Neutral citation [2011] CAT 13

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1122/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

27 April 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
THE HONOURABLE ANTONY LEWIS
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

AH WILLIS AND SONS LIMITED

Appellant

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 8 July 2010

JUDGMENT

APPEARANCES

Mr. Matthew Cook (instructed by Field Seymour Parkes) appeared for the Appellant.

Mr. Daniel Beard and Mr. Philip Woolfe (instructed by the Office of Fair Trading) appeared for the Respondent.

I. INTRODUCTION

1. On 21 September 2009, the Office of Fair Trading ("OFT") published an infringement decision entitled "Case CE/4327-04: Bid rigging in the construction industry in England" ("the Decision"). The Decision found that, between 2000 and 2006, 103 undertakings had been party to one or more agreements and/or concerted practices infringing section 2 of Chapter I of the Competition Act 1998 (the "Chapter I prohibition": section 2(8)). Penalties were imposed on those undertakings found to have infringed the Chapter I prohibition.

2. The Decision is – unsurprisingly, given the number of addressees – extremely long. For the purposes of this Judgment, references are in the following form: "Decision/II.10-16 (p36)", where the first reference (after "Decision/") is to the relevant paragraph numbers, and the bracketed reference to the equivalent page number(s). This example thus refers to paragraphs II.10 to 16 of the Decision, at page 36.

3. One of the addressees of the Decision was AH Willis & Sons Limited ("Willis"). The company is described in Decision/II.10-16 (p36). The Decision found that Willis had committed three infringements of the Chapter I prohibition. Each of these infringements concerned the alleged provision of a "cover price" by Willis to Mansell Construction Services Limited ("Mansell"). Mansell, and its group structure, are described in Decision/II.133-182 (pp56-64). It, too, is an addressee of the Decision.

4. This is not the first occasion on which the Tribunal has had to consider cover pricing. The issue arose also in *Apex Asphalt Paving Co Limited v Office of Fair Trading* [2005] CAT 4 and in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11. The practice has, of course, now been the subject of consideration in other appeals arising out of the Decision (see, for example, *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3, *GF Tomlinson Building Limited and others v Office of Fair Trading* [2011] CAT 7, and *Barrett Estate Services Limited and others v OFT* [2011] CAT 9). Cover pricing occurs where one of those invited to tender for a construction

contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is tendering for that contract (Company B). Company B will be seeking to win the contract and will have reached a view as to its own tender price. Indeed it may already have submitted its own tender to the client. The cover price which it provides to Company A will be at a level sufficiently high to ensure that if it is tendered Company A does not win. This price is submitted to the client by Company A as though it is a genuine tender. It should be noted that Company B does not reveal its own tender price to Company A – the cover price is an inflated price. Clearly, cover pricing requires co-operation between two of the contractors being asked to tender: one must want a cover price, and another must be prepared to give it. In Decision/III.74 (p357), the OFT described the phenomenon in the following terms:

> "Cover pricing or cover bidding occurs when a supplier/bidder (Bidder A) submits a price for a contract that is not intended to win the contract; rather, it is a price that has been decided upon in conjunction with another supplier/bidder (Bidder B) that wishes to win the contract. It therefore only gives an impression of competitive bidding, as the token bid submitted by Bidder A is higher than the bid of Bidder B who seeks to win the contract. Whether or not the decision by Bidder A not to submit a genuine competitive bid was taken in conjunction with Bidder B, the level of the uncompetitive bid submitted by Bidder A was set using commercially sensitive price information obtained from Bidder B."

As to the final sentence of the OFT description, it is not alleged by the OFT that cover pricing necessarily or typically involved the two companies reaching an agreement that the recipient of the cover price would cease to be a contender, and no such allegation is made against Willis in the present case.

5. The three infringements that the OFT found that Willis had committed were as follows:

(1) *Infringement 188.* This infringement ("Infringement 188") concerned the provision, by Willis, of a cover price to Mansell in respect of a tender by Mansell for the refurbishment of Willington Down Farm and Brick Cottage, Didcot. The date for tender return was 16 April 2004.

Infringement 188 is described at Decision/IV.5182-5214 (pp1328-1334).

(2) *Infringement 215.* This infringement ("Infringement 215") concerned the provision, by Willis, of a cover price to Mansell in respect of a tender by Mansell for the conversion of 14 Redland Road to flats. The date for tender return was 28 January 2005. Infringement 215 is described at Decision/IV.6018-6049 (pp1475-1481).

(3) *Infringement 224.* This infringement ("Infringement 224") concerned the provision, by Willis, of a cover price to Mansell in respect of a tender by Mansell for the conversion of 12 and 16 Redland Road to flats. The date for tender return was 27 May 2005. Infringement 224 is described at Decision/IV.6244-6291 (pp1517-1525).

We shall refer to these three infringements collectively as "the Infringements".

6. In the case of each of the Infringements, a penalty of £40,006 was imposed. The relevant part of the Decision dealing specifically with the penalties imposed on Willis is at Decision/VI.401-404 (pp1720-1721).

7. Willis appeals in respect of the OFT's findings on all three Infringements, both as regards liability and the amount of the penalties imposed.

II. THE CHAPTER I PROHIBITION AND THE JURISDICTION OF THE TRIBUNAL

8. As we have stated, the Infringements found by the OFT were infringements of the Chapter I prohibition (Decision/III.3-4 (p339)). The Chapter I prohibition is contained in section 2 of the Competition Act 1998 ("the 1998 Act"), which provides as follows:

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevent, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

(4) Any agreement or decision which is prohibited by subsection (1) is void.

(5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(6) Subsection (5) does not apply where the context otherwise requires.

(7) In this section 'the United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

(8) The prohibition imposed by subsection (1) is referred to in this Act as 'the Chapter I prohibition'."

9. The OFT's jurisdiction to impose penalties in respect of infringements that it has found to exist arises by virtue of section 36(1) of the 1998 Act. By section 36(3), the OFT may only impose a penalty if it is satisfied that the infringement has been committed intentionally or negligently.

10. Findings of infringement of the Chapter I prohibition, and decisions to impose penalties are appealable to the Tribunal under section 46 of the 1998 Act. By virtue of section 46(5), Part I of Schedule 8 to the 1998 Act makes further provision for such appeals. For present purposes, it is simply necessary to note that paragraph 3(1) of Part I of Schedule 8 provides that

"[t]he Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal".

and paragraph 3(2) provides that

"The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—

(a) remit the matter to the OFT,

(b) impose or revoke, or vary the amount of, a penalty,

(c) …

(d) give such directions, or take such other steps, as the OFT could itself have given or taken, or

(e) make any other decision which the OFT could itself have made."

III. ISSUES IN THE APPEAL AND STRUCTURE OF THIS JUDGMENT

11. As we have stated, Willis appeals in respect of the OFT's findings on all three of the Infringements, both as regards liability and the amount of the penalties imposed. We have considered the Decision, the pleadings, the written submissions of the parties and the parties' oral submissions.

12. We shall consider the issues of liability first. The question of penalties is dealt with in Section VIII below.

13. In relation to liability, as regards Infringements 188 and 215, Willis contends that the OFT has failed to meet the burden of proof, that rests on it, to show that these infringements were in fact committed by Willis. As regards Infringement 224, the facts are common ground. Willis disputes liability because it contends that it is not legally liable for the actions of the person who committed the infringement. Infringement 224 thus raises rather different issues from Infringements 188 and 215, and we shall consider them separately.

14. The three infringements have certain facts in common. In each case, a client (the University of Reading) sought tenders from a limited number of companies: in the case of Infringement 188, four; in the case of Infringement 215, six; and in the case of Infringement 224, five. In each case, these companies included Willis and Mansell, and the OFT concluded that on each occasion Willis had provided a "cover price" to Mansell.

15. In the case of each infringement the OFT determined that:

(1) Mansell was unable to submit a tender by the return date and/or did not want to win the tender.

(2) Mansell requested and received a cover price from Willis.

(3) Mansell submitted its bid on this basis.

See Decision/IV.5211 (pp1333-1334) (Infringement 188); Decision/IV.6046 (pp1480-1481) (Infringement 215); Decision/IV.6288 (p1525) (Infringement 224).

16. As we observed in paragraph 13 above, the evidence upon which the OFT based these determinations was different, and a distinction needs to be drawn between, on the one hand, Infringement 224 and, on the other hand, Infringements 188 and 215.

17. In the case of Infringement 224, the OFT had the benefit of the following factual input from Willis, which was provided in a letter to the OFT from Willis' solicitors dated 23 April 2007. The Decision relied on this input from Willis. It is appropriate to set out the relevant paragraphs of the Decision (Decision/IV.6257-6259 (pp1519-1520)):

> "**IV.6257** The OFT wrote to AH Willis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that AH Willis had participated in bid rigging on this tender. In response to that letter AH Willis stated that *'it does not believe that it has been involved in bid rigging on any of these projects.'*
>
> **IV.6258** As part of its response to that letter AH Willis described its relationship with Cyril Elbourn ('CE'), as follows:
>
> *'Cyril is a freelance costs estimator/quantity surveyor who works for a number of clients, though it would be fair to say that most of his time is in fact spent working for [Willis]. He has been working for [Willis] for the past 4 years'.*
>
> **IV.6259** In respect of this tender, AH Willis advised that:
>
> *'The directors' inquiries reveal that a few days before the deadline date for bid submission, Cyril received a telephone call from someone named Barry Russ at Mansells. He asked if [Willis] were bidding on*

this particular project. Cyril confirmed that they were. Mr Russ asked Cyril how he was "getting on". Cyril said that he had nearly finished preparing their bid. Mr Russ said that he was in great difficulty due to pressure of other work and asked Cyril if he would "help" by writing to the University's architect asking for a 7 day extension of the deadline, as Mr Russ himself intended to do. Cyril refused. A short while later Mr Russ called again. He indicated that he had discussed the matter with the University's architect and had been told that it was not going to be possible to grant even a short extension of the deadline. He again asked Cyril how far he had progressed with the preparation of the tender documentation. On behalf of [Willis], Cyril indicated that this had now been completed and submitted. Mr Russ asked Cyril if he would "help" Mr Russ by preparing some figures for Mansells' bid. He said to Cyril that Mansells did not really want the job and he would "want you to put me well away". As he had already completed and submitted [Willis]'s bid, Cyril agreed to help and prepared some figures for Mansells' use.

Subsequently [Willis] was advised that its bid was the lowest and it was invited to provide a fuller breakdown of that bid, which it duly did. Cyril then received another telephone call from Mr Russ in which he was told that Mansells' bid had in fact been the second lowest and they too had been invited to provide a breakdown of their bid. Mr Russ pointed out that he was in difficulty doing this as he had not calculated their original bid. He asked Cyril to help him once more. Cyril then provided Mr Russ with a Photostat of the breakdown that he had produced for his own bid and submitted to the University. He did not produce a further breakdown for Mr Russ' use.

IV.6260 In summary AH Willis's solicitors advised that the activities of CE in respect of this tender *'does not amount to bid rigging by our client'*. They state *'…Cyril is a freelance contractor. He is not an officer or even an employee of our client company'*."

[Footnotes omitted.]

18. Thus, as regards Infringement 224, the facts being admitted, Willis' liability essentially turned on a point of law, considered in Section IV below.

19. The dispute as regards Infringements 188 and 215 was more factually based. Essentially, Willis denied that it had ever provided cover prices and contended that the OFT had failed to make good its case in this regard. The relevant evidence as regards these two infringements is, therefore, crucial. The evidence on which the OFT relied was set out in paragraph 15 of its Defence on Liability and comprised the following:

(1) *Mr Russ' electronic "workload" reports.* Mr Russ – whose conversations with Mr Elbourn have been described in paragraph 17 above – was a managing estimator at Mansell. His workload reports ("the Mansell workload reports") were spreadsheets that recorded details of the various tenders that Mansell submitted. In the case of all three infringements, the Mansell workload reports contained entries which (according to the OFT) recorded that Willis had supplied a cover price to Mansell.

(2) *Corroboration of the accuracy of the entries in the Mansell workload reports.* The OFT contended that the accuracy of the Mansell workload reports had been corroborated in respect of other infringements (ie where other contractors, apart from Willis, had provided a cover price to Mansell), as well as by the entry in respect of Infringement 224 (which Willis admitted and which, as has been noted, was in substance similar to the entries in respect of Infringements 188 and 215).

(3) *OFT interviews with Mr Russ.* The OFT conducted interviews with Mr Russ, in which Mr Russ answered questions regarding Mansell's involvement in the use of cover prices, and (in particular) Mansell's systems for recording cover prices, and the contractors providing them. We consider below the manner in which this evidence was obtained by the OFT.

(4) *A table submitted by Mansell as part of its leniency application.* This was a table prepared by Mansell's legal representatives which confirmed that no calculated competitive bid had been prepared by Mansell and which identified Willis as the source of the cover price.

(5) *An explanation of Mansell's practices submitted as part of its leniency application.* This was a general explanation by Mansell's legal representatives of Mansell's participation in cover pricing.

Of course, this evidence also existed in relation to Infringement 224.

20. Willis challenged the significance and probative value of all of this evidence, as we describe in Section VI below. But Willis also adduced a witness statement from one of Willis' directors, Mr Mark Andrew Willis.

21. Our approach to the issues of liability described in the foregoing paragraphs is as follows:

    (1) First, we determine the legal issue regarding the attribution of Mr Elbourn's conduct to Willis in relation to Infringement 224 (Section IV). We do this first, not only because it is a self-contained legal point, but because it is a point that is relevant to Infringements 188 and 215, for the reasons we give in paragraph 61(2) below.

    (2) Turning then to the factual disputes in relation to Infringements 188 and 215, we set out the relevant principles regarding burden and standard of proof (Section V).

    (3) In the light of these principles, we then consider the evidence relied upon by the OFT and Willis, in order to determine whether Willis' liability in respect of Infringements 188 and 215 has been established (Section VI).

IV. INFRINGEMENT 224: ATTRIBUTION OF MR ELBOURN'S CONDUCT TO WILLIS

(1) Introduction

22. In its written submissions, the OFT contended that Willis was responsible for the cover price given by Mr Elbourn on two alternative grounds:

    (1) First, because, as a matter of EU law, Mr Elbourn was a part of the "undertaking" that was Willis (paragraph 22 of the OFT's Defence on Liability).

    (2) Secondly, because, as a matter of English law, Mr Elbourn "acted with the ostensible authority of Willis. Willis is therefore bound by the conduct of Mr Elbourn under the normal principles of vicarious liability" (paragraph 25 of the OFT's Defence on Liability). The use of the terms "ostensible authority" and "vicarious liability" suggest that

the OFT was relying upon both agency arguments and the doctrine of vicarious liability.

23. During oral submissions before us, Mr Beard for the OFT abandoned the OFT's second ground for attributing Mr Elbourn's conduct to Willis, and pursued only his first ground, relying upon the concepts of ostensible authority and/or vicarious liability for analagous purposes only (Transcript, pp55-56).

24. We consider that concession to have been rightly made by Mr Beard. Section 2 of the 1998 Act is modelled upon what is now Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), formerly Article 81 of the Treaty establishing the European Community ("TEC"). Section 60 of the 1998 Act provides as follows:

> "(1) The purpose of this section is to ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part [ie Part I of the 1998 Act, which includes section 2] in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –
>
> (a) the principles applied, and decision reached, by the court in determining that question; and –
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission."

According to section 60(5), "court", in sections 60(2) and (3), means "any court or tribunal", which obviously includes this Tribunal.

25. The term "undertaking" is used similarly in section 2 of the 1998 Act, and in Article 101 TFEU, formerly Article 81 TEC. The concept of an "undertaking" – whilst undefined in the TFEU and, for that matter, in the TEC – is a term that has been given extensive consideration by the EU Courts and by the EU

Commission. By contrast, it is a term that is unknown in English law. This is plainly a case where, in order to ensure that section 2 of the 1998 Act is construed consistently with Article 101 TFEU, we must have regard to the relevant decisions of the EU Courts and the relevant decisions and statements of the EU Commission. This was the approach of the Tribunal's predecessor, the Competition Commission Appeal Tribunal, in *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2001] CAT 4 at paragraphs 252 to 253, itself a case concerning the Chapter I prohibition and the meaning of "undertaking".

26. Accordingly, our primary focus shall be to consider whether, as a matter of EU law, Mr Elbourn was a part of the "undertaking" that was Willis. However, as Mr Beard suggested, we shall, by way of cross-check, briefly consider thereafter the English law concepts of vicarious liability and agency.

(2) As a matter of EU law, was Mr Elbourn a part of the "undertaking" that was Willis?

27. In *Höfner and Elser v Macrotron GmbH* Case C-41/90, [1991] ECR I-1979, at paragraph 21, the European Court of Justice ("ECJ", now the Court of Justice of the European Union, "CJEU") stated that "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed".

28. Bellamy & Child, *European Community Law of Competition*, 6th ed (2008) states (at paragraph 2.003):

> "The Court of First Instance has stated that Article 81 is addressed to economic entities made up of a collection of physical and human resources capable of taking part in the commission of an infringement of the kind referred to in that Article. The term thus includes, for example, limited companies, partnerships, agricultural cooperatives, sole traders and self-employed professionals, and State corporations."

29. An undertaking designates an economic unit, rather than an entity characterised by having legal personality. In *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C* Case C-170/83, [1984] ECR 2999 at paragraph 11, the ECJ stated that "[i]n competition law, the term 'undertaking' must be understood as designating an economic unit for the

purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal". Because the focus of EU law is on the economic, rather than the legal, nature of an entity, a number of individual legal bodies can be treated as a single undertaking for the purposes of competition law.

30. Thus, a single undertaking may comprise a parent company and its subsidiary, provided that the relationship between them is so close that economically they form a single economic entity. Equally, an employee (obviously a natural person in his or her own right) will typically be part of the undertaking that employs him. Similarly, an independent contractor and the person engaging that contractor can be a single undertaking. In *Marlines v Commission* Case T-56/99, [2003] ECR II-5225, a cartel case, the Court of First Instance (now the General Court) had to consider whether a manager of certain vessels was a part of the same economic unit as the owners of those vessels. The Court concluded that he was, and stated at paragraph 60:

> "It is clear from case-law that, where an agent works for his principal, he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking (*Suiker Unie and Others v Commission*, cited above, paragraph 539)."

31. The same entity can be both an association of undertakings and an undertaking itself by virtue of the economic activity it pursues. Thus, in *UEFA Champions League* OJ [2003] L 291/25, the Commission decided that UEFA was an association of associations of undertakings, an association of undertakings and also an undertaking itself because it engaged in commercial activity.

32. Clearly, the precise definition of Willis as an undertaking matters because this determines whether Mr Elbourn's conduct can be imputed to Willis.

33. Counsel for Willis, Mr Cook, accepted that there were circumstances in which an individual – despite being notionally self-employed – could in practice be part of the same undertaking as Willis, but he contended that Mr Elbourn's position was "analogous to that of any other third party professional contracted to provide particular services. As with other professionals such as lawyers, accountants, structural engineers or architects, agreement was reached on a job

by job basis for specific services to be provided and the professional then determined how to provide the services contracted for" (paragraph 63 of Willis' Notice of Appeal).

34. The OFT, in paragraph 22 of its Defence on Liability, contended that:

> "…as a matter of EU law, Mr Elbourn did not exercise an independent economic activity in relation to the preparation and submission of the Redlands Road tender. It is undisputed that Mr Elbourn did not himself offer to supply the contract services for the tender, and as pointed out in the Decision he assumed no financial or commercial risk in relation to those services. These are the hallmarks of a genuine agency agreement, for the purposes of which the agent is not regarded as a separate undertaking. It is also common ground that Mr Elbourn was the agent of Willis in relation to the preparation of the tender. It follows that Mr Elbourn was, for this purpose, part of a single economic entity together with Willis. Willis has, therefore, properly been held responsible for the cover price given."

35. The last three sentences of that passage demonstrate the conflation of two separate questions: (1) whether Mr Elbourn was part of the Willis undertaking for the purposes of preparing the Redlands Road tender for Willis, and (2) whether he was part of that undertaking for the purposes of supplying a cover price to Mansell. Mr Elbourn was tasked by Willis to provide an estimation in respect of the tender for 12 and 16 Redland Road and, in addition, was "given authority, as a matter of administrative convenience, to perform the administrative task of submitting bid documentation after the directors of AH Willis had decided what bid to make" (paragraph 51 of the Notice of Appeal). It is difficult to resist the conclusion that as regards these functions, Mr Elbourn was acting as anything other than a part of the undertaking that was Willis. As regards these functions, Mr Elbourn formed a single economic unit with Willis.

36. Had Mr Elbourn performed these functions wrongfully - in the sense that he went beyond the authority that had been conferred on him by Willis, or even acted inconsistently with his instructions – this would not prevent his conduct from being attributed to Willis. Thus, in *Marlines* (above), at paragraph 60, it was held that the Commission was entitled to treat the manager of the vessels as part of the same economic unit as the ship owners. The fact that the ship

owners had not given the agent authority to take part in the cartel was irrelevant.

37. The question is whether (looking objectively at all the factual circumstances and the economic realities of the situation) Mr Elbourn's provision of a cover price to Mansell amounted to the wrongful performance of a function that Mr Elbourn was performing for Willis, or whether it was in fact a discrete function altogether. In our view, it was the latter. In this case, Mr Elbourn was serving two masters. He was providing estimation services (as well as submitting the bid documentation) for Willis, but he was also providing "some figures for Mansell's use" (to quote from Decision/IV.6259 (p1520)). In this latter respect, *if* (were we obliged to decide the point, which we are not) Mr Elbourn was acting as part of any undertaking other than that comprised in his own estimating business, it was Mansell, and his conduct is to be attributed to Mansell. The main point is that he was not acting as part of the Willis undertaking. The fact that this conduct almost certainly involved a breach of Mr Elbourn's duties to Willis does not alter this conclusion. Nor is it altered because it was as a result of the estimating work which he had already carried out for Willis that he was in a position to provide, without much additional labour on his part, the cover price that Mansell required.

(3) Vicarious liability and agency

38. It is now well-established that the doctrine of vicarious liability does not involve the attribution of an employee's acts and state of mind to his employer, who then personally owes a duty of care which he breaches by virtue of his employee's act and/or state of mind (the so-called "master's tort" theory). Rather, the employer is simply liable for a tort committed by his servant when acting within the scope of his employment. See: *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at paragraph 15; Atiyah, *Vicarious Liability in the Law of Torts*, 1st ed (1967), pp6-7; Dugdale & Jones (eds), *Clerk & Lindsell on Torts*, 20th ed (2010) at paragraph 6-54.

39. The law of agency is principally concerned with the ability of an agent to bind his principal eg to a contract. But the law of agency can involve the personal

liability of the principal for the wrongs of his agent. The circumstances in which a principal may be so liable are extremely difficult to state, as is noted in Reynolds, *Bowstead & Reynolds on Agency*, 19th ed (2010) at paragraph 8-176. The better view is that a principle is liable for wrongful acts specifically instigated, authorised or ratified by the principal. See *Bowstead & Reynolds*, *op cit*, Article 90(2), paragraph 8-177; Munday, *Agency*, 1st ed (2010) at paragraph 11.18.

40. Both the doctrine of vicarious liability and the law of agency have evolved tests for the purposes of determining whether the tort of an employee (in the case of vicarious liability) or the act of an agent (in agency cases) is to be attributed to the employer or principal, as the case may be.

41. In the case of vicarious liability, the test is whether the employee was acting within the course of his employment. In his book *The Law of Torts*, Sir John Salmond propounded the following test (this taken from Salmond & Stallybrass, *The Law of Torts*, 8th ed (1934) at p97):

> "It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it."

42. The vicarious liability of an employer for the torts of his employee is very different from the liability of an undertaking under Article 101 TFEU. Unsurprisingly, the course of employment test is very different from the question of what comprises an undertaking, and we are very doubtful about the usefulness of this test even as a "cross-check" on our conclusion at paragraph 37 above. Moreover Mr Elbourn was not, of course, an employee of Willis. Nevertheless, even if this test were applicable, it does seem to us that Mr Elbourn's provision of a cover price to Mansell would not be an unauthorised mode of doing something that he had been authorised to do, but rather an altogether different act which he had not been asked by Willis to perform for it at all. For what it is worth, therefore, the "course of employment" test rather

confirms than calls into question our conclusion that Mr Elbourn's provision of a cover price to Mansell is not attributable to Willis.

43. Nor do we derive assistance from the law of agency. As we have indicated, the circumstances in which an agent's wrongful act can be attributed to his principal are difficult to identify, but appear to turn on actual instigation, authorization or ratification. Mr Beard referred us to Article 72 of *Bowstead* (footnote 39 of the OFT's Defence on Liability), which refers to apparent (or ostensible) authority. But this Article of *Bowstead* is concerned with the circumstances in which an agent can bind his principal to a transaction. In this context, it is quite clear that an agent can bind his principal if he has actual authority or if he has been given apparent authority by virtue of some kind of holding out by the principal. It is impossible to see, however, any kind of "holding out" on the part of Willis that Mr Elbourn was authorised to provide a cover price, and we consider that even as a cross-check the concept of ostensible authority is an unhelpful one. It is perfectly clear that a person can be part of an undertaking and cause that undertaking to commit a breach of Article 101 TFEU without any kind of holding out of authority at all.

(4) Conclusion

44. We conclude that, in providing a cover price to Mansell Mr Elbourn was not a part of the undertaking that was Willis. It follows, therefore, that Willis can have no liability for the acts of Mr Elbourn in that regard.

V. INFRINGEMENTS 188 AND 215: BURDEN AND STANDARD OF PROOF

45. The OFT accepts that the legal burden of proof rests on it, as the Tribunal held in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 at paragraph 95: see Decision/III.197 (pp385-386).

46. As regards the standard of proof, this is the civil standard of proof, on the balance of probabilities: *Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 at paragraph 109; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17 at paragraph 204.

47. There has, in recent years, been a great deal of debate as to whether, in serious cases, there is a "heightened standard" of civil proof. We consider that this debate has been laid to rest in a series of decisions of the House of Lords, in particular, *Re H (Minors)* [1996] AC 563 at 586; *Re D (Northern Ireland)* [2008] 1 WLR 1499 at paragraph [28]; *Re B* [2009] 1 AC 11 at paragraph [13].

VI. INFRINGEMENTS 188 AND 215: THE EVIDENCE

48. Before us, the OFT did not appear to contend that Infringement 224 could be proved by the same evidence that it was relying upon in connection with Infringements 188 and 215. Nevertheless, it is worth bearing in mind that that is indeed the case. It is simply that Infringement 224 involved the additional material – produced by Willis – regarding the role of Mr Elbourn. This factor, which was not present in Infringements 188 and 215, is the reason why Infringement 224 falls to be considered separately.

(1) Evidence relied upon by the OFT

49. The evidence upon which the OFT relied has been summarised in paragraph 19 above. Essentially, this evidence comprised five different elements. However, two of these elements simply comprised material that had been created after the event by Mansell as part of its leniency application: namely, a table (described in paragraph 19(4) and an explanation (described in paragraph 19(5). Plainly, these documents must have been based upon other documentary evidence, or upon the recollection of someone at Mansell. In other words, they are parasitic on other evidence, in the form of the Mansell workload reports (paragraph 19(1) and/or the interviews the OFT conducted with Mr Russ paragraph 19(3). We do not see how these after-the-event documents can add anything to contemporaneous documents and transcript material which the OFT has adduced. We can attach no evidential weight to these after-the-event documents.

50. The next two sections consider, in turn, the Mansell workload reports and the OFT's interviews with Mr Russ.

(2) The Mansell workload reports

51. The Mansell workload reports were maintained by Mr Russ, in the form of electronic spreadsheets. The spreadsheets comprised 13 columns, as follows:

(1) *Column 1.* This was headed "Est No" and provided a unique reference for each piece of work for which Mansell had been invited to tender.

(2) *Column 2.* This was headed "Location/Description" and provided a very brief description of the work for which Mansell had been invited to tender.

(3) *Columns 3 to 7.* These columns all provided details regarding the tender that Mansell submitted. It is not necessary to describe all of these columns. Column 3 – headed "Bid" – set out the tender that Mansell in fact submitted except that – according to the OFT - when Mansell's tender was based on a cover price this entry would be blank. Again, according to the OFT, where the tender was based on a cover price, the tender amount would appear in Column 4, headed "Net".

(4) *Columns 8 to 12.* These columns all recorded where Mansell's tender had stood in relation to other tenders that had been submitted.

(5) *Column 13.* This column was headed "Remarks", and contained Mr Russ' general comments about the tender. According to the OFT, where this column identified a contractor in brackets (as in "(AH Willis"), this served to indicate that a cover price had been provided by that particular contractor.

52. Clearly, on their face, the Mansell workload reports are not remotely incriminating. They only become so if there is a system contained within them whereby persons providing cover prices to Mansell are reliably identified. According to the OFT, Mansell did have a system for recording: *(i)* tenders that were based on a cover price; and *(ii)* who had provided that cover price. As we have described, this information was said to have been recorded by not entering the tender amount in Column 3, but in Column 4, and by identifying the contractor supplying the cover price in Column 13, by including the contractor's name in brackets.

(3) OFT interviews with Mr Russ regarding Mansell's system for recording cover prices

53. Information regarding Mansell's system came from Mr Russ in a transcript of a recorded interview that the OFT conducted with Mr Russ on 1 May 2007. At the beginning of the interview, there was the following exchange:

> At p1 of the transcript:
>
> "**OFT**[1] **[1]**[2] This interview is part of an investigation by the Office of Fair Trading, under the Competition Act 1998, into suspected bid rigging activity in the construction industry. This interview is taking place as part of the leniency application by Mansell plc to the Office of Fair Trading. The content of this interview may be used in the investigation and decision-making process by the Office of Fair Trading. You have the right to have a legal representative present today and you've chosen to do so.
>
> **Mr Russ** **[2]** Ah, yes.
>
> **OFT** **[3]** This is a voluntary interview and you're not compelled to answer any of the questions that are put to you in this interview. Do you understand that?
>
> **Mr Russ** **[4]** Yes, I do, yes.
>
> **OFT** **[5]** I must warn you that if during the course of this interview you knowingly or recklessly provide information to the Office of Fair Trading that is false or misleading in a material particular, you may be guilty of a criminal offence punishable by a fine of up to £5,000, or a maximum of two years imprisonment, or both. Do you understand that?
>
> **Mr Russ** **[6]** Ah, yes, I do."

54. In a post-oral hearing letter to the Tribunal dated 6 August 2010, which referenced several appeals against the Decision, including the present one, the OFT stated *inter alia*:

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[1] The transcript identifies the persons within the OFT conducting the interview. We have substituted "OFT" for the initials identifying that person.

[2] For each of reference, we have consecutively numbered the questions and answers we quote from the transcript. These numbers do not appear in the orginal transcript.

"2. The interviews were each taped and the tapes transcribed. The transcripts are therefore a verbatim record of those interviews. The transcripts are not evidence that has been redrafted into witness statements and elaborated upon with the assistance of legal representatives; rather, the transcripts contain the interviewee's actual responses to the questions put to them by the OFT. As Mr Beard for the Oft suggested at the Durkan hearing, it would be "a complete triumph of form over substance, to try and translate a transcript into a witness statement when the transcript is a verbatim record under the s.44 sanction" (day 5, page 24, lines 20 to 23).

3. The OFT followed a set process to verify the content of the transcripts. The transcripts were checked by the OFT and together with copies of the relevant tapes were sent to legal representatives to check and confirm that the transcripts accurately reflected the taped interviews. Legal representatives were then given an opportunity to make any comments or amendments (see Durkan transcript day 4, page 24, lines 1-5).

4. All of that correspondence was placed on the OFT's file (in confidential and non-confidential forms as appropriate), which the parties received when the OFT issued its Statement of Objections ("SO"). In addition, as part of the administrative process, the OFT set out in the SO the extent to which it relied on the transcripts in question. Parties then had the opportunity to make written and oral representations in response to the OFT's case set out in the SO, including challenging the OFT's evidence and providing the OFT with evidence in response."

This does not indicate whether the transcript of the interview was sent to Mr Russ for him to check (although it may have been). What is certain is that Mr Russ did not verify the accuracy of the transcript by signing it with a statement of its truth or any other kind of endorsement. We return to the matters raised by the OFT letter in paragraphs 66 to 68 below.

55. Mr Russ is recorded as describing the system as follows:

At pp8-9 of the transcript, referring to the Mansell workload reports:

"**OFT** **[7]** And just for, um, help for us, in terms of the headings on this table, it would be if you could go through the headings. Especially the ones in relation to the bids, and things like that, and just give a description of what each one means, and that's from left to right on the table.

Mr Russ **[8]** Okay, from left to right. Um, well, the first column is, ah, estimate number, um and that's the number given, well, certainly in the year 2000, it would have been from our AS400 system. That was the recording system we had for marketing, going through to estimating, and following the projects through. It was on a system called an AS400 system and these numbers would have been churned out from that, effectively, and we, for estimating purposes kept those same numbers, rather than create our own number again purely for estimating. So that

would have been got from there, and the next column is location and description and its purely taken from the, the workload, um, bar charts on the front sheet. Associated with that number is the, is the actual job, um and then we had our bid and I would record, where we actually tendered a job, I would record in the bid column our bid, and then there's various other columns there with, um, percentage margin, and etc etc. But where in most cases we took a cover, I would tend to put it in the net column, so that it was written short, effectively, or put into the other column. And then there's a results column, which basically gives where we know our position. Some clients will tell you if you did, don't win a job, where you were, and they will give you the results once they've let the contract, so we would put down our position. And then there's a remarks column, which basically gives such information as, um, whether a contract was awarded, whether it was lost, and if, if we'd taken a cover at that point, who, who we'd taken the cover from, and, and any other likely information which goes towards our weekly meeting.

…

At p10 of the transcript:

OFT **[9]** Okay, and in terms of contact with competitors, um, under what circumstances would there be contact close to the tender submission date?

Mr Russ **[10]** What with competitors?

OFT **[11]** Mm.

Mr Russ **[12]** Well, there wouldn't be any, other than ringing up for, for the cover. Um, but in most cases it, once you'd made an approach, um, and, and contractor X said, 'yes I'll, I'll give you a cover, I'll give you a ring at such and such a time, the day before, or on the day, then, um, that would be the only contact we would have basically.

…

At p13 of the transcript:

OFT **[13]** So in terms of the early decision, would it then be that you would contact another, ah, contractor for the cover price, or to discuss getting a cover price, at an early stage? Or would it be that you would wait til, say, the tender submission?

Mr Russ **[14]** Um, well, in some cases it would be later, um, because if you're so involved with other things you'd think, oh well, that one there is, we know we're not going to bid that and we'll find out later on with that. So there were some, some instances, because quite often you'd get very short tender periods, which is another aspect. Um, you know,

some clients might want you to return quite a complicated job back in two weeks, which is a real task, so you've got to put a concerted effort in to do that, even if you were really going for it. Um, so if it was, if you've left it a few days you're suddenly into the next week, you'd think, well, I better arrange a cover for that one. Um, but in a lot of cases it would be within the first few days, um, but it's really down to pressure of work, as whether you would do it early, or leave it into the second week, say.

OFT **[15]** Okay, and, um, in terms of recording covers, in terms of covers you'd taken, or given, um, we've mentioned on the workload, and there was a tender results sheet. And we're going to come on to look at obviously a few of those later...

Mr Russ **[16]** Yes, yes.

OFT **[17]** …that you would sometimes put who you'd taken the cover from?

Mr Russ **[18]** Yes.

OFT **[19]** And were there any other ways in which you would indicate that a cover had been taken or given, or…?

Mr Russ **[20]** Not really, no, because no-one else would be particularly interested, to be honest. That if, if, if, you know, as far as the management was concerned, that was a, a, a, job we didn't want, or couldn't price so let's get on with what we do want, um, and just deal with it, effectively. But we used to record who we had, partly for my own purpose, so I could keep a record of what, who I had got taken from one, um, and I would put that down on the results sheet of the workload meetings.

OFT **[21]** Um, and we have got some entries, which where a company appears in brackets.

Mr Russ **[22]** Yes.

OFT **[23]** Um, was that…?

Mr Russ **[24]** I tended, I tended to do that, as, as you know, my way of parentheses was of saying that was the company that helped us out effectively.

…

At pp19-21, Mr Russ was asked questions in respect of a tender in which Mansell obtained a cover price. This tender is not at issue here, Mr Russ made some general remarks as to system:

OFT **[25]** …The next contract that we have is the refurb, um, 73 Wate-, Wates houses in Windsor, and again I have the tender results analysis, as a major project, B3538, page one, and this, um, contract is highlighted. Do you have any recollection, in relation to this particular contract?

Mr Russ **[26]** Well, again, 2000 no, not, not particularly, other than it was, it, it was a refurb. Of, of, of houses in Windsor, which I, I think had window replacements, re-roofing, the sort of things which have got specialist contractors. And looking at the name that we went to, they are a specialist contractor of that sort of work, um, and so perhaps that was the reason for that decision at that time, that we felt might not be competitive.

OFT **[27]** And on the sheet it says in the remarks column, cover from Connaught.

Mr Russ **[28]** Connaught, yes.

OFT **[29]** And they were specialists, in terms of those areas?

Mr Russ **[30]** Well, they, they do tend to do, um, external refurb., and they do have divisions within their, their company, which carry out the trades themselves. So concrete repairs, and that sort of thing, um, they, they do actually carry out themselves, so they've got a bit of an edge.

OFT **[31]** And in terms of just when you filled this in, um, would you have filled in the remarks column, so if when you rang up Connaught's and they said, yes, no problem, we'll give you a figure, call us back on X, would you then have gone to that sheet and filled it in, or would it have been at the, kind of, the tender adjudication point that you would have put your comment here?

Mr Russ **[32]** What on here?

IFT **[33]** Yes, on there.

Mr Russ **[34]** Um, no, it probably would have been, actually just after the, after the event. I mean I would probably go through and update these weekly, so it wouldn't necessarily be, you know, ready for the next meeting.

OFT **[35]** Okay, but it would have been pretty much around the time that you'd actually spoken to them, and you would have…?

Mr Russ **[36]** Yes, yes, but, but, but, you know, ah, probably after the, the tender had gone in.

OFT **[37]** Right.

Mr Russ **[38]** Um, ah, and, and just fill, just fill out the, out the figure, and because I would have put the figure and the name in. Um, if I knew in advance, and it was a week or two earlier that we were going to be getting some help ftom such and such, I may well have put their name in, just to say, well, look, that particular one, you wanted to take a cover, and this, this is the company that say they're going to help us.

OFT **[39]** Okay, and so there again we've just got a figure in the net column, um…

Mr Russ **[40]** Well, that's where I tended to put it, um…

OFT **[41]** And that would be generally that the cover price, or, or the figure that you were submitting is that…?

Mr Russ **[42]** Yes, yeah. I, I tended to not put it in the first big [*sic*] column, because it's, although it was a bid it was, um, a cover bid effectively, so I didn't tend to put it in there. It was just my foible, really.

OFT **[43]** Mm, mm, and also there are gaps for the, um, margin, and the percentage?

Mr Russ **[44]** That's right, yes.

OFT **[45]** I mean, is, is that another indication, as well that it's a cover?

Mr Russ **[46]** Yeah, well, effectively, yes.

OFT **[47]** Because, clearly, you wouldn't have that information?

Mr Russ **[48]** Yes, exactly, yes, yeah, that's right, that, that would be another indication."

(4) Evidence of "system"

56. We do not consider that on the basis of that material there is sufficient evidence to support the conclusion that Mansell had a reliable system for recording the contractor from whom it obtained a cover price so as to justify the inference that Willis provided cover prices to Mansell in the case of the infringements in question.

57. According to the OFT, Mansell's system identified which tenders were based on covers by not entering the tender amount in Column 3, but in Column 4. The contractor supplying the cover price was identified in Column 13 by including the contractor's name in brackets. Clearly, the latter of these two elements is the more important for present purposes.

58. The problem is that the Mansell workload reports show no kind of consistency. To be fair to Mr Russ, an examination of the transcripts shows that he did not in fact claim to have a consistent system for recording the provider of a cover price. As to this:

(1) It is very significant that in his general description of system (see Transcript at 8), Mr Russ did not refer to the use of brackets to identify the provider of the cover price at all. He merely said that the remarks column (Column 13) would record "who we'd taken the cover from".

(2) It is the OFT that first raises the question of brackets with Mr Russ (see Transcript at 21), and in the exchanges that follow (Transcript at 22 to 24) Mr Russ confirms that he "tended" to record the providers of cover prices in that way.

(3) Yet in the Connaught example (Transcript at 25 to 48, which was relied upon by the OFT in paragraph 15 of its Defence on Liability) Connaught's status as the provider of a cover price was not recorded by way of brackets, but rather more explicitly with the words "cover from Connaught". Nor is this the only example. The Mansell workload reports are replete with other similar instances. Thus, for example, looking simply at the Mansell workload reports for 2004:

(a) The tender referenced (in Column 1) by the number "02-0002278" refers (in Column 13) to "Cover from Latimers", with no brackets.

(b) The tender referenced (in Column 1) by the number "05-00744" refers (in Column 13) to "Cover from Knowles & Son (Knowles 3rd)". It is clear that the use of brackets there does

not refer to the provision of a cover price, but to where Knowles & Son ranked in terms of the tenders of others.

(4) Conversely, there are cases where a contractor's name is included in brackets or parentheses where it is clear that that contractor was not providing a cover price. The Knowles & Son case to which reference is made in paragraph 58(3)(b) is one such example. Another is the tender referenced (in Column 1) by the number "02-00174". This appears to be a case where no cover price was obtained by Mansell. The entry in Column 13 reads: "LOST (Claydons lowest)". Again, it is obvious that the brackets say nothing about whether or not this was a cover price.

59. In these circumstances, we consider that the inference to be drawn from the fact that, in the case of Infringements 188, 215 and 224, Willis' name appears as "(AH Willis)" in Column 13 is not sufficient to establish, on the balance of probabilities, that Willis did indeed provide a cover price to Mansell.

60. As we have noted in paragraph 19(2) above, the OFT sought to support its argument by suggesting that the reliability of Mansell's system was corroborated in respect of other infringements. We were provided with a list of these infringements (specifically, Infringements 22, 42, 43, 69, 91, 97, 154, 199, 203, 208, as well as the present three infringements). But in all of these cases, except for the present infringements, the evidence was not tested. Apart from Willis, none of the contractors in question have challenged the OFT's case. Indeed, the fragility of the "corroboration" provided by these instances is demonstrated by the first example on the OFT's list – Infringement 22, which relates to the case we have already adverted to, Connaught. Here, as we have pointed out, brackets were not used: the Mansell workload report stated "cover from Mansell".

(5) Other grounds for rejecting the evidence contained in the Mansell workload reports

61. There are two other matters which cause us to reject the Mansell workload reports as reliable indictors that Willis provided cover prices to Mansell:

(1) First, the entry in the Mansell workload reports for Infringement 224 records (also in brackets, despite the fact that this was meant to be an indicator of cover pricing) "(HN Edwards won it)" – apparently referring to the winner of the tender. This statement was incorrect: HN Edwards neither participated in, nor won, this tender. The OFT characterised this as a "single typographical error relating to the name of the winning tenderer" (paragraph 17(d) of the OFT's Defence on Liability). We doubt whether this is an accurate description: it is certainly not a *typographical* error; and whilst it is a single error, it is merely the only error that has unequivocally been established in a document that has not been especially thoroughly reviewed for error. This error, whilst it is not in any way conclusive about the reliability of the Mansell workload reports as a record, detracts rather than adds to our confidence in the Mansell workload reports.

(2) Secondly, Infringement 224 itself has an entry stating "(AH Willis)". Even if we were to accept – and for the reasons we have given, we do not – that this was a reliable reference to Willis as a cover price provider, it is common ground between Willis and the OFT that the cover price in relation to Infringement 224 was in fact provided by Mr Elbourn. In other words, the Mansell workload reports do not distinguish between a cover price provided by Willis *qua* undertaking and a cover price provided by Mr Elbourn who (as we have found) was not a part of the undertaking that was Willis in so far as he did so. This, in itself, is sufficient to cause the OFT to fail in its contentions. It seems perfectly possible to us that – in the case of Infringements 188 and 215 too – Mansell obtained a cover price based on a Willis tender from someone other than the undertaking that was Willis.

(6) The evidence from Willis itself

62. In addition there is the evidence of Willis. Mr Mark Andrew Willis submitted a short statement, exhibiting the letter from his solicitors to the OFT dated 23 April 2007 (in response to the allegation that Willis had been involved in providing cover prices) and a statement by him dated 27 June 2008 (in

response to the OFT's statement of objections). In his statement, he confirmed the truth of the content of both of these documents, as well as of Willis' Notice of Appeal. He was tendered for cross-examination, but the OFT indicated in a letter to the Tribunal dated 21 June 2010, which was copied to Willis' legal representatives, that the OFT did not intend to cross-examine him. He therefore did not give oral evidence (See the Transcript, p1).

63. Mr Willis was unable to provide anything more than a bare denial of Willis' involvement in providing a cover price in the case of Infringements 188 and 215. This was simply because, given the lack of specificity in the OFT's case, anything more specific than a general denial was impossible.

64. Even so, we attach some weight to a statement from a witness prepared to give oral evidence and to be cross-examined – even if that statement is no more than a general denial. We recognize that Mr Willis may not have been aware of cover pricing going on – as, plainly, he was not aware of the conduct of Mr Elbourn until the OFT raised the question of infringement with Willis. Nevertheless, it is significant that it was Willis, and not the OFT, that discovered and disclosed the conduct of Mr Elbourn. In our view, had other, potentially incriminating, evidence been uncovered by Mr Willis, he would have disclosed it to the OFT in the same way, and no doubt made the appropriate admissions. The straightforwardness of Willis, as demonstrated by the conduct and evidence of Mr Willis, reinforces our conclusion that the OFT have not established to the requisite standard that Willis was involved in cover pricing.

65. We stress that we make no criticism of the OFT in putting forward a case that is unspecific. It is quite possible that documents may show clearly that a cover price was provided by a certain party, but provide no more information than that. Had the Mansell workload reports and the material from Mr Russ's interview proved more cogent, then this might have been such a case.

(7) Postscript: the OFT's evidence

66. As we stated in paragraph 19(3) above, difficult and important questions arise in relation to the "evidence" adduced by the OFT. We have already noted that

the transcript of Mr Russ' interview with the OFT does not appear to have been satisfactorily reviewed by and attested to by Mr Russ (see paragraph 54 above). Certainly he has not endorsed the transcript with a statement of truth or even signed it.

67. More fundamentally, we have considerable doubts as to whether material contained in transcripts of interview – even if reviewed and attested – is a satisfactory means of evidencing alleged infringements in cases of this kind. It is one thing to use a transcript of interview as evidence of relevant admissions by the interviewee; it is quite another thing to attempt to use it as evidence against a third party. In paragraph 81 of the Tribunal's decision in *Argos Limited v The Office of Fair Trading* [2003] CAT 16, the Tribunal observed that "notes of interview are not, in our view, satisfactory substitutes for witness statements". We agree. A witness statement will set out the relevant facts, will be attested to by the witness by way of a statement of truth, and will enable the witness to be exposed to cross-examination should the accuracy and/or truth of those facts be disputed. This is not to say that relevant interview transcripts cannot or should not be put before the Tribunal in support of a witness statement. It is simply that they are not a substitute for it.

68. We do not therefore agree with the suggestion in numbered paragraph 2 of the OFT's letter to the Tribunal dated 6 August 2010, and referenced to *inter alia* this appeal, that the preparation of a witness statement in circumstances such as the present would be "a complete triumph of form over substance". Where crucial facts are disputed it may in certain cases, and depending upon what if any other evidence is available, be very difficult to resolve the issues in the absence of evidence from a witness who has been deposed in the ordinary way and whose assertions are available to be tested in cross-examination by those who dispute them. Where central issues of fact cannot be resolved, the outcome may have to turn on the burden of proof. It is therefore all the more important from the OFT's perspective that there should be probative evidence before the Tribunal. Thus, even if the OFT has not obtained witness statements in order to fortify its own decision-making process, once it becomes clear that there is a material dispute as to the facts on which its decision was based, the OFT should consider to what extent such statements are necessary or desirable

in order to support those facts in an appeal, subject always to the provisions of rule 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372). It is, of course, not normally the role of the Tribunal to decide whether and if so which witnesses should be deposed or called to give evidence by any party. We should add in regard to these matters that we are in entire agreement with the comments of the Tribunal at paragraphs 108 to 110 of its judgment in *Durkan Holdings Limited and others v OFT* [2011] CAT 6.

VII. CONCLUSIONS ON LIABILITY

69. For the reasons we have given, we unanimously conclude:

(1) As regards Infringement 224, the conduct of Mr Elbourn is not, as a matter of law, to be attributed to Willis.

(2) As regards Infringements 188 and 215, the OFT has failed to meet the burden of proof, that rests on it, to show that these infringements were in fact committed by Willis.

70. Accordingly, the appeal is allowed in respect of all three infringements, and the findings of liability and penalties in respect of the infringements are set aside.

VIII. PENALTIES

71. Given the conclusions above, we do not need to consider whether the penalities imposed by the OFT on Willis were appropriate or not, and we do not do so.

The President Antony Lewis Marcus Smith QC

Charles Dhanowa
Registrar Date: 27 April 2011