question of construction to be settled by looking at the whole scheme and purpose of the Act and weighing the importance of the condition, the prejudice to private rights and the claims of the public interest."

Then over the page, under a heading "Procedural Safeguards".

> "Procedural safeguards which are so often imposed for the benefit of persons affected by the exercise of administrative powers are normally regarded as mandatory so that it is fatal to disregard them. Where this is a statutory duty to consult the persons affected, this must genuinely be done, and reasonable opportunity to comment must be given. Where a proposal or scheme is required to be published it must be accurately described …"

and so on. It then goes on to describe the different cases, and essentially circumstances in which some more formal requirements of procedure will be treated as effectively directory and correctable. Then over the page:

> "In Notices affecting private rights, particularly where the effect is penal, scrupulous observance of statutory conditions is normally required. A demand for a training levy and a certificate of alternative development have both been held void for failure to indicate, as required by statute, that there was a right of appeal … The enforcement notice is void if it fails to state as it should the time allowed for compliance. A demand for a payment is void if it is signed by the Borough Treasurer instead of the Town Clerk. Where an applicant requires consent in writing

from the local authority for carrying on an offensive trade the requirement in writing is mandatory."

All of these are cases where it might well be possible (a) to correct the failing; and (b) that there is no possible prejudice in the circumstances. But what is being said here is that one looks at the scheme and one analyses whether this is a formal requirement. For example, in *Jeyeanthan*, which is actually foot noted at foot note 87 on that same page, if the requirement is merely regulatory as to some minor details, and in *Jeyeanthan* it was to do with whether or not the Secretary of State had signed a statement of truth on an appeal, and it was said that the Secretary of State is obviously not telling lies in his statement that when he lodges the appeal you can presume it is true. The fact that he has not actually signed it off on the correct form does not matter in the circumstances.

That is very, very different from a situation when you are talking about a proposal to impose a penal sanction. Mr. Ward has referred to it as a procedural requirement and, of course, that is right in one sense, but it is not just simply a formality, it is not like "you must lodge your appeal within X days", or, in the House of Lords "You must ensure that the front cover or your petition is in faded cornflower blue paper". It is an important requirement that goes to enabling the recipient of that document to consider properly how to answer a serious case being made against him.

THE CHAIRMAN: I do not think that the cases which are referred to in the paragraph we are dealing with are that sort of case. I think these are actually the decision. It is a demand for an industrial training levy, or a certificate of the alternative development, it is not asking for a further and better or a fuller response. These are actually saying that if there is a decision, and there is a statutory formula for that decision, that formula has to be complied with.

MR. BEARD: Well, those cases are – in fact the closest analogy is probably cases like *Grunwick* which is referred to on the page before, just at the beginning of "Procedural and Formal Requirements", where there was a statutory requirement to consult, and the consultation was not properly carried out. That is the closest analogy I can find. I have got copies ----

THE CHAIRMAN: Then it happened, the consultation was not properly carried out.

MR. BEARD: I am sorry – the consultation was not properly carried out?

THE CHAIRMAN: Yes.

MR. BEARD: Well, that is true. The analysis of this is that if you do not fulfil those sorts of requirements then the decision that results will be struck down, and we say that is the same here. He is not answering the question of whether there are ways of curing that in the interim. For example, in the *Grunwick* case, although they had not initially consulted,

before the time they reached their final decision they had actually done all the relevant consultation – the situation might have been different. So there is no disagreement about that. What I am trying to do here is simply clarify where the English law lies, and distinguish it from any suggestion which, to be fair to Mr. Ward I am not sure he is making, that if you have a purely formal requirement, a time limit, then there may be very good reasons why a court can correct failures to comply with it. But where you are dealing with a proposition that actually affects the right of the recipient in due course, those will be construed strictly and, what is important, of course, in this is that there is no emphasis on the notion of proving prejudice. There is no suggestion in *Grunwick* that those not consulted had to show that they had actually suffered. There is a presumption ----

THE CHAIRMAN: But they were not consulted and it says you have consult. You said had it been corrected thereafter the decision may be different.

MR. BEARD: Well that may be right, I am not trying to avoid that, and I am recognising, because there may be circumstances in which a correction can occur. The point here is simply that where one is talking about the English law and whether or not a requirement such as Rule 14 is to be treated as – to use a tendentious term – mandatory, but to be treated as obligatory, and therefore, if there has been no attempt to cure it then there is no argument but that this Tribunal cannot uphold the fine Decision of the OFT. Then the question arises had the OFT actually cured this, and before that question is reached, in the middle is: can the OFT, in these particular circumstances, cure the matter?

In relation to that interim question, Apex is not making a blanket submission that the OFT can never cure flaws in its Rule 14 Notices if it makes mistakes. It only makes submissions in relation to the final proposition which is that serving a Notice by e-mail after the submissions have gone in is not fair and not curative, given the importance of the Rule 14 requirements, the structure of the legislation, and the importance of the compliance with those requirements and, furthermore, that in fact what the OFT relies upon, does not, on any account, cure the failure to indicate that fines were proposed. So Apex case is in two parts there. In support of that it relies on the European case law and it also refers, in order to clarify and assist, to the English case law. I do not know whether now would be a convenient time?

THE CHAIRMAN: You are not going to finish before lunch?

MR. BEARD: I will probably be less than five minutes, because it is only the fining issues to be dealt with now. Do you wish me to continue?

THE CHAIRMAN: (After a pause) We are going to have to come back after lunch because of Mr. Price.

MR. BEARD: Yes, absolutely.

THE CHAIRMAN: (To Mr. Price): We have not forgotten you. (To Mr. Beard): It is up to you whether you want to ----

MR. BEARD: I will wait until after lunch, it will take five minutes or so to tidy up.

THE CHAIRMAN: Yes. Going back to the question I asked you, Mr. Ward, I think it has a significance to Mr. Beard's submissions because if we remitted the case on the basis that Mr. Beard is suggesting, and quash the Decision because of it, then what is the position? There would have been a Decision – can it then be corrected? Do you see what I mean? Or is that the end of it? I do not think it is totally hypothetical.

MR. WARD: I see the force. I hope you will not be dismayed if I say what I would like to do is to put something in writing because this is quite difficult, and there is case law in this area, which I do not have at my fingertips, but I am quite sure my clients will want to be very careful about what they say, given the potential for it to come back in future cases.

MR. BEARD: We obviously do not have any objection to that, so long as we have an opportunity to see it and comment upon it.

THE CHAIRMAN: I am not sure what your submission on that is, but it may be that you will want to put that in writing as well.

MR. BEARD: It may well be. I think it is probably sensible to leave that and see what the OFT say.

THE CHAIRMAN: Yes, because you are making a submission that we would have to quash the Decision, the question is what effect that has.

MR. BEARD: Yes, well we are making effectively two submissions. We are saying you should quash the Decision of infringement and, even if you think you should not quash the Decision on infringement in relation to Dudley, you should quash the Decision on fine.

THE CHAIRMAN: Yes, on the Dudley matter, yes, quash the Decision on the fine, but not remit it is what you are really saying.

MR. BEARD: We do not see any need for remission in these circumstances.

THE CHAIRMAN: No, because that is the end of it because the result would be that they could not correct it now.

MR. BEARD: Yes, that would be the supplementary submission, but we need the OFT to put forward how they would put it and then we will deal with it thereafter, if we may.

THE CHAIRMAN: Yes. If we come back at 10 past 2 and we will deal with fines, and then we deal with Mr. Price's case.

MR. BEARD: Yes.

(Adjourned for a short time)

MR. BEARD: Madam, before turning to fines, there was one matter which was referred to by you, Madam, before the short adjournment, which was whether or not Apex accepted that following Briggs' contact on their, Apex's evidence, there had subsequent discussion with Briggs.

THE CHAIRMAN: Yes.

MR. BEARD: The position is that Apex do not accept that. Apex's evidence is as set out in what has now being referred to as the statement of the Apex Mr. "C".

THE CHAIRMAN: So we take the whole of one or the whole of the other.

MR. BEARD: Yes.

THE CHAIRMAN: That is the way you want us to deal with it?

MR. BEARD: Yes. That must be right.

THE CHAIRMAN: We do not mix them?

MR. BEARD: Well it is very difficult to see possibly how that can be done, since of course the OFT has said "It does not matter", and so the alternative they are now running is that if you follow one course of evidence, i.e. the course they draw out of the material from the fax and the interview, then the outcome is in their favour, but we say not.

If you follow the other course of evidence the outcome is still in their favour, and again we say not. But they cannot pick and choose between the bits and pieces.

THE CHAIRMAN: Yes, but the question then is if we came to the conclusion that we were not happy with the alternative – it would work on one but not the other – and the one that it does work on is "Mr 'C'" – Briggs. If you are saying "We do not accept it", then what do we do, because we have no evidence here. Are you saying that we have to remit ----

MR. BEARD: Well the question for the Tribunal is obviously whether or not the OFT has made out its case on the strong and compelling evidence.

THE CHAIRMAN: No, because as was pointed out this morning, it is not just that we remit. This is effectively a rehearing.

MR. BEARD: That may be so, but it is still a matter for the OFT to prove their case. It is for the OFT to prove their infringement. We have set out our position in our submissions, and the OFT have said "It does not matter, we are not accepting either particular version of evidence", now they are saying "Well we can accept one or the other".

MR. WARD: Could I just add one point?

THE CHAIRMAN: Yes.

MR. WARD: In *Napp*, where the Tribunal was explaining the full jurisdiction that it has, it says:

> "Since there is no right to test the evidence of witnesses before the Director, it is at this judicial stage of the proceedings that the Applicant may apply to test by cross-examination the evidence of all relevant witnesses."

THE CHAIRMAN: Yes. And we gave the opportunity to do that.

MR. WARD: Exactly, and the opportunity has been waived. It is still open to Mr. Beard to make points about the credibility of the evidence, rather as one would in a Judicial Review.

THE CHAIRMAN: Yes.

MR. WARD: But he cannot simply say because Apex has gone on record saying it does not accept this the Tribunal can, or even should, reject it. That is really wrong. He had to call for Mr. "C" to give his evidence, and to test that evidence, and then persuade you that it was ill-founded. Our case is that it does not matter because on his version events anyway the infringement is made out. But he cannot say because we do not believe Mr. "C", or we do not agree with him, you have to remit it, that is simply not right.

MR. BEARD: Our primary case is if you accept the line of evidence that the OFT was setting their primary case on you do get to concerted practice out of this. The point that was merely being made is you cannot pick and choose between contradictory sets of evidence that has been put forward and come out with a combined story that they then contend amounts to a concerted practice.

THE CHAIRMAN: If we concluded that, on the Mr. "C" evidence – in other words, the OFT evidence – that that was a concerted practice ----

MR. BEARD: That is a different position altogether, because you are essentially rejecting the primary submission that there was not practical cooperation, so that is a rather different scenario. What I was focusing upon is the notion that in the alternative, where the OFT says "if we take Apex's evidence our case is all the stronger." We say "Well no, that is not correct, for the reasons we have already given", and certainly you cannot try and bolster your case by picking bits of evidence from one story that you are not relying on for this hypothetical purpose and trying to fit it into evidence that you are relying upon for this hypothetical purpose, even when they are contradictory. That is all I was pointing out.

THE CHAIRMAN: I think we understand what you were pointing out. There is the problem that you did not challenge the evidence.

MR. BEARD: Well we say there is no difficulty with that. We have put in our submissions of credibility already in the submissions, and there is nothing further to add in relation to it. That is as it stands.

THE CHAIRMAN: Thank you.

MR. BEARD: Although in relation to the fines we are focusing on two particular issues, it is obviously important to consider these matters in context. Here, Apex says the approach and reasoning, the way in which the OFT has dealt with the whole of this case has been sloppy – dealing with legal issues, procedure and factual matters. That is exemplified by, for example, the failure to deal with the evidence they specifically asked for after the oral hearing about motivation at all. It is exemplified also by the supposed corrective e-mails that were sent in relation to infringement and fining. Of course, Apex says that that sort of casual approach is wholly inappropriate given the seriousness of the impact upon Apex of the OFT's actions because, of course, for Apex, just engaging with the OFT is in this process requiring a significant commitment of time and money. In addition, it takes the company focus away from its ordinary business and it places a great strain on the company and, fines aside, it also has a very significant financial detriment – after the Decision Apex was removed from a number of lists of approved contractors by public authorities and it had to shed jobs.

Against that background, failing to deal in particular with the evidence relating to motivation, and to some extent trying to pick and choose which evidence it is relying upon, the OFT has not properly considered how fining should be dealt with. Now, turning to the two specific issues upon which we are focused today. The first is the suggestion by the OFT that they have dealt with the important consideration that the impact upon consumers has been considered in setting the level of fines. The simple point is there is no basis for considering that is the case. It is undoubtedly an important matter, as is set out in the guidance, to be dealt with in step1 of the fine setting process. It is not simply a matter of referring to competitors and third parties, the guidance specifically refers to the impact on consumers as being important.

The OFT says "Ah, well, we have dealt with the import of these infringements in the round and that is sufficient". It is not. The key here is the word "impact", and when one is considering different allegations of infringement, it was incumbent upon the OFT to consider the differential impacts that they could have. That, of course, is of particular importance, when one is talking about a case such as the FHH contract case where, of course, no cover bid was lodged. It is also notable that there is no consideration of to what

extent the price charge could be affected. There is no recognition of the fact that there were, for example, four other bidders in the FHH contract, and that in those circumstances it is notable that not only was Apex facing stiff competition, but the Tribunal having identified the figure on the first page of that contract it is notable that Apex's successful bid was below that. Those differentiations of impact are important. Even if the OFT is correct only to be focusing on those primary customers, the public authorities we are dealing with here, and one would have expected that the OFT would have made distinctions and they have not done so. In those circumstances there must be a reduction in the fine because what the OFT referred to in their guidance as "that important consideration" has not been taken into account – if it had one would have seen those differentials recognised in step 1. That is certainly what one should have seen, and one does not.

Turning now to the duration issue. In June 2003 the OFT was effectively told by this Tribunal that although the Guidance that they had provided and published said "We will consider extending or increasing a fine where an infringement goes beyond one year", the CAT clearly said "If the infringement is below one year you must consider whether or not there should be a reduction." Of course Mr. Ward is right that one is going to look at particular cases, but *Aberdeen Journals* concerned a finding of very, very serious predatory pricing. In that case, where there was very significant impact, it was contended, it was considered that there should be a substantial reduction. If one turns to the case, which is at tab 11 of bundle 2, and at p.145 Mr. Ward has referred you to para.498. Paragraph 497 says that the Director's calculation was at the top end of the scale – multiplied by four for deterrence, and the CAT goes on to say that that might be a little on the high side, at the conclusion of that paragraph. Then it goes on to consider step 2, and says:

"Although in this case the short duration may be partly taken into account …" because the matter lasted only for one month. It reduced the penalty in those circumstances by 25 per cent. Here we are dealing with a situation where Mr. Ward has tried to argue that actually duration was taken into account in step 1. Apart from that being wrong, and contrary to their own guidance, it is not plausible and it is not sufficient. The requirement of *Aberdeen Journals* was to consider these matters at step 2 and at step 2, para.393 the OFT does not adjust any of the penalties in this case for duration, and the reason it does not do that is because none of them are less than a year. It just ignored *Aberdeen Journals*, and in doing so it simply got its fine calculation wrong and, accordingly, there should be a reduction in the level of fine that is imposed on Apex in relation to both of the infringements.

THE CHAIRMAN: What they did at step 1 was to take account that this was a one-off transaction.

MR. BEARD: Yes.

THE CHAIRMAN: If they took account of it is a one-off transaction, they actually took account of duration in step 1, and where they have taken that into account, then it would be double counting to then say that "It was a one-off only a month, therefore I am going to reduce it more" – that would be double accounting, would it not, or double reduction?

MR. BEARD: Well I am not sure why that is the case. One can have individual infringements that can be prolonged ----

THE CHAIRMAN: But it did not say that. In this case it said that this was an individual, one-off infringement, and "We are taking that into account and reducing it at step 1".

MR. BEARD: Yes, but the point I am making is that using a term "individual" or "discrete" tells you nothing about the extent to which duration is being taken into account, because saying that something is individual and discrete means that it is not apart of a prolonged pattern.

THE CHAIRMAN: But they must have taken into account in the context that this was a tender, it was only one tender, it was therefore only this arrangement or practice ----

MR. BEARD: No, with respect, Madam, talking about something as an individual infringement, or a discrete infringement is in contrast to what I referred to at the very outset of my submissions as the sort of "you scratch my back, I'll scratch yours" where you have reciprocal arrangements ----

THE CHAIRMAN: But they had made a finding already as to what the infringement is, so when they are talking about the "individual" infringement they are talking about it in the context of that finding. You cannot say that they meant something else because what they meant was the finding that they had made.

MR. BEARD: Well what they were saying was there was an individual instance, but that does not tell you anything about a reduction in relation to duration. That is why the guidance has two steps. The first is to consider a range of issues that may go to its seriousness – the starting tariff, if you can call it that. If it is a serious type of infringement, if it is part of a pattern of infringements, then in those circumstances the starting tariff is going to be higher. But in setting that starting tariff it is specifically not considering the issue of duration because that is what it explicitly says it is to do at step 2, and it is not a matter of double counting to say "(a) something is individual and therefore it is less serious because it is not part of a pattern; and (b) it is also short and therefore, in accordance with *Aberdeen Journals*, there should be a reduction in the level of fine. That is not double counting, because those are different

considerations, different steps that are set out by the OFT. If you have a situation where you have an individual infringement which occurs for over a year – for instance, if you have some sort of exclusive dealing arrangement which would be a single infringement of Chapter I prohibition but could have gone on for some time, you might say "This is only one exclusive dealing arrangement, you do not have lots of others. It is not a part of a pattern of behaviour that you have instituted as a supplier in the market. Therefore, the seriousness of that particular infringement is not going to be so great, so our starting tariff would go down. When you came to analyse the duration question you say "Well it was a bit more than a year, so we might put it up slightly", but they are two different issues. There is no question of double counting here, they are different parameters that are separated in the Guidance, the OFT was under an obligation to consider duration – indeed it did separately consider duration. What it failed to do was take into account the message that had been sent out by this Tribunal in *Aberdeen Journals*, that when you do this you do not just consider it in one direction - that is it longer – you actually consider is it shorter too. If Mr. Ward's double counting argument was right, we would not need step 2 in these sorts of circumstances.

In those circumstances the OFT has simply failed to follow its own Guidance, as modified by the instruction of this Tribunal. This infringement was substantially less than a year, accordingly there should be a further considerable reduction in the fine in relation to each of the relevant infringements.

So taken together, and against the background which I have described, there should be a substantial reduction in the level of fine for each of the infringements, the OFT having failed to consider those two matters which they are required to consider in these circumstances.

Unless I can assist the Tribunal further, those are Apex's submissions.

THE CHAIRMAN: (After a pause) We have no further questions.

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