IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1061/1/1/06

Victoria House
Bloomsbury Place
London WC1A.2EB

30 October 2006

Before:
MARION SIMMONS QC
(Chairman)

MICHAEL BLAIR QC
VIVIEN ROSE

Sitting as a Tribunal in England and Wales

BETWEEN:

MAKERS UK LIMITED — Applicant

and

OFFICE OF FAIR TRADING — Respondent

Mr. Aidan Robertson (instructed by DLA Piper Rudnick Gray Cary LLP) appeared for the Applicant.

Mr. Tim Ward (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

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HEARING

THE CHAIRMAN: Before we start I have two matters. First, we have just been told this morning by our Referendaire that a third party some time ago supplied documents to the Tribunal which were returned to the third party by the Tribunal (the Registry). We have also been told this morning that the third party supplied documents to the OFT and the OFT sent those documents, we understand, to Makers and also provided a copy to the Tribunal. The Tribunal – the three of us – have not seen those documents and we assume that no one today is relying on those documents. I am just mentioning it so that all parties know that this Panel is ignorant of the content of those documents, and that the Panel does not intend to read them.

MR. ROBERTSON: Madam, I can give the confirmation that we do not intend to rely upon those documents.

MR. WARD: Nor do the OFT.

THE CHAIRMAN: They are not in the Panel's files. Mr. Ward, I think we are going to start on the evidence?

MR. WARD: Yes.

THE CHAIRMAN: Before the evidence we would like the OFT to summarise the infringement which they allege against Makers, and that is particularly in regard to what you say in para.17 of your Defence. We wonder whether or not you are pursuing para.17?

MR. WARD: We are indeed pursuing that. We essentially put the case in a number of ways, and you will have appreciated that our primary case is that the evidence that is now put forward by Makers should not be accepted, but once it has been considered we will make submissions in closing about what inferences may be drawn from the state of their evidence in any event. But I would rather not go further now until we hear what their evidence is.

THE CHAIRMAN: Right.

MR. WARD: May I make a brief observation about timetable, if that is convenient.

THE CHAIRMAN: That was my next point, so that is good.

MR. WARD: We are all grateful for the indication that in principle if necessary the Tribunal can sit tomorrow morning. I have no hesitation in saying that a day and a half will be enough for this case. It may even be possible to finish it today. The OFT has put in a very detailed skeleton argument and, as a result, submissions on the law and the evidence will be brief. We do however have three witnesses to cross-examine. We have quite a lot of questions for Mr Bowman and, indeed, questions on the detail of what happened in 2002. So I anticipate – depending of course on his answers to some extent – that that might take some time. The other two witnesses, Mr. Whitehouse and Mr. Cowland. I must confess that my own best guess is that that might take half a day – it is not even impossible it will go into the afternoon.

Needless to say I will do everything possible to keep the cross-examination within reasonable bounds and pursue it as fast as I properly can whilst putting our case fully to Mr. Bowman.

THE CHAIRMAN: The Tribunal does not want to rush you, and of course all we knew was that nobody was agreeing timetable.

MR. WARD: Of course.

THE CHAIRMAN: If it had been possible to finish this in a day then that would be preferable. It would be very unfortunate if it turned out that there was half an hour for tomorrow, if you see what I mean. We are not trying to rush you.

MR. WARD: I am very grateful for that indeed.

THE CHAIRMAN: Shall we revisit it after the evidence and then see how long submissions will be and then we know how much time we have and whether we will have to go into tomorrow, and then we can decide what time we will finish this afternoon.

MR. WARD: If the OFT has been indulged on the cross-examination of course I bear that in mind on the submissions.

THE CHAIRMAN: Yes, except that what you were just saying about how you are going to put your submissions may depend on the evidence, it may be that you need some time for that.

MR. WARD: It may indeed.

THE CHAIRMAN: You are happy to call your evidence first?

MR. ROBERTSON: I am happy to call my evidence first and if there are no questions from the Tribunal I suggest that we call Mr. Rob. Bowman.

THE CHAIRMAN: Can I say that there is a transcript but that is being done through a tape instantaneously and therefore we have no shorthand writer.

Mr. ROBERT OLAF BOWMAN, Sworn

Examined by Mr. ROBERTSON

Q Mr. Bowman, could you state your full name, please? A. Robert Olaf Bowman.

Q Could you give the Tribunal your address, please? A. 173 Holly Lane, Urdington, Birmingham, B24.9LA.

Q Do you have a bundle of statements in front of you? A. I do, sir, yes.

Q And is the statement in front of you a copy of the statement that you made on 19th April this year A. Yes.

Q Madam, I was not proposing to ask the witness to read out his statement in light of the time constraints that we are under. I do want to take the witness to one paragraph of his statement to ask one question by way of clarification.

THE CHAIRMAN: Yes, we were just wondering, there are two statements – one is an amended statement and we were not sure what the amendments were – they are both dated 19th April. We want to make sure that we are looking at the right one.

MR. ROBERTSON: The amended statement is news to me, I shall check with those instructing me. (After a pause) Madam, there was an amended statement to substitute different cross-references to the bundle, but the text of the statement, other than the cross-references, is the same.

THE CHAIRMAN: So the amendments were nothing to do with the witness, it was just cross-referencing to the bundle.

MR. ROBERTSON: Cross-referencing done by my solicitors, that is correct. So whichever text you are looking at it is the same text, just different cross-references, yes. Madam, if I can have the Tribunal's permission to take Mr. Bowman to one paragraph of his statement by way of clarification?

THE CHAIRMAN: Yes.

MR. ROBERTSON: Mr. Bowman, could you turn, please, to para.17 of your statement, which begins on p.4; in fact, the question I am going to ask you relates to the final sentence of that paragraph which is on p.5. You say: "I knew that they [Asphaltic] were already quoting for the job, but I did not know whether this was as a subcontractor or main contractor." The question I have for you is how did you know that Asphaltic were already quoting for the job? A. When we approached them for a price they said "We don't need the full document sending through", normally one would send out a full bundle of documents to a subcontractor. They simply said that they could give us a price.

Q You did not know that they were quoting for the job before you approached them? A. No.

MR. ROBERTSON: Madam, I have no further questions.

THE CHAIRMAN: Can Mr. Bowman confirm that the contents of the witness statement is the evidence today?

MR. ROBERTSON: Madam, yes, you are right, I have omitted to ask the witness that question. (To the witness) Mr. Bowman, can you just confirm, please, that the statement that you made in April remains true; there is nothing that you wish to add by way of correction to it? A. There is nothing that I know of that I would wish to correct in this statement.

THE CHAIRMAN: Does that statement stand as your evidence today? A. It does.

<u>Cross-examined by MR. WARD</u>

Q. I will mostly be showing Mr. Bowman documents from Bundle C, which he has in front of him, which contains his statement, but also A, B, and F to a lesser extent. I wonder if it would be convenient to put them within his reach before we start? (After a pause): I would like to

begin, Mr. Bowman, by establishing the extent of your personal knowledge of this tender process. Would you please turn to Tab 15 of the bundle in front of you which contains the annexes to your statement. Page 120. This is the ... from Makers to AKS, and you signed it.

A. Yes.

Q. So, did you prepare the figures in hand which are on the next page, which actually set out the schedule? A. Those figures are in my hand, yes.

Q. They are in your hand. At that time you say in your statement you were senior estimator - para. 4 of your statement. A. Yes.

Q. You effectively had personal responsibility then for working out the bid, subject to the supervision of Paul O'Neil. A. That is correct.

Q. So, you would have done the calculations. A. I would have pulled together all of the relevant information in the preparation of the bid, yes. So, yes, I would have done the calculations.

Q. So, that much at least we know is within your personal knowledge. In the course of your witness statement there are a large number of places where you use a form of words like 'would have done this', 'would have done that', and so on, and so forth. Can I just show you some examples. In para. 17 at p.4, right at the beginning of the bundle, talking about the sub-contract from guaranteed, it says, "This was received from Guaranteed on 30 June. We would have had enough time to review the prices. After reviewing the prices provided by Guaranteed, we would have seen they were not competitive", and then similarly in para. 19 (I will show you a couple more examples), "I have produced a schedule of the likely calculations we would have done" ... at para. 22, "This approach to the Elliott House tender would have been agreed at an adjudication meeting ----" and so on, and so forth. Is it right to infer from that that in fact you cannot specifically remember because they seem to be very carefully chosen words? A. Because of the lapse of time, my specific memory of events wasn't particularly good at all at the initial stages. Upon gathering the other quotes from Guaranteed and Berrys and Radflex that we were able to obtain, my recollection became better of the project, and I was subsequently able to make that statement.

Q. Let me take that if I may. Just dealing specifically with what I put to you rather narrowly - where you have said 'would have done', that implies very strongly that you are not actually sure now whether that is what happened, or not. Essentially it is a kind of reconstruction on your part. Is that right?

MR. ROBERTSON: Madam, the witness is being cross-examined on a number of paragraphs in one go here ----

THE CHAIRMAN: No. The only question is 'would have done' ----

MR. ROBERTSON: I am only thinking there are specific ---- Each one is a statement to a specific incident ---- I think it is unfair to ask the witness to deal with these compendiously.

MR. WARD: It seems to me the witness is using the same form of words repeatedly, but I am quite happy to confine my question for now just to an example. But, I am, indeed, going to put all of this to you in some detail. So, just look at para. 17 as an example. "As this was received from Guaranteed on 13 June, we would have had enough time. After reviewing we would have seen ----" That suggests you cannot actually remember what happens, but you are reconstructing. Is that fair? A. As we had destroyed the Elliott House file prior to the OFT's visit I was in a position where I had to reconstruct. My recollection is that that is what would have happened.

Q. Later on in your statement you state quite unambiguously what did happen, particularly in relation to your dealings with Asphaltic. So, just to give you an example, at para. 18 the 'would haves' have disappeared, and what we have instead is, "Asphaltic was only prepared to offer us a price for the whole job ... I was unaware ----" etc. So, that is positive evidence, is it not, of what you actually remember happening? A. Yes, that's true.

Q. Now, what you said a moment ago was that you spoke, to prepare a written statement at least, to representatives from Rio Total and Guaranteed. We can see that at paras. 14 and 16 of your statement. (After a pause): Sorry. In fact, if I can take you back to the beginning and para. 2, "Following Maker's decision to appeal to the Competition Appeal Tribunal I have made further investigations. As a result I have spoken to John Goodwin, Charles Joel, Ian Darlington ----" etc. That was 6 to 13 March, 2006. You made no inquiries to those people at all during the course of the OFT's investigation itself. A. We did not believe that the information would have been kept by those companies at that time, and we did not believe that we were ---- we did not believe that we were guilty because we had tried to win the Elliott House bid.

Q. If I may, I will come back to the OFT phase of the investigation in a minute. I just want to look at what the people you spoke to actually told you. This is on p.4 of your statement at paras. 14, 15, and 16. At para. 14 you report what Mr. Goodwin told you. He said to you - and this is the conversation you had with him in March 2006, if I understand it, is it not? A. That's correct.

Q. What Mr. Goodwin said is ---- "John Goodwin at Rio told me he would have given me a verbal price of £55 per sq.m." So, he was telling you he would have done, but not what he actually recalled doing, one way or the other. Is that fair? A. That would seem to be fair.

Q. Again, we have Ralph Sallantalo in para. 15. "I was told that Total would not have priced for the job as it would not have been able to provide the necessary insurance back guarantees". He

did not tell you that they would not price, but that they would not have done. A. He didn't tell me that they didn't price. However, I do recall that they had not priced.

Q. So, you did not actually get an awful lot of help here, did you, because neither of these people apparently could remember anything specific about the sub-contract back in 2002. Is that fair? A. That's correct.

Q. Then you say in para. 16 of course, Guaranteed actually produce a copy of the letter from you to them which enclosed the subcontract, and you say there at 16: "I did not recall this letter at the time of the OFT's visit", but it is right to say, is it not, that actually at the time of the OFT's visit you did not remember any of this? A. That's correct.

Q There is no suggestion here that you contacted anybody from AKS or indeed Asphaltic, is that right? A. That is correct.

Q But it is on the basis of this new information you have that you say your memory was jogged and the account that is in your witness statement was recalled by you? A. That's correct.

Q So from effectively statements from Relay and Total that almost told you nothing, they told you what they would have done, or they did do and from that you have effectively recreated this account that we have today? A. From the quotations that I was provided by Radflex, Rio, Guaranteed, and Berry Systems, I was able to largely re-price the project.

Q Those are the workings that we see at tab 6 to your own statement, and indeed tab 7? That is what you refer to? A. That's correct.

Q Let us be clear, these are schedules that you prepared as part of this evidence, as part of that re-pricing exercise? A. These are schedules which reflect the document that was sent to us by Andrew Kent & Sons

Q Yes, but just to be clear, these documents were made in 2006, were they not? A. These were made in preparation for this witness statement.

Q You say at para.9: "I have produced a schedule of the Mighty Schedules we would have done". So this is part of your reconstruction of what would have happened in 2002 – correct? A. That is correct.

Q It is not part of your case that this is actually what you did do in 2002? A. This is as close a reconstruct ion as I was able to provide to demonstrate Makers' position with regard to this project.

Q That is because you have no specific recollection? A. No.

Q The curiosity about your statement is that it is nevertheless from there on, from para.22, where you talk about what you would have agreed at an internal adjudication with Paul O'Neil that all of a sudden the tone of your statement shifts, and from there on you give positive evidence about actually what you say happened. "We spoke to Asphaltic …" and so on and so forth.

This is now positive evidence about what happened? What is it that jogged your memory about this level of detail? A. It was the act of reconstruction. It was like me reading an old book, a book you haven't read for several years and pick up; some chapters you remember well and some chapters you remember sparingly.

Q You did not approach Asphaltic for any help, there are no documents at all, are there, dealing with your subcontract dealings with Asphaltic over the tender in June 2002? A. We do not possess any documents relating to that, no. The file was destroyed shortly – well I think a month or two prior to the OFT informing us that they were coming to see us. We regularly get rid of our old estimating files for the need of space.

Q Have you never been sued on one of your contracts – a construction dispute, never mind this competition dispute? A. Not to my knowledge.

Q You do not have a practice of keeping papers for six years for that purpose? A. We only keep contracts that we have secured. We have a process whereby those are put on to a CD-Rom now.

Q There are no computer records of any letter that you sent to Asphaltic at any stage? A. No, if we had sent them anything in writing it would have been a handwritten fax requesting a copy of their quotation that they were preparing.

Q Can you turn to tab 3? These are what you say are the letters that you sent to the various other subcontractors, not Asphaltic but the first three that you approached – yes? A. That's right.

Q And the date is wrong because you have explained the date was when they were printed off? A. When they were printed.

Q But these are original letters from 2002. "Invitation to tender" Then it sets out the subcontractors, what they are being asked to tender for and so on and so forth. There are three in the same form under this head. There is no document of this kind that went to Asphaltic? A. That is correct. When you are rushing in an estimating office to get things out and get people to sort things out for you, you do not always have time to do the documents in the detail that you would like to and if somebody has already told you that they have the documents they require to price the job there is no need to go to this extent.

Q But anyway, where we are is simply this, is it not, there are a few documents here that relate to subcontract inquiries made at the earlier stage to Rio et al, but you have no documents at all relating to the documents with Asphaltic. You have spoken to no one from Asphaltic in preparing this evidence, but it is here that your evidence becomes positive. The OFT's submission is going to be that this is all untrue. Do you accept that it is at least a little implausible that this can all be remembered now without the benefit of any assistance? A. No, I do not believe that it is implausible at all.

Q It is not implausible that here we are, four years after the infringement when you make your witness statement, you have remembered all of this, and yet two years after the infringement, when you were interviewed by the OFT, you did not remember any of it? A. No, I don't believe that is implausible either. I was not expecting the OFT to be talking to me about a car park project when they came in. Then the events of 2002 with the regular restructuring of the business I put behind me. When one loses a job one tries to file and forget.

Q I would like to look now at what the logic was of this tender process in the first place. Can I ask you to turn up the third page of your statement which is para.10 in particular? "Makers Car Parking Division did not have much work during 2002 and we were chasing every tender available." Then at the last two lines of that paragraph: "We did not want to lose the Elliott House tender as that time Makers Car Parking business needed to grow substantially in order to remain viable", and that is essentially your case. You were going after this contract, you had every intention of winning it, and you needed the work? A. Peter Cowlard has been pursuing that contract for several years and we wanted the work, it was a project we wanted to try and win.

Q And you always would have needed a subcontractor for the Asphalt specification part of the job, would you not – that is what you say in para.9? A. If the project was to be done with Asphalt then we would have required to use a subcontractor.

Q Can I ask you to turn to tab 1, p.80? This is from the scope of works, this is part of the tender document itself. Here is the scope of works, the asphalt works are the stripping out, no.1 – presumably you are capable of stripping out, that is just removal? A. The requirement for the car park, because it was an occupied dwelling was to maintain waterproof integrity of the car park during the contract works. In order to co-ordinate that it is much better for one contractor to be solely responsible for all elements that deal with maintaining the waterproof integrity.

Q It is not just 2 and 3 then, it is 1, 2 and 3 that are the Asphalt works? 3, is the elastic joint, that is something different, so it is 1 and 2? A. With respect, the elements that deal with the waterproof integrity of that project include items 1, 2, 3, 4, possibly 6, 8, 9, 10, 11, 14, 15 in part, so ----

Q. At this rate there is almost nothing left in the contract for you, is there? I mean, we have moved on --- A. We would have effectively been a management contractor.

Q. We have moved on from what you actually said in your witness statement, which is the polymer modified asphalt works, to you saying now that really most of this work was work that Makers would not have been able to do on this specification. A. I didn't say we

wouldn't have been able to do it. I said it would be preferable if we could have placed that package with a single source.

Q. Preferable. What? The whole contract with a single source? A. Not necessarily the whole contract with a single source, but certainly the elements that deal with maintaining the waterproof integrity of the structure.

Q. So, the case now is that anything to do with the waterproof integrity of the structure you would have wanted to sub-contract out. A. It would've been preferable if we could have persuaded the client to adopt our own waterproofing techniques.

Q. Yes. We will come on to that. A. Which would have enabled us to carry out the works ourselves. But, failing that, we were going to become a management contractor effectively, and manage.

Q. Well, let us look at the sub-contract that you say you received from Guaranteed. That is at Tab 5. The cover sheet here is form 2006 - 15 March, 2006. So, this is part of the inquiries that you have explained. It says, "As requested, we have pleasure in enclosing a copy of our estimate dated 13 June, 2002 for the works done above", and then under that cover is a letter which is dated 13 June, 2002. Then, under that is the specification and estimate. This estimate does not contain the works along the scope that you have just described. It is not all and any waterproofing works. It is 'strip up existing asphalt layer - £23,000; remove over-layer - £6.50 per. m^2, horizontal works [which I am guessing is laying the work] ... kerbing works' and a total of £155,000. A. And the dressing works, yes.

Q. Yes. So, about £155,000. We know it is your case that that quote was uncompetitive anyway. So, those prices, on your view, were a bit high. Let us go back, if we may, to p.121, which is the pricing that you filled out on Makers' tender summary. (After a pause): Here we have Item 2 - demolition - £40,000-odd; Item 6 - put in rather round terms - polymer modified asphalt roofing - £81,000. So, that is £121,000. A total of £318,000 plus VAT, I assume that is at the bottom. So, these elements were only one component in the contract, were they not - that which you were looking for a sub-contract for? A. These elements were of varying sizes and degrees according to the capabilities of the companies that were pricing them. Guaranteed Asphalt priced for the demolition. I believe they included for the coping, which is Item 5 (the other important thing in keeping the car park dry), and the polymer modified asphalt.

Q. Yes. So, on that basis, subject to ---- A. Sorry. Also, the car park layout at item 11. I know it is only a small items, but ----

Q. £1,800 there. But, you see, if you had accepted that sub-contract that would, of course, have left quite a lot of work for Makers, would it not? A. In what respect?

Q. Well, we have just been through this together, and we have identified ---- or, you have identified that Items 2, 5, 6, and 11 would have been covered by the Guaranteed sub-contract, which would have left for Makers Items 3,4, 7, 8, 9, 10 and 12 - well, 12 is contingencies. (After a pause): Plenty in it for you. A. The works remaining comprise of a proprietary movement joint, which was to be provided by Radflex, or through another contractor from Radflex, unless we could persuade the client, of course, to use our own proprietary movement joint. The other works are largely jobbing works - building ---- jobbing builder works which we would have sub-contracted.

Q. So, jobbing builder works that are worth about half the total value of the contract, and you would have sub-contracted those anyway? A. Sorry? Can you explain to me which items you are looking at that you are saying comprise half the value of the project?

Q. I am looking at this - and if I have got this wrong, I of course apologise unreservedly: demolition - £40,000. A. That was the strip-off.

Q. Yes. You said that would be part of the Guaranteed quote. A. Yes.

Q. Then we have coping - £15,000. A. Yes.

Q. Asphalt - £81,000. Car park layout - £1,800. We saw that the Guaranteed sub-contract price, which you said was uncompetitive, was £156,000. The grand total before VAT is £318,000. So, that is about half very roughly. A. Items 1 through 4 are basically management costs. Item 5 is the insurance back guarantee cost from the asphalting company which comprise £29,500. Then there is a further ---- well, £22,500 in the contingencies after it was corrected. So, that is £51,000.

Q. Can I just ask you to turn to para. 12 of your witness statement, please? (After a pause): Here you say at the beginning of para. 12, "As Makers are unable to do asphalt work I sent out sub-contract inquiries for this aspect of the Elliott House project to Total, Rio and Guaranteed", and then you set out what they say about the asphalt work they would have done. The evidence you are giving this morning, if I understand it rightly, is that basically you would have never done any work under this contract - you were going to be a managing contractor; is that right? Is that what you are saying? A. Effectively, had the client chosen - which they did - to remain with an asphalt project ---- an asphalt-driven project with the Radflex joints (not our own joints), then, yes, we would've become a management contractor.

Q. Could you look at para. 18 as well? We will come back to this in detail, but I just want to look at one thing you say here. "Asphaltic was only prepared to offer us a price for the whole job and not just a sub-contract price for the asphalt elements of the work." What your witness statement is saying is that you wanted a sub-contract on asphalt only if you could. Is that not right? Is that not what it said? A. That was what we were trying to obtain initially, yes.

Q And do you accept the implication of that which is that left some work for your car parks' division to actually do? A. The work that we carry out, whether it be through a subcontractor, or whether it be using our own people, is turnover that we generate.

Q Turnover yes, but it is not actually work, is it, in the sense that if you are not doing the work yourselves, you are not doing the work? A. The only way in which we could have done the work would have been to persuade the client to use an alternative decking system, and/or an alternative joint system.

Q Could you look at the schedule at tab 6? This is the schedule you created for this litigation of the Guaranteed versus Asphaltic prices, and you have the Guaranteed prices, if I understand it correctly, essentially the left hand side of the page is the Guaranteed prices, and the Asphaltic prices down the right hand side? A. Yes.

Q So the third column along from the left is "Price" meaning Guaranteed prices? A. Yes.

Q Under B11 you have a subtotal which is 337, then you have "Overhead Profit Mark-up say, 10 per cent."? A. Yes.

Q Ordinarily you would put a profit mark up on a subcontract, would you not? A. Ordinarily we would bid a project at that stage between – we had bid projects down to minus 5 per cent.

Q Ordinarily ---- A. Ordinarily we would look to obtain a profit.

Q Because that at least creates revenue for your car parking business that needs to grow substantially, even if it is not actually doing the job? A. Yes.

Q Because without a mark up – putting it crudely – there is no profit, there are just costs, because there is the cost of your time, there is the cost of putting the bid in, you actually make a loss on it, even if you get the work? A. That's correct. Could I point out though that in the Asphaltic price, which shows no m ark up, we had a potential buying gain with regard to the vehicle protection safety barrier if we could persuade them to forego that element. It is item B4. We felt that that constituted sufficient potential margin at the time of our bid.

Q Can you show me that in your witness statement, please? A. I didn't bring it out in my witness statement.

Q Is that something else you have just remembered? A. No.

Q Let us move on to what you said about Asphaltic, the starting point, actually, is Guaranteed and that is para.17, so I want to look closely now, if I may, at para.17 and the paragraphs that follow. The first thing you say is that the bid from Guaranteed was received on 13th June. We have already looked at the letter from Guaranteed that they sent you this year – that is again at tab 5. You will see that it is dated 13th June, I have already shown you that, but again it is dated 13th June. What we do not have, of course, is any actual record of when it was received by you, do we? A. No, we have no record because the file has been destroyed.

Q Because the file has been destroyed. So we do not actually know for sure when it was received, but in any event we see it is dated 13th June, so it was not any earlier than that. What you say is: "We would have had enough time to review the prices and use them to compile a bid", and you have explained that that is effectively your reconstruction rather than any specific recollect ion – yes? A. Yes.

Q Then we move on to Asphaltic, at the end of the page, you say you did not like these prices, or rather you would not have liked these prices? A. We did not feel we would be competitive if we submitted prices on the basis of those that we had received.

Q Is that your positive recollection or is that what you assume happened? A. That is my positive recollection.

Q Positive recollection. Here we talk about Asphaltic and you say: "From discussions with our supply chain, or possibly using Yell.com we contacted Asphaltic". What is Yell.com? A. It is a search engine for finding companies that do things. It is the computer equivalent of Yellow Pages.

Q Now, here very importantly there is an "or" here, either you talk to your supply chain, which I assume means recommendations in the trade, in a nutshell – yes? A. Yes.

Q Or you use the Yellow Pages, but you cannot remember which? A. I do not remember specifically how we arrived at that.

Q Then you said "We contacted Asphaltic", "We" meaning Makers? A. Yes.

Q Not necessarily you personally? A. Not necessarily me personally but I believe it was me.

Q You think it was you – is that something you are confident in saying you now positively recall? A. No, I think it was me.

Q How did you contact them? A. We contacted them by telephone.

Q By telephone. Then it says: "I do not think I sent them the full tender documentation as it was close to the tender deadline and they already had the tender details. I knew they were already quoting for the job." I think you clarified under a question from Mr. Robertson that you did not know that before you contacted them? A. No, we didn't.

Q And how did you find out? A. We asked them whether they would be prepared to give us a quotation for the job and they said "Yes, we are already pricing this".

Q I am sorry if this strikes you as excessively pedantic, but this is actually important. You did just say again "We asked them …" and "… they told us". You are not giving positive evidence then that you personally had this conversation? A. I do not recall whether it was specifically me or one of my assistants. We worked in an open plan office together.

Q You would not want to rule out the possibility that actually it was Asphaltic that called one of your assistants? A. I would rule that out immediately.

Q How would you rule that out? A. Because I know that we struggled to find people who could price this work, there are very few people who actually work in the field of polymer modified Asphalts.

Q It was a struggle, was it not, because it was getting rather late in the day by that time? A. That's correct.

Q Can I hand out the calendar for 2006? You will see that this has come from a rather random looking website, but I can assure you that I checked it against a couple of others to make sure there was no error. June 2002 we see that the date of the letter from Guaranteed, which was the trigger for this idea that you would contact Asphaltic was 13th June, and that was a Thursday. We know that your bid, which we have at tab 15, went in on the 18th June, which is the following Tuesday. So there were two working days between one and the other. Of course, we do not know when you received the letter from Guarantee? A. I am sorry, but I make it three working days.

Q Three working days, there is the Friday, Monday and the Tuesday? A. Having received it on the Thursday, there is the Thursday, the Friday and the Monday.

Q Yes, sorry, you are quite right. At para.22 you explain your work schedule, and this is programming as I understand it rather than diary. Your estimating programme shows there was programmed work at Elliott House for five days and none of them were either 13th or 18th June? A. Sorry, which paragraph?

Q Paragraph 22 of your statement, I am sorry. Yes? A. That is correct, the programme will have moved.

Q The programme will have moved because things do not happen on the day they should? A. That is right, and other things crop up that one has to react to.

Q But the plan at least was that you would not be working on this at all on these dates? A. That was the hope, that would have it sorted, that we did not receive sufficient subcontract prices as you can see, the Guaranteed price was not received until the 13th, and we could not really start on compiling a bid until we had sufficient information.

Q Now, what we do not know either is the date on which you actually contacted Asphaltic, do we? A. No, we don't.

Q In fact, in the chronology that your solicitors have prepared, they suggested that you contacted them around the 18th itself. Of course, they are not giving evidence, and I am not holding you to the way they put it, I just want to know whether you think that is possible? A. No, we would not have contacted them on the 18th, we would have contacted them prior to that.

Q Prior to that? A. Not much prior to that, granted, but ----

Q Of course, if they not had all the documentation, and if they had not already been bidding on the contract it would have been unrealistic, would it not, for them to have put in a bid on that kind of time frame? A. That's correct, yes.

Q So in a sense then on your case, it was your very good fortune indeed that whether it be through the Yellow Pages, or whether it be through the supply chain you happened to hit upon a contract or already bidding on the job? A. It was good fortune. There are very few companies that carry out polymer modified asphalt works. It is one of the difficulties that I think AKS probably experienced in trying to find people to go on to the tender list.

Q Could the witness have bundle A, please? If you would turn up p.72 of the Decision, which summarises a piece of evidence which I just want to put to you? Paragraph 256, p.72. "According to AKS, the employer, the four companies would have received four individual invitations to tender", and that of course is true, is it not? That much you would accept? A. That's true.

Q "And should not have known who the other companies in the competition were"? A. That's also true.

Q That is also true, because you get your tender without knowing who else is bidding? A. That's true.

Q You appreciate your independence in that respect is certified when you put your bid in, is it not? Let us look at C15 again, which is your bid, p.122. "We declare that we are not party to any scheme or arrangements under which we communicate the amount of our tender, any other tenderer is reimbursed …." and so on and so forth. So you are basically being asked to certify your independence? A. Yes.

Q And you appreciate why, from the client's point of view, that is extremely important? A. Yes.

Q Because the object of the exercise is to get four independent bids at the most competitive price possible? A. Yes. In clarification, our case is that we did not know that Asphaltic were bidding as a main contractor for this project.

Q No, but let us look at what you say you did know, though. Back to your witness statement, please, p.5, para.17. What you say is that you knew they already had their tender details and were already quoting for the job, " …but I didn't know whether it was as a subcontractor or main contractor." A. No, but the assumption would have been that they were pricing as a subcontractor.

Q Why would that have been an assumption when you did not know whether it was a sub-contractor or main contractor? A. No, but the assumption would have been that they were pricing as a sub-contractor.

Q. Why would that have been the assumption when you did not know, and you could not know, who the other bidders were? A. Because there are likely to be more sub-contractors pricing any given project than there are main contractors, because in the very nature of sending out sub-contracting inquiries, we ourselves sent out three and a subsequent fourth. We would expect the other main contractors to have done the same, thereby giving some sort of multiple. It would not have been a direct multiple because there were not that many people who could do polymer modified asphalt.

Q. You appreciate that the OFT's case is going to be that it is simply not credible to suggest that in this very narrow window of time you happened, by chance, through the Yellow Pages, to alight upon what was in fact one of the other three bidders. A. We knew what we were looking for. We were looking for somebody who did polymer modified asphalt.

Q. There are enough people out there that the source was the Yellow Pages - not just that you happened to know everybody (rather like lawyers in the same area know all the other lawyers). There were obviously enough that it was necessary to look in the Yellow Pages. A. We do not do a large amount of asphalt work. Therefore we don't keep a comprehensive database of people who do asphalt. We try and work within a limited supply chain because we only have a certain amount of work for these sub-contractors.

Q. Now, the implication of the fact that you looked in the Yellow Pages was that you did not actually know Asphaltic before before that; is that right? A. That's correct. We'd not had any dealings with Asphaltic before then.

Q. You personally, or you as a company? A. Me personally. I believe, having read the evidence that the OFT have compiled that our Sawtry division, who acted completely independently from ourselves, and we have no real contact with ---- they are like two different feudal states competing against each other within the same company, had had some contact with Asphaltic.

Q. Could I ask you to look at Bundle F, please? (After a pause): This may be the records that you are talking about. These are documents which the OFT obtained from Asphaltic itself. (After a pause): I am so sorry. Tab 18. Is this what you were just referring to, do you think? I want to show you certain passages from it. (After a pause): Let me take you through it. What we have here on p.92 is a screen print of the inquiry received by Asphaltic concerning Elliott House, and you will see it is from Andrew Kent & Sons. So, that is not your sub-contract. Then we have the log of contracts. You will see that it starts off with the employer ... status ... trade ... estimator ... and then there are notes and there are various comments. If you turn to p.118 you will see here is a log for 18 May, and you will see Asphaltic make no

mention at all of the sub-contract that you and I have been discussing this morning. A. That, frankly, doesn't surprise me, given the circumstances of their offer to us.

Q. Now, why do you say that? A. In hindsight ----

Q. Oh, is it because they were bid rigging ---- A. That would appear to be the case, would it not?

Q. Your case is that although they were bid rigging, you were oblivious to that. A. That's correct.

Q. So, it is possible now that they never had any sincere interest whatsoever in entering into a sub-contract with Makers. A. That's quite probable.

Q. Let us look at p.117. Here you will see this is a sub-contract offered to them by Makers. At the bottom of the page, "From Miramont House, Kingston-upon-Thames, Surrey". J. Wright. Who is J. Wright? Someone you know? A. John Wright. I recognise the name, but ---- I don't know in what capacity he still works with Makers - if he still does.

Q. Then, in the comment section it says, "Makers - we don't want it". Then there is something similar ---- I do not mean to be discourteous by showing you this. I am making a point here, I can assure you, and I can assure the Tribunal. At p.124 there is something fairly similar at the bottom of the page. Oaklands Estate. Makers U.K. Mr. Wright again. Not you. Then it is very dismissive. So, the obvious implication of this is that Asphaltic would not have been interested in a bona fide sub-contracting arrangement with you in any event, is it not? A. That would appear to be the case, yes.

Q. Your case is essentially that even though they may have been unlawfully bid-rigging, you, Makers, were just completely oblivious to this. A. That's correct.

Q. It must follow from that then that it is just your misfortune that you had accidentally lit upon what was (a) a bidder for the contract, and (b) a bid rigger for the contract. A. That's correct.

Q. And it is only that misfortune really that has brought you here today. A. Yes.

Q. I would like to look then at what happened after you had contacted Asphaltic because you have said you would have contacted them not at the last minute ... not on 18th. I put to you that there is no evidence as to exactly when you contacted them. But, anyway, some time after 13th when the letter was sent by Guaranteed, after you had considered the figures that Guaranteed had given you, after you had carried out some work, something like the schedule at Tab 6, had a discussion about what to do, tried to find another contractor, hit upon the possibility of calling Asphaltic, and then contacted them. That is the chain of events. A. Yes, that would be the chain of events, yes.

Q. And we know that the beginning of that chain is on Thursday, and that your bid went in on the Tuesday - Tuesday, 18th. A. Yes.

Q. Could I ask you to look at Bundle F, please? Tab 8, p.42. I am sure you have seen this before. This is the fax from Rock to Asphaltic - not to Makers, but to Asphaltic, which the OFT says contains the cover bids that were placed in this case. You will recall that the OFT's case is that it is Schedule 2 which we say forms the basis of your bid. That schedule you can see at pp.45 and 46. I do not think there is any dispute that line by line this is precisely what you ended up bidding. A. That's exactly the figure we put in, yes.

Q. You got these figures from Asphaltic, you say. A. Yes.

Q. Not from Rock. Here we see how Asphaltic got the figures from Rock. This is the fax from Rock to Asphaltic. Just turn back to the cover sheet, please, at p.42. You will see the date is 18 June. That is the date of course that you put your bid in. You see the time is given as 2.10 p.m. In fairness, on the previous page is a transmission report which gives the time as 13.13. So, it may be that they had not adjusted for British summer time. We do not know. We do not know. But, in any event, Barry, who signed this fax to Joe Kelly thought the time was ten past two when this fax went in. Now, at a bare minimum, this fax had to go to Asphaltic, had to be read by Asphaltic, had to be considered by Asphaltic, and had to be submitted back to you, did it not, before these figures could reach you? A. Yes.

Q. Once it reached you, on your case, you still had some work to do, did you not? A. Yes.

Q. Because this was quite a complex tender to prepare, was it not? A. The backbone of the work had been done in the previous comparisons, but it was not a straightforward contract.

Q. Well, you described it as a 'complex project' in para. 11 of your witness statement. We saw that you had set aside five days ---- or, programmed ---- Sorry. Not the whole day, but you had programmed five days for working on this contract. It was complex. A. Yes, that's correct, and most of that work will have been in pursuing sub-contract prices and sending out and chasing those people in with their prices.

Q. Yes. 'Will have been.' 'Would have been.' But, of course, we know there is no real recollection of any of that stage, is there? A. I remember it being very busy.

Q. I dare say. (After a pause): So, the fax goes from Rock to Asphaltic, some time after two o'clock. It is looked at by Asphaltic. Asphaltic contact you with these prices. We do not have that piece of paper, of course, because you have not records. But, somehow or other, you say Asphaltic communicated these prices to you. A. Yes.

Q. You considered them. You discussed it with Paul O'Neil? A. Yes.

Q. You say at para. 22 that you would have had to do that. You priced it. You compared it with the other options you had. You decided to put in a tender. You prepared the tender documentation. A. Yes.

Q. Can you remember what time of day it was when you did that? A. Not with any great clarity, but from the evidence you've presented, we would've been working quite late I think.

Q. Quite late. Could I ask you to go back to Bundle C, which is your witness statement? (After a pause): Tab 11, please. Now, this is a document that you produced on 1 March, 2006. We can see that at the bottom right-hand corner of the page. Is that your writing? A. Yes. Yes, that's my handwriting.

Q. This is a print-out of your computer screen to show the documents saved on your hard disk, if I understand it correctly. You printed it out because the document fourth from the bottom is Radflex Fax, and you were relying on that from July 2002. Yes? That is the purpose to which you refer to this in your statement? A. The Radflex fax was after the tender submission.

Q. Yes. I am not asking you about that now. I am just reminding you why this document was here. A. Yes.

Q. Could I ask you to look two items up from Radflex Fax please? Elliott House car park - 18 June. That presumably is your document - the document that you produced ... the tender. A. That was the covering letter.

Q. The covering letter. A. We would have prepared the covering letter in advance of submitting the tender.

Q. I see. So, the fact that it was done at 15.46 just means nothing? Document created/modified 15.46. An hour and a half after Rock's' fax to Asphaltic. A. If we could turn to that letter ---- I am not sure where it is in the bundle, I am afraid.

Q. I can tell you. Tab 15. A. It's simply a letter of enclosure.

Q. I see. So, we must not infer from that then that in fact by then you had simply copied out the rates provided by Rock or Asphaltic and stuffed them in an envelope under this letter? A. No.

Q. I see. And there is no record whatsoever though to prove, or demonstrate in any way, that what you have just said is true, is there? A. No, but it's quite common to have a letter prepared prior to finalising a tender.

Q. And you would not accept that the reasonable inference is simply that you just copied out the figures when they came through from Rock or Asphaltic? A. No.

Q. No. Let us go back to what you said about the contract you received from Asphaltic at para. 20 of your witness statement. I would like to start actually, if I may, at para. 18. "Asphaltic was only prepared to offer us a price for the whole job, and not just a sub-contract price for the

asphalt elements of the works." Did you hear that from Asphaltic personally? Was it you that had this conversation? A. I don't recollect.

Q. But you are sure, in any event, that this is all they were prepared to offer you? A. Yes.

Q. Do you recall asking them why, or trying to negotiate down with them? A. No.

Q. Because if you look at para. 25 of your statement ---- This is in the post-tender period "We decided to go back to Asphaltic to see if they would quote just for the asphalt works." Why did you not ask them when you had their quote? A. We didn't have time.

Q. You did not have time. (After a pause): So, what you did, in fact, was just put the whole thing in. A. Effectively, having compared it to the other prices we had.

Q. The other prices which were for basically the asphalt works. A. For the asphalt works, for the jointing works, for the Berry System works, and for the other jobbing elements of the project.

Q. Why did you not just put in Makers' prices for the other elements? A. Because we felt that it was safer from a risk point of view to put in a fully priced schedule from somebody who'd given it due consideration.

Q. Had you not given any consideration already to the parts that Makers wanted to do? A. The parts that Makers wanted to do were to change the project specification.

Q. Well, I think we have already been over this ground as to whether the intention was just to get a sub-contract for the asphalt or was to get the contract for the whole works. I have put to you that your evidence appeared to be before today that you were only seeking any sub-contracts on the asphalt works. A. I'm sorry, but it's quite clear from the documentation we have provided that we were seeking sub-contracts for the jointing works, the Berry System works, the asphalting works ----

Q. Now, you say at para. 20 that you became ---- "We [Makers] became uneasy about using Asphaltic's price for the whole job as we were unsure of Asphaltic's status in the tendering process." What was the uncertainty? A. We felt they might be supporting another contractor and giving us a higher price.

Q. What do you mean by 'supporting another contractor'? A. It's not uncommon for people who work in a supply chain to offer discounts.

Q. So, by 'supporting another contractor', just explain ---- I am sorry. I am not quite sure what you mean. A. We felt that they might have given somebody a lower price than the price which they were giving us.

Q. I see - because you were unsure of their status in the tendering process - in other words, whether they were a sub-contractor or a main contractor. A. No - because we felt that they were probably a sub-contractor who was pricing the job for somebody else.

Q. Why did you not ask them? A. (After a pause): We didn't feel the need.
Q. Well, why not? It sounds vital. You say that as a result you decided to put no mark-up on the prices. (After a pause): No mark-up - no profit. (After a pause): Could you not have just asked them to clear it up? A. (After a pause): What purpose would that have served? If they had been acting on behalf of somebody else, would they have given us an honest answer? Or would we simply have tipped them off to the fact that they might have ---- to the fact that we suspected them?
Q. This rather reflects the fact that you really knew nothing about them, doe sit not? A. That's right.
Q. There must be some people in the construction trade that you do trust. A. Well, the people that we went to in our original supply chain inquiry.
Q. So, you went to somebody you hardly knew, or did not know at all; somebody you did not trust enough to even ask them what they were really doing; and then you put their bid in in its entirety. That is your case. A. We felt it was the most competitive thing we could do.
Q. Even though you were already convinced that they might well be undercutting you with another customer ---- another contractor. A. That was one possibility that crossed our minds.
Q. So, on that basis you effectively did not dare mark it up, and you say, "Asphaltic would have expected us to do this". Why would Asphaltic have expected that? A. You would normally expect somebody to put a mark-up on.
Q. Indeed. I am sorry. Maybe I have misunderstood the evidence. I read it as they would expect you not to. Perhaps I have misunderstood. "As a result, it was decided there was to be no mark-up by us on the prices when we submitted to AKS. I believe Asphaltic would have expected us to do this". A. Yes. We would expect ---- We felt they would expect us to put a mark-up on the price they had supplied to us.
Q. All right. I apologise. I misunderstood that. I thought you were suggesting that they would have expected you not to. (After a pause): So, what you knew though was that you had a contractor - Asphaltic - who was either a main contractor like you, or possibly a sub-contractor for another --- A. No. Probably a sub-contractor and possibly a main contractor.
Q. Well, I will read you your evidence. Your evidence was, "I knew they were already quoting for the job, but I did not know whether this was as a sub-contractor or main contractor". A. And I think I've already explained that it was more probable that they were a sub-contractor.
Q. And in any event, what they gave you was an entire schedule of prices - even though you had asked for the asphalt only. A. They had agreed to give us a price for everything.

Q. You would agree, I am sure, that this is not the kind of information you normally expect to have about someone else involved in the bidding process. A. It's certainly not ---- It is very unusual to have that, but at the time we did not know they were involved in the bidding process - other than as a sub-contractor.

Q. Now, what you said is that the intention here was effectively to use this bid to get round the table, and then substitute Makers' own systems. A. Products.

Q. In broad terms. (After a pause): Can I show you the tender documentation which is under Tab 1 of the witness statement? Page 21, please. "Exclusions. If the contractor cannot tender for any parts of the work as defined in the tender documents, the CA ----" Who is the CAT? A. Contract Administrator.

Q. Contract Administrator. "-- must be informed as soon as possible, defining the relevant parts and stating the reasons for the inability to tender". So, the starting point is that they expect to be told if you are going to want to use a sub-contractor, do they not? A. They normally expect to be told who the sub-contractors are that you are going to be using for any part of the works, but that is usually later in the process.

Q. 5.1.7, please, which is at p.23. "In addition to, and at the same time as, tendering for the works as defined in the tender documents, the contractor may submit an alternative tender based upon a different method of construction for completion and consideration. If the contractor wishes to substitute products of different manufacture to those specified, details must be submitted with the tender, giving reasons for each proposed substitution. Substitutions which have not been notified at tender stage may not be considered." So, the obvious intention of this arrangement is that you would put in your alternative at the time of the tender, is it not? A. I think I've explained in my witness statement why we felt it would be prudent to try and persuade the client and the contract administrator to accept our alternatives once we are in front of them.

Q. You accept, do you not, that that is quite contrary to the terms of the tender document itself? A. It is very common practice.

Q. Very common practice, but nevertheless not what they were asking for. (After a pause): What would be the down side of putting in both? A. The down side would be that you may not get to tell the full story ... to give your whole ----

Q. Why not? You put both options in front of them. If they are interested in them, they will call you in. A. It's much easier to explain to somebody face-to-face.

Q. I see. Well, it was particularly difficult in this case, was it not, because, of course, they told Mr. Cowlard that they were not interested in substitutes at all. Shall we look at Mr. Cowlard's witness statement at Tab 2. The statement starts at p.173. The paragraph we wanted to show

you - which I am sure you have seen before - is para. 16. For the Tribunal, Mr. Cowlard's evidence deals with the period before the tender process. He is essentially what one might loosely call doing a marketing job. He says at p.175 ---- This is about a meeting in April 2002 - so, just before the tender period - with Audley Johnson of AKS, the employer, regarding the roof membrane. "I suggested it would be possible to use an alternative Maker system, but I was informed that the building owner wanted Asphalt. I understood it would be difficult to persuade the client to change his mind." So, presumably Mr. Cowlard told you this, did he, at this stage of the bidding? A. He will have done, yes.

Q. He would have done. So, you knew that not only did the contract preclude you from the way you were proposing to do this, but also the employer had specifically said that they were not interested in alternative systems. A. That was why we specifically wanted to get in front of them and try and persuade them otherwise.

Q. Would it not, though, have made more sense to offer them both what they wanted and what you wanted? A. They may well just have simply rejected our alternative out of hand. . We wanted the opportunity to put our case.

Q. Now, the logic of what you are saying though is that in truth you did not intend to use any of the Asphaltic bid, did you, at the end of the day? A. If we could change it our intention was to change it.

Q. So, you would effectively use the Asphaltic bid to get in front of the employer, then involve the employer and explain the merits of the Makers' alternative system, and effectively jettison the Asphaltic quote, having persuaded them to get rid of it. A. Effectively, yes.

Q. So, why did you not then just put in the part of Asphaltic's quote that dealt with the asphalt? Why was it necessary to put in the whole quote? A. There was nothing uncompetitive about their quote. So, there was no reason to change any part of it to my mind - particularly in the timescales we had.

Q. Now, you knew, did you not, that AKS would not allow you to operate on the basis of 100 percent sub-contract, did you not? That was not really going to be acceptable. A. We could potentially have operated on a 100 percent sub-contract.

Q. Let us have a look at what you said in your witness statement at para. 26, p.6. (After a pause): This is part of your explanation of the post-tender period, but at para. 26 you say " Asphaltic would not re-negotiate …" this is what I had already shown you,

> "… and still wanted to price for the whole job. AKS did not know at this point that the prices we had originally provided were for Asphaltic to do the whole job as our sub-contractor."

Pausing there, because of course, your tender made no reference to the sub-contractor.

"As we would have told them we were still in negotiation and no sub-contract packages had been decided. I believed that once this was known by AKS we would not have been able to continue with the project as the client would be unhappy with Asphaltic doing all the works as our sub-contractor when it had also tendered as main contractor."

A. Well obviously AKS were not going to accept Asphaltic as a sub-contractor for us to do the whole of the works, that would have been collusion effectively.

Q Indeed. So where we are is that you have put in a bid with 100 per cent. sub-contract from someone you knew at least was another bidder, albeit not necessarily a main bidder. You have put no mark-up on it because you are not sure what they are doing so you stand to make no profit if, in fact, it is accepted. But if it is accepted, once they find out you have a sub-contractor who is a bidder, the employer is not very likely to be happy, and you are seeking to substitute other products, but yet the contract documents say that you cannot. This does not make any commercial sense, does it? A. As I said before, it is common practice to try and get in front of the client to explain to them your case. The clause in the contract to which you refer asks – if you were to price a project without telling a client that you have changed, my understanding of that clause is to prevent us from substituting products of our own within our bid and passing those off as the products for which the clients asked.

Q That does not really deal with 517, does it, sorry, it is p.23? It says that what you may do is put in an alternative tender. Is that not much more straightforward? A. It would have been more straightforward.

Q Much more straightforward. A. But much less likely to have won us the job.

Q What we have here is a tremendously convoluted story, my suggestion, seeking to answer what is a very, very simple case, which is there is Rock's fax, three sets of figures, Asphaltic puts one in, Makers puts in the other, the OFT says the obvious inference is collusion. What you have offered us instead is a complicated case backed up with very little evidence, partially based on reconstruction in any event . It is just not believable, is it? A. It is what happened.

Q Shall we look at the post-tender meeting? What you said at para. 23 is that following submission you were called to this meeting that took place, the post-tender meeting on 27th June 2002. At para.24 you say:

"At the meeting we discussed our bid and our alternative specifications."

Yes? A. Yes.

Q So it was at that stage that you sought to persuade them that they should use your system? A. Yes.

Q Can I ask you to turn to p.186 of the bundle in front of you, the same bundle? A. Peter's notes.

Q Handwritten page, meeting notes, this is Mr. Cowlard exhibited this, he was at the meeting with you, was he not? A. Yes, he was.

Q It is 27th June on the top of the page, which is the day of the meeting, these are the minutes – no sorry, they are not minutes, they are notes. There is no mention here at all of any effort, or indeed, the result of any effort to change the system, is there? A. There was a query regarding the jointing system.

Q But that is not the same thing as the Asphalt. A. No, there is not.

Q Indeed, there is nothing in Mr. Cowlard's witness statement to suggest he remembers any conversation on that subject, but you say it took place in any event ? A. I believe we tried to persuade them to have either an overlay or a deck coating system.

Q Can I refer you now, please, to tab 13 to your witness statement? This is a letter from you to AKS, 2nd July 2002, so a few days after that meeting, and in para.7 you are still referring to your asphalt sub-contractor: "We have obtained guarantee information from Radflex …" who are the joint people, "… and our asphalt sub-contractor …" A. Yes.

Q So at that point it is clear that it is proceeding on the basis that you will, in fact, be doing an asphalt job, albeit with a sub-contractor? A. Yes, at that point we had re-evaluated our price and this letter explains the uplift required for us to have employed Guaranteed Asphalt.

Q This is all about Radflex 125 double air expansion joints, is it not? A. That's correct, and that should have referred to – but we felt it would have been embarrassing to refer to a problem with our asphalt supply chain.

Q So there is nothing at all about Asphalts in this letter, is there – apart from the mention I have just made? So there is nothing here in the paper trail to suggest you ever made an attempt to persuade them t o use your system. Nothing at all – do you accept that? A. I accept that there is no documentary evidence of that, yes.

Q My suggestion to you, of course, is that you never put it to them? A. My recollection is that we did.

Q Of course, one of the differences between yourself and the OFT is whether or not there was cover bidding vis-à-vis Makers in this case, that is what we are here to decide. You are aware of cover bidding more generally in the construction industry, I assume? A. I am aware of it, yes.

Q And you have seen it in this case at least in between Rock and Asphaltic? A. Yes.

Q Would you accept that one of the reasons that people put in cover bids is to try and signal to the employer that they are still interested in the employer's work, even when they cannot actually bid for it? A. Yes.

Q If that strategy is going to be successful it is necessary is it not to maintain the position that you are interested in the work? A. Yes.

Q And that in turn could lead you to going to a post-tender meeting just as happened in this case? A. Yes, it could.

Q What I would like to do now, briefly and finally with this witness, is ask you about your role in the OFT's investigation, because you appreciate that the OFT's case is that it is just not credible that this account that you have given today was not given at an earlier stage in the investigation? A. Yes, I do.

Q We have made that clear. The starting point, of course, is the visit from the OFT to Makers, which you refer to – you have given quite a lengthy account – starting at para.32 of your witness statement, and going through to para. 41. At para.41 you say:

> "At the time of the OFT's visit [September 2004] I did not understand the OFT's allegations and I did not bring to mind the allegations set out above."

So this is a little bit more than two years after the infringement – we are now four years after the infringement – and the essential case you are making is that you could not remember then what you can remember now? A. That's correct.

Q There is one point I must just put to you as a matter of formality, you say you do not recall the OFT showing you the Rock fax at the meeting? A. No, I do not recall having seen the Rock fax.

Q You have seen it is in the OFT's attendance note, which is at annex 17 to your statement? A. Yes.

Q It says on p.141: Your answer is timed at 11.02, "He .." which is "EL" – Ed Lennon, an official from the OFT "… gives RB …" which is you, "… a copy of the Rock fax, and tells him that for today the matter is closed", and you have no recollection of receiving that fax? A. Ed Lennon gave us a copy of our own quotation which we had submitted to AKS.

Q In any event, what you said is that you cannot answer, so you were obviously reserving your position, other than to say "There has been a mistake". So you were convinced at that point that whatever the answer was you had done nothing wrong? A. That was our feeling, yes.

Q You were again involved in the investigation when the statement of object ions came, were you not, Mr. Whitehouse showed it to you? A. Yes, Kevin passed me the document to read through.

Q His evidence essentially is that when you read through it you did not know what the answer was, you could not come up with an explanation? A. We still did not know what we had done wrong.

Q Could you look at vol. A please? There are two thick documents here, the first one is the Decision, the second is the statement of objections. Page 284, please. Starting at para.217, Elliott House, London. On 22nd May AKS invited four contractors to bid. 218:

> "According to AKS the four companies would have received individual invitations to tender and should not have known who the other companies in the competition were."

219: At 1.13 a fax of seven pages was sent from Rock to Asphaltic for the attention of Joe Kelly and it contained of course, the three schedules of rates that we have already looked at. A. Yes.

Q Paragraph 222, the second schedule of rates, which is, of course your schedule, and then 267 the tender submitted to AKS by Makers had figures that were identical to those in para.222 above, which was part of the fax sent from Rock to Asphaltic on 18th June. The total figure for Makers was also the same in the second tender summary. Then it reports your observation there from the day when they came to meet you: "There has been a mistake". It goes through the post-tender period, and then there is the OFT's analysis of the evidence.

At 233, particularly important:

> "The evidence also demonstrates that Makers must have received a copy of the second 'Schedule of Rates' and 'Tender Summary' from Rock or Asphaltic that was sent by Rock to Asphaltic on 18 June 2002, thereby colluding with Rock and/or Asphaltic in submitting cover bids to AKS. If Makers had received the 'Schedule of Rates' from Rock it would have been after some prior discussion. The OFT has no reason to believe that the same would not have happened if Makers had received it from Asphaltic. The OFT considers that there is no other reasonable and innocent explanation for Makers submitting a tender containing the precise figures faxed by Rock to Asphaltic in the second 'Schedule of Rates'."

That is precisely the OFT's case today, and these paragraphs I have taken you through rather quickly, are more or less verbatim the same as the paragraphs that appear in the decision – where there is a finding of an infringement.

Finally, in the statement of objections, the last paragraph, p.367, para.560:

> "The OFT proposes to impose a penalty on the Parties listed at paragraph 4 …" which includes Makers, of course."

Well, by the time you had got the statement of objections, and considered the statement of objections, you knew the case, you knew what was at risk, you knew the inferences the OFT

were drawing from this fax from Rock, there was nothing that you did not know at that time in order to see what the case was that you needed to meet. Your case is that at that time you could not think of the explanation that had been given today? A. We discussed various possible explanations and I believe one of them is referred to in my witness statement.

Q Absolutely, the letter that was sent actually refers to two possibilities. It was not sent by you, it was sent by Mr. Whitehouse following discussions with you. I will just show you that briefly, if I may. It is at p.202 of the bundle with your witness statement in it, right towards the back. "We have carried out our internal review", and that review, of course, included you? A. Yes, briefly.

Q "And, as a result, we are confident that there have been no collusive practices carried out in the asphalt roofing market sector by Makers." Then there is a point about where the bill of quantities came from, but I am not going to bother you with that. "It cannot be accounted for as a number of employees who were involved in this tender have now left the company", but you were all along? A. Yes.

Q And you were the man who signed the tender? A. Yes, I was.

Q "Possible explanations for this may be..." so that is a possible explanation that may be, " ...that the document that was the subject of the sub-contract inquiry to a competitor ...". So that is a possibility that there is a sub-contract. "On the basis we were contemplating not tendering for the works ..." I am not going to put that to you, Mr. Whitehouse has explained why that "not" is there. Then there is an alternative: "... or, we wanted a sub-contract price for that part of the works in which Makers UK did not have a strong expertise." The crucial point here is that this letter shows that you do not really know, and you are raising possibilities about what has happened? A. I didn't recall.

Q You did not recall, but you do recall now? A. I recall a large proportion of it now, yes.

Q The OFT's case, as you know, is that what you recall now simply cannot be relied upon.

MR. WARD: I have no further questions for this witness, thank you, ma'am.

THE CHAIRMAN: Any re-examination?

MR. ROBERTSON: No re-examination.

(The Tribunal confer)

THE CHAIRMAN: Thank you very much.

(The witness withdrew)

MR. ROBERTSON: Madam, I will call our second witness, Mr. Peter Cowlard.

Mr. PETER KARL JOHN COWLARD, Sworn

Examined by Mr. ROBERTSON:

Q Mr. Cowlard, could you give the Tribunal your full name, please? A. Yes, I am Peter Karl John Cowlard.

Q And could you give the Tribunal your address, please? A. Teignside Cottage, Christow, Exeter. EX6.7NA.

Q Mr. Cowlard, you have a bundle in front of you, could you please turn to p.173. The number is in the bottom right hand corner. Could you confirm that this is a copy of the statement that you made on 19th April this year? A. Yes, it is.

Q And does that statement stand as your evidence today? A. Yes, it does.

Cross-examined by Mr. WARD:

Q You explain, Mr. Cowlard, that your involvement is in essentially in the pre-tender stage of the Makers' business? A. Yes, sir, that is correct.

Q And not, as you say, at para.8: "I have not really been involved in the pricing side of Makers' business? A. Yes, that's correct.

Q Because by the time a job reaches the hands of Mr. Bowman it is essentially changing hands, would that be fair? A. Yes, it goes from one sector of the business into a pricing sector where we get into competition with others because there is an opportunity at this early stage for us simply to attempt to negotiate with the client on a relatively straightforward basis.

Q In the hope of precluding the thing even going out to tender? A. Yes, that's correct.

Q And that is what you were engaged in in this case, but it did not quite work out that way, there was a tender? A. That's correct, yes.

Q Now you say, at para.8, that you have never been aware of cover pricing happening. But if there had been cover pricing in this contract, there is no reason why you would have known, is there? A. That item relates specifically to Maker's business going back in time, so me looking at our business and saying I don't believe we've ever been in the field of cover pricing. I think if we had been involved in this particular contract, and I do not become divorced from the job simply because it goes into estimating, there is still some dialogue and I believe that if we were approached in that manner then I would hear of it even if someone didn't talk to me about it.

Q What if, and this is conjecture, what if the people involved in the pricing side of the job were engaged in a cover bidding process, and they wanted to keep it quiet. There is no reason it would be anything to do with you, is there? A. I would suggest that because we are a very small unit that would be extremely difficult to do.

Q Do you share an office with Mr. Bowman? A. No.

Q Do you work in the same building as Mr. Bowman? A. I am trying to recollect, you are talking about then rather than now?

Q I am actually talking about then not now? A. Yes. No, I had an office to myself.

THE CHAIRMAN: You have not answered the second question? A. Sorry.

Q Is it in the same building? A. Yes, it is.

MR. WARD: Paragraph 9, you say that:

> "Sometimes Makers do submit a tender even if we have a heavy work load and do not expect to be able to do the work. This is in order to maintain client contact and to remain on an approved contractor list. We base our tender prices on our experience of the market and market rates, we will also use published rates for building work or call on our supply chain for an indication."

And that is something less than doing a proper specification for the job, is it? A. No, because the specification for the job is described in the bill of quantities, we would simply be going from historical rates to price those items in the bill of quantities.

Q And would you be doing more work if it was a tender that you were serious about winning? A. Yes, I believe we would.

Q So it is a kind of half job? A. I wouldn't like to say it is a half job, but it involves significantly less work.

Q Significantly less work but more work than cover bidding? A. I can't comment on that.

Q Would you accept that even this kind of conduct really is rather unhelpful to the client? A. It possibly doesn't help the client's process, but nonetheless I think we have said that we wanted to maintain our ability to talk to this client, and therefore with any other client it is an option.

Q Well, I will just read you a few words from this Tribunal in another case, what it said were the harmful effects of cover bidding, and for the record this is para.251 of *Apex*. It says that one of the effects is to reduce the number of competitive bids submitted in respect of that particular tender, and what you have described here has that effect too, does it not? A. I suppose ultimately it could do, yes.

Q It deprives the tenderee, in other words, the employer, of the opportunity of seeking a replacement competitive bid? A. Not necessarily, no.

Q It prevents other contractors wishing to place competitive bids in respect of that tender from doing so because it creates the idea that you, Makers, are still in the ring? A. I can't see how that affects other competitors pricing theirs.

Q Well it really follows from what is said next, namely, that it gives the tenderee – that is to say the employer – "... a false impression of the nature of competition in the market leading at least

potentially to future tender processes being similarly impaired", because the short point is that the effect of this kind of conduct is to create the impression that Makers is ready and willing to bid for work that it is not ready and willing to bid for? A. That is not the impression we are trying to create. I think the item we are talking about here is a very isolated incidence, where our workload precludes us from actually putting together a massive tender and we are using rates which we have seen to have won in the past.

Q And what happens in those cases if you actually win the tender? A. Then clearly we have to go through the process of taking on the job. If we are competitive, given those sorts of rates, then there is no reason why we should not go forward.

Q So you would go to the post tender meeting, for example? A. Absolutely, yes.

Q Carry on with any negotiations, changes of specification? A. Yes, we would be very surprised in that instance but, as I said, this is such an isolated incident in our business that, sure, we would carry on that track.

Q Because the last thing you would want to do is essentially expose the fact that it was not a proper bid in the first place? A. What we wouldn't want to do is turn round to a client that we are attempting to continue favour with and say to him "Sorry, our bid was useless."

Q No, so in effect once you are in you have to keep going? A. There is no doubt about that.

Q At the end of the day you might even make a large loss if you had done your rather hasty sums wrongly? A. I think the nature of contracting things can be changed as the contract commences, and therefore it is unreasonable to suggest that a tender may go in and we already are aware that we are going to make a large loss on it because it can be varied during the project.

Q At para.10 you say: "Makers does not have the capability to do asphalt work itself, and would always need a sub-contract price". Do you normally put a mark-up on your sub-contracts? A. I am not able to comment on that because that's a pricing item.

Q Fair enough. I just wanted to ask you briefly about the post-tender meeting which you attended, and you have provided the minute for it. I am so sorry, it is not a minute it is a note of what was agreed? A. It is.

Q And you say that your role was to answer any technical questions and you were in the room, I take it, when I was asking Mr. Bowman about this minute? A. Yes, I was.

Q And the minute is at p.186 – I am quite happy to adopt Mr. Robertson's preferred word of "note", no insinuation was intended at all. Did you draw this note up? A. It's in my handwriting.

Q I put to Mr. Bowman that nothing in here suggested any attempt by Makers to renegotiate the system that was going to be used for this contract. I was just going to put to you that you have

not suggested that they did, either, in your witness statement? A. No, this, as we rightly say are notes, they are not exact minutes of the meeting. They are there really as aides-mémoires to us going back to the office predominantly to trigger the response letter which Mr. Bowman wrote.

Q But if there had been any discussion at that meeting of a change of specification to what Makers would have preferred, you would have put that in your evidence, would you not? A. No, I wouldn't, it was simply – sorry, are you referring to ----

Q Your witness statement? A. In the witness statement ----

Q Not necessarily the note? A. Equally, not necessarily.

Q Is it your evidence that there was any such discussion? A. Yes, it is. We did have that discussion.

Q You did – you had that discussion although it did not make its way into your witness statement? A. No, that is correct.

Q Just one last thing I would like to ask you about, para.23 ----? A. Of?

Q Your witness statement, I am sorry – p.176:

> "Makers does not have the resources to go into that much detail or spend that much time on a project if we did not intend to win it. The amount of meetings and discussions I had with AKS both pre and post tender submission, all of which is evidenced by the documents attached to this statement, and the further details Rob Bowman provided to the client show that Makers wanted to win the job. This work is inconsistent with any allegation of collusion."

What you told me a minute ago is that where Makers has put in what one might call a rather rapid, a hasty bid on its own – never mind collusion – then once you are in the system, to keep up appearances with the client you have to keep going. Is that not every bit as true if there was collusion? A. No, I don't believe so. We certainly wouldn't have the intent that we demonstrated here in this particular meeting that we went to with the client.

Q. So, you put in a cover bid. Just hypothetically - and I know you do not accept there was a cover bid, and I am not asking you to accept that ---- I put it to you, but I do not expect you to accept it. A cover bid is made. The cover bidder gets invited to the tender meeting. It has got to go on, has it not, just as, well, you put in a bid with no serious intent to win. A. No, I don't believe so. If, in your hypothetical basis, we knew that we shouldn't be at that table, and we shouldn't win the job, then we could very easily turn round to the client and say, "We have an error in our tender" and withdraw it.

Q. Thank you. I have no more questions for this witness.

MR. ROBERTSON: I have no re-examination.

THE CHAIRMAN: Turn to p.186, please. As we understand it, this is a note of the meeting on 27 June. A. Yes.

Q. You drew up the note. A. Yes. That's in my handwriting.

Q. Now, when did you draw the note up? A. During the meeting.

Q. During the meeting. A. So, as matters were mentioned you would put them down on the note. A. If they were a matter we had to attend to when we went away from the meeting.

Q. Now, in the right-hand column you have got reference to Makers in what would be the second line, and then about the eighth line, the eleventh line and the thirteenth line (I may have the numbers wrong). Were the other matters, matters that you had to attend to? A. For example, above my small hieroglyphic you see 'Potential for another contractor on site at ground level'. There's no action against that item. It's simply a point that the client made for us to be aware of.

Q. Yes. So, I thought you said that you only wrote in the note what you had to attend to. A. But that would be relevant should we go further into the contract, and it's good that we make a note of that now at this meeting.

Q. Now, you went to this meeting in order to persuade the client to change the specification. A. I went there in the hope that there was an opportunity to do that. You see in my witness statement that I had attempted that during the build-up to the tender process. Sometimes. in the event that tenders come back significantly more expensive than the client can afford, then there may be a second avenue that they would like to explore. Very clearly here, they made the decision even at that meeting that they had sufficient funding to carry on with what they wanted to do, and that was the way they were going to go.

Q. What happens to this note once you have made it? You go back to the office. What do you do with the note? A. It stays in my notebook and we refer to it should we need to. In fact, Rob Bowman and I sat down, if I recollect, to look at what we had to respond to.

Q. So, you sat down with Mr. Bowman and the note, and you went through the points that you had ---- A. Yes.

Q. Because, as I understand it, your evidence is that the note contains what you need to do, and what you need to tell. A. Yes.

Q. What you need to discuss back home. A. Well, simply what we need to respond to the client about.

Q. And what you need to know about potentially ---- A. Yes.

Q. What needs to be known ---- A. Items that came up during that meeting that could be relevant to a contract situation.

Q. So, can you explain why you do not put on this note anything about the fact that the opportunity that you wanted to change the specification was a low ---- A. Sure. It becomes of no relevance going forward. That had been dismissed out of hand, and I would not rely on it later on in any works that we did.

Q. So, when you went back to speak to Mr. Bowman about the meeting, did you have any discussions about that opportunity that had been lost? A. I'm not aware of any. (After a pause): It had gone. It was as simple as saying ----

Q. It was never mentioned again. A. No. We'd fought all our battles. (After a pause): Do you have any questions arising from that?

MR. WARD: I have only one really, which is to clarify that, of course, Mr. Bowman was at that meeting with you? A. Yes, he was.

(The witness withdrew)

KEVAN WHITEHOUSE, Sworn

Examined by Mr. ROBERTSON:

Q. Mr. Whitehouse, could you give the Tribunal your full name, please? A. Kevan Whitehouse.

Q. And your address, please? A. 23 Pilkington Avenue, Sutton Coldfield, West Midlands B72 1LA.

Q. Mr. Whitehouse, you have a bundle in front of you. Could you please turn to p.187 in the bottom right-hand corner, and could you confirm that this is a copy of the statement that you made in this matter on 19 April this year? A. Yes, it is.

Q. Does that statement stand as your evidence today? A. It does.

Q. No further questions.

Cross-examined by Mr. WARD:

Q. Could you turn to p.202, please, Mr. Whitehouse? This is the letter that you wrote, and I am going to ask you a bit about this in detail in a minute. Just for now, it is signed by you on the next page as Finance Director and Company Secretary. A. That's right.

Q. How many divisions did Makers have at that time? A. At the time there was about six/seven maybe.

Q. And your responsibility as Finance Director and Company Secretary was across all of those divisions? A. Yes, it would be.

Q. So, you would not often, I imagine, get involved in the details of tendering by the car parks division? A. No.

Q. Although here it seems that you were involved really from the outset of the OFT's investigation because we see at para. 4 of your statement at p.187 that Mr. Bowman told you

about the OFT's letter. Then, at para. 5, "I was not able to attend the meeting as I was at a prior engagement". But, had you been able to, you would have. A. Yes.

Q. That suggests that that is a sign that this was taken very, very seriously in the Makers organisation. A. I think that was a mistake that we made - that we didn't treat it as seriously as we should have done.

Q. But your presence was a sign of seriousness, was it not? A. My lack of attendance was a sign that we didn't take it as seriously as we should have done

Q. What are your day-to-day responsibilities? A. Producing management accounts, financial commentaries, reporting to Group, ensuring compliance with a number of legal issues ----

Q. Is that why you became involved? A. It is, yes.

Q. Because it was a legal compliance issue? A. Yes, it was.

Q. That is really in your role as Company Secretary. A. That's right, yes.

Q. So, presumably you were aware of the Competition Act at this time, were you? A. I was aware of the Competition Act, but not the detail of it.

Q. Did you know that it could lead to penalties for this kind of activity? A. Yes, I did, but at the time we did discuss this case and we really couldn't see how we could've been involved in anything that was anti-competitive.

Q. But, your role as Company Secretary means that you were entirely dependent on what you were being told by the people in the pricing department of the car parks division. A. That is correct, yes.

Q. And, of course, whatever papers they chose to show you. A. Correct.

Q. There is no way that you would have first-hand knowledge of how this contract came into being. A. Absolutely. That's right.

Q. That, presumably, is why you talked to them ---- asked the guys on the ground what had been going on. A. Yes.

Q. You say at para. 12 that you had initial discussions with Rob Bowman and Simon Lamb at the time of the OFT's visit ---- Sorry. You say you confirmed that you refuted any allegations. A. Mmm.

Q. They told you presumably that there was nothing at all to be concerned about. A. That's right.

Q. We do not have a witness statement from Simon Lamb. Is he still at the company? A. Yes, he's sitting in court now.

Q. Oh, he is sitting in court. Right. We have not heard from him, but, he, like Mr. Bowman, told you there was nothing to be concerned about. A. That's right.

Q. So, you wrote in the first instance to the OFT on, I think it was, 14 April a kind of robust rebuttal, if I can put it that way. That letter I think we will find at p.204. A. Yes. That was really an acknowledgement that we'd received the bundle and we then triggered a further investigation process which took us to the next letter ----

Q. I will take that step by step, if you do not mind --- A. Sure. Yes.

Q. -- because I would like to ask you a few questions about H. What you say in this letter, dated 14 April ---- You refer to the OFT's letter of 6 April (which I will show you in a minute). A. Yes.

Q. It says, "From our initial [fair enough - initial] internal inquiries we refute the allegation that Makers were involved in any collusive practices in connection with any of the matters raised in your documentation". Now, the letter of 6 April was actually the statement of objections, which is the heavy document in which the OFT sets out its allegations. Really, just for the Tribunal's note, that is p.227 of Bundle A. Perhaps I would like to show it to you. It should be the first document under Tab 2. This is the letter that you are responding to. "I attach the statement of objections ...We give you an opportunity to inspect the file ----" which you never did. It also makes clear what the timetable is for reply. For that we can see ---- If you turn to p.235, at the top of the page, the OFT asks for a response by 6.00 p.m. on 3 June, 2005. A. Yes.

Q. So, it basically gave you two months to investigate this. You had already had an initial investigation where you had been told firmly, presumably, that there was nothing to be concerned about, and then you say in your witness statement that you effectively turned over the Statement of Objections to Mr. Bowman and Mr. Lamb for them to look into. Is that a fair summary? A. That's right - with a view to reconvening in seven weeks' time when they had the chance to absorb the contents and we would then discuss it.

Q. So, they had seven weeks to look at it. A. Yeah.

Q. Then you had a further meeting with them. A. Yes.

Q. At that meeting what was said is that essentially none of you could think of the answer. Sorry. I did not mean to put that discourteously. You did not know what it was that the OFT were on about. A. No. I think it's fair to say there was a lot of confusion; there was a lot of guesswork. We really didn't know what you guys were getting at. I think that the people that attended the initial meeting were told that the investigations surrounded collusive practices.

Q. Well, any doubt though at that stage which - and I accept what you have just said is of course right ----- It was cleared up, was it not, by the Statement of Objections because the Statement of Objections contained the detailed allegations? A. Yes. Yes, it did.

Q. Just look at p.288, if you would not mind, in Bundle A. Paragraph 233 is, in a sense, the crux of the OFT's case against Makers. A. Yes.

Q. It explains it. You have been here this morning. You have heard the argument. There is the fax from Rock. There are the rates that go in to make his tender. What the OFT says, if you look at the last three lines, "The OFT considers that there is no other reasonable and innocent explanation for Makers submitting such a tender". A. Yes.

Q. Then, in the last paragraph of the document, it threatens you with a fine ---- or, rather, it says it is going to impose one unless you explain it. A. Yes.

Q. So, although, as you say, you may not have taken it seriously initially, this is serious, is it not? A. Yes, it is. I think we were still thinking that we had not got a case to answer and ----

Q. Well, how could you think that, if I may respectfully say so? It jumps off the page, does it not, that these rates were exactly the same as the ones faxed by Rock? A. Yes, it does, but no-one actually says that we're involved in collusive tendering in the evidence in ----

Q. They do, do they not? They say, "Look! You've got these rates. They came from Rock. Rock sent them to Asphaltic. We think you're colluding too!" The OFT is absolutely clear about that. A. Well, I think that's where the confusion has arisen because we didn't see the clarity in the link that you made.

Q. Did you not see that the job ---- Well, you clearly did see that the task for you was to come up with the explanation. How did these rates find their way into Makers' tender, because if you could explain that, there would be no fine, and the OFT would go away, and you would not be wasting your time here today. A. I think that was what I attempted to do in the letter of 6 June where we said that they were sub-contract prices.

Q. Yes. Well, you did not quite say that, did you? Let us look at what you did say. (After a pause): I showed Mr. Bowman this before, and you may have been following then. Really I put to you the same point I put to Mr. Bowman: what this letter shows is that you did not know how these rates had got into the tender. This is p.202 in Bundle C, which is the witness statement bundle. A. I think at the time that was right. I think that it did start to dawn on us how serious this issue was, and we were very, very busy at the time. The company in the previous year had just posted a very large loss. It was on its third Managing Director in as many years. It was a very hectic time. The business was being put back on the rails. We had a limited amount of time to look at this - again, naively and inadvisedly - which we thought was something that would go away, because we hadn't been a part of it . I think as the whole thing went on we realised how serious it was, and the deeper we dug, the more information we unearthed.

Q. You heard Mr. Bowman's evidence this morning that he says that at this stage he had not - putting it neutrally - remembered the account he ---- A. Yes, I think that's ---- that's correct, and I think that is reflected in the letter.

Q. Yes. Because the letter displays uncertainty. A. Yes, it does.

Q. If you had had a positive explanation to give at that stage, you would have put it forward? A. Yes, we would have done, of course.

Q I just want to ask you briefly, and I do not wish to take up a lot of time about this, the word "not" that appears in the letter that you have talked about in your witness statement, it is in the third line from the bottom? The last sentence here is:

> "Possible explanations for this may be that the document was the subject of a subcontract inquiry to a competitor on the basis we were contemplating not tendering for the works, or we wanted a subcontract price for that part of the works in which Makers UK did not have a strong expertise."

A. Yes.

Q And in your witness statement you describe this as "very misleading"? A. It is, yes.

Q What you say, I will just take you to it, I think it is para.24:

> "The last explanation put forward in paragraph four of my letter is that we may have been making a sub-contract enquiry '*on the basis that we were contemplating not tendering for the works or we wanted a sub-contract price …*"
>
> "Having re-read my letter … I believe that it was clumsily expressed and very misleading. What the letter should have said is '*… on the basis that we were contemplating tendering… and we wanted a sub-contract price'.*"

So that explanation effectively requires us to delete the lot and delete the order as well, does it not? A. Yes.

Q So it is pretty far removed from what you now say the matter was supposed to mean? A. It is. In my defence, at this time, as I say, the business was in a pretty poor state. I was out of the office for a lot of the time and you will see that a lot of these letters are actually signed off by my secretary I have even dictated them into a Dictaphone and she signs them off. It is not in the letter of 6th June, but I guess if we pulled the original it would have my secretary's signature on there.

MR. WARD: Would you just give me a moment? A. Sure.

MR. WARD: Thank you, I have no more questions.

MR. ROBERTSON: I have no re-examination for this witness, madam.

MR. BLAIR: I would like to ask you one question, if I may, there was reference in the papers and I think it has been mentioned this morning, to a Mr. Paul O'Neil, do you happen to know if he is still in the company? A. No, he left in January 2003.

Q So he was not available to you when you had to review the matter? A. No, he was not.

THE CHAIRMAN: I have no questions. Do you have anything following that?

MR. ROBERTSON: No questions for the witness, madam, no.

THE CHAIRMAN: Thank you very much.

(The witness withdrew)

MR. ROBERTSON: Madam, I am happy to start my submissions now or we could take the opportunity to adjourn now and come back in an hour's time.

THE CHAIRMAN: That is probably better. I was just wondering how the timing is going to work, because we have finished before lunch.

MR. ROBERTSON: I would anticipate being a little over an hour in my submissions, say an hour and a quarter.

THE CHAIRMAN: So if we start again at 2 that would be 3.15. It does sound as if we might be able to finish.

MR. WARD: We might well. I think I am the same as Mr. Robertson, an hour, hour and a quarter ought to be enough for me as well.

THE CHAIRMAN: That includes the submission on fines.

MR. WARD: Yes.

THE CHAIRMAN: We have a problem sitting beyond 4.30, so we have to try and finish by 4.30. I do not want to rush you, on the other hand to have to come back tomorrow is quite a lot of cost.

MR. ROBERTSON: Exactly, madam, we are very mindful of that. We will do our best and with the opportunity of a bit of preparation over the short adjournment I will try and confine myself to an hour.

THE CHAIRMAN: I do not want to rush you.

MR. ROBERTSON: That is understood madam.

THE CHAIRMAN: I do not want to rush you but let us try and finish by 4.30. Thank you. Shall we try and come back at five to two, so we have the hour?

MR. ROBERTSON: Yes.

THE CHAIRMAN: Thank you.

MR. ROBERTSON: Thank you, madam.

(Adjourned for a short time)

MR. ROBERTSON: Madam, Makers' appeal is advanced on two grounds: Ground 1 - liability; Ground 2, in the alternative, the amount of penalty. These submissions will concentrate principally on Ground 1, but I will say a few words about Ground 2 in conclusion.

Our submissions on Ground 1 - liability are under two broad headings: (1) the law; and (2) the evidence. In relation to the first of those headings - the law - our submissions are already set out extensively in our Notice of Appeal, and our skeleton argument, but I want to say a couple of words about two issues: firstly, burden and standard of proof; secondly, the definition of anti-competitive collusion, and infringement of Section 2 of the 1998 Act.

In relation firstly to burden and standard of proof, it is not in dispute between the parties that the burden is on the OFT to prove infringement by Makers. As to the standard of proof, I do not think it is in dispute that while the standard of proof is not precisely equivalent to the criminal standard, it is still incumbent on the OFT to prove its case with sufficient likelihood to overcome the presumption of innocence to which Makers is entitled. Now, the OFT has argued at para. 7 of their skeleton argument that the evidence need not be extensive to overcome these thresholds. But, the evidence of infringement that is relied upon by the OFT must be cogent in our submission, and sufficiently persuasive, as the Court of Appeal said in the *JJB* case at para. 206, "It must be sufficiently persuasive depending on the particular context and the particular circumstances". I will not take you to the authority (it is in Tab 7 of your authorities bundle), but the Court of Appeal cited the Court of Justice in Aalborg Portland at para. 57 in para. 206 of *JJB* in stating that it would not be sufficient to establish infringement if there is another 'plausible explanation'. It really amounts to what the OFT said in its Statement of Objections to which Mr. Ward has already taken you - if there is another reasonable and innocent explanation, then the case for infringement is not made out.

Turning to the second heading - Definition of Concerted Practice- what I have called anti-competitive collusion. The OFT has rightly cited the Court of Appeal's statement of the principles governing what constitutes a concerted practice for the purpose of the Chapter 1 prohibition at para. 11 of the OFT's skeleton.

We say those are the right principles, but they have been wrongly applied by the OFT in this case. The core concept underlying the definition of 'agreement' and 'concerted practice' for the purposes of the Chapter 1 prohibition, is that of anti-competitive collusion where the parties engage in co-ordination, which is the Court of Justice stated is *Dye Stuffs*, cited by the Court of Appeal in *JJB* ---- where the parties engage in co-ordination which "knowingly substitutes practical co-operation between the undertakings for the risk of competition". So, it is a knowing substitution of practical co-operation for the risks of competition. Now, the Court of Justice - again, in another passage also cited by the Court of Appeal in *JJB* in the

Zucker Uni case said., "The requirement of independent determination of policy on the market on the part of competitors strictly precludes any direct or indirect contacts between competing undertakings, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which the undertaking has decided to adopt or contemplate adopting on the market".

In our submission, it is not anti-competitive collusion to obtain "from a potential sub-contractor" - even if it is thought likely that the potential sub-contractor may also be involved as a sub-contractor in a competing bid. That is because sub-contracting part of a contract does not have the object or effect of disclosing to that sub-contractor the level at which the main contractor - Makers in this case - may decide to pitch its bid. It does not have that object. It does not have that effect.

Now, the OFT refers at para. 57 of its skeleton argument to the Court of Appeal's observation in *JJB* that "it is not normal for competing undertakings to have dealings with each other so that any dealings they do have are regarded with greater suspicion". That observation, which was made in the context of pricing discussions between retailers and suppliers does not apply where, as here, one undertaking approaches another in order to seek a quote for sub-contracting works - as happens all the time in the construction industry. In fact, sub-contracting is normally pro-competitive because it enables an undertaking to bid for contracts even though it does not itself have the capacity to complete all the works itself. It enables small and medium-sized undertakings to bid in competition with larger undertakings which can actually do everything themselves. So, the construction industry in practice depends on sub-contracting. This case is a good illustration of that.

We say that the key passage of the Court of Appeal's Judgment in *JJB* is para. 141 of that Judgment where the Court of Appeal said, "The proposition which in our view falls squarely within the *Bayer* Judgment [*Bayer* distinguishing unilateral conduct from agreements and concerted practices] in the ECJ and which is sufficient to dispose of the point in the present appeal can be stated in more restricted terms if: (1) Retailer A discloses to Supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of the information to influence market conditions by passing that information to other retailers of whom C is, or may be, one ----" We say here that A is the position of Rock, B is the undertaking in the position of Asphaltic -- so, it is Rock supplying the pricing information to Asphaltic -- and we are in the shoes of C, applying this, because we are the person to whom that pricing information inadvertently ---- well, unknown to us was passed on to. Then, this is the crucial item where the Court of Appeal says: "(2) B [that is, Asphaltic] does in fact pass that information to C [Makers] in circumstances where C [Makers] may be taken to know the

circumstances in which the information was disclosed by A [Rock] to B [Asphaltic]; and (3) C does in fact use the information in determining its own pricing intentions, then A, B, and C are all to be regarded as parties to a concerted practice, having as its object the restriction or distortion of competition".

Now, here, we say applying that ---- Okay. That is retailer/supplier, but applying it by analogy here, we are in the position of C. A and B - Rock and Asphaltic - may be in collusion -- and it seems almost certain that they were -- but the second element of that test is not satisfied. Just to repeat it: B [Asphaltic] does in pass that information to C [Makers] in circumstances where C [Makers] may be taken to know the circumstances in which the information was disclosed by A [Rock] to B [Asphaltic]. Well, we say, on the evidence, that we, Makers, C, did not know the circumstances in which the information was disclosed by Rock to Asphaltic. We had no knowledge of that.

So, we say that applying the definition of concerted practice helpfully set out by the Court of Appeal in the JJB case, we say Condition 2 is not satisfied - Rock and Asphaltic almost certainly were in collusion, but that was never, at any relevant time, known to Makers. Makers at all times acted independently in determining its pricing intentions on the market. Therefore, there cannot be, simply through the receipt of prices from its would-be sub-contractor, Asphaltic ---- cannot be taken therefore to meet the requirements of being a party to a concerted practice.

That is all I want to say by way of oral submission on the law.

Turning to the evidence, I want to divide my submissions into three parts. Firstly, I want to make some submissions on the proper approach to the evidence before the Tribunal. Secondly, I want to look at the evidence - or lack of evidence - as to alleged collusion between Makers and Rock. Thirdly, I will turn to the evidence relied upon by the OFT in relation to alleged collusion between Makers and Asphaltic.

So, starting with the first of those three topics - the approach to the evidence. We submit that the evidence relied upon by the OFT in this case in support of its case of infringement is neither cogent, nor persuasive. Now, it is true that the account of what actually did happen that is advanced by Makers has been advanced for the first time on appeal. You have heard from Mr. Whitehouse this morning the reasons why it was not advanced during the administrative procedure. We say that the fact that Makers has only advanced its full case for the first time on appeal does not affect either the burden of proof - that is squarely with the OFT - nor the standard of proof - that is, the requisite high standard in infringement cases of this type. Moreover, nothing in Makers' appeal advanced before this Tribunal is inconsistent with what it previously did, or what it has previously stated. There is no reason for Makers'

appeal, and the evidence in support of it, to be as the OFT argues - incapable of belief. The fact that we are advancing it now - and not during the administrative procedure - does not affect the approach the Tribunal should take to the evidence.

Fundamentally, we say there is no evidence that Asphaltic or Rock, on the one hand, and Makers, on the other, disclosed to each other their intentions as to how each of them intended to bid for the Elliott House contract.

Now, you have heard oral evidence this morning from Makers' witnesses. We submit that the evidence that each of the three gentlemen gave was truthful, accurate, and unshaken in any significant detail by cross-examination. In fact, Mr. Ward's cross-examination simply demonstrated how carefully each of them had approached making their witness statements. Mr. Ward sought to make play of Mr. Bowman's distinction between areas where he could definitely recollect things happening, and points where he had reconstructed events and concluded that they must have occurred even though he did not have an actual, precise recollection. Now, that is unsurprising that there are some things that you cannot actually recollect. A lot of Mr. Ward's questions turned on the actual timing of what happened on 18 June, 2002. If someone were to ask me what I was doing on that day, what time I got into chambers in the morning ---- I do not have any precise recollection, but I can tell you what time it probably was - just simply because I know what my morning routine is. So, I probably did get in about nine o'clock - I normally do. So, we say it is not open to criticise Mr. Bowman for doing that. In fact, it just illustrates that he was very careful in expressing himself in his statement. The same goes for the other two gentlemen.

It is unsurprising there are certain things he is not going to remember - or, they are not going to remember. After all, Elliott House was a contract which, although they competed hard for it, at the end of the day they did not get. So, as Mr. Bowman said, "File and forget". You tend to remember your victories, rather more than your defeats -although some defeats do leave a bit of a scar on the memory. I thought Mr. Bowman put it very well, going back to the events of a few years ago - he said it was like re-reading an old book: certain passages he definitely did remember; other things took a while for him to bring back to his memory. That is hardly unusual. . So, we say that their evidence is accurate; it is truthful.

The OFT seeks to draw an inference that it is not to be believed because it was not advanced during the administrative procedure. Well, I have already given you our answer to that. First of all, that is attempting to reverse the burden of proof. But, in any event, they have explained this morning - Mr. Whitehouse in particular - why Makers responded in the inadequate terms that it did then. It was naïve, as he said. They naively assumed that because they had not been involved in what was alleged against them, the OFT would clear them. A naïve, unwise

assumption to make. They have learnt their lesson the hard way. But, it cannot be relied upon as any admission; nor can any adverse inference be drawn against them.

It is to be noted, finally, in relation to the evidence ---- the approach to the evidence that the Tribunal should bear in mind that in fact the only evidence that appears to be relied upon by the OFT against Makers is the faxed figures from Rock to Asphaltic, and Makers' limited response to the Statement of Objections. But, there is no evidence from any third party ---- there is no evidence from Rock or Asphaltic saying that, yes, they had decided to get into cahoots with Makers.

So, that is what I have to say about the approach to the evidence.

Secondly on the evidence, alleged collusion between Makers and Rock. Now, Mr. Ward has criticised Mr. Whitehouse and Mr. Bowman for not clearly understanding what was being alleged against them in the Statement of Objections. Well, I do not think that criticism is merited. There is still a great deal of confusion in my mind as to the case the OFT has been seeking to advance. In para. 33 of the OFT's skeleton for this hearing they say that its contention is that "Makers in fact provided a cover to Rock". That is not a contention that appeared in the OFT's defence, despite the fact that we raised the issue of allegation as between Rock and Makers in our Notice of Appeal at para. 30. There is no evidence whatsoever of any contact between Rock and Makers. I find that submission confusing. Why would Makers want to give a cover to Rock? That would normally mean that Rock did not wish to submit a competitive bid. It is taking cover. It knows that somebody else is bidding at a price; it can bid at a higher price, and therefore look forward to being selected. But, in fact, Rock's bid was the lowest ---- well, it was initially the lowest, although AKS then scrutinised it, and then discounted it because it found that some of the figures did not really stack up. So, as for its bid being the lowest, it is completely inconsistent with Rock seeking cover from Makers or anyone else.

If, on the other hand, the OFT means that Makers had agreed to submit a bid higher than that of Rock, then we say, "Why on earth would Makers have gone to such lengths nevertheless to attempt to win the contract?" We say whatever the OFT's contention in relation to Makers and Rock we say their contention must be doomed to failure on the evidence, because there is nothing to suggest that Rock approach Makers for cover, or that Makers agreed to give Rock cover – absolutely no evidence of any contact between them, and this was explicitly denied by Mr. Bowman at para.43 of his witness statement, and he was not cross-examined about that by Mr. Ward when he had the opportunity this morning. Rock, after all, was a leniency applicant in this investigation. I think one can surmise that if it had taken cover from Makers, or given cover to Makers, having contact with Makers it would have said so. It is under a duty as a

leniency applicant completely to co-operate with the OFT, but there is nothing from Rock about Makers.

The OFT relies on the figures in a fax from Rock to Asphaltic being the same as those subsequently tendered by Makers, but all that goes to show is collusion between Rock and Asphaltic. There is nothing to implicate Makers in that collusion and the fact that Mr. Ward addressed no questions this morning to any of the witnesses about that rather suggests that the OFT does not believe the case that it was advancing at para.33 of its skeleton.

I turn to the third area of the evidence which is the one that Mr. Ward did concentrate on in cross-examination this morning, and that is the alleged collusion between Makers and Asphaltic. I want to divide my submissions on the evidence under this heading into three further sub-headings, because I think you can look at the Elliott House bid really at three stages. First, before AKS issued the invitation to tender, secondly, the period between invitation to tender and selection of preferred bidders; and thirdly, the post-tender discussions. Chronologically that is how it breaks down.

Dealing with the first of those – before the invitation to tender – as Mr. Cowlard explained this morning (and explains in his witness statement) the reason why Makers put so much effort into trying to secure the contract for Elliott House, was to stop it going out to tender, that is why he put all that effort into trying to convince them that Makers have the superior product and therefore "there is no need to go out to tender, deal with us; we are the best solution for your needs". That did not happen, but nowhere has the OFT sought to challenge Makers' evidence that before the contract went out to tender it was putting all its efforts into securing this contract, trying to convince them to audit them, to Makers, without it going out to tender in the first place – they obviously wanted this contract, and it is not hard to understand why they wanted this contract because they desperately needed the work. That is explained in Mr. Cowlard's witness statement – you also heard from Mr. Whitehouse this morning, talking about why they made an inadequate response in 2005 to the statement of objections, he said in the previous year Makers had made a thumping great loss – it had been through a considerable period of turmoil, three managing directors in three years, and that simply corroborates Mr. Cowlard's evidence, which has been absolutely unchallenged. So at that stage there is nothing to suggest that somehow Makers is wanting to avoid this contract being awarded, it desperately does want this contract.

Secondly, from the period of the issue of the invitation to tender, to the submission on 18th June of Makers' bid – well the evidence from the witnesses is that Makers were seeking to obtain from Asphaltic a quote for subcontracting. It had approached its normal channels of supply for asphalting works, it did not feel it could tender on that basis, was looking around

and the evidence is not clear on this – it was either recommended Asphaltic or found them through looking up in Yellow Pages.

There is no evidence at all that Makers at any time gave any indication to Asphaltic as to the price at which Makers intended to bid, or in fact did bid, nor did Asphaltic give any indication to Makers as to whether it intended to bid itself, or as to any price which it intended to bid - or still less any price at which it intended to bid. The only evidence on which the OFT relies against Makers is that there is a fax from Rock to Asphaltic containing a schedule of rates which is identical to the rates then supplied by Asphaltic to Makers, and which Makers included in its bid. There is no evidence to suggest that Makers knew or had reason to know that Rock and Asphaltic were colluding in this way. As far as Makers had reason to know the quote it had received for subcontracted works from Asphaltic had been independently arrived at by Asphaltic.

The OFT says at para. 24 of its skeleton that "The evidence against Makers falls to be considered against this background of collusion" between Rock and Asphaltic. Now, that cannot, as a proposition of law, be correct. Collusion between A and B cannot, without more, be evidence of collusion between A and C. The OFT's argument is that the account given by Makers as to why it approached Asphaltic and why it used the figures supplied by Asphaltic without any variation in its tender as being inherently implausible. They would have to make that out because, as I have said, in relation to the law if there is a plausible explanation which does not fit with the allegation of concerted practice then the OFT's case must fail.

Looking at the matters that the OFT relies upon as demonstrating the inherent implausibility, in fact not just inherent on plausibility, the untruthfulness of the account given by the three witnesses when cross-examined this morning comes down to the following I think four propositions. They say it is implausible that Makers simply happened upon – as Mr. Ward put it this morning – Asphaltic as a potential subcontractor. In my submission that is not at all implausible for the reasons explained by Mr. Bowman this morning. This is a specialist area. It is one that Makers does not do itself. It has its normal supply chain for asphalting works. There are not many companies out there that do it, and when its normal supply chain cannot enable them to tender at a realistic price, then there is a shortage of realistic candidates. I do not think that is at all implausible that they chose Asphaltic.

Secondly, the OFT says it is implausible that Makers would tender for the Elliott House contract on a 100 per cent. subcontracted basis even though that apparently left it with no profit. We have heard this morning, from Mr. Bowman, as to why they were prepared to go on a 100 per cent. subcontracted basis at no profit - in fact, Mr. Bowman said that they could have done it at a profit if they had omitted one item of the works, it was item B4 on the

particular schedule that we were looking at and if they had been able to omit that they would have been able to do it at a profit, but in any event all the evidence is that they were trying to get to the negotiating table. They failed before the invitation to tender had been issued, they failed to persuade AKS to specify their system, but they want to get to the negotiating table and have a second attempt.

We also heard evidence that sometimes they would even go in below the level of the subcontractor, up to even minus 5 per cent., so price below cost, because once you have been selected as a contractor there is an opportunity to renegotiate. Anyone who has had to deal with builders, particularly in this part of the world will probably vouch for the veracity of that particular comment. It may or may not be good business practice, but it is certainly not evidence of implausibility as the OFT argues.

Thirdly, the OFT says – and this is set out in para.59(b) of their skeleton argument – that it is difficult to understand what legitimate commercial objective there could be for obtaining a subcontract quote for the entirety of the job. That is not in fact the evidence, they did not seek a subcontracted quote for the entirety of the job, they sought a quote for Asphaltic subcontracting but, as Mr. Bowman says at para.18 of his statement, and he was cross-examined on this, Asphaltic was only prepared to offer a price for the whole job. They had to go on that basis, they had no choice. They had been quoted an uncompetitive price by Guaranteed, and they were really up against a time limit, and had absolutely no choice. That was the quote from Asphaltic and they were only prepared to quote on that basis then what else could Makers do?

The fourth element, and this really follows on from this, is that the OFT argues that it is implausible that Makers was proposing to use Asphaltic to carry out all the works, despite the fact – and this is what Mr. Bowman says at para.26 of his statement – the client "… would be unhappy with Asphaltic doing all the works as our subcontractor." Well what Mr. Bowman was saying at para.26, he was referring to the situation after the bids has been submitted – after the tendering process had closed. At that point AKS knows that it has got bids from Makers who in fact are quoting on the basis of Asphaltic being a subcontractor for the entire works, and they have also got a bid from Asphaltic itself. Which client would be happy with having the works carried out by two competing bids, one from a particular undertaking, Asphaltic, directly and the other one interposing a middle man between Asphaltic and it, the client, i.e. Makers. The middleman is there to do nothing except to add a further margin. So we do not regard that as evidence of implausibility, doing something the client would be unhappy with. What Mr. Bowman was talking about was the situation once the client was reviewing the bids it had received, then the client would be unhappy with makers

using Asphaltic as 100 per cent. subcontractor when Asphaltic had subsequently bid itself. That is what Mr. Bowman was saying in his statement, and the OFT is simply inviting you to take his evidence out of context. It comes down to the fundamental problem that Asphaltic were not prepared to quote for the asphalt works separately, they were only prepared to quote for the whole job. So in our submission none of those submissions cast any doubt on Mr. Bowman's explanation that Makers needed an asphalt works' subcontractor, how it came to approach Asphaltic and why it chose to submit a bid based on Asphaltic's quote. In short, as Mr. Bowman explained in para.21 of his witness statement the strategy that Makers had was to put in a bid that would enable us, Makers, to get to the table to meet the client and negotiate alternative specifications than Makers could do itself, using Makers' system and technologies. We did not offer an alternative specification during the tendering process because we wanted to present these alternative technologies directly to the client where their full benefit could be explained. These technologies are in direct competition to Asphaltic, they would have provided us with an opportunity to give the client a cost savings and for Makers to realise a margin.

The OFT took Mr. Bowman to the terms of the invitation to tender, and sought to make criticisms based up on strict wording of that invitation to tender. As Mr. Bowman explained, what he was doing is common practice; it is a perfectly legitimate approach to competing for business. This is not a case about strict compliance with tender documentation, this is a case about attempting to prove collusion. The OFT falls very far short in its case on collusion because there just simply was none between Makers and Asphaltic.

Those are our submissions on the evidence as between the invitation being issued and submission of the tenders.

The third stage is post-tender, which we have evidence of both Mr. Bowman, and Mr. Cowlard that they went along to a meeting with AKS, and it is their direct recollection (both gentlemen) tested under cross-examination this morning, that they attempted to persuade AKS to switch to using Makers' systems and technologies. The OFT argues that they are lying and that they did not do that, and it has sought to advance a case based upon the lack of any reference to that in Mr. Cowlard's note of that meeting. But, as Mr. Cowlard explained this morning to the Tribunal, that note was a series of action points and other points to be borne in mind going forward. There was no point in recording that they had attempted to persuade AKS to switch technologies because that attempt had failed and that did not need explaining to anyone because Mr. Bowman and Mr. Cowlard were both at the meetings, they knew it. The fact of the matter is that Maker's strategy had worked, it did get to the negotiating table, it attempted to persuade AKS – it did not. In the light of the comments at that meeting it then had to revisit

its quote. Mr. Bowman gives detailed evidence of that at para.23 to 31 of his witness statement. In the event their revised quote lost out on cost, because they had to include some eventualities they had not included for in their original quote, and that caused them to recalculate the quote. They lost out on a contract that all the evidence is they would dearly loved to have won. So that is not inherently implausible, in fact, it is a perfectly obvious, straightforward explanation of an attempt to win a contract.

So, on the three elements of this contracting process for Elliott House, as I say, the first and the third elements, up to the issue of the invitation to tender and after tender there is no evidence relied upon by the OFT. In relation to the second stage, as between invitation to tender and submission of the tender, the OFT's case that it is implausible that Makers would have approached Asphaltic as a subcontractor, the only basis that Asphaltic was prepared to deal with them using their prices, the OFT's argument that that is implausible falls far short. As Mr. Bowman candidly said, when Mr. Ward put it to him that it is just not likely to have happened, he said "Well, that is what happened", and there is nothing to suggest that Mr. Bowman was not being anything other than completely honest and truthful in the witness box; the same goes for Mr. Cowlard and Mr. Whitehouse.

In conclusion, the OFT has not proved a concerted practice, in particular it has not proved the second element of concerted practice, to be found at para.141 of the Court of Appeal's Judgment in *JJB*, namely, that there were circumstances in this case where Makers may be taken to know the circumstances in which information was disclosed by Rock to Asphaltic. Standing back a minute, why on earth would Makers have any interest whatsoever in basing itself on figures provided by Rock to Asphaltic if it new those figures had been provided by Rock to Asphaltic and therefore might be unreliable in some way. They desperately wanted to win this contract.

Finally, there is one point just to deal with on the evidence, and it is really something of a side issue, the OFT has referred to the *Apex* case, and Mr. Ward cited a passage this morning – it is referred to in para.12 of their skeleton. They talk about the importance of having independent bids for contracts. We would not dissent from those principles, but it should be borne in mind in this case that Elliott House is a contract in the private sector. There are not EU public procurement rules which would have required AKS to deal with all bids in exactly the same fashion. In the private sector it is legitimate for a business to seek to put itself forward to differentiate itself, to engage in further negotiations. After all, the invitation to tender documentation said that AKS did not bind itself to award any contract at all, so it was just an attempt by AKS to get competing bids, that is what Makers thought; all the evidence is that is what Makers thought it had submitted, and it was doing so to get its foot in the door and to

negotiate. The fact that it wanted to get contract specifications to be changed, to engage in further negotiations is an entirely healthy aspect of competition.

In conclusion on the evidence we would say the key issue is for the OFT to prove before this Tribunal to the requisite standard of proof that Makers had knowingly co-operated with either Rock or Asphaltic as to the price at which either of them would bid, but there is no evidence to support that allegation and all the evidence of Makers' witnesses and the surrounding evidence is to the contrary. It may be that Asphaltic took cover from Rock and took advantage of that in an attempt to stymie Makers' attempt to win the bid, but Makers was not privy to any of that, and that does not make Makers a participant in a cartel or covered bidding, it makes it, if anything, a victim of cover pricing.

That is all I wish to submit on ground one – liability.

MISS ROSE: Yes, Mr. Robertson, I just want to be clear, if we can go back in relation to this idea of the Asphaltic figures being 100 per cent. of the contract, because there was one point when we saw a document this morning which had about £50,000 worth of what was referred to was management contractor work price by Makers, and I was not clear when we went through that how that fitted in with this question of whether Makers intended to make any money out of performing this contract?

MR. ROBERTSON: I think the position is quite simply that was something of a diversion. The facts are that the bid that was submitted by Makers, the figures in it – and this is what we are concerned with – are identical to those that were faxed by Rock to Asphaltic. So they were simply copied or put into the bid and that is how Makers sought to get its foot in the door.

MISS ROSE: Yes, but if they had won would they have been relying, or was the intention that they would rely on Asphaltic to do that management contracting part, that £50,000 worth of, I think they were called "Prelims" or something on the piece of paper?

MR. ROBERTSON: I will be corrected by those behind me if I am wrong on this, but I do not think there is specific evidence on what would have happened in relation to that particular sum. The witness was asked questions about it, but I do not think he directly gave that information. What we do know is that what they sought to do was switch to Makers system and technologies, switch to something else, and to make money that way. If they did not do that then they had to go back on the basis of a revised bid in the light of the questions that had been put to them by AKS, and that is what we know did happen, so those facts are established, we know what they did do in the light of the post-tender meeting. But I do not think we know hypothetically.

THE CHAIRMAN: Have you got the reference to the document? My understanding is that there are two columns to that – is that the one you are looking at.

MR. WARD: I do not know whether this is the document that Miss Rose was thinking of, if you look at C, tab 15, p.121, you can find the Makers' tender and the preliminaries are at the top of the page. All of the figures in that right hand column are identical to those in the Rock fax.

THE CHAIRMAN: Including the preliminaries?

MR. WARD: Yes, which is at F46.

THE CHAIRMAN: So those preliminaries, if you had got the contract and therefore had used Asphaltic those preliminaries would have been paid to Asphaltic?

MR. WARD: I will leave my friend to make submissions on that but every single line of the figures is identical.

THE CHAIRMAN: The other document, the pull out document, where is that?

MR. WARD: I think at tab 6 of bundle C.

MR. ROBERTSON: Tab 6 is the comparison that Mr. Bowman prepared.

THE CHAIRMAN: My understanding is that if Asphaltic were prepared to price the whole job, the whole job included the preliminaries?

MR. ROBERTSON: Yes.

THE CHAIRMAN: Therefore, if everybody had been awarded the contracts that money would have had to be paid to Asphaltic?

MR. ROBERTSON: If AKS says "That's it".

THE CHAIRMAN: There is nodding at the back.

MR. ROBERTSON: Yes. What they do is they put a rubber stamp on the figures.

MR. BLAIR: Although Mr. Bowman said that it would be a management contract in that event, so it is unclear as to whether he would expect to be paid for the management?

MR. ROBERTSON: Well that is right, because Makers would have had insurance obligations – I think I am right in saying – to have staff on site supervising Asphaltic, so it was not a question of them just being there in name only, obviously the legal liability rested with them and the insurance would have required them to supervise.

THE CHAIRMAN: Yes, but if it was not in the tender and the tender was accepted then that was a cost which they would have to absorb.

MR. ROBERTSON: If they had tendered on this basis it would have been performed at a loss, but of course that was not the basis on which they put in a tender, they wanted to get in and say "hang on, you should not be doing it in that way."

THE CHAIRMAN: We are just assuming – that is right, is it?

MISS ROSE: Yes, I was not clear whether Mr. Bowman's evidence, when he pointed to those five prelim items and totted them up to be £50,000-odd, whether he was saying that that is what

Makers would have got out of the contract if things had gone according to what may have been AKS's plan rather than Makers' plan ----

MR. ROBERTSON: They had understood that obviously because they went back to Asphaltic and said "Can you please quote for us just on the asphalt works only", and Asphaltic refused to do that. I think what Mr. Bowman was saying is if they had done that and had said "Right, we will just do the asphalt works" then you identify the other elements that Makers could have done itself and under marginal.

THE CHAIRMAN: My understanding is that had the tender been won on the basis of the Asphaltic prices, and therefore had the Asphaltic done the work that it had agreed to do, that would have included the preliminaries, and a loss would have been made on the contract. What Mr. Bowman had hoped was that he could convince AKS to substitute, particularly the asphalt, he would not have had to have given the subcontract to Asphaltic and had he not given the subcontract to Asphaltic he would still have had to subcontract some of the works to other people but he would then have had the preliminaries' money himself.

MR. ROBERTSON: Yes.

THE CHAIRMAN: I am getting lots of nods at the back so I assume I have described what his evidence is. I got a "thumbs up" as well.

MR. ROBERTSON: Well I will give that a "thumbs up" myself then.

MISS ROSE: At tab 6, this B4 item, which Mr. Bowman mentioned.

MR. ROBERTSON: That is the item that he said that they could have sought to persuade the client to drop and so even if everything else had been paid – that they had to pay Asphaltic for – they nevertheless could have made a saving there and made a term on that.

MISS ROSE: What that looks like in the source notes is that that is a passing on of a cost that they have been quoted by Berry Systems.

MR. ROBERTSON: For what I think Mr. Bowman said they would have sought to persuade the client was an unnecessary piece of work that could be dropped.

MISS ROSE: But if they had succeeded and the clients had dropped it, would they have managed to get the clients to pay for it nonetheless?

MR. ROBERTSON: I would think the client must have been somewhat unobservant if they allowed them to make a saving like that.

THE CHAIRMAN: My understanding actually was not that. My understanding was that they did not want to use the Berry system, they wanted to use some other system which would have been cheaper. I have got a "thumbs up" again. You cannot see what is going on behind you. Therefore, it was not abandoning the whole thing, it was using another system that was a

cheaper cost and I assume that the idea is that it would have been put in at a similar cost to this and therefore they would have made some profit?

MR. ROBERTSON: They could have made a cost saving, yes. Miss Rose's point is that the client could have said "Hang on, if there is a cheaper system, you do not make the saving on that, we do." All of this is very much subsidiary to the main point, "the foot in the door" point.

THE CHAIRMAN: But I think you submitted that that article B4 would come out totally, and that was not the case, it was that there was a substitution. I got a nod.

MR. ROBERTSON: I am happy to stand corrected on that. Those are submissions on the evidence. On penalty, as I indicated at the outset, I will be very short indeed. We have set out our case in the alternative, obviously this only arises if they finding of infringement remains, so one finds oneself in the situation of making a plea in mitigation for the guilty defendant who has pleaded 'not guilty'. We set out our case in the alternative on the level of penalty fully in our notice of appeal and in our skeleton argument, and I am not going to rehearse it here. It is clear that everything that we complain about turns on the step 3 uplift. Had the penalty been that after step one, £6,500 Makers could have had no complaint. There are two basic challenges to the level of the penalty, one is that it is disproportionate, secondly, that it offends the principle of non-discrimination.

As to proportionality, the OFT has argued in its skeleton argument the question on appeal is: "Whether the OFT exceeded its margin of discretion". That is incorrect. The question as a matter of law on the question of penalty is one of Judgment for the Tribunal. That is set out by this Tribunal in its Judgment in *Napp* at para.499, which was cited by approval with the Court of Appeal in the *JJB* case at para.162. So it is a matter for you, the Tribunal, it is not a matter of reviewing OFT's exercise of discretion.

As we have set out in our skeleton argument at para.52, it is clear that the OFT did not exercise any discretion at step 3 when it came to the level of penalty on Makers, it instead mechanically applied the minimum deterrence threshold, about which we learned for the first time in the course of these proceedings without regard to any of the factors that we identified at para.52 of our skeleton argument, i.e. it just applied a percentage to Makers Group turnover without having regard to matters such as the numbers infringements, the length of the infringements, whether individuals were intentional or reckless in their behaviour, the knowledge of management or lack of knowledge of management, risk of future infringements, or gain. Our submission is that you cannot simply apply a mechanistic percentage without having regard to other factors; it inevitably leads to a penalty which is disproportionate. We say as regards penalty in this case that had Makers been involved in an infringement the correct level would one of tens of thousands of pounds, not half a million pounds.

As to our second challenge which is on discrimination, unfortunately the Office of Fair Trading's skeleton does not even address a comparison that we drew in our notice of appeal with the position of Coverite. We have argued on our notice of appeal that we are in a comparable position to Coverite both engaged, according to the OFT in single infringements, and we made that case at paras. 84 to 96 of the notice of appeal. The OFT simply asserted in its defence at para.41that Makers and Coverite did receive consistent treatment. Now, we have set out in detail at paras. 54 to 67 of our skeleton why that is not the case, and I have set out my calculations there as to the penalty that Makers would have received, had it been treated consistently with Coverite, and if that were the case on our calculations that would justify a reduction in penalty of £312,000. Now, because the OFT has not set out any positive case as to why we were treated consistently with Coverite, when on the figure we appear not to have been, I cannot go into attack their reasoning at this stage. If there is reasoning, then I will deal with that, if I may, by way of submission in reply.

THE CHAIRMAN: Thank you very much.

MR. WARD: We heard a great deal of evidence this morning about what did, or might have, happened according to partial recollection today. But, it is useful to start by looking at the facts the OFT found in its decision on the evidence then in front of it. We set it out in the skeleton argument. You have seen it for yourselves in the decision. But, the relevant core facts are these. Here we have a leniency applicant, Rock, who admits that it sought a cover on this particular contract. There might be some confusion between Mr. Robertson and I as to what that means. Seeking a cover, it wanted to put in a bid; it wanted other people to put in higher bids. That is why it bid as it did. Rock bid £254,000. It provided a schedule with three other sets of figures. One was put in by Asphaltic. Another was put in by Makers. The essence of the OFT's case is, in truth, that that gives rise to a very powerful presumption indeed of collusion. It is not just an assumption. It is an admission on the part of Rock, and it is a finding against Asphaltic.

Now, of course, Mr. Robertson is right to say that without more you cannot jump from collusion between Rock and Asphaltic to collusion between Makers and either Rock or Asphaltic. But, he did not quite go as far as to say, "You should ignore that fact". It is one contract. Rock is the party ultimately seeking to benefit from the cover arrangement. It is the party that puts in the lowest bid on the same day it faxed those three schedules to at least Asphaltic. Now, I say 'at least' because, of course, we do not have any concrete evidence about how those figures came into Makers' hands. But, they did come into Maker' 'hands, and Makers adopted them line by line precisely.

Now, I showed the witnessed today where this reasoning was set out in the Statement of Objections, and where in the Statement of Objections it said, "In the absence of any reasonable explanation, we assume Makers got these figures by collusion, either with Rock and/or with Asphaltic". The Decision and the Statement of Objectives did not commit one way or the other. Because that is the only reasonable explanation - unless there is some evidence of something else. Of course, as we say in our skeleton argument, no explanation came back to the OFT. Rock had made an admission. Asphaltic gave pretty much a bare denial, and Makers just said it did not know.

So, the inference stands - unless it is displaced by something that has been said in this appeal. Here, there is agreement between my friend and I. The question is whether there is now a plausible explanation. That is not to reverse the burden of proof. The burden of proof is firmly on the OFT. The standard of proof, as my friend asserts. But your job is to assess the totality of the evidence, including the positive case now advanced for the very first time. Does it stand up? Does it explain away what otherwise is apparently blatant collusion? That is the question.

Now, I do emphasise that in the Decision the OFT was careful to say at para. 272 that it does not have to decide whether there were two bilateral agreements and/or concerted practices between Rock and Asphaltic and Rock and Makers, or agreements between Rock and Asphaltic, and Asphaltic and Makers. Nor is it necessary to decide whether this case is like *JJB* where there is a kind of chain of collusion from A to C, where all A is trying to do is get to C. We have cross-examined today on the basis of the relationship between Asphaltic and Makers because that is the positive case we admit to. We are now told that the figures came through contact with Asphaltic. Our submission is that that contact, if it happened at all, was unlawful collusion. But, I will come back to that.

Our primary submission is that all of the evidence you have heard today about the contact between Asphaltic and Makers from Mr. Bowman should be rejected. I do not make that wholesale submission about Mr. Whitehouse or Mr. Cowlard. Neither of them were directly involved in the pricing of the contract. Mr. Bowman was. We submit Mr. Bowman's account simply should not be believed.

The first reason is, indeed, the circumstances in which this case has come to light. We are now more than four years from the infringement. At the time of Mr. Bowman's witness statement we were just under four years from the Decision. But, Mr. Bowman was very direct today. He thought of this explanation this year - after he made some inquiries in March. When Makers was looking into this matter he had not thought of it. He accepted that. But, in my respectful submission, that is simply wholly unbelievable. He had the statements of objections for seven weeks. He was asked by the Company Secretary to investigate it. The

allegations in it are the same. It is exactly the same case that he is meeting today. It is quite obvious what was needed. Makers had to explain how those figures came to be in his bid. Mr. Bowman could not think in 2004. In 2005 he could not think. In 2006 he came up with the answer. Now, the reason he came up with the answer, he says, is because he made some inquiries: he spoke to Rio, he spoke to Guaranteed, and he spoke to Total. He said, "Well, once I'd spoken to those, it jogged my memory". But, they did not tell him anything useful. Rio and Total could not remember anything about this contract. They said, "Well, we would have done this ... We might have done that ----" But, they did not say, "Yes! Yes! We remember it all. Now it all comes flooding back to us!" There was no positive evidence - even hearsay - from them, never mind actual witnesses before this Tribunal, giving their own personal recollection. What we have is the faintest trace of a conditional, "Well, we would have priced it this way ----"

Then, of course, there is a document which, I accept, gives some support to what Mr. Bowman says - the tender from Guaranteed ---- or, the apparent sub-contract from Guaranteed. But, that is a document about Guaranteed and Makers. It is not a document about Asphaltic and Makers. There is nothing at all concrete ---- documentary about the so-called relationship between Asphaltic and Makers, except for the fact that we know Asphaltic did not like working for Makers. That is the only thing we have got by way of a contemporaneous paper trail on this.

So what was it then that could possibly have jogged Mr. Bowman's memory in 2006 that he could not have thought of in 2004 or 2005, the first two times he was asked about this? In my respectful submission it is just not capable of belief. In truth, it is all too convenient. In the Decision the OFT said at para. 282, "In the absence of a formal sub-contracting relationship there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another. No alternative credible explanation has been advanced by the parties". Well, now we have one. Now we are told it is a formal sub-contracting relationship. But, there is not a trace of this before. There is not a trace of this in the documents, and there is nothing really put forward to explain why this comes to light for the first time now. In my respectful submission, that is simply not capable of belief, and that alone, in my submission, disposes of the liability appeal.

But, of course, we do say that the detail of this case is implausible. What matters here is not whether or not Mr. Bowman has an explanation for each and every problem with his case - because he did today. I accept he put forward an explanation for everything we put to him - explanation of a kind though. Your job, as the Tribunal, is of course to decide on the totality of that evidence whether it is to be believed. On the one hand you have a very simple case put

forward by the OFT. Rock's figures ended up in the tender on the same day that Rock faxed them to Asphaltic. On Makers' case it says, "No. No. No. It is much more complicated than that". It is all explained away - but by a series of improbable propositions. The cumulative effect of that improbability is simply too great. It leaves the OFT's inference in place. It is not shifting the burden of proof. The burden of proof is on the OFT. But, Makers' case just cannot be believed.

Now, looking at some of the features of this thing, the commercial logic of it is really a nonsense. Here we have a contractor that apparently Mr. Bowman had never heard of; who might have been taken from the Yellow Pages; who gave the wrong kind of bid; apparently insisted on only doing the whole job and not the asphalt part where they actually wanted the help. All the figures are put in. There is not even a mark upon the management time. As Miss Simmons said, all that money flows straight back through to Asphaltic if the bid is accepted. Well, we hear this story about how there might be scope for getting them drop one requirement on Berry Systems, but, of course, the bid is itemised. If a line goes through that particular job, it does not affect the price on any other job. It is ludicrous to suggest that AKS might have been duped into paying an extra £20,000/£30,000 because they did not notice the effect of deleting part of the contract.

But, there are more and more odd features of this. It is deeply strange that Makers did not tell AKS about this sub-contract arrangement. Now, the reason - if it is a reason - is, they said ---- Mr. Bowman said, "Well, they wouldn't want us to have a whole sub-contract from another bidder". But, then, of course, that is why it is very important that Makers actually knew that Asphaltic was another bidder. Mr. Bowman said, 'or sub-contractor ... bidder or sub-contractor' ---- but, already bidding in this contract one way or the other.

This is where we say it is a remarkable coincidence. In fact it is too much of a coincidence to say, "There they were, three days before the tender deadline. They went to the Yellow Pages - Yell.com - and accidentally came upon the company that was also bidding in the contract". Pure coincidence, Mr. Bowman would have you believe. And then, if that was not unlucky enough, that company turned out to be a bid rigger and, on Mr. Bowman's evidence, it basically duped Makers. Well, again, I say, "Step back! What is more likely? Is it more likely that that is true? Or, is it more likely that there was bid rigging going on here?"

Now, it is also important that although Mr. Bowman gave positive evidence about what happened during the details of the contact with Makers, it all got terribly murky on the most crucial points. Under cross-examination he shifted his position slightly, and said, "Yes, all right. It was me that made the 'phone call to Makers in the first place", although he did not sound very convinced. That, of course, was not what his evidence actually said. Then, when I

asked him about, "Who was it who Asphaltic spoke to when they insisted that they would not put in a partial bid for the job, but only the whole job?", he was not sure who had taken down that piece of information. So, we do not know what was really said by who.

There is a sense in which Mr. Bowman is slightly removed from the action here. Of course, it is absolutely critical to understand the nature of the contact between the two. Now, the overall explanation for all of this is supposedly that Makers was intending to re-negotiate the bid later. In effect, that is what they say, "Well, we have got this, frankly, non-sensical bid from Asphaltic - no profit, no role for Makers, no work for the car park division ---- a whole sub-contract the employer would not like, but we put it in because we'd work out all the details later". That is essentially what is being said.

But, it is a problem to this case that however much it is brushed aside, the tender documentation expressly precluded this approach, and that Mr. Bowman said that it would not like it if there was a whole contractor. So, it is a covert approach that they are taking on their case. They are not being open about what they are doing with the employer at all - they are disguising it in the hope of muddling through and somehow re-configuring the bid so they could make a profit, basically, later.

Well, there is a problem here for them that there is no record of any such attempts being made at the time. It is quite right that Mr. Cowlard said that he remembered at that meeting that they did attempt to get AKS to agree a change of specification, but it is striking that he did not say that in his witness statement. The answer came in response to a question - that in any event there is an alternative explanation for what happened after the tender process put forward by none other than Mr. Cowlard himself, because Mr. Cowlard explained that Makers is not averse to putting in what are essentially false bids in order to keep employers on side. No collusion. He made no suggestion there was collusion involved. I am not seeking to either. But, false bids - bids that were not properly priced for contracts that Makers did not want to win in order to convince the employers that Makers were very keen to work for them. (Barristers' clerks maybe do the same thing sometimes too!)

But, the crucial thing here is, as Mr. Cowlard admitted, that once you start down that road, you have to keep going, because if you say to the employer, "Well, actually, to tell you the truth, we're not really interested in this bid", what other mumbo-jumbo reasons are produced, the employer can see you were not interested at all in the first place. So, the purpose of putting in the false bit just falls away. It is not clear whether Mr. Cowlard would have even known if there was bid rigging in this case because, as he said, he was far removed from coal face of putting in the prices. It may have been that this whole exercise was a total waste of his time - the post-tender exercise. But, from the point of view of Makers, having got itself in that far, it

had to keep going - otherwise the purpose of bid rigging, vis-à-vis the client at least, would fall away.

Now, Mr. Robertson said, "Well, there is no evidence at all of any contact - any direct contact between Rock and Makers" and he is quite right to say, "We didn't put any case to the witnesses on the basis ----" I did not say, "I put it to you that you received the fax from Rock" because we have no evidence of that. But, what we do respectfully remind the Tribunal is the way the matter is put in the Decision is, "There is a form of collusion here, and actually it is not necessary to decide precisely what form it took". What I put to this witness was that the contact with Asphaltic just simply did not add up. What I do submit is that if there was contact with Asphaltic, that contact was, in truth, in the form of collusion - not in the form of bona fide pro-competitive sub-contracting of the kind Mr. Robertson described.

Now, that primary case, of course, depends on you, in part, rejecting the evidence that you have heard this morning. But, we did make a submission in the skeleton argument, and in the defence, which I am now going to develop very briefly, that much of this evidence actually is supportive of the proposition that there is a concerted practice in any event. What happened here on Makers' account? Well, Makers invites a sub-contract from Asphaltic. Asphaltic therefore immediately knows that Makers is a bidder. Makers knows that Asphaltic is bidding for the job (that is para. 18). Not sure whether it is bidding in its own right or bidding as a sub-contract, but it is a bidder. So, it is part of the competitive process in what ought to be a wholly independent sealed bids tender.

What happened then is that Makers asked Asphaltic for a price - albeit for any part of the job. But what it got back was the whole job, and this is actually important. So, Asphaltic responded by giving Makers important market information. It said, "We are a bidder in this process, and this is the price for which we will do the whole job". Makers then act on that information. It worried about whether this bid was a false bid or a real bid, but it acted upon it. It acted upon it by adopting it. It put the figures in. So Asphaltic, who were one of the other bidders or sub-bidders, has said "Here is our price", and Makers simply adopted it; and, as Mr. Bowman said, Asphaltic expected it to do that, although Asphaltic would have expected a mark-up. So Asphaltic then, on Mr. Bowman's evidence, has an understanding of what Makers is likely to do. Now, we know, of course on Mr. Bowman's account, the flow of information is only one way and a concerted practice has to be reciprocal. I would simply refer the Tribunal to para.21(v) of the *Argos* Court of Appeal decision – it is a very well known proposition:

> "Although the concept of a concerted practice implies the existence of reciprocal contacts, that requirement may be met where one competitor discloses its future

intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it."

Well, here it has been requested, it has been accepted, what Asphaltic has done is disclose its bid. Now, Mr. Bowman says: "Well, the bid might be false, it might be completely wrong. They may be selling us a dummy." That does not demonstrate a lack of collusion because, of course, it is trite law that the parties to a classic cartel arrangement may cheat on the cartel, and we have an authority that we can hand up for that proposition if it is needed, but it is trite law. Perhaps just for completeness I will hand it up – it is the case of *S.C Belasco and Others*. I gave my friend the reference for this this morning. If I can just hand it up and invite you to consider para.15 at some convenient moment.

It is really no answer to say that it is possible that it is possible Asphaltic was cheating, or did not tell it the truth. Now, what Mr. Robertson says by way of answer to this point is that the OFT has made a fundamental mistake here; it has completely misunderstood the requirements because there has to be knowing substitution or practical co-operation for competition, and of course sub-contracting is competition. It goes on all the time; it is completely bonkers if the OFT is going to go around saying that sub-contracting is anti-competitive. We are not saying that at all – not at all. There was a very special feature of this so-called subcontract arrangement. Makers knew Asphaltic was a bidder. Asphaltic knew that Makers was a bidder. If Makers had not known that Asphaltic was a bidder – or even a possible bidder – then of course there is no element of collusion. Of course there is no knowing substitution of co-operation for competition. What we are supposed to have here is four competing bids, formulated independently without collusion, without co-operation, each party hopefully giving its best price. What we had instead was an exchange of information between two out of four of those, albeit that Asphaltic may have only been a subcontractor.

For reasons I have already given it is very much open to doubt whether Makers really thought that Asphaltic was a sub-contractor. If so, why did it disguise from the employer that it was using Asphaltic at all? Why did it not just own up to the fact that it was using a sub-contract? Mr. Bowman said why, he said because if a sub-contract was one of the other bidders the employer would never be interested in using Makers as a middle man.

With that, I will move to penalty, if that is convenient?

MISS ROSE: Mr. Ward, on your second case about what information Asphaltic were giving Makers when they sent them the figures, is there anything to suggest that Asphaltic were saying, or that Makers took it as saying, that that was what they would have quoted, or were quoting, as sub-contractors to other bidders? Would that not be a necessary element? I know you say well they might be lying as far as that, and they are cheating on the cartel, but would it not be a

necessary element that Makers understood that those figures were not simply what Asphaltic were quoting to them, but what they were quoting to other bidders?

MR. WARD: I submit that it is not necessary they should know that. What they learn from that is Asphaltic's price for this work. In the absence of any other information, it is information about the way in which Asphaltic priced this job. It may or may not be giving bids that are different to others, but Makers has said to Asphaltic "What is your price for this schedule of work?" Asphaltic has communicated that price.

THE CHAIRMAN: I suppose, if one takes that thought process, it is a sub-contract price and it is saying "Well, I will do the whole of that sub-contract for you, for that price", is that the same as saying "That is the price that I will do it for somebody else"?

MR. WARD: Not necessarily, but it is nevertheless an exchange of market information about the price Asphaltic attaches to this work. I do not need, in my submission, to show that it would definitely quote the same price to somebody else; any more than when Rock sends a fax to Asphaltic it is necessary to show that Rock is intending to put in a price at any particular figure. What it is, is information exchanged between two parties competing in the same bidding process.

THE CHAIRMAN: Mr. Ward, I think what you might say is that if you go to a sub-contractor and you get a price you can assume, and you know that he is either a sub-contractor on the same tender, you can assume that he has either given you a price which is the price that he is giving other sub-contractors, or a price higher than he has given other contractors?

MR. WARD: Which is indeed what Makers thought; Makers was worried that it was being a sold a false price, a too high price, but the crucial thing is that Asphaltic influenced Makers in what Makers bid – because Makers had this worry Makers did not dare put in the mark-up. Asphaltic, by giving Makers these figures could obviously see that it was going to influence Makers' conduct one way or the other. Now, in a concerted practice you need not be certain about what another party is doing, of course not – not just from the point of view of cheating, but it is not necessary for one party to say "This is what we are going to do", and stick to it.

THE CHAIRMAN: The fact that you get the information from the sub-contractor about the price they are giving to you – one has to assume for these submissions – is going to influence the amount that you are going to put in for the bid?

MR. WARD: Yes.

THE CHAIRMAN: And therefore that is co-operation and ----

MR. WARD: Exactly.

THE CHAIRMAN: -- and not independent thought.

MR. WARD: Madam, you are putting it better than I am, but that is what I am putting. That is what I am seeking to put. So Asphaltic gives figures to Makers, knowing that Makers is one of the bidders, and knowing that Makers is going to be influenced by those figures. Mr. Bowman's evidence was that "Asphaltic would expect us to put on a mark-up; we didn't because we didn't dare, because we didn't trust them." But they knew ----

THE CHAIRMAN: Because they were influenced by those figures.

MR. WARD: Because they were – exactly. So there was an intention to influence, and there was influence. It is not actually necessary for Makers to be sure that Asphaltic's ultimate bid would be the same as the sub-contract that goes to Makers; it actually does not matter at all.

MR. BLAIR: So what you are actually saying is that if you are approached as a sub by A, and then you are approached to be a sub for B, the only safe thing you can do is to give B the door?

MR. WARD: No, because the difficulty here only arose because of the fact that Asphaltic supposedly said to Makers: "We are already bidding on this contract". That is what Mr. Bowman said. They approached Asphaltic completely out of the blue, without any prior knowledge that Asphaltic is in any way involved in this process, and then at that point Asphaltic said "We are already a bidder," and Makers said "That's okay, we'll have your prices anyway".

MR. ROBERTSON: Excuse me, that is not what Mr. Bowman said. Mr. Bowman said that they already had the tender documentation and from that he inferred they were either involved as a sub-contractor, more likely, or as a potential contractor.

THE CHAIRMAN: But they knew from that that they had the tender documentation and therefore they were potentially either a sub-contractor or a contractor.

MR. ROBERTSON: But that is as far as the evidence goes.

MR. WARD: I did not mean to put a gloss on it.

MR. BLAIR: So the sub-contractor I am thinking about has to go through the dance of asking for the tender documents again?

MR. WARD: Indeed not. If Makers is genuinely an innocent dupe in all of this then, of course, there is no collusion. So Makers approaches Asphaltic out of the blue, asks it to quote, has no reason to suppose that Asphaltic is already bidding on the contract, then there is no collusion – of course, not. There is no knowing co-operation, even if Asphaltic is cynically manipulating Makers to its own end, I will accept that, but we say on the evidence that is wholly preposterous.

The case that we are now discussing is really only a case that arises if you accept in all material respects Makers' evidence. The OFT's primary case is that all of this is a fiction.

MISS ROSE: The question of whether the sub-contract offer, or pricing influences Makers' ultimate bid to AKS, that hinges on the fact that the sub-contract covered the whole job in effect. If you sub-contract for a small part then, of course, that influences your ultimate price.

MR. WARD: But is that not a striking feature of the case put forward by Makers, they said "We only wanted an asphalt quote", but instead what comes back is a quote for the whole job.

MISS ROSE: But it is essentially your argument still the element that at the time they received the quote from Asphaltic they knew that Asphaltic was involved in the bid process either as a contractor or ----

MR. WARD: .... that is what creates co-operation as opposed to competition. You are talking to one of the other bidders and the other bidder is giving you price information in order to influence what you do.

MISS ROSE: But if they had known that but they had still only got a quote from Asphaltic for a small part of the works, would you still say that that was collusion, anti-competitive ----

MR. WARD: I am far more reluctant, but I would not want to commit those behind me to a categorical answer on that. The case I am making is much easier to make. With that, madam, may I move on to penalty?

THE CHAIRMAN: Yes.

MR. WARD: The job for the Tribunal, if you are with the OFT on liability, is of course to fix the penalty *de novo*. You can increase it, or you can decrease it. Mr. Robertson is quite right, and we do not seek to suggest that this is a Judicial Review of the OFT's approach to questions of ultimate reasonableness. In so doing, of course it is trite law again that the Tribunal is not bound by the guidance that the OFT has produced, but nor should it disregard that guidance altogether, and for that we can go to para.500 of the Argos Decision. Of course, as the Tribunal will well know there are two policy objectives in that guidance. The penalty should reflect the seriousness of the infringement, and that it should provide effective deterrence. Here, Mr. Robertson has made no attempt, rightly, to argue that this penalty should be reduced on grounds that it is not serious. That has formed no part of his submissions, but I do remind the Tribunal of what it said in *Apex* at paras 208 to 211 and 251 to 252 about just how detrimental this kind of cover bidding is to the competitive process assured by tendering. Mr. Robertson does not challenge either the principle that there has to be effective deterrence. The question is only: "Is the uplift so great that the overall size of the penalty is disproportionate?" What he does, of course, is isolate step 3, as he fairly says, and complains that step 3 must be disproportionate, because it is equivalent to a multiplier of 80 times over, "and that cannot be right", he says. Of course, put like that it does sound very dramatic, but of

course the Tribunal's job is to make an overall assessment of the size of the penalty, and that we find in *Argos* again at para.163.

Here, we had a starting point and by the end of step 2 the penalty stood at £6,500. Makers, is a £70 million undertaking – just under, in fact, in the relevant year. So at step 2 the penalty represented less than 0.01 per cent. of its turnover.

THE CHAIRMAN: Question: are these figures confidential?

MR. WARD: Not so far, thank you for reminding me. I will bear that in mind, I hope I am not going to refer to any further figures. We also know that the deterrent must be serious and effective and that we find in *Napp* at para.502, in *Argos* at para.162. We also know that the European Court of Justice says that it is relevant to look at the overall size of the undertaking, not just the relevant market for the purpose of the penalty. For that we have the very recent case of *Showa Denko* – it is in our skeleton, but I would like to give you a slightly extended reference – I will not take you to it because of the time. Advocate General Geelhoed, whose opinion is at tab. 8, bundle 3 of the authorities, paras. 36 to 38, and 50 to 53, and the ECJ itself at tab 9, paras. 16 to 18. What we ask – not rhetorically – is can it possibly be said a penalty that represents such a small proportion of turnover could be a serious and effective deterrent? Manifestly not, in my submission.

Also, before coming to a little bit more of the detail of the argument one must bear in mind the industry in which this infringement has taken place, because the penalty is aimed not only at the undertaking which is the subject of the decision, but also at other undertakings who might be contemplating such conduct, and we find that in para.2.11 of the Guidance, and in *Showa Denko* at para.16 of the ECJ.

In the decision the OFT specifically said that its intention is to raise the profile of the issue in the industry in which Makers operates (para.846). In those circumstances we ask: is such a penalty disproportionate? The answer we give to the question is, of course, "no". £500,000 remains a modest portion, well below the 10 per cent. statutory threshold. More figures are set out in our skeleton argument.

Now, what is said here is that the approach is somehow unduly mechanistic because the OFT used what is called the "minimum deterrence threshold". I am not going to take you through that in any detail, but you will have seen it annexed to the OFT's defence. There are two points to make about this: first, if it had not used this method and had used it in other cases, of course what we would be hearing would be a complaint about discrimination, and if we had not used the method at all we would be hearing a complaint about arbitrariness. So the OFT has sought to eradicate the discrimination and the arbitrariness by using, as part of its evaluation – and that is very important – a method, but it did not supplant the exercise of the

OFT's function for two reasons: firstly, the method is only part of a five step process. Mr. Robertson read out a list from his skeleton argument of various factors he said the OFT should have had regard to - the number of infringements, the length of infringement, intent or recklessness, etc., etc. Those are all things that crop up at other stages of the calculation. So, to say that the length of the infringement is not taken account of at Step 3, but is taken account of at Step 2 really is not much of a complaint at all. Everything he referred to is taken account of in the guidance and, indeed, in the decisions applied in this case somewhere - with one exception: he said, "Risk of future infringements. The Decision is disproportionate because the OFT did not take into whether or not there was a risk of future infringement". Well, it would be surprising if the Oft was required to somehow prove that there was such a risk; indeed, he has not cited - nor does the OFT know of - any case law, whether of the CAT or of the ECJ that one must somehow prove this before moving on to the question of deterrence. On the other hand, where undertakings do have some form of compliance scheme, that can count for mitigation under Step 4 - not in the case of Makers, alas, but in other cases. So, that is my first answer to the point about mechanistic approach.

But, the other thing is that the OFT is very careful to be clear in its annexe to the defence that it did not apply this mechanistically. It involved exercises of judgment, both as to where the threshold would be set in the first place, but also as to its application in any individual case - because, of course, if the OFT could have seen a reason not to follow the method, then it could have rationally distinguished it without infringing the principle of equality. In that regard, I will just refer you for your notes to para. 18 of the annexe which makes absolutely clear that a check of judgment was carried out where the method was applied. So, there is nothing, in my respectful submission, in that complaint.

Then, on discrimination ... The real complaint about discrimination is that Makers says that it was treated worse than Coverite. Mr. Robertson has produced some figures in his skeleton argument which are supposed to show that, indeed, Coverite somehow ended up with proportionately smaller penalty.

Now, it would be useful at this point to turn, if you would, to the schedules that were annexed to the defence where there was a confidential and a non-confidential version. I will endeavour to not refer to any confidential figures, but it is useful to turn up the confidential version. (After a pause): I hope you have Schedule B. This table summarises the confidential penalty calculations. In the middle, roughly, is Coverite, and another undertaking, and then Makers. This table, I hope, if you follow it through, gives a step-by-step approach to all fives stages, including the approach of the minimum deterrence threshold at Step 3 where it says 'Net Adjustment'. You will see there the figure that Makers are complaining about - £520,000 -

and the figure of £100,000 ---- These figures are in the Decision. So, there you see there is a disparity there. Mr. Robertson has done some calculations which he hopes show that there is an overall difference in percentage as against total turnover.

Now, in fact, on this table the percentage of the penalty as total turnover ---- I will just check that no-one objects to me giving you those percentages ---- (After a pause): I can leave it at this: it is actually lower. The figure for Coverite is a little bit lower, but the reason for that, you can see, is under 'Mitigation'. Coverite got 25 percent discount for mitigation for various reasons. Why then does Mr. Robertson come up with such spectacular-looking figures that he says suggest that, in effect, Makers have been fined double. The reason for that is actually very easy to discern. Row 5 is Step 5 - total turnover. You will see there the figure for Coverite ---- I just need to check that that is in the public version of the Decision. (After a pause): Yes, that figure is in the Decision, which is £18 million-odd. But, Mr Robertson says, "Well, actually the correct figure there is £30 million-odd". This is picked up in the footnote in fact. Footnote 1 explains how this all came about. You will see in Footnote 1, "In the case of Coverite Ltd. the penalty was based on figures supplied by Coverite Ltd's solicitors, Denton Wilde Sapte, on 23 May, 2005 which showed a turnover of £18.3 million". Then, at para. 18 of the Decision it refers to a figure of £33.1 million derived from the financial analysis made easy report. Then, Makers have also served copies of Coverite's published accounts which contain the £33 million. If you put the £33 million in, you end up with a bigger penalty of course.

So, Mr. Robertson is trying to reverse-engineer from that and say that he should have a smaller penalty.

Now, the first question which we cannot resolve in fact is which of those is the appropriate figure? We cannot and we need not. I will show you why we cannot. The Coverite accounts are annexed to the Notice of Appeal of Makers. It is in the annual report. You will see the figure relied upon is at p.37 of the bundle. So, there is the figure relied up - £33 million-odd for 2004. You will see that this is described as a consolidated profit and loss account. We can see at p.45 what is described as the holding company's profit and loss. Then, at p.48 there is a list of subsidiary undertakings and participating interests.

Now, as the Tribunal will, of course, be aware - not least from another case running at the moment - there are issues about when, and in what circumstances a head company can be grouped together with other companies which it has whole or partial ownership of. There is a presumption that if it is whole ownership, then it is a single undertaking. But, it is a rebuttable presumption. It is a murky issue. Denton Wilde Sapte produced a figure and some draft accounts which the OFT relied upon for its decision. It is no part of my submissions today to

seek to persuade you one way or the other which of those is correct. We can in fact proceed on the assumption - although I would not accept it - that the OFT may have made a mistake here. Let us assume for a minute that it is just a mistake and that Denton Wilde Sapte gave the wrong figures to the OFT, and the OFT were wrong to allow them.

For Mr. Robertson to succeed in obtaining his discount, he needs you, the Tribunal, to give his client the benefit of effectively the same mistake, and fine us as if you had a figure for turnover of about half the real figure - because on his version of events that is what happened to Coverite. The OFT fined it on the basis it was an £18 million undertaking instead of it being a £33 million undertaking. He says, "Well, that's discrimination against us. They got the benefit of a mistake. So should we". That, in my respectful submission, obviously cannot be right. Indeed, I will show you in a moment some authority to show that it is not right.

But, before showing you that one must pause and ponder on the logic of it. There are actually thirteen undertakings to the decision. The logic of that position would be that they all should get the benefit of the mistake. It would be very surprising indeed if the law required that. In fact, it does not. I would like to hand up two authorities which I gave to Mr Robertson this morning. (Handed) They are recent decisions of the court of first instance. We have *Hoek Loos* NV and *JFE Engineering*.

Can I start with *Hoek Loos NV* which is the slimmer of the two? I can assure you we do not need much of *JFE Engineering*, I am pleased to say. Now, these are both cartel penalty appeals. In both cases the complaint was that there was discrimination because another party had the benefit of something of a mistake in its favour, in effect. In *Hoek Loos NV,* at para. 96, "Alleged discriminatory nature of the fine imposed". Paragraph 96 recites the principle of equal treatment. Paragraph 97 says,

> "Although the Applicant disputes, generally, the difference between the amount of the fine imposed on it and that imposed on other undertakings involved in the cartel, it bases and expands its complaint as to the alleged discriminatory nature of its fine in the light of the way *AGA Gas* in particular [one of the other undertakings] was treated."

It claims that being in the same position in terms gravity and duration in relation to *AGA Gas*. Then it says again at para. 109:

> "The applicant asserts only that the Commission was wrong to treat it differently from the other undertakings, in particular, *AGA Gas* - and it demands to receive the same treatment ..."

The gist of the argument was about whether there had been an improper application of the 10 percent threshold in a way that somehow favoured *Aga Gas*. The facts really do not matter,

but of course I invite you to consider them later. The claim is rejected basically. The court says that, well, all it has done is apply this 10 percent limit. We can see that in para. 112 at the last two lines:

> "Thus, what the applicant describes as a discriminatory final outcome of the Commission's calculation process is, in reality, nothing other than an inevitable consequence of the application of the 10% limit".

This is where it becomes relevant to the present case.

> "Insofar as the applicant alleges that *AGA Gas* obtained an unlawful reduction in its fine and even if the Commission wrongly granted that undertaking a reduction by incorrectly applying the 10% upper limit, compliance with the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party".

Then there is a small forest of further authority for that proposition. So, that, in my respectful submission is pretty firm authority for the proposition that even if the OFT made a mistake in favour of Coverite, the principle of equal treatment does not require that you give it the benefit of a further mistake to Makers.

JFE Engineering is really to the same effect, but there are some points of detail in this which I think it is right to draw to your attention. We can turn, mercifully, to para. 559. What we had here was more than one cartel involving Japanese producers and European producers. That is about as much of the facts as you need to know for present purposes. You will see at para. 559 that,

> "JFE- Kawasaki and Sumitomo argue that the level of the fine imposed on the Japanese producers for supposedly agreeing to refrain from selling the products mentioned in Article 1 of the contested decision in Europe is disproportionate by comparison with the level of the fines imposed on the European producers".

So, the Japanese producers are saying they were soft on the European producers. "The latter, i.e. the European in fact are alleged to have committed two infringements, the purpose of which was ----" and so on, and so forth. Then the core submission is repeated there at para.560,

> "JFE-Kawasaki reiterates its argument that the relations between the European and Japanese producers and the relations between the European producers themselves should be treated as two separate infringements".

So, they were saying, "It's not fair. The other group committed two infringements - not one infringement - and the Commission didn't take that into account". The Commission went

before the Court of Justice arguing that it got it right, and that it had made no mistake in this regard.

Now, the court essentially upheld the finding that there was a mistake in this regard. It upheld the submission of the Appellants. In para. 573 you see that in short form.

> "By thus omitting to take account of the infringement found in Article 2 of the contested decision in determining the fine imposed on the European producers, the Commission treated different situations in the same way but without relying on any objective reasons capable of justifying that approach. It follows that it infringed the general Community law principle of equal treatment".

So, it said to the Japanese producers, "We've got this right actually. The Commission should have found two infringements on the part of the Europeans, and it only found one". Obviously, that is a potentially aggravating factor. So, there is a *prima facie* breach of the principle of equal treatment. But, really what matters is what follows. What should be done about it?

Now, here at para. 575,

> "In that connection, the Commission observed at the hearing that the possible existence of unequal treatment referred to above should logically lead to an increase in the fines imposed on the European producers, rather than a reduction of the amount of the fines imposed on the Japanese producers. It must be observed, in that context, that contrary to the views of JFE- Kawasaki, Commission representatives may, subject to any express instructions to the contrary from their superiors, lawfully plead that the Community judicature should exercise its unlimited jurisdiction to increase the amount of a fine set by the Members of the Commission".

Then, carry on at para. 576,

> "It must be considered that, in the circumstances of this case, the most appropriate way of restoring a fair balance between the addressees of the contested decision would be to increase the amount of the fine imposed on each of the European producers which brought an action to the court to change the amount of its fine".

So, just pausing there, it is very important that the European producers were also in front of the court. They had also appealed. So the court is saying, "Well, as they're all here, and as we are re-opening their fines, and as we have unlimited jurisdiction, we could solve this problem by increasing their fines".

> "The aforementioned unequal treatment does not relate to the proportionally over-severe fine imposed on the Japanese producers."

In other words, there is nothing *per se* wrong with the Japanese penalty. It is the European penalty that has been inadvertently too low. At para. 577,

"Moreover, the Applicants [i.e. the European applicants] each asked the court in their applications to exercise in that connection its unlimited jurisdiction to change the amount of the fine imposed ----"

At that point they are saying, "But this isn't quite what we had in mind". But, nevertheless, they are there. The court is seized. It has jurisdiction over its penalties. Then there is a kick in the teeth for the Commission at para. 578,

"However, the Commission has not pleaded in its defence that the court should revise upwards the fines on the Applicants. So we are not going to do it ----"

Rather a windfall for the Europeans perhaps. What I submit about this case is that it again demonstrates that in this case it was no justification whatsoever forgiving Makers the benefit of any mistake that might have been committed for Coverite. Makers is before you today - Coverite is not before you. It did not appeal. You are not seized of any appeal in respect of its penalty.

MISS ROSE: They did actually go on to reduce the fines for the Japanese, did they?

MR. WARD: They did, I think, possibly on other grounds. It follows that the most useful way is to reduce the amount ---- Yes, indeed. They said, "Well, because we cannot increase them, but we should have been able to, and it's just because the Commission didn't plead it, that we will make the reduction". So, they are saying to the Commission, "It's essentially all your fault that we can't deal with this sensibly, because these people were before us, and we should have been able to do it". In our case it is quite fundamentally different. There is no basis upon which the Tribunal could interfere with the penalties imposed on Coverite - they are not an appellant; they are not before the Tribunal; nor could they be; nor do you have jurisdiction. In those circumstances our submission is to extend the benefit of any mistake to Makers would simply be inappropriate.

THE CHAIRMAN: But is that not why they reduced the fine?

MR. WARD: Well, no, because there they were saying, "We should have been able to do it - but for what the Commission did".

THE CHAIRMAN: No, "But, because we cannot, we therefore will reduce the ----"

MR. WARD: The obstacle there was not a fundamental jurisdictional one - it was just the error by the Commission. Otherwise, how does one reconcile it with what is said in HG***? You cannot have the benefit of the mistake.

THE CHAIRMAN: Maybe they are different. But, if they did reduce the fine, and not for other reasons, then they did ----

MR. WARD: They gave them the benefit of the mistake.

THE CHAIRMAN: -- give them the benefit of the mistake.

MR. WARD: But in those very particular circumstances.

THE CHAIRMAN: What are the particular circumstances?

MR. WARD: The particular circumstances were that it was really, in a sense, an error on the part of the Commission that they were not in a position to do what they otherwise wanted to do.

THE CHAIRMAN: But, what they would have wanted to do is what?

MR. WARD: Increase the penalty upon the European producers for which they otherwise had jurisdiction to do.

THE CHAIRMAN: But, here, we cannot reduce the penalty in relation to Coverite. Therefore *a fortiori* this case would say we should reduce the penalty. That fits in with sentencing rules in criminal cases where, although the rule is that the first instance court - the Crown Court - must make a disproportionate sentence because he was sentenced correctly, there is then an appeal to the Court of Appeal, and the Court of Appeal looks at all the sentences and makes them proportionate.

MR. WARD: The difficulty here though is that if you do that - and on the basis that the OFT have simply made a mistaken - you are looking exactly at the language of *Hoek Loos NV* which says that you cannot extend the benefit of what appears to be a mistake in favour of another party.

THE CHAIRMAN: We are not bound by the European Court jurisprudence for this purpose, are we?

MR. WARD: No. No. Absolutely right. But, it is also relevant, in my submission, that here in the *JFE* case, what was being dealt with was a substantive error of assessment in terms of equality of treatment. In other words, the Commission itself has erred in some substantive case. In our case, all we have, if anything, is the solicitors, Denton Wilde Sapte, giving incorrect information to the OFT. The OFT has done nothing wrong here.

THE CHAIRMAN: But it may not be incorrect.

MR. WARD: It may be correct; absolutely. I am assuming against myself that it is at least a mistake. We do not know that, and we cannot proceed on the basis that it is a mistake.

THE CHAIRMAN: We do not know whether it is right to find on the basis of the £30 million or on the £18 million. We do not know that, because that is going to be decided in some other panel.

MR. WARD: Or not at all. But, what we do know is that the OFT applied its method, and took the correct approach to the question of fairness whereas in the *JFE Engineering* case the Commission ... a substantive mistake of assessment as to how serious the infringements were by the European producers. That, in my respectful submission, is, on any view, a clear basis for distinction of the approach in *JFE*.

THE CHAIRMAN: So, it is a different sort of mistake.

MR. BLAIR: The later case of the two is *Hoek Loos NV*, is it not?

MR. WARD: It is, indeed.

MR. BLAIR: And it is only Court of First Instance.

MR. WARD: They both are, in fact.

MR. BLAIR: So they are. I do not see that the earlier one - *JFE* - was cited in *Hoek Loos*.

MR. WARD: Nor indeed in *JFE* is this list of authority relied upon in *Hoek Loos* cited by the court of first instance on that occasion. Can I assist further?

MISS ROSE: Mr. Ward, if we were to decide that we accepted the second basis on which you put your case - namely, just the collusion of Makers being influenced by the figures given by Asphaltic, do you accept or not that that is a less serious infringement which ought then to lead us to re-calculate the fine and give Makers a reduction?

MR. WARD: May I take instructions before I answer that? (After a pause): Madam, the views expressed behind me are rather inconclusive on that question as you will have gathered. I think the OFT is a bit reluctant, on the hoof, to accept that there could be a material distinction between the way in which collusion in the context of competitive tendering actually took place. I entirely accept, of course, that that is something it is open to the Tribunal to consider when exercising its original jurisdiction on setting the penalty if it finds liability. But, I am afraid I do not think I can clearly make a submission on that at such short notice.

MISS ROSE: Does that mean that if we did go down that line you would want to come back?

MR. WARD: May I take instructions on that? (After a pause): I think in those circumstances it is a matter for the Tribunal in fact.

MISS ROSE: That we should set an amount.

MR. WARD: You set the penalty.

MISS ROSE: I think that is right.

MR. ROBERTSON: I have got three points in reply. The first is in relation to the OFT's first formulation of the case which is that this is deliberate collusion - that is, that in fact Rock was seeking cover from both Asphaltic and Makers, and that is why Makers put these figures in. Well, if Makers is in on that, why on earth is it having to rely on the figures supplied by Asphaltic. It has already got a quote from Guaranteed which is way in excess of what Asphaltic supplied to it. There is actually no need for it to rely upon the figures that Asphaltic quoted. In any event, that case is entirely inconsistent with the uncontroverted evidence that Makers desperately wanted to win this contract.. Why on earth would it collude to put itself out of the running and leave the way open to Rock? The OFT's primary case is just incoherent and implausible.

Secondly, the OFT's alternative case, somewhat developed in my learned friend's submissions, that knowing the receipt of information by Makers equals collusion contrary to Section 2 ----

It does not. As a matter of law, it does not. The evidence is that Makers received a sub-contract quote from Asphaltic in circumstances where it had reason to believe that Asphaltic would also be involved either as (as on the evidence is more likely) sub-contractor to someone else, or possibly as a contractor in its own right. It has no way of knowing the figures that Asphaltic have supplied to Makers; how they relate to the price at which Asphaltic is going to quote to another contractor; or the figures that Asphaltic might have put in itself, itself acting as a principal contractor. As a matter of law, anti-competitive collusion is knowingly substituting co-operation for the risks of competition. Merely receiving a quote from a sub-contractor who may also be involved in a competing bid does not replace co-operation for the risks of competition - otherwise, any time that a contractor receives a quote from a sub-contractor and the sub-contractor does as Asphaltic and says, "You don't have to tell us about this. We've already been invited to be involved ourselves either as a sub-contractor or as a principle contractor" ---- That immediately raises, "What should Makers have done?" Makers should have said, "Sorry. We can't deal with you". That would have put itself out of the running. So, there would not have been as many bids as there were for this contract - a reduction of competition there. It means that a sub-contractor can only involve itself in potentially one consortium bidding for a contract. It means that if it is acting as a sub-contractor it cannot say, "Well, I'll act as a sub-contractor, and maybe I'll also put in a bid myself as a contractor". That, on the OFT's case would also be anti-competitive collusion. It is just commercially idiotic.

Makers receives a quote from Asphaltic. The limit of its knowledge is that it knows that is a price that Asphaltic is willing to commit to do the work as sub-contractor to Makers. That is not collusion with Asphaltic as to the price at which Makers actually will bid. In fact, the evidence here is that Mr. Bowman thought, or assumed, that Asphaltic would assume that Makers would add a margin. In fact, it did not. It did that because it wanted to get its foot in the door ... get to the negotiating table. It is not collusion with Asphaltic indicating to Makers the price at which it is going to put its bid in. It might decide to go ahead and do it as a loss. We have had evidence that sometimes that happens. Or, it might go and stick an unrealistic mark-up on it. Neither of the parties know. They are not knowingly substituting co-operation. Obviously, if you deal with a sub-contractor there is going to be co-operation. That is in the nature of a contract. That is what a contract is - it is an agreement to co-operate. Any sub-contract is going to have a price on it. That is just the price for the work. That is not collusion as to the price at which either of them will subsequently bid at. It just does not come within the legal definition that I have already cited to you, as set out by the Court of Appeal in *JJB*. It is not knowing substitution of co-operation for the risks of competition. It does not meet the

test set out in Part 2 of the test set out at 411 of the Court of Appeal's Judgment in *JJB*. It just does not meet that test. On the facts, there is nothing here that discloses that element of knowing that you are substituting practical co-operation for the risks of competition. That element is missing here.

So, the OFT's alternative case also falls down.

The third point I have in reply is quite simply in relation to penalty. If we are wrong on that ---- My learned friend drew your attention to *JFE Engineering* in the court of first instance. But, he did not draw attention to the fact that it was cited to the Court of Appeal in *JJB*. In para. 257 of the Court of Appeal in *JJB* they say this, "We do not see why the ability of the other parties to rely on unequal treatment is a ground of appeal at all. It should depend on the decision of the favoured undertaking whether or not to appeal. If there has been unequal treatment in the imposition of penalty, the OFT has acted in breach of relevant principles of community law, and therefore of the Act. That breach ought, in principle, to be available to the other undertakings as a ground of appeal". Coverite having apparently got away with it, they are very unlikely to have wanted to appeal. In any event, they have gone into administration. We have a situation where we have a decision which discloses right at the outset that Coverite's annual group turnover is £33 million and not £18 million. We are entitled to proceed on that basis in drawing the very obvious discrimination against us. Both Coverite and Makers were only found guilty of one infringement each and are entitled to have the penalty reduced for that discrimination.

Those are the three submissions that I have in reply.

THE CHAIRMAN: Thank you very much. We will in due course deliver our Judgment.