Neutral citation [2005] CAT 4

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1032/1/1/04

Victoria House
Bloomsbury Place
London WC1A 2EB

24 February 2005

Before:

Marion Simmons QC (Chairman)
Dr Arthur Pryor CB
Mr David Summers

BETWEEN:

APEX ASPHALT AND PAVING CO LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

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

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

Heard at Victoria House on 23 and 24 September 2004.

JUDGMENT (Non-confidential version)

Note: Excisions in this judgment relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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I INTRODUCTION

1. By a Notice of Appeal dated 14 May 2004, and amended pursuant to a request dated 14 June 2004, Apex Asphalt & Paving Co. Limited ("Apex") appeals to the Tribunal against Decision no. CA98/1/2004 taken by the Office of Fair Trading ("OFT") on 16 March 2004 ("the Decision") under section 2(1) of the Competition Act 1998 ("the Act"). In so far as is material, that section prohibits agreements between undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

2. In the Decision the OFT concluded that various roofing contractors, including Apex, had infringed the prohibition contained in section 2(1) of the Act ("the Chapter I prohibition") by colluding in relation to the making of tender bids for flat roofing contracts in the West Midlands. Nine contractors were found to have been involved in various discrete individual agreements or concerted practices each of which had as its object or effect the fixing of prices in the market for the supply of repair, maintenance and improvement services ("RMI services") for flat roofs. Penalties were assessed by the OFT against all of those contractors.

3. Apex was found to have participated in such collusive tendering in relation to two tender bids. One was for re-roofing works to Frankley Community High School and Harborne Hill School ("the FHH Contracts"); the other was for re-roofing and associated building works in relation to two sets of schools: Hob Green and Wollescote Schools, and Christchurch and Church of the Ascension Schools ("the Dudley Contracts").

4. It is alleged in the Decision that Apex entered into concerted practices in relation to the making of tender bids with Briggs Cladding & Roofing Limited ("Briggs") (in respect of the FFH Contracts) and Howard Evans (Roofing) Limited ("Howard Evans") (in respect of the Dudley Contracts).

5. As noted below, Briggs and Howard Evans benefited from the OFT's leniency policy and paid no fine, and a reduced fine, respectively. Apex itself was fined £35,922.80.

II SUMMARY OF THE TRIBUNAL'S DECISION

6. Apex appealed against the OFT's findings of infringement and imposition of a penalty on four bases, set out in paragraphs 44 and 45 below. For the reasons given in this judgment we dismiss the appeal. Our principal reasons are as follows:

(a) Apex was not caused any prejudice by the OFT omitting from the Rule 14 Notice that it proposed to take action in respect of the alleged infringement by Apex in relation to the Dudley Contracts. Accordingly, notwithstanding the omission in the Rule 14 Notice the OFT was entitled to impose a penalty on Apex in relation to the Dudley Contracts;

(b) We are satisfied that the elements of a concerted practice contrary to the Chapter I prohibition are made out in respect of Apex in relation to both the FHH Contracts and the Dudley Contracts;

(c) We are satisfied that the reasons set out in the Decision sufficiently informed Apex of the factual and legal basis for the Decision and were sufficient to enable Apex to understand the basis for the Decision;

(d) We are satisfied that the level of the penalty imposed by the OFT is appropriate having regard to the impact upon consumers, and the duration, of the infringements found.

III THE STATUTORY FRAMEWORK UNDER THE ACT

7. Section 2 of the Act provides, so far as material:

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

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

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

8. Following an investigation under section 25 of the Act, the OFT may, pursuant to section 31(1)(a), make a decision that the Chapter I prohibition has been infringed. Before doing so, the OFT must give the person or persons likely to be affected by the decision the opportunity to make representations: see section 31(2) and rule 14 of the Director's Rules set out in the Schedule to the Competition Act 1998 (Director's Rules) Order 2000 (SI 2000 No 293). This was at the material time customarily done by the service of what is known as "a Rule 14 Notice". The Director's Rules have since been replaced by the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004 No 2751) ("the OFT's Rules"), which came into force on 17 November 2004. In the OFT's Rules the term "Statement of Objections" has replaced the term "Rule 14 Notice". A Rule 14 Notice/Statement of Objections is required to be served on each person whom the OFT considers to be a party to an infringement of the Chapter I (or Chapter II) prohibition.

9. Section 36(1) provides that, on making a decision that conduct has infringed the Chapter I prohibition, the OFT may require the undertaking concerned to pay a penalty in respect of the infringement. Under section 36(3), such a penalty may be imposed only if the OFT is satisfied that the infringement has been committed intentionally or negligently. By virtue of section 36(8), no penalty fixed by the OFT may exceed 10% of turnover of the undertaking as determined in accordance with provisions specified by an Order made by the Secretary of State. At the material time, that Order was the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No 309).

10. Section 38(1) of the Act requires the OFT to publish guidance as to the appropriate amount of any penalty. Under section 38(8) the OFT must have regard to that guidance when setting the amount of the penalty. The OFT's published guidance at the material time was the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, March 2000) ("the *Guidance as to Penalty*").

11. Any party to an agreement in respect of which the OFT has made a decision may appeal to this Tribunal against, or with respect to, that decision: section 46(1).

12. The powers of this Tribunal to determine appeals under section 46 are set out in paragraph 3 of Schedule 8 of the Act, which provides:

> "3.- (1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-
>
> (a) remit the matter to the OFT
> (b) impose or revoke, or vary the amount of, a penalty,
> …
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
> (e) make any other decision which the OFT could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.
>
> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

13. Section 60 of the Act provides, so far as material:

> "(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 [European] Commission."

14. By virtue of section 60 of the Act, section 2 of the Act is to be interpreted in a manner consistent with Community law. Section 2 is closely modelled on Article 81 of the EC Treaty.

IV THE FACTUAL BACKGROUND

15. Apex is a company that specialises in asphalt and felt roof contracting. Briggs is a company specialising in the provision of roofing services. Howard Evans specialises in roof coverings and roof contracting services.

Industry overview

16. The following account is drawn from the Decision and is not contested. The UK roofing contracting services industry as a whole was valued at £1,388 million in 2001. There are three general types of roof that are used in the building industry: pitched, flat and metal. Pitched roofs are common in the commercial market and industrial sector. AMA Research, a market analyst company, has suggested that metal coverings compete primarily with pitched roofing products (primarily tiling) and reported that one of the most important markets for metal coverings is speculative new build in the industrial construction sector for low-cost, out of town factories and warehouses.

17. The term "flat roofing" is somewhat misleading. It appears that many "flat" roofing products can also be fitted at a pitched angle. Such products are better defined by the materials employed in their construction, namely bituminous felts, single ply membranes and mastic asphalt. In 2001 flat roofing products accounted for roughly 25% of the roofing materials used in the UK roofing contracting services market.

18. The services of contractors specialising in RMI services for flat roofing products are usually procured through a selective competitive tendering process. This process involves local authorities and private managing agents, architects or surveyors inviting a number of selected contractors to submit sealed competitive bids.

The events leading up to the Decision

19. In the autumn of 2001 Ruberoid plc – in its capacity as parent company of Briggs – applied for leniency under the terms of the OFT's leniency scheme (set out in the *Guidance as to Penalty*). Ruberoid was granted full immunity in respect of the activities of itself and its subsidiaries. The granting of leniency was conditional on Briggs providing evidence of the cartel and co-operating with the OFT throughout its investigation. As part of that cooperation, an employee of Briggs, known as Mr C, gave evidence in the form of an interview with officials of the OFT on 26 November 2002. The record of that interview was part of the evidence on which the OFT relied, both in coming to the Decision and before us in this appeal. The OFT was satisfied that Briggs did comply with the leniency conditions and so the penalty calculated for it was reduced to nil.

20. Information received by the OFT suggested that undertakings including Apex, Briggs and Howard Evans were engaged in various price-fixing or market-sharing agreements under which the tender prices submitted to local authorities and private undertakings for flat roofing works were agreed amongst those who would bid prior to tenders being returned.

21. On 11 June 2002 the OFT began a formal investigation under the Act, having decided that there were reasonable grounds for suspecting that collusive tendering had taken place. The premises of Apex and Howard Evans, amongst others, were entered and searched by the OFT pursuant to warrants obtained under section 28 of the Act. The OFT issued notices requiring information to various contractors and bodies responsible for putting contracts out to tender pursuant to section 26 of the Act.

22. After the OFT commenced its investigation, Howard Evans also applied for leniency. By way of a letter dated 23 July 2002 the OFT granted Howard Evans leniency subject to the same conditions as Briggs but only to the extent that any penalty would be reduced by 50%. The OFT was satisfied that Howard Evans complied with its leniency conditions as a result of which the penalty imposed on Howard Evans was reduced by 50%.

23. On 13 August 2003 the OFT issued a Rule 14 Notice to various flat roofing contractors, including Apex, Briggs and Howard Evans. All of the contractors to whom the Rule 14 Notice was issued made written representations in response. Apex made its written response to the Rule 14 Notice on 17 November 2003 but confined this to the FHH Contracts.

24. The OFT did not, in the Rule 14 Notice, expressly state that it was intending to take any action against Apex in relation to the alleged infringement concerning the Dudley Contracts. It is accepted by the OFT that this was a mistake on its part. In paragraph 333 of the Rule 14 Notice it should have included Apex in the list of undertakings suspected of having infringed the Act in respect of the Dudley Contracts. It did not do so. The OFT only realised that this omission had been made when it considered Apex's written response to the Rule 14 Notice, which was directed at the FHH Contracts and not the Dudley Contracts. This provoked the OFT, through one of its officials, Mr Braithwaite, to telephone Apex and to follow that telephone conversation with an email timed at 1530 on 27 November 2003 in the following terms:

> "I write to confirm our conversation this afternoon in relation to the OFT's allegations that Apex was involved in an infringement of the Chapter I prohibition in the Dudley schools contracts discussed in the Rule 14 Notice served on Apex.
>
> OFT's allegations as to Apex's involvement in the Dudley Schools contracts are set out in detail in the evidence, analysis and findings contained in paragraphs 273 to 299 of the Rule 14 Notice. Thus, although the summary table of infringements by party in the Rule 14 did not list Apex's name next to the Dudley Schools contracts, OFT considers that its (OFT's) allegations relating to Apex's involvement in those Dudley contracts are nevertheless clear from the Rule 14.
>
> In the circumstances, however, although Apex did not make written representations in relation to the Dudley Schools contracts by the closing date for written representations, OFT is prepared to give Apex a further 10 days from today's date to make written representations on those contracts. Please therefore send any representations that Apex wishes to make in relation to the Dudley Schools contracts to us by 5pm on Thursday 11 December 2003."

25. The email response by Apex on 1 December 2003 was as follows:

"Thank you for your email, the contents of which we note. As discussed, Apex did not comment in its response on the evidence relating to the Dudley Schools contracts as it appeared from paras 331 et seq of the Rule 14 Notice that the OFT did not propose to make a decision against Apex in relation to those contracts. In order to allow Apex a reasonable time to consider the evidence and the position in relation to these contracts and to prepare a response with any representations, we would like to request a little more time until 5.00 pm on Monday 22 December. Please confirm that this is in order.

This has a knock-on effect in relation to the dates for the oral hearing as clearly it would be best if this was fixed to take place a little time after the submission of the further representations. Would you be able to put forward some further alternative dates?"

26. The OFT's email response to Apex's email, at 1557 on 3 December 2003, was in the following terms:

"We have considered your request for an extension of the additional time that the OFT has granted Apex to make representations on the Dudley Schools contracts until 5pm on Monday 22 December 2003. We are unable to accede to your request.

As I stated in my email of 27 November 2003, we consider that it was clear from the Rule 14 Notice as a whole that that OFT did intend to make a decision against Apex in relation to the Dudley Schools contracts and that the proper time to have made representations on those contracts was by the closing date that the OFT set for written representations on the Rule 14 Notice, i.e. November 2003. Although OFT is, as I stated in my last email to you, prepared to give Apex extra time to make representations on the Dudley Schools contracts, we are unable to extend this time until 22 December. We are hearing oral representations from the parties in the above case before Christmas and the list of possible dates that I have already given you for oral hearings are the dates that remain available. Nevertheless, we are prepared to extend the time for the submission of written representations on the Dudley Schools contracts by a shorter period, until 12 pm (midday) on 18 December 2003.

As you noted, the extension of time for these written representations may have a knock-on effect on the date on which Apex will make written representations. In that context we note that while OFT normally considers that oral representations are an opportunity to expand upon written representations, there is no reason why Apex – if it wished to do so – could not make its oral representations on the Dudley Schools contracts before it has sent in its written representations on those contracts and after those oral representations send in its written representations on those contracts (although in any event by 18 December 2003). That said, the OFT is prepared to offer Apex one additional date to make oral representations: 10 am to 12 pm on Friday 19 December 2003."

27. Following this email exchange Apex provided the OFT with a supplemental response to the Rule 14 Notice on 18 December 2003 ("supplemental response"). These submissions were made without prejudice to Apex's primary submission that, because of the omission in the Rule 14 Notice, the OFT was not entitled to take action against Apex in connection with the Dudley Contracts. Apex submitted in its supplemental response and before us that it was not permissible for the OFT to correct the omission once Apex had provided its first response to the Rule 14 Notice.

28. Apex also availed itself of the right to make oral submissions. These were made on 19 December 2003.

29. In its oral submissions Apex submitted *inter alia* that if it did not respond and/or did not lodge bids when invited to tender, that could result in Apex not being asked to bid in future by the tendering authority in question.

30. During the oral hearing the OFT asked Apex to put forward any evidence it had in support of that contention. Apex provided its written response to this request on 13 January 2004, stating *inter alia*:

> "2.1. Apex drew a distinction between being removed from a list of approved contractors which a tendering authority had and not being invited to tender in future as a result of not returning a bid following an invitation to tender. Apex accepts that simply failing to respond to an invitation to tender alone is unlikely to result in a company being removed from the list of approved tenders. However, given the necessary discretion which local authority officers have in sending out invitations, there is a very real risk that future invitations will not be extended to a party which does not lodge bids when invited to do so. As set out in our previous submissions (17 November §§5.6-5.10; 18 December §§5.2-5.8), this is as much a matter of common sense as evidence: if a person invited to bid does not respond it is of disadvantage to the person inviting tenders since they receive fewer; it may, in extreme circumstances, require the inviting authority to follow special processes for appointment which are inconvenient and expensive; and it may be read as a lack of interest in a type of work or work in a particular area on the part of the invitee. Certainly, all these factors operate as a disincentive to invite a company to tender again.
>
> 2.2. Staff at Apex have had conversations with Local Authority officers about the practice of informally 'suspending' a contractor for the failure to submit a

> tender on previous occasions. However, by their nature, such conversations tend to be 'off the record' and Apex does not believe those it has spoken to would be willing to provide evidence.
>
> 2.3. However, Apex believes that its understanding of the business is well accepted in the industry. Indeed, a number of authorities make it very clear on their invitations to tender that failure to submit a tender could have significant repercussions for the invitee. Attached as examples are the following very recent letters inviting tenders: …"

31. On 16 March 2004 the OFT issued the Decision, finding *inter alia* that Apex had committed two infringements of the Act, being the two separate concerted practices referred to above.

32. Of the nine undertakings (including Briggs and Howard Evans) found by the OFT in the Decision to be party to various infringements, only Apex and Richard W Price (Roofing Contractors) Limited (see case 1033/1/1/04) have appealed the Decision.

V THE DECISION

33. The Decision sets out, first, the facts, including the evidence relied on (Section I); secondly, the OFT's legal and economic assessment (Section II); and thirdly, its decision and determination of the penalties (Section III).

34. In the Decision the OFT sets out the nature of the tendering process and why it considers that collusive tendering is anti-competitive in the following paragraphs: [1]

> "17. The services of contactors who specialise in the repair, maintenance and improvement of flat roofing products are usually procured through a competitive tendering process, which involves local authorities and private managing agents, architects or surveyors inviting a number of contractors to submit sealed competitive bids. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently.
>
> 18. Collusive tendering eliminates competition amongst suppliers. In the industry that is the subject of this Decision there are generally three types of arrangement that can result in a pre-selected supplier winning a contract:

[1] Any footnotes contained in direct quotations from the Decision or any other document found in this judgment have been omitted.

- Cover bidding (also referred to as cover pricing) occurs when a supplier submits a price for a contract that is not intended to win the contract. Rather, it is a price that has been decided upon in connection with another supplier that wishes to win the contract. Cover bidding gives the impression of competitive bidding, but in reality suppliers agree to submit token bids that are usually too high.

- Bid-suppression takes place when suppliers agree amongst themselves to either abstain from bidding or to withdraw bids.

- Bid-rotation is a process whereby the pre-selected supplier submits the lowest bid on a systematic or rotating basis.

19. Local authorities make it clear in their invitations to tender that any form of collusive tendering is unacceptable. For example, Coventry City Council's Standing Orders explicitly state,

> "In every tender submitted to the City Council, the tenderer shall certify that the tender amount has not been fixed or adjusted by, under, or in accordance with any agreement or arrangement with any other person."

The standard terms and conditions used by the other local authorities referred to in this Decision contain similar stipulations regarding collusion and corruption in relation to the submission of tenders.

20. The OFT also notes that, in the absence of a formal sub-contracting relationship, there is no reason why undertakings invited to participate in a single stage (or any other) competitively tendered process would need to communicate with one another in relation to the tender before returning their bids to the local authorities, the surveyors or the private agents managing the tendering process.

…

128. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently (see paragraphs 17 to 20 above). The OFT considers that any tenders submitted as the result of collusive activities which reduce the uncertainty of the outcome of the tender process are likely to have an appreciable effect on competition.

…

360. The OFT has considered the important issue of the procurement process in the roofing contracting sector and how this affects competition within the relevant market.

361. The OFT notes that services in this market are procured through a tendering process, which involves local authorities and private managing agents, architects or surveyors inviting contractors to submit bids. Any undertaking with expertise in repairing flat roofs within a reasonable distance

of the contract might feasibly tender for a contract. However, buyers (local authorities or managing agents) will usually short-list a number of firms from their standing lists of suitable contractors.

362. Where the original tendering process fails to identify a suitable contractor on the short-list, customers may consider alternative contractors. In such circumstances, different undertakings can be approached, but only if they are already included on the appropriate standing lists. Often local authorities do not look beyond their short list, (i.e. they do not consider other suppliers on the relevant standing list), even if all the original bids are deemed unaffordable or unsuitable. This is because procedures typically allow for negotiation where the buyer gets its budgeted price but compromises are made on the specification for the job.

363. Furthermore, the ability of different contactors to be included on standing lists is restricted by a number of different factors. In particular, firms would need to demonstrate:

(i) Specialist roofing skills;
(ii) Adequate insurance coverage;
(iii) A good health and safety record; and
(iv) Relevant product/manufacturer guarantees.

364. This suggests that, in the absence of collusion, the most effective competition in the product market would be those suppliers on the relevant standing list, and in particular those on the relevant short lists for the supply of RMI services for the different types of flat roofs.
…"

35. The analysis of the evidence relied on by the OFT in relation to each of the contracts in question commences at paragraph 156 of the Decision. The analysis in relation to the FHH Contracts and the Dudley Contracts commences at paragraphs 188 and 329 respectively.

36. In relation to the FHH Contracts the material passage of the Decision reads as follows:

"**Frankley and Harborne Hill Schools**

Analysis of evidence

188. *Fax dated 30 August from Apex to Briggs* (see paragraph 61 above). This fax header sheet with handwritten script on it notes,

"[…] [C]

THESE ARE YOUR FIGURES INCLUSIVE OF CONTINGENCIES
FOR TWO PROJECTS WITH BIRM C.C.

FRANKLEY = £193460.40
HARBORNE HILL = £144910.10…"
(Emphasis added).

A section of the fax headed "DATE/TIME" notes,

"30.8.2001
14.30"

The OFT considers that there is no legitimate reason for Apex to send Briggs, or any other undertaking involved in this contract, a fax with prices relating to this contract. The OFT considers that the words, "These are your figures inclusive of contingencies for two projects with Birm C.C." and "Frankley = £193460.40. Harborne Hill = £144910.10" show that Apex sent Briggs figures relating to the Frankley and Harborne Hill contracts. In particular, the OFT finds that the words, "These are your figures…" shows that Apex was sending Briggs figures which Briggs should submit as its tenders for the contracts such that Briggs would not win the contracts.

189. *Record of interview with Mr C of Briggs* (see paragraphs 62 and 63 above). An extract from this interview records that,

"…**we were asked to do a cover for a couple of schools that Apex knew about that were coming out to tender**… The jobs or the enquiries duly hit my desk and remained there until this fax came through with our prices to put in…

…We were rather shocked at the value…it's a lot of money and we looked at the specification required for the job and the roof areas involved on a roof plan that had been supplied and I went and saw my boss Mr F and we looked at it carefully together again. We didn't actually sit very comfortable with the figures that we got to submit…because it was too high…and it was duly decided that we were not gonna actually put a tender bid in at all – it was just an absolute no tender as far as we were concerned because we thought they were having a laugh with the figures… we didn't return a price at all."

(Emphasis added).

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

190. *Details of the tenders submitted to BCC* (see paragraph 64 above). These details show that Apex submitted figures to BCC of £187,354.22 and £136,959.37 for Frankley High School and Harborne Hill Secondary School respectively. These figures are approximately £6000 and £8000 less than the figures that Apex asked Briggs to submit to BCC. The OFT considers that the fact the figures Apex asked Briggs to submit were so much higher supports Mr C's interview statement that Briggs did not submit a tender because Briggs thought that the cover bid it was asked to submit was too high.

191. The OFT considers that the evidence set out at paragraphs 188 to 190 demonstrates that a concerted practice to provide non-competitive prices such that Briggs would not win the contracts was in place between Apex and Briggs in relation to the tenders submitted for work in relation firstly to Frankley School and secondly in relation to Harborne Hill School. The fact that Briggs did not put in a tender for the Frankley and Harborne Hill School contracts because it thought that the prices Apex gave it were too high does not change the fact of the existence of the concerted practices that the OFT has found, the object of which was that Briggs would put in a bid but not win the contracts. Case law of the European Court confirms that where an agreement (and by analogy a concerted practice) has the object of restricting competition – as it does in this case (see paragraph 367 below) – an agreement (or concerted practice) does not have to be put into effect to infringe the Act. In any event, the fact that Apex sent Briggs details of a cover price, and the evidence that Briggs did not submit any tender at all only because it considered that the cover price was to high, shows that Apex and Briggs knowingly substituted practical cooperation between them for the risks of competition."

37. In relation to the Dudley Contracts the material passage of the Decision reads as follows:

"**DUDLEY SCHOOLS CONTRACTS**

Hob Green, Wollescote, Christchurch and Church of the Ascension Schools

Analysis of evidence

329. *Fax from John Roper at Howard Evans to Tony at Solihull*. This undated fax states the following:

> "…YOUR PRICE INCLUDING PROVISIONAL SUMS AND CONTINGENCIES.
>
> CHRISTCHURCH AND CHURCH OF THE ASCENSION SCHOOL
>
> £172,320 + VAT
>
> HOB GREEN AND WOLLESCOTE SCHOOLS

£291,822.00 + VAT…"

330. The OFT considers that there is no legitimate reason for Howard Evans to send Solihull, or any other undertaking involved in these contracts, a fax with prices relating to these contracts. The OFT considers that, together, the words in the quotation above in a fax sent by Howard Evans to Solihull indicate that Howard Evans told Solihull the price that Solihull should bid for the Christchurch and Church of the Ascension schools contract and for the Hob Green and Wollescote schools contract rather than Solihull independently determining its own price for the contracts.

331. *Fax from John Roper at Howard Evans to* […][**C**] *at Apex*. This undated fax states the following:

> "…YOUR PRICE INCLUDING PROVISIONAL SUMS AND CONTINGENCIES.
>
> CHRISTCHURCH AND CHURCH OF THE ASCENSION SCHOOLS
>
> £166,518 + VAT
>
> HOB GREEN AND WOLLESCOTE SCHOOLS
>
> £283,101.00 + VAT…"

332. The OFT considers that, together, the words in the quotation above in a fax sent by Howard Evans to Apex indicate that Howard Evans told Apex the price that Apex should bid for the Christchurch and Church of the Ascension schools contract and for the Hob Green and Wollescote schools contract rather than Apex independently determining their own price for the contracts.

333. *Interview with Mr G of Howard Evans, dated 3 September 2002*. As noted at paragraph 122 above, Mr G was asked by an OFT official who interviewed him a number of questions about documents found by OFT officials on a section 28 visit to Howard Evans's premises. In relation to the faxes quoted at paragraphs 329 and 331 above, Mr G stated,

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

The OFT considers that this statement is further evidence that Howard Evans colluded with each of Apex and Solihull in relation to the making of tender bids that each would submit for the Hob Green and Wollescote Schools

contract and for the Christchurch and Church of the Ascension Schools contract.

334. *Breakdown of General Asphalte's bids for the Dudley schools contracts.* The OFT considers that the presence of General Asphalte's bids for the Dudley schools contracts at Howard Evans' premises shows that there was contact between General Asphalte and Howard Evans.

335. The OFT considers further that the breakdown of General Asphalte's bid for the four schools found at Howard Evans's premises in document RG3 (pages 7-10), and the similarity of the *total* sum for each contract noted in RG3 (pages 7-10) to the total sums in the bid sent by General Asphalte to DPC before the tender return date, supports the OFT's finding of collusion between Howard Evans and General Asphalte.

336. *Interview with Mr A of Howard Evans, dated 11 February 2003*. When questioned on figures provided to General Asphalte, Mr A stated that the lump sum figures provided to General Asphalte, Solihull and Apex would have been sent to those companies before the tender return date.

337. The OFT also notes that the fax from Craig Newman at General Asphalte to Paul Rosevere at DPC timed at 1621 on 17 April 2002, which contains General Asphalte's full breakdown of tender prices for all four schools, provides figures identical to the figures provided by Howard Evans to General Asphalte which were found at Howard Evans' premises. The OFT considers that the similarity of these two figures supports the OFT's finding of collusion between Howard Evans and General Asphalte.

338. *Howard Evans' Message Book and document entitled 'Explanation of RG4 – Message Book'* (see paragraph 123 above). An entry in Howard Evans' Message Book dated 5 April 2002 records,

> "Stan Clarke Solihull Roofing + BLDG
> Dudley."

Howard Evans explained the meaning of this entry in a document that it gave to the OFT in connection with its leniency application. The explanation stated,

> "Stan contacted us to say he could not carry out the works due to its size and complicated nature. We agreed to supply him a price, he informed us that Apex Asphalt had received the tender as well."

The OFT considers that the entry dated 5 April 2002 in Howard Evans' message book and the explanation of that message provides further evidence of collusion between Howard Evans and Solihull.

339. *Letter from Howard Evans to the OFT dated 28 August 2002*. This document was created in connection with Howard Evans' leniency application. This letter states in relation to the Dudley schools contracts,

> "To our knowledge […][**C**] of Apex Asphalt contacted Howard Evans Roofing Ltd office, requesting assistance at a date again we cannot recollect. We were then contacted by Alan Cooper of General Asphalt Company, who explained that due to current work commitments he could not undertake the works."

In light of the other evidence of collusion discussed at paragraphs 329 to 338 above, the OFT considers that Howard Evans' statement that […][**C**] of Apex contacted Howard Evans requesting assistance provides further evidence of collusion between Howard Evans and Apex. Also, the OFT considers that Howard Evans' statement that Alan Cooper of General Asphalte could not undertake works in relation to these contracts provides further evidence of collusion between Howard Evans and General Asphalte.

340. The OFT considers that the evidence set out at paragraphs 329 to 339 demonstrates that a concerted practice to provide non-competitive prices was in place between Howard Evans and each of Apex, Solihull and General Asphalte in relation to the tenders submitted for work at the Christchurch and Church of the Ascension Schools and at the Hob Green and Wollescote Schools."

38. The Decision also includes the following paragraph:

> "112. Dudley Property Consultancy ("DPC") - part of DMBC - sent out invitations to tender for contracts in relation to the above schools on 20 March 2002 to Howard Evans, Apex, General Asphalte, Solihull and Roofing Construction Services, with a return date of 11 April 2002. However, RCS were unable to provide a quotation due to their existing workload, which resulted in Monarch being sent an invitation to tender on 25 March 2002."

39. The overall conclusion of the OFT is summarised in paragraphs 365 to 367 and 373 of the Decision:

> "365. Section 2(1) of the Act prohibits, inter alia, "agreements between undertakings…or concerted practices which…have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom". Accordingly, in light of the specific wording of section 2(1), the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition.
>
> 366. The 'object' of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it, but rather is determined by an objective analysis of its aims. This analysis should generally be carried out against the economic context in which the undertakings operate, unless, as here, the agreements are concerned with "obvious restrictions of competition such as price fixing…" The agreements or concerted practices in this case are concerned with fixing the prices at which undertakings would make bids for contracts of work and it is therefore

not necessary for the OFT to undertake a detailed analysis of their economic effects.

367. If the obvious consequence of an agreement or concerted practice is to restrict or distort competition, that is its object even if the parties claim that this was not their subjective intention or that it also had other objects. In this case, the OFT considers that the obvious consequence of the Parties' actions in artificially setting the prices of bids for contracts was to prevent, restrict or distort competition. The OFT also notes that the European Commission and the European Court have decided that collusive tendering has the object of restricting competition. Consequently, the OFT considers that the object of the Parties' agreements or concerted practices in this case was to prevent, restrict or distort competition.

…

373. The OFT concludes on the basis of the evidence considered above that the Parties infringed the Chapter I prohibition by forming a series of individual agreements or concerted practices each of which had as its object the fixing of prices in the market for the supply of RMI services for flat roofs in the West Midlands area."

40. The Decision continued as follows:

"374. The evidence set out at Part I of this Decision formed the basis of the Rule 14 Notice sent to the Parties. The OFT's assessment of the views set out in the Parties' representations to the OFT is set out in Part II of this Decision. Having considered carefully the evidence and analysed the views set out in the Parties' representations, the OFT finds that there were agreements or concerted practices between the participants in each contract particularised in Part II above to fix the prices of the supply of certain RMI services by collusive tendering in relation to the contracts particularised in Part II above.

375. On the basis of the evidence available, set out at paragraphs 157 to 358 above, the OFT has calculated the relevant duration for each of the infringements for the Parties. The table below shows the Parties to each infringement and that, in relation to each infringement to which this Decision applies, the duration of each infringement has been calculated by the OFT as less than a year.

INFRINGEMENT	PARTICIPANTS	DURATION OF INFIRNGEMENT
…		
Frankley and Harborne Hill Schools	• Briggs • Apex	August 2001 to October 2001

…		
Hob Green, Wollescote, Christchurch and Church of the Ascension Schools	• Howard Evans • Solihull • Apex General Asphalte	March 2002 to April 2002

…"

41. The OFT set out its calculation of the penalty to be paid by the undertakings found to have committed the various infringements as follows:

> "378. Section 36(1) of the Act provides that, on making a Decision that an agreement has infringed the Chapter I prohibition, the OFT may require a party to the agreement to pay it a penalty in respect of the infringement. No penalty which has been fixed by the OFT may exceed 10% of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act (Determination of Turnover for Penalties Order) 2000 ('the Penalties Order'). The OFT considers that the parties to each infringing agreement or concerted practice are as set out in the OFT's conclusions in relation to each infringement, set out in the OFT's analysis at paragraphs 157 to 358 above.
>
> 379. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently but is under no obligation to determine specifically whether there was intention or negligence.
>
> 380. In the instant case, in relation to the local authority contracts, the Parties were required to certify that they created their tender figures on their own rather than in conjunction with another person. For the private contracts, the OFT considers that the Parties would in all likelihood have made tender applications before and either would have, or ought to have been, aware that the purpose of conducting tenders is to ensure competition in the award of contracts. The OFT considers that, in the light of these facts, the Parties could not have been unaware that the agreements or concerted practices to which they were party had the object of preventing, restricting or distorting competition. Moreover, the OFT considers that the very nature of the agreements or concerted practices was such that the Parties could not have been unaware that they had the object of preventing, restricting or distorting competition. The OFT is therefore satisfied that the Parties intentionally or negligently infringed the Chapter I prohibition.
> …
> 383. In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty.
>
> *Step 1 - starting point*

384. The starting point for determining the level of penalty is calculated by applying a percentage rate to the 'relevant turnover' of an undertaking, up to a maximum of 10%. The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. To be consistent with the Penalties Order, the OFT considers that the last financial year is the business year preceding the date when the infringement ended.

385. The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement. The more serious the infringement, the higher the likely percentage rate. When making its assessment, the OFT will also consider a number of other factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. An assessment of the appropriate starting point is carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.

386. The OFT has imposed a penalty on the Parties. The starting point for each penalty is based on the fact that the agreements or concerted practices in this case are related to collusive tendering. Collusive tendering is a form of price-fixing and is one of the most serious infringements of the Chapter I prohibition. The usual starting point for each penalty in such a case is likely to be at or near 10% of relevant turnover.

Nature of product

387. RMI services for flat roofs in the West Midlands area are 'industrial' services sold to local authorities, private managing agents, architects or surveyors. Flat roofs are one of a number of available types of roof but because of a basic difference in materials and technology, purchasers that need RMI services carried out on flat roofs have no substitute to employing the services of a contractor that can carry out that kind of work in relation to flat roofs.

Structure of market

388. The market consists of those contractors able to supply RMI services for flat roofs in the West Midlands. As noted at paragraph 14 above, there is a high degree of fragmentation in the roofing contracting industry as a whole with some 74% of companies commanding a turnover of less than £250,000 in 2002. The flat roofing market in the West Midlands is therefore likely to be fragmented. Local authorities are significant purchasers of the RMI services for flat roofs that the Parties supply. Many of the Parties told the OFT that there was perceived pressure in the industry for suppliers to put in tender bids even when suppliers did not wish to win the contract because otherwise there was the risk of not being invited to tender in the future.

Market share of undertakings involved and entry conditions

389. Although detailed statistical data about the market for RMI services of flat roofs specifically is unavailable, the OFT considers the fact that the roofing market as a whole is so fragmented (see paragraph 388 above) suggests that none of the Parties has a leading market share in the market for RMI services for flat roofs (although it should be noted that Briggs is, in the roofing market as a whole, a leading player). Personnel to work in the roofing industry are scarce, so it would be hard for new players to enter the market.

390. The Parties identified in the Decision constitute a not insignificant part of suppliers of RMI services for flat roofs in the West Midlands area. Also, the Parties have made representations that 'cover pricing' in the sense used in this Decision (see paragraph 18 above) is a widely-encountered phenomenon in the roofing industry. The Parties' infringements gave **purchasers** of flat-roofing services the impression that there was more competition in the tender process relating to a specific contract than there actually was. However, the OFT notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. The OFT considers that such infringements are not the most serious examples of collusive tendering.
[Emphasis in the original]

391. The OFT considers that a more serious example of collusive tendering would be cartels where collusion in relation to individual contracts was part of a single overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel. Equally, the OFT considers that cartels where participants made inducements to other cartel participants to persuade them to submit false bids in order to make substantial financial gains from their activities are more serious than the type of collusive tendering in which the Parties were involved.

392. The OFT has had regard to the nature of the product, the structure of the market, the market share of the Parties, market entry conditions and the effect of the infringements on competitors and third parties, as set out in paragraphs 387 to 391 above. On the basis that the market is fragmented (see paragraph 388 above) and none of the Parties has a leading market share (see paragraph 389 above), and the fact that the Parties' infringements were - by virtue of the fact that they were individual, discrete infringements - not the most serious examples of collusive tendering, the OFT has fixed a starting point of […][**C**]% of relevant turnover for all the Parties.

Step 2 - adjustment for duration

393. The starting point may be adjusted to take into account the duration of the infringement for infringements which last for more than one year. As noted at paragraph 375 above, the duration of each of the infringements in this Decision are calculated by the OFT to be less than a year. The OFT does not therefore adjust any of the penalties in this case for duration.

Step 3 – adjustment for other factors
…
Step 4 – adjustment for further aggravating or mitigating factors
…
Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy
…"

42. Moving on to the specific calculation in relation to Apex, the Decision stated (in so far as is material to this appeal):

"*Step 1 - starting point*

398. Apex was involved in two infringements: collusive tendering in connection with the Frankley and Harborne Hill contracts – which the OFT considers came to an end in October 2001 – and collusive tendering in connection with the Dudley schools contracts – which the OFT has found came to an end in April 2002. Apex's financial year is 1 February to 31 January and so these contracts were in two financial years. As noted at paragraph 396 above, where an undertaking has been involved in multiple infringements that occurred in more than one financial year, the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point. In relation to the Frankley and Harborne Hill contracts (Apex's first infringement in time), Apex's turnover in the relevant product and geographic markets in the business year preceding the date when the infringement ended (1 February 2000 to 31 January 2001) was £[…][**C**].

399. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at […][**C**]% of relevant turnover. The starting point for Apex is therefore £[…][**C**].

Step 2 – adjustment for duration

400. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.
…"

43. It should be noted that in respect of each of the FHH Contracts and Dudley Contracts the OFT finding was of a concerted practice and not an agreement.

VI THE GROUNDS OF APPEAL

44. Apex appeals against the OFT's findings of infringement and imposition of a penalty on the following bases (see Notice of Appeal, paragraph 2):

> "(1) In respect of the FHH Contracts:
>
> There was not strong and compelling evidence that there was either an unlawful agreement or a concerted practice between Briggs and Apex in relation to the FHH Contracts.
>
> (2) In respect of the Dudley Contracts:
>
> (a) The Respondent was not entitled to impose a fine on Apex in respect of the infringement in circumstances where it had not indicated in its Rule 14 Notice that it proposed to take any action in respect of the alleged infringement;
>
> (b) Further and in any event, on the evidence relied upon by the Respondent there was not strong and compelling evidence that there was either an unlawful agreement or a concerted practice between Apex and Howard Evans (and others) in relation to the Dudley Contracts.
>
> (3) Alternatively, the Respondent has failed adequately to set out the reasons for its Decision in respect of either the FHH and/or Dudley Contracts.
>
> (4) Further and in any event, in respect of the level of the fine imposed, the Respondent failed to take into account the absence of any impact upon consumers of the infringements found and in doing so imposed too great a fine upon Apex."

45. By a request dated 14 June 2004 Apex applied to amend its Notice of Appeal. It wished to supplement its submissions on the level of the penalty by arguing that the OFT had made no adjustment to the level of the penalty in accordance with Step 2 of the *Guidance as to Penalty* to reflect the fact that the duration of the infringement was less than a year. Apex submitted that the OFT should have made explicit recognition of the fact that the alleged infringements in this case lasted only 56 and 22 days respectively. That application was granted by Order made at the case management conference on 15 June 2004.

46. Apex therefore seeks from the Tribunal an order that the Decision be quashed insofar as it relates to findings of infringement against Apex in respect of the FHH Contracts

and/or the Dudley Contracts, and/or a reduction in the level of the penalty imposed upon it.

VII HISTORY OF PROCEEDINGS BEFORE THE TRIBUNAL

47. At the case management conference on 15 June 2004 the question was raised as to whether the appellant was challenging the factual evidence relied upon by the OFT, and in particular in respect of the FHH Contracts, as to which of Briggs and Apex had been the instigator of Apex sending the fax of 30 August 2001 to Briggs (as to which see paragraph 113 below). It was appreciated at that hearing that if Apex was challenging the facts relied upon by the OFT in the Decision it would be necessary for the OFT to produce Mr C as a witness for cross-examination and similarly the witness relied upon by Apex would need to be made available for cross-examination by the OFT. The Tribunal made an order at that case management conference that the parties were to inform the Tribunal by 5 pm on 22 June 2004 as to whether one or both wished to call witnesses of fact for examination and/or cross-examination. The parties chose not to call any evidence.

VIII JURISDICTION OF THE TRIBUNAL

48. The Tribunal's jurisdiction in cases involving allegations of an infringement of the Chapter I prohibition is wide. The appeal is a full appeal on the merits.

49. As set out above, paragraph 3 of Schedule 8 of the Act provides, so far as is material:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may-
> (a) remit the matter to the Director,
> (b) impose or revoke, or vary the amount of, a penalty,
> …
> (e) make any other decision which the Director could himself have made.
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.

(4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

50. The Tribunal's powers are implemented by The Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) ("the 2003 Tribunal Rules"), adopted under section 15 of the Enterprise Act 2002 ("the 2002 Act"). Reference to the Act and the 2003 Tribunal Rules shows that such an appeal is a full appeal on the merits, conducted primarily by reference to written evidence but subject to oral evidence where appropriate, under the discretionary control of the Tribunal: see Rule 19 of the 2003 Tribunal Rules and *Napp v Director General of Fair Trading* [2001] CAT 3, at [75].

51. As the Tribunal observed in *Napp v Director General of Fair Trading* [2002] CAT 1,

"117. If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the rôles of "prosecutor" and "decision maker", becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional rôle of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case "on the merits" and may, if necessary and appropriate, "make any other decision which the Director could have made": paragraph 3(2)(e). If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director: paragraph 3(4) of Schedule 8. Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts (see Schedule 8, paragraph 9 of the Act, and Rule 17 of the Tribunal's Rules) and may do so even if the evidence was not available to the Director when he took the decision: see Rule 20(2) of the Tribunal's Rules.

…

133. …in principle, the Director should not be permitted to advance a wholly new case at the judicial stage, nor rely on new reasons. To decide otherwise would make the administrative procedure, and the safeguards it provides, largely devoid of purpose; the function of this Tribunal is not to try a wholly new case. If the Director wishes to make a new case, the proper course is for the Director to withdraw the decision and adopt a new decision, or for this Tribunal to remit.

134. However,… it is virtually inevitable that, at the judicial stage, certain aspects of the Decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the Director. As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the Decision which are in

> issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the Director."

52. Although the Rules cited in *Napp* formed part of The Competition Commission Appeal Tribunal Rules 2000 (2000 SI No 261), the current version of the Tribunal Rules is not materially different.

53. We note that the appellant is not limited to placing before this Tribunal the evidence he has placed before the OFT but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the OFT, it is at this judicial stage of the proceedings that the appellant may apply to test by cross-examination the evidence of all relevant witnesses against it: *Napp* [2001] CAT 3 at [76].

IX THE STANDARD OF PROOF

54. An important preliminary issue in cases involving alleged breaches of the Chapter I prohibition concerns the correct standard of proof sufficient to discharge the burden on the OFT of proving the alleged infringement.

(a) Apex's submissions

55. Apex submits that the standard to be applied is that contained in the judgment of the Tribunal in *Napp* [2002] CAT 1, in which the Tribunal stated that:

> "105. …under domestic law the standard of proof we must apply in deciding whether infringements of the Chapter I or Chapter II prohibitions are proved is the civil standard, commonly known as the preponderance or balance of probabilities, notwithstanding that the civil penalties imposed may be intended by the Director to have a deterrent effect.
> …
> 108. Since cases under the Act involving penalties are serious matters, it follows from *Re H* that strong and convincing evidence will be required before infringements of the Chapter I and Chapter II prohibitions can be found to be proved, even to the civil standard. Indeed, whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, we think in practice the result is

> likely to be the same. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we were anything less than sure that the Decision was soundly based.
>
> 109. …It is for the Director to satisfy us in each case, on the basis of strong and compelling evidence, taking account of the seriousness of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be."

56. Apex submits that there is no difference between the Tribunal's dicta in *Napp* and the test laid down by Lord Nicholls in *Re H* [1996] 1 FCR 509 at 525-526, [1996] 1 All ER 1 at 16-17.

57. Apex further submits that, whilst inferences and presumptions may be relied upon by the OFT, it is only where inferences can be drawn with sufficient clarity and confidence that they overcome the relevant standard that they will be sufficient to form the basis of a case.

(b) OFT's submissions

58. The OFT submits that, in order to establish a breach of the Chapter I prohibition, the civil standard of proof applies, otherwise known as the "balance of probabilities". Whilst strong and compelling evidence is required, that is not to convert the civil standard into the standard used in criminal law cases, namely "beyond reasonable doubt". Relying on *Re U* [2004] EWCA Civ 567, CA, at paragraph 13 and *Re H*, cited above, at 16-17 (All ER), the OFT contends that the difference between the two standards should not be treated as "largely illusory".

59. Furthermore, the OFT submits that it is fundamental that in discharging the burden of proof the OFT is entitled to rely, where the evidence supports it, on inference and presumption: see *Napp* [2002] CAT 1 at paragraphs 110 to 111. The OFT points to *Claymore Dairies Ltd and Express Dairies plc v Office of Fair Trading* [2003] CAT 18, where the Tribunal observed, at paragraphs 3 and 10, that

> "by their nature, Chapter I cases will often concern cartels that are in some way hidden or secret; there may be little or no documentary evidence; what evidence there may be may be quite fragmentary; the evidence may be wholly

> circumstantial or it may depend entirely on an informant. That is often a feature of a Chapter I case.
> …
> In addition, as we point out at paragraphs 110 and 111 of *Napp*, the OFT may well be entitled to draw inferences or presumptions from a given set of circumstances, for example, that the undertakings were present at a meeting with a manifestly anti-competitive purpose, as part of its decision-making process."

(c) Tribunal's analysis

60. The Tribunal considers that the relevant test is set out in *Re H*. The application of *Re H* to this Tribunal has recently been considered in the Tribunal's judgment in *JJB and Allsports v Office of Fair Trading* [2004] CAT 17 at [164] to [208], in particular from [187] onwards. We agree with the Tribunal's analysis in that judgment and adopt it *mutatis mutandis* as our reasoning.

61. Although submissions were made on the standard of proof, we were not required to evaluate the evidence. There was no dispute as to the facts relevant to the Dudley Contract. In respect of the FHH Contract, Apex does not accept the version of the facts relied upon by the OFT. However the Tribunal was not asked to decide any issue of fact. Instead Apex submitted that on either version of the facts no infringement had been committed, and the OFT submitted the contrary: i.e. that on either version of the facts an infringement had been committed.

X THE GROUNDS OF APPEAL IN DETAIL

62. We consider the Grounds of Appeal in the following order:

(a) Ground 2(a) (alleged procedural error in relation to the Dudley Contracts; see paragraphs 63 to 110 below);
(b) Grounds 1 and 2(b) (the infringement issues, including the issue as to admissibility of evidence in respect of the FHH Contracts; see paragraphs 111 to 253 below);
(c) Ground 3 (the OFT's reasoning; see paragraphs 254 to 259 below); and
(d) Ground 4 (the penalty issues; see paragraphs 260 to 279 below).

Ground 2(a): alleged procedural defects in the Rule 14 Notice in respect of the infringement concerning the Dudley Contracts

(a) Apex's submissions

63. Apex submits that the OFT failed to adhere to the requirements laid down in rule 14(3) of the Director's Rules. Rule 14(3) sets out the matters which the OFT must include in a written notice if it proposes to take a decision that the Chapter I or Chapter II prohibitions have been infringed.

64. In Apex's submission, it is clear from the wording of that provision that the OFT is obliged to state in a Rule 14 Notice the action it proposes to take in respect of an infringement in circumstances where it proposes to take an infringement decision. That obligation must be construed strictly, especially because the only derogation from or modification of those obligations is specifically set out in rules 25 and 26 of the Director's Rules.

65. Whilst Apex is mentioned frequently in the section of the Rule 14 Notice entitled "Legal and Economic Assessment", the only reference to Apex in the section entitled "The OFT's proposed action" was in relation to the FHH Contracts. No mention was made in the Rule 14 Notice of proposed action against Apex in respect of the Dudley Contracts.

66. In its response to the Rule 14 Notice dated 17 November 2003 Apex dealt only with matters relating to the FHH Contracts. It was concerned with only those matters in respect of which the OFT proposed to take action. Apex contends that it was entitled to take the Rule 14 Notice at face value and make submissions only on those points in relation to which the respondent proposed to take action.

67. Apex submits that whilst Mr Braithwaite's telephone call to Apex's solicitors of 27 November 2003, and the subsequent email of the same date, forced Apex to conclude that the OFT was proposing to take action against Apex in respect of the Dudley Contracts, its supplemental response to the Rule 14 Notice of 18 December 2003 was

made on an inappropriate basis and without prejudice to Apex's primary position that the OFT was not entitled to take action in respect of the Dudley Contracts.

68. According to Apex, the wording of rule 14(3) is clear: the requirements are to be fulfilled in a single notice. Crucially, in Apex's submission, all the matters relied on must be provided to the party allegedly party to the infringement at the same time. Apex submits that the OFT was therefore not entitled to take an adverse decision against Apex in respect of the alleged infringement concerning the Dudley Contracts and, in particular, to impose a penalty on Apex in that regard.

69. Apex submits that the OFT must specify unambiguously in the Rule 14 Notice the parties in respect of which it proposes to make a particular finding of infringement. It relies for this submission on the judgment of the Court of Justice in Cases C-395 and 396/96 P *Compagnie Maritime Belge v Commission* [2000] ECR I-1365 at paragraph 143, where the Court of Justice stated that "the Commission is required to specify unequivocally, in the Statement of Objections, the persons on whom fines may be imposed". In Apex's submission, the principles of fairness and interpretation that apply to the relevant statutory provisions in the domestic context mean that a similar approach must be adopted by the OFT.

70. Apex takes issue with the assertion from paragraphs 347-348 and 351-354 of the Decision that it was clear that the OFT proposed to take action against Apex in respect of the alleged concerted practice concerning the Dudley Contracts. Apex submits that this is simply untrue. The Rule 14 Notice did not set out anywhere that the OFT proposed to take action against Apex in this regard.

71. Apex also takes issue with the OFT's claim that the omission was simply from a "summary table". Apex submits that the table in question – at para 333 of the Decision – does not summarise information already given but rather is the only place where the OFT sets out its proposed action vis-à-vis the alleged infringements in respect of the Dudley Contracts.

72. Furthermore, Apex submits that it is not open to the OFT to purport to vary by telephone or email the terms of the Rule 14 Notice and to include within that notice

material that was not previously included, or to propose action in relation to matters in respect of which no action was previously proposed. To allow the OFT to act in such a piecemeal manner would be contrary to the principles of fairness in proceedings and in breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR").

73. Apex submits that being put in a position where it had to make two sets of submissions in relation to matters raised at different times in relation to the same issues did potentially prejudice Apex. Moreover, Apex submits that the result of the OFT's position – that because Apex put forward submissions in response to the allegations concerning the Dudley Contracts it can have suffered no prejudice – is that Apex would have been better off not putting forward its supplemental response or oral submissions and staying entirely silent in order that it could subsequently submit that it did not know what was being proposed against it and therefore needed to make no submissions. Apex submits that the unlawful action of the OFT cannot be made lawful by reference to the response of Apex to the invidious position in which it had been placed by the OFT.

74. In its oral submissions before the Tribunal, Apex conceded that the OFT may in certain circumstances issue a supplementary Rule 14 Notice. It submitted, however, that a supplementary Rule 14 Notice was not issued in this case.

75. Apex submits that in any event, even if the OFT is allowed to expand in piecemeal fashion upon the content of the Rule 14 Notice, the OFT still failed to comply with the terms of Rule 14 of the Director's Rules. Nowhere is it stated in the emails provided to Apex's solicitors that the OFT proposed to take action in respect of the Dudley Contracts by way of imposition of a financial penalty. Apex was left to infer from the invitations to make further submissions that the OFT intended to take further action. Apex submits that this was insufficient and failed to comply with the requirements of rule 14(3) of the Director's Rules, especially when the OFT proposed to impose a financial penalty in relation to what is a "criminal offence" for the purposes of Article 6 ECHR.

(b) OFT's submissions

76. The OFT submits that, first, Apex's rights of defence have not been prejudiced; secondly, the alleged defect does not provide a legal basis to allow the appeal; and thirdly, the Rule 14 Notice was in any event not defective.

77. The OFT's first submission is that the rights of the defence were fully protected. Although Apex made no reference to the Dudley Contracts in its first response to the Rule 14 Notice on 17 November 2003, it was offered the chance to make further written submissions. It accepted that opportunity, submitting a supplemental response on 18 December 2003 which dealt solely with the Dudley Contracts. Moreover, Apex availed itself of the opportunity to make oral representations to the OFT on both the FHH and Dudley Contracts on 19 December 2003. The OFT therefore submits that Apex has been "afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on documents used by the Commission [here, the OFT] to support its claim": Case C-204/00 *Aalborg Portland v Commission* (judgment of 7 January 2004, not yet reported) at paragraph 66.

78. The OFT submits that Apex in addition now enjoys the right of appeal to the Tribunal during which it is free to raise such arguments as it sees fit in relation to the Dudley Contracts.

79. According to the OFT, Apex has therefore suffered no prejudice as a result of the alleged defect. It is in exactly the same position as it would have been in had it been aware at the outset that the OFT proposed to impose a penalty in respect of both the FHH and Dudley Contracts. Apex's argument to the contrary, namely that its submissions in response to the Rule 14 Notice might have been different had the nature and extent of the allegations and proposed actions against it been contained in the Rule 14 Notice, is not elaborated. Apex gives no explanation of how this alleged prejudice works in practice, i.e. in what way its submissions might have been different. As the Rule 14 Notice made clear, the OFT has analysed each tender separately; it has not made any finding that, taken together, the FHH and Dudley Contracts constitute parts of some larger concerted practice. Apex's submissions

would in any event have been directed to the individual tenders, just as they have been before the Tribunal.

80. The OFT's second submission is that, even if there were a defect in the Rule 14 Notice, such defect gives no legal basis for allowing the appeal. This is true, in the OFT's submission, under Community law, the law of the ECHR and common law.

81. As to Community law, the OFT refers to the Tribunal's judgment in *Napp* [2001] CAT 3 at [73], in which it was said that, under the case law of the Court of First Instance, not every breach of the right to be heard in the administrative procedure will necessarily lead to annulment of the decision.

82. The OFT refers in particular to the judgment of the Court of First Instance in Case T-48/00 *Corus UK Ltd v Commission* (8 July 2004, not yet reported), at paragraphs 155 to 158, where the Court of First Instance found that the Commission's Statement of Objections was vitiated by a defect because it did not indicate the provisional classification of the gravity of the infringement committed. It did not, however, annul the Commission's decision. Rather, it remarked that it was not appropriate to annul Community measures on the basis of omissions in a preparatory document such as a Statement of Objections which have no repercussions on the defence of the undertakings concerned in circumstances where the defendant has not demonstrated in what way the conduct of the administrative procedure and the content of the contested decision might have been different. The Court of First Instance in that case also noted that the appellant put forward before the Court of First Instance arguments which were substantially the same as those appearing in its reply to the Statement of Objections.

83. The OFT submits that precisely the same occurred in this case: Apex fully addressed the allegations concerning the Dudley Contracts in both its response of 18 December 2003 and its oral representations. It has also had the benefit of a hearing before the Tribunal at which it could put forward all arguments capable of supporting its view.

84. As for the ECHR, the OFT refers to the Tribunal's judgment in *Napp* [2002] CAT 1, where the Tribunal observed that even if the administrative procedure before the OFT

does not satisfy Article 6 ECHR, the appellant's ECHR rights are not breached provided that the OFT's decision is subject to subsequent control by a judicial body having full jurisdiction. The Tribunal further remarked that the appellant was not limited to placing before the Tribunal the evidence it placed before the OFT; it may also expand, enlarge upon or even abandon that evidence and present a new case.

85. The OFT submits that, for the purposes of the ECHR, any procedural defect in the Rule 14 Notice which may have caused unfairness at the administrative stage has been cured by the present appeal to the Tribunal.

86. As to the position at common law, the OFT points to *Napp* [2001] CAT 3, at [75], where the Tribunal referred to *Lloyd v McMahon* [1987] 2 WLR 821, HL, in which it was held that it was possible for a court enjoying a jurisdiction similar to the Tribunal in certain circumstances legitimately to correct unfairness which may have occurred in the administrative procedure below without necessarily quashing the decision concerned.

87. The OFT's third submission is that, in any event, the Rule 14 Notice was not defective. The OFT made it clear in the Rule 14 Notice that it considered that the evidence demonstrated the existence of an agreement and/or concerted practice in respect of the Dudley Contracts. The Rule 14 Notice also expressly stated that the OFT proposed (i) to take action in respect of the infringement of the Chapter I prohibition concerning the Dudley Contracts; (ii) to impose a penalty upon Apex; (iii) to impose a penalty on Apex and Briggs for collusion in respect of the FHH Contracts; and (iv) to impose a penalty upon Howard Evans for collusion with Apex in respect of the Dudley Contracts.

88. Whilst the Rule 14 Notice did not expressly state that the penalty to be imposed on Apex would be based on the Dudley Contracts as well as the FHH Contracts, it was abundantly clear as a matter of implication that the OFT did intend to impose a penalty in respect of the Dudley Contracts.

89. The OFT submits that the matter was in any event put beyond doubt by the email correspondence and telephone exchange between Mr Braithwaite, on behalf of the

OFT, and Apex, as detailed in the Decision. It is clear from its supplemental written representations and its oral representations that Apex well understood that this was the effect of the telephone conversation and email exchange.

90. Contrary to Apex's submission that the Rule 14 Notice must be a single and complete document, the OFT contends that there is nothing in the language of rule 14 of the Director's Rules to preclude the OFT from clarifying the provisions of a Rule 14 Notice so as to ensure that a recipient can properly exercise its rights of the defence, as happened in this case.

91. In the OFT's submission, the fundamental point is that Apex was given every opportunity to advance its case. The fact that it took that opportunity is secondary. It is therefore wrong to suggest, as Apex does, that Apex would have been better off staying silent. It is not open to Apex to ignore the opportunities to put its case and then claim it has been deprived of the right to do so.

(c) Tribunal's analysis

(i) The law

- EC law

92. In Cases C-395 and 396/96 P *Compagnie Maritime Belge v Commission* [2000] ECR I-1365 appeals were brought by four members of a shipping liner conference, Cewal, against a judgment of the Court of First Instance substantially upholding a decision of the Commission which had found that the members of Cewal had engaged in an abuse of a collective dominant position. Fines were imposed on four of the members. One of the grounds of challenge was that the Court of First Instance had erred in finding that the Commission had been entitled to impose on those members individual fines whereas, in the Statement of Objections, the Commission had threatened to impose fines on Cewal itself rather than any one of its members. On this point the Court of Justice observed:

"142. It is settled case-law that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. The essential procedural safeguard which the statement of objections constitutes is an application of the fundamental principle of Community law which requires the right to a fair hearing to be observed in all proceedings (Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraphs 10 and 14).

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

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

145. Similarly, a statement of objections in those terms is not sufficient to warn the companies concerned that the amount of the fines imposed will be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement."

93. In that case, Advocate General Fennelly made the following observations on this issue:

"(i) Breach of the right to a fair hearing

173. The appellants assert that the Court of First Instance has erred in law in upholding the entitlement of the Commission to impose fines on them notwithstanding that the statement of objections only threatened to impose fines on Cewal but not on any of its members. At paragraph 232 of its judgment, that Court held as follows:

> 'Secondly, as regards the calculation of the fine, the Court finds that, since the conference does not have legal personality, the Commission was entitled to impose a fine on the members of Cewal, rather than on the conference itself. In this regard, it should be stressed that, in addition to Cewal, each of the members of the conference was an addressee of the statement of objections. In those circumstances and having regard to the fact that Cewal had no legal personality, the Court considers that, even if the statement of objections referred only to the possibility of imposing a fine on Cewal in respect of the abusive practices, the applicants could not have been unaware that they ran the risk of a fine being imposed upon them, rather than on the conference.'

174. The appellants contend that if the Commission were not minded to impose fines on Cewal because it lacked legal personality, it should have told

them that the fines would be imposed on them. They point to the following prejudice which, in their opinion, flowed from this omission:

- if the fine had been imposed on Cewal it could only have been based on Cewal's turnover and not on that of its members; the former, being based solely on the Zaïrean routes, was lower than the latter;
- while the fine would ultimately have been paid by the members of Cewal individually, their contributions would have been in accordance with their share in the pool;
- CMB was not on notice that it would be singled out for a disproportionate share of the fine by reason of its especially active role in the abuses.

The appellants conclude that the Commission failed to respect the basic requirement of a statement of objections that it inform the parties of the objections raised against them, and, in particular, as to which of them will bear the financial burden of the fine imposed.

175. The Commission does not claim that the members of Cewal were put on notice of fines but maintains that it should have been clear to the appellants 'that throughout the statement of objections, Cewal was intended to refer to the group of undertakings making up the conference', since a list of its members was annexed to the statement of objections. It also claims that the Court of First Instance was correct to hold that it would have made no sense to impose a fine on Cewal as it had no legal personality. The Commission contends that it was 'implausible that they should be 'unsophisticated' enough to be surprised by the imposition of a fine ...'. In addition, the Commission maintains that, because it was envisaged that fines would be imposed on members of Cewal in respect of the infringements of Article [81] alleged in the statement of objections, Cewal members were put on notice that individual fines would be imposed on them.

176. In my opinion, the Court of First Instance was wrong to assume that the Commission was entitled to impose a fine on the members of Cewal because Cewal lacked legal personality and because they were each addressees of the statement of objections. This error of law flows from its mistake in assuming that the applicants could not have been unaware that they ran the risk of being fined.

177. It is common case that a copy of the statement of objections was sent to the appellants, albeit only three months after it was sent to Cewal. The real issue, however, is whether the appellants were properly put on notice, by the copy of the statement of objections which they eventually received along with a cover letter which added nothing to the contents of that statement, that they could individually be subjected to fines which the statement expressly envisaged imposing only on Cewal, with all the consequences that would follow in respect of the calculation of the amount of the fines

178. In the first place, I do not find it acceptable that the Commission should make presumptions concerning such an important matter. The Court has consistently held that 'the statement of objections must set forth clearly all the

essential facts upon which the Commission is relying at that stage of the procedure'. The essential procedural safeguard provided by the statement of objections is 'an application of the fundamental principle of Community law which requires the right to a fair hearing be observed in all proceedings'. Even if not criminal in nature, fines have a punitive function. It follows that the Commission has a strict obligation to notify undertakings clearly that they may be subjected to fines.

…

180. Thirdly, the failure to notify the individual members of Cewal of this exposure to fines is not a merely formal defect. CMB, in particular, is in a position to point to concrete prejudice. …"

94. In Case T-25/95 *Cimenteries v Commission* [2000] ECR II-491, the Court of First Instance dealt with various appeals against a decision of the Commission concerning the cement cartel. One of the grounds of challenge was that the Commission had infringed the rights of the defence by not stating in the Statement of Objections that it intended to impose fines on trade associations for participating in the so-called Cembureau agreement. On that point the Court of First Instance stated:

"478. The Commission imposed fines for participation in the Cembureau agreement not only on the undertakings but also on the trade associations to which the contested decision was addressed (contested decision, Article 9). It considers it necessary to fine the trade associations also 'so as to dissuade them from taking the initiative in or facilitating such restrictive agreements and practices in future' (contested decision, recital 65, paragraph 8, first indent).

479. FIC, VNC and Oficemen assert that they were not notified during the administrative procedure of the Commission's intention to impose fines on them. Such infringement of their rights of defence should lead to the annulment of Article 9 of the contested decision in their case.

480. The Court points out that the Commission is not entitled to impose a fine on an undertaking or an association of undertakings without its having previously informed the party concerned, during the administrative procedure, that it intended to do so. The [statement of objections ("SO")] must make it possible for the undertaking or association of undertakings concerned to defend itself not only against a finding of an infringement but also against the imposition of a fine (*Michelin* v *Commission*, cited above at paragraph 150, paragraph 20 and Opinion of Advocate General Fennelly in Joined Cases C-395/96 P and C-396/96 P *CMB and Dafra-Lines* v *Commission*, not yet published in the ECR, paragraph 178). In cases where, after service of the SO, the Commission decides to impose a fine that has not been mentioned in that SO, it must serve on the undertaking or the association of undertakings concerned a supplement to the SO that observes the procedural rules applicable to any SO.

481. In the present case, the SO contains a single paragraph on the fines, point 93. In it, the Commission refers first of all to the provisions of Article 15(2) of Regulation No 17, under which the Commission may impose fines on undertakings or associations of undertakings (first paragraph of point 93 of the SO). The article in question is cited almost word for word. The wording of point 93 of the SO contains no other reference to associations of undertakings. The Commission states that 'the undertakings in question have, intentionally, or at the very least negligently, committed, as from the dates or during the periods indicated in the above outline, the infringements referred to in this Statement of Objections' (second paragraph of point 93 of the SO). Further on, as regards the gravity and duration of the infringements (third paragraph of point 93 of the SO), it refers to 'a number of the producers' and 'the undertakings concerned', but not to associations of undertakings. It also refers to the failure to cooperate on the part of 'the undertakings' during the investigation.

482. The Commission contends that, in the context of an SO which clearly describes the participation of the associations of undertakings in the Cembureau agreement, the paraphrasing of Article 15(2) of Regulation No 17 in the first paragraph of point 93 of the SO should have been sufficient to inform the associations of undertakings, during the administrative procedure, that it was likely that fines would be imposed upon them in respect of their participation in the Cembureau agreement.

483. That argument cannot be accepted. Although the SO unequivocally complained that the associations of undertakings had participated in the Cembureau agreement, the same was also true with regard to the undertakings (see paragraphs 506 to 543 below). The Commission explained in the second paragraph of point 93 of the SO that the initial conditions (order of 25 March 1996 in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 53) to enable the imposition of fines were fulfilled with regard to the undertakings, when it stated that they had committed the infringements referred to in the SO 'intentionally or negligently'. On the other hand, it made no statement of that kind in regard to the associations of undertakings. Likewise, in the third paragraph of point 93, the Commission, when explaining how the amount of the fines would be determined, referred only to the conduct of undertakings. If the paraphrase of Article 15(2) of Regulation No 17 in the first subparagraph of point 93 had sufficed to inform the associations of undertakings that a fine would be imposed on them, it should also have sufficed for the undertakings. It is thus clear that in its statements in the SO concerning the initial conditions for the imposition of a fine and the determination of the amount of the fine, the Commission did not express its intention to impose fines also on associations of undertakings."

95. In *Aalborg Portland*, cited above, which was the appeal to the Court of Justice against the *Cimenteries* judgment of the Court of First Instance, the Court of Justice said:

> "60. However, the statement of objections must specify unequivocally the legal person on whom fines may be imposed and be addressed to that person (Case C-176/99 P *ARBED v Commission* [2003] ECR I-0000, paragraph 21).
> …
> 66. Equally, respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (see Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 10, and Case C-310/93 P *BPB Industries and British Gypsum* v Commission [1995] ECR I-865, paragraph 21)."

96. Case T-48/00 *Corus v Commission* (judgment of 8 July 2004, not yet reported) concerned an appeal against a decision of the Commission finding that various manufacturers of seamless steel tubes had entered into a market-sharing agreement contrary to Article 81 EC. The appellant submitted *inter alia* that the rights of the defence had been breached in that the Commission had not, in the Statement of Objections, given sufficient indication of the gravity of the alleged infringement or whether it had been committed intentionally or negligently. The appellant submitted that in those circumstances it was given no opportunity to comment on the Commission's assessment of those matters before the Commission adopted its decision, which found both that the infringement committed by the appellant was very serious and that the appellant had been aware that its actions were unlawful. On that point the Court of First Instance said:

> "150. …the arguments put forward by the Commission regarding its provisional assessment of the gravity of the infringement are not very convincing.
>
> 151. In the SO, the Commission confined itself, in points 153 and 154 thereof, to stating that it intended imposing a fine, referring to the terms of Article 15(2) of Regulation No 17. It is true that it stated in the SO, in point 147, that there was a market-sharing agreement which gave rise to an appreciable restriction of competition. However, it must be pointed out that that statement does not enable it to be ascertained whether, in the Commission's view, the infringement was serious or very serious within the meaning of the Guidelines.
>
> 152. Similarly, the Commission's argument concerning the publication of the Guidelines does not carry conviction. Once again, if the Court were to consider that the publication of them were sufficient in itself to enable the addressees of a statement of objections to infer from the description of the nature of the infringement the category in which the Commission classified it,

the obligation, laid down in the case-law, to give indications concerning the gravity of the infringement would serve no practical purpose (paragraph 145 above).

153. Thus, it must be concluded that in this case the SO is vitiated by a defect, in that the Commission did not indicate in the SO its provisional classification of the gravity of the infringement committed.

154. However, this finding cannot in itself give rise to annulment of the contested decision. The obligation to include in the statement of objections a brief provisional appraisal concerning the duration of the alleged infringement, its gravity and whether the infringement was committed intentionally or negligently is not an end in itself but is designed to place the addressee of the statement of objections in a position properly to defend himself (see paragraph 146, and, by analogy, *Cement*, paragraph 76 above, paragraph 156).

155. Thus, that obligation is inseparable from and dependent on the principle of the rights of the defence (see, by analogy, *Cement*, paragraph 76 above, paragraph 156, and the case-law cited therein). It is not appropriate for the Community judicature to annul Community measures on the basis of omissions in a preparatory document such as a statement of objections, which have no repercussions on the defence of the undertakings concerned. It is therefore necessary to consider whether Corus' defence was affected by the defect noted in paragraph 153 above.

…

157. Consequently, Corus has not demonstrated in what way the conduct of the administrative procedure and the content of the contested decision might have been different regarding the gravity of the infringement and, therefore, the amount of the fine, if the Commission had specified, in the SO, the degree of gravity which it attributed to the infringement resulting from the market-sharing agreement in the framework of the Europe-Japan Club (see, to that effect, PVC II , paragraph 71 above, paragraph 1021, and the case-law cited therein). The mere assertion made by Corus in point 6.7 of that reply, to the effect that it presumed that it would have a further opportunity of giving its views on the criteria mentioned in the Guidelines, cannot change its legal position in that regard.

158. Finally, it must be observed, for the sake of completeness, that that conclusion is supported by the fact that Corus put forward, before the Court, arguments which were substantially the same (see paragraph 161 et seq. below) as those appearing in section 6 of its reply to the SO (see paragraph 156 above), in order specifically to challenge the appraisal of the gravity of the infringement found in Article 1 of the contested decision, as set out in recitals 159 to 165 thereto. The Community judicature enjoys unlimited jurisdiction to reappraise the amount of fines imposed under Article 17 of Regulation No 17. It follows that, if a party considers that one of the factors relating to that issue was incorrectly dealt with by the Commission, it can put forward all arguments capable of supporting that view before the Court."

97. In *Napp* [2001] CAT 3 the Tribunal commented on the *Cimenteries* judgment of the Court of First Instance as follows:

> "[73] As regards the administrative stage, under Rule 14 of the Director's Rules, the Director must put to the defendant "the matters to which he has taken objection, the action he proposes and the reasons for it", provide an opportunity for the defendant to inspect documents in the Director's file, and give the defendant the opportunity to make written and oral representations. We accept that under the case law of the Court of First Instance the European Commission's obligation to put to the defendant the essential facts on which he relies is a fundamental part of the rights of the defence, breach of which can result in the annulment of the decision: see e.g. Cases T-25/95 etc *Cimenteries CBR and others v Commission* (the Cement case) [2000] ECR II-491, paragraphs 106 and 476. While of course strongly persuasive, the judgments of the Court of First Instance are however influenced by the formal concepts of French administrative law, and by the nature of the jurisdiction exercised by that Court under Article 230 of the EC Treaty. Moreover, not every breach of the right to be heard in the administrative procedure will necessarily lead to annulment of the decision, see e.g. Case 85/76 *Hoffman La Roche v Commission* [1979] ECR 461, points 15 to 17; and the Cement case, at points 241 and 247."

- *English Law*

98. We were referred to *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [2000] 1 WLR 354, [1999] 3 All ER 231. It is apparent from the judgment of the Court of Appeal in that case that the question as to whether a statutory requirement must be strictly complied with normally depends on whether the non-compliance can be cured fairly. Lord Woolf MR identified three separate and independent questions which require consideration in determining whether the non-compliance can be cured fairly. The first question is whether there has been substantial compliance with the requirement (the substantial compliance question). The second question is whether the non-compliance has been, can be, or should be waived (the discretionary question). The third question is what, if the non-compliance cannot be waived, are the consequences of non-compliance (the consequences question): see at p. 362 (WLR); at pp. 238-239 (All ER).

99. We note both that a Rule 14 Notice issued by the OFT serves the same purpose as a Statement of Objections issued by the Commission and that similar principles apply under English and Community law.

(ii) Principles

100. In our judgment, the applicable principles derived from the authorities cited above are as follows:

(a) the Statement of Objections/Rule 14 Notice must set forth clearly all the essential facts upon which the OFT is relying at that stage of the procedure. This essential procedural safeguard which the Statement of Objections constitutes is an application of the fundamental principle of Community and English law which requires the right to a fair hearing to be observed in all proceedings (*Compagnie Maritime Belge*, paragraph 142);

(b) the OFT is therefore required to specify unequivocally, in the Statement of Objections/Rule 14 Notice, the persons on whom fines may be imposed (*Compagnie Maritime Belge*, paragraph 143);

(c) in cases where, after service of the Statement of Objections/Rule 14 Notice, the OFT decides to impose a penalty that has not been mentioned in that Statement of Objections, it must serve on the undertaking or the association of undertakings concerned a supplement to the Statement of Objections/Rule 14 Notice that observes the procedural rules applicable to such a document (*Cimenteries*, paragraph 480);

(d) the reason for (c) is that the Statement of Objections/Rule 14 Notice must make it possible for the undertaking concerned to <u>defend itself</u> - not only against a finding of an infringement but also against the imposition of a penalty (*Cimenteries*, paragraph 480); this respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the OFT to support its claim that there has been an infringement of the Act (*Aalborg Portland*, paragraph 66);

(e) similarly, the obligation to include in the Statement of Objections/Rule 14 Notice a brief provisional appraisal concerning the duration of the alleged infringement, its gravity and whether the infringement was committed intentionally or negligently is not an end in itself but is designed to place the addressee of the Statement of Objections/Rule 14 Notice in a position properly to defend himself (*Corus*, paragraph 154); The same applies by extension to the obligation to include details of all the infringements in respect of which the authority intends to impose penalties on an undertaking.

(f) however, it is not appropriate for the Tribunal to annul a decision on the basis of omissions in a preparatory document such as a Statement of Objections/Rule 14 Notice which have no repercussions on the defence of the undertaking concerned. The crucial question is whether the defence was affected by the defect (*Corus*, paragraph 155);

(g) it is relevant to ascertain in what way the conduct of the administrative procedure and the content of the contested decision might have been different were it not for the defect (*Corus*, paragraph 157);

(h) if the arguments put forward before the Court are substantially the same as those appearing in the reply to the Statement of Objections/Rule 14 Notice, the likely conclusion is that the conduct of that administrative procedure would not have been different (*Corus*, paragraph 158).

(i) essentially, the question is whether the defect can be cured fairly: the Tribunal's task is to seek to do what is just in all the circumstances (*Jeyeanthan*, at p. 359, 366 (WLR); at pp. 235-236, 242 (All ER)).

(iii) Application of the principles

101. The Director's Rules are contained in a statutory instrument made under the relevant powers granted to the Secretary of State and the respondent pursuant to the Act. Those rules set out certain of the procedures which are to be followed by the OFT in carrying out its investigations. Rule 14 provides:

> "**14.** (1) If the [OFT] proposes to make a decision that the Chapter II prohibition or the Chapter I prohibition has been infringed [it] shall give written notice:
>
> …
>
> (b) …subject to rules 25 and 26 below, to each person who [the OFT] considers is a party to the agreement, or is engaged in the conduct, as the case may be, which [the OFT] considers has led to the infringement.
>
> …
> (3) A written notice given under paragraph (1) or (2) above shall state the facts on which the [OFT] relies, the matters to which [it] has taken objection, the action [it] proposes and [its] reasons for it."

102. We have set out the history relating to the OFT's omission at paragraphs 24 to 27 above.

103. We do not accept the submissions of Apex on Ground 2(a) of its grounds of appeal.

104. Fairness requires that the undertaking is provided with a notice in writing of the facts and circumstances alleged against it, including the fact that a penalty is proposed, so that that undertaking can properly defend itself. The procedure which the OFT is required to follow is to give written notice in the document known as a Rule 14 Notice. Where a Rule 14 Notice is to be supplemented the normal procedure which should be adopted is for a formal supplementary Rule 14 Notice to be issued. In this case the OFT did not do so. The Tribunal therefore has to consider the consequences flowing from this failure.

105. In this case, instead of issuing a supplementary Rule 14 Notice, the OFT relies on a telephone conversation between Apex and Mr Braithwaite on 27 November 2003 and an exchange of emails of 27 November 2003, 1 December 2003 and 3 December 2003. These emails are set out at paragraphs 24 to 26 above.

106. Apex submits that the emails did not specify that a penalty was to be imposed and so was in any event defective in this regard. However, we consider that the supplemental response provided by Apex clearly evidences a full understanding by Apex of the facts relied upon by the OFT and of the OFT's intention to impose a penalty on Apex in respect of the infringement concerning the Dudley Contracts. We refer in particular to paragraph 7 of that supplemental response, which states:

> "7. Mitigation
>
> 7.1. For the reasons set out above, it is Apex's position that the OFT has failed to make out a case of infringement of the Chapter I prohibition against it in relation to the Dudley Schools contracts and that accordingly it would be unfair and unreasonable for the OFT to impose any fine on Apex. Without prejudice to the preceding representations, Apex makes the following submissions in relation to any such finding of infringement and calculation of penalty.
>
> 7.2. The action the OFT proposes to take relates to comparatively small contracts by a small company.
>
> 7.3. Apex did not win the Dudley Schools contracts or make any financial gain from the alleged conduct. The only benefit it received was limited to the increased possibility that it would not be ignored in future rounds of invitations to tender by Dudley MBC.
>
> 7.4. Apex sought prices from Howard Evans not to distort competition but to protect its relationship with the client...
> …
> 7.6. The duration of the alleged infringement was extremely short (being only 22 days). See further para 6.5 of the November Representations regarding the OFT Guidance (as to the Appropriate Amount of a Penalty).
>
> 7.7. Apex considers that any adverse finding against it would be perverse given that Howard Evans:
>
> (a) is one of the largest flat roofing businesses in the West Midlands and may benefit from leniency of up to 100%;
> (b) controlled the prices of the Vedag Villas materials;
> (c) was the beneficiary of any anti-competitive activity in relation to the Dudley Schools contracts and ultimately won the contracts.
>
> 7.8. Any penalty imposed should be nominal or, at most, very low, given (see further para 6 of the November Representations):
>
> - the limited nature of the alleged infringement;
> - the limited duration of the alleged infringement;

- the lack of evidence that the alleged infringing agreement had an impact on competition (given, in particular, the role of Howard Evans);
- the absence of any benefit to Apex from the alleged infringement or any detriment to Dudley MBC;
- the nature of Apex – being a small player in the market;
- the nature of dealings in the market generally and Apex's lack of appreciation of the unlawfulness of such practices and that if, as alleged, it has infringed the Chapter I Prohibition it did not do so intentionally;
- the fact that Apex has fully cooperated with the OFT;
- the fact that Apex was not a leader of anti-competitive practices and, on any assessment, did not seek to enforce any infringing arrangements;
- the fact that Apex has, rather than benefiting from, suffered as a result of anti-competitive practices in its industry;
- the effect the investigation has already had on Apex;
- the seriousness with which Apex takes competition matters in the light of the investigation;
- the instigation of a competition compliance programme;
- the appointment of new directors to give an external perspective on the company's activities; and
- the detrimental impact any substantial penalty could have on Apex and the detrimental impact that, in turn, could have on competition."

107. We also note that Apex's supplemental response in this respect does not differ in any significant way from the response it provided to the initial Rule 14 Notice in relation to the FHH Contracts.

108. Apex has had ample opportunity to indicate if it has suffered any prejudice by virtue of the OFT's omission, but has refrained from doing so. Apex submitted at the hearing and in its letter to the Tribunal of 15 October 2004 that it was prejudiced in the manner in which it was able to put forward its case. In that letter Apex submitted:

> "Apex lost the opportunity to decide how it wished to respond to the proposed infringements and penalties taken together. By effectively putting forward the proposed steps piecemeal Apex was prejudiced in the manner in which it was able to forward its case. This is not simply a matter of abstract theory, it poses real and unfair problems for any recipient of a Rule 14 Notice and subsequent communications purporting to amplify or extend that Notice."

109. However, in the specific circumstances of the present case we are unable to find that Apex has in fact been caused any prejudice. We do not consider that it is sufficient for Apex merely to say that it has lost the opportunity to decide how it wished to

respond without indicating what difference it could have made to its responses had it been fully aware of the OFT's case against it. The facts relied on by the OFT as regards the Dudley Contracts are fully identified in the Rule 14 Notice, although the intention to fine Apex in respect of those contracts was admittedly omitted. Following the exchange of emails set out above, Apex dealt fully with these matters in its supplemental response. In any event, Apex correctly conceded at the oral hearing that the OFT may issue supplementary Rule 14 Notices. We therefore reject Apex's submissions in this respect.

110. To put the matter another way, and in applying the test set out in *Jeyeanthan*, our answer to the first of Lord Woolf's questions is that there has been substantial compliance with the procedural requirement; our answer to the second question is that non-compliance can and should be waived since there is no prejudice to Apex; and our answer to the third question is that if we were wrong as to the answer to the first two questions then the consequences of non-compliance would be that the matter should be remitted to the OFT to serve a supplementary Rule 14 Notice. However that latter possibility demonstrates the weakness of Apex's argument. We can see little point in a remittal when the matter has now been fully argued on the merits before the Tribunal and Apex has had every opportunity to be heard.

Grounds 1 and 2(b): existence of infringements in relation to the FHH Contracts and the Dudley Contracts

The agreed facts

- The FHH Contracts

111. The following facts relating to the FHH Contracts are agreed between Apex and the OFT.

112. On 7 August 2001 Birmingham City Council Urban Design Department sent out invitations to tender for re-roofing works at Franklin Community High School and Harborne Hill School. These invitations were addressed to Apex, Briggs, Envirotek Systems Limited, SIAC Construction UK Limited, Sharkey & Co Limited and

Torclad & Co Limited. All of the invitees were approved installers of the so-called Firestone roofing system, which was the system specified for the FHH Contracts. The tenders had a return deadline of 12 p.m. on 4 September 2001.

113. On 30 August 2001 Apex sent Briggs a fax ("the 30 August fax") containing *inter alia* the following passage:

> "…these are your figures inclusive of contingencies for two projects with Birm C.C.
>
> Frankley = £193460.40
>
> Harborne Hill - £144910.10…
>
> Many thanks and have a good holiday"

114. In all, five bids were received in respect of the FHH Contracts. The tenders were as follows:

	Frankley	Harborne Hill
Apex	£187,354.22	£136,959.37
Briggs	Declined	Declined
Envirotek	£203,010.00	£147,825.00
SIAC	£206,275.00	£150,350.00
Sharkey	£196,498.00	£140,794.25
Torclad	£198,840.00	£142,656.00

115. Apex was subsequently awarded the FHH Contracts by way of letters from Birmingham City Council dated 1 October 2001.

- *The Dudley Contracts*

116. The following facts relating to the Dudley Contracts are agreed between Apex and the OFT.

117. Dudley Property Consultancy ("DPC"), part of Dudley Metropolitan Borough Council, sent out, by letter dated 20 March 2002, invitations to tender for contracts in relation to Hob Green and Wollescote Schools and Christchurch and Church of Ascension Schools. The undertakings which were invited to tender were Apex, Howard Evans, The General Asphalte Company Limited ("General Asphalte"), Solihull Roofing and Building Co Limited ("Solihull Roofing") and Roofing and Construction Services ("RCS"). RCS withdrew from the tender process and so Monarch Roofing Company was sent an invitation to tender on 25 March 2002. The deadline for bids was 11 April 2002.

118. John Roper of Howard Evans sent […][**C**] of Apex an undated fax containing the following passage:

> "…your price including provisional sums and contingencies.
>
> Christchurch and Church of the Ascension Schools
>
> £166,518 + VAT
>
> Hob Green and Wollescote Schools
>
> £283,101.00 + VAT…"

119. The following bids were recorded as being received on 11 April 2002:

	Hob Green and Wollescote Schools	Christchurch and Church of the Ascension Schools
Apex	£283,101.00	£166,518.00
Howard Evans	£271,345.00	£156,667.00
General Asphalte	£276,380.46	£161,211.62
Solihull Roofing	£291,822.00	£172,320.00
Monarch	£299,980.00	£201,655.00

120. The Dudley Contracts were awarded to Howard Evans in accordance with the bids placed by it.

Admissibility of evidence referred to in the Decision or in the documents identified as open to inspection in the Rule 14 Notice

121. In the Decision the OFT relies on the record of interview with Mr C of Briggs. That evidence was given as part of Briggs' commitment to cooperate with the OFT's investigation. An extract from the record of interview with Mr C was quoted in paragraph 189 of the Decision. The same passages were set out in the Rule 14 Notice at paragraphs 109-110.

122. Pursuant to rule 14(5) of the Director's Rules the OFT was under an obligation to give Apex and the other undertakings suspected of having infringed the Chapter I prohibition a reasonable opportunity to inspect the OFT's file relating to the proposed decision. To that end, the OFT set out, in paragraphs 10 and 11 of the Rule 14 Notice, the right to inspect the file, noting that the documents on which the OFT relied were set out at Annex 1 to the Rule 14 Notice. The transcript of interview with Mr C of Briggs was listed as Item 44.

123. The transcript of interview with Mr C has been submitted in full to the Tribunal as Document 6 in the agreed bundle of factual evidence prepared by the parties in advance of the main hearing. It ought to be added, however, that, owing to an oversight, the wrong transcript was included in that bundle. By letter dated 22 September 2004 the Tribunal requested clarification of Document 6. By a letter of the same date the OFT acknowledged the error and provided the correct transcript of interview.

124. In its submissions to the Tribunal the OFT sought to rely on the whole of that record of interview rather than simply the passage quoted in the Decision. In fact, the passage quoted in the Decision was incomplete.

125. The passage which the OFT sought principally to rely on at the hearing is the beginning of the third sentence of a three-sentence answer given by Mr C to a question posed by the OFT. We set out below the whole of the answer with the passage not quoted in the Rule 14 Notice or in the Decision shown in italics:

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

126. Following the hearing, Apex wrote to the Tribunal on 30 September 2004. In that letter Apex submitted that it would be inappropriate for the Tribunal to place any weight on the evidence not relied upon directly in the Decision (unless explicitly accepted by Apex).

127. In a letter dated 8 October 2004 the OFT submitted that it was clear in the Decision that the OFT relied on the evidence of Mr C. The salient extracts from Mr C's interview were appended to the Decision and the transcript of the full interview was included in the OFT's file which was available for inspection (and was inspected) by Apex under rule 14(5) of the Director's Rules.

128. In that letter of 8 October 2004 the OFT noted that the issue as to the evidence of Mr C was canvassed at the case management conference on 15 June 2004 and the question of calling witnesses was actively considered. The OFT submitted that it was clear that it was open to the appellant to adduce witness evidence if it wished to challenge the truthfulness of Mr C's account. The appellant chose not to call witness evidence or to seek to cross-examine Mr C. The OFT submits that Apex has had every opportunity to challenge this material.

129. In Case T-7/89 *Hercules Chemicals NV v Commission* [1991] ECR II-1711 the Court of First Instance observed at paragraph 51 that:

> "regard for the rights of the defence requires that an applicant must have been put in a position to express, as it sees fit, its views on all the objections raised against it by the Commission in the statement of objections addressed to it and on the evidence which is to be used to support those objections and is mentioned by the Commission in the statement of objections or annexed to it".

130. In the Rule 14 Notice in the present case the OFT gave Apex the opportunity to inspect the transcript of interview with Mr C (see paragraphs 10 and 11 of the Rule 14 Notice) which was listed in the Annex to the Rule 14 Notice. Paragraph 109 of the Rule 14 Notice records as part of the evidence on which the OFT relied "The Record of Interview with Mr C of Briggs" and then continues by setting out "An extract from the interview record". The OFT repeated this format in the Decision at paragraphs 62 and 189.

131. It is unfortunate that in both the Rule 14 Notice and the Decision, the extract from Mr C's interview omitted the passage which the OFT now wishes to rely on, indicating that there had been a conversation between Apex and Briggs.

132. In the present case the first time the OFT sought to rely on the words in italics set out in paragraph 125 above was during the oral hearing of the appeal. No mention of these words had been made by the OFT in its defence or in its skeleton argument. Apex had not, therefore, been given any notice by the OFT that it would be relying on these words in its oral submissions to the Tribunal. Apex was therefore not given any opportunity to investigate the alleged conversation referred to in the italicised words and to consider whether it wished to call evidence in rebuttal. We refer in this respect particularly to rule 14(3) of the Tribunal Rules which expressly provides for the defence to contain a succinct presentation of the arguments of fact and law upon which the respondent will rely. Without deciding how far the OFT was, in any event, permitted to rely on wording not relied on in the Decision, in the present case we consider that it was incumbent on the OFT at the stage of presenting its defence to have referred to the full passage from Mr C's interview record if it wished to rely upon it. Accordingly, having regard to rule 14(3) of the Tribunal Rules and the particular circumstances in which this issue has arisen before us, we have decided that for the purposes of this appeal we will take into account only the words quoted in the Decision and will not take into account the words in italics.

133. We therefore take no account of that part of Mr C's statement when considering whether the OFT has proved the existence of a concerted practice in relation to the FHH Contracts.

Existence of infringements

(a) Apex's submissions

(i) Principles

134. Apex submits that the OFT failed to provide clear and compelling evidence of the existence of a concerted practice involving Apex in relation to either the FHH Contracts or the Dudley Contracts. It notes that an article by Oliver Black entitled "Concerted practices, Joint Action and Reliance" [2003] ECLR 219 criticises (at 222) as being unhelpful the definition furnished by the Court of Justice in Case 48/69 etc *ICI v Commission* [1972] ECR 619 ("*Dyestuffs*"), in which it was held (at paragraph 64) that:

> "a concerted practice is a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."

135. Notwithstanding the criticisms of the definition, Apex contends that, even if *Dyestuffs* can be relied on, the following requirements can be identified from *Dyestuffs* which have be satisfied for there to be a concerted practice: (i) there must be at least two undertakings involved; (ii) the two parties must cooperate; (iii) the cooperation between the two parties must be practical, i.e. it must involve actions on both parts (or specifically intended omissions to act); (iv) the result of those actions must substitute for the risks of competition; (v) the actions of the parties must cause the result by which the risks of competition are substituted; and (vi) each party must know that its actions contribute to an outcome which substitutes for the risk of competition.

136. Apex submits that propositions (i) and (ii) are obviously necessary. Proposition (iii) flows from the particular terms of the definition and the term concerted practice. Moreover, this proposition is necessary for there to be any sense in the notion of concertation or cooperation.

137. Apex further submits that the judgment of the Court of Justice in Cases 40/73 etc *Suiker Unie v Commission* [1975] ECR 1663 does not alter the definition laid down in *Dyestuffs*, and in particular the need for positive cooperation between the parties to the alleged infringement. Apex submits that it was in the context of long-term, persistent contact between the parties by which they exchanged information and made arrangements concerning their market behaviour that the Court said in *Suiker Unie* that the tailoring of information based on information passing between the parties could amount to a concerted practice even in the absence of a clearly worked out plan. The Court of Justice cannot, in Apex's submission, be taken to be expanding the definition of "concerted practice" beyond the circumstances of that case.

138. Apex submits that proposition (iv) similarly follows from the terms of the definition of a concerted practice in *Dyestuffs*. There must be actions by the parties which result in their not facing the ordinary risks of competition. Proposition (v) emphasises the necessary causal link between the actions of the parties and the result. Proposition (vi) spells out the necessary mental element to the infringement which is emphasised in *Dyestuffs* ("knowingly").

139. Apex submits that in addition to these six minimum requirements, the article by Black, cited above, provides a more detailed analysis of the conditions which need to be fulfilled. In that article Black concludes, according to Apex, that a concerted practice is a species of joint action, which requires mutual reliance by, and communication between, the parties to the action.

140. Apex further submits that any concerted practice once identified must be shown to fall within the scope of the Chapter I prohibition by reason of either its object or its effect. Apex submits that a concerted practice which has an anti-competitive object may be declared to infringe the Chapter I prohibition without the need for a detailed assessment of the market impact – i.e. the effect – of the behaviour of the parties to it. Apex submits that this does not mean, however, that a concerted practice can exist by thought or intention alone. It must be manifested by action.

(ii) Application of principles to the facts

- The FHH Contracts

141. Apex accepts that the 30 August fax constitutes evidence of positive contact between the parties. It denies, however, that the OFT has shown cooperation between Apex and Briggs. Apex further denies that the OFT has proved that either party's conduct was affected by the sending of the 30 August fax.

142. Apex submits that the OFT has not explained what the cooperation between Apex and Briggs relied upon by the OFT amounts to. Apex submits that the OFT is wrong in its analysis that there was knowing substitution of practical cooperation between Apex and Briggs for the risk of competition in relation to the intended use of the figures in the 30 August fax. Apex submits that it does not follow that any intention, presumably on the part of Apex, as to the use of the figures amounts to cooperation. The 30 August fax, sent by Apex to Briggs, does not evidence intention on the part of Briggs to use the figures set out in it, since, first, Briggs had not seen the figures in question and, secondly, it decided not to submit them.

143. Further, Apex submits that the OFT erred in disregarding the question as to at whose instigation the figures were sent in the 30 August fax. If Briggs unilaterally requested the figures from Apex for its own purposes, the fulfilment of such a request cannot, in Apex's view, constitute concertation between the two parties. Acceding to the request does not give rise to a concerted practice.

144. According to Apex, the fact that Briggs requested the figures set out in the 30 August fax is not disputed in the Decision. No evidence is provided to the contrary. In its written response to the Rule 14 Notice dated 17 November 2003 Apex had explained why it should be concluded that the figures were sent at Briggs' instigation. That material, in Apex's submission, provides a strong and compelling basis why the OFT should have concluded that Briggs requested the figures.

145. Apex therefore denies that the OFT has shown that the 30 August fax was sent at the instigation of Apex. However, even if Apex had sent Briggs the 30 August fax with the object or hope that Briggs would lodge those figures in respect of its bid for the FHH Contracts, that object or intention does not, in Apex's submission, by any

presumption transfer to Briggs. The OFT has not put forward any evidence that Briggs shared Apex's alleged intention. In fact, according to Apex, the OFT has only been able to adduce evidence that contradicts that inference: Briggs did not intend to lodge the figures contained in the 30 August fax and did not do so. The OFT is impermissibly seeking to transform a unilateral act of providing figures into cooperation between the parties. According to Apex, therefore, the fact that Briggs did not enter bids as per the figures contained in the 30 August fax is, contrary to the OFT's position, material: attempting to engage in anti-competitive behaviour does not constitute an infringement of the Chapter I prohibition.

146. Apex submits further that, contrary to the OFT's position, it is not part of the test for determining the existence of a concerted practice that a party has to "openly distance" itself from an attempt to inveigle it into concertation. Not only would this improperly reverse the burden of proof vis-à-vis parties subject to overtures to engage in concerted practices, it would also make no sense as part of the test, and is not mentioned in the case law.

147. Apex states that the idea of distancing oneself from a concerted practice appears to stem from the judgment of the Court of First Instance in *Cimenteries*, cited above, at paragraph 1353. In that case, which concerned anti-competitive behaviour among cement producers contrary to Article 81 EC, the undertakings in question had all attended meetings at which a particular anti-competitive agreement was concluded. The conduct of the parties in attending and participating in those meetings was evidence that each was party to that agreement. It would only be if a party to that agreement could subsequently point to behaviour by which it had clearly distanced itself from the agreement that it would not be considered to be a party to that agreement.

148. As regards the alleged practice to which the OFT claims Apex has been party, however, Apex submits that it is hard to see how the rationale in *Cimenteries* applies to the facts relating to Apex. Simply stopping the practice puts a stop to it. In any event, the *Cimenteries* case is not authority for the proposition the OFT now seek to advance. It does not suggest that where one is invited to enter into a concerted practice, one is treated as cooperating even if one does nothing about it. A more

appropriate analogy with *Cimenteries* would, in Apex's submission, be where an undertaking was invited to meetings but decided not to attend. In such circumstances that undertaking would be a party neither to an unlawful agreement nor a concerted practice.

149. As to propositions (iv) and (v), Apex submits that the OFT has not adduced any evidence that Apex's behaviour on the market was in any way influenced by the sending of the 30 August fax. As to whether the alleged cooperation affected the commercial conduct of Apex and Briggs, Apex contends that it did not. The OFT has not adduced any evidence that Apex's conduct was affected. The OFT has failed to make out any case in this respect. The OFT must show that the conduct of both parties has been altered as a result of the supposed cooperation. It has not been able to do so.

150. In respect of Apex's conduct, Apex submits that the OFT has failed to take account of the fact that there were four other bidders in relation to the FHH Contracts. There is no suggestion that their bids were anything other than competitive. In respect of Briggs' conduct, there is no suggestion that Briggs would have lodged a bid for the FHH Contracts in the absence of the alleged cooperation. Apex submits that the only reasonable evidence, on the (denied) assumption that the figures were sent at the instigation of Apex, is that Briggs did not intend to bid either prior to the contact with Apex or after it. Nothing in the evidence suggests that Briggs changed its conduct by reason of the contact as alleged.

151. Apex notes the OFT's statement at paragraph 198 of the Decision that "there was a concerted practice between Apex and Briggs because, in relation to the intended use of the figures that Apex gave to Briggs, they knowingly substituted practical cooperation between them for the risks of competition. The intended outcome of the concerted practice was that Briggs would not win the contracts." The intention must, in Apex's submission, be that of Apex; and yet the OFT wrongly conflates the intentions of the two parties, transferring Apex's supposed intention to Briggs.

152. Apex submits further that this statement reveals a further omission in the reasoning of the OFT in relation to propositions (iv) and (v). Even if Briggs did not want to win

the FHH Contracts, that is not sufficient to make out a concerted practice. The OFT must show that the actions of Apex were *causative* of Briggs' intention not to win those contracts. It was clearly open to Briggs to reach a conclusion that it did not wish to bid for or win the FHH Contracts because, for example, it lacked capacity. If it had reached that decision, the fact that Apex subsequently asked it to do something it was already (lawfully) intending to do does not render its behaviour unlawful.

153. Apex submits that, contrary to the OFT's case in the defence at paragraph 22, the evidence does not show that "Briggs decided not to enter a bid in the light of the information received from Apex, despite its willingness to do so". On the contrary, there is no evidence, in Apex's submission, that Briggs was intending to bid for the FHH Contracts. The natural inference to be drawn from Briggs' behaviour is that it was able to make up its own mind as to whether it was going to bid when the tender was sent out, and it decided it was not going to do so prior to the sending of the 30 August fax.

154. As to proposition (vi), Apex submits that, apart from bald assertion, the OFT does not spell out on what basis the cooperation in question is knowing. In the absence of cooperation, that omission is, in Apex's submission, understandable.

155. Finally, in so far as the article by Black cited above sets out further conditions for a concerted practice, the OFT has failed to explain where the mutual reliance considered by Black to be necessary arises in the circumstances of the FHH Contracts.

- *The Dudley Contracts*

156. Apex also submits that the OFT has not proved the existence of a concerted practice between Apex and Howard Evans in relation to the Dudley Contracts. In Apex's submission, where the OFT finds "concertation" between two parties in relation to a single set of contract bids and relies for evidence upon the simple fact of communication between them rather than on any change of behaviour of either party, the terms and nature of that communication are crucial to the assessment of whether there was indeed such concertation.

157. In this regard, Apex submits that merely acceding to the request of another, as Howard Evans did in relation to Apex's request for figures for the Dudley Contracts, cannot amount to concertation between the parties. There is no common behaviour or intent of the two parties.

158. Apex had, in its view, good reasons for requesting the figures. These were set out in Apex's submissions to the OFT of 18 December 2003 as follows:

> "5.6. Many Standing Orders require the receipt of a minimum number of bona-fide tenders for a tender to be accepted, sometimes the number is related to the project value. Where contractors do not submit a tender, particularly without prior or timely notification enabling the Officer to approach a substitute contractor, this may cause the number of tenders received to fall below that necessary for the acceptance of a tender.
>
> 5.7. In such cases, the action necessary may include a further tender process or a committee report to obtain approval to an exemption to standing orders. This may delay the commencement of a project and place an additional workload on the Officer. Additional consequences are budgetary difficulties associated with a delay in commencement, an increase in fees or a reduction in notable profitability, a knock on effect on other projects due to the additional workload and in extreme cases the abandonment of projects. This can lead to criticism of the Officer and the Department responsible for contract administration."

159. Apex's response dated 13 January 2004 to the OFT's request for further information at the oral hearing, stated, at paragraph 2.1:

> "2.1. Apex drew a distinction between being removed from a list of approved contractors which a tendering authority had and not being invited to tender in future as a result of not returning a bid following an invitation to tender. Apex accepts that simply failing to respond to an invitation to tender alone is unlikely to result in a company being removed form the list of approved tenders. However, given the necessary discretion which local authority officers have in sending out invitations, there is a very real risk that future invitations will not be extended to a party which does not lodge bids when invited to do so. As set out in our previous submissions…, this is as much a matter of common sense as evidence: if a person invited to bid does not respond it is of disadvantage to the person inviting tenders since they receive fewer; it may, in extreme circumstances, require the inviting authority to follow special processes for appointment which are inconvenient and expensive; and it may be read as a lack of interest in a type of work or work in a particular area on the part of the invitee. Certainly, all of these factors operate as a disincentive to invite a company to tender again."

160. That response attached three letters from various Local Authorities. Those letters are from Wolverhampton City Council (dated 26 November 2003), Bristol City Council (dated 28 November 2003) and Birmingham Heartlands and Solihull NHS Trust (dated 11 December 2003) respectively. The first of these, sent to Apex following Apex's acceptance of an invitation to tender, states *inter alia*:

> "If after receiving these tender documents you decide for exceptional reasons that you cannot submit a tender, you are reminded of the provisions of the [Code of Procedure for Single Stage Selective Tendering 1994] which require notification of your withdrawal within two working days of receipt of the tender documents. Failure to give such notification precludes the substitution of another firm and is considered to be a serious breach of the Selective Tendering Principles."

161. The second, inviting Apex to tender for a particular contract, states *inter alia*:

> "Please complete and return the enclosed receipt document to acknowledge this tender invitation. Failure to acknowledge and subsequently not to return a tender could result in the suspension or withdrawal of your approved status."

162. The last, also inviting Apex to tender for a particular contract, states *inter alia*:

> "If, when you receive these documents, unforeseen circumstances now prevent you from submitting a competitive tender, you must immediately inform the officer named above by telephone and return the documents within three days. Late notification of inability to submit a tender is deprecated as this deprives the Trust of the opportunity of obtaining the requisite number of competitive prices. Immediate notification will not adversely affect future invitations."

163. Apex submits that none of the evidence put forward by Apex to the OFT in explanation of its conduct was referred to in any way in the Decision. The relevant paragraphs of the Decision simply reiterate the Rule 14 Notice.

164. Further, and in any event, Apex submits that the OFT has not provided strong and compelling evidence of any change of conduct on the part of either Apex or Howard Evans in accordance with the alleged concerted practice. There is no evidence to suggest that Howard Evans lodged non-competitive bids as a result of the alleged concertation. Similarly, there is, in Apex's submission, nothing to suggest that Apex

submitted non-competitive bids as a result of the alleged concerted practice when, in the absence of that alleged concertation, it would not have done so.

(b) OFT's submissions

(i) Principles

165. The OFT first points out that a concerted practice is not the same thing as an agreement. No agreement is alleged by the OFT against Apex. The OFT refers to *Dyestuffs*, cited above, in which the Court of Justice, at paragraphs 64 and 65, defined the term "concerted practice" as

> "a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation for the risks of competition.
>
> By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants."

166. The OFT also relies on *Suiker Unie v Commission*, cited above, paragraph 174, in which it was stated by the Court of Justice that each operator must determine independently the policy he intends to adopt on the market, and that this "strictly preclude[s] any direct or indirect contact between competitors the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

167. The OFT submits that it is not, however, necessary for the concerted practice to have been put into effect: if, for example, the parties engage in a concerted practice to raise prices, it does not matter whether they in fact do so: see e.g. Case C-42/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125 ("*Anic*") at paragraphs 122-124.

168. Nevertheless, the concerted practice must in the OFT's submission have *some* influence upon conduct on the market pursuant to that concerted practice and a relationship of cause and effect between the two: *Anic*, paragraph 118.

169. The OFT also refers to *Aalborg Portland*, cited above, at paragraph 84, where the Court of Justice held that active cooperation is not required: where there is tacit approval by a party of an unlawful initiative, and that party does not publicly distance itself from the initiative or report it to the authorities, the party engages in a passive mode of participation and is thus liable in the context of a single agreement.

170. If, as the OFT submits, Apex entered into concerted practices with the object of providing (or procuring) non-competitive prices in a tender process, it is abundantly clear, in the OFT's view, that such concerted practices have as their object the "prevention, restriction or distortion of competition" (section 2(1) of the Act). Referring to its Guideline on the Chapter I prohibition (OFT 401), the OFT notes that an essential feature of tendering procedures is that prospective suppliers prepare and submit tenders independently. Any tenders submitted as a result of joint activities are likely to have an appreciable effect on competition.

171. Finally, the OFT submits that, as to effect on trade within the UK, the effect need not be appreciable; nor is it subject to any *de minimis* rule: *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 11 at [459]-[461]. This requirement is in the OFT's submission clearly fulfilled in this case: the concerted practices, whose object was to introduce non-competitive bids to the tender process, may have altered the outcome of the tender processes.

(ii) Application of principles to the facts

- The FHH Contracts

172. In relation to the FHH Contracts the OFT submits that the evidence shows that there was a concerted practice between Apex and Briggs with the object of providing non-competitive prices in relation to the tenders submitted.

173. First, there was clearly contact between the parties whose object was to influence Briggs' conduct on the market. This is evidenced by the 30 August fax and Apex's own statement that it provided these figures for Briggs to tender.

174. The OFT submits that the object of that contact was to influence the conduct of Briggs on the market by supplying price information to Briggs.

175. There was also, in the OFT's submission, cooperation between Apex and Briggs. This was not a case of wholly unilateral contact on the part of Apex. The interview conducted by the OFT with Briggs shows that Briggs was prepared, in principle, to enter a bid at prices provided by Apex. Briggs did give careful consideration to the figures provided by Apex but ultimately did not submit the figures because it thought them too high, i.e. not because it was unwilling to countenance unlawful conduct. Further or in the alternative, the OFT submits that it may be inferred that Briggs considered the figures provided by Apex with a view to seeking to enter a realistic, but not winning, bid.

176. Briggs' conduct went far beyond "mere receipt" of information: it actively cooperated in a bid-rigging proposal in taking account of the figures sent to it by Apex in deciding whether to enter a bid at all. On Apex's own case, Briggs actively solicited such figures. In any event, according to the OFT, the evidence demonstrates "tacit approval" or "passive mode of participation" on the part of Briggs as per *Aalborg Portland*.

177. The OFT submits, moreover, that there was clearly contact and cooperation between Apex and Briggs before the sending of the 30 August fax. On the one hand, according to the OFT's interview with Briggs, Apex had made contact with Briggs prior to the sending of the 30 August fax. That contact must have been received sympathetically by Briggs for otherwise that fax would never have been sent. On the other hand, according to Apex's version of events, Apex was contacted by Briggs requesting figures because Briggs would have otherwise been unable to submit figures due to holidays and other commitments. Apex duly sent Briggs the figures.

178. On Apex's version of events, therefore, Briggs expressed a desire to enter a bid in accordance with figures supplied to it by Apex and Apex responded by providing such figures. The OFT submits that that is plainly cooperation.

179. The OFT submits that the effect of the cooperation was the knowing substitution of cooperation for the risks of competition. The OFT points out that Apex averred, in its response to the Rule 14 Notice, that the figures it provided to Briggs were higher than the prices it put forward itself. By providing Briggs with those figures, Apex knowingly substituted practical cooperation for the risks of competition which would have arisen had Apex bid independently and without sharing information which would or might influence the conduct of another bidder. The practical outcome, on either version of events, was that the risk of a competitive bid from Briggs was reduced. From Briggs' point of view, the risks of competition for which practical cooperation had been substituted were either the cost of making its own bid or the risk of not making a bid and being removed from the list of tenderers.

180. The OFT submits that the fact Briggs did not submit bids is immaterial. This is not a mere attempt at practical cooperation. It was practical cooperation, but just did not go as far as submitting the figures. A mere attempt would have arisen, for example, if the first request for cooperation had been ignored or rejected, or if the 30 August fax had gone to the wrong number. Moreover, the evidence does not show that Briggs openly distanced itself from Apex.

181. In any event, in the OFT's submission, in order to show a concerted practice it is not necessary to demonstrate that Briggs formally undertook to adopt a particular course of action as a result of its contact with Apex. It is sufficient that the risk that Briggs would enter a competitive bid was eliminated or substantially reduced and/or the uncertainty borne by Briggs as to Apex's conduct was substantially reduced.

182. As to the requirement of conduct on the market resulting from the concerted practices, the OFT submits that this is clearly satisfied in two ways: there is either a presumption and/or, in any event, an inference to that effect.

183. The OFT refers first to *Anic*, at paragraph 121, where the Court of Justice observed that "there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on the market, particularly when they come together on a regular basis over a long period." Whilst there were no regular meetings over time at which information was exchanged, the OFT points out that the Court of Justice in *Anic* (and other cases such as Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 162) did not hold that the presumption could only apply to this particular subset of concerted practices. On the contrary, in *Anic* the Court of Justice stated that the presumption "particularly" applied in those circumstances, but did not exclude its application in other cases. In *Hüls* at paragraph 162 the Court of First Instance stated that the presumption is "all the more true where the undertakings concert together on a regular basis over a long period". The Community courts were, in the OFT's submission, careful not to preclude the application of the presumption to cases such as the present.

184. Once the presumption arises, the OFT submits, it is, in line with *Anic*, for the parties concerned to adduce proof to the contrary. No such proof has been adduced by Apex before the Tribunal. The presumption therefore stands.

185. In any event, the OFT submits, such a presumption reflects an obvious inference to be drawn from the evidence. As to Briggs, the 30 August fax was obviously relevant to Briggs' future conduct on the market: it gave Briggs information as to the approximate level of Apex's own bid, and therefore Apex's approach to pricing, as well as information as to Apex's attitude to bid-rigging. Moreover, according to evidence gathered from Briggs, Briggs would have put in a bid at the level suggested by Apex had the figures not been too high.

186. As to Apex, OFT submits first that it is not necessary to show any effect on its conduct. Where, as here, the information flows in only one direction, there can be no requirement that the provider of the information should change its conduct on the market. Secondly, and in any event, it is reasonable to infer that Apex's conduct was influenced either in respect of the level at which it placed this particular bid or, more generally, in knowing that Briggs was in principle amenable to bid-rigging.

187. On Apex's version of events, viz. that Briggs had requested the figures from Apex, the situation is in the OFT's submission even clearer: Apex could fix its own bid in anticipation that there would be no bid from Briggs and that Briggs was amenable to bid-rigging.

188. The OFT makes a general comment on the fact that Apex's version of events is different from that set out in the Decision. It contends that, on Apex's version, the case against Apex is even stronger. Briggs' request for figures, and Apex's agreement to provide them, evidences (a) contact made by Briggs with Apex the object or effect of which was to disclose to Apex the course of conduct which Briggs had decided to adopt or contemplated adopting on the market, viz. placing a cover bid; (b) contact made by Apex with Briggs the object or effect of which was to influence the conduct of Briggs on the market, viz. by providing prices for a cover bid; and (c) the knowing substitution of practical cooperation between them for the risks of competition.

189. Finally, the OFT submits that the object of the concerted practice was anti-competitive. Apex provided prices for its competitor to tender that were in excess of the prices it tendered itself. The object of the concerted practice was to introduce non-competitive bids to the tender process.

- *The Dudley Contracts*

190. As to the Dudley Contracts, the OFT submits that the evidence shows that there was a concerted practice between Apex and Howard Evans with the object of providing non-competitive prices in relation to the tenders submitted.

191. According to the OFT, Apex does not dispute that the fax sent by Howard Evans to Apex in advance of the tender return date was sent following contact from Apex requesting assistance. Indeed, Apex's case is that it requested a price from Howard Evans because it was reluctant not to submit a tender since it had been some considerable time since it had received an enquiry directly from Dudley MBC.

192. Apex then submitted a bid at precisely the same figures as those suggested by Howard Evans, namely £166,518 and £283,101. Thus, the recipient of the figures actually acted upon them.

193. The OFT submits that a concerted practice is clearly made out: there was (i) contact by Apex to Howard Evans which disclosed to the latter the course of conduct Apex had decided to adopt or was contemplating adopting on the market, namely placing a cover bid; (ii) contact by Howard Evans with Apex whose object or effect was to influence the conduct on the market of Apex, namely providing prices for a cover bid; and (c) knowing substitution of practical cooperation between Apex and Howard Evans for the risks of competition.

194. As to change of conduct, the OFT submits that Apex did change its conduct by submitting bids at the levels suggested by Howard Evans. Whilst Apex submits that there is not sufficient evidence that Apex was intending to lodge a competitive bid for the contract, there is, in the OFT's submission, a clear inference that Apex was not planning to enter a bid at the levels put forward by Howard Evans until the latter suggested them. If and in so far as it is necessary to show that Howard Evans's conduct was also affected, which the OFT denies, the OFT submits that influence on its conduct may reasonably be inferred – either in respect of the level at which it placed the particular bid for the Dudley Contracts (knowing that Apex would not be entering a competitive bid) or, more generally, in that it knew that Apex was amenable in principle to bid-rigging. The OFT alternatively relies on the *Anic* presumption (set out above).

(c) Tribunal's analysis

(i) Case law

195. We were referred to the following authorities of the Court of Justice and Court of First Instance in which the principles applicable to concerted practices are considered: Case 48/69 etc *Dyestuffs* [1972] ECR 619; Cases 40/73 etc *Suiker Unie* [1975] ECR 1663; Case T-1/89 *Rhône Poulenc* [1991] ECR II-867 (one of the appeals to the Court of First Instance against the *Polypropylene* decision of the Commission (OJ 1986

L230/1)); Cases C-89/85 etc *Ahlström Osakeyhtiö* [1993] ECR I-1307 ("*Woodpulp II*"); Case C-42/92P *Anic* [1999] ECR I-4125 and Case C-199/92 P *Hüls* [1999] ECR I-4287 (both of which were appeals to the Court of Justice against judgments of the Court of First Instance following the *Polypropylene* decision); Cases T-25/95 etc *Cimenteries* [2000] ECR II-491 (the appeal to the Court of First Instance against the *Cement* decision of the Commission (OJ 1994 L343/1)); Case T-41/96 *Bayer v Commission* [2000] ECR II-3383 (the appeal to the Court of First Instance from the *Adalat* decision of the Commission (OJ 1996 L201/1)); Case T-9/99 *HFB Holding* [2002] ECR II- 1487 (the appeal to the Court of First Instance from the *Pre-insulated Pipe Cartel* decision of the Commission (OJ 1999 L24/1)); Cases C-2/01 P etc *Commission v Bayer*, judgment of 6 January 2004 (the appeal against the Court of First Instance judgment in *Bayer*, referred to above); Case C-204/00 *Aalborg Portland*, judgment of 7 January 2004 (the appeal to the Court of Justice against the judgment of the Court of First Instance in *Cimenteries*).

196. In *Dyestuffs* the Court of Justice discussed the concept of "concerted practices" in the context of Article 85 (now Article 81), the wording of which is materially the same as section 2 of the Act. In that case the Court of Justice observed that:

> "64. Article [81] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings'; the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.
>
> 65. By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.
>
> 66. Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.
>
> 67. This is especially the case if the parallel conduct is such as to enable those concerned to attempt to stabilize prices at a level different from that to which competition would have led, and to consolidate established positions to the

> detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers.
>
> 68. Therefore the question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested Decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question."

197. The behaviour described as "parallel behaviour" in *Dyestuffs* is the behaviour of producers in either simultaneously or consecutively increasing the price of the same range of product in the same market. However, the observations of the Court of Justice in *Dyestuffs* are not limited to parallel behaviour. The description of a concerted practice set out in *Dyestuffs* has been adopted in subsequent authorities: see e.g. *Suiker Unie*, paragraphs 26-28; *Woodpulp II*, paragraph 63; *Anic*, paragraph 115; *Hüls*, paragraph 158; and *HFB Holding*, paragraph 211.

198. In *Suiker Unie*, a case concerned with restrictions on those to whom sugar would be supplied, the Court further considered the features of a concerted practice:

> "26. The concept of a 'concerted practice' refers to a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market.
>
> 27. Such practical cooperation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions to the detriment of …the freedom of consumers to choose their suppliers.
>
> 28. In a case of this kind the question whether there has been a concerted practice can only be properly evaluated if the facts relied on by the Commission are considered not separately but as a whole, after taking into account the characteristics of the market in question.
> …
> 173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.

> 174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.
>
> 175. The documents quoted show that the applicants contacted each other and that they in fact pursued the aim of removing in advance any uncertainty as to the future conduct of their competitors."

199. The passages cited above in *Suiker* are referred to in *Woodpulp II*, paragraph 63; *Anic*, paragraphs 116-117; *Rhône-Poulenc*, paragraph 121; *Hüls*, paragraphs 159-160; and *HFB Holding*, paragraph 212.

200. In *Rhône-Poulenc* the Court of First Instance held, in the context of a case concerned with meetings at which the applicant was present and at which information was exchanged relating to price-fixing and sales volume target-setting, that:

> "122. … Through its participation in those meetings, it took part, together with its competitors, in concerted action the purpose of which was to influence their conduct on the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market.
>
> 123. Accordingly, not only did the applicant pursue the aim of eliminating in advance uncertainty about the future conduct of its competitors but also, in determining the policy which it intended to follow on the market, it could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings. Similarly, in determining the policy which they intended to follow, its competitors were bound to take into account, directly or indirectly, the information disclosed to them by the applicant about the course of conduct which the applicant itself had decided upon or which it contemplated adopting on the market."

201. In *Anic* the Court of Justice made the following observations:

> "99. It is settled case-law that, for the purposes of applying Article [81(1)] of the Treaty, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1964] ECR 299, at p. 342; see also, to the same effect, Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-45; Case

C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraphs 14 and 15.

…

108. The list in Article [81(1)] of the Treaty is intended to apply to all collusion between undertakings, whatever the form it takes. … The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion.

…

116. The Court of Justice has further explained that criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the market (see *Suiker Unie and Others* v *Commission*, cited above, paragraph 173; Case 172/80 *Züchner* [1981] ECR 2021, paragraph 13; *Ahlström Osakeyhtiö and Others* v *Commission*, cited above, paragraph 63; and *John Deere* v *Commission*, cited above, paragraph 86).

117. According to that case-law, although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 174; *Züchner*, paragraph 14; and *John Deere* v *Commission*, paragraph 87, all cited above).

118. It follows that, as is clear from the very terms of Article [81(1)] of the Treaty, a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.

…

121. For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.

122. For another, a concerted practice, as defined above, falls under Article [81(1)] of the Treaty even in the absence of anti-competitive effects on the market.

> 123. First, it follows from the actual text of Article [81(1)] that, as in the case of agreements between undertakings and decisions by associations of undertakings, concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.
>
> 124. Next, although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition.
>
> …
>
> 131. A comparison between [the] definition of agreement and the definition of a concerted practice … shows that, from the subjective point of view, they are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves."

202. Paragraph 99 of *Anic* was referred to in *Hüls*, paragraph 178 and *Aalborg Portland*, paragraph 261. Paragraph 118 was referred to in *Hüls*, paragraph 161 and *HFB Holding*, paragraph 213. Paragraph 121 was referred to in *Hüls*, paragraph 162, *Cimenteries* (we refer in particular to paragraphs 1865 and 1910) and *HFB Holding*, paragraph 216. Paragraph 131 was referred to in *HFB Holding*, paragraph 190.

203. In *Cimenteries*, the Court of First Instance stated that the reciprocal contacts mentioned in paragraph 175 of *Suiker Unie* are established:

> "where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it…" (paragraph 1849).

and that

> "It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part" (paragraph 1852).

204. *Bayer* was concerned with agreements rather than concerted practices. The Court of First Instance said:

> "66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 81(1) of the Treaty (Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford and Ford*

Europe v Commission [1985] ECR 2725, paragraph 21; Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 56)."

The judgment of the Court of First Instance in *Bayer* was upheld on appeal by the Court of Justice.

205. In *Aalborg* (the appeal to the Court of Justice from *Cimenteries*) the Court made the following remarks:

> "56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.
>
> 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 the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.
> …
>
> Establishment of the liability of the undertakings
>
> 78. As the Council very recently stated in the fifth recital of Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), it should be for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it should be for the undertaking or association of undertakings invoking the benefit of a defence against a finding of an infringement to demonstrate that the conditions for applying such defence are satisfied, so that the authority will then have to resort to other evidence.
>
> 79. Although according to those principles the legal burden of proof is borne either by the Commission or by the undertaking or association concerned, the factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged."

(ii) Principles

206. We have considered the submissions of Apex and the OFT as to the principles of law applicable to concerted practices in the light of all the authorities cited to us. We conclude that the principles relevant to this case as derived from those authorities are as follows:

(i) decisions constituting purely unilateral conduct on the part of an undertaking escape the prohibition contained in Chapter I of the Act (*Bayer* (judgment of the Court of First Instance), paragraph 66);

(ii) the concepts of agreement and concerted practice are intended to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves (*Anic*, paragraph 131, followed in *HFB Holding*, paragraph 190);

(iii) the term concerted practice itself refers to a form of coordination between undertakings which knowingly substitutes, for the risks of competition, practical cooperation between them (*Dyestuffs*, para 64, followed in *Suiker Unie*, paragraph 26; *Woodpulp II*, paragraph 63; *Anic*, paragraph 115; *Hüls*, paragraph 158; *HFB Holding*, paragraph 211);

(iv) the criteria of coordination and cooperation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells (*Suiker Unie*, paragraph 173, followed in *Anic*, paragraph 116; *Hüls*, paragraph 159);

(v) the requirement of independence strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie*, paragraph 174, followed in *Anic*, paragraph 117; *Rhône-Poulenc*, paragraph 121; *Hüls*, paragraph 160; *HFB Holding*, paragraph 212).

(vi) in particular, a concerted practice may arise if there are reciprocal contacts between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market (*Suiker Unie*, paragraph 175);

(vii) reciprocal contacts are established where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it (*Cimenteries*, paragraph 1849);

(viii) it is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part (*Cimenteries*, paragraph 1852);

(ix) a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two (*Anic*, paragraph 118, followed in *Hüls*, paragraph 161; *HFB Holding*, paragraph 213);

(x) subject to proof to the contrary, which it is for the economic operators concerned to adduce, there is a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period (*Anic*, paragraph 121, followed in *Hüls*, paragraph 162; *Cimenteries*, paragraphs 1865 and 1910; *HFB Holding*, paragraph 216);

(xi) although the concept of a concerted practice presupposes conduct of the participating undertakings on the market, it does not necessarily imply that that conduct should produce the concrete effect of restricting, preventing or distorting competition (*Anic*, paragraph 124);

(xii) it follows from the actual text of Article 81(1) that concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object (*Anic*, paragraph 123).

207. The foregoing principles are applicable generally to concerted practices. Their specific application to a tendering process involving cover bidding has not, however, been the subject of Community case law or Commission decisional practice. Before considering their application to the present facts it is important to consider the nature of a tendering process.

- *Nature of tendering process*

208. The essential feature of a tendering process conducted by a local authority is the expectation on the part of the authority that it will receive, as a response to its tender, a number of independently articulated bids formulated by contractors wholly independent of each other. A tendering process is designed to produce competition in a very structured way.

209. The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to certify that they have not had any contact with each other in the preparation of their bids. This is important from the standpoint of the customer, since the tendering process is designed to identify the contractor that is prepared to make the most cost-effective bid. The competitive tendering process may be interfered with if the tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants. Such behaviour by undertakings leads to conditions of competition which do not correspond to the normal conditions of the market.

210. When the tendering process is selective rather than open to all potential bidders, the loss of independence through knowledge of the intentions of other selected bidders can have an even greater distorting effect on the tendering process. In a selective tender process the contractors invited to tender will in general be those considered most likely to have the required specialist skills. The Tribunal understands that

selective tendering is commonly used by local authorities (and others commissioning construction and maintenance work). Selective tendering processes ensure that the workload involved in analysing the various bids submitted can be kept within manageable bounds.

211. Accordingly, since the selective tendering process by its nature has a restricted number of bidders, any interference with the selected bidders' independence can result in significant distortions of competition.

212. The Tribunal notes that the Form of Tender used for the Dudley Contracts requires the tenderer to certify that "the amount of this tender has not been communicated to any other person or adjusted in accordance with any agreement or arrangement with any other person" and the invitation to tender states that "Any tender not complying with these requirements will be rejected." This highlights the importance in the tendering process of independence and open competition.

213. As the Tribunal understands it, local authorities recognise the possibility that a contractor who is invited to submit a bid as part of the selective tender exercise may find himself in a position, for instance because of other commitments, where he cannot undertake the work to which the bid would relate. The tender process normally provides that such a contractor may, within a specified (and usually short) period, decline the invitation to submit a bid. This gives the tendering body the opportunity to replace that contractor with another so that the number of competitive bids for the work will remain the same. Indeed, this is precisely what happened in relation to the Dudley Contracts. One contractor, RCS, declined the original invitation. This gave DPC the opportunity of replacing that contractor, which opportunity DPC took, inviting Monarch to submit a bid in RCS' place (see paragraph 112 of the Decision).

214. In addition to the case law set out at paragraph 195 above, we have had particular regard to the following in considering what amounts to anti-competitive conduct in the context of a tendering process:

(i) The OFT's Guidance entitled *The Chapter I prohibition* (OFT 401), which states:

> "3.14 Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any tenders submitted as a result of joint activities are likely to have an appreciable effect on competition."

(ii) The Decision, especially paragraphs 17 – 20, 112, 128 and 360 – 364 and 367, which we have set out above.

(iii) Apex's supplemental response to the Rule 14 Notice, in particular at paragraphs 5.6-5.7 to which we have referred above.

(iv) Apex's response dated 13 January 2003 to the OFT's request for further information at the oral hearing, in particular paragraph 2.1 to which we have referred above:

(iii) Application of the principles to the facts

- *The FHH Contracts*

215. The factual basis for the alleged concerted practice was formulated differently by Apex and by the OFT during the administrative procedure before the OFT and in their respective submissions before the Tribunal. In particular, as mentioned above, there is a difference as to whether Briggs or Apex was the instigator of the sending of the 30 August fax by Apex to Briggs.

216. The facts as submitted by Apex to the OFT in response to the Rule 14 Notice and in its Notice of Appeal are as follows:

(a) A previous employee of Briggs was now an employee of Apex ([…][**C**]);

(b) […][**C**] spent a number of hours on the sites for the FHH Contracts measuring up the works with the intention of submitting a competitive bid;

(c) Apex wanted to secure the works to sustain its workforce;

(d) On the morning of Thursday 30 August 2001 […][**C**] was telephoned by a Briggs employee and asked if Apex was tendering for the FHH Contracts. That employee said that due to staff holidays and other enquiry commitments, Briggs would not be able to submit a tender by the return date, and that Birmingham City Council looked unkindly on tenders that were not returned by the due date after accepting the invitation to tender;

(e) The Briggs employee asked […][**C**] to send the figures to […][**C**] of Briggs;

(f) […][**C**] duly did so as per the 30 August fax at 1430;

(g) The fax message from […][**C**] to […][**C**] read as follows:

> "[…][**C**]
> These are your figures inclusive of contingencies for two projects with Birm. C.C.
> Frankley = £193,460.40
> Harborne Hill = £144,910.10
> Many thanks and have a good holiday.
> Best wishes
> […][**C**]"

(h) Briggs did not submit a bid.

217. In the context of the facts as submitted by Apex, the word "figures" refers to figures for a cover bid. On the facts as submitted by Apex the following is admitted:

(a) Briggs and Apex had accepted an invitation to tender for the FHH Contracts;

(b) Briggs' understanding was that Birmingham City Council looked unkindly on tenders that were not returned by the due date after accepting the invitation to tender;

(c) Apex had completed the estimating process for the tender for the FHH Contracts;

(d) Apex wanted to win the tender for the FHH Contracts;

(e) Briggs was unable to submit an independent tender by the return date;

(f) Briggs contacted Apex;

(g) Apex supplied figures to Briggs for a cover bid; and

(h) Briggs did not submit a tender for the FHH Contracts.

218. We are satisfied that the facts set out under (a) to (h) above amount in law to a concerted practice contrary to the Chapter I prohibition.

219. The requirement of concertation is met by Briggs contacting Apex and Apex sending Briggs the 30 August fax. This contact:

(a) shows that Apex's conduct in sending the 30 August fax was not unilateral;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market;

(c) constitutes direct contact between Apex and Briggs which had as its object or effect –

i. the disclosure by Briggs to Apex of the course of conduct which Briggs was to adopt or was contemplating adopting in the tendering process; and
ii. influencing Briggs' conduct on the market, as a result of Apex's response.

220. That contact contravenes the principle against direct or indirect contact set out in *Suiker Unie* at paragraph 174. It also constitutes a prohibited reciprocal contact as referred to in paragraph 175 of *Suiker Unie* in that Briggs contacted a competitor, Apex, and disclosed to Apex its future intentions on the market, which disclosure Apex accepted: see also *Cimenteries*, paragraph 1849.

221. There is a presumption that the exchange of information relating to the price at which Briggs might bid had an impact on the conduct of Apex and Briggs on the market in that:

(a) Apex is presumed to have taken account of the information it received from Briggs (that Briggs did not intend to provide a competitive bid) when determining its own conduct in the tendering process; and

(b) Briggs is presumed to have taken account of the information it received from Apex when determining its own conduct in the tendering process.

222. No evidence has been adduced by Apex to rebut the presumptions. We deal with this aspect further below.

223. The elements of a concerted practice are thus made out. The result was that Briggs and Apex substituted practical cooperation for the risks of competition. Their cooperation substantially eliminated the uncertainty which they each faced as to the conduct of the other in the tender process.

224. In our judgment the conduct of Apex and Briggs in Apex providing, and Briggs receiving and considering, a price for this purpose, has as its object the prevention, restriction or distortion of competition. The placing of a bid by Briggs at the price

submitted or at all is not in our judgment a necessary ingredient for the conduct of Briggs and Apex to amount to a concerted practice.

225. The OFT obtained from Briggs a different version of the facts from that put forward by Apex. This version, which the OFT relied upon for the Decision and which Apex submits is not the correct version, is based upon on the following evidence:

(a) The fax dated 30 August 2001 from Apex to Briggs:

> "[…][**C**]
> These are your figures inclusive of contingencies for two projects with Birm. C.C.
> Frankley = £193,460.40
> Harborne Hill = £144,910.10
> Many thanks and have a good holiday.
> Best wishes
> […][**C**]"

(b) The extract of the record of interview with Mr C of Briggs which reads as follows:

> "… we were asked to do a cover for a couple of schools that Apex roofing knew about that were coming out to tender…. The jobs or the enquiries duly hit my desk and remained there until this fax came through with our prices to put in."
> "We were rather shocked at the value …. it's a lot of money and we looked at the specification required for the job and the roof areas involved on a roof plan that had been supplied and I went and saw my boss Mr F and we looked at it carefully together again. We didn't actually sit very comfortable with the figures that we got to submit… because it was too high…. And it was duly decided that we were not gonna actually put a tender bid in at all – it was just an absolute no tender as far as we were concerned because we thought they were having a laugh with the figures… we didn't return a price at all."

226. We are satisfied that the terms of the 30 August fax are evidence of a prior conversation between Apex and Briggs in which Briggs indicated to Apex that it would be receptive to the receipt of a cover figure from Apex.

227. On this version:

(a) Apex asked Briggs to put in a cover for the FHH Contracts;

(b) Briggs indicated that it would be receptive to the receipt of a cover price from Apex;

(c) Apex supplied cover figures to Briggs;

(d) Briggs considered the figures for the purpose of a cover bid; and

(e) Briggs decided the figures were too high.

228. We are satisfied that the facts set out under (a) to (e) above amount in law to a concerted practice contrary to the Chapter I prohibition.

229. The requirement of concertation is met by the previous conversation between Apex and Briggs, followed by Apex sending Briggs the 30 August fax. This contact:

(a) shows that Apex's conduct in sending the 30 August fax was not unilateral;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market;

(c) constitutes direct contact between Apex and Briggs which had as its object or effect –

i. disclosure to Apex of the course of conduct which Briggs was contemplating adopting in the tendering process, and
ii. influencing Briggs' conduct on the market

which contravenes the principle against direct or indirect contact set out in *Suiker Unie* at paragraph 174.

230. There is a presumption that the exchange of information relating to the price at which Briggs might bid, had an impact on the conduct of Apex and Briggs on the market in that:

(a) Apex is presumed to have taken account of the information it received from Briggs (that Briggs contemplated submitting a cover bid which would be a non- competitive bid) when determining its own conduct in the tendering process; and

(b) Briggs is presumed to have taken account of the information it received from Apex when determining its own conduct in the tendering process.

231. No evidence has been adduced by Apex to rebut the presumptions. We deal with this aspect further below.

232. The elements of a concerted practice are thus again made out. The result was that Briggs and Apex substituted practical cooperation for the risks of competition. Their cooperation substantially eliminated the uncertainty which they each faced as to the conduct of the other in the tender process.

233. As we have explained above, the conduct of Apex and Briggs in Apex providing, and Briggs receiving and considering, a price for this purpose, has as its object the prevention, restriction or distortion of competition. The placing of a bid by Briggs at the price submitted or at all is not a necessary ingredient for the conduct of Briggs and Apex to amount to a concerted practice.

234. The Tribunal notes that Apex and the OFT formulated the alleged concerted practice differently. Apex submitted that if there was a concerted practice then it would be that Briggs would bid at prices specified by Apex. Since Briggs did not bid, Apex submitted that the conduct could not amount to a concerted practice. The OFT submitted that the concerted practice between Apex and Briggs was to provide non-competitive prices the intended use of which was that Briggs would bid but not win the contract. The OFT submitted that whether or not Briggs bid was immaterial.

235. We consider that the concept of a concerted practice relied on by Apex is self-serving. The principal object of the cooperation between Apex and Briggs was that Briggs would not win the contract. It was not that Briggs would put in a bid. We therefore accept the OFT's argument that it is immaterial that Briggs did not bid. Furthermore,

that conclusion is consistent with the fact that once it is shown that the object of the concerted practice was anti-competitive, it is no longer necessary to show that it had an anti-competitive effect.

236. We accept the submission of the OFT that the concerted practice is made out at a stage prior to consideration of whether the person receiving the price actually puts in a tender. We are satisfied that there was a concerted practice in place between Apex and Briggs to provide non-competitive prices such that Briggs would not win the FHH Contracts. The fact that in relation to the FHH Contracts Briggs did not put in a tender at all is not material to the question whether a concerted practice was in place. Likewise the reason for Briggs not putting in the tender is immaterial.

237. For the reasons stated above we do not consider that the answer to the question whether there is a concerted practice is dependent on who instigated the 30 August fax. We reject Apex's submission in this respect. We accept the OFT's conclusion that a concerted practice exists whether the fax was instigated by Apex or Briggs.

238. Apex continued to submit at the main hearing that the issue of who instigated the 30 August fax was relevant and that it did not accept the version of events put forward by the OFT in this respect. We observe that, had the Tribunal accepted Apex's submission and concluded that the question whether there was a concerted practice depended on who instigated the 30 August fax, the Tribunal would then have had to consider whether it preferred the version of the events put forward by the OFT or by Apex. However, Apex did not chose to cross-examine Mr C. If Apex had wished to challenge the OFT version, then the appropriate course for Apex to take would have been to seek to cross-examine Mr C and to give the OFT the opportunity to cross-examine […][**C**]. The jurisdiction of this Tribunal in an appeal from a decision of the OFT under section 2 of the Act is an appeal on the merits. The Tribunal can make any other decision which the Director could have made and in so doing can set aside a finding of fact made by the Director: see *Napp* [2002] CAT 1 at paragraphs 114 to 120, to which we have referred above.

- *The Dudley Contracts*

239. There is no dispute between Apex and the OFT as to the relevant facts:

(a) An employee of Howard Evans telephoned Apex before the tender invitation date and advised Apex that he was preparing a list of tenderers for the Dudley Contracts;

(b) Apex received the tender documents;

(c) Apex decided not to carry out a full estimating exercise because:
   i. The specification of product gave a price advantage to Howard Evans who, from the earlier conversation, was likely to bid, and
   ii. Apex had a heavy estimating workload on prospective contracts which it had a greater chance of winning;

(d) Apex therefore decided to seek a cover price;

(e) Since Apex knew that Howard Evans was tendering, it contacted Howard Evans for a cover price;

(f) Howard Evans provided prices to Apex and to two other tenderers;

(g) Apex submitted the prices provided by Howard Evans; and

(h) Howard Evans won the contract.

240. On these facts the following is admitted:

(a) Apex and Howard Evans had both accepted an invitation to tender for the Dudley Contracts;

(b) Apex's understanding was that DPC looked unkindly on tenders that were not returned by the due date after accepting the invitation to tender;

(c) Howard Evans had completed the estimating process for the Dudley Contracts (and Apex knew this);

(d) Howard Evans wanted to win the tender for the Dudley Contracts;

(e) Apex did not wish to submit an independent tender by the tender date;

(f) Apex contacted Howard Evans requesting figures;

(g) Howard Evans supplied figures to Apex; and

(h) Apex submitted a tender in respect of the Dudley Contracts using the figures supplied to it by Howard Evans.

241. We are satisfied that the facts set out under (a) to (h) above amount in law to a concerted practice contrary to the Chapter I prohibition.

242. The requirement of concertation is met by Apex contacting Howard Evans and Howard Evans sending Apex a fax with figures to submit. This contact:

(a) shows that Howard Evans' conduct in sending that fax was not unilateral;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market;

(c) constitutes direct contact between Howard Evans and Apex which had as its object or effect -

i. disclosure to Howard Evans of the course of conduct which Apex was to adopt or was contemplating adopting in the tendering process; and

ii. influencing Apex's conduct on the market

which contravenes the principle against direct or indirect contact set out in *Suiker Unie* at paragraph 174.

243. There is a presumption that the exchange of information between the parties had an impact on the conduct of Apex and Howard Evans on the market in that:

(a) Howard Evans is presumed to have taken account of the information it received from Apex (that Apex did not intend to provide a competitive bid) when determining its own conduct in the tendering process; and

(b) Apex is presumed to have taken account of the information it received from Howard Evans when determining its own conduct in the tendering process.

244. No evidence has been adduced by Apex to rebut the presumptions. We deal with this aspect further below.

245. The elements of a concerted practice are thus made out. The result was that Apex and Howard Evans substituted practical cooperation for the risks of competition. Their cooperation substantially eliminated the uncertainty which they each faced as to the conduct of the other in the tender process.

246. As we have explained above, the conduct of Apex and Howard Evans in Howard Evans providing, and Apex receiving and submitting, a price for this purpose, has as its object the prevention, restriction or distortion of competition.

247. Moreover, the tendering process provides for the tenderee to receive independent bids following the acceptance of an invitation to tender, alternatively for the invited tenderer to decline the invitation to bid so that the tenderee has the opportunity to replace that undertaking with another competitor. As we have pointed out above, the latter outcome in fact materialised in respect of one contractor, RCS, who was invited to tender for the Dudley contract, who declined the invitation and in whose place Monarch bid (see paragraph 112 of the Decision). The effect of the conduct of Apex and Howard Evans was to deprive the tenderee of a similar opportunity. In this respect also the concerted practice has as its object or effect the prevention, restriction or distortion of competition.

Apex's explanation of conduct in respect of tenders for the FHH Contracts and the Dudley Contracts

248. Apex submitted that the object of the practice in which Briggs and Apex participated in respect of the FHH Contracts was to avoid Birmingham City Council looking unkindly on Briggs in respect of invitations for future tender opportunities. Apex similarly submitted that the object of its conduct in respect of the tender for the Dudley Contracts was to remain on DPC's tender list.

249. Apex submits that that is an innocent explanation for the submission of cover bids because if a contractor does not submit a "realistic" bid following an invitation (albeit in circumstances where the contractor does not in fact wish to be awarded that particular contract), there is a significant risk that the tenderee will not approach that contractor again or at least will not invite it to submit on the next occasion that an appropriate contract arises. We refer in particular to paragraphs 5.6 and 5.7 of Apex's submissions to the OFT of 18 December 2003 and to paragraph 2.1 of its response of 13 January 2004 to the OFT's request, at the oral hearing, for further information. These paragraphs have been set out at paragraphs 158 and 159 above.

250. The Tribunal does not accept that this explanation for Apex's conduct absolves Apex of liability. Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.

251. We accept the submission of the OFT that submitting a cover-bid in these circumstances has an anti-competitive object or effect:

(a) it reduces the number of competitive bids submitted in respect of that particular tender;

(b) it deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;

(c) it prevents other contractors wishing to place competitive bids in respect of that particular tender from doing so;

(d) it gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.

252. An analysis of the tender process in respect of the Dudley Contracts puts the issue in sharp focus. It is clear that, of the five bids submitted, three – those of Apex, Solihull and General Asphalte – were cover bids. The tenderee, DPC, therefore received only two competitive bids, one of which – that of Howard Evans – was submitted in the knowledge that three of the others were cover bids. In fact, therefore, only one wholly independent bid – that of Monarch – was submitted. Indeed, had RCS not declined to tender in a timely fashion, DPC would, in all likelihood, not have received any independent bids at all. Throughout the process, however, DPC was under the mistaken impression that all of the tenderers had submitted competitive bids independently and were genuinely interested in carrying out the work.

253. The fact that the parties to the concerted practices may not have considered the anti-competitive nature of their conduct, and therefore may not have appreciated that the object or effect of that conduct was anti-competitive, is not a relevant consideration when considering the existence of an infringement. The obvious object or effect of the conduct is to prevent, restrict or distort competition.

Ground 3: Reasoning in the Decision

(a) Apex's submissions

254. Apex makes a general point about the OFT's reasoning. It submits that the OFT has failed to set out the precise nature of the alleged infringements and/or their legal and factual bases. As such, the Decision is inadequate.

255. Apex submits that the OFT's reasoning in the Decision is inadequate for the following reasons:

(a) it fails to set out the basis for the infringement decisions; and

(b) it fails to provide any significant analysis of the term "concerted practice".

(b) OFT's submissions

256. The OFT submits that Apex has failed to particularise its submission that the reasoning was inadequate. In any event, any defect in the OFT's reasoning would not of itself give grounds to allow the appeal. Referring to the Tribunal's judgment in *Napp* [2001] CAT 3 at [75], the OFT submits that the appeal is a full review on the merits: the Tribunal can consider any aspect of the evidence which it considers has not been sufficiently addressed by the OFT in the course of the appeal. If the Tribunal concludes that Apex did engage in the alleged concerted practices, any defect in the OFT's reasoning would be immaterial.

(c) Tribunal's analysis

257. We are satisfied that the reasons provided by the OFT are sufficient. The function of the statement of reasons is to ensure that affected parties (and, by extension, the Tribunal) are sufficiently informed of the factual and legal basis of the contested decision to be able to defend its own interests.

258. In *Compagnie Maritime Belge*, cited above, Advocate General Fennelly made the following observations with which we agree:

> "43. The classic statement of the obligation of the Community institutions to support their decisions with a statement of the principal points of fact and of law upon which it relies is to be found in *Remia* v *Commission*:
>
> > '[A]lthough under Article 190 of the EEC Treaty [now Article 253 EC] the Commission is required to state the factual matters justifying the adoption of a decision, together with the legal considerations which have led to its adopting it, the article does not require the Commission

> to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings. The statement of reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision and must provide the person concerned with the information necessary to enable him to decide whether or not the decision is well founded.'
>
> …"

259. In our view the reasons set out in the Decision were sufficient to enable Apex to understand the basis for the Decision. Further, and in any event, the legal and factual matters upon which the OFT relied in the Decision have been the subject of a full hearing before the Tribunal. In the circumstances, we reject Apex's submission.

Ground 4: Level of the penalty

(a) Apex's submissions

260. Apex submits that, in any event, the OFT set the level of the penalty imposed on Apex at too high a level and in so doing failed to follow its own guidance as set out in the *Guidance as to Penalty*.

261. First, Apex submits that the OFT failed to take account of the lack of any adverse impact on competitors or consumers in relation to either the FHH Contracts or the Dudley Contracts, despite the fact that the OFT considers these to be important considerations in setting the level of the penalty: see *Guidance as to Penalty*, paragraph 2.5.

262. As to the FHH Contracts, Apex maintains that, since no action was taken as a result of the alleged concertation, there can have been no possible impact on competitors or consumers. Four other competitors entered the bidding process and were beaten by Apex. Apex submits that a significant reduction in the overall level of the penalty would therefore be appropriate.

263. As to the Dudley Contracts, Apex submits that the manner in which the figures were obtained is highly relevant to the calculation of the fine. The OFT must accept for the

purposes of calculating the penalty that the request for the figures came from Apex. There is no evidence to suggest that Howard Evans' behaviour was affected by the request by Apex for the figures. Its bid was the successful bid and there is no basis for concluding that the bid would have been anything other than successful absent the alleged concerted practice. According to Apex there was, therefore, no impact on competitors or consumers. Accordingly, the penalty should be reduced.

264. Apex submits that there is simply no reference in the Decision to the question of whether or not the infringements in question had an impact on consumers. There is no analysis of whether or not there was, or could have been, a real effect. The classification by the OFT of the infringements as individual and discrete says nothing about impact on consumers.

265. Secondly, Apex submits that the OFT did not make an adjustment to the level of the penalty at Step 2 of its penalty calculation process to reflect the fact that the duration of the infringement was less than a year. The two alleged infringements – in respect of the FHH Contracts and Dudley Contracts – lasted only 56 and 22 days respectively. Referring to *Aberdeen Journals v Director General of Fair Trading* [2003] CAT 11 at [498], Apex submits that the Decision should have made explicit recognition of this fact. Once again, the fact that the OFT considers the infringements to be individual and discrete says nothing about whether or not there has been a reduction in the penalty because the infringement lasted less than one year.

(b) OFT's submissions

266. As to Apex's first argument, namely that the OFT failed to take account of the lack of any adverse effect on competitors and consumers, the OFT contends that this was taken into account at paragraphs 390-392 of the Decision, where it set the starting point at […][**C**]% of Apex's relevant turnover rather than nearer the 10% that would be usual in the case of serious infringements such as price-fixing or market sharing (see *Guidance as to Penalty*, paragraph 2.4). One of the reasons the OFT adopted such a low figure was that the instances of cover pricing dealt with in the Decision were individual and discrete. Whilst the word "consumers" is not mentioned in the Decision, the OFT submits that the final "consumers" are the purchasers of RMI

services referred to in paragraph 390 of the Decision, and that the Decision fully recognises the nature of the impact of the infringements upon those "consumers".

267. As to Apex's second argument, namely that the OFT did not make an adjustment to the level of the penalty to reflect the fact that the duration of the infringements was only 56 days and 22 days respectively, the OFT distinguishes *Aberdeen Journals* on the basis that the concerted practices under appeal did not involve a sustained period of unlawful conduct, as was the case in *Aberdeen Journals*. The infringements in the present appeal were individual and discrete rather than a pattern of continuing conduct. That was one of the reasons for setting the starting point as low as […][**C**]%. There is therefore, in the OFT's submission, no other reason to make a further adjustment to the penalty to take this consideration into account.

(c) Tribunal's analysis

268. Apex submits that the OFT did not comply with the *Guidance as to Penalty* in two important respects:

(a) It failed to take into account the impact on consumers; and

(b) It failed to take into account the duration of the infringement.

269. The starting point for the quantification of penalties is the *Guidance as to Penalty*. The OFT stated in paragraph 383 of the Decision that it had had regard to this document when setting the amount of the penalty.

270. The Introduction to the *Guidance as to Penalty* provides as follows:

> **"Statutory background**
>
> 1.1 Section 38(1) of the Competition Act 1998 ("the Act") requires the Director General of Fair Trading to prepare and publish guidance as to the appropriate amount of any penalty.
>
> 1.2 Under section 36 of the Act the Director General of Fair Trading may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of the Chapter I or Chapter II prohibition.

1.3 The sector regulators have concurrent powers with the Director General of Fair Trading to apply and enforce the Act in their designated sector under section 54 of the Act. They also have the power to impose financial penalties on undertakings. References to the "Director" (but not references to the "Director General of Fair Trading") throughout this guidance should therefore be taken to include the regulators in relation to their designated sector.

1.4 The financial penalty may not exceed 10% of the "section 36(8) turnover" of the undertaking. The "section 36(8) turnover" of an undertaking for the purposes of this cap on penalties is to be calculated in accordance with the Determination of Turnover for Penalties Order.

1.5 By virtue of section 38(8) of the Act, the Director must have regard to the guidance for the time being in force when setting the amount of any penalty imposed for infringement of the Chapter I or Chapter II prohibition.

1.6 This guidance was approved by the Secretary of State as required under section 38(4) of the Act on 29 January 2000.

1.7 Section 38(2) of the Act provides that the Director General of Fair Trading may alter the guidance at any time. Any such alterations must be made with the approval of the Secretary of State and following consultation with such persons as the Director General of Fair Trading considers appropriate. This guidance on penalties will be reviewed in the light of experience in applying it over time.

Policy objectives

1.8 The twin objectives of the Director's policy on financial penalties are to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter undertakings from engaging in anticompetitive practices. The Director therefore intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets and other cartel activities, as well as serious abuses of a dominant position, which the Director considers are among the most serious infringements caught under the Act. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities that are contrary to the Chapter I and Chapter II prohibitions.

1.9 The Director also wishes to encourage members of cartels to come forward with evidence on the existence and activities of any cartel in which they are involved and therefore the guidance sets out in Part 3 a clear policy on when lenient treatment will be given to such undertakings.

1.10 The guidance has been drafted to increase transparency by setting out the steps which the Director will follow when calculating the amount of a penalty."

271. The relevant provisions of the *Guidance as to Penalty* are as follows:

"2.1 Any financial penalty imposed by the Director under section 36 of the Act will be calculated following a five step approach:

- calculation of the starting point by applying a percentage determined by the nature of the infringement to the "relevant turnover" of the undertaking (see paragraph 2.3 below)
- adjustment for duration
- adjustment for other factors
- adjustment for further aggravating or mitigating factors
- adjustment if the maximum penalty of 10% of the "section 36(8) turnover" of the undertaking is exceeded and to avoid double jeopardy.

Details on each of these steps are set out in paragraphs 2.3 to 2.15 below.

…

Step 1 – starting point

2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated by applying a percentage rate to the "relevant turnover" of the undertaking, up to a maximum of 10%. The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year. This may include turnover generated outside the United Kingdom if the relevant geographic market for the relevant product is wider than the United Kingdom.

2.4 The actual percentage rate which will be applied to the "relevant turnover" will depend upon the nature of the infringement. The more serious the infringement, the higher the percentage rate is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements caught under the Chapter I prohibition. Conduct which infringes the Chapter II prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have a particularly serious effect on competition, for example, predatory pricing, is also one of the most serious infringements under the Act. The starting point for such activities and conduct will be calculated by applying a percentage likely to be at or near 10% of the "relevant turnover" of the infringing undertakings.

2.5 It is the Director's assessment of the seriousness of the infringement which will determine the percentage of "relevant turnover" which is chosen as the starting point for the financial penalty. When making his assessment, the Director will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration. The assessment will be made on a case by case basis for all types of infringement.

2.6 Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings

concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.

Step 2 – adjustment for duration

2.7 The starting point may be increased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement. Part years may be treated as full years for the purpose of calculating the number of years of the infringement.

Step 3 – Adjustment for other factors

2.8. The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives, outlined in paragraph 1.8 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anti-competitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to the Chapter I and Chapter II prohibitions. Considerations at this stage may include, for example, the Director's estimate of the gain made or likely to be made by the infringing undertaking from the infringement. Where relevant, the Director's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the "relevant" market under consideration. The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking.

2.9. This step may result in a substantial adjustment of the financial penalty calculated at the earlier steps. The consequence may be that the penalty which is imposed is much larger than would otherwise have been imposed. The result of any one of steps 2 or 3 above or 4 below may well be to take the penalty over 10% of the "relevant turnover" identified at step 1, but the overall cap on penalties is 10% of the "section 36(8) turnover" referred to in step 5 below and must not be exceeded.

…"

272. The OFT reminded us that the starting point for a penalty is 10% of the relevant turnover but in this case the OFT reduced this to […][**C**]% of the relevant turnover. In doing so it took account of the effect of the infringement on competitors and third parties. Such third parties include consumers.

273. The OFT submits that it did take into account the impact on consumers and that this is demonstrated by paragraph 390 of the Decision headed "Effect on competitors and third parties":

> "The Parties identified in the Decision constitute a not insignificant part of suppliers of RMI services for flat roofs in the West Midlands area. Also, the Parties have made representations that 'cover pricing' in the sense used in this Decision (see paragraph 18 above) is a widely-encountered phenomenon in the

> roofing industry. The Parties' infringements gave **purchasers** of flat-roofing services the impression that there was more competition in the tender process relating to a specific contract than there actually was. However, the OFT notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. The OFT considers that such infringements are not the most serious examples of collusive tendering."
> *[Emphasis in the original]*

274. At paragraph 392 of the Decision the OFT stated:

> "The OFT has had regard to the nature of the product, the structure of the market, the market share of the Parties, market entry conditions and the effect of the infringements on competitors and third parties, as set out in paragraphs 387 to 391 above. On the basis that the market is fragmented (see paragraph 388 above) and none of the Parties has a leading market share (see paragraph 389 above), and the fact that the Parties' infringements were - by virtue of the fact that they were individual, discrete infringements - not the most serious examples of collusive tendering, the OFT has fixed a starting point of […][**C**]% of relevant turnover for all the Parties."

275. We are satisfied from the above paragraphs that the effect on consumers was taken into account by the OFT.

276. The Decision expressly stated in paragraph 400 that the OFT did not make any adjustment for duration (see paragraph 393 and 400 of the Decision). In paragraph 401 of the Decision it stated that "the OFT intends this Decision to raise awareness of these issues within the industry further" and considered that the penalty figure is sufficient to act as an effective deterrent to Apex and to other undertakings that might consider engaging in collusive tendering. The OFT submitted that duration was taken into account as evidenced by the reference to "individual, discrete infringements" and that it would be duplicating the discount to reduce the penalty further at Stage 2 of the *Guidance as to Penalty*. However this submission appears to be inconsistent with the statement in the Decision that no adjustment for duration had been made. The fact that the infringement was individual and discrete does not mean that it necessarily has a short or long duration.

277. In *Aberdeen Journals* the Tribunal decided on the particular facts of that case that the Director should take into account the duration of less than a year. In *Aberdeen Journals* the abuse of dominance only lasted one month. In the present case the OFT

states in paragraph 333 of the Rule 14 Notice that the durations were of limited periods: the infringement in relation to the FHH Contracts lasted 54 days and that in relation to the Dudley Contracts lasted 22 days. The question for the Tribunal is whether a reduction would be appropriate in the circumstances of the present case.

278. Notwithstanding what is said in paragraph 333 of the Rule 14 Notice, in the present case the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderees. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified. We consider, therefore, that the OFT's decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable.

279. Accordingly we consider that the penalty imposed on Apex by the OFT is appropriate in all the circumstances and should not be reduced.

XI CONCLUSION

280. For the foregoing reasons we unanimously dismiss the appeal by Apex against the findings made by the OFT in Decision no. CA98/1/2004 of 16 March 2004.

Marion Simmons QC	Arthur Pryor	David Summers

Charles Dhanowa

Registrar

24 February 2005