Neutral citation [2011] CAT 11

IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1120/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

15 April 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
ANN KELLY
DAVID SUMMERS OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) QUARMBY CONSTRUCTION COMPANY LIMITED
(2) ST JAMES SECURITIES HOLDINGS LIMITED

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 6 and 7 July 2010

JUDGMENT (Non-Confidential Version)

Note: Excisions in this judgment marked "[…][**C**]" relate to passages excluded having regard to Schedule 4, paragraph 1 to the Enterprise Act 2002

APPEARANCES

Mr. Mark Clough Q.C. and Mr. Adam Aldred (of Addleshaw Goddard LLP) appeared for the Appellants.

Miss Kelyn Bacon and Mr. Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared for the Respondent.

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I. INTRODUCTION

1. On 21 September 2009, the Office of Fair Trading ("OFT") published a decision under the Competition Act 1998 ("the 1998 Act") entitled "Bid rigging in the construction industry in England" ("the Decision").[1] The Decision found that, between 2000 and 2006, 103 undertakings had been involved in bid-rigging of construction contracts, infringing section 2(1) of the 1998 Act (the "Chapter I prohibition"). Penalties were imposed on those undertakings found to have infringed the Chapter I prohibition.[2]

2. Quarmby Construction Company Limited ("Quarmby") undertakes building and civil engineering work, mainly in the Yorkshire and Humberside areas. At the time of issue of the Statement of Objections, Quarmby was 80% owned by Quarmby Design Build Limited, which was wholly owned by St James Securities Holdings Limited ("St James Securities" and, together with Quarmby, "the Appellants").

3. According to the Decision, Quarmby was found to have contravened the Chapter I prohibition by colluding with other contractors in relation to three bids, those relating to the conversion of offices to flats at 2 Water Lane in Leeds ("Infringement 6"), to works at the Humanities Research Institute at the University of Sheffield ("Infringement 214") and to a new build construction inside the retained facade of Eastbrook Hall in Bradford ("Infringement 233"). A penalty of £881,749 was imposed jointly and severally on the Appellants in respect of these infringements.

4. On 20 November 2009, the Appellants appealed against the Decision both as regards liability and the amount of the penalty imposed on them. The hearing in these proceedings took place on 6 and 7 July 2010.

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1 For the purposes of this Judgment, references to the Decision are in the following form: "Decision/II.10-16 (p. 36)", 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.

2 The manner in which the OFT calculated the penalties imposed on those undertakings is described at Decision/VI.4-VI.665 (p. 1628-1839) and is summarised in the Tribunal's judgment in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 at paragraphs 25 to 67.

5. The Appellants raised the following main grounds of appeal as regards liability:

(a) As a preliminary issue, the Appellants submitted that they should have been excluded from the scope of the OFT's investigation, and should not have been addressees of the Decision, for the same reasons that other companies with less than five "suspect tenders" were excluded from the investigation and were not addressees of the Decision.

(b) The OFT erred in law by fining the Appellants in respect of Infringement 6 because (i) the infringement is "statute barred" by operation of Article 25 of Council Regulation (EC) No. 1/2003 and/or the Limitation Act 1980 and (ii) it pre-dates the entry into force of the 1998 Act. Alternatively, the OFT erred in law by concluding that a cover price which pre-dated the 1998 Act was caught by it nonetheless by virtue of transitional provisions.

(c) There was insufficient evidence for the OFT to conclude that the Appellants engaged in cover pricing as alleged in the Decision, or at all.

(d) As regards Infringement 233, the client was not deceived into thinking that the cover price was genuine, and should have been removed from the OFT's investigation in the same way as another suspected infringement (alleged infringement 101).

6. The Appellants additionally raised a number of specific grounds of appeal on penalty, which are summarised at paragraph 141 below. As regards the relief sought, the Appellants asked that the Tribunal set aside the finding of liability in the Decision, and annul (alternatively reduce) the penalty imposed on them.

7. We have considered all of the arguments that have been raised by the Appellants, and have had regard to their written submissions filed in September 2010 pursuant to paragraph 3(f) of the Tribunal's Order of 25 January 2010.

II. PRELIMINARY ISSUE ON LIABILITY: APPELLANTS SHOULD HAVE BEEN EXCLUDED FROM THE SCOPE OF THE INVESTIGATION

8. The Appellants raised a preliminary issue of liability concerning the process by which the OFT narrowed the scope of its investigation in the period prior to the issuing in April 2008 of the Statement of Objections. The OFT did so in the manner described at Decision/II.1459-1469 (p. 253-256), by reference to the availability of evidence and the number of "suspect tenders" in relation to which such evidence was held. The OFT decided to include within its investigation only those companies in relation to which there was "category 1, 2 or 3 evidence" (as described at Decision/II.1464 (p. 255)) in relation to a minimum of five suspect tenders.

9. The OFT thereby narrowed the scope of the investigation from over 1,000 companies in connection with which it had specific evidence of collusive tendering, to a total of 122 companies for which it held the requisite standard of evidence in relation to at least five suspect tenders. Of these 122 companies, 37 had applied for leniency and the remaining 85 had not.

10. On 22 March 2007, the OFT wrote to the 85 non-leniency parties (and, subsequently in November 2007 to their ultimate parent companies), including the Appellants, informing them of the suspect tenders in respect of which they were suspected of engaging in bid rigging activities, and giving them an opportunity to admit to those activities (and make certain ancillary promises) in exchange for a 25% reduction in the financial penalty ultimately imposed in respect of any suspect tenders for which admissions were received. This is referred to in the Decision as the Fast Track Offer ("FTO"), and the process by which the OFT made the FTO is described at Decision/II.1483-90 (p. 261-263). The FTO was sent to Quarmby on 22 March 2007 (and subsequently to St James Securities in November 2007) and described the OFT's suspicion that Quarmby had participated in bid rigging activities in relation to seven suspect tenders.

The Appellants' submissions

11. The Appellants argued that only one of the seven suspect tenders listed in the FTO warranted classification as a suspect tender on the basis of the evidence available to the OFT at that time, and by reference to the criteria outlined in the Decision. Accordingly, it was submitted that the OFT breached the principle of equal treatment by proceeding to address the Statement of Objections (and ultimately the Decision) to the Appellants, when they should have been excluded from the scope of the investigation in the same way as other companies which had been involved in less than five suspect tenders.

12. The Appellants made a number of general submissions in relation to six of the seven suspect tenders included in the FTO, contending that the OFT was not entitled to treat any of the following as a suspect tender:

(a) Any infringement that was time-barred, or did not infringe the 1998 Act on the basis that it pre-dated the entry into force of the 1998 Act or by reason of the transitional provisions contained in Schedule 13 to the 1998 Act.

(b) Any tender where, on the date of sending the FTO, the OFT had not ascertained whether the suspect party was Quarmby or the separate company Quarmby Construction (Special Projects) Limited ("QSP"). Although both Quarmby and QSP were originally subsidiaries of the same holding company, Quarmby Holdings Limited, QSP was sold to its management in 1989 and moved to separate business premises shortly thereafter, since when it has operated as an entirely independent company. Both companies are based in Ilkley and both are addressees of the Decision. The Appellants submitted that a reference simply to "Quarmby" in evidence used by the OFT is insufficient to attribute a suspect tender to one or other of the Quarmby companies without some further evidence to indicate which was the correct company.

(c) Any tender in relation to which the Appellants' records show that a bid was not in fact submitted by Quarmby, such that the OFT could not have reasonably held a suspicion that Quarmby engaged in cover pricing.

(d) Any tender in respect of which the OFT did not, on the date of sending the FTO, hold the evidence described at Decision/II.1464 (p. 255); or indeed the evidence that the OFT stated that it held in relation to the suspect tenders as described in the wording of the FTO letter:

> "The OFT's suspicion that your company has participated in bid rigging activities in relation to the suspect tenders listed in the table is based in most cases, on at least:
>
> - one contemporaneous incriminatory document (such as an annotated tender register of one of the implicated parties); **and**
>
> - an express written admission of participation in bid rigging activities by one of the many leniency applicants in this case which directly implicates your company in relation to that suspect tender." (Emphasis in the original)

13. We summarise below the Appellants' specific submissions in relation to the suspect tenders included in the FTO, to which Mr. Clough Q.C., for the Appellants, took us in some detail at the oral hearing.

(a) *Suspect Tender 1 – 2 Water Lane Leeds (later, Infringement 6)*: The Appellants submitted that this tender both pre-dated the entry into force of the 1998 Act and is time-barred as a result of the application of Council Regulation (EC) No. 1/2003 ("Regulation 1/2003") and/or the Limitation Act 1980. Further, at the time of sending the FTO, the OFT did not know whether the words "Quarmby Construction" and "Ilkley" written on the documents in the OFT's case file referred to Quarmby or QSP.

(b) *Suspect Tender 2 – 154/155 High Street, Lincoln*: The Appellants advanced the same contentions described above in relation to Suspect Tender 1 in connection with Suspect Tender 2. In addition, the Appellants submitted that the OFT did not have an express written admission of participation (from the leniency applicant) implicating Quarmby, in particular because the OFT had relied on evidence included in an appendix listing tenders in relation to which the leniency applicant *suspected* it had engaged in cover pricing, as distinct from a separate appendix listing tenders in relation to which the leniency applicant *admitted* it had engaged in cover pricing. Nor, according to the Appellants, was there evidence that Quarmby had ever tendered for this project.

(c) *Suspect Tender 3 – City Learning Centre, Leeds; Suspect Tender 4 – Newcastle and Fairfax House, Bradford*: The Appellants submitted that both of these tenders are time-barred as a result of the application of Regulation 1/2003 (but not, in this case, the Limitation Act 1980) and that the OFT did not know whether the word "Quarmby" written on the documents in the OFT's case file referred to Quarmby or QSP.

(d) *Suspect Tender 5 – Humanities Research Institute, University of Sheffield (later, Infringement 214):* The Appellants accepted that the evidence available to the OFT in relation to this tender at the time of sending the FTO was sufficient to give rise to a reasonable suspicion of an infringement, although they did not accept (for the reasons expanded upon at paragraphs 105 to 116 below) that the same evidence was sufficient to establish an infringement.

(e) *Suspect Tender 6 – Residential, Morley:* The Appellants challenged whether, at the time of sending the FTO, the OFT had any contemporaneous documents in relation to this tender, and pointed in particular to a document that had been annotated with the words "?? Quarmby", which in the Appellants' view suggests that the leniency applicant had expressed doubt about the involvement of Quarmby in cover pricing in relation to this tender. Further, the Appellants submitted that the OFT had no evidence that Quarmby ever tendered for this particular project.

(f) *Suspect Tender 7 – Eastbrook Hall, Bradford (later, Infringement 233):* The Appellants submitted that none of the four pieces of evidence in the OFT's possession at the time of sending the FTO was sufficient to give rise to a reasonable suspicion of cover pricing by Quarmby. The Appellants noted that one of these documents does not name Quarmby, and the other three are not (or are probably not) contemporaneous. They contended that the only incriminating evidence against "Quarmby" (the Appellants submit again that it was unclear whether this was Quarmby or QSP) was an annotation by a person unknown, made at a time unknown, on a document which includes other annotations which are clearly not contemporaneous.

14. Accordingly, with the exception of Suspect Tender 5, the Appellants submitted that the OFT did not have reasonable grounds to suspect that Quarmby had engaged in cover pricing in relation to these suspect tenders at the time of sending the FTO. The Appellants accepted that the requirement of a reasonable suspicion is less onerous a standard of proof than that required to establish an infringement. However, the OFT's suspicion must be held reasonably and, in relation to six of the seven suspect tenders, the Appellants claimed that the OFT did not have sufficient evidence to support such a reasonable suspicion.

15. In addition to their general complaint that the OFT acted in breach of the principle of equal treatment, the Appellants made three further submissions in relation to the manner in which the OFT conducted its exercise of consolidating the investigation:

(a) Applying the judgment of Cranston J in *Crest Nicholson plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin) (in particular, at [65]), the Appellants submitted that they were in an objectively different position from other companies under investigation, as no other company has such a similar name as another addressee of the Statement of Objections (QSP), and the OFT should have taken steps to address this issue.

(b) The OFT acted arbitrarily and with partiality in deciding to attribute liability to Quarmby where the word "Quarmby" appeared on a suspect tender, and failed to make sufficient inquiries before attributing liability.

(c) It was disproportionate for the OFT to proceed against Quarmby given the poor quality of evidence in its possession, particularly in light of the severe penalties and reputational harm that were likely to arise from being included in the Statement of Objections.

The OFT's submissions

16. The OFT submitted that Quarmby's detailed submissions in relation to the evidence held by the OFT at the time of issuing the FTO were misconceived. The OFT was not required to ask itself, at that stage, whether the evidence in its possession would be sufficient to establish an infringement in respect of each tender. Rather, the OFT was entitled to consider whether there was evidence from which a reasonable suspicion could be drawn regarding the suspect tenders. Inevitably, some of the hundreds of suspect tenders considered by the OFT at that stage were subsequently excluded on the grounds of insuffient evidence, but that does not mean that the threshold adopted by the OFT was arbitrary or not objectively justifiable. Rather, the reasons for the OFT's process of consolidation were clearly explained at Decision/II.1459-1469 (p. 253-256).

17. In response to the general submissions made by the Appellants in relation to the suspect tenders at paragraph 12 above, the OFT submitted:

(a) The OFT was not required, at the time of sending the FTO, to have reached a final conclusion on whether a particular suspected infringement pre-dated the 1998 Act, was caught by the transitional provisions in that Act, or was statute barred. These were questions which the OFT was entitled to defer to a later stage of its investigation, once it had established the underlying facts relating to each infringement.

(b) The fact that Quarmby and QSP had similar names did not mean that the OFT had to apply a higher evidential threshold when deciding whether an undertaking was involved in at least five suspect tenders. The OFT was entitled, at the time of sending the FTO, to suspect *both* Quarmby and QSP in relation to a tender with evidence referring simply to "Quarmby". This, argued the OFT, did not mean that the OFT had concluded at that stage that "Quarmby" meant Quarmby (as defined for the purposes of this judgment), but simply meant that the reference to “Quarmby” reasonably gave rise to a suspicion that a company named Quarmby was involved. In the course of the main hearing, Miss Bacon for the OFT made a further, but subsidiary, point: the documentary evidence demonstrates that in cases where companies referred to QSP, they did so habitually by writing “QSP” and not “Quarmby”. This is demonstrated at Decision/IV.4444 (p. 1201) and IV.6745 (p. 1606) which describe the contemporaneous documents held in relation to QSP’s own infringements. Further, for all but one of the suspect tenders attached to QSP’s own FTO letter, the evidence held by the OFT referred to QSP specifically rather than Quarmby. The only exception was Suspect Tender 2, which was addressed to both.

(c) The OFT was not required, at the time of sending the FTO, to determine conclusively whether the party in question tendered for a particular project. It was merely required to have evidence on which it could reasonably suspect the company of having been involved in a particular tender. In any event, Quarmby itself admitted tendering for five of the projects regarded by the OFT as suspect tenders (in the second witness statement of Mr. Nelson at paragraphs 8, 10 and 12), and Quarmby’s participation in a further project (Suspect Tender 4) was specifically confirmed by the client for that project.

(d) As regards the Appellants’ submission that the OFT did not have in its possession the evidence described by the OFT in the FTO (for example, where the OFT did not have an express written admission of participation or an item of contemporaneous evidence), the OFT submitted that this is a mis-reading of the FTO. That letter stated that the OFT’s suspicion was based “in most cases” on at least one contemporaneous incriminatory document and an express written admission of participation, but not in all cases.

18. It is not necessary in this judgment to set out the OFT’s detailed rebuttal to the specific submissions put forward by the Appellants at paragraph 13 above, in particular because the OFT’s rebuttal in relation to the six suspect tenders (the Appellants having accepted that the OFT entertained a reasonable suspicion in

relation to Suspect Tender 5) largely repeated the general submissions made at paragraph 17 above.

19. The OFT rejected the contention that the principle of equal treatment applies in such a way as to limit its discretion to decide which cases to pursue at an early stage of its investigation. The OFT disputed, in any event, that its inclusion of Quarmby in the Statement of Objections was in breach of the principle of equal treatment. By the time of the Statement of Objections, the OFT had evidence implicating Quarmby in at least six infringements. Quarmby was, accordingly, treated no differently from other non-leniency parties.

The Tribunal's analysis and conclusions on the preliminary issue

20. The OFT was required to comply with the principle of equal treatment in its offer and administration of the FTO. However, at the time of sending the FTO, we have borne in mind that the OFT was still "at the stage of investigation, not in the process of finally determining liability" (*Crest Nicholson Plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin) at [78]).

21. The OFT had not, at the time of sending the FTO to Quarmby (or any of the other companies under investigation) in March 2007, decided which of the alleged infringements to include in the Statement of Objections. Rather, it went through two further stages of consolidation. As described in Decision/II.1467-1471 (p. 256), the OFT narrowed the seven suspect tenders to five, with the aim that, in most cases, there would be sufficient evidence to include three alleged infringements in the Statement of Objections. This allowed for the possibility that, at the conclusion of the investigation and prior to issue of the Statement of Objections, there might be insufficient evidence in respect of one or more of the five Suspect Tenders.

22. The circumstances in which the OFT can open an investigation under the 1998 Act are set out in section 25. That section provides that the OFT may conduct an investigation where it has reasonable grounds for suspecting an infringement of the Chapter I prohibition. Notwithstanding the Appellants' acceptance that the quality of evidence required to create a reasonable suspicion is less than that required to

establish an infringement, at various points in their written and oral submissions the Appellants appeared to suggest that the relevant evidential tests at each stage should be elided. As Mr. Clough said to the Tribunal:

> "In our submission, in stating the SO will set out in full the OFT's provisional view that certain companies, including your company, have engaged in bid rigging activities in the Chapter I prohibition, the OFT is effectively saying that it has sufficient evidence to send [a] statement of objections to [Quarmby], at least in respect of some of the suspect tenders, to be totally literal about it.
>
> It follows that the evidence that the OFT says it has obtained, which indicates that [Quarmby] has been involved in bid rigging and detailed in the table of suspect tenders in the annex to the fast track offer is the same evidence it proposes to rely upon in the statement of objections.
>
> Pausing there, I am not going to try and mislead the Tribunal because of course the decision goes on to the next stage, and in para. 1482 it actually says that the OFT has not yet selected the tenders for the statement of objections. That does not fit comfortably with what has just been said about the statement of objections in that para. 2 of the fast track offer where the implication is, "We have chosen at least five suspect tenders, we are at the latter stages of our investigation, we are going to send you a statement of objections in the decision we have, it may not be on all those cases". Our submission is that that is a very strong indication that the evidence that was used by the OFT, according to the OFT, for the identification of the five suspect tenders was sufficient and of a quality to justify issuing the statement of objections. Even if it was not in all five of them, it must have been in some of them to have made these observations, if I can put it like that, in the decision, but more importantly this para.2 in the FTO letter itself.
>
> If you tie that together with para.IV-127 where they say they have effectively used the same evidence to find the substantive infringements, then it all seems to make sense, and it seems to add up to the OFT saying, "At the time of the fast track offer we actually have sufficient evidence in which to prosecute you", effectively."

23. Judged by this standard, argued the Appellants, the OFT failed to meet the necessary standard of evidence set by the Tribunal in *Claymore Dairies Limited v. Office of Fair Trading* [2003] CAT 18 at [11]. There the Tribunal stated that the OFT should ask itself when making the decision whether to issue a Statement of Objections: "Am I satisfied that this evidence, if uncontested, would be sufficient to establish a Chapter I infringement"?

24. We are not persuaded, however, that this is the correct question to pose, at a time when the OFT's investigative phase was still ongoing, in respect of evidence which might not ultimately be included in any statement of objections or decision. Indeed, four of the seven suspect tenders were not pursued in the Statement of Objections addressed to the Appellants. Nor did the OFT itself purport to have satisfied the

test set out in *Claymore Dairies* in relation to each of the suspect tenders. Rather, the FTO letter (the operative paragraph of which has been set out at paragraph 12(d) above) referred to the OFT's "suspicion" that Quarmby had participated in bid rigging activities, and to the OFT having obtained evidence "indicating" that Quarmby had so participated. In our judgment, this reflects the correct evidential standard required at that stage.

25. Further, it was clear from the wording of the FTO letter that the OFT did not purport to hold exactly the same quality of evidence in relation to every party at that stage of the investigation. The main body of the FTO letter was the same for each recipient, stating that the OFT's suspicion was based "in most cases" on at least one contemporaneous incriminatory document and an express written admission of participation from a leniency applicant directly implicating the recipient of the letter.

26. The evidence that the OFT actually held at the time of sending the FTO letter is described at Decision/II.1464 (p. 255). It included within its investigation only those companies "for which there was category 1, 2 or 3 evidence" in relation to a minimum of five Suspect Tenders. It is clear from the Decision that these were not cumulative categories of evidence, contrary to the Appellants' suggestion at paragraph 10(g)(iv) of their skeleton argument, although it may have been the case that, in relation to a particular tender, the OFT held more than one type of evidence.

27. The OFT did not assert that the evidence described in the FTO letter was capable of supporting an alleged infringement without more. Rather, it considered that the existence of such evidence in relation to five or more suspect tenders was a fair basis on which to narrow the scope of its investigation, being evidence which was sufficient for the OFT to entertain a suspicion that a particular undertaking had engaged in cover pricing. The OFT may have continued to suspect other companies in relation to which it held evidence in relation to less than five suspect tenders.

28. In our judgment it was appropriate for the OFT to take steps to narrow the scope of its investigation, provided that the criteria were designed and applied with procedural fairness. The OFT properly exercised its discretion to conduct and

manage its investigation into possible competition law infringements (see, for example, *Crest Nicholson* at paragraphs 45 to 47).

29. We are satisfied that the OFT did hold the evidence described at Decision/II.1464 (p. 255) in relation to each of the suspect tenders. It follows that we reject the Appellants' contention that the OFT acted in a procedurally unfair manner towards Quarmby at this stage of the investigation. We have set out below our further conclusions in relation to certain of the Appellants' more specific submissions.

30. We consider that the OFT was not required, at the stage of sending the FTO, to have formed a definitive view as to whether a particular infringement was potentially statute barred or pre-dated the entry into force of the 1998 Act. Self-evidently, the OFT was yet to decide which infringements it would ultimately pursue in the Statement of Objections (which was issued over a year after the FTO was sent to Quarmby) and this was a question that it was entitled to defer to a later stage of its investigation, in the event that the particular infringement was included in the Statement of Objections.

31. We accept the OFT's submission that, in the unusual situation where it holds evidence that two independent companies with very similar names, based in the same town, may be involved in an alleged infringement, the OFT is reasonably entitled to suspect both companies in the preliminary stages of its investigation. With the exception of one suspect tender (in relation to which the evidence was received at a late stage, and was thus sent to both Quarmby and QSP), the OFT had come to the entirely sustainable view at the time of sending the FTO that it suspected Quarmby, rather than QSP, of involvement in the infringement. Accordingly, there was no material difference between the Appellants and other recipients of the FTO.

32. The Appellants' submission that the OFT was required to hold evidence that Quarmby had actually submitted a bid in relation to each of the suspect tenders at the time of sending the FTO does not assist them. It is the unlawful contact between competitors at the time of giving a cover price, rather than the submission of a bid, that forms the basis of the infringement (*Apex Asphalt and Paving Co*

Limited v. Office of Fair Trading [2005] CAT 4 at [236]). In any event, for the reasons stated above, the OFT was not required, at the stage of sending the FTO, to ask itself whether the evidence *established* an infringement to the civil standard of proof. Rather, it was entitled to take an administrative step to narrow the scope of its investigation by reference to those companies for which it had the best available evidence at the time, and the companies for which it had evidence of the most repeat behaviour.

33. For the reasons above, we dismiss this ground of appeal.

34. Next we turn to the Appellants' further grounds of appeal in respect of liability. These concern the three infringements that ultimately appeared in the Decision.

III. LIABILITY GROUND ONE – INFRINGEMENT 6: LIMITATION PERIOD HAD ALREADY EXPIRED

35. The Appellants submitted that Infringement 6 was statute barred by the operation of Article 25 of Regulation 1/2003 and section 60 of the 1998 Act and/or the Limitation Act 1980, because the infringement (in relation to a project which had a tender closing date of 3 March 2000) took place more than seven years prior to the date when the Appellants were first notified that they were under investigation (which, in the case of Quarmby, was 22 March 2007, the date on which it received the FTO).

<u>Limitation period under Regulation 1/2003</u>

The Appellants' submissions

36. Although the 1998 Act does not contain any limitation period for the imposition of fines by the OFT for infringements of the Chapter I prohibition, the Appellants submitted that the OFT is nevertheless subject to a limitation period either as a matter of consistency with EU law by operation of section 60 of the 1998 Act and/or under UK law by virtue of the Limitation Act 1980. Regulation 1/2003, unlike the 1998 Act, does contain a five year limitation period (Article 25(1)), and

the Appellants argued that the OFT is bound by the same limitation period, by virtue of section 60 of the 1998 Act which provides:

> "(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (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.
>
> (4) Subsections (2) and (3) also apply to –
>
> > (a) the [OFT]; and
> >
> > (b) any person acting on behalf of the [OFT], in connection with any matter arising under this Part.
>
> (5) In subsections (2) and (3), "court" means any court or tribunal.
>
> (6) In subsections (2)(b) and (3), "decision" include a decision as to –
>
> > (a) the interpretation of any provision of Community law;
> >
> > (b) the civil liability of an undertaking for harm caused by its infringement of Community law."

37. The Appellants argued that this is an area where the UK authorities and courts are obliged to adopt an approach that is consistent with EU law. They rejected the notion that there is a "relevant difference" between the 1998 Act and the EU law provisions, as a "relevant difference" can only exist to the extent that the provision of EU law is expressly contradicted by domestic law. The Appellants referred in particular to the Tribunal's approach in *Pernod Ricard SA and Campbell Distillers Limited v. Office of Fair Trading* [2004] CAT 10, where the 1998 Act was silent about the participation of a third party complainant during the administrative

procedure, but where the Tribunal was prepared to infer the same entitlement to participate that exists as a matter of EU law. They referred in particular to paragraph 230 of that judgment:

> "As to "any relevant differences between the provisions concerned", to which the Tribunal must have regard, there is nothing in the Act or the Director's Rules which *prevents* the participation of the complainant in the ways indicated above. It is not therefore a case of a positive provision of the Act or of subordinate legislation precluding an approach which is in conformity with Community law. It is simply that the existing procedural framework does not *expressly* provide for complainants' rights in the same way as Community law does." (Emphasis in the original)

38. As there is no express provision in the 1998 Act concerning limitation in respect of penalties, the Appellants submitted that the consistency requirement of section 60 of the 1998 Act supports the view that the same limitation period that applies to the Commission under EU law should apply to the OFT here, with the consequence that the infringement is statute barred from investigation. The Appellants submitted further that principles of legal certainty and administrative fairness require a limitation period to apply to the imposition of penalties for competition law infringements.

The OFT's submissions

39. The OFT submitted that there is a clear "relevant difference" between the Commission's fining powers, which are subject to the five year limitation period in Article 25(1)(b) of Regulation 1/2003, and the OFT's equivalent powers, which are not. Following the approach of the Tribunal in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 at [503], where such a relevant difference exists, the position under EU law need not be taken into account.

40. The OFT submitted further that it is by no means unusual that the domestic enforcement powers should be broader than those under EU law, pointing for example to the power of this Tribunal to adopt its own decisions under paragraph 3(2)(e) of Schedule 8 to the 1998 Act, a power not shared by the EU courts. The OFT rejected the Appellants' submission that there must be an "express provision" of domestic law that conflicts with the relevant EU law provision. The OFT submitted that the Tribunal is not faced with the same lacuna as existed in *Pernod*.

Rather, the 1998 Act contains an express provision conferring on the OFT a power to require payment of penalties in respect of infringements, unrestricted by reference to any limitation period. As the OFT put it at paragraph 21 of its Defence: “the absence of a limitation period in the legislative scheme does not leave uncertain the question of limitation, but rather confers a legally certain broader power than that conferred upon the Commission by the EU legislature.”

41. As regards principles of legal certainty and administrative fairness, the OFT submitted that, although a reasonable limitation period may be consistent with general principles of EU law, neither the principle of legal certainty nor the principle of administrative fairness requires such a limitation period to be implied. The fact that EU legislation may refer to limitation periods being necessary in the “interests of legal certainty” does not suggest that the absence of a limitation period in other contexts (including domestic legislation) would constitute a breach of the principle of legal certainty. As regards administrative fairness, the OFT referred to the Tribunal’s judgment in *Pernod* at paragraph 235:

> “Turning to domestic administrative law, and looking at it from the point of view as to how the OFT should exercise its discretion under the 1998 Act, we take the general principle to be that where Parliament has conferred an administrative power, that power is to be exercised in manner which is fair in all the circumstances. What is fair in all the circumstances depends notably, on the context of the particular decision in question and on the “shape of the legal and administrative system in which the decision is taken”, having regard to the particular statute in question…”

42. The OFT submitted, accordingly, that the principle of administrative fairness does not require the imposition of a limitation period in circumstances where the 1998 Act makes no such provision.

The Tribunal’s analysis and conclusions

43. In our judgment the OFT’s fining powers under section 36 of the 1998 Act are not subject to a five year limitation period. The Tribunal is satisfied that there is a relevant difference, for the purposes of section 60 of the 1998 Act, between the provisions of Regulation 1/2003 and the 1998 Act. This case is not analogous with *Pernod* because there is an express power in section 36 of the 1998 Act and that power is not limited by any limitation period.

44. Nor do we consider that the Tribunal's judgment in *Pernod* supports a general proposition that, on each occasion where the 1998 Act is silent on a matter of competition law enforcement that is the subject of specific legislation at EU level, the EU provisions should be "read across" to the 1998 Act.

45. In *Pernod*, the Tribunal was faced with legislation which, although it recognised the ability of third party complainants to bring an appeal by virtue of section 47 of the 1998 Act, was otherwise silent on their broader role. The Tribunal's decision to extend certain procedural rights to the complainants by reference to section 60 of the 1998 Act must be understood in its proper context. First, the Tribunal emphasised at paragraph 245 that its judgment was specific to the circumstances of the case, in particular in the light of the factual background outlined by the Tribunal at paragraph 236. Further, the Tribunal drew on other provisions of domestic administrative law (paragraph 235) and, at paragraph 241 of its judgment, to the "general system" of the 1998 Act, as supporting its Decision that the OFT should have afforded certain procedural rights to the complainant in that case.

46. Here, by contrast, there is no indication, by reference to the broad scheme of the 1998 Act or otherwise, that Parliament intended the OFT to be constrained by any period of limitation in relation to the exercise of its powers. We note (although we were not taken to it by the parties) that Parliament did appear to give some consideration, when debating the Competition Bill in 1998, to the possibility of constraining the OFT's powers by reference to a limitation period, but that possibility was not enacted.[3] Had Parliament intended to constrain the OFT's fining powers in this way, we would have expected this to be clear on the face of the 1998 Act.

47. The domestic penalties regime is, therefore, relevantly different and it would be inappropriate to "read in" the limitation period that applies under Article 25 of Regulation 1/2003.

[3] See, in particular, the debate before House of Commons Standing Committee G, dated 16 June 1998 (afternoon) in connection with proposed amendment No. 157.

48. We also reject the Appellants' submission that the lack of a limitation period leads to any adverse position as regards legal certainty or administrative fairness. As noted by the Tribunal at paragraph 235 of *Pernod*, what is fair in all the circumstances depends on the context of the particular decision and on the "shape of the legal and administrative system in which the decision is taken". Here the domestic legal system does not provide for any such limitation period. We note that the Tribunal in its judgment in *G F Tomlinson Group Limited & Ors v. Office of Fair Trading* [2011] CAT 7 came to the same view in relation to similar submissions made by Galliford Try Plc, to which these Appellants referred in their written submissions.

<u>Application of the Limitation Act 1980</u>

The Appellants' submissions

49. The Appellants argued that the six year limitation period pursuant to the Limitation Act 1980 also applies, by virtue of section 2 which provides:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

or alternatively section 9, which provides:

> "An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued."

50. The Appellants referred to *China v. Harrow Urban District Council* [1954] 1 Q.B. 178 in support of their proposition that an "action" for these purposes is wide enough to capture the issuing of a Statement of Objections under section 31 of the 1998 Act or a penalty notice under section 36 of the 1998 Act. They also referred to *Competition Law*, Whish (6^{th} Ed) at page 400, which states: "The Competition Act does not specify a limitation period for the imposition or recovery of penalties: this is a matter of general law, as established by the Limitation Act 1980 which prescribes a period of 6 years."

The OFT's submissions

51. The OFT submitted that its powers to require payment of a penalty pursuant to section 36 of the 1998 Act are not an "action" to which either section 2 or section 9 of the Limitation Act 1980 applies. An "action" for these purposes means a "proceeding in a court of law" and the various cases that have considered the width of the definition of an "action" for these purposes all reach the same conclusion that what is being considered here is "*proceedings in a court of law*" to recover any sum recoverable by virtue of any enactment" (Sellers LJ in *China v. Harrow* at p. 187, emphasis added). The OFT's powers to require payment of a penalty pursuant to section 36 of the 1998 Act are not proceedings of that kind: they are not concerned with such recovery. Therefore neither section 2 nor section 9 of the Limitation Act 1980 applies. This can be contrasted with section 37 of the 1998 Act which permits the recovery of any amount payable under a penalty notice as a civil debt.

52. The OFT submitted in the alternative that, even if the Tribunal was to conclude that section 2 or 9 of the Limitation Act 1980 applies (and Miss Bacon reminded us that the Appellants had not explained how a penalty imposed by the OFT could conceiveably be regarded as an action "founded on tort" within the meaning of section 2, or an action to recover a sum recoverable by virtue of an enactment within the meaning of section 9), it was entitled to rely on section 32(1)(b). This provides that, where any fact relevant to the plaintiff's right of action has been "deliberately concealed" by the defendant, the limitation period does not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it. The OFT submitted that Quarmby itself had identified 6 July 2005 as the earliest date on which the OFT could have learned of the infringement, and the requirement to pay a penalty has therefore clearly been imposed within time.

53. The Appellants denied that there was any concealment, in which regard the burden of proof rests on the OFT. They submitted, in any event, that neither silence, nor intentional acts without knowledge of breach, amount to concealment.

The Tribunal's analysis and conclusions

54. In our view, the word "action" in sections 2 and 9 of the Limitation Act 1980 cannot support the excessively broad definition contended for by the Appellants. Although it is clear from *China v. Harrow* that the word should not be interpreted narrowly, we were not taken to any authority where the word has been held to extend to the commencement of (or other key steps in) administrative investigations. It is important, too, to note that the appellants in *China v. Harrow* were not contending for such a broad interpretation, but rather a more modest extension to the ordinary meaning of the word "action" to include the recovery of a civil debt (rates) by a local authority.

55. Accordingly, we hold that the Limitation Act 1980 does not apply to the issuing by the OFT of a Statement of Objections or a penalty notice. It is not necessary for us to reach any conclusion on the issue of concealment.

56. The Appellants attempted to reformulate their original submissions on this ground in their September 2010 written submissions. They argued that, even if Infringement 6 is not statute barred, "the effluxion of time and the overall justice and proportionality of the situation nevertheless calls for the fine in respect of Infringement 6 to be quashed". We disagree. Whilst it is desirable that the OFT concludes its investigations as quickly as possible, it is not appropriate to suggest that proportionality requires the OFT to be subject to a *de facto* subjective and uncertain limitation period in circumstances where Parliament did not intend there to be any such constraint on the OFT's powers.

IV. LIABILITY GROUND TWO – INFRINGEMENT 6: PRE-DATES INTRODUCTION OF THE 1998 ACT

The Appellants' submissions

57. The Appellants' second ground of appeal on liability concerned the specific timing of Infringement 6. The Appellants noted that the tender closing date in respect of this project was noon on 3 March 2000, 2.5 days after the entry into force of the

1998 Act. They submitted that, even if Quarmby did provide a cover price to Strata Construction Limited ("Strata") (which is denied), that constituted an agreement or arrangement that commenced before 1 March 2000 and ended either before 1 March 2000 or, by virtue of the transitional provisions, did not constitute an infringement of the 1998 Act.

58. The Appellants submitted that the OFT has failed to prove that they infringed the 1998 Act, in particular because:

(a) There was no written record showing the date on which Strata requested, or the date on which Quarmby gave, a cover price for the project.

(b) Strata's senior estimator, Mr. Duncan Ironmonger, had no specific recollection of requesting or receiving a cover price in respect of Infringement 6, but rather responded to a leading question by the OFT as to how he supposed he might have received a cover price from "Quarmby Construction".

(c) The OFT's only evidence as to when the cover price was given was Mr. Ironmonger's statement at an interview on 29 March 2007 that it was "more than likely" that he received a cover price at the last minute (which he had previously explained meant on the day of or the day before the tender due date).

(d) At Decision/III.124 (p. 369), the OFT referred to the fact that construction companies typically agreed to give a cover price some time in advance of the tender due date (the Appellants referred, too, to the transcript of the OFT's interview with Mr. Paul Throssell of Strata). The Appellants submitted that, in this case, the agreement (if any) was made well in advance of the tender due date, to avoid the risk of Strata being embarrassed if Quarmby had decided not to price the project.

59. Accordingly, the Appellants submitted that the OFT had not proved to the necessary standard that the cover price was given on or after 1 March 2000 or that there was an agreement that continued until after the entry into force of the 1998 Act.

60. In the alternative, the Appellants submitted that, should the Tribunal find that a cover price was requested before, but provided after, 1 March 2000, the agreement falls within the transitional provision at paragraph 19 of Schedule 13 to the 1998 Act. Paragraph 19(2) to that Schedule provides that the Chapter I prohibition does not apply to an agreement to the extent to which there is a transitional period. Paragraph 20(1) provides that there is no transitional period for an agreement to the extent to which, immediately before the starting date, it is void under section 2(1) or 35(1)(a) of the Restrictive Trade Practices Act 1976 ("RTPA").

61. The Appellants submitted that the OFT has interpreted incorrectly the transitional provisions at Decision/III.223 (p. 392-393), in particular in its conclusion that Infringement 6 would have been void under the RTPA in any event. The Appellants submitted that "simple cover pricing" is neither an arrangement under which two parties accept "relevant restrictions", nor a "price-fixing agreement" for the purposes of the RTPA.

62. In their September 2010 submissions, the Appellants highlighted the particular complexity of the RTPA, and that identifying an infringement requires a detailed understanding of the agreement being analysed. They argued that the OFT had not provided a sufficient analysis of the agreement to demonstrate why the pre-1 March 2000 agreement gives rise to relevant restrictions falling on both parties. The Appellants referred, too, to paragraph 1.21 of the OFT's Decision in *Tobacco*[4], where the OFT concluded that the transitional provisions were engaged, arguing that the same approach should have applied in this case.

The OFT's submissions

63. The OFT referred to its analysis of the relevant evidence in relation to this tender set out in the Decision and repeated the view stated there that, on the balance of

4 Decision of the Office of Fair Trading in Case CE/2596-03: *Tobacco* (15 April 2010).

probabilities, the infringement took place on or after 1 March 2000. The date of the infringement is the date on which the cover price was *given*, and the OFT stated that the Appellants are wrong to suggest that the OFT relies only on the evidence of Mr. Ironmonger of Strata to establish the timing of the infringement. Rather, the OFT relies on the transcript of its interview with Mr. Throssell of Strata to establish the time at which a cover price was given by Quarmby to Strata:

> "And then **the day before the tender was due in**, we'd ring them up and say, if they hadn't already contacted us, we'd ring them and say, you said you were going to give us a cover, can you tell me when we can have this price…"

64. As regards the transitional provisions under the 1998 Act, the OFT repeated the conclusion stated at Decision/III.223 (p. 392-393) namely that, even if the agreement between Quarmby and Strata was made before 1 March 2000, it is still caught by the Chapter I prohibition on the following reasoning:

(a) Paragraph 20(1)(a) of Schedule 13 to the 1998 Act provides that there is no transitional period for an agreement which was, as at 1 March 2000, void for lack of registration under section 35(1)(a) of the RTPA.

(b) The agreement between Quarmby and Strata was required to be registered because it fell within section 6(1) of the RTPA.

(c) Applying section 6(1), both Quarmby and Strata accepted a "restriction" (defined in section 43(1) of the RTPA) in respect of the prices to be charged and quoted to the procuring party. Quarmby, in giving the cover price, agreed not to submit a tender above the level of the cover price, while Strata, in taking the cover price, agreed not to submit a tender below the level of the cover price.

(d) It makes no difference that a cover price may have been *requested* before 1 March 2000 but *given* after 1 March 2000. For the same reasons outlined above, the transitional provisions do not apply where an agreement made before 1 March 2000 is void for lack of registration under section 35(1)(a) of the RTPA.

65. The OFT submitted that its later decision in *Tobacco* is of no relevance here, as the conclusions in that case were reached in a different factual and legal context, and the decision has no bearing on whether the transitional provisions apply in this case to a different type of agreement.

The Tribunal's analysis and conclusions

66. Infringement 6 was the earliest infringement pursued by the OFT in the Decision (Alleged Infringements 1-5 were not pursued). Even so, provided that the OFT has sufficient evidence to support the finding of infringement and that the OFT respects any relevant transitional provisions, it cannot be criticised for choosing to pursue an infringement that occurred early in the life of the 1998 Act. Indeed, it is understandable that the OFT should do so, lest companies treat the periods surrounding the entry into force of new legislation as "safe havens", during which they might infringe the law with impunity.

67. In the absence of evidence that pin-points the date on which a cover price was requested by Strata and (beyond the general commentary of Mr. Throssell) the date on which a cover price was provided, we consider that it was appropriate for the OFT to consider the application of the transitional provisions of the 1998 Act, and indeed it did so. In this regard, we do not find fault with the OFT's analysis set out at paragraph 64 above, nor do we consider that the question of whether or not an agreement falls within the transitional provisions is as complex as maintained by the Appellants in their September 2010 submissions.

68. We turn now to the Appellants' submission that cover pricing does not involve any "restriction" for the purposes of the RTPA because the requesting party does not accept a restriction that it will bid the amount of the cover price received (or indeed accept any obligation that it will submit a bid at all) nor does the providing party accept any restriction as to the price it will bid. We were referred by both the Appellants and the OFT to *Re Electrical Installations at Exeter Hospital Agreement* [1971] 1 All ER 347, where the Restrictive Trade Practices Court ("RTPC") was called upon to review the registrar's proposed registration of an agreement between seven electrical contractors in relation to a contract for the supply of electrical

goods to Exeter Hospital. The relevant paragraph of the memorandum by which the registrar recorded the terms of the agreement stated as follows:

> "…(a) that the then Colston Electrical Co. Ltd., Troughton & Young Ltd. and Lee Beesley & Co. Ltd., would each prepare a detailed tender for the contract, that Duncan Watson (Electrical Engineers) Ltd., and Wheeler Crittall Berry Ltd., (formerly F. H. Wheeler & Co., Ltd) would prepare check estimates **and that Haden Electrical Ltd., and the Drake & Scull Engineering Co., Ltd., would do not more than receive cover prices;** (b) that at a subsequent meeting each party who had prepared a detailed tender or had prepared a check estimate would inform the others of the price it had estimated; (c) that, as between the prices of the parties who had prepared detailed tenders, a middle price would be taken, and the one of those parties who had prepared an estimate at the middle price would be treated, as between all the parties, as the successful tenderer; (d) that any party who prepared an estimate at a price lower than the middle price would submit tenders at prices increased so as to exceed the middle price, **and that any party who had received a cover price would, if they decided to submit a tender, not do so below that price**; (e) that each estimate would be made on the basis that the successful tenderer would pay the sum of £500 to each of the other two parties who had prepared detailed tenders and of £200 to each of the two parties who had prepared check estimates." (Emphasis added)

69. The Appellants argued that the practice described in *Re Electrical Installations* differed from "simple" cover pricing[5] because the nature of the restriction was clear in that case: the bidder taking a cover price accepted a restriction as to the price it will quote (by agreeing not to estimate), agreed the overall arrangements and as part of that agreed to bid higher than the agreed "winning" bid. By contrast, "simple" cover pricing does not involve the requesting party accepting a restriction that it will bid the amount of the cover price received (or indeed accepting any obligation that it will submit a bid at all). Similarly the providing party does not accept any restriction as to the price it will bid.

70. We agree with the OFT that there does not need to be an express agreement between parties in order for a "restriction" for the purposes of section 6 of the RTPA to exist. Rather, a restriction (whether express or implied) is inherent in every instance of cover pricing, insofar as a contractor requests another to provide a cover price and the cover price is then given on the understanding that the recipient will not ultimately undercut the price of the genuine bid. The contractor providing

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5 Miss Bacon for the OFT made it plain that the term "simple cover pricing" was not a definition used by the OFT in its own assessment of the infringing behaviour at issue in the Decision (Transcript, day 2, page 62 at lines 19 to 22).

the cover price would not do so unless it was confident that the receiving party would so restrict or alter its conduct.

71. The RTPC in *Re Electrical Installations* was in little doubt that the companies in that case should have registered the agreement under the RTPA, and we are similarly in little doubt that, if the agreement was made before 1 March 2000, Quarmby and Strata should have done the same. Accordingly, in the event that the agreement commenced prior to 1 March 2000 and continued until 3 March 2000, when Strata placed its bid, the agreement was void under s. 35(1)(a) of the RTPA for lack of registration and would not have benefited from the transitional provisions.

V. LIABILITY GROUND THREE – INFRINGEMENTS 6, 214 AND 233: INSUFFICIENT EVIDENCE

72. The Appellants dedicated the greatest proportion of their oral submissions to their third ground of appeal on liability, namely that there was insufficient evidence for the OFT to conclude that the Appellants engaged in cover pricing as alleged in the Decision, or at all. Before turning to those specific submissions, it is necessary first to outline the parties' more general submissions, and the Tribunal's conclusion, on the applicable burden and standard of proof in relation to the alleged infringements.

The burden and standard of proof

The Appellants' submissions

73. The Appellants submitted that, following *Re D (Northern Ireland*) [2008] UKHL 33 at paragraph 28, when determining whether or not the standard of proof has been discharged on the balance of probabilities, a court or tribunal must look at the facts more critically or more anxiously in light of the following circumstances:

(a) the inherent improbability of the occurrence taking place;

(b) the seriousness of the allegation to be proved; and

(c) the consequences that would follow.

74. The Appellants submitted that all of these circumstances are relevant here. First, the Quarmby "corporate culture" means that it is inherently unlikely that Quarmby engaged in cover pricing: it consistently returned tenders and Quarmby had a clear policy, which was not to seek or give cover prices[6] (in this regard the Appellants relied on the evidence of Mr. Roger Nelson, Quarmby's Commercial Director), such that Quarmby should be treated differently from companies which openly admitted to engaging in cover pricing. Second, the OFT itself concluded that the infringements are serious and, third, severe consequences follow from proof of the alleged facts. The Appellants submitted that the evidence against them, viewed critically and more anxiously, fails to prove to the requisite standard that Quarmby engaged in cover pricing in respect of any of the infringements.

75. The Appellants submitted that the OFT had found guilt by association in this case, relying on the fact that many other companies in the industry regularly engaged in cover pricing, without considering the individual circumstances of each defendant. They submitted that the OFT was not entitled to take account of the fact that cover pricing was said to be "endemic" within the industry, and that the totality of the evidence on which the OFT is entitled to rely in relation to any infringement is the evidence that specifically relates to that defendant and that alleged infringement. To do otherwise shows an improper disregard for the presumption of innocence.

76. The Appellants made a general complaint about the fragmentary nature of the evidence relied upon by the OFT, referring to the judgment of the Court of Justice in joined Cases C-204/00 P & Ors, *Aalborg Portland A/S & Ors v. Commission* [2004] ECR I-123, in particular at paragraph 57:

> "In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in

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6 The Appellants asserted that it had long been Quarmby's corporate policy not to engage in cover pricing. In their Notice of Appeal, the Appellants stated: "[Quarmby]…consciously decided that participating in cover pricing did not fit with the corporate image which it wanted to convey to the market place" and that "…[Quarmby's directors] can say with utter conviction that the estimators were not allowed to give cover prices and were specifically told not to."

> the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."

The Appellants submitted that where the evidence is ambiguous (including documentary evidence) and there is a plausible explanation which is innocent, the Appellants are entitled to the benefit of the doubt.

77. The Appellants raised a more general complaint in relation to the quality of evidence relied upon by the OFT, by reference to the transcripts of the interviews conducted by the OFT. The Appellants submitted that the OFT's interviews were very unsatisfactory, in that the witnesses did not really appear to remember what had happened, and were merely surmising what had happened on the basis of the documents that they were shown (using words such as "surmise", "suspect" and "may"). This was not helped, in the Appellants' submission, by the OFT's use of leading questions. In their September 2010 submissions, the Appellants added that the OFT had in some instances failed to ask obvious questions of interviewees, which might have helped understand the robustness of the allegations, and in the absence of such clarification, led to ambiguities in the evidence. Because the OFT did not prepare formal witness statements for the individuals that it interviewed, they were not witnesses for the purposes of these proceedings and could not be called for cross-examination by the Appellants.

The OFT's submissions

78. The OFT responded that the three situations listed by the House of Lords in *Re D (Northern Ireland)* were all considered by their Lordships to be facets of the same proposition, namely that the inherent probability or improbability of an event should be taken into account when deciding whether the balance of probabilities test is satisfied. The OFT rejected the notion that it had shown an improper disregard for the presumption of innocence, by applying a lower standard of proof. Rather, the standard of proof is that of the balance of probabilities, which is not altered by the fact that the allegation is itself serious, and the OFT has applied that standard. The OFT cited Lord Nicholls in *Re H (minors)* [1996] AC 563 at 586 in this regard:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.
>
> …**this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred**. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established." (Emphasis added)

79. The OFT submitted that, in assessing whether behaviour was probable or improbable, it was entitled to consider the behaviour of other companies in the same industry at the same time. This is not to disregard the presumption of innocence or to rely on guilt by association; rather, it is the proper contextual approach to adopt in considering whether the facts satisfied the balance of probabilities in the present case. Further, the giving of a cover price by Quarmby was not made "inherently" improbable by reason of Quarmby's alleged policy of not engaging in cover pricing. Rather, that alleged policy was simply a factor to be taken into account by the OFT in reaching its conclusion and it was indeed weighed in the balance.

80. The OFT wrote to the Tribunal on 6 August 2010 to respond to the complaints made by the Appellants (and by certain other companies that appealed the Decision) about the quality of evidence gathered by the OFT in this investigation, and its decision not to adduce witness statements for the purposes of these appeals (in respect of individuals who had provided evidence to the OFT at interview during the course of the investigation). The OFT emphasised that the individuals interviewed by it were made aware, at the start of an interview, that it is a criminal offence knowingly or recklessly to provide the OFT with false or misleading information. Further, the interviews were transcribed from tapes – rather than redrafted into witness statements and elaborated upon with the assistance of legal representatives – and thus provide actual responses to the OFT's questions. The parties' legal representatives were also given the opportunity to make any comments or amendments in relation to the transcripts at the time they were

prepared, and to make written and oral representations in response to the Statement of Objections (which included the transcripts that formed part of the OFT's file). Lastly, the Appellants did not apply to cross-examine the relevant individuals, in which case the Tribunal could have issued an appropriate witness summons.

The Tribunal's analysis and conclusions

81. The question of the relevant standard of proof has been well-traversed in the case law. It is clear that the legal burden of proof rests on the OFT, which must establish an infringement according to the civil standard of proof, that is to say, on the balance of probabilities.

82. As regards the Appellants' submissions regarding the "inherent improbability" of Quarmby engaging in cover pricing, we agree with the OFT that the giving of a cover price by Quarmby was not made "inherently" improbable by reason of Quarmby's assertion that it had a policy of not engaging in cover pricing. Indeed, it is clear from Mr. Roger Nelson's evidence that no such policy had been promulgated within the firm prior to the summer of 2004 (see Transcript, day 1, page 18, lines 1-30). Such policy as was ultimately adopted appeared to have been triggered by Mr. Nelson reading an article in *Building* magazine in summer 2004, which highlighted the serious legal consequences of cover pricing. Thereafter, Mr. Nelson held discussions with Mr. David Jones (Quarmby's Managing Director) and Mr. David Harrison (then the senior estimator at Quarmby) at which he highlighted those consequences.

83. Mr. Nelson stated that he relied on Mr. Harrison to communicate the same message to the other staff in the estimating department at that time, and confirmed that his conversation with Mr. Harrison in 2004 was the last time the two spoke about cover pricing before Mr. Harrison retired in the spring of 2006. Mr. Harrison, when cross-examined, said that he could not recall having a discussion with any of his estimators in which he specifically told them not to engage in cover pricing.

84. We would have expected a company with a clear policy against cover pricing to ensure that such a policy is communicated clearly (and repeatedly) to existing staff

and new joiners (see, for example, paragraph 115 of the Tribunal's judgment in *Durkan Holdings Limited & Ors v. Office of Fair Trading* [2011] CAT 6 ("the Durkan Judgment")). By contrast, the only evidence to which we were referred of a policy being disseminated within Quarmby at the relevant time was the discussions between Messrs. Jones, Nelson and Harrison in summer 2004. No written policy was adopted, nor does it appear to have been the practice of Quarmby to draw the attention of new joiners to this policy, relying instead on their staff to have an "understanding" of how Quarmby operated. Accordingly, in the circumstances, we do not find it "inherently improbable" that Quarmby engaged in cover pricing for that reason alone.

85. A number of letters were annexed to the witness statement of Mr. Nelson, purporting to show that, from November 2000 onwards, Quarmby would consistently decline to tender in writing when it was unable to price a tender. In cross-examination, Mr. Nelson accepted that none of these letters demonstrated that Quarmby had any policy regarding cover pricing and declining tenders prior to the summer of 2004.

86. As regards the evidence of cover pricing being an "endemic" practice in the industry, we consider that the prevalence of this conduct was a factor which the OFT was entitled to take into account in coming to a view on the likelihood of an individual company participating in a specific infringement. This Tribunal may take into account circumstantial evidence, particularly in connection with secret cartel behaviour where little or nothing may be committed to writing (*JJB Sports PLC v. Office of Fair Trading* [2004] CAT 17 at paragraph 206). This is also true of evidence described by the Appellants as fragmentary. Ultimately, the totality of evidence, viewed as a whole, must be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled (*JJB* at paragraph 204).

87. Turning to the Appellants' criticisms of the way in which the OFT gathered evidence in the course of this investigation, and the purported failure by the OFT to adduce witness statements in respect of those individuals who gave evidence at interview during the course of its investigation, we accept, to an extent, the

Appellants' criticisms of the OFT's approach in the Decision and in the conduct of this (and other) appeals. In this regard, we agree with the reservations expressed by the Tribunal at paragraphs 109 to 110 of the Durkan Judgment, in particular that the lack of a witness statement (and subsequent cross-examination) can prevent the Tribunal from gaining a proper understanding of the strength of the OFT's case, for example where the underlying interview transcript was unclear or ambiguous.[7] However, notwithstanding this criticism, we have considered the totality of the evidence relied on by the OFT in relation to each infringement, and have formed a view based on that evidence in our consideration of the Appellants' specific submissions below.

Quality of the evidence

88. We now turn to the Appellants' more detailed submissions in relation to the quality of the evidence held by the OFT in relation to the three infringements ultimately pursued in the Decision. They submitted that the evidence against them fails to prove to the requisite standard that Quarmby engaged in cover pricing in respect of any of the infringements. At the hearing, Mr. Clough took us, in some detail, to the evidence relied on by the OFT in the Decision to support each infringement and, in each case, argued that the evidence fell short of the applicable standard of proof.

Infringement 6

89. The evidence in relation to Infringement 6, which concerned a tender for the conversion (from offices into flats) and refurbishment of a riverside warehouse at 2 Water Lane, Leeds ("the Water Lane project"), comprised the following:

(a) During a search of the premises of Strata, the OFT found a ring binder file marked "Covers from Jan 2000 to Dec 2001", containing copy 'form of tenders' and result letters. The form of tender relating to the Water Lane project, which had been completed by Mr. David Ironmonger of Weaver

7 See also the President's comments during the hearing of *North Midland Construction PLC v Office of Fair Trading* (Case No. 1124/1/1/09, Transcript, page 43, lines 19 to 34), and the exchanges between the Chairman and Mr. Beard and Mr. Hoskins Q.C. during the hearing of *Durkan Holdings Limited & Ors v Office of Fair Trading* (Case No. 1121/1/1/09, Transcript, day 4, pages 23 to 29; day 5, pages 2 to 4).

Construction Ltd ("Weaver", which company is now known as Strata), was annotated by hand with the text "FROM QUARMBY CONSTRUCTION".

(b) As part of its leniency application, Strata's legal representatives provided the OFT with a table listing the tenders in relation to which it had engaged in cover pricing. This included the Water Lane project, against which project the table recorded that Strata had received a cover price from "Quarmby Construction" of Ilkley.

(c) The OFT conducted interviews with certain Strata employees, including Mr. Ironmonger and Mr. Paul Throssell, during which they were asked to comment on the written evidence. Mr. Clough took us to certain extracts from the transcripts of the interview with Mr. Ironmonger (see Transcript, day 2, pages 4-5), which we have read in full, together with the transcript of the interview with Mr. Throssell.

90. The conclusions drawn by the OFT from this evidence are set out at Decision/IV.758-787 (p. 556-562). The Appellants challenged the quality of the evidence held by the OFT in relation to Infringement 6 and repeated their submissions made in response to the Statement of Objections. Those submissions are set out, together with the OFT's response, at Decision/IV.771-IV.777 (p. 559-560).

91. We have carefully considered all the material before us, including the material relied on by the OFT in the Decision, the documents submitted by the Appellants in response to the Statement of Objections, the parties' additional written submissions in their pleadings and skeletons, and to the additional points made in oral submission. Our conclusions in relation to this material are set out below.

92. We are satisfied that the OFT held a contemporaneous document in relation to the infringement. Despite the Appellants' submissions regarding the "Strata" label attached to a folder of "Weaver" cover prices, there does not appear to be any real doubt as to the contemporaneity of the 'form of tender' document. Both Strata employees interviewed by the OFT confirmed that it was Strata's practice, on

taking a cover price, to annotate a copy of the form of tender with the name of the company providing the cover price, and to place that form in a dedicated file marked "Covers".

93. When asked more specifically about the 'form of tender' document, Mr. Ironmonger (the Strata employee who completed the document at the time) confirmed during his interview with the OFT that the writing ("FROM QUARMBY CONSTRUCTION") was his own and that it indicated that he had received a cover price from "Quarmby Construction" (Page 13 of Ironmonger transcript). Although Mr. Ironmonger could not confirm at that interview whether "Quarmby Construction" referred to Quarmby or QSP, any potential ambiguity is removed by Quarmby's admission that it tendered for this particular project.

94. We do not consider that there was any ambiguity in Mr. Ironmonger's evidence in relation to the cover price provided by Quarmby to Strata. The relevant extract from the verbatim transcript of his interview provides as follows:

"[OFT]:	For the, for the benefit of the tape, Mr. Ironmonger, you, you looked at the, the, that form of tender, ah, and something caught your eye and you laughed. Could you just explain what you were laughing at, please?
[Ironmonger]:	Yeah. I'd written in the top right-hand corner who we'd received a cover from.
[OFT]:	And that was?
[Ironmonger]:	Quarmby Construction.
[OFT]:	Thank you.
[OFT]:	Okay. And that indicates to you that you took a cover from Quarmby Construction.
[Ironmonger]:	Yeah.
[OFT]:	Yeah. Is that your handwriting?
[Ironmonger]:	It is, definitely.
[OFT]:	Okay. Um, and the word from, that indicates you, you mean cover from.
[Ironmonger]:	Yeah."

95. Turning to the specific grounds of challenge advanced by the Appellants in relation to this infringement, our conclusions are as follows.

96. *Quarmby's policy not to engage in cover pricing:* In so far as the Appellants sought to rely on the evidence of Mr. Harrison, Mr. Jones and Mr. Nelson that it was contrary to Quarmby's policy to engage in cover pricing, we were not persuaded, in particular having heard the evidence of Mr. Nelson, that Quarmby had taken sufficient steps to ensure that existing and new members of staff were aware of Quarmby's policy (see paragraphs 82 to 85 above). Mr. Harrison accepted before us that any estimator may have given cover prices without his knowledge (Transcript, day 1, page 19, lines 22-23). The series of letters exhibited to Mr. Nelson's witness statement demonstrate nothing more than that Quarmby declined some tenders on the basis that it had insufficient resources.

97. *Mr. Harrison's recollection of the project:* The fact that Mr. Harrison does not recall being contacted by Strata in relation to the Water Lane project, and has no recollection of his then subordinate, Mr. Andrew Bell, discussing with him any request for a cover price, is a factor to be weighed in the balance by the Tribunal when determining whether the OFT has discharged the burden of proof. We are satisfied that, on the evidence before it, the OFT was entitled to conclude that a cover price was given. The fact that Mr. Harrison could not exclude the possibility of one of Quarmby's estimators giving a cover price, and that Mr. Harrison could not recall a conversation with Mr. Bell during which he specifically informed the latter that he should not engage in cover pricing, supports the OFT's conclusion in this regard.

98. *The "design and build" nature of the tender:* The Appellants accepted that the "design and build" nature of the tender does not *a priori* exclude the possibility of cover pricing, so there is nothing to this point. Mr. Nelson accepted in cross-examination that Strata could have submitted a tender form containing the cover price in the first instance, and then gone on to submit more detailed proposals at a later stage (Transcript, day 1, page 26, lines 13-14).

99. *Mr. Ironmonger's recollection of the project:* The Appellants attached significance to the fact that the relevant Strata estimator, Mr. Ironmonger, did not recall the Water Lane project or having requested a cover price from Quarmby. However, we accept the OFT's submission that, even where an individual cannot provide details of a specific infringement, he can give evidence to the OFT as to his interpretation of the contemporaneous material, with the benefit of having been the relevant estimator at Strata at the relevant time. We are satisfied, in particular in light of the evidence provided by Mr. Ironmonger in his interview with the OFT (quoted at paragraph 94 above), that this evidence supports the OFT's finding of an infringement. Further, Mr. Ironmonger did appear to have at least some recall of this instance of cover pricing, as the interview transcript records that he laughed when he turned to the 'form of tender' in relation to the Water Lane project, before providing the recollection set out at paragraph 94 above.

100. *The labelling of the file that contained the documents retained by Strata:* We do not attach any significance to the labelling of the file that contained the documents retained by Strata (formerly Weaver), in relation to its cover pricing activity. The evidence of Mr. Throssell and Mr. Ironmonger establishes the contemporaneity of the documents contained in the file.

101. *The annotation on the form of tender:* We reject the Appellants' submission that the annotation on the form of tender in the Strata file "is not sufficient for the OFT justifiably to infer that cover pricing occurred in the tender specified". This argument ignores the totality of the evidence, in particular the explanations provided by the relevant Strata employees, on which the OFT relied in arriving at its decision.

102. *Annotations used by another Strata director to identify a cover price:* The fact that a Strata director (Mr. Kawecki) identified a different method of annotating documents to identify a cover price, does not in our view undermine the probative value of the evidence provided by Mr. Ironmonger, where he unambiguously confirms how *he* would have identified a cover price in relation to his own projects.

103. *Timing of the annotations to the form of tender:* As regards the Appellants' submissions that the annotation to the tender is more likely to be consistent with post-tender discussions, in light of comments made by Mr. Ironmonger at page 21 of his interview, we agree with the OFT that the location of the annotation (in the file marked "covers") and the interview evidence provided by Mr. Ironmonger are sufficient to demonstrate that it is more likely than not that the annotation referred to a cover price rather than a post-tender discussion.

104. In conclusion, we are satisfied that the OFT has proved Infringement 6 to the requisite standard and consider that the evidence relied on by the OFT, viewed as a whole, demonstrates on the balance of probabilities that Quarmby engaged in cover pricing in relation to the Water Lane project.

Infringement 214

105. Infringement 214, which concerned works at the Humanities Research Institute at the University of Sheffield ("the HRI project"), was based on the following evidence:

(a) Two contemporaneous handwritten notes provided by Admiral Construction Limited ("Admiral") to the OFT as part of its leniency application. These notes were written by Mr. Andrew Clarkson (Admiral's estimating director), the content of which is described at Decision/IV.5982-5983 (p. 1468-1469). These included a list of company names and a second document, referred to in the hearing as the "BT Phone Disc Memo", which appears to be a printed set of contact details for Quarmby, on which Mr. Clarkson had made various notes.

(b) A schedule listing the names of individuals and companies that Admiral contacted about tenders, which includes "D Harrison" at "Quarmby". This was also provided by Admiral to the OFT.

(c) Transcripts of interviews by the OFT of certain Admiral employees, during which they were asked to comment on the written evidence. Mr. Clough took us to certain extracts from the transcripts of the interview with Mr. Clarkson, which we have read in full (see pages 9-10 of the transcript of day 2 of the hearing).

106. The conclusions drawn by the OFT from this evidence are set out at Decision/IV.5982-6015 (p. 1468-1475). As with Infringement 6, the Appellants repeated the representations made in response to the Statement of Objections. They are summarised, together with the OFT's response, at Decision/IV.5997-6005 (p.1471-1473).

107. We have carefully considered all the material before us, including the material relied on by the OFT in the Decision, the documents submitted by the Appellants in response to the Statement of Objections, the parties' additional written submissions in their pleadings and skeletons, and to the additional points made in oral submission. Our conclusions in relation to this material are set out below.

108. We were invited by the parties to consider the handwritten markings on the BT Phone Disc Memo, a document which appeared to have been electronically generated on 21 December 2004, and to consider these in the context of the prices actually tendered by Quarmby and Admiral. Even before one considers the explanation provided by the Admiral employees, there is a clear correlation between the figure that appears to have been "worked out" on the BT Phone Disc Memo and the price actually tendered by Admiral. The OFT submitted that the writing on the former document points to a pre-tender discussion between Quarmby and Admiral, as there would have been no reason for Mr. Clarkson to show his workings as a result of a conversation with someone *after* the tender had been submitted. This view is supported by the context of the relevant dates, in particular the date on which the document was printed (Tuesday 21 December 2004), the return date for the tender (Thursday 23 December 2004) and the handwritten reference to a call on "Wednesday", which (on the OFT's view) is most likely to refer to the day before the tender return date.

109. When interviewed by the OFT, Mr. Clarkson confirmed that Admiral had engaged in cover pricing with Quarmby on between one and three occasions. When

specifically asked about the BT Phone Disc Memo by the OFT, Mr. Clarkson said as follows:

> "I suspect the guy's name that I spoke to was David Harrison. Um… I would have rung him and said, are you pricing this? He must have said yes. Ah, then when you have your figure ready, give me a ring on 4:30 on Wednesday. Ah, so that's what I would have done, and when I rang him back, um, he obviously gave me one or two things that I needed to put into our bid, ah, or our tender, ah, which was to say that there was no work outside the site boundary included within the figure."
>
> …
>
> "Ah, I suspect that the 1487250 was a figure that he gave me as our figure, as our cover figure, and it looks, and I may be wrong, but it looks as though I've then added 40,000 to that, probably based on the information that he said, you're not a silly distance away. And it may well be that I thought, well, I don't want to be pestered to submit another document, so I put a bit more money on it to make sure we didn't get it."

110. We consider that this transcript evidence supports the OFT's conclusion that a pre-tender discussion took place between Admiral and Quarmby at which a cover price was communicated. Turning to the specific grounds of challenge advanced by the Appellants in relation to this infringement, our conclusions are as follows.

111. *Quarmby's policy not to engage in cover pricing:* For the reasons set out at paragraphs 82 to 85 and 96 above, we do not attach weight to the Appellants' submission that it was Quarmby's putative policy not to engage in cover pricing.

112. *Reliability of Mr. Clarkson's evidence:* We reject the Appellants' challenge to the reliability of Mr. Clarkson's evidence. The Appellants argued that, because Mr. Clarkson admitted (during the interview with the OFT in March 2007) to having no specific recollection of the tender for the HRI project, this casts doubt on the accuracy of the schedule of tenders submitted to the OFT in January 2006. They submitted further that Mr. Clarkson's transcript should be disregarded in so far as he "reconstructs what he surmises occurred around 23 December 2004" but does not have a specific recollection of those events (as evidenced, for example, by his use of the words "I suspect" and "I may be wrong"). However, we consider that Mr. Clarkson's explanation to the OFT of the annotations on the BT Phone Disc Memo provides both relevant and important context to the contemporaneous evidence. Mr. Clarkson was able to provide a plausible explanation of the meaning

of his own annotations made on the document at the relevant time, and we have taken that into account in reaching a conclusion on the totality of the evidence before us.

113. *Mr. Clarkson's specific annotations of the BT Phone Disc Memo:* The Appellants submitted that the more appropriate interpretation of the documentary evidence is that a post-tender discussion took place between Mr. Clarkson and someone from Quarmby, noting in particular that Mr. Clarkson did not confirm the date on which the discussion took place. They referred in particular (in their September 2010 submissions) to Mr. Clarkson's interpretation of the three annotations of "asked for one", "not lowest" and "not silly distance away", arguing that the OFT's interpretation of the document was wildly speculative. We are satisfied that Mr. Clarkson's explanation of the annotation "Ring 4:30 Wednesday", when understood together with the likely sequence of events building up to the submission of tenders by the parties (as explained by reference to dates for the relevant period; see paragraph 108 above), means that this document was created prior to the submission of the tender. However, we should add that it would have been a matter of some concern for the OFT to discover evidence that companies were routinely contacting each other following the submission of competing bids to a particular client to determine the amount bid by each company. Such an exchange of commercially sensitive information might still have resulted in a finding of an infringement.

114. *Evidence provided in the context of Admiral's leniency application:* The Appellants' submission that Mr. Clarkson's evidence was "tainted" because it was given in the context of Admiral's leniency application (and thus Admiral will have erred on the side of caution when providing information to the OFT) is an unsubstantiated assertion. The contemporaneous document furnished by Admiral (the BT Phone Disc Memo) is a document that on its face is *prima facie* evidence of an infringement. Both Admiral in providing the evidence to the OFT, and Mr. Clarkson in commenting on that evidence, were aware of the criminal sanctions that they faced if they provided false or misleading information to the OFT, and the requirement to maintain continuous and complete cooperation as a condition of Admiral's leniency.

115. *Differential between the prices actually tendered by Admiral and Quarmby:* The Appellants referred to the fact that it was Admiral's practice to add 4-5% to a price when giving a cover price, whereas the differential between Quarmby's tendered price (£1,335,356) and the price tendered by Admiral (£1,527,272) reveals a much greater differential (of 14%). They submitted that this cuts across the rationale of cover pricing, which is to "maintain face" with the client. We do not find this comparison helpful, both insofar as Admiral's approach to the giving of cover prices is unlikely to be helpful in interpreting Quarmby's own approach to the giving of cover prices, and because comparisons in percentage terms are particularly sensitive to the value of the project, when the difference in real terms between the tendered prices can be less significant (particularly in light of Mr. Clarkson's statement at interview that Admiral added an additional £40,000 to the price provided by Quarmby to ensure a safe distance was maintained between the two companies' prices). Further, the question of whether a price is too high to win the bid but not so high as to dissuade a client from seeking prices from that company again is highly subjective, and we were not taken to any evidence of how clients would react to such a differential in prices.

116. In conclusion, we are satisfied that the OFT has proved Infringement 214 to the requisite standard and consider that the evidence relied on by the OFT, viewed as a whole, demonstrates on the balance of probabilities that Quarmby engaged in cover pricing in relation to the HRI project.

Infringement 233

117. The specific evidence in relation to Infringement 233, which concerned new build construction inside the retained façade of Eastbrook Hall in Bradford ("the Eastbrook Hall project"), comprised the following:

(a) *Document A0490:* As part of its leniency application, York House Construction Limited ("York House") provided the OFT with various versions of a document used to record its participation in ongoing tenders. This is referred to at Decision/IV.6499 (p. 1561) as the "Estimating Programme Printout". A better description of the document can be found at

Decision/IV.746 (p. 553) by reference to the explanation provided by York House in its leniency application:

> "They [estimating programs] set out when a tender comes in and when it's due back. This process used to be done by hand. The program is updated (on average) on a weekly basis. It allows the company/estimators to keep an eye on when tenders are due back and lists all jobs currently in. When a job comes in it gets an estimate number and is inputted as a "program". It allows [Arthur Richardson] to allocate estimating resource and decide whether the company can or cannot price a tender."

(b) *Document A1595:* A second printed document, described at Decision/IV.6500 (p. 1562), was also provided by York House as part of its leniency application, following an IT search of the York House computer system. This appears to be generated from the same programme as the document described at paragraph (a) above, given the same reference to a "task name", duration, etc.

(c) *Document A0491:* An inspection was carried out by the OFT on 28 March 2006 at the premises of York House, in the course of which the managing director of York House, Mr. Andrew Bruce, provided a handwritten list of cover prices. The entry in relation to the Eastbrook Hall project is described at Decision/IV.6501 (p. 1562).

(d) *Document A0633:* York House also provided the OFT with a schedule of cover prices given and taken, which shows that York House received a cover price from Quarmby in relation to the Eastbrook Hall project (Decision/IV.6503 (p.1562)). The individual contact named in the schedule is "David Harrison", and his contact telephone number was also listed.

(e) *Document 11457:* The OFT conducted an interview with Mr. Arthur Richardson, Estimating Director at York House, during which he was asked to provide an explanation of the contemporaneous documents. We were taken to certain extracts from the transcript of the interview with Mr. Richardson during the hearing.

118. The conclusions drawn by the OFT from this evidence are set out at Decision/IV.6499-6532 (p. 1561-1568). The Appellants again repeated the representations made in response to the Statement of Objections. They are summarised, together with the OFT's response, at Decision/IV.6513-6521 (p. 1564-1566).

119. We have carefully considered all the material before us, including the material relied on by the OFT in the Decision, the documents submitted by the Appellants in response to the Statement of Objections, the parties' additional written submissions in their pleadings and skeletons, and to the additional points made in oral submission. Our conclusions in relation to this material are set out below.

120. A particularly important piece of evidence was the detailed Estimating Programme Printout, which listed the various projects in relation to which York House was invited to tender. A number of details were listed against each project, including the due date for the tender, a bar chart showing (against a calendar) the remaining period of time until that due date and a three letter abbreviation referring to the initials of the individual estimator assigned to the project. We understand from York House's description of the document that the electronic version of the document was amended on approximately a weekly basis at the relevant time, to incorporate the manuscript amendments made by estimators during the previous week. This is consistent with the sequence of annotations and re-prints that we were taken to at the hearing (for example, the manual annotation "JWL" in relation to a housing project at Skelton on Ure on the version at page 3 was typed on the updated version at page 4).

121. Mr. Richardson explained to the OFT during his interview that, where York House engaged in cover pricing, the letters "COV" would be inputted into the Estimating Programme instead of the individual estimator's initials. Mr. Richardson was asked by the OFT to give his view of the use of these letters in the Estimating Programme Printout in relation to the Eastbrook Hall project. He confirmed both that the reference to "COV" against the project signified a cover price and, more specifically:

> "…according to that he's put we have taken a cover from Quarmby and looking at that the date has changed to the 1st of the 8th."

122. Turning to the specific grounds of challenge advanced by the Appellants in relation to this infringement, our conclusions are as follows.

123. *Quarmby's policy not to engage in cover pricing:* For the same reasons as outlined at paragraphs 82 to 85 and 96 above, we reject the Appellants' submissions that Quarmby had a clear policy of not engaging in cover pricing. However, the Appellants presented a more specific objection in relation to Infringement 233 than the other infringements, in so far as they identified the specific estimator at Quarmby for this project, Mr. Andrew Buckler, and advanced a witness statement in which Mr. Buckler confirmed that he did not give a cover price in relation to the Eastbrook Hall project. Indeed, of the individuals who – in the Appellants' submission – were in a position to give a cover price (the estimators, the Commercial Director and the Managing Director), three of these (Mr. Buckler, Mr. Nelson and Mr. Jones) provided witness statements in which they categorically denied ever having given or taken a cover price.

124. The witness statement of Mr. Harrison, by contrast, contained no such denial. Rather, he stated:

> "During the period of my employment with [Quarmby], I never understood it to be [Quarmby]'s policy to give or receive cover prices.
>
> I can also state categorically that had I at any stage been asked for and provided a cover price, this would not have influenced me in any way in my estimate of the price at which Quarmby would carry out the specification."

125. Specifically in relation to the Eastbrook Hall project, Mr. Harrison stated in his witness statement:

> "Given that Andrew Buckler priced the job, he would be better able to assist with more detail on this job. However, to the best of my knowledge [Quarmby] did not give a 'cover price' for this contract to any other tenderers."

126. Mr. Harrison was more categoric when asked again about the Eastbrook Hall project during cross-examination by Miss Bacon:

> "Q: Do you accept that either you or Mr. Buckler might have given a cover price for this project?
>
> A: No I don't. Sorry, I don't accept that. It was not our policy to give cover prices."

127. We did not find Mr. Harrison's evidence credible in light of the documentary evidence before us. His acceptance that "there were occasions when we were asked to provide a cover price" (Transcript, day 1, page 43), coupled with the lack of any denial in his witness statement, suggested to us that it was likely that Mr. Harrison had engaged in cover pricing. Accordingly, we agree with the OFT's conclusion at Decision/IV.6514 (p. 1564)) that the documentary and witness evidence from York House should be preferred to the assertions advanced by the Appellants, and are satisfied that this evidence supports the OFT's finding that Quarmby provided a cover price to York House in respect of this project.

128. *The nature of the Eastbrook Hall project:* The Appellants made a number of submissions in relation to the particular nature of the Eastbrook Hall project, which was described as a "two stage tender", consisting of a pre-qualification exercise followed by the submission of the detailed tender. The Appellants' submissions, and the OFT's response, are summarised at Decision/IV.6517 (p. 1565-1566). We agree with the OFT that the mere fact of York House's participation in an earlier stage of the tender process (in relation to which the OFT made no specific finding) does not preclude the possibility that York House ultimately decided to seek a cover price. We do not find it extraordinary that a representative of York House should have attended a site visit two days after receiving the invitation to tender, as the company might not have decided at that point whether or not to proceed to tender for the contract. Indeed, in so far as the Appellants have described the objective of cover pricing as being to "save face" with a particular client, York House might have been motivated to attend the site visit out of a desire to maintain contact with the client, up to and including the submission of a cover price in relation to a project described by Mr. Richardson as "not our type of work".

129. *Differential between the prices actually tendered by Quarmby and York House:* For the same reasons set out above at paragraph 115, we reject the Appellants' submission that cover pricing is not credible where the alleged recipient of a cover

price submits a tender that is 7% higher than the tender submitted by the company providing the cover price.

130. *Mr. Richardson's evidence at interview:* We disagree with the Appellants' submission that Mr. Richardson did not indicate that a cover price was given by Quarmby in his interview. In particular, the quote extracted at paragraph 121 above appears to confirm that a cover price was given. Nor was this particular statement by Mr. Richardson elicited in response to a leading question.

131. *Presence of Mr. Harrison's contact details in the York House records:* We agree with the Appellants that the mere presence of David Harrison's contact details in York House's records does not itself establish that Quarmby engaged in cover pricing. However, that is not the OFT's case: its finding of liability is based on the totality of the evidence described in the Decision.

132. *The documentary evidence relied on by the OFT:* We reject the Appellants' specific objections in relation to the four main pieces of evidence relied on by the OFT (described at paragraph 117 above in more detail):

(a) *Document A0490* (the Estimating Programme Printout): the Appellants concentrated much of their submissions to challenging the contemporaneity of Document A0490, arguing that the reference to "Quarmby" was added after the event as part of York House's leniency application. Having reviewed Document A0490 and its markings, we consider that it is a contemporaneous document and that the manual annotations are consistent with the updating of a "rolling" record of York House's participation in tenders (including the specific instances of cover pricing), rather than an *ex post* recollection of the same. The Appellants' assertion that, prior to the hearing on 7 July 2010, they did not know how the OFT thought the estimating programme worked ignores Decision/IV.746 (p. 553). That paragraph clearly provides York House's own explanation of how the estimating programme worked. The Appellants' criticism of the OFT for not having disclosed an original version of the document was not warranted as, even if the original showed that the "different entries were not made contemporaneously", this simply reflects the fact that Document A0490 was a "rolling" record, updated by hand on more than one occasion until the point at which it was "refreshed" electronically. Further, no application for disclosure was made to us.

(b) *Document A1595* (the document produced during the IT sift of the York House computer system): the Appellants submitted that this document "merely indicates that York House took or intended to take a cover price". We agree, insofar as that specific print-out contains no reference to the party alleged to have provided the cover price. However, we consider it more likely than not that this document was generated from the same programme as Document A0490 and, by the time of its creation, the handwritten reference "COV" in relation to the Eastbrook Hall project had been converted into an electronic entry.

(c) *Document A0491* (York House Leniency Application – handwritten list of covers): The Appellants submitted that the document is not contemporaneous, has no or negligible probative value and that, if Document A0490 – on which it is based – is shown to be flawed evidence, then Document A0491 is flawed too. We do not consider that there is anything in this point, in particular because it is clear from Decision/IV.6522-6532 (p. 1566-1568) that the OFT attached greater weight to the other documents, in particular Documents A1595 and A0490, and did not refer to Document A0491, other than as part of the wider body of evidence to which it had regard.

(d) *Document 11457* (Transcript of interview with Mr. Arthur Richardson on 6 March 2007): the Appellants submitted that the interview with Mr. Richardson casts doubt on the probative value of Document A0490 above, in particular because (i) the quote at paragraph 121 above demonstrates that an individual other than Mr. Richardson annotated the tender sheet (see the reference to "he"); and (ii) Mr. Richardson's recollection of the tender was vague (as he states "I think this was the façade retention job") and he could not immediately remember from whom York House had taken a cover price.

In our judgment, this particular interview transcript demonstrates the opposite: despite not being the individual involved in the Eastbrook Hall project, Mr. Richardson was able to identify the project as a "façade retention job". Further, Mr. Richardson's interpretation of the contemporaneous evidence, which was consistent with the other items of evidence, had value as someone who worked in the same team as the estimator at the relevant time and was familiar with the system by which cover prices were recorded. This was evidence that the OFT was entitled to take into account.

133. *Comparison with 38 other infringements excluded from the investigation after the Statement of Objections:* We were unpersuaded by a further argument introduced by the Appellants late in the day that the OFT should have excluded Infringement 233 from the Decision for the same reason that 38 other infringements were excluded from its investigation after the Statement of Objections, on the basis that the evidence was insufficient to meet the civil standard of proof. The Appellants submitted that the evidence against them in respect of Infringement 233 was of the same nature and quality as the evidence in the 38 cases that the OFT decided not to pursue (in which regard we were taken to an Annex which provided a "sample" of the evidence held by the OFT in relation to infringements which were dropped post-Statement of Objections), and the OFT therefore breached the principle of equal treatment by failing to exclude Infringement 233. It is not part of the Tribunal's function to draw any conclusions as to the respective weight of evidence in such cases, which was not before the Tribunal, as compared with the evidence for Infringement 233.

134. In conclusion, we are satisfied that the OFT has proved Infringement 233 to the requisite standard and consider that the evidence relied on by the OFT, viewed as a whole, demonstrates on the balance of probabilities that Quarmby engaged in cover pricing in relation to the Eastbrook Hall project.

VI. LIABILITY GROUND FOUR – INFRINGEMENT 233: CLIENT NOT DECEIVED

The Appellants' submissions

135. The Appellants submitted that the OFT acted in breach of the principle of equal treatment by failing to remove Infringement 233 from the scope of its investigation on the basis that the client had not been deceived into thinking the cover price that it had received was genuine. The OFT removed Infringement 101 from the scope of its investigation for this reason, and should have done the same in respect of Infringement 233 because the client was similarly not deceived. The Appellants referred to the following evidence in this regard:

(a) The project manager of Aldersgate Estates Limited ("Aldersgate"), Mr. Tony Marsh, gave an interview to the press in which he expressed the view: "…the eventual winners of the tender were the lowest by a small margin, so I don't think we received an unfair price."

(b) Mr. Colin France, the quantity surveyor appointed to conduct the tender on behalf of Aldersgate, provided a witness statement in which he expressed surprise that York House had submitted a cover price. He states:

> "I understand that the OFT has found that York House took a cover price from Quarmby on this project.
>
> I did not see it as a case of cover pricing and thought I had received five legitimate tenders, so I am a little surprised that Quarmby and York House were on the OFT's list for this particular project. York House came onto the list fairly late in the process (but before the tender documents had been distributed) but I had worked with them in the recent past.
>
> If someone had asked me at the time whether one of the tenders had been a cover price, my answer would be that it is never possible to be certain. At the same time I would not have thought about cover pricing in this case, particularly given that I personally knew the directors of most of the companies (apart from Stainforth).
>
> If the OFT is right that York House took a cover price from Quarmby then that made no difference to my project. With the approval of the Client, I did not even consider the tenders from York House or Quarmby

> as I was only interested in taking forward the preferred three. These three tenders from Ham, Myddleton and Stainforth were within around £150k to £200k of each other by the time Stainforth had opportunity [sic] to firm up its price.
>
> As I have said above, one always knew that cover pricing was about even if I didn't know exactly when it was being used. At the same time, my thinking on cover pricing is that any contractor who is pricing for one of my projects, I would prefer them to tell me that they cannot price a job than to take a cover price and it will not make any difference to their chances of future work with me. If York House did take a cover there was no need for them to deceive me and they could have just told me they were not able to price the job. In fact, given that they knew what the budget was, I do not know why they felt the need to put in a cover: they could just have quoted above the budget."

136. The Appellants filed a further witness statement of Mr. France, in which he stated that he did not believe he was deceived, and that there was no need for any contractor to provide a cover price, because any contractor not wanting to win the contract would simply submit a tender above the budget.

The OFT's submissions

137. The OFT submitted that the circumstances of Infringement 101 and Infringement 233 are quite different. The OFT removed Infringement 101 from the scope of the investigation on the basis of evidence indicating that in that particular instance the client had not been deceived into thinking that a cover price was genuine. By contrast, in this case, the evidence of both Mr. Marsh and Mr. France is that neither of them was aware that a cover price had been given at all. Accordingly, Quarmby's own evidence demonstrates that the client did not know about the cover price and was in fact deceived.

The Tribunal's analysis and conclusions

138. Having considered the Appellants' submissions and evidence on this point, we find this ground of appeal to be wholly without merit. It is clear from the evidence that this situation is not analogous with Infringement 101, where the client was aware that a cover price had been submitted. Here, by contrast, it is clear that neither Mr. Marsh nor Mr. France was so aware. Indeed, the Appellants appeared to accept (at paragraph 24 of their skeleton argument) that the position regarding Infringements

101 and 233 differ, and made no further submissions in this regard in their written reply of 10 September 2010.

139. We therefore do not need to decide whether as a matter of law it makes any difference to a finding of infringement that the client knew of, or consented to, the cover price.

140. For the reasons stated above, we dismiss the Appellants' appeal on liability.

VII. PENALTY

141. The Appellants raised a "root and branch" attack on the OFT's assessment of the penalty imposed on them, by reference to the different steps set out in the OFT's guidance as to the appropriate amount of a penalty ("the 2004 Guidance"):

(a) As regards Step 1 of the penalty calculation:

i. the OFT was wrong in law to fine the Appellants on the basis of their turnover in the relevant product markets in the last business year for which data is available, and should have used the Appellants' turnover in the year preceding the date of the infringement;

ii. the starting point percentage of 5% set by the OFT was too high in the circumstances of this case;

iii. the OFT erred in failing to define the private housing market more narrowly, with the result that firms with infringement in this market have received higher fines than firms with infringements in other markets;

iv. the Appellants were treated unfairly by reason of the OFT's arbitrary selection of infringements; and

v. the OFT should have excluded from its calculation of the relevant turnover at Step 1 both (i) turnover relating to negotiated contracts, as this turnover could not be affected by cover pricing; and (ii) intra-group contracts and turnover as between Quarmby and St James Securities as these companies are part of the same economic unit.

(b) As regards Step 3 of the penalty calculation:

i. the OFT applied a maximum fine threshold in limited scenarios which was arbitrary and set too high;

ii. the penalty imposed is disproportionate given current economic conditions, and should have been reduced to avoid any "chilling effect" as between the addressees of the decision and the industry at large; and

iii. the OFT's use of a maximum of three infringements for each party failed to fairly and proportionately reflect the extent to which parties have engaged in cover pricing.

(c) As regards Step 4 of the penalty calculation:

i. the OFT should have reduced the level of fines to take account of the genuinely and widely held belief within the construction industry that "simple" cover pricing was not harmful or unlawful;

ii. the OFT's approach to direct involvement has led to a disproportionate outcome that has also breached the principle of equal treatment, in particular because parties which had director involvement were very likely to receive lower fines because the directors knew that the OFT's case was based on a correct assessment of facts; and

iii. the OFT failed to give credit for prompt termination of the infringements.

142. Similar grounds of appeal on penalty to those raised by the Appellants have already been considered by the Tribunal in its composite penalty judgments in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 ("the Kier Judgment"), *G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7 ("the Tomlinson Judgment") and *Barrett Estate Services Limited & Ors v. Office of Fair Trading* [2011] CAT 9 ("the Barrett Judgment"). Where this is the case and where it is appropriate to do so, we have cited the reasoning in those judgments in support of our conclusions in this case.

143. We also agree with and adopt the Tribunal's conclusions at paragraphs 74 to 77 of the Kier Judgment regarding the nature of the Tribunal's jurisdiction to determine appeals against the imposition of a penalty by the OFT.

(1) Use of incorrect year to determine the relevant turnover

The parties' submissions

144. The Appellants, in common with the majority of the companies who have appealed the Decision, challenged the OFT's use of turnover from the business year preceding the date of the Decision ("Pre-Decision Turnover") for the purposes of Step 1 of the penalty calculation, arguing that the OFT should have used instead turnover from the business year preceding the date when the infringement ended ("Pre-Infringement Turnover").

145. The Appellants submitted that the OFT was wrong to use Pre-Decision Turnover when calculating relevant turnover at step 1 of the penalty calculation, in particular because:

(a) Prior to the 2004 amendment to the Competition Act (Determination of Turnover for Penalties) Order 2000 ("the Turnover Order"), the OFT used Pre-Infringement Turnover when calculating relevant turnover. This was consistent with the underlying intention of Step 1 of the 2004 Guidance, which is to determine the size of the market upon which the infringement is said to have been inflicted and ensure that the starting point secures a direct correlation between the harm, the affected market and the fine. The OFT's use of Pre-Decision Turnover breaks the temporal link between these factors and, in circumstances where the OFT has not undertaken a proper economic analysis to determine the relevant market, risks magnifying mistakes with regard to turnover based on imperfect market definitions.

(b) The 2004 amendment to the Turnover Order was only ever intended to affect Step 5 of the penalty calculation, namely the application of a statutory maximum penalty, and it was irrational for the OFT to change its practice in relation to Step 1, in particular where the amendment to the Turnover Order was intended to bring aspects of the UK fining methodology in line with the EU regime. Further, in contrast to the statutory definition of "applicable turnover" at Step 5, there is no statutory definition of "relevant turnover" at Step 1. The OFT is under a positive obligation to determine turnover for the purposes of Step 1, and cannot simply assume that the turnover defined for Step 5 is necessarily the correct turnover to use.

146. The OFT's submissions in relation to the relevant year of turnover have been set out in some detail by the Tribunal in the Kier Judgment, the Tomlinson Judgment and the Barrett Judgment, and we have obviously taken these into account, together with the OFT's specific submissions in relation to these Appellants. The OFT's key submissions in response to the grounds put forward by these Appellants were that:

(a) Although the OFT accepted there is no statutory definition of relevant turnover for the purposes of Step 1, the use of Pre-Decision Turnover is plainly reasonable and rational. In particular, it has the advantage of calibrating the deterrent effect of the penalty to recent, rather than historic, levels of turnover. Further, there is no reason to tie an object-based infringement to its impact on a particular market.

(b) It is clearly reasonable and sensible that the measure of turnover adopted for the purposes of Step 1 is consistent with the measure of turnover adopted for the purposes of Step 5, not least because the starting point adopted necessarily falls within the allowable range of penalties under the Turnover

Order. Further, the OFT’s approach is consistent with the approach taken in the previous construction industry collusive tendering decisions.

The Tribunal’s analysis and conclusions

147. In our judgment, the OFT was wrong to use Pre-Decision Turnover at Step 1 of the penalty calculation and should instead have used Pre-Infringement Turnover, as was its practice prior to May 2004. We agree with and adopt the Tribunal’s conclusions at paragraphs 130 to 139 of the Kier Judgment in this regard. We have set out below our conclusions in relation to the specific arguments advanced by the parties in these appeals at paragraphs 145 and 146 above.

148. Step 1 of the penalty calculation is concerned with an assessment of the seriousness of the infringement which takes account of “the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties” (paragraph 2.5 of the 2004 Guidance). As the Tribunal noted at paragraph 132 of the Kier Judgment, there is a tension between the consideration of circumstances related closely in time to the infringement, and the use of turnover at the time of an infringement decision which could be wholly remote from those circumstances. Between the date of an infringement and the date of the decision, there could be many intervening and unconnected developments and changes in both the infringer’s business and the market in question. This is particularly the case in relation to the Appellants, given that Infringement 6 was the earliest infringement pursued in the Decision.

149. The 2004 Guidance did not make any material change to the OFT’s approach to Step 1 and did not justify the use of Pre-Decision Turnover at that step of the penalty calculation. Whilst the 2004 Guidance makes clear that Pre-Decision Turnover is relevant at Step 5, we are satisfied that the 2004 Guidance did not introduce the use of Pre-Decision Turnover at Step 1. The OFT could not rely on the fact that the measure of turnover used at Steps 1 and 5 had previously been the same, nor was there any reason why the two measures of turnover needed to be the same, given that they perform different functions in the penalty calculation. We

therefore agree with and adopt the conclusions of the Tribunal at paragraph 137 of the Kier Judgment.

150. The Appellants referred to the European Commission's fining guidelines and the fact that the 2004 amendment to the Turnover Order was made in the context of updating the OFT's guidelines following the entry into force of Regulation 1/2003. Although we note that the European Commission calculates the "basic amount" of the fine by reference to Pre-Infringement Turnover, we do not consider that the OFT is required (by virtue of section 60 of the 1998 Act or otherwise) to bring its fining policy in line with that of the European Commission. We agree with the Tribunal's conclusion at paragraph 102 of the Tomlinson Judgment that there is a "relevant difference" between the UK and EU provisions in this regard, and that the Commission's fining guidelines do not supplant the OFT's statutory duty under section 38(8) of the 1998 Act to have regard to its own published guidance. We have reached the same conclusion in relation to other references by the Appellants in their submissions to the European Commission's approach to fining.

151. The Tribunal requested the OFT to provide the Pre-Infringement Turnover figures it had gathered from each party during the course of its investigation. These were provided by the OFT in January 2011. Given our conclusions at paragraphs 181 and 182 below, we have taken into account these figures, rather than those handed up by the parties in the course of the oral hearing, in our calculation of the appropriate revised penalty that should be applied.

(2) The starting point percentage of 5% was too high

The parties' submissions

152. The Appellants submitted that the OFT erred in setting the Step 1 starting point at 5% for each of the infringements, a level which is disproportionate and manifestly too high, in particular because:

(a) The OFT failed to take account of the factors listed at paragraphs 2.3 to 2.5 of the 2004 Guidance as they apply to the Appellants (or failed to give proper reasons for not taking these factors into account) when setting the starting point at Step 1. The Appellants submitted in particular that the OFT failed to take account of their submissions in relation to the seriousness of the infringements, the fragmentation of the construction market and low market share of the Appellants, low profit margins and the lack of effect on competition (referring to the witness evidence of Mr. France and to the expert evidence of Mr. Bamford).

(b) The OFT failed to have regard to paragraph 2.9 of the 2004 Guidance in so far as it set a fixed starting point of 5% for all cases of cover pricing, rather than carrying out an assessment of the appropriate starting point for each of the parties concerned. Treating different cases in a similar manner is in breach of the principle of equal treatment. Further, the OFT's decision in this regard to take into account the "relevant broad similarities" between types of case, contradicts the finding in the Decision that the infringements were "discrete, individual infringements".

(c) The OFT erroneously took into account at Step 1 the need for deterrent effect, when this can only be taken into account at Step 3.

153. The OFT's submissions in relation to the Step 1 starting point percentage have been considered in some detail by the Tribunal at paragraphs 85 to 91 of the Kier Judgment, and we have obviously taken these into account, together with the OFT's specific submissions in relation to these Appellants. The OFT's key submissions in response to the grounds put forward by these Appellants were that:

(a) The OFT was right to apply a consistent set of criteria to the assessment of penalties for the infringements in the Decision, rather than seeking to assess each undertaking separately and discretely without reference to others. However, this did not mean that the OFT applied these criteria mechanistically. Rather, the OFT identified what features of the cases were relevantly comparable, and applied the criteria for penalty setting in a fair manner to all relevant parties. Where arguments were genuinely unique to the factual circumstances of particular companies, they were dealt with in relation to those specific undertakings. Step 1 is only a starting point in this context, and all penalties were subject to adjustment on the basis of a range of aggravating, mitigating and other factors.

(b) The OFT did take account of all those factors that were relevant to the seriousness of the infringement bearing in mind that the infringement was object-based and there was an endemic and widespread culture of bid rigging in the construction industry. As regards effects, although the OFT did not, in this case, attempt to quantify the anti-competitive effects of the infringements, this was not because such effects could not be demonstrated, but because the nature of the conduct was such as to reveal a sufficient degree of harm to competition without the need for further investigation. Miss Bacon referred us to the qualitative analysis of the effects on competition produced by cover pricing in general terms in the Decision.[8] As regards market shares, the OFT considered that these were in this case adequately reflected in the turnover figures.

The Tribunal's analysis and conclusions

154. We note the careful consideration given to this issue by the Tribunal at paragraphs 92 to 116 of the Kier Judgment, and we agree with and adopt the Tribunal's conclusions in relation to the appropriate level of the starting point percentage. We share the view that, expressed on the basis of a scale from 1 to 10, the Appellants' behaviour should be attributed a level of seriousness lower than the mid point of that range, and we consider that a starting point percentage of 3.5% would have been more appropriate in this case. In reaching this conclusion we have taken account of the mitigating effect of the general uncertainty and ambivalence as to the legitimacy of the practice of cover pricing, which admittedly existed from at least 2000 to 2004.

155. However, we reject the Appellants' submission that the OFT was wrong to adopt a common starting point percentage for infringements of a similar nature. We agree with and adopt the Tribunal's conclusions at paragraph 121 of the Kier Judgment in

[8] Transcript, day 2, page 64, lines 4-9.

this regard. At Step 1 of the penalty calculation, it was acceptable to focus largely on the fact that the infringements involved essentially similar conduct, with similar effects on competition, in the same industry, and to treat factors such as whether an undertaking was the party requesting a cover or the party providing it, as insufficient to make a difference to the starting point.

(3) Lack of segmentation of the private housing market

The parties' submissions

156. The Appellants submitted that the OFT's approach to market definition in the Decision unfairly penalised them. In particular the segmentation of markets varies greatly in the Decision, reflecting the fact that the OFT began its market definition exercise by reference to a set of statistical market definitions developed by the Department for Business, Enterprise and Regulatory Reform ("BERR"), rather than starting the exercise by reference to the focal product that is the subject of the investigation. The "private housing" market was very broadly defined by comparison with other markets, such as "commercial", and the OFT did not undertake a market definition analysis to determine whether it should have been more narrowly defined (the Appellants referred again in this context to the expert evidence of Mr. Bamford). In particular, having identified that competition was on the supply side rather than the demand side, it was not reasonable for the OFT to use a categorization based on "use by the ultimate consumer", and the OFT failed to take account of other relevant factors.

157. The consequence of the OFT's approach was that companies with infringements in the "private housing" market were likely to have a significant amount of relevant turnover and, in the absence of a substantial corrective mechanism, a greater fine.

158. The OFT submitted that, given that it was not obliged to carry out a formal analysis for the purposes of imposing a penalty, it in fact adopted a "cautious" relevant market definition. That market definition included consideration of whether, within the various segments, the markets should have been further sub-divided by type of work, and a mere assertion by the Appellants that markets "could have been defined

on a narrower basis" is insufficient to impugn the OFT's conclusions in this respect. The fact that some markets are larger than others does not render the market definition invalid. Miss Bacon for the OFT spent some time taking us through relevant passages of the Decision, emphasising that the OFT had not "blindly accepted" the BERR classification and had, in particular, considered whether its analysis of demand- and supply-side substitutability suggested that markets such as the housing market should be sub-divided, concluding that it should not.[9]

The Tribunal's analysis and conclusions

159. We have closely reviewed the OFT's definition of the relevant markets at Decision/II.1597 to 1765 (p. 288 to 338), in light of the criticisms of that definition made by Mr. Bamford in his second expert report.

160. It is clear from judgments of this Tribunal and the Court of Appeal that the OFT is not required, when assessing the penalty that should be applied in connection with an object infringement, to conduct a formal market definition exercise. For example, at paragraph 173 of its judgment in *Argos Limited and Littlewoods Limited v. OFT and JJB Sports plc v. OFT* [2006] ECWA Civ 1318, the Court of Appeal held:

> "…**The purpose of the identification of the relevant product market in relation to penalty is quite different, and it is not necessary or appropriate to be so exact as when ascertaining a market for the purpose of seeing whether an undertaking has a dominant position in a relevant market**, before deciding whether that position, if it exists, has been abused. Thus, as it seems to us, the reason why it is not necessary, at any rate in a Chapter I case involving price-fixing, to conduct a formal market analysis is the same as the reason why the market which is taken for calculation of the turnover relevant for Step 1 on a penalty assessment **may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement**, rather than by a relatively exact application of principles that would be relevant for a formal analysis, such as substitutability or, on the other hand, by limiting the turnover in question to sales of the very products or services which were the direct subject of the price-fixing arrangement or other anti-competitive practice." (Emphasis added)

161. Accordingly, the OFT correctly states at Decision/II.1600 (p.289) that the relevant test here is that the OFT (and here the Tribunal) must "…be satisfied, on a reasonable and properly reasoned basis, of what is the relevant product market

9 Transcript, day 2, pages 64-67.

affected by the infringement" (*Argos* at paragraph 173). Notwithstanding this judicial guidance, the OFT devoted some fifty pages of analysis in the Decision to the definition of the relevant markets.

162. Mr. Bamford's central complaint in his expert report appeared to be that the OFT was wrong to commence its analysis at an aggregate level, but should have considered the particular facts of each case in the market definition (in particular because certain aspects of supply side substitution, such as evidence of spare capacity, are time-specific). This point was repeated by the Appellants in their written submissions of 10 September 2010, where they illustrated the submission by reference to the market definition for Infringement 233 (at paragraph 14.4):

> "If illustration is required of what the OFT did wrong and how it should have proceeded if following a conventional methodology, Eastbrook Hall was a specialist project involving facade retention in Bradford (as confirmed by York House's interviewee, Mr Richardson). The correct approach might have been to look at facade retention work of this size in Bradford and ask the question, "If price increased by say 5-10%, would this prompt firms who do not currently do this work to enter the market in Bradford within a year and without incurring substantial sunk investment such that the price rise would be unprofitable?" If the answer is no, then the correct market definition would be facade retention work of this size in Bradford. See to this effect OFT 403 (Market Definition) paragraph 3.12 to 3.15 (supply side substitution)."

163. In our view, this cannot be correct given the nature of the market definition exercise for the purposes of calculating a penalty. Accordingly, the OFT's choice of focal product – the supply of building works for a particular construction project (Decision/II.1602 (p. 289)) – was a reasonable one. We are also satisfied that the OFT's subsequent analysis, which included a consideration of whether any narrower markets could be identified, was both logical and reasonable, and that the OFT put itself in a position whereby it could properly identify the particular "trade affected by the infringement". The more formal market analysis advocated by the Appellants in respect of each infringement in the Decision would have added unnecessary complexity and length to the investigation.

164. We accordingly reject the Appellants' submission that the OFT defined the markets too broadly in the Decision. Rather, the OFT adopted a conservative approach which led to markets which Mr. Unterhalter SC (on behalf of the OFT in the

hearing of Ballast Nedam NV's appeal[10]) acknowledged were "extremely narrowly framed", both in product and geographic terms.

(4) Arbitrary selection of infringements and failure to differentiate on grounds of culpability

The parties' submissions

165. The Appellants submitted that the manner in which the OFT chose the infringements that were included in the Decision operated against the Appellants in an arbitrary manner that is disproportionate, unfair and fails to observe the principle of equal treatment. The OFT's selection was based primarily on quality of evidence, and there was no differentiation (other than in cases involving compensation payments) between more or less serious cases. This had a perverse effect on fines, as for some parties (including the Appellants) the OFT's selection resulted in the inclusion of projects relating to markets where they had significant turnover, whereas for other parties (including those involved in compensation payments) the OFT selected projects in markets where those parties had little or no relevant turnover, leading to lower fines. In this regard, the fact that Quarmby had fewer suspect tenders operated against it, as there were fewer infringements from which the OFT could choose. The Appellants submitted that the OFT should have taken into account the individual circumstances of the parties, including the seriousness of their infringements, and made a suitable adjustment to the penalties imposed on them.

166. The Appellants made two connected submissions:

(a) First, that the OFT should have adjusted the penalties imposed in the Decision to distinguish between those parties that habitually gave and took cover prices and those parties that rarely did so. The Appellants provided figures comparing the fines imposed on those addressees of the Decision who did not benefit from leniency with the number of suspect tenders

[10] Case No. 1119/1/1/09, *Ballast Nedam N.V v Office of Fair Trading*, Transcript, page 24, line 32.

identified by the OFT in relation to each company. The Appellants submitted that these figures demonstrated that the parties with the highest fines as a percentage of total turnover had the lowest number of suspect tenders. The OFT should have recognised that the Decision did not fairly and proportionately reflect the extent to which a party has engaged in cover pricing.

(b) Secondly, the OFT was wrong to impose separate penalties in respect of each infringement. This was in contrast with the OFT's approach in the recent *Tobacco* decision, where only one penalty was imposed in respect of each retailer, notwithstanding a finding that each retailer was found to have entered into two separate infringing agreements.

167. The OFT submitted that its choice of infringements was made on the basis of objective criteria, set out at Decision/II.1496 (p. 264), the most important of which was the quality of the available evidence. That process was manifestly not arbitrary. Further, the OFT submitted that there was no reason why the OFT should have taken the individual seriousness of a particular infringement into account in deciding whether to include it in the Decision. Insofar as seriousness was relevant to the calculation of penalties, it was taken into account in the identification of different starting point percentages (5% and 7%) and different levels for the minimum deterrence threshold ("MDT") used at Step 3 of the penalty calculation (0.75% and 1.05%). The OFT did not consider that, within the two types of infringement, the different circumstances of individual cases warranted adjustments on grounds of seriousness.

168. In response to the Appellants' complaint that it received higher penalties than other parties, including parties involved in compensation payments, the OFT submitted that this was simply the result of a fair and objective fining methodology in individual cases. The application of a complex fining methodology that takes account of a number of different factors leads to different penalties on different parties. Different outcomes cannot be criticised if the process which leads to them is, overall and in its constituent steps, fair and objective.

169. The OFT rejected the Appellants' submission that it should have reflected the relative culpability of the various undertakings by taking account of the number of suspect tenders for each undertaking. The OFT submitted that there was no lawful or rational basis for the OFT to base any element of a penalty on suspected infringements where no concluded findings have been made. The OFT was only entitled to penalise parties on the basis of such infringements as were proven to have occurred.

170. The OFT also rejected the Appellants' submission that it should not have imposed separate penalties for each individual infringement. The OFT submitted that, wherever an infringement of the Chapter I prohibition is found, the imposition of a penalty for that infringement is lawful and proper. The decision only to impose a single penalty in other investigations, on different facts, does not impugn the OFT's approach in this case.

The Tribunal's analysis and conclusions

171. In our judgment, the OFT's selection of infringements in this case was not arbitrary. We agree with and adopt the conclusions of the Tribunal at paragraph 30 of the Barrett Judgment. We consider that the OFT's selection of infringements was carried out on the basis of clear and objective criteria, and that the OFT was operating within its broad margin of discretion in deciding to proceed as it did, and in so doing acted reasonably and proportionately.

172. However, we also agree with the conclusion reached by the Tribunal at paragraphs 31 to 32 of the Barrett Judgment, namely that the OFT effectively adopted a form of collective punishment or "representative justice" in this investigation, such that the Tribunal is not in a position to assess the relative culpability of the different addressees of the Decision. This was acknowledged by Miss Bacon for the OFT at the hearing:

> "Just to explain the OFT's position: we cannot make any adjustment on this basis because the OFT's investigation was necessarily and inevitably perhaps incomplete. We did the best that we could, but this was not an investigation into every single company. We did not dawn raid every single company in the infringement list. What we had to do was rely on the evidence that we got from the

> dawn raids that we did do, and the leniency evidence. So, that evidence was not sufficient to enable us to conclude whether or not Quarmby had loads of infringements. All that we could do was identify a number of suspect tenders that had been thrown up in the leniency evidence and the dawn raid evidence that we received. So, there was no basis on which the OFT could assess relative culpability based on absolute numbers of infringements or suspect infringements." (Transcript, day 2, page 70 at lines 9 to 18)

173. The consequence of this approach by the OFT is that the Tribunal is not in a position to ensure that any difference in the level of penalty as between infringers is objectively justified by relative levels of culpability. Instead, the Tribunal has sought to be scrupulous in ensuring that the overall penalty imposed on the Appellants is proportionate in all the circumstances.

174. We reject the Appellants' connected submission that the OFT was wrong to impose separate penalties in respect of each infringement. The OFT was plainly entitled to impose a fine for each infringement that an undertaking was found to have committed. However, we note that a consequence of the OFT's approach in the Decision is that there is considerable disparity between the fines imposed in respect of near-identical infringements committed by the same undertaking. In our own reassessment of the penalties at Section VIII below, we have arrived at an overall figure in respect of the Appellants which we consider to be appropriate in all the circumstances, and have divided this total by the number of infringements in order to arrive at the final penalty in respect of each infringement.

(5) Exclusion of turnover relating to negotiated tenders

The parties' submissions

175. The Appellants submitted that the OFT should have excluded turnover relating to negotiated contracts from the calculation of relevant turnover at Step 1, on the basis that such contracts could not be affected by cover pricing. The OFT failed, as a matter of standard economic analysis, to examine whether tendered and non-tendered contracts were in the same market in the particular circumstances of the Appellants.

176. The OFT responded that the Appellants' submissions were misconceived. The OFT's approach was to set the starting point for a penalty by reference to the turnover of the undertaking in the relevant market. The OFT defined a range of markets, and determined that the market should not be defined on the basis of the method by which bids were sought or prices negotiated. Accordingly, both tendered and non-tendered work fell within the same product and geographical markets. Market definition identifies those goods or services which constrain each other as regards price and quality. That constraint is not mitigated by the method of negotiation. Miss Bacon also referred at the oral hearing to guidance published by OGC, demonstrating that many non-traditionally tendered projects are tendered on the basis of framework agreements which are themselves awarded pursuant to a competitive tender process, and are frequently followed by a mini-competition on particular aspects when the framework agreement is called down.[11]

The Tribunal's analysis and conclusions

177. Very similar submissions were made by other undertakings that appealed the Decision, and we agree with and adopt the conclusions of the Tribunal at paragraphs 52 to 53 of the Barrett Judgment and paragraphs 126 to 130 of the Tomlinson Judgment in this regard. The OFT was not required, as the Appellants contended, to examine whether the possibility of cover pricing existed in the market, but rather to consider conventional market definition issues such as the existence and extent of demand- and supply-side substitutability. This is necessary in order for the OFT to be able to reach a proper conclusion on the appropriate level of penalty, having satisfied itself on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the infringement.[12]

[11] Transcript, day 2, pages 67-68.

[12] *Argos Limited and Littlewoods Limited v. OFT and JJB Sports plc v. OFT* [2006] EWCA Civ 1318, paragraph 170, see also paragraph 160 above.

(6) Exclusion of intra-group turnover (and Appellants' submission regarding the allocation of turnover relating to "mixed-use" projects)

The parties' submissions

178. The Appellants submitted that the OFT should have excluded intra-group turnover (i.e. turnover negotiated between Quarmby and St James Securities) from the calculation of relevant turnover at Step 1 of the penalty calculation, or alternatively to adopt a suitable corrective mechanism at Step 3 to reduce the penalty in proportion with the amount of intra-group turnover. The Appellants submitted that this is consistent both with standard practice when calculating turnover for the purposes of merger control, and with long-established case law that contracts, agreements and other arrangements within a single economic entity are not to be treated for the purposes of competition law as agreements.

179. The OFT rejected any submission that there had been any double-counting of turnover here, having specifically indicated to parties that intra-group turnover should be excluded from the figures provided. In its skeleton argument, the OFT noted that the Appellants had not provided any evidence to demonstrate their claim, specifically by providing a breakdown of the turnover figures which were said to be erroneously included in the OFT's calculations, and evidence supporting its claims that such turnover related to intra-group contracts and services.

180. At the hearing, the Appellants made a further submission in relation to the turnover figures relied upon by the OFT in the Decision, submitting that the figures did not represent the proper allocation of turnover in connection with "mixed use" projects (i.e. projects that related to more than one relevant market defined by the OFT). The Appellants submitted that it had only become clear to them, after reviewing Decision/II.1619 (p. 295) and the accompanying footnote 1742) that the OFT had allocated mixed-use projects to the market that represented the highest proportion of the work undertaken as part of the project. Accordingly, the Appellants submitted revised turnover figures on 7 July 2010 which purported to correct the previously erroneous calculation of the split of turnover in relation to such mixed-use

projects.[13] The OFT objected strongly to the production of these figures at such a late stage, in circumstances where the Appellants had had every opportunity prior to the hearing to submit the correct figures, and pointed to the fact that the Appellants had not raised this issue in their Notice of Appeal. Miss Bacon for the OFT noted, too, that the figures provided by the Appellants were not audited, pointing to a disclaimer in the covering letter written by the Appellants' accountants (Transcript, day 2, page 72). The OFT also challenged the correctness of the new figures.

The Tribunal's analysis and conclusions

181. We found the Appellants' submissions under this heading to be entirely without merit. As regards the deduction of intra-group turnover, we are satisfied that the OFT clearly indicated to the parties that they should exclude intra-group turnover from the figures provided to the OFT. The Appellants failed to do so. Rather than raise this issue directly with the OFT, the Appellants have attempted to shift the blame for their fairly elementary error to the OFT by suggesting in their notice of appeal that the OFT was in some way at fault. We find this most unsatisfactory, and Miss Bacon for the OFT was correct to state that the OFT ultimately has to rely on the turnover figures supplied by the parties (Transcript, day 2, page 69).

182. Turning to the allocation of turnover in connection with mixed-use projects, we have considered the revised turnover figures supplied by the Appellants (which purport to remove a large part of the relevant turnover for Infringement 233), but have decided that it would not be appropriate to take these into account for two main reasons. First, it is not at all satisfactory for such figures to be provided at the door of court (Addleshaw Goddard LLP wrote to the OFT for the first time in relation to this issue on 1 July 2010), in circumstances where clarification could very easily have been sought from the OFT at a much earlier stage. Second, the figures were not agreed between the parties (see in particular Miss Bacon's submissions at Transcript, day 2, pages 72 and 73) and we were left in some doubt as to whether the Appellants had correctly allocated turnover in relation to mixed-use projects. In any event, given our conclusion at paragraphs 209 and 210 below that it is appropriate to apply an uplift to the penalty that results from the

[13] Transcript, day 2, pages 59-60.

application of Steps 1 and 2 of the 2004 Guidance, this submission is of no material consequence.

183. In light of our conclusions above, we propose to rely on the turnover data in the form originally provided by the Appellants in response to the OFT's request for information dated 16 April 2008 (see paragraph 151 above).[14]

(7) Maximum fine threshold set too high

The parties' submissions

184. The Appellants referred to Decision/VI.273 (p. 1688), in which the OFT applied a downward adjustment (at Step 3 of the penalty calculation) to the penalties imposed on parties with two or three infringements in the same market who received a penalty amounting to more than 4.5% of their total turnover. The Appellants submitted that this "maximum fine threshold" did not meet the criteria set out in that paragraph of the Decision, exceeded the level required to achieve the twin objectives of deterrence and punishment, and did not ensure equal treatment as between different parties. The Appellants noted that the fine imposed on them, which amounted to 3.62% of their total turnover at the end of Step 3, significantly exceeds the equivalent penalties for other parties in the same case that were involved in infringements of the same nature, and was nearly five times the level necessary to ensure deterrence, namely the MDT selected by the OFT at 0.75% of total turnover. The OFT should, as in other cases, have narrowed the range between the lowest and highest penalties imposed on the parties, in particular given that the OFT's selection of infringements was not related to the seriousness of each individual infringement.

185. The OFT rejected the Appellants' submission that the cap on penalties was set too high. The MDT threshold was not intended as a ceiling, but rather represented the minimum figure necessary to act as a proper deterrent. The Appellants' submission that there should be a range between lowest and highest penalties (as a proportion

[14] These data were provided in the form of a letter dated 13 June 2008 sent by Jolliffe Cork, Chartered Accountants, as restated in an email sent by Addleshaw Goddard LLP to the OFT on 12 December 2008.

of total turnover) of 25-35% is based on pure assertion without any objective reasoning or analysis, and comparisons with other OFT decisions (such as *Tobacco* and *Construction Recruitment Forum*[15]) are unhelpful, since they involved far fewer parties and entirely different facts. The Appellants have not advanced any reasoning to suggest that the threshold of 4.5% was inherently unreasonable.

186. In response to the Appellants' submission that the OFT did not sufficiently take account of low profit margins in the construction industry, the OFT submitted that there are sound reasons why penalties were calculated by reference to turnover and not profitability, and the construction industry is no way exceptional in this regard.

The Tribunal's analysis and conclusions

187. In our view, the OFT clearly asked itself an appropriate question at Decision/VI.273 (p. 1688), where it stated:

> "…the OFT has considered whether any form of reduction would be appropriate at step 3 in certain cases in order to ensure that the cumulative impact of the aggregate penalty is not excessive where a Party has been found to have participated in more than one Infringement in the same relevant market and a large proportion of its total turnover in the relevant business year was achieved in that market. An aggregate penalty may be considered excessive if it significantly exceeds the equivalent penalties for other parties in the same case that were involved in very similar infringements and is well above the level necessary to ensure deterrence."

188. However, we agree with the Appellants that the mechanism used by the OFT to address this issue was too narrowly focussed, and agree with and adopt the conclusions of the Tribunal at paragraph 168 of the Kier Judgment as regards the formulaic nature of the 4.5% cap that was applied by the OFT in this case. The OFT's approach was, in our view, defective both because it operated only in connection with those parties found to have participated in more than one infringement in the same relevant market, and also because it was applied purely by reference to a benchmark based on turnover, and did not have proper regard to the individual circumstances of each addressee of the Decision. As we note at paragraphs 193 and 194 below, the OFT also failed to have regard to the broader

15 Decision of the Office of Fair Trading in Case CE/7510-06: Construction Recruitment Forum (29 September 2009).

circumstances in the industry, which was characterised by low profitability. In our own assessment of the appropriate level of the penalty that should be imposed on the Appellants, we have had regard to these factors.

(8) Fine is disproportionate given current economic conditions / chilling effect

The parties' submissions

189. The Appellants submitted that in light of both economic conditions within the industry and the inherently low profit margins of the industry, the level of fines required to achieve punishment and deterrence was substantially lower than the level actually set in the Decision in respect of the Appellants. The Appellants drew attention in particular to the impact of the recession on the construction industry, and the specific impact on the Appellants' turnover and profit, arguing that the penalty imposed on them should be substantially reduced in light of these factors. In their skeleton argument, the Appellants made further submissions in connection with financial hardship, the OFT having disclosed in the consolidated penalties defence the manner in which it assessed such financial hardship claims in the Decision. The Appellants submitted both that the OFT set the thresholds for the assessment of financial hardship too high, and that they in fact fulfilled one of these criteria (namely, whether the penalty accounted for 150% of the company's profit after tax). The Appellants' submissions in relation to financial hardship are considered in paragraphs 206 to 209 below.

190. The Appellants submitted further that Quarmby has experienced a chilling effect with regard to its business and ability to secure work as a result of this investigation, referring to the (often inaccurate) press coverage that accompanied the publication of the Decision and examples of clients omitting Quarmby from tender lists as a result of the Decision. This has led to unequal treatment vis-à-vis third parties who likely engaged in cover pricing but were not investigated by the OFT. The chilling effect is exacerbated by the level of fine imposed on the Appellants which potentially gives the impression to third parties that the Appellants were amongst the worst offenders in the Decision. The OFT acknowledged the risk of a chilling effect when it published a joint information note

on 22 September 2009 together with the Office of Government Commerce, recommending that parties to the Decision should not automatically be excluded from future tenders. Having acknowledged this risk, the Decision should have made a substantial adjustment to the level of fines at Step 3 in the special circumstances of this case.

191. The OFT responded that wider economic circumstances were taken into account when setting penalties in so far as they affected the financial viability of any individual party. However, the OFT was entitled to take the view that it would be inappropriate to reduce penalties across the board as a result of the current economic climate, as not all parties will be similarly affected. The OFT did, however, take the current economic climate into account in offering the parties an extended period in which to pay their penalty, subject to payment of interest on the outstanding balance.

192. As regards the chilling effect on future business, the OFT referred to its conclusion at Decision/VI.201-203 (p. 1673) that adverse publicity on its own would not act as a sufficient deterrent to the addressees of the Decision and other companies, and that fines should be imposed. The OFT considered the case for a reduction in fine, but concluded that no downward adjustment was necessary. The OFT submitted that the Appellants had not identified any error in those considerations.

The Tribunal's analysis and conclusions

193. We agree with the Appellants that both the inherent features of an industry, and the impact of current economic conditions, are factors that should be taken into account by the OFT in its assessment of a penalty. These are particularly important in order to determine a penalty that is proportionate in all the circumstances, and in this regard we agree with and adopt the Tribunal's conclusions at paragraphs 172 and 173 of the Kier Judgment. In the context of this particular investigation, we have concluded that the OFT should have had greater regard for the low margins prevalent in the construction industry, and the particular impact of the economic downturn in that industry.

194. Although we are satisfied that the OFT acted within its broad discretion in deciding which infringements to pursue, the OFT should have been aware of the potential distorting effect of imposing very substantial penalties on certain companies, in the context of a widespread practice where a number of likely offenders escaped any sanction.

195. These are factors that we have taken into account in our assessment of the appropriate level of fine that should be imposed on the Appellants in Section VIII below.

(9) Aggravating and mitigating factors at Step 4

The parties' submissions

196. The Appellants submitted that the OFT erred in its assessment of certain aggravating and mitigating factors at Step 4 of the penalty calculation:

(a) *Uncertainty regarding legality of cover pricing*: The OFT should have recognised that the law with regard to cover pricing was not sufficiently clear and certain for the Appellants to have known that cover pricing was forbidden (and clearly and ascertainably punishable) before the Appellants were said to have engaged in cover pricing. The Appellants pointed to a distinction drawn in the industry between "cover pricing", which was viewed as legitimate, and "bid rigging", which was considered unlawful. There was considerable uncertainty in the industry, as demonstrated by descriptions of the practice in text books. Further, only one of the Appellants' infringements (Infringement 233) post-dated the Tribunal's judgments in this area. The Appellants submitted that the OFT should have taken account of this genuine uncertainty, in particular following the practice of the European Commission and European Court of Justice to impose no fine or a nominal fine in cases where the law is unclear or could not be easily ascertained.

(b) *No director involvement:* The manner in which the OFT fined companies with director involvement was disproportionate and in breach of the principle of equal treatment. Those addressees of the Decision with director involvement were likely to obtain a significant reduction in fines compared with those without such involvement, as the directors were in a position to ascertain whether cover pricing took place. However, this leads to a situation where companies with few infringements without director authorization (or knowledge of the infringements) receive higher penalties than companies with many infringements and director authorization, as the latter companies were in a position to accept the FTO or apply for leniency. The Appellants submitted that the OFT should have devised a suitable corrective mechanism to address this concern.[16]

(c) *Prompt termination:* The OFT was wrong to conclude at Decision/VI.331 (p. 1701) that no discount should be given for prompt termination of the infringement, in circumstances where paragraph 2.16 of the 2004 Guidance identifies prompt termination of a mitigating factor and where there was genuine uncertainty as to whether the practice of cover pricing was unlawful.

197. The OFT responded to these submissions as follows:

(a) *Uncertainty regarding legality of cover pricing*: The OFT submitted that no properly advised undertaking could ever have thought that cover pricing was lawful. That conclusion is not altered by the fact that there was widespread ignorance within the industry in this regard. Such ignorance is irrelevant to the question of whether a properly informed undertaking, which turned its mind to the question and took appropriate advice, would have expressed genuine uncertainty as to the law. Genuine uncertainty as to the law is a potential mitigating factor when an informed assessment of the application

[16] At paragraph 2.33 of their Notice of Appeal, which summarised their grounds of appeal, the Appellants referred to a further ground of appeal in connection with the administration of the FTO in this investigation, namely that the "OFT failed to take into consideration the inability of [Quarmby] and [St James Securities] to accept a fast track offer, as they had no evidence of [simple cover pricing]." This ground of appeal was not expanded upon in the Notice of Appeal, however, and was not pursued in subsequent written pleadings or oral submissions.

of the law to particular facts leaves an undertaking and its advisers with good reason to consider that the conduct in question might be lawful. There is no such good reason here. A contention to the effect that "they were all at it" or that grossly ill-informed publications suggested such conduct might be lawful does not mean there was any genuine uncertainty as to the law. Further, contrary to the Appellants' submissions, the Tribunal's previous judgments (in *Apex*, *Price*[17] and *Makers*[18]) also made it abundantly clear that cover pricing contravened the Chapter I prohibition.

(b) *No director involvement:* The OFT submitted that, whilst the involvement of company directors is an aggravating factor, it would not be logical to consider the absence of direct involvement to be a basis for reducing penalties. Further, the Appellants are wrong to suggest that, absent director involvement in an infringement, they could not have accepted the FTO. There were many ways in which the Appellants could have assessed the accuracy of the OFT's assessment of the facts without director involvement. The fact that the Appellants remain unaware of which employee supplied the relevant cover prices is hardly either a distinguishing feature of the Appellants' case, or a ground for the reduction of their penalty.

(c) *Prompt termination:* The OFT submitted that it was not appropriate to give a discount for prompt termination in a case where the infringements involve price-fixing and the exchange of prices between competitors, given the clear illegality of such conduct. In such a case, termination of the illegal conduct upon detection is a proper response but not one that diminishes blameworthiness.

The Tribunal's analysis and conclusions

198. The Tribunal's conclusions on these issues are as follows:

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[17] *Richard W. Price (Roofing Contractors) Ltd v Office of Fair Trading* [2005] CAT 5.
[18] *Makers UK Limited v Office of Fair Trading* [2007] CAT 11.

(a) *Uncertainty regarding legality of cover pricing*: Very similar arguments to those put forward by the Appellants were made by other companies that brought appeals against the Decision. We agree with and adopt the Tribunal's conclusions at paragraphs 105 to 107 of the Kier Judgment. As the Tribunal stated at paragraph 107 of that judgment:

> "Whilst the industry's general perceptions and motivations as described above do not affect the unlawfulness of cover pricing, they do seem to us to have a bearing on the seriousness of the infringements in question, and to provide significantly more mitigation generally than has been recognised by the OFT in the Decision."

These are factors that we have taken into account in our conclusion, at paragraph 154 above, that it is appropriate to set a revised starting point percentage of 3.5% in this case. We are also satisfied that the overall penalty set at paragraph 211 below properly reflects these factors.

(b) *No director involvement:* We agree with the OFT that the involvement of directors in an infringement is an aggravating factor, and that the lack of director involvement does not, of itself, constitute a mitigating factor. Whilst it is true that a number of smaller companies whose directors had a closer involvement with the infringements were better placed to apply for leniency (and those companies received an uplift to their penalties as a result of such director involvement), this does not excuse a larger company for its failure to stamp out a particular practice, or to gather information from the individuals most closely connected with the infringements. Our conclusion from the evidence that was presented to us during the course of the hearing was that the directors of Quarmby did not take adequate steps, prior to the commission of the infringements, to foster a culture of compliance within the firm.

(c) *Prompt termination:* We do not consider that the Appellants should have benefited from any additional discount for prompt termination of the infringing conduct in this case. If anything, the evidence that we heard is that the Appellants became aware of the illegality of this practice in 2004 (see paragraph 82 above), and then took inadequate steps to prevent it from occurring again in the future. Prompt termination following intervention by the OFT is a proper response but not one that, in our view, justifies any reduction in penalty in the circumstances of this case.

(10) Justice and appropriateness of the overall penalty

The parties' submissions

199. The Appellants made a broader submission in relation to the penalty imposed on them in respect of the infringements, namely that the penalty imposed on them was inappropriate not only when considered on a step-by-step basis, but when considered in the round. The Appellants submitted that the OFT adopted an unduly rigid "fining machine" in this case, and as identified in the Appellants' more specific grounds of appeal on penalty, failed to have regard to important factors listed in the 2004 Guidance, or to consider relevant facts and circumstances on a case by case basis. According to the Appellants, the Decision did not make adequate allowance for the fact that a small number of parties and tenders had been singled out in the context of an endemic practice, but instead applied a rigid fining machine which was discriminatory, unfair and disproportionate. The Appellants submitted that the fine was particularly severe when compared with the penalties imposed for corporate crimes, such as corporate manslaughter, and given the low profit margins prevalent in this industry.

200. The OFT submitted that it was not required to offer a substantive defence to the broad assertion that the overall penalty was disproportionate, when it had clearly and extensively justified the manner in which it applied the steps set out in the 2004 Guidance to arrive at the penalty imposed on the Appellants. Specifically in response to the Appellants' reference to the penalties applicable for corporate crimes, the OFT submitted that no sensible or relevant comparison can be drawn with separate and distinct regimes, such as corporate manslaughter, addressing very different types of behaviour. The approaches to fining in the two situations are incommensurable. Parliament has recognised that corrupting the operation of the market through anti-competitive conduct is a serious matter, and has made

arrangements for severe penalties to be available where appropriate in order to ensure effective sanction and deterrence.

The Tribunal's analysis and conclusions

201. In our view, the Appellants are correct to challenge the proportionality of the overall fine levied on them by the OFT in this case. We note that the practical consequence of substituting Pre-Infringement Turnover for Pre-Decision Turnover in calculating the relevant turnover at Step 1 has the immediate consequence of substantially reducing the Appellants' penalty, and we believe this to have been the key cause of a disproportionate outcome in the case of the Appellants. However, we also adopt and agree with the Tribunal's broader conclusions at paragraph 166 of the Kier Judgment, namely that there was a failure by the OFT to take a step back and ask itself whether in all the circumstances its proposed penalties were necessary and proportionate in order to achieve the objectives of the 2004 Guidance.

VIII. THE TRIBUNAL'S ASSESSMENT OF THE APPROPRIATE LEVEL OF PENALTY

202. It follows from the above that the penalty imposed on the Appellants cannot stand and, further to the Appellants' request at paragraph 23.1 of their Notice of Appeal, should be reassessed by the Tribunal pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act.

203. We have considered the impact of our conclusions above in connection with the application of the five step methodology set out in the 2004 Guidance, and have reassessed the penalty to a level that we consider to be just and proportionate having had regard to all relevant circumstances put before us in the course of this appeal.

204. At Step 1 of the penalty calculation, the substitution of Pre-Infringement Turnover (as a result of the Appellants' successful ground of appeal considered at paragraphs 147 to 151 above) leads to the substitution of relevant turnover figures of £1,631,

£2,383,341 and £769,136 in respect of Infringements 6, 214 and 233 respectively. For the reasons set out at paragraphs 181 to 183 above, we do not consider that it would be appropriate to amend these figures in light of the Appellants' submissions at paragraphs 178 to 180 above.

205. As a result of the Appellants' successful ground of appeal considered at paragraphs 152 to 155 above, we have applied a starting point percentage of 3.5% to those relevant turnover figures, leading to penalties after Step 1 of £57, £83,417 and £26,920 in respect of the three infringements (a total of £110,394). No adjustment is made to the penalty at Step 2 as the infringement did not exceed a year's duration.

206. The next step is for us to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence. This is also the appropriate stage at which to consider the Appellants' claim to financial hardship (see paragraph 189 above).

207. In support of their claim to financial hardship, the Appellants advanced a witness statement on 2 July 2010 from Mr. John Batty, the Financial Controller of St James Securities. In particular, Mr. Batty identified a number of relevant factors which, in his view, demonstrated that the Appellants should benefit from a reduction in any penalty reassessed by the Tribunal. These included:

(a) That details of the Appellants' profitability over the last six years provides a more reliable indicator of their performance, over which period St James Securities made a loss on average of £1.1m a year. Mr. Batty also referred to certain exceptional items occurring in 2004 and 2008, by explanation of the company's loss of £10.8m in 2004 and profit of £7.9m in 2008. […][**C**].

(b) […][**C**].

(c) That the decision to pay a dividend in 2007 was made well before the Appellants knew that they were implicated in the OFT's investigation.

(d) That any analysis of profit in a particular year has to be viewed against the company's existing liabilities at that time and its projected future commitments (principally to sustain its ongoing development projects).

208. The OFT submitted that the Appellants had not sufficiently demonstrated their inability to pay the penalty imposed for the following reasons:

(a) Even if 2009 figures are taken into account, the average profit of St James Securities over the last three years was approximately £788,000. Further, the loss recorded by St James Securities in the most recent financial year includes full provision for the OFT's penalty. Adjusting for this takes the actual profit that St James Securities may use to pay the penalty to an average of £1.08 million over three years. The penalty accounts for only 82% of this average annual profit.

(b) The penalty is only 10% of the adjusted net assets for St James Securities, and it is notable both that St James Securities paid a dividend of £1.18 million in 2008, and that a large part of the Appellants' net assets are listed as cash in the bank, accounting for over £5 million in 2009. Even on the updated figures, therefore, the OFT would not have considered that the financial situation of the Appellants merited a reduction in penalty.

209. We have considered the parties' submissions above, and the information that was made available in relation to the Appellants' financial position, in our assessment of whether any adjustment to the provisional penalty is necessary at Step 3. We are of the view that the figure generated by the application of Steps 1 and 2 is insufficient to achieve the objectives of 2004 Guidance. The provisional penalty of £110,394 accounts for approximately 14% of St James Securities' three year average profit after tax up to 31 March 2009, which (as noted above) already makes provision for payment of the penalty originally imposed by the OFT in the Decision. Excluding such provision, the provisional penalty accounts for approximately 10% of three year average profit after tax. The provisional penalty accounts for 1.4% of net assets and 0.4% of group turnover in the year ended 31 March 2009.

210. In light of all the circumstances, including the very low penalty imposed in respect of Infringement 6, the nature, scale and seriousness of all three infringements[19] (and the specific evidence that we heard in this regard during the hearing), the size and financial position of the Appellants, and the need to achieve specific and general deterrence, we have come to the view that the penalty should be adjusted at Step 3 to £225,000.

211. At Step 4 of the penalty calculation we apply the same discount of 5% that was originally awarded to the Appellants for their adoption of a competition compliance programme, resulting in a figure of £213,750. For the reasons set out at paragraph 174 above, we have concluded that it is appropriate to set the final penalty for each infringement at one third of the total penalty above, that is £71,250 for each infringement.

212. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover.

IX. CONCLUSION

213. For the reasons set out above, our unanimous conclusion is that:

(a) The appeal against the Appellants' liability for Infringements 6, 214 and 233 is dismissed;

(b) The Appellants' challenge to the penalty succeeds to the extent described in this Judgment, such that the overall penalty for Infringements 6, 214 and 233 is set at £213,750 (a penalty of £71,250 for each infringement).

214. Subject to any representations by the parties the penalty will be subject to interest at 1% above Bank of England base rate from 24 November 2009 to the date of

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[19] In their September 2010 written submissions, the Appellants raised a new point, namely that the OFT should have granted a further reduction in penalty on account of the length of its investigation, as it did in the *Tobacco* decision (at paragraphs 8.6 and 8.7). As this was an entirely new submission, which the OFT did not have the opportunity to respond to, we have not considered it further here. However, we consider that the adjusted penalty set out in this section is proportionate in particular with a view to the age of certain of these infringements.

payment or the date of any relevant judgment obtained by the OFT under section 37(1) of the 1998 Act.

Lord Carlile Q.C.	Ann Kelly	David Summers

Charles Dhanowa
Registrar

Date: 15 April 2011