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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case No 1033/1/1/04

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

24th September, 2004

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

Sitting as a Tribunal in England and Wales

BETWEEN:

RICHARD W PRICE (ROOFING CONTRACTORS) LTD Appellant

and

OFFICE OF FAIR TRADING Respondent

The Appellant appeared In Person.

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

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**MAIN HEARING**  
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1 THE CHAIRMAN: Yes, Mr. Price?

2 MR. PRICE: Having dealt at some length with concerted practice and Rule14, I am not prepared  
3 to argue – I am not a lawyer, as you are well aware – it would just confuse everybody.

4 THE CHAIRMAN: You adopt what Mr. Beard says?

5 MR. PRICE: Yes, it sounded fairly reasonable.

6 THE CHAIRMAN: And in so far as it was the facts of the Apex case, we will transpose it to the  
7 facts of your case.

8 MR. PRICE: Thank you very much. I would like to talk about what actually happened for the  
9 tender inquiry. I had a phone call through from BCC Donaldsons asking whether we would  
10 like to price some work at Pallasades, and the classified it as some asphalt repairs and  
11 coating works. We said “yes” because you agree to price things – to a contractor you are  
12 really only as good as your last job, and only trade as long as you get inquiries through.  
13 That is just the nature of the business.

14 I went to Birmingham and turned up at the Pallasades Shopping Centre. I do not  
15 know if you know the Pallasades Shopping Centre? It is basically above New Street Station.

16 THE CHAIRMAN: Oh yes.

17 MR. PRICE: Probably the best way to describe it is like Victoria, London, with a shopping centre  
18 above that, a car park above that, and then offices above that. It was huge. It was one of the  
19 biggest flat roofs I have ever seen. It was just a very, very large job. We could not  
20 undertake it, there was just no way we had the financial clout, resources, or anything to  
21 undertake it – I would not even have undertaken it in London, let alone in Birmingham. It  
22 involved the removal and replacement of plant on roofs, plumbing, extensive scaffolding  
23 around the buildings. It would invariably envisage putting something like my entire  
24 workforce now – you talk about vertically integrated companies, I am the most vertically  
25 integrated company I have, there is just me. I do the estimating, contract managing, I do all  
26 the wages. My wife does the typing, which is why there are these handwritten notes, she is  
27 away on holiday and I have to write things out by hand, I am sorry about that.

28 To price the Pallasades’ contract realistically would have taken me, I think, about  
29 five days. We have tried over a number of years to be competitive in the West Midlands,  
30 and especially Birmingham. It was my father’s idea – he subsequently retired in early 2000  
31 – to try to break into the market, and we have not done so. We did one job there which was  
32 back in the mid to late 90s, and we lost money – a considerable amount of money. We  
33 tried, because, as I said, you need to have the inquiries come through to guarantee that you  
34 still get inquiries. Sometime when you approach jobs, the likes of Apex and Rio and

1 Briggs, if the job is small and it goes out to tender, and it is less than, say, £20,000 or  
2 £30,000 they are not interested, and that is the only realistic time, as a small contractor, that  
3 you can actually become competitive, because rather than send one of their estimators down  
4 they guess a price for a bid and just submit it, and it goes off. You go down and price it  
5 properly and you can actually get in for that. It is predominantly in the small area of  
6 contracts that we actually trade, especially in London.

7 So I visited the site, I took some preliminary measurements and, invariably,  
8 because we could not do the work, because it is too big, I could have overpriced the job.  
9 You just work out what it is. I think the rough estimation size it was about 7000 metres  
10 square, which is a huge area. You just sit down and say “coating works, asphalt works, and  
11 scaffolding it comes in at £150 a metre, so multiply that by 7000”, and that is the price you  
12 submit. It is grossly inaccurate. You could decline to tender, just say “Sorry, it is too big”  
13 and decline. You then end up with the problem, which has been well documented yesterday  
14 by Apex, and in our submissions, that you have to submit realistic prices and if you do not  
15 send tenders back you do become exempted from tender lists. It is really that simple.

16 In our statement of agreed facts, the Office of Fair Trading look at it and say “That  
17 is the perception in the industry. I said in my Notice of Appeal “it is a reality”, and it is a  
18 reality to a small contractor. You are reliant on tenders coming through for you to price  
19 because that is your sole source of work. Nothing you can do can jeopardise that influx of  
20 inquiries – you might as well just shoot yourself in the foot, and pack up and go home. It is  
21 realistically that simple.

22 We could have subcontracted the works out either in part or in whole. At the  
23 moment in the construction industry in this country there is a serious shortage of skilled  
24 labour. The Office of Fair Trading draw attention to it in their Rule 14 Notice, and in a  
25 footnote in that. If you want it, it is para.314 and footnote 155 of the Rule 14 Notice, which  
26 states there is a serious shortage of skilled labour in the country and especially in the West  
27 Midlands. In London, on a practical point, you cannot seem to get anybody to do anything.  
28 There is just no subcontract labour available to you. The more that you go out of London  
29 the worse it gets, probably because we are not training enough, or recently I lost two of my  
30 guys, they went to drive trains because there is more money driving Connex trains than  
31 actually being a roofing contractor. That is the sad fact about it, it is underpaid. We could  
32 have subcontracted the works out, as a whole, it is a complete package, but in doing so I  
33 have now got to find another contractor that is big enough to take on the works with direct  
34 labour. So he is going to be there, four or five times bigger than my own company, to

1 employ that amount of labour to do it. We only know one contractor in the West Midlands,  
2 as we mentioned in our submissions, and that was Rio, and they had the tender. In hindsight  
3 I should have said to them “Will you be my domestic subcontractor?” If they had priced it  
4 as subcontractor I would have become the principal contractor and I then take over  
5 responsibility for health and safety, welfare and various other legal responsibilities that are  
6 put on me as a principal contractor, with them as a subcontractor.

7 The problem with that is, they are bidding for it as a main contractor in their own  
8 right. I am also caught in the element there that I had to add a certain percentage to their  
9 price to cover my overheads, because I have now got to pay increased insurance premiums  
10 because I take on domestic subcontractors. I have to now make provision for health and  
11 safety, welfare, and all the other things that go with it. That then over inflates and over  
12 prices the job. An example of that – if you think that being a main contractor, or a principal  
13 subcontractor and a main contractor is unusual – a the moment it is slightly different, but  
14 the Government has employed Bayles to build two aircraft carriers, and British Aerospace  
15 bid for the same contract and they are now Bayles’s subcontractor. Do not ask me why, it is  
16 just the way it can happen, and it does and, from what I gather, that is perfectly legal in a  
17 controlled environment, if they decide to become a domestic subcontractor that is fine. But  
18 if they are bidding as a main contractor we would stand no chance because of the inflation  
19 of price. So I asked them for a cover, and I have never denied that in any of the  
20 correspondence I have put through here, and in the subsequent responses to the Rule 14  
21 Notice, because at the end my price would have been vastly inflated. Typically you would  
22 have had to have had between 20 and 25 per cent. as a main contractor on to a  
23 subcontractor’s price. That is typically what we would consider to go through and do, and  
24 that would have pushed the tender well in excess and make it unobtainable. So I asked Rio  
25 for some guide figures, which they gave me, which I submitted. I have never, ever denied  
26 that.

27 Generally now, because of the way the insurance market is in the UK, we as a  
28 company in flat roofing are shrinking. We could not afford to pay our insurance premiums  
29 from two years ago to undertake the amount of flat roofing work that we used to do, and so  
30 our company is shrinking. We are involved more and more in pitched roofing, and our  
31 turnover, even in London and the South East – our own market – is now down below  
32 £75,000 a year. The claims that they had at Centre Parcs has pushed our insurance  
33 premiums through the roof so we have had to subcontract out almost all our flat roofing  
34 work now to domestic subcontractors and concentrate on pitch roofing, because the

1 premiums involved in that are significantly less. I do not make any excuses for it, it is just  
2 the market. The insurance industry, as you are probably well aware from the technical  
3 press, has increased all its premiums dramatically for employers and public liability, and  
4 especially those in the construction industry. Apex would probably verify this fact, three  
5 years ago our premiums went up nearly 500 per cent., which caused us untoward problems.  
6 So we had to change the structure of our company.

7 We do not trade in the West Midlands, and I would just like to talk about the fine,  
8 which is the real basis of my argument. We do not trade in the West Midlands, we cannot  
9 trade in the West Midlands, we cannot get there. We are not competitive – to put guys up  
10 there to do work means you have to lodge them, you have to pay their transport backwards  
11 and forwards. You have to pay subsistence, it proves you are just being uneconomic –  
12 unless you have a real niche job, or a job that you have a competitive edge to go in and  
13 attack, and for us it just has not happened – the job we did get we lost money on. It happens,  
14 as a contractor you take a profit and you also take the loss, and in that job we just took the  
15 loss and walked away. I have now almost discontinued pricing work in the West Midlands –  
16 I cannot compete so I am not going to bother doing it. It is too expensive to go and price it  
17 when I can concentrate my time and effort in London and the South East, which is our area.

18 There are some errors in **this**, and I do apologise, it was written by me very late  
19 one night and I have messed it up, so I will go through it just for some minor corrections.  
20 The Office of Fair Trading could not fine us under its formula (as explained by the counsel  
21 next to me) because we do not turn over any trade in the area, we have no flat roofing  
22 turnover in the area, and so it decided to impose a fine on us on other matters of £20,000.  
23 This, we contest, is unfair, and it is disproportionate as our total turnover, in relation to the  
24 other people involved in this inquiry. I use the table below – I made a mistake, our fine was  
25 actually £18,000, I made the mistake between gross and net fines, what we actually paid as  
26 opposed to what we were actually fined. Our fine was £18,000. Based on turnover in 2001,  
27 which was the last year I had for all of the people, taken from the Decision of the Office of  
28 Fair Trading, and it is pertinent that I use the argument of “as late as possible”, because the  
29 fine appears in this financial year and not in what happened two, three, four or five years  
30 ago. Anything we pay now comes into this financial year, not subsequently, because as you  
31 are aware that is the way the companies trade. It represents approximately 2.2 per cent. of  
32 our turnover, not 2.4 – I do apologise.

33 On the list of offences, if you go down to the table at the bottom – I apologise to  
34 Apex and I apologise to Rio and to yourselves – the number of offences was for both of

1 them two not three. For Howard Evans, at the bottom, their fine was subsequently reduced  
2 from paper work, from £90,000 to £71,000. Based on those figures our fine is  
3 proportionately greater than people we were accused with and that were involved in the  
4 same investigation – almost double Rio and Briggs for fewer offences in an area where we  
5 cannot trade, and cannot compete in, and I have never denied. With Apex it is even greater.  
6 Howard Evans I chose – well I did not, actually, my four year old son, James, picked a  
7 name out of the hat and I put it there purely at random, as a control, just to highlight  
8 something that was outside the scope of this Appeal, and also the scope of the Pallasades’  
9 contract. I have not tried to include in this any duration. I figured that would just  
10 completely confuse the issue – I was trying to make it as simple as possible.

11 This year we are having a torrid time – I make no bones about it. The construction  
12 industry is being squeezed on profit margins and we are having a fairly torrid time. I project  
13 my profit for this year to be £12,000. An £18,000 fine in this financial year is 150 per cent.  
14 of my profit. I do not like using the phrase “It will force me into liquidation” because you  
15 do not know, but it is going to cause me serious solvency issues. To give the Tribunal some  
16 idea, in the first three months of this year, my firm lost £18,593 in three months. We had a  
17 better second quarter and as it stands at the moment on 4<sup>th</sup> July, we are making a net loss of  
18 £6,668. The remaining six months of the year are, in fact, only five months due to  
19 holidays and a two week shut off for Christmas, so the £12,000 projected profit is a realistic  
20 profit margin, what we believe we are going to make based on current turnover.

21 I personally think it is unfair that the liquidity of my company is forced into  
22 jeopardy by the Office of Fair Trading, that is unfair. I think the fines in relation to each  
23 other are disproportionate. All I wanted to do was to submit a tender price – a realistic  
24 tender price – which, in fairness to RIO, was more competitive than a price I could have  
25 given myself. I know that is up to argument, but if you take on board that I would have had  
26 to move my entire work force to Birmingham, lodge them there for six to eight months, it  
27 was unrealistic. It just becomes an unrealistic price.

28 That is really the basis of my argument. I thank you for your time. If there are any  
29 questions you would like to ask?

30 THE CHAIRMAN: (After a pause) Mr. Price, you have given us your figures, and I think you  
31 gave us some figures before. What we have seen is your accounts – have you got your  
32 audited accounts?

33 MR. PRICE: I have the management accounts, which you can take a copy of – you are more than  
34 welcome.

1 THE CHAIRMAN: Have you got your accounts for last year that would have been used for  
2 Revenue purposes? Are you a limited company?

3 MR. PRICE: Yes.

4 THE CHAIRMAN: So you will have audited accounts, or not?

5 MR. PRICE: Yes.

6 THE CHAIRMAN: Have you got the audited accounts for last year, at home?

7 MR. PRICE: Yes, not here.

8 THE CHAIRMAN: Do you think we could perhaps see those?

9 MR. PRICE: I can certainly send them into the Tribunal. To be perfectly honest, last year we had  
10 a reasonably good trading year, so the figures are slightly distorted, in effect.

11 THE CHAIRMAN: If you want to send us two years', plus the management accounts that you  
12 have?

13 MR. PRICE: By all means, I will send those through over the next few days.

14 THE CHAIRMAN: Right. Well let us listen to what Mr. Ward says.

15 MR. WARD: Just dealing firstly with the issue of whether there was a concerted practice here,  
16 we say this is very similar to the Dudley contracts. There are no procedural issues to  
17 grapple with, but as a matter of substance it is very similar.

18 In outline, just to remind you of what happened, Price wanted to bid but did not  
19 want to win, so it asked for a price from Rio. It entered the price which Rio provided and  
20 Rio itself entered a lower bid. There is a difference, which is that a contract was not  
21 proceeded with at all, but we say that is irrelevant, because that just goes to whether the  
22 concerted practice was actually put into effect, and I submitted this morning that that did not  
23 matter. So we repeat, really, precisely the submissions we made on Dudley – is there any  
24 need for me to go through them again?

25 THE CHAIRMAN: No.

26 MR. WARD: In which case I will just turn to the question of the penalty. Dealing firstly with  
27 what Mr. Price said. He is advancing the argument essentially as was advanced in the  
28 Dudley case, about the motives for entering into this arrangement, and it is very easy to  
29 have considerable sympathy for the difficult business environment in which he operates.  
30 The substance of what he was saying was as a small contractor in the South East he could  
31 not bid competitively for any contract in the Midlands. If he had bid competitively, or put in  
32 what I call a genuinely priced bid, he thought he might have been 20 – 25 per cent. over.  
33 Well we respectfully submit that if he had done that, that would have been a composition  
34 preserving alternative which would, of course, given relevant information to the contractor

1 as well. By choosing to put in a cover bid that has substituted for competition in the way  
2 that we described.

3 THE CHAIRMAN: What he says is that it would have taken at least five days to do that, and it  
4 would have cost him a lot of money.

5 MR. WARD: Indeed, but that causes another aspect in which cover bidding substitutes for  
6 competition, because any genuine bidder is going to have to expend that time and money,  
7 and so the cover bidder free rides, in effect, and presents a bid without having to incur that  
8 cost. That distorts competition itself. So whilst one sympathises with the position the  
9 competition law and the analysis does remain the same.

10 Dealing then with what Mr. Price said about the relative sizes of these fines. Of  
11 course, Price was in a different position because its turnover was nil in the West Midlands  
12 in the relevant year, but it is very important to recall what the relevant year actually is. It is  
13 the year before the infringement which, in this case, is 1999. That is the basis of the penalty  
14 under the Competition Act, under determination of turnover for penalties rules. If I could  
15 hand up two copies – this is the letter that Price wrote to the OFT with details of its turnover  
16 for 1999.

17 THE CHAIRMAN: That is not in the files?

18 MR. WARD: I do not think it is, unfortunately.

19 MR. PRICE: Is that the letter dated 23.2.04?

20 THE CHAIRMAN: Yes.

21 MR. PRICE: That is tab 12 of the factual evidence.

22 MR. WARD: You are quite right, I am very grateful. It is in tab 12 of the Price file.

23 THE CHAIRMAN: I thought I had seen it.

24 MR. WARD: If we return to the table that Mr. Price produced in his written note, we have  
25 adjusted these figures three ways. We have adjusted them to reflect the fact that the fine is  
26 £18,000 and not £20,000, as Mr. Price himself mentioned, and we have actually adjusted  
27 them so that they are based on the relevant year, which is 1999.

28 Starting then with para. 8 of the note, the relevant percentage is [...], not [...],  
29 because the turnover was higher, it was [...]. Then we have carried out the same adjustment  
30 to the table underneath. So we have based the analysis on turnover for 1999. May I just  
31 read the figures, which are all taken from the decision.

32 THE CHAIRMAN: So you are changing the turnover of Apex, Rio and Briggs, are you?

33 MR. WARD: Yes, just for 1999, which is the year of assessment.

34 THE CHAIRMAN: Yes.

1 MR. WARD: May I read out the figures?

2 THE CHAIRMAN: Yes.

3 MR. WARD: For Apex the turnover figure is [...] and that generates a percentage of [...]. For  
4 Rio the turnover is [...] and that generates a percentage of [...]. For Briggs the turnover is  
5 [...] and that generates a figure of [...]. For Howard Evans the figure is [...] and that  
6 produces a figure of [...]. That is the correct factual way to look at this submission, but we  
7 respectfully submit that one has to be cautious with this submission, because it is not the  
8 guidelines. The guidelines do not say “The penalty has to reflect the turnover”. It reflects a  
9 complex formula, starting with a percentage of relevant turnover, and then looking at  
10 aggravation and mitigation and deterrence.

11 THE CHAIRMAN: And proportionality?

12 MR. WARD: Well of course. There is an element of discretion and you, as the Tribunal, of  
13 course, have a much wider discretion. So I do not say that this is hopelessly irrelevant and  
14 utterly misguided, but what I am saying it is an oversimplified approach as compared to the  
15 exercise that the OFT was embarked upon. Here there was a difference in this case in the  
16 sense that there was a nil turnover in the year of assessment. So the OFT had to start by  
17 saying “Starting with nil at stage two in fact, not stage 2, what view do we take about  
18 deterrence in the circumstances?” All I am saying about this is, whilst I do not say it is  
19 impermissible to have regard to it, it does not of course affect the approach and guidance  
20 that the OFT was obliged to follow.

21           Would you just give me one moment? (After a pause) One point in clarification,  
22 the figures I have just given are the figures for the year of assessment of the penalty, which  
23 is the year preceding the infringement, which is not necessarily 1999 in each case, because  
24 all of the infringements did not happen at precisely the same time.

25 THE CHAIRMAN: But in fact I think the same points arise whether you take the percentages  
26 that you have just given us – they may come out slightly differently, but the point still  
27 arises.

28 MR. WARD: Yes. There is a slight forensic point in there to me, which is to say that on my  
29 version Mr. Price’s figure is more in the range, whereas on his version it seems to be the  
30 highest one. In any event you now have the appropriate basis, the fact, on which to assess  
31 the submission, and unless I can assist further, those are my submissions.

32 DR. PRYOR: Can I just ask, Mr. Ward, does the OFT have a position on the proposition that the  
33 level of a fine, calculated according to your principles, might nonetheless be one that would

1 cause financial difficulties to a fined company at the present time – is there either case law  
2 or doctrine within the Office which would deal with that particular point?

3 MR. WARD: I think I know the answer, if you will forgive me I will just check.

4 MR. BEARD: Whilst Mr. Ward is doing that, it has been noted that Mr. Ward has read out a  
5 number of figures about turnover. I believe that many of those figures may actually be from  
6 confidential versions, not just for Apex but possibly for other parties.

7 THE CHAIRMAN: I had assumed they were not because they were in the skeleton.

8 MR. BEARD: I am not absolutely sure, but it has been raised by those behind me and it is just  
9 something that perhaps ought to be double checked before they are left on any transcript or  
10 referred to in any Decision.

11 THE CHAIRMAN: I do not think there is any member of the public in court.

12 MR. BEARD: Well yes, I think there is.

13 MR. WARD: Can I just answer your question before turning my mind to whatever Mr. Beard is  
14 saying – I half heard.

15 MR. BEARD: Yes, I am sorry.

16 MR. WARD: That is all right. My instructions are that the position is that had financial hardship  
17 considerations been advanced at the time the penalty was being assessed, they would have  
18 been at least considered. That is not the same as saying necessarily what Mr. Price has said  
19 today would have led to a reduction of the penalty because, of course, as the Tribunal has  
20 picked up, we have not seen any concrete evidence of what the true situation is. But no, we  
21 would not dismiss that as absolutely irrelevant if it had been advanced at the time.

22 Now I think Mr. Beard was pointing to the possibility that some of this is ----

23 MR. BEARD: Yes, it is just a concern that some of these figures that have been referred to are  
24 not actually public, they are confidential, but in part that is something we cannot comment  
25 on. We would have to do a comparison of the two texts. It may be that the OFT are in a  
26 position to help.

27 THE CHAIRMAN: Turnover should be in the published accounts. There may not be published  
28 accounts, I do not know.

29 MR. BEARD: It may not be, because it depends if it is relevant turnover, of course, because  
30 relevant turnover is broken out of global turnover because it is related to relevant market.

31 THE CHAIRMAN: Can I make an order for the time being – I am asking if I can make the order,  
32 rather than making it – that those figures are not to be published?

33 MR. WARD: Yes.

34 MR. BEARD: Yes.

1 MR. WARD: Yes. Perhaps what we can do is write to the Tribunal and clarify what the position  
2 is.

3 MR. BEARD: If you would not mind.

4 THE CHAIRMAN: In the interim those figures are not to be published. In other words, what was  
5 stated in here in relation to figures is not in the public domain, and must be kept  
6 confidential.

7 MR. BEARD: I am most grateful.

8 MR. WARD: We will write to the Tribunal when we have had a chance to look at the documents.

9 THE CHAIRMAN: Yes. I am just concerned how I make that order here, having regard to the  
10 fact that there are members of the public in here now.

11 MR. BEARD: I would have thought you had the power to make the direction. We can look, but I  
12 do not see why anyone who has heard those figures is not permitted to repeat them, and if  
13 there is any transcript to be prepared, of course they can be taken out of that. That tends to  
14 be less of a problem. It may be that I am setting a hare running loose unnecessarily, but  
15 those behind me have raised it and I thought it appropriate ----

16 THE CHAIRMAN: No, you are quite right to raise it. While the Referendaire is looking that up,  
17 can I ask you a question, Mr. Ward? I think you have said that you accepted the  
18 proportionality ----

19 MR. WARD: Yes.

20 THE CHAIRMAN: -- in other words that there has to be proportionality between the fines  
21 imposed on civil appeal, in the same way as in a criminal case?

22 MR. WARD: It is obviously a principle of administrative law, you have to treat like alike.

23 THE CHAIRMAN: And it is a principle of sentencing as well, so there must be a principle here.  
24 So one looks at the way that Mr. Price has very usefully put this out, and whether one takes  
25 his figures or your figures, it is clear that if you take Apex and RIO, he is very much above  
26 those.

27 MR. WARD: Yes.

28 THE CHAIRMAN: Forgetting about Briggs and Howard Evans, and that those fines are dealing  
29 with two offences and not one.

30 MR. WARD: Yes.

31 THE CHAIRMAN: Is there a reason for that disproportionality?

32 MR. WARD: I cannot give you a simple "yes, here it is". All I can say is that in each case an  
33 individual decision is made applying the criteria of the guidance, where certain factors are

1 mitigating, certain factors are aggravating. There is a difference, simply that there was no  
2 starting turnover. So when the OFT came to assess ----

3 THE CHAIRMAN: No, I appreciate that.

4 MR. WARD: There is not a tidy answer where I can say “Oh yes, Mr. Price’s case was much  
5 more grave because of X”, there is no X.

6 THE CHAIRMAN: So would it be appropriate to say that Mr. Price’s case and Apex’s case, and  
7 Rio’s case are not dissimilar?

8 MR. WARD: I would rather, if I may, just reiterate what I said.

9 THE CHAIRMAN: Leave it to us.

10 MR. WARD: Each turns on its facts. Each case has a broad similarity which of course you are  
11 pointing to, but when one says is one comparing like with like they are not exactly the  
12 same, they have distinct features. The OFT was bound to treat them as individual cases. For  
13 example, if the OFT had just said we are going to do to Price exactly what we did to Apex,  
14 and vice-versa no doubt there would have been complaints about that, which ever party had  
15 come off worse would say “There are all sorts of differences in our case”. So there are  
16 broad similarities, but there are differences, and the OFT has to grapple with those  
17 differences in reaching an individual decision.

18 THE CHAIRMAN: If one was saying 2.2 per cent - if we use Mr. Price’s figures – was  
19 appropriate in Mr. Price’s case one would have to show the features which made it  
20 appropriate in Mr. Price’s case to be higher than in Rio and Apex, and you are not  
21 submitting that?

22 MR. WARD: I am not submitting any simple factor. All I am saying is that the OFT has to go  
23 through the whole exercise in each case applying it to the facts. I cannot really take it  
24 further than that.

25 THE CHAIRMAN: No. Thank you very much.

26 MR. WARD: Thank you.

27 THE CHAIRMAN: (After a pause) I am going to make an order that the figures remain  
28 confidential until the matter is sorted out and so either in the transcripts when the are  
29 published the figures will be in or they will be out, and that will show whether or not they  
30 are confidential. So they must be kept confidential unless they are published in the  
31 transcript.

32 MR. BEARD: I am most grateful.

33 MR. WARD: I am very grateful, and I also apologise that we presented the Tribunal with this  
34 problem.

1 MR. BEARD: I should note that those behind me have pulled out the version of the Decision  
2 from the public document which has all these figures excised from it. So I think it is very  
3 likely that ----

4 THE CHAIRMAN: That they are confidential.

5 MR. BEARD: Yes.

6 MR. WARD: We will double check.

7 THE CHAIRMAN: When the transcript is published, which it will in due course be on the  
8 internet the figures will be in, or if they are not in they must remain confidential.

9 MR. BEARD: I am most grateful.

10 THE CHAIRMAN: Mr. Price, apart from that interruption, do you have anything to say in  
11 response to what Mr. Ward?

12 MR. PRICE: Just one or two things. In relation to the Pallasades contract Mr. Ward was quite  
13 correct in saying that Rio did produce the cheapest price, but it was not the most  
14 competitive price for the contract, that was awarded to another company for a different  
15 system. That was excluded by BCC Donaldsons, it was a "best value" contract, rather than  
16 the most competitive. There was an element of performance from the membranes as well.  
17 So the actual cheapest tender price was from a company called "Single-Ply Roofing" and  
18 not Rio Asphalt and Paving.

19 The only other point is that whilst I understand why he is getting the turnovers  
20 based on a figure from 1999, we are now in 2004 moving towards 2005, turnover and profit  
21 are relevant to this financial year and not from four or five years ago, and that is what  
22 happened in a company last week. Because we earned profits last year, or the year before or  
23 the year before that, does not affect the solvency today.

24 THE CHAIRMAN: Have you paid the £18,000?

25 MR. PRICE: No.

26 THE CHAIRMAN: I think there are two points then. The first point is whether the fine, when  
27 you calculate it, is proportionate, that is the point you are making.

28 MR. PRICE: Yes.

29 THE CHAIRMAN: And we have to consider that, and whether the way it was worked out is an  
30 appropriate way. Then there is your submission today in mitigation that on your position  
31 today, or your position last year, or your general position, for you to pay that fine now has  
32 an effect on your solvency or your business and what you are asking us to do is to take that  
33 into account.

34 MR. PRICE: Yes, Ma'am.

1 THE CHAIRMAN: So there are two points, one – the way it was done at the time, and whether it  
2 was proportionate; and two – are you able to pay that fine today?

3 MR. PRICE: Yes.

4 THE CHAIRMAN: And that is why I think your accounts for the last few years – because I think  
5 it is a conglomerate thing really – and your management accounts for this year would be  
6 useful so that we can consider that.

7 MR. PRICE: Yes. One thing that I will say is that I do not say we “will” be insolvent, “may”,  
8 because I have no idea what is going to transpire for the next five trading months in effect.  
9 We will not earn excessive profits because that is probably a pipe dream, but the profits  
10 may be there to enable us to pay – if I could pay the fine I would probably pay the fine, but  
11 at the moment I do not think I can, and that is why I mentioned the solvency matter.

12 THE CHAIRMAN: Part of the question is how much - it is not just profit, it is what assets the  
13 company has?

14 MR. PRICE: Oh yes.

15 THE CHAIRMAN: And how much money is in the bank from previous years.

16 MR. PRICE: Which detracts slightly from the proportional thing.

17 THE CHAIRMAN: But we will see that when we see the accounts.

18 MR. PRICE: Yes.

19 THE CHAIRMAN: And that will be black and white on the accounts, so we can have a look and  
20 see how much of that we take into account.

21 MR. PRICE: Thank you.

22 THE CHAIRMAN: Are you happy with that, Mr. Ward?

23 MR. WARD: Absolutely, yes.

24 THE CHAIRMAN: I do not think there is anything else, is there? So thank you all very much for  
25 the very useful submissions, and can I just say thank you very much, Mr. Price, and we will  
26 in due course provide a Judgment.

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