
Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/02/2009

Bid rigging in the construction industry in England

21 September 2009

(Case CE/4327-04)

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [...]C].

COMPETITION ACT 1998

DECISION

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CONTENTS

A brief description of the contents of each section of this document.

Capitalised terms used in this Contents section are defined in the Glossary at pages 28 to 29 below.

Purpose of this Contents section

- (i) This Contents section is intended to assist readers with understanding the structure and purpose of this Decision. A more detailed Index follows.

Section I – Introduction

- (ii) The Introduction lists the Parties to the Infringements of the Chapter I prohibition of the Act which form the subject of this Decision. Some Parties comprise more than one legal person, i.e. the Participant Company, together with its ultimate parent company at the time of each Infringement, where relevant.

Section II – Factual Background

- (iii) The first part of the Factual Background section, ***II.A The Parties***, describes each of the Parties' primary activities and corporate structure. It lists details of the Parties' turnover and directors for each of the relevant years, and sets out the OFT's analysis of undertakings comprising more than one legal person, where relevant. The Parties' representations in relation to these matters are also addressed here.
- (iv) The second part of this section, ***II.B The OFT's Investigation***, provides details of the investigation carried out by the OFT in this case, including dates of inspections and searches, interviews and written requests for information, and the Statement and Supplementary Statements. This part also lists the leniency Parties and describes the OFT's Fast Track Offer made to the non-lenieny Parties. It also describes the process by which the OFT selected the Alleged Infringements included in the Statement from information received in relation to the Suspect Tenders, and sets out the OFT's decision not to pursue certain Alleged Infringements following the issue of the Statement and receipt of the Parties' representations.
- (v) This part also describes the circumstances in which leniency Parties will receive full immunity for Infringements, when a reduction in penalty will be available, and in general terms the number of penalties each leniency Party and non leniency Party will face.
- (vi) Representations from the Parties on possible alternative remedies, the nature, length and conduct of the OFT's investigation, the leniency process and the Fast Track Offer are also addressed in this part.
- (vii) The third part of the Factual Background section, ***II.C Definition of Relevant Markets***, sets out the OFT's definition of the relevant product markets and relevant geographic markets within which each of the Infringements is considered by the OFT to have occurred, and which form the basis of the starting point for the OFT's calculation of the penalty in respect of each of

those Infringements. The Parties' representations on market definition are also addressed here.

Section III – Legal Background

- (viii) This section sets out the legal framework against which each of the Infringements has been considered by the OFT. It includes, but is not restricted to, a description of the law relating to undertakings, price fixing and bid rigging activities including cover pricing and compensation payments. This section also addresses the Parties' representations on the legal background to this Decision.

Section IV – The Conduct of the Parties

- (ix) This section describes the Infringements that form the subject of this Decision, namely, bid rigging activities in the construction industry in England between the coming into force of the Act on 1 March 2000, and December 2006. The majority of the bid rigging activities discovered by the OFT involved cover pricing, which occurs when a company obtains a price from a competitor in the tender process which is not designed to win the contract but is intended to give the appearance of competition. In addition the OFT found a number of instances of payments made between bidders, commonly referred to as 'compensation payments'.
- (x) The first part of this section, ***IV.B General comments on cover pricing and other bid rigging activities in the construction industry in England***, sets out certain common themes that emerged in the course of the OFT's investigation, concerning the way in which construction companies conducted the practice of cover pricing and other bid rigging activities during the period under investigation. Many of the Parties in this case have testified to the endemic nature of the practice. The widespread and endemic practice of cover pricing in the construction industry was carried out in a relatively standard way, and the comments in this section should be read as applying to all Parties and all of the Infringements that are described in the following sections, except as specifically otherwise stated in the descriptions of the Infringements. The Parties' representations in relation to these matters are also addressed in this part.
- (xi) In order to avoid extensive repetition, the OFT sets out in the second part of this section, ***IV.C Leniency Parties' Approach to Cover Pricing and other Bid Rigging Activities***, evidence on the way in which each of the leniency Parties engaged in cover pricing and other bid rigging activities, that is common to all of the Infringements in which each leniency Party has been found to have participated. The Parties' representations in relation to this evidence are also addressed here. The information on each leniency Party is described in alphabetical order.
- (xii) The third part of this section, ***IV.D The Infringements***, sets out the specific evidence, and the inferences and conclusions drawn by the OFT from that evidence, in respect of each of the 199 specific Infringements in which the OFT has concluded that the Parties engaged in cover pricing and other bid rigging activities. The Parties' representations in relation to this evidence and the OFT's conclusions are also addressed on an Infringement-by-Infringement basis. The Infringements are described in chronological order.

- (xiii) Thus for each Infringement, reference should be made not only to the particular part of section IV.D setting out details of the Infringement, but also to the relevant part of section IV.C detailing the cover pricing activities of any leniency Party(ies) involved in that Infringement, and in addition to the general comments on cover pricing in section IV.B, which precedes both of those parts. The OFT has therefore included, in Annex A towards the end of this Decision, a **Navigation Table** (see below), which details the paragraphs in which the case against each Party may be found in relation to each relevant Infringement.

Section V – Legal Assessment

- (xiv) This section assesses the Infringements against the Legal Background and sets out the OFT’s conclusions, together with any representations from the Parties, and the OFT’s response.

Section VI – Enforcement

- (xv) This section states that the OFT is imposing financial penalties on each of the Parties in respect of a maximum of three Infringements. It sets out the factors the OFT has taken into account and its calculation methodology, including a separate penalty calculation for each Infringement and application of a Minimum Deterrence Threshold methodology at step 3 of the calculation.
- (xvi) This section also describes how the OFT has applied reductions in penalty for leniency Parties and discounts for non-leniency Parties that accepted the OFT’s Fast Track Offer.
- (xvii) The Parties’ representations on the OFT’s penalty calculations are also addressed in this section.

Annex A – Navigation Table

- (xviii) The Navigation Table in Annex A details the paragraphs in which the case against each Party may be found in relation to each relevant Infringement. The Parties are listed in alphabetical order and against each Party are listed the Infringement(s) in which that Party engaged in bid rigging activities, together with references to the relevant paragraphs in section IV.D describing that Infringement and the relevant paragraphs in section IV.C describing the cover pricing activities of the leniency Party(ies) involved in that Infringement, where applicable.
- (xix) The Navigation Table also makes it clear in respect of each Infringement: (a) for a leniency Party, whether: (i) it will receive either full 100 per cent immunity for that Infringement (because it is a But For Infringement for that Party); or (ii) it will receive its allocated leniency percentage deduction from the penalty for that Infringement (because it is a Not But For Infringement for that Party); or (iii) there will be no penalty (because the Infringement is not amongst the most recent three Not But For Infringements for the Party); and (b) for a non-leniency Party, whether it is receiving a 25 per cent deduction from penalty on that tender (because it accepted the OFT’s Fast Track Offer in respect of that tender) or alternatively is not receiving any deduction from penalty on that tender (because it did not accept the OFT’s Fast Track Offer in respect of that tender).

Annex B – List of Markets affected by each of the Infringements

- (xx) The table in Annex B sets out the relevant product market and the relevant geographic market into which the OFT considers each of the Infringements falls. This forms the basis of the starting point for the OFT's calculation of the penalty for each of the Parties in respect of each of those Infringements.

Annex C – List of Parties whose directors the OFT considers were involved in one or more of the Infringements

- (xxi) The tables in Annex C contain a list of the Parties whose directors the OFT considers were involved in one or more of the Infringements. The first table in Annex C lists the Parties in respect of which the OFT has evidence of general director involvement in bid rigging activities for all instances of bid rigging. The second table lists the Parties in respect of which the OFT has evidence of specific director involvement in bid rigging activities in relation to particular Infringement(s). The OFT considers that the involvement of company directors in the Infringements is an aggravating factor and has taken this into account at step 4 of the penalty calculation as set out in Section VI.

Annex D – Annexes to Definition of Relevant Markets

- (xxii) This section contains the Annexes D(1) to D(5) of section II.C, Definition of Relevant Markets.

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GLOSSARY

(i) In this Decision, the following are used as defined terms:

'2000 Order' means the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309);

'2004 Order' means the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259);

'Act' means the Competition Act 1998;

'Alleged Infringements' means the 244 alleged infringements included in the Statement;

'Article 81(1)' means Article 81(1) of the EC Treaty;

'But For Infringement' or **'But For tender'** means an instance of bid rigging on a tender about which the OFT would not have known, but for the evidence provided by a particular leniency Party, and in respect of which that leniency Party is receiving 100 per cent immunity from penalty (referred to as **'But For immunity'**) (see also paragraph II.1475 of this Decision);

'CAT' means the Competition Appeal Tribunal;

'CFI' means the European Court of First Instance;

'Chapter I prohibition' means the prohibition imposed by section 2(1) of the Act;

'Commission' means the European Commission;

'Decision' means this Decision, issued by the OFT on 21 September 2009;

'EC' means the European Community;

'ECJ' means the European Court of Justice;

'EU' means the European Union;

'EU Council' means the Council of the European Union;

'Infringements' means the 199 infringements particularised in Section IV of this Decision, consisting of agreements and/or concerted practices which had as their object the prevention, restriction or distortion of competition through cartel activity, taking the form of collusive tendering or bid rigging in the construction industry in England (each an **'Infringement'**);

'leniency Parties' means the Parties that have applied for, and been granted, leniency in this case;

'Modernisation Regulation' means Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty;

'Navigation Table' means the navigation table at Annex A of this Decision;

'non-leniency Parties' means the Parties that have not applied for leniency in this case;

'Not But For Infringement' or **'Not But For tender'** means an instance of bid rigging on a tender which does not qualify as a But For Infringement/But For tender for a particular leniency Party, and in respect of which that leniency Party is receiving its allocated percentage deduction from any penalty (see paragraph VI.386 of this Decision);

'OFT' means the Office of Fair Trading;

'OFT's Fast Track Offer' means the OFT's offer of a reduction in penalty to the non-leniency Parties (see also paragraphs II.1481 to II.1487 of the Decision);

'Participant Company' means the legal entity directly involved in the relevant Infringement;

'Parties' means the undertakings listed at paragraph I.1 of this Decision (each a **'Party'**);

'Penalty Guidance' means OFT 423 *OFT's Guidance as to the appropriate amount of a Penalty* (December 2004);

'Suspect Tenders' means the 4,000 tenders, involving over 1,000 companies in respect of which the OFT received information as part of its investigation in this case;

'Statement' means the Statement of Objections in this case, issued by the OFT on 16 April 2008;

'Supplementary Statements' means the six Supplementary Statements of Objections issued by the OFT to affected Parties on 23 December 2008, 9 February 2009, 18 March 2009, 30 March 2009, 16 April 2009 and 19 May 2009 (each a **'Supplementary Statement'**), described in more detail at paragraphs II.1584 to II.1590 of this Decision; and

'UK' means the United Kingdom.

- (ii) In addition to the terms defined above, the legal persons which are addresses of this Decision are defined in the list of Parties in Section I of this Decision at paragraph I.1.
- (iii) Certain other terms, which are used in only a particular part or section of this Decision, are defined therein.

SECTION I – INTRODUCTION

A. The purpose of this document

- I.1. The OFT has concluded that the following Parties have been party to one or more agreements and/or concerted practices that infringe the Chapter I prohibition of the Act:
1. A. H. Willis & Sons Limited ('A H Willis')
 2. ARG (Mansfield) Limited ('ARG')
 3. Ackroyd & Abbott Limited ('Ackroyd & Abbott') together with its subsidiary Ackroyd & Abbott Construction Limited ('Ackroyd & Abbott Construction')
 4. Adam Eastwood & Sons Limited ('Adam Eastwood') together with its controlling party the Sir John Eastwood Foundation ('Eastwood Foundation')
 5. Admiral Construction Limited ('Admiral') together with (for infringements from 31 October 2003) its ultimate parent company A C Holdings Limited ('A C Holdings')
 6. Allenbuild Limited ('Allenbuild') and Bullock Construction Limited ('Bullock') together with the current ultimate parent company of Allenbuild and the former ultimate parent company of Bullock, Renew Holdings plc ('Renew')
 7. Apollo Property Services Group Limited formerly known as Apollo London Limited ('Apollo') together with its former ultimate parent company Apollo Holdco Limited formerly known as Apollo Group Holdings Limited ('Apollo Group')
 8. Arthur M. Griffiths & Sons Limited ('Arthur M Griffiths')
 9. B & A Construction (Leicester) Limited ('B & A')
 10. Baggaley & Jenkins Limited ('Baggaley & Jenkins')
 11. Balfour Beatty Construction Limited ('BBCL') and Balfour Beatty Refurbishment Limited ('BBRL') (for infringements from 2000 onwards) and Mansell Construction Services Limited ('Mansell') (for infringements from 19 December 2003), together with their current ultimate parent company Balfour Beatty plc. For infringements involving Mansell prior to 19 December 2003, Mansell and its former ultimate parent company Mansell plc
 12. Ballast Nedam N.V. ('Ballast Nedam') as the ultimate parent company of its dissolved subsidiary Ballast plc ('Ballast')
 13. Beaufort Construction (S-in-A) Limited ('Beaufort') together with its ultimate parent company Beaufort Holdings U.K. Limited ('Beaufort Holdings')
 14. Bodill & Sons (Contractors) Limited ('Bodill')
 15. Bowmer & Kirkland Limited ('Bowmer & Kirkland') together with its subsidiary B & K Property Services Limited ('BKPS')
 16. Bramall Construction Limited ('Bramall') and Frank Haslam Milan & Company Limited ('Frank Haslam Milan') together with their ultimate parent company Keepmoat Limited formerly known as Keepmoat plc ('Keepmoat')
 17. C. J. Ellmore & Company Limited ('C J Ellmore')
 18. Caddick Construction Limited ('Caddick') together with its ultimate parent company Caddick Group plc ('Caddick Group')
 19. Carillion JM Limited ('Mowlem')

20. Clegg Construction Limited ('Clegg') together with its ultimate parent company Clegg Group Limited formerly known as D E Clegg Holdings Limited ('D E Clegg')
21. Connaught Partnerships Limited ('Connaught') together with its ultimate parent company Connaught plc
22. Crown Point Maintenance Group Limited ('Crown Point') as the ultimate parent company of its dissolved subsidiary Greenwood Building Contractors (Mansfield) Limited ('Greenwood'), for Greenwood's infringements after 11 June 2002
23. Davlyn Construction Limited ('Davlyn')
24. Derwent Valley Construction Limited ('Derwent Valley') together with its ultimate parent company Chevin Holdings Limited ('Chevin')
25. Dukeries Building Company Limited ('Dukeries')
26. Durkan Pudelek Limited now trading as Concentra Limited ('Durkan') and Durkan Limited ('Durkan Limited'), together with the former ultimate parent company of Durkan and the current ultimate parent company of Durkan Limited, Durkan Holdings Limited ('Durkan Holdings')
27. E. Manton Limited ('E Manton')
28. E. Taylor & Sons (Southwell) Limited ('E Taylor'), trading as Carmalor Construction ('Carmalor')
29. F. Parkinson Limited ('F Parkinson') together with its ultimate parent company Mowbray Holdings Limited ('Mowbray')
30. Francis Construction Limited ('Francis') together with its ultimate parent company Barrett Estates Services Limited ('Barrett')
31. Frudd Construction Limited ('Frudd')
32. GAJ Construction Limited ('GAJ') together with its ultimate parent company GAJ (Holdings) Limited ('GAJ Holdings')
33. G Carter Construction Limited ('G Carter')
34. G. F. Tomlinson Building Limited ('G F Tomlinson') together with its ultimate parent company G. F. Tomlinson Group Limited ('G F Tomlinson Group')
35. G G Middleton and Sons Limited ('G G Middleton')
36. G. & J. Seddon Limited ('G & J Seddon') together with its ultimate parent company Seddon Group Limited ('Seddon')
37. GMI Construction Group plc ('GMI') together with (for infringements after 6 February 2005) its current ultimate parent company GMI Construction Holdings plc ('GMI Construction Holdings')
38. Geo Houlton & Sons Limited ('Geo Houlton') together with its ultimate parent company Geo Houlton & Sons (Holdings) Limited ('Geo Houlton Holdings')
39. Greswolde Construction Limited ('Greswolde') together with its ultimate parent company Mantisson Limited ('Mantisson')
40. Hall Construction Group Limited ('Hall')
41. Harlow & Milner Limited ('Harlow & Milner')
42. Harold Adkin & Sons (Sutton-In-Ashfield) Limited ('Harold Adkin')
43. Haymills (Contractors) Limited now trading as Straw Realisations (No1) Limited ('Haymills') together with (for infringements prior to 26 May 2004) its former ultimate parent company Corringway Conclusions plc ('Corringway') and (for infringements after 26 May 2004) its current ultimate parent company Haymills Group Limited ('Haymills Group')
44. Henry Boot Construction (UK) Limited ('Henry Boot') together with its ultimate parent company Henry Boot plc
45. Herbert Baggaley Construction Limited ('Herbert Baggaley') together with its ultimate parent company Baggaley Group Limited ('Baggaley Group')

46. Hill Bros. (Nottingham) Limited ('Hill')
47. Hobson & Porter Limited ('Hobson & Porter')
48. Holroyd Construction Limited ('Holroyd') together with (for infringements prior to 30 March 2005) its former ultimate parent company Holderness Investments Limited ('Holderness') and (for infringements after 30 March 2005) its current ultimate parent company Holroyd Construction Group Limited ('Holroyd Group')
49. Interclass Public Limited Company ('Interclass') together with its ultimate parent company Interclass Holdings Limited ('Interclass Holdings')
50. Interserve Project Services Limited ('Interserve') together with its ultimate parent company Interserve plc
51. Irwins Limited ('Irwins') and Jack Lunn (Construction) Limited ('Jack Lunn') together with their ultimate parent company Jack Lunn (Holdings) Limited ('Jack Lunn Holdings')
52. J. Harper & Sons (Leominster) Limited ('J Harper') together with its ultimate parent company Harper Group plc ('Harper plc')
53. JH Hallam (Contracts) Limited ('J H Hallam') together with its ultimate parent company JH Hallam (R & J) Limited ('Hallam')
54. J. J. & A. R. Jackson Limited ('J J & A R Jackson')
55. J. J. McGinley Limited ('J J McGinley'), together with its former ultimate parent company McGinley Holdings Limited ('McGinley Holdings')
56. John Cawley Limited now trading as John Cawley Developments Limited ('John Cawley')
57. John Sisk & Son Limited ('John Sisk') together with its ultimate parent company Sicon Limited ('Sicon')
58. K. J. Bryan (Builders) Limited ('K J Bryan')
59. Kier Regional Limited ('Kier') together with its ultimate parent company Kier Group plc ('Kier Group')
60. Lemmeleg Limited ('Lemmeleg') together with its ultimate parent company Rok plc ('Rok')
61. Lindum Construction Co. Limited ('Lindum') together with its ultimate parent company Lindum Group Limited ('Lindum Group')
62. Linford Group Limited ('Linford') together with its ultimate parent company F. & E. V. Linford Limited ('F & E V Linford')
63. Loach Construction & Development Limited ('Loach')
64. Lotus Construction Limited ('Lotus')
65. Milward Construction (Belper) Limited ('Milward')
66. Morgan Ashurst plc formerly known as Bluestone Plc ('Bluestone') together with its ultimate parent company Morgan Sindall plc ('Morgan Sindall')
67. North Midland Construction plc ('North Midland')
68. P D H Developments Limited (formerly trading as G. Hurst & Sons (Contractors) Limited) ('PDH') together with its ultimate parent company G. Hurst & Sons Limited ('G Hurst & Sons')
69. P. Casey & Co. Limited ('P Casey') together with its ultimate parent company The Casey Group Limited ('The Casey Group')
70. P. Waller Limited ('P Waller')
71. Pearce Construction (Midlands) Limited ('Pearce'), together with its parent ISG Pearce Limited (formerly Pearce Group Limited, formerly Pearce Group plc) ('Pearce Group') and their former ultimate parent company Crest Nicholson plc ('Crest Nicholson')
72. Peter Baines Limited ('Peter Baines')
73. Phoenix Contracts (Leicester) Limited ('Phoenix')

74. Propensity Group Limited ('Propensity') together with its wholly owned subsidiary companies, ISG Jackson Limited ('Jackson'), ISG Regions Limited formerly known as Totty Construction Group Limited ('Totty'), ISG Regions Building Limited formerly known as Totty Building Services Limited ('Totty Building') and Propensity Limited
75. Quarmby Construction Company Limited ('Quarmby') together with its ultimate parent company St James Securities Holdings Limited ('St James Securities')
76. Quarmby Construction (Special Projects) Limited ('Quarmby (Special Projects)') together with its ultimate parent company Justgrade Limited ('Justgrade')
77. R Durtnell & Sons Limited ('R Durtnell') together with its ultimate parent company R Durtnell & Sons (Holdings) Limited ('Durtnell Holdings')
78. R. G. Carter Limited ('R G Carter') and R. G. Carter Building Limited ('R G Building') together with their ultimate parent company R. G. Carter Holdings Limited ('R G Holdings')
79. Richardson Projects Limited ('Richardson Projects')
80. Robert Woodhead Limited ('Robert Woodhead') together with its ultimate parent company Robert Woodhead Holdings Limited ('Woodhead Holdings')
81. Robinson & Sawdon Limited ('Robinson & Sawdon')
82. Shaylor Construction Limited ('Shaylor')
83. Simons Construction Limited ('Simons') and Wrights Construction (Lincoln) Limited ('Wrights (Lincoln)') together with their ultimate parent company Simons Group Limited ('Simons Group')
84. Sol Construction Limited ('Sol') together with its ultimate parent company Barkbury Limited ('Barkbury')
85. Speller-Metcalfe Malvern Limited formerly known as Speller-Metcalfe Limited ('Speller-Metcalfe')
86. Stainforth Construction Limited ('Stainforth')
87. Strata Construction Limited (formerly trading as Weaver) ('Strata')
88. T. & C. Williams (Builders) Limited ('T & C Williams')
89. T. Denman & Sons (Melton Mowbray) Limited ('T Denman')
90. Thomas Fish & Sons Limited now trading as TF Realisations Limited ('Thomas Fish') together with its ultimate parent company Fish Holdings Limited ('Fish Holdings')
91. Thomas Long & Sons Limited ('Thomas Long') together with its ultimate parent company Radford Holdings Limited ('Radford')
92. Thomas Vale Construction Plc ('Thomas Vale') together with its ultimate parent company Thomas Vale Holdings Limited ('Thomas Vale Holdings')
93. Thorndyke Limited ('Thorndyke')
94. Try Accord Limited ('Try Accord') and Galliford Try Construction Limited ('Galliford Construction') together with their ultimate parent company Galliford Try plc ('Galliford Try')
95. W. R. Bloodworth & Sons Limited ('W R Bloodworth')
96. Wiggett Bros & Co Limited ('Wiggett')
97. Wildgoose Construction Limited ('Wildgoose')
98. William Sapcote and Sons Limited ('William Sapcote') together with its ultimate parent company Sapcote Holdings Limited ('Sapcote Holdings')
99. William Woodsend Limited ('William Woodsend')
100. Willmott Dixon Construction Limited ('Willmott Dixon') together with its ultimate parent company Willmott Dixon Limited now trading as Willmott Dixon Holdings Limited ('Willmott Dixon Limited')

101. Wright (Hull) Limited ('Wright (Hull)') together with its ultimate parent company T. Wright & Son (Holdings) Limited ('T Wright Holdings')
102. Wygar Construction Co Limited ('Wygar') together with its ultimate parent company Wygar (Holdings) Limited ('Wygar Holdings')
103. York House Construction Limited ('York House').

I.2. In addition, whilst the following dissolved companies are referred to, the OFT has not included them as addressees of this Decision since there is no longer any legal or economic entity with undertaking identity to pursue.

1. Craske Building Limited ('Craske') together with its former ultimate parent company Craske (Midlands) Limited ('Craske Midlands')
2. K. W. Brookes (Contractors) Limited ('K W Brookes')

B. Summary of the Infringements and the OFT's enforcement action

I.3. The OFT has concluded that the Parties, between 2000 and 2006 and in breach of the Chapter I prohibition, were each involved in one or more Infringements. In particular, in relation to a number of contracts for which the Parties were invited to tender, each of the Parties engaged in bid rigging activities comprising (1) cover pricing by either requesting a 'cover price'¹ for themselves or providing a 'cover price' in response to requests from other Parties, or both, and/or (2) agreements to pay compensation to a competing bidder.

I.4. The OFT considers that agreements and/or concerted practices between undertakings that directly or indirectly engage in bid rigging arrangements are among the most serious infringements of the Act.² The CAT has fully endorsed the OFT's decision in its investigations into the roofing industry that cover pricing is anti-competitive and contravenes the Chapter I prohibition.³

I.5. The OFT is imposing financial penalties under section 36 of the Act on each of the Parties in relation to their respective Infringement(s).

I.6. The list of Infringements relating to each of the Parties is set out in the Navigation Table at **Annex A**. This table also details the paragraphs of this Decision in which the information relating to each of the Infringements may be found.

I.7. In this document, the OFT addresses at various points the Parties' representations made in response to the Statement and Supplementary Statements. The Parties' representations are grouped and addressed according to their substance (rather than the specific sub-heading under which the Party made the representation). Where several Parties have made the same or a similar representation, the OFT has usually cited a few by way of example. These citations are non-exhaustive and the OFT has nevertheless taken into account all representations made on any particular point. Where representations have been made jointly by two or more group companies, for ease of reading the OFT has tended to refer only to the Participant Company.

¹ See paragraph IV.7 below for an explanation of cover pricing.

² Collusive tendering or bid rigging is among the most serious infringements of competition law, as reflected in its inclusion within the criminal cartel offence under section 188 of the Enterprise Act 2002.

³ See *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4.

SECTION II – FACTUAL BACKGROUND

A. The Parties

Introduction to this Section

- II.1. This section sets out, Party by Party in the same alphabetical order as used in paragraph I.1 above, the details of all of the Parties which the OFT has found to have engaged in the Infringements.
- II.2. In particular, this section describes each of the Parties' primary activities and corporate structure at relevant times.
- II.3. This section also sets out the relevant Parties' latest available total turnover figures (consolidated or group turnover where applicable in the case of ultimate parents) which, unless otherwise stated, relate to the business year preceding this Decision. The majority of the total turnover figures in this section have been obtained by the OFT from each of the Parties.
- II.4. This section also lists the Participant Companies' directors, and where applicable their ultimate parents' directors, for each of the relevant years, from the information available to the OFT.
- II.5. Finally, this section sets out the OFT's conclusions on liability for the Infringements, including where applicable the joint and several liability of the ultimate parent company of the undertaking involved in each of the relevant Infringements.

Points of general applicability and importance

Currency of company information

- II.6. This Decision generally contains the latest information available to the OFT at the time of writing. Where there has been a change in corporate structure since the date of the Statement, this will not affect the OFT's view on liability, which is generally formed by the circumstances that existed at the time of the relevant Infringement(s). Due to the possibility that there may have been a change in the company name and/or registered address, each Party's company number, as recorded at Companies House, is detailed below. This Decision is to be construed as applying to the company registered with the stated company number, however named and/or irrespective of its registered address prior, at, or subsequent to the time of the relevant Infringement(s).
- II.7. Similarly the information on companies' activities and numbers of subsidiaries generally reflects the position at the time of the Statement, and changes since that time have not usually been recorded as they do not affect the OFT's position on liability.

References to years (e.g. 2000, 2006)

- II.8. Unless otherwise specified, any reference in this section to 2000, for example for the date of appointment of a director, should be taken as meaning 1 March 2000, the date upon which the Act came into force. Similarly, any reference in this section to 2006 should be taken as meaning 31 December 2006, the cut-off date for the OFT's investigation in this case. It should be noted, for

example, that where a director was already in post on 1 March 2000, only the year 2000 is referred to and not the actual date of appointment. Where a director was still in post on 31 December 2006, again only the year 2006 is referred to and not the actual date of resignation.

- II.9. References to years between those dates, i.e. 2001, 2002, 2003, 2004 or 2005, should be taken as meaning the entirety of the relevant calendar year. For example, if the OFT states that a director was in post from 2002 to 2004, this means that the director was in post at least from 1 January 2002 to 31 December 2004.

A. H. Willis and Sons Limited ('A H Willis')

- II.10. A H Willis is a private limited company registered in England and Wales, company number 04575214.⁴ It was incorporated on 28 October 2002.⁵ A H Willis's registered address is Griffins Court, 24-32 London Road, Newbury, Berkshire RG14 1JX⁶ and its head office is located at Wilmar, Gainfield, Buckland, Faringdon, Oxon, SN7 8QQ.⁷
- II.11. At the time of issue of the Statement, A H Willis undertook work as general building contractors in the education, housing and infrastructure sectors⁸ and it did not carry out work outside the United Kingdom.
- II.12. A H Willis has no holding companies or subsidiaries.⁹
- II.13. A H Willis's turnover for the financial year ending 31 December 2008 was [...] [C].¹⁰
- II.14. The directors of A H Willis from 2003 to 2006 were as follows:¹¹
- | | |
|-------------------------|-------------|
| - Andrew James Willis | 2003 – 2006 |
| - Anthony Hugh Willis | 2003 – 2006 |
| - Brenda Loraine Willis | 2003 – 2006 |
| - Mark Andrew Willis | 2003 – 2006 |
| - Steven Hugh Willis | 2003 – 2006 |
- II.15. A H Willis did not apply for leniency, but was given the opportunity of accepting the OFT's Fast Track Offer.¹²
- II.16. This Decision is addressed to A H Willis. The OFT considers that A H Willis is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

⁴ FAME report, OFT Document Reference 11526.

⁵ Certificate of Incorporation, OFT Document Reference 11528.

⁶ Latest available Companies House information

⁷ Market definition response, OFT Document Reference 6642.

⁸ FAME report, OFT Document Reference 11526 and Market definition response, OFT Document Reference 6642.

⁹ FAME report, OFT Document Reference 11526.

¹⁰ Letter from Griffins, 29 June 2009.

¹¹ Company Appointments, OFT Document Reference 11527.

¹² See paragraphs II.1481 to II.1487 below.

A.R.G. (Mansfield) Limited ('ARG')

- II.17. ARG is a private limited company registered in England, company number 02915437.¹³ ARG's registered and primary trading address is Dukeries House, Mill Way, Old Mill Lane Industrial Estate, Mansfield Woodhouse, Nottinghamshire, NG19 9BG.¹⁴
- II.18. ARG is a local, family business operating throughout the Midlands and, at the time of issue of the Statement, undertook general construction, refurbishment and design and build projects for private sector clients, public sector clients, local authorities, education bodies, healthcare associations and housing associations.¹⁵ At the time of issue of the Statement, ARG did not carry out work outside the United Kingdom.
- II.19. ARG has no holding companies or subsidiaries.¹⁶
- II.20. ARG's turnover for the financial year ending 31 March 2009 was [...] [C].¹⁷
- II.21. The directors of ARG from 2000 to 2006 were as follows:¹⁸
- | | |
|---------------------------|-------------|
| - Andrew Eato | 2000 – 2006 |
| - Allan Russell Gregory | 2000 – 2006 |
| - Jacqueline Roma Gregory | 2000 – 2006 |
- II.22. ARG applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁹
- II.23. This Decision is addressed to ARG. The OFT considers that ARG is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Ackroyd & Abbott Construction Limited ('Ackroyd & Abbott Construction')
Ackroyd & Abbott Limited ('Ackroyd & Abbott')

- II.24. Ackroyd & Abbott Construction is a private limited company registered in England and Wales, company number 00697176.²⁰ Ackroyd & Abbott Construction's registered and primary trading address is 2 Rotherham Road, Sheffield 13, Sheffield, South Yorkshire, S13 9LL.²¹
- II.25. At the time of issue of the Statement, Ackroyd & Abbott Construction undertook a variety of general construction work including the refurbishment of

¹³ FAME report, OFT Document Reference 11595.

¹⁴ FAME report, OFT Document Reference 11595.

¹⁵ ARG Website, OFT Document Reference 11598.

¹⁶ FAME report, OFT Document Reference 11595.

¹⁷ Letter from Bruce J. Woodcock, 7 July 2009.

¹⁸ Company Appointments Report, OFT Document Reference 11599.

¹⁹ See Part 3 of OFT Guidance 423

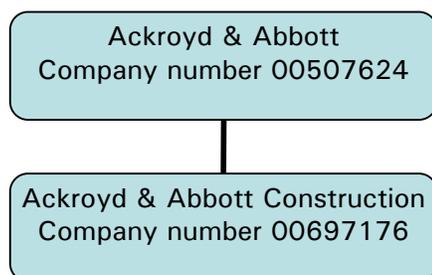
http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

²⁰ FAME report, OFT Document Reference 11525b.

²¹ FAME report, OFT Document Reference 11525b.

housing stock, listed commercial buildings, factories, hospitals, schools and new build housing.²² At the time of issue of the Statement, Ackroyd & Abbott Construction did not carry out work outside the United Kingdom.

- II.26. Ackroyd & Abbott Construction ceased trading in 2006.²³ Ackroyd & Abbott Construction is a dormant company.²⁴
- II.27. Ackroyd & Abbott Construction has no subsidiaries.²⁵
- II.28. Ackroyd & Abbott Construction's ultimate parent company is Ackroyd & Abbott, a public limited company, company number 00507624.²⁶ Ackroyd & Abbott's registered address is 2 Rotherham Road, Handsworth, Sheffield, South Yorkshire, S13 9LL.²⁷ Ackroyd & Abbott Construction is a wholly owned subsidiary of Ackroyd & Abbott.²⁸
- II.29. Ackroyd & Abbott has seven other subsidiaries, of which six are wholly owned.²⁹
- II.30. The overall company structure from 2000 to 2006 is as follows:³⁰



- II.31. Ackroyd & Abbott's consolidated turnover for the financial year ending 30 April 2009 was [...] [C].³¹
- II.32. The directors of Ackroyd & Abbott Construction from 2000 to 2006 were as follows:³²
 - Neil Drummond 2000 – 2006
 - Peter Horsepool 2000 – 2006
 - Richard Neil Horsepool 2000 – 2006
 - Geoffrey Kingston 6 October 2004 – 2006

- II.33. The directors of Ackroyd & Abbott from 2000 to 2006 were as follows:³³

²² Ackroyd & Abbott's website, OFT Document Reference 11525 and market definition response, OFT Document Reference 6789.

²³ Market definition response, OFT Document Reference 6789.

²⁴ FAME report, OFT Document Reference 11525b.

²⁵ FAME report, OFT Document Reference 11525b.

²⁶ FAME report, OFT Document Reference 11522.

²⁷ FAME report, OFT Document Reference 11522.

²⁸ FAME report, OFT Document Reference 11522.

²⁹ Latest available FAME report of Ackroyd and Abbott.

³⁰ Directors report, OFT Document reference 11521 and Directors report, OFT Document Reference 11523.

³¹ Email from DLA Piper UK LLP, 8 July 2009.

³² Company Appointments, OFT Document Reference 11525a

³³ Company Appointments, OFT Document Reference 11524.

- Andrew James Hartley 2000 – 2006
- Peter Horsepool 2000 – 2006
- Richard Neil Horsepool 2000 – 2006
- Robert Matthew Rusling 1 December 2002 – 2006
- George Arthur Wain 2000 – 2006

II.34. The following directors were on the Board of Directors of both Ackroyd & Abbott Construction and Ackroyd & Abbott for the periods mentioned below.³⁴ The OFT considers that this provides evidence that Ackroyd & Abbott exercised decisive influence over Ackroyd & Abbott Construction's conduct at the time of the Infringements.

- Peter Horsepool 2000 – 2006
- Richard Neil Horsepool 2000 – 2006

II.35. Ackroyd and Abbott did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.³⁵

II.36. The OFT considers that Ackroyd & Abbott as 100 per cent owner of Ackroyd & Abbott Construction, can be presumed to have exercised decisive influence over Ackroyd & Abbott Construction's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Ackroyd & Abbott and Ackroyd & Abbott Construction. Ackroyd & Abbott Construction and Ackroyd & Abbott are therefore jointly and severally liable for Ackroyd & Abbott Construction's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.37. This Decision is therefore addressed to Ackroyd & Abbott Construction and Ackroyd & Abbott.

Adam Eastwood & Sons Limited ('Adam Eastwood')
Sir John Eastwood Foundation ('Eastwood Foundation')

II.38. Adam Eastwood is a private limited company registered in England and Wales, company number 00286134.³⁶ Adam Eastwood's registered and primary trading address is 9803 Handley Arcade, Leeming Street, Mansfield, NG13 9FT.³⁷

II.39. At the time of issue of the Statement, Adam Eastwood was a building and civil engineering contractor³⁸ and it did not carry out work outside the United Kingdom.

II.40. Adam Eastwood was wholly owned from 2000 until 2006 by the Eastwood Foundation, which is a registered charity.³⁹ The Eastwood Foundation's

³⁴ Company Appointments reports, OFT Document Reference 11525a and 11524.

³⁵ See paragraphs II.1481 to II.1487 below.

³⁶ FAME Report, OFT Document Reference 11542.

³⁷ Latest available Companies House information.

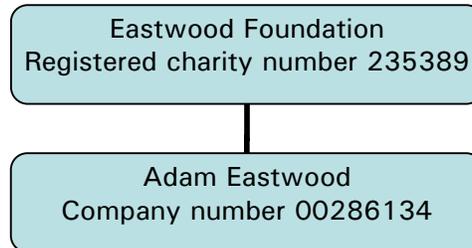
³⁸ FAME Report, OFT Document Reference 11542.

³⁹ Report of the Directors and Financial Statements, OFT Document Reference 11543 and 11544.

registered charity number is 235389.⁴⁰ The principal address of the Eastwood Foundation is Burns Lane, Warsop, Mansfield, Nottingham, NG20 0QG.⁴¹

II.41. Adam Eastwood has one subsidiary.⁴²

II.42. The overall structure is therefore as follows:



II.43. Adam Eastwood's turnover for the financial year ending 31 March 2009 was [...] [C].⁴³

II.44. Eastwood Foundation does not trade and therefore has no turnover of its own.⁴⁴

II.45. The directors of Adam Eastwood from 2000 to 2006 were as follows:⁴⁵

- Charles Geoffrey Dawson 2000 – 2006
- Colin Gillatt 2000 – 2006
- David William Marriott 2000 – 2006
- Peter Michie Spencer 17 October 2001 – 2006
- Christopher Stubbs 6 April 2006 – 2006
- Adrian Tranter 2000 – 2006

II.46. The trustees of the Eastwood Foundation from 2000 to 2006 were as follows:⁴⁶

- G G Raymond 2000 – 2006
- D M Cottingham 2000 – 2006
- V A Hardingham 2000 – 2006
- C B Mudford 2000 – 2006
- P M Spencer 2000 – 2006

II.47. The following director has been on the Board of Directors of Adam Eastwood and acted as a trustee of the Eastwood Foundation during the period mentioned below.⁴⁷ The OFT considers that this provides evidence that the Eastwood Foundation exercised decisive influence over Adam Eastwood's conduct at the time of the Infringements.

- Peter Michie Spencer 17 October 2001 – 2006

⁴⁰ Report and Financial Statements, OFT Document Reference 11546c.

⁴¹ Report and Financial Statements, OFT Document Reference 11546c.

⁴² FAME Report, OFT Document Reference 11542.

⁴³ Letter from Harrop White, Vallence & Dawson, 15 May 2009.

⁴⁴ Letter from Harrop White, Vallence & Dawson, 15 May 2009.

⁴⁵ Company Appointments Report, OFT Document Reference 11545.

⁴⁶ Report and Financial Statements, OFT Document Reference SA001 to SA006.

⁴⁷ Company Appointments Report, OFT Document Reference 11545 and Report and Financial Statements, OFT Document Reference SA001 to SA006.

- II.48. Adam Eastwood applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁴⁸
- II.49. The OFT considers that the Eastwood Foundation, as 100 per cent owner and controlling party of Adam Eastwood, can be presumed to have exercised decisive influence over Adam Eastwood's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition, in respect of the period from 17 October 2001 to 2006, the evidence of the exercise of decisive influence in the form of directors in common between the Eastwood Foundation and Adam Eastwood at the time of the . Adam Eastwood and the Eastwood Foundation are therefore jointly and severally liable for Adam Eastwood's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringements 50, 108 and 116.⁴⁹
- II.50. In its response to the Statement, the Eastwood Foundation disputed the OFT's preliminary finding that it had decisive influence over Adam Eastwood. The Eastwood Foundation submitted that it held shares in Adam Eastwood as an investment and did not interfere in the day-to-day running of Adam Eastwood, but instead maintained 'a watching and supportive brief.'⁵⁰ Furthermore the Eastwood Foundation questioned the legal basis for finding that a charity could be jointly and severally liable for an infringement committed by its trading subsidiary.⁵¹
- II.51. The OFT has had regard to all the submissions put forward by Adam Eastwood and the Eastwood Foundation in relation to this issue. In the light of the 100 per cent shareholding in Adam Eastwood held by the Eastwood Foundation and the common directorship noted above, the OFT considers that it is entitled to rely on the presumption of decisive influence as set out in paragraphs III.13 to III.18 below. Furthermore the OFT considers that the submissions put forward by the Eastwood Foundation and Adam Eastwood fall short of establishing that Adam Eastwood determined its conduct on the market autonomously.
- II.52. It follows that the OFT is entitled to treat Adam Eastwood and the Eastwood Foundation as forming the same undertaking for the purposes of the Chapter I prohibition. While that undertaking has a not-for-profit function (in the form of the charitable grant-making activities of the Eastwood Foundation), it also pursued between 2000 and 2006 the economic activities conducted by Adam Eastwood.⁵² In the OFT's view those activities must be considered separately, and the fact of the Eastwood Foundation's social function does not entail that Adam Eastwood's economic activities fall outside the scope of the Chapter I prohibition.⁵³
- II.53. This Decision is therefore addressed to Adam Eastwood and the Eastwood Foundation.

⁴⁸ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

⁴⁹ The penalty in respect of Infringement 116 is reduced to zero as this is a 'But for' Infringement.

⁵⁰ Written representations of Adam Eastwood and Eastwood Foundation, 26 June 2008, pages 2 and 6.

⁵¹ Letter from Adam Eastwood and Eastwood Foundation, 8 May 2008, page 1.

⁵² The OFT notes in any event that the attribution of joint and several liability to the Eastwood Foundation does not affect the overall level of penalty.

⁵³ See for example Case T-155/04 *SELEX* [2006] ECR II-4797, paragraph 54; see also OFT Decision CA98/05/2006, Case CE/2890-03 *Exchange of information on future fees by certain independent fee-paying schools*, 20 November 2006, at paragraphs 1312 to 1316.

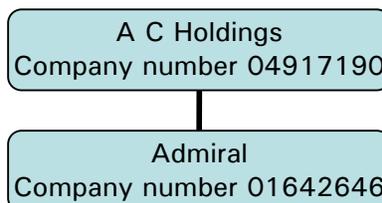
Admiral Construction Limited ('Admiral')
A C Holdings Limited ('A C Holdings')

- II.54. Admiral is a private limited company registered in England and Wales, company number 01642646.⁵⁴ Admiral's registered and primary trading address is Chiverton Yard, 39 Chesterfield Road, Dronfield, Derbyshire, S18 2XG.⁵⁵
- II.55. At the time of issue of the Statement, Admiral undertook general construction and civil engineering works in the commercial and industrial sectors⁵⁶ and it did not carry out work outside the United Kingdom.
- II.56. Admiral has no subsidiaries.⁵⁷
- II.57. Admiral's ultimate parent company is A C Holdings, a private limited company, company number 04917190.⁵⁸ A C Holdings was incorporated on 1 October 2003 and the shares of Admiral were transferred to A C Holdings on 31 October 2003.⁵⁹ A C Holdings' registered address is 27 Meadowhead, Sheffield, Yorkshire, S8 7UA.⁶⁰ Admiral is a wholly owned subsidiary of A C Holdings.⁶¹
- II.58. The relevant company structure is outlined below:

2000 – 31 October 2003



31 October 2003 – 2006



- II.59. A C Holdings has one other wholly owned subsidiary.⁶²
- II.60. Admiral's turnover for the financial year ending 30 June 2008 was [...] [C].⁶³
- II.61. A C Holdings does not trade and therefore has no turnover of its own.⁶⁴

⁵⁴ FAME report, OFT Document Reference 11536.

⁵⁵ FAME report, OFT Document Reference 11536.

⁵⁶ FAME report, OFT Document Reference 11536 and Market Definition, OFT Document Reference 5749.

⁵⁷ FAME report, OFT Document Reference 11536.

⁵⁸ FAME report, OFT Document Reference 11537.

⁵⁹ 363s Annual Return, OFT Document Reference 11541a.

⁶⁰ FAME report, OFT Document Reference 11537.

⁶¹ FAME report, OFT Document Reference 11537.

⁶² Latest available FAME report of AC Holdings.

⁶³ Email from Irwin Mitchell Solicitors, 20 July 2009.

⁶⁴ Latest available FAME report of Admiral.

- II.62. The directors of Admiral from 2000 to 2006 were as follows:⁶⁵
- Andrew Clarkson 2000 – 2006
 - Keith Edwin Roebuck 2000 – 2006
 - Patricia Roebuck 2000 – 2006
 - Stephen Henry Savage 2000 – 2006
- II.63. The directors of A C Holdings from 2003 to 2006 were as follows:⁶⁶
- Keith Edwin Roebuck 13 October 2003 – 2006
 - Patricia Roebuck 13 October 2003 – 2006
 - Stephen Henry Savage 15 October 2003 – 2006
- II.64. The following directors have been on the Board of Directors of both Admiral and A C Holdings during the period mentioned below. The OFT considers that this provides evidence that A C Holdings exercised decisive influence over Admiral's conduct from 31 October 2003⁶⁷ to 2006.
- Keith Edwin Roebuck 13 October 2003 – 2006
 - Patricia Roebuck 13 October 2003 – 2006
 - Stephen Henry Savage 15 October 2003 – 2006
- II.65. Admiral applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁶⁸
- II.66. The OFT considers that Admiral is solely liable for the Infringements described in this Decision preceding 31 October 2003 and that it is therefore liable for payment of the penalties that the OFT is imposing in respect of Infringements 53 and 136, on account of the participation in the Infringements of that undertaking.
- II.67. The OFT considers that A C Holdings, as 100 per cent owner of Admiral, can be presumed to have exercised decisive influence over Admiral's commercial policy from 31 October 2003⁶⁹ to 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between A C Holdings and Admiral. Admiral and A C Holdings are therefore jointly and severally liable for Admiral's participation in the relevant Infringements committed after 31 October 2003. Admiral and A C Holdings are therefore jointly and severally liable for payment of the penalty that the OFT is imposing in respect of Infringement 214.⁷⁰
- II.68. This Decision is therefore addressed to Admiral and A C Holdings.

⁶⁵ Company Appointments Report, OFT Document Reference 11541.

⁶⁶ Company Appointments Report, OFT Document Reference 11541.

⁶⁷ The date that A C Holdings acquired the shares of Admiral.

⁶⁸ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

⁶⁹ The date that A C Holdings acquired the shares of Admiral.

⁷⁰ The penalty in respect of Infringement 116 is reduced to zero as this is a 'But for' Infringement.

Allenbuild Limited ('Allenbuild')
Bullock Construction Limited ('Bullock')
Renew Holdings plc ('Renew')

- II.69. Allenbuild is a private limited company, registered in England and Wales, company number 1248351.⁷¹ Allenbuild's registered address is Yew Trees, Main Street North, Aberford, West Yorkshire, LS25 3AA.⁷² It operates from regional offices based in Wigan (North West), Leeds (North East), Derby (Midlands), Nottingham (Central Services) and London (South East).⁷³
- II.70. Bullock is a private limited company registered in England and Wales, company number 00545646.⁷⁴ Bullock's registered and primary trading address is Northgate, Aldridge, Walsall, West Midlands, WS9 8TU. Bullock also trades from regional offices in Cheshire, Lancashire and Gloucestershire.⁷⁵
- II.71. At the time of issue of the Statement, Allenbuild operated in the healthcare, education, commercial, residential, leisure and retail sectors for both private and public clients.⁷⁶ At the time of issue of the Statement, Allenbuild did not carry out work outside the United Kingdom.
- II.72. At the time of issue of the Statement, Bullock's principal activity was that of construction, predominantly within the social housing sector⁷⁷ and it did not carry out work outside the United Kingdom.
- II.73. On 8 June 2001, Allenbuild was acquired by Montpellier Group plc ('Montpellier').⁷⁸ Accordingly, from 8 June 2001, Allenbuild was a wholly owned subsidiary of Montpellier and the directors considered that Montpellier was the ultimate parent undertaking of Allenbuild.⁷⁹
- II.74. Montpellier was a public limited company, company number 00650447, whose registered address was 39 Cornhill, London EC3V 3NU.⁸⁰ Montpellier was previously known as YJL plc and on 19 March 2001, it changed its name to Montpellier. Subsequently, on 12 January 2006, it changed its name to Renew.⁸¹ Renew's registered address is Yew Trees, Main Street North, Aberford, West Yorkshire, LS25 3AA.⁸² Allenbuild's ultimate parent company is Renew.⁸³
- II.75. On 30 September 2002, Montpellier transferred the beneficial ownership and on 22 October 2002, the legal ownership of Allenbuild to YJL plc, a wholly owned subsidiary of Montpellier.⁸⁴ Therefore, from 22 October 2002, Allenbuild's immediate parent company was YJL plc. YJL plc was previously known as YJL

⁷¹ FAME report, OFT Document Reference 11547b.

⁷² Companies House Form 287(ef), OFT Document Reference 11547a.

⁷³ Allenbuild's website, OFT Document Reference 11559, page 30.

⁷⁴ FAME report, OFT Document Reference 11731.

⁷⁵ Latest available FAME report of Bullock.

⁷⁶ Allenbuild's website, OFT Document Reference 11559.

⁷⁷ Annual Report, OFT Document Reference 11737, pages 4 and 5.

⁷⁸ Directors' Report and Financial Statements, OFT Document Reference 11551, page 2.

⁷⁹ Directors' Report and Financial Statements, OFT Document Reference 11551, page 20.

⁸⁰ FAME report, OFT Document Reference 11548.

⁸¹ FAME report, OFT Document Reference 11548.

⁸² Latest available FAME report of Renew.

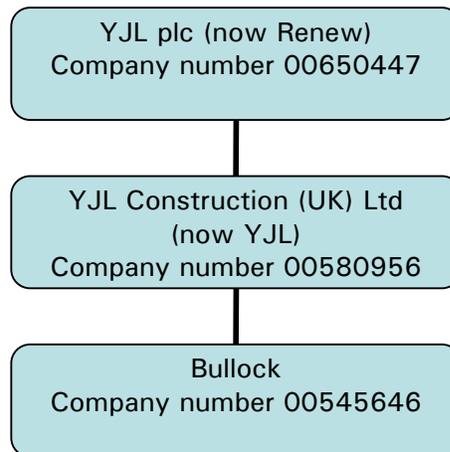
⁸³ FAME report, OFT Document Reference 11548.

⁸⁴ Annual Report, OFT Document Reference 11552, page 22.

Construction (UK) Limited and on 4 April 2001, it changed its name to YJL plc.⁸⁵ Subsequently, on 6 April 2005, it changed its name to YJL Limited ('YJL').⁸⁶ Allenbuild is currently wholly owned by YJL, whose company number is 00580956 and registered address is Yew Trees, Main Street North, Aberford, West Yorkshire, LS25 3AA.⁸⁷ YJL is wholly owned by Renew.⁸⁸

II.76. In 2000 Bullock was a wholly owned subsidiary of YJL Construction (UK) Limited, company number 00580956.⁸⁹ Its ultimate parent company was YJL plc, company number 00650447, whose registered address was 39 Cornhill, London EC3V 3NU.⁹⁰

II.77. The overall structure of Bullock at the time of its Infringement on 20 December 2000 is outlined below:



II.78. The overall structure of Allenbuild and Bullock from 22 October 2002 to 19 September 2005 is outlined below:

⁸⁵ Annual Report, OFT Document Reference 11734a.

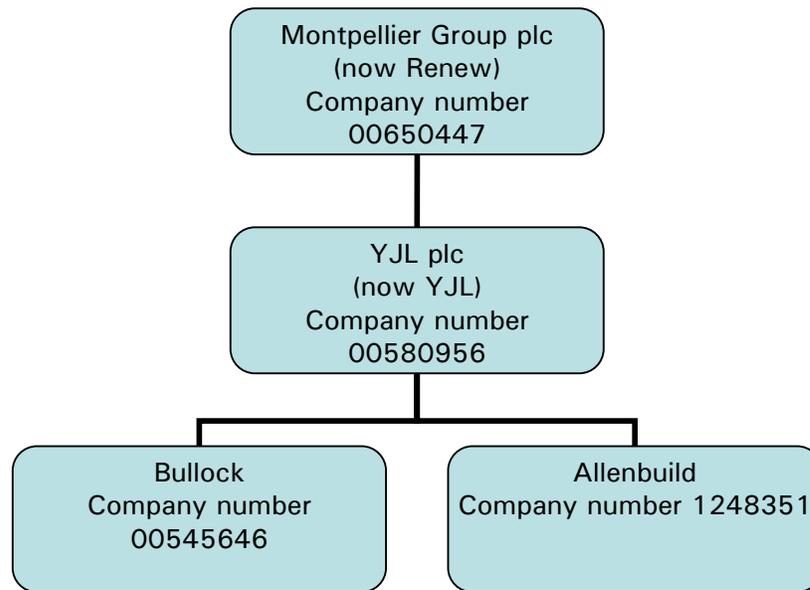
⁸⁶ FAME report, OFT Document Reference 11549.

⁸⁷ Latest available FAME report of YJL.

⁸⁸ FAME report, OFT Document Reference 11548.

⁸⁹ Directors' Report and Financial Statements, OFT Document Reference 11566, page 9.

⁹⁰ FAME report, OFT Document Reference 11548.



II.79. Bullock's turnover for the financial year ending 30 September 2008 was £180,659,000.⁹¹

II.80. Renew's worldwide group consolidated turnover for the financial year ending 30 September 2008 was £390,557,000.⁹²

II.81. The directors of Allenbuild from 2002 to 2006 were as follows:⁹³

- Stuart Reeve Andrew	8 June 2001 – 4 October 2002
- Edward Carlisle	19 February 2003 – 2006
- Patrick James Cassidy	8 June 2001 – 13 October 2006
- Stephen John Clarkson	28 September 2005 – 2006
- Neville Colvin	2000 – 2 April 2003
- Roger Feast	8 June 2001 – 3 October 2003
- John Sherwood Gaffney	3 October 2003 – 14 April 2005
- Michael Bernard Hayes	15 November 2004 – 31 October 2005
- John Rowland Kazer	8 June 2001 – 31 December 2002
- Alexander Nigel McArthur	8 June 2001 – 22 September 2005
- David Harry Miller	1 October 2001 – 2006
- Renew Corporate Director Limited	22 September 2005 – 2006
- Jeffrey Sawyer	2000 – 2006
- Paul Sellers	3 October 2003 – 24 March 2004
- Philip John Underwood	3 October 2003 – 14 April 2005
- Colin Veitch	8 June 2001 – 30 April 2004

II.82. The directors of Bullock from 2000 to 2006 were as follows:⁹⁴

- Stephen William Daniels	2000 – 2006
- Roger Feast	14 April 2000 – 3 October 2003
- John Sherwood Gaffney	2000 – 2006

⁹¹ Letter from Pinsent Masons, 24 April 2009.

⁹² Letter from DLA Piper UK LLP, 29 April 2009.

⁹³ Company Appointments Report, OFT Document Reference 11561.

⁹⁴ Company Appointments Report, OFT Document Reference 11740.

- Paul Hooper Keeley 20 April 2006 – 2006
- Keith Richard Maxwell 1 April 2003 – 2006
- Peter Dominic McGrail 3 July 2000 – 2006
- George William Leonard Miller 2000 – 14 April 2000
- Montpellier Corporate Director Limited 15 December 2004 – 19 September 2005
- Kevin John Walker 1 October 2004 – 2006
- Alan Higson Whitehead 2000 – 30 April 2000

II.83. The directors of Renew from 2000 to 2006 were as follows:⁹⁵

- John Anthony Biles 2 June 2004 – 25 June 2004
- John Michael Bishop 1 October 2006 – 2006
- Roger Feast 2000 – 3 October 2003
- John Sherwood Gaffney 3 October 2003 – 30 August 2005
- Peter Jan Patrik Valentin Gyllenhammar 2000 – 11 March 2004
- Roy James Harrison 19 November 2003 – 2006
- Brian Ward May 20 June 2005 – 2006
- George William Leonard Miller 2000 – 30 June 2000
- John William Young Strachan Samuel 1 May 2006 – 2006
- Cedric Annesley Scroggs 2000 – 11 March 2004
- Paul Sellars 2000 – 31 March 2004
- Philip John Underwood 3 October 2003 – 1 May 2006
- Arnold Wagner 19 November 2003 – 31 October 2006

II.84. The following directors have been on the Board of Directors of both Allenbuild and Renew during the periods mentioned below.⁹⁶ The OFT considers that this provides evidence that Renew exercised decisive influence over Allenbuild's conduct at the time of the Infringements.

- Roger Feast 8 June 2001 – 3 October 2003
- John Sherwood Gaffney 3 October 2003 – 14 April 2005
- Paul Sellars 3 October 2003 – 24 March 2004
- Philip John Underwood 3 October 2003 – 14 April 2005

II.85. The following directors have been on the Board of Directors of both Bullock and Renew during the periods mentioned below.⁹⁷ The OFT considers that this provides evidence that Renew exercised decisive influence over Bullock's conduct at the time of the Infringements.

- Roger Feast 14 April 2000 – 3 October 2003
- John Sherwood Gaffney 3 October 2003 – 30 August 2005
- George William Leonard Miller 2000 – 14 April 2000

⁹⁵ Company Appointments Report, OFT Document Reference 11560.

⁹⁶ Company Appointments Reports, OFT Document Reference 11560 and 11561.

⁹⁷ Company Appointments Reports, OFT Document Reference 11560 and 11740.

- II.86. The following directors have been on the Board of Directors of Allenbuild, Bullock and Renew during the periods mentioned below.⁹⁸ The OFT considers that this provides evidence that Renew exercised decisive influence over Bullock's and Allenbuild's conduct.
- | | |
|-------------------------|--------------------------------|
| - Roger Feast | 8 June 2001 – 3 October 2003 |
| - John Sherwood Gaffney | 3 October 2003 – 14 April 2005 |
- II.87. Allenbuild did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Renew, were given the opportunity of accepting the OFT's Fast Track Offer.⁹⁹
- II.88. Bullock did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringement, Renew, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁰⁰
- II.89. The OFT considers that Renew, as 100 per cent owner of Allenbuild and Bullock, can be presumed to have exercised decisive influence over their commercial policies during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Renew, Allenbuild and Bullock. Renew and Allenbuild are therefore jointly and severally liable for Allenbuild's participation in the Infringements after 8 June 2001. In addition, Renew and Bullock are therefore jointly and severally liable for Bullock's participation in Infringement 39. Accordingly, in both instances they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.90. Since the Infringement described in this Decision, Bullock has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Bullock at the relevant time, it is not jointly and severally liable with Bullock, Allenbuild and Renew for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Bullock.
- II.91. In their response to the Statement, Allenbuild and Renew submitted that Renew should not be held liable for Allenbuild's and Bullock's participation in the relevant Infringements.¹⁰¹ In support of this submission, Allenbuild and Renew put forward the following contentions:
- (a) Renew was a holding company whose interests in its subsidiaries were essentially financial. Renew had little or no awareness of or involvement in the day-to-day operations of Allenbuild and Bullock, and Allenbuild and Bullock determined their commercial policy with minimal interference from Renew.¹⁰²
 - (b) The holders of the common directorships between Renew, Allenbuild and Bullock, as identified above, were not involved in the day-to-day

⁹⁸ Company Appointments Reports, OFT Document Reference 11560, 11740 and 11561.

⁹⁹ See paragraphs II.1481 to II.1487 below.

¹⁰⁰ See paragraphs II.1481 to II.1487 below.

¹⁰¹ See for example written representations of Allenbuild and Renew, 4 July 2008, paragraph 1.7.

¹⁰² Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.4.

operations of the subsidiaries.¹⁰³ Their role was to report to the Renew board on the performance of the subsidiaries.¹⁰⁴ The Renew board considered these reports on the subsidiaries' businesses in overview and did not discuss operational details.¹⁰⁵

- (c) The Renew board had limited awareness of certain important tenders, but no knowledge of or involvement in the tender processes operated by Allenbuild and Bullock.¹⁰⁶ Renew created 'authority levels' determining when contracts to be entered into by Allenbuild and Bullock required approval from Renew. As regards Bullock, approval from a Renew director was generally only required for contracts within a certain value range (tens of millions), while the approval of the Renew board was only required for contracts with a value above that level. As regards Allenbuild, the corresponding financial thresholds were (as a general matter) lower figures.¹⁰⁷

II.92. The OFT has had regard to all of the submissions put forward by Allenbuild and Renew in relation to this issue. The OFT considers that, in the light of Renew's 100 per cent shareholdings in Allenbuild and Bullock at the relevant times and the common directorships identified above, it is entitled to presume that Renew exercised decisive influence over Allenbuild and Bullock, in accordance with the principles set out in paragraph III.13 below.

II.93. The OFT considers that the contentions put forward by Allenbuild and Renew fall short of rebutting that presumption and do not establish that Allenbuild and Bullock determined their conduct on the market autonomously. In this regard the OFT takes into account, in particular, the following:

- (a) The Renew board reviewed the performance of the subsidiaries by means of the reports prepared by the common directors as noted in II.91(b) above;¹⁰⁸
- (b) Roger Feast, a common director at the time of the Infringements, explained that his focus as Managing Director of the construction division subsidiaries was to '*...ensure that a sensible profit margin percentage was being made in relation to each contract, to monitor month-end turnover, gross margins, the volume of new orders, workload and to understand any significant problems*';¹⁰⁹
- (c) Renew retained direction of Allenbuild's and Bullock's decision-making in relation to high-value contracts.¹¹⁰ The predetermined authority levels referred to above also provided for other matters to be referred to a Renew director, including where a subsidiary had a negative cash flow

¹⁰³ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.9 and Annex 7, paragraph 12.

¹⁰⁴ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.8 and Annex 7, paragraphs 13 to 14.

¹⁰⁵ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.8.

¹⁰⁶ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.9.

¹⁰⁷ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.10.

¹⁰⁸ See Case T-112/05 *Akzo Nobel* [2007] ECR II-5049, at paragraph 76, upheld by the ECJ on 10 September 2009, Case C-97/08P.

¹⁰⁹ Witness statement of Roger Feast, paragraph 13.

¹¹⁰ See above, II.91(c); see also Case T-112/05 *Akzo Nobel* [2007] ECR II-5049, at paragraph 74, upheld by the ECJ on 10 September 2009, Case C-97/08P.

or a proposed margin on a tender which was less than its overheads, and also in relation to new technology, joint ventures and PFI projects.¹¹¹

- (d) The OFT does not consider that the absence of significant consideration of the Allenbuild and Bullock businesses in Renew board papers and minutes is conclusive evidence that Renew did not exercise decisive influence over its subsidiaries. That influence might be exercised in ways other than resolutions of the Renew board. In any event, the OFT notes that there are suggestions that the Renew board had involvement at least in relation to problems within the Allenbuild business:
- i. The 'Board Papers' for the Renew board meeting on 19 September 2001 at item 12 refer to '*our involvement on [Allenbuild's] final accounts, project resourcing, construction methods and programming*';¹¹²
 - ii. The 'Board Papers' for the Renew board meeting on 14 November 2001 at item 11 refer to Allenbuild's '*4 month result to the end of September 2001 [being] considerably better than their forecast due mostly to our assistance on current projects*';¹¹³
 - iii. The 'Board Papers' for the Renew board meeting on 13 November 2002 at item 12 note that within Allenbuild '*management changes are still necessary*'.¹¹⁴
- (e) The OFT considers that, in accordance with the principles set out in paragraph III.18 below, Renew cannot escape liability by reference to its argument that neither the common directors identified above, nor the other members of the Renew board, had knowledge of or involvement in the tenders which were the subject of the relevant Infringements.

II.94. In its response to the Statement, Bullock submitted that there was no legal basis for the OFT's proposed finding that Renew and Bullock are jointly and severally liable for Bullock's participation in the relevant Infringement. Bullock submitted that the OFT was entitled to hold *either* Bullock *or* Renew liable, citing the decision of the CFI in *Raiffeseisen*.¹¹⁵

II.95. The OFT considers that Bullock's submission is incorrect as a matter of law, and that its citation of *Raiffeseisen* is taken out of context. In particular, in that case the Commission had imposed liability on a subsidiary company alone, and the argument before the CFI was that liability should have been imputed to the parent company instead of the subsidiary (hence the CFI's finding that the Commission had a discretion to do either). As the Commission had not imposed joint and several liability on the parent and subsidiary, it is unsurprising that this issue was not addressed by the CFI. It is clear, however, from other case law of

¹¹¹ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 2.10 and Annex 3.

¹¹² Written representations of Allenbuild and Renew, 4 July 2008, Annex 5.

¹¹³ Written representations of Allenbuild and Renew, 4 July 2008, Annex 5.

¹¹⁴ Written representations of Allenbuild and Renew, 4 July 2008, Annex 5.

¹¹⁵ Written representations of Bullock, 26 June 2008, paragraphs 4.8.2 and 7.8, citing Case T-259/02 *Raiffeseisen* [2006] ECR II-5169, at paragraph 331.

the CFI that joint and several liability of a parent and subsidiary, where they are found to constitute the same undertaking for competition law purposes, is permitted in EC law¹¹⁶ and therefore, by extension, under the Act. The fact that, since the Infringement, Bullock and Renew have separated and no longer form part of the same undertaking, cannot affect the liability which arose at the time of the Infringement. Indeed, the OFT considers that this also follows from *Raiffeseisen*. If the OFT has a discretion to impose liability on Bullock or Renew, then there is no reason why it should not impose joint and several liability on both.

II.96. This Decision is therefore addressed to Renew, Allenbuild and Bullock.

Apollo Property Services Group Limited formerly known as Apollo London Limited ('Apollo')

Apollo Holdco Limited formerly known as Apollo Group Holdings Limited ('Apollo Group')

II.97. Apollo is a private limited company registered in England and Wales, company number 01243933.¹¹⁷ Apollo's registered and primary trading address is Conquest House, Church Street, Waltham Abbey, Essex, EN9 1DX.¹¹⁸

II.98. At the time of issue of the Statement, Apollo's main business activities were the refurbishment of social housing and educational establishments¹¹⁹ and it did not carry out work outside the United Kingdom.

II.99. On 15 March 2002 Apollo was acquired by Apollo Group.¹²⁰ Apollo Group was known as Axelcrest Limited, a private limited company, company number 04252778¹²¹ prior to 24 January 2005. Apollo Group was Apollo's ultimate parent company during the period 15 March 2002¹²² to 21 April 2006.¹²³ Apollo has, since being acquired by Apollo Group, been a wholly owned subsidiary of Apollo Group.

II.100. Apollo changed its name to Apollo Property Services Group Limited on 2 November 2007.¹²⁴ Apollo Group changed its name to Apollo Holdco Limited on 5 November 2007.¹²⁵

II.101. Apollo has six wholly owned subsidiaries.¹²⁶

II.102. The overall company structure at the time of the Infringements was:¹²⁷

¹¹⁶ See Case C-97/08P *Akzo Nobel* ECJ Judgment of 10 September 2009; also Case T-69/04 *Schunk*, judgment of the Court of First Instance of 8 October 2008 (not yet reported), at paragraphs 53 et seq. (in particular paragraphs 75 and 76).

¹¹⁷ FAME report, OFT Document Reference 11577.

¹¹⁸ FAME report, OFT Document Reference 11577.

¹¹⁹ Market definition response, OFT Document Reference 6671.

¹²⁰ Companies House 363s Annual Return, OFT Document Reference 11590.

¹²¹ FAME report, OFT Document Reference 11580.

¹²² Companies House 363s Annual Return, OFT Document Reference 11590.

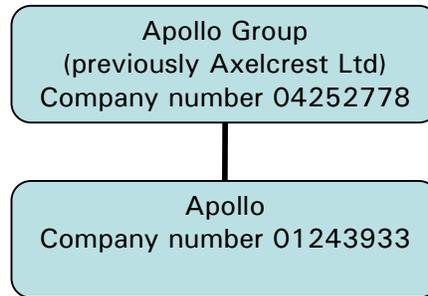
¹²³ Companies House 363s Annual Return, OFT Document Reference 11590.

¹²⁴ Company details, OFT Document Reference SA038.

¹²⁵ Company details, OFT Document Reference SA037.

¹²⁶ FAME report, OFT Document Reference 11577.

¹²⁷ Report and accounts years ending 31 March 2003, OFT Document Reference 11586, 31 March 2004, OFT Document Reference 11587, 31 March 2005, OFT Document Reference 11588 and 31 March 2006, OFT Document Reference 11589.



II.103. Apollo Group's consolidated turnover for the financial year ending 31 March 2008 was [...] [C].¹²⁸

II.104. The directors of Apollo from 2003 to 2006 were as follows.¹²⁹

- Stephen John Allen 2003 – 2006
- Nicholas Ash 5 July 2006 – 2006
- Aiden Couch 12 October 2004 – 20 April 2006
- Gary Patrick Couch 2003 – 2006
- Christopher Doyle 5 July 2006 – 2006
- Trevor Neil Drury 2003 – 30 July 2004 and 5 July 2006 – 2006
- Graham Leslie Jones 2003 – 29 January 2004
- Simon Lacey 5 July 2006 – 2006
- Russell Meagher 2003 – 21 May 2004
- Robert Henry McGregor 2003 – 2006
- Daren Moseley 5 July 2006 – 2006
- Martin Robert Scott 2003 – 20 April 2006
- Shaun Sheldrake 5 July 2006 – 2006
- Martin Stone 5 July 2006 – 2006
- Ian Timms 2003 – 2006

II.105. The directors of Apollo Group from 2003 to 2006 were as follows:¹³⁰

- Stephen John Allen 2003 – 2006
- Aiden Couch 15 March 2004 – 20 April 2006
- Gary Patrick Couch 2003 – 2006
- Martin Robert Scott 2003 – 20 April 2006

II.106. The following directors have been on the Board of Directors of both Apollo and Apollo Group during the periods mentioned below.¹³¹ The OFT considers that this provides evidence that Apollo Group exercised decisive influence over Apollo's conduct during the period from 2003 to 20 April 2006.

- Stephen John Allen 2003 – 2006
- Aiden Couch 12 October 2004 – 20 April 2006
- Gary Patrick Couch 2003 – 2006
- Martin Robert Scott 2003 – 20 April 2006

¹²⁸ Email from Slaughter and May, 30 June 2009.

¹²⁹ Company Appointments Report, OFT Document Reference 11574.

¹³⁰ Group Company Appointments Report, OFT Document Reference 11571.

¹³¹ Company Appointments Reports, OFT Document Reference 11574 and 11571.

- II.107. Apollo did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Apollo Group, were given the opportunity of accepting the OFT's Fast Track Offer.¹³²
- II.108. The OFT considers that Apollo Group, as 100 per cent owner of Apollo, can be presumed to have exercised decisive influence over Apollo's commercial policy from 2003 to 20 April 2006 and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Apollo Group and Apollo. Apollo and Apollo Group are therefore jointly and severally liable for Apollo's participation in the Infringements during this period. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.109. Since the Infringements described in this Decision, Apollo Group has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Apollo Group at the relevant times, it is not jointly and severally liable with Apollo and Apollo Group for payment of the fine that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Apollo Group.
- II.110. This Decision is therefore addressed to Apollo and Apollo Group.

Arthur M. Griffiths & Sons Limited ('Arthur M Griffiths')

- II.111. Arthur M Griffiths is a private limited company registered in England and Wales, company number 00222595.¹³³ Arthur M Griffiths' registered and trading address is Thomas Street, Wolverhampton, West Midlands, WV2 4BY.¹³⁴
- II.112. At the time of issue of the Statement, Arthur M Griffiths undertook new build and regeneration work in both the public and private sectors. It primarily carries out work within the commercial, conservation, ecclesiastical, education, health and industrial sectors.¹³⁵ At the time of issue of the Statement, Arthur M Griffiths did not carry out work outside the United Kingdom.
- II.113. Arthur M Griffiths has no holding companies or subsidiaries.¹³⁶
- II.114. Arthur M Griffiths's turnover for the financial year ending 31 March 2008 was £10,440,599.¹³⁷
- II.115. The directors of Arthur M Griffiths from 2000 to 2006 were as follows:¹³⁸
- | | |
|-------------------------|------------------------|
| - Simon Charles Dix | 2000 – 2006 |
| - Alan Dudley Griffiths | 2000 – 2006 |
| - Maurice James Walsh | 2000 – 2006 |
| - Gary James Wildsmith | 10 January 2001 – 2006 |

¹³² See paragraphs II.1481 to II.1487 below.

¹³³ FAME report, OFT Document Reference 12505.

¹³⁴ FAME report, OFT Document Reference 12505.

¹³⁵ Website, OFT Document Reference 12508.

¹³⁶ FAME report, OFT Document Reference 12505.

¹³⁷ Email from Arthur M Griffiths, 1 June 2009.

¹³⁸ Company Appointments Report, OFT Document Reference 12507.

- II.116. Arthur M Griffiths applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹³⁹
- II.117. This Decision is addressed to Arthur M Griffiths. The OFT considers that Arthur M Griffiths is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

B & A Construction (Leicester) Limited ('B & A')

- II.118. B & A is a private limited company registered in England and Wales, company number 01645572.¹⁴⁰ B & A's registered and trading address is Lorne House, 98 Uppingham Road, Leicester, Leicestershire, LE5 0QF.¹⁴¹
- II.119. At the time of issue of the Statement, B & A undertook work in a number of areas including general construction¹⁴², refurbishment and restoration¹⁴³ of commercial properties such as schools, shops, offices and warehouses and the building of new public sector housing.¹⁴⁴ At the time of issue of the Statement, B & A did not carry out work outside the United Kingdom.
- II.120. B & A has no holding companies or subsidiaries.¹⁴⁵
- II.121. B & A's turnover for the financial year ending 31 December 2007 was [...] [C].¹⁴⁶
- II.122. The directors of B & A from 2001 to 2006 were as follows:¹⁴⁷
- | | |
|------------------------|------------------------------------|
| - Anthony Price | 2001 – 2006 |
| - Barry Simpson | 1 January 2001 – 28 September 2001 |
| - Shane Darrell Sutton | 2001 – 2006 |
- II.123. B & A did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁴⁸
- II.124. This Decision is addressed to B & A. The OFT considers that B & A is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

¹³⁹ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/offt423.pdf.

¹⁴⁰ FAME report, OFT Document Reference 11607.

¹⁴¹ FAME report, OFT Document Reference 11607.

¹⁴² FAME report, OFT Document Reference 11607.

¹⁴³ <http://www.leicestershire.com/local/building-refurbishment-and-restoration-contractors/>, OFT Document Reference 11609, page 2.

¹⁴⁴ Market Definition response, OFT Document Reference 6714 and

http://www.sireh.com/uk/b/5/b_&_a_construction_leicester ltd leicester/, OFT Document Reference 11609, page 3.

¹⁴⁵ FAME Report, OFT Document Reference 11607.

¹⁴⁶ Email from Berryman, 28 July 2009.

¹⁴⁷ Company Appointments Report, OFT Document Reference 11610.

¹⁴⁸ See paragraphs II.1481 to II.1487 below.

Baggaley & Jenkins Limited ('Baggaley & Jenkins')

- II.125. Baggaley & Jenkins is a private limited company registered in England and Wales, company number 01559297.¹⁴⁹ Baggaley & Jenkins' registered and primary trading address is Construction House, Hermitage Way, Mansfield, Nottinghamshire, NG18 5ES.¹⁵⁰
- II.126. At the time of issue of the Statement, Baggaley & Jenkins undertook new construction, repair and refurbishment for local authorities and housing associations. It was also active in the commercial and industrial sectors for both public and private clients.¹⁵¹ At the time of issue of the Statement, Baggaley & Jenkins did not carry out work outside the United Kingdom.
- II.127. At the time of issue of the Statement, Baggaley & Jenkins had no holding companies or subsidiaries.¹⁵²
- II.128. Baggaley & Jenkins' turnover for the financial year ending 30 June 2008 was £19,856,000.¹⁵³
- II.129. The directors of Baggaley & Jenkins from 2000 to 2006 were as follows:¹⁵⁴
- | | |
|---------------------------|-------------------------------|
| - Stuart Ian Caddy | 2000 – 2006 |
| - Leslie Reginald Jenkins | 2000 – 2006 |
| - Robert Bruce Jones | 2000 – 8 December 2000 |
| - Clive Lyons | 1 July 2002 – 11 July 2003 |
| - Keith Ronald Marshall | 2000 – 2006 |
| - David Graham Smith | 1 July 2002 – 17 October 2005 |
| - Brian Kevin Swallow | 2000 – 11 August 2000 |
| - James Michael Ward | 1 July 2002 – 2006 |
- II.130. Baggaley & Jenkins did not apply for leniency, but was given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁵
- II.131. Since the Infringements described in this Decision, Baggaley & Jenkins has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Baggaley & Jenkins at the relevant times, it is not jointly and severally liable with Baggaley & Jenkins for the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Baggaley & Jenkins.
- II.132. This Decision is addressed to Baggaley & Jenkins. The OFT considers that Baggaley & Jenkins is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

¹⁴⁹ FAME report, OFT Document Reference 11611.

¹⁵⁰ FAME report, OFT Document Reference 11611.

¹⁵¹ Baggaley & Jenkins' website, OFT Document Reference 11617.

¹⁵² FAME report, OFT Document Reference 11611.

¹⁵³ Letter from Baggaley & Jenkins, 29 April 2009.

¹⁵⁴ Company Appointments Report, OFT Document Reference 11615.

¹⁵⁵ See paragraphs II.1481 to II.1487 below.

Balfour Beatty Construction Limited ('BBCL')
Balfour Beatty Refurbishment Limited ('BBRL')
Balfour Beatty plc ('Balfour Beatty plc')
Mansell Construction Services Limited ('Mansell')
Mansell plc ('Mansell plc')

- II.133. Mansell is a private limited company registered in England and Wales, company number 01197246.¹⁵⁶ Mansell's registered address is Roman House, Grant Road, Croydon, Gt London, CR9 6BU.¹⁵⁷
- II.134. At the time of issue of the Statement, Mansell's principal activities were construction, both new build and refurbishment, in its core market sectors of Affordable Housing, Education, Defence, Health, Heritage, Airports and Interior Solutions.¹⁵⁸ At the time of issue of the Statement, Mansell did not carry out work outside the United Kingdom.
- II.135. Mansell was acquired by Balfour Beatty plc on 19 December 2003.¹⁵⁹
- II.136. BBCL is a private limited company registered in Scotland, company number SC106247.¹⁶⁰ BBCL's registered address is Dean House, 24 Ravelston Terrace, Edinburgh, Lothian, EH4 3TP.¹⁶¹
- II.137. At the time of issue of the Statement, BBCL provided national building services, from a number of offices spread throughout the UK.¹⁶² BBCL operated through a number of divisions called North West & Midlands, North East & Yorkshire, Scotland, London & South (Projects), Metronet and Birmingham Hospital JV.¹⁶³
- II.138. BBRL is a private limited company registered in England and Wales, company number 03107653. BBRL's registered address is Ludgate House, 3rd Floor, 245 Blackfriars Road, London, SE1 9UF.¹⁶⁴
- II.139. At the time of issue of the Statement, BBRL was a specialist company which specialised in the renovation and refurbishment of buildings for both public and private sector clients within Greater London and the South East of England.¹⁶⁵
- II.140. At the time of issue of the Statement, Mansell, BBCL and BBRL were all indirect wholly owned subsidiaries of Balfour Beatty plc¹⁶⁶, a public limited company, company number 00395826.¹⁶⁷ Balfour Beatty plc's registered address is 130 Wilton Road, London, SW1V 1LQ.¹⁶⁸
- II.141. The directors of BBRL from 2000 to 2006 were as follows:¹⁶⁹

¹⁵⁶ FAME report, OFT Document Reference 11627.

¹⁵⁷ FAME report, OFT Document Reference 11627.

¹⁵⁸ Directors' Report and Financial Statements, OFT Document Reference 11630, page 2.

¹⁵⁹ Directors' Report and Financial Statements, OFT Document Reference B2853.

¹⁶⁰ FAME Report, OFT Document Reference 11618.

¹⁶¹ FAME Report, OFT Document Reference 11618.

¹⁶² Leniency application, OFT Document Reference B1602, page 8.

¹⁶³ Leniency application, OFT Document Reference B1602, page 8.

¹⁶⁴ FAME Report, OFT Document Reference 11630i.

¹⁶⁵ Leniency application, OFT Document Reference B1602, page 8.

¹⁶⁶ Annual Report and Account, OFT Document Reference 11621.

¹⁶⁷ FAME report, OFT Document Reference 11630h.

¹⁶⁸ FAME report, OFT Document Reference 11630h.

¹⁶⁹ Company Appointments Report, OFT Document Reference 11630n.

- Graham Robert Burns 2000 – 29 September 2000
- Robert Clark 1 March 2005 – 2006
- Peter Charles Clist 2000 – 5 May 2000 and
7 July 2003 – 2006
- Alexander Ritchie McNaught Fryer 2000 – 3 March 2003
- Derek Knox 28 October 2005 – 2006
- James Lindsay Nicolson 3 March 2003 – 2006
- Kevin Robert Pluckrose 1 March 2001 – 7 July 2003
- Paul John Randall 28 October 2005 – 2006
- John Ronald Samuel 2000 – 11 November 2003
- Graeme Taylor 2000 – 2006
- Nigel Paul Wilson 2000 – 29 September 2000
- Kenneth James Winter 11 November 2003 – 1 January 2006

II.142. The directors of BBCL from 2000 to 2006 were as follows:¹⁷⁰

- Jonathan Henry Adams 28 October 2005 – 2006
- Robert Clark 3 July 2003 – 2006
- David John Donaldson 2000 – 2006
- James Baxter Gibson 2000 – 1 July 2002
- Derek Knox 1 October 2004 – 2006
- Paul John Lester 2000 – 28 June 2002
- James Lindsay Nicolson 7 May 2002 – 2006
- Brian Osborne 2000 – 1 November 2004
- John Ronald Samuel 2000 – 11 November 2003
- Marshall Duncan Scott 2000 – 2006
- Graeme Taylor 2000 – 2006
- Harry Worthington Townley 3 July 2003 – 2006
- John Anthony Meade Walsh 28 October 2005 – 2006
- Jane Elizabeth Whitfield 3 July 2003 – 2006
- Kenneth James Winter 2000 – 1 January 2006
- Alistair James Wivell 2000 – 1 November 2004

II.143. The directors of Balfour Beatty plc from 2000 to 2006 were as follows:¹⁷¹

- Chalmers Carr 1 September 2003 – 31 August 2006
- James Lionel Cohen 2000 – 2006
- Richard Delbridge 24 October 2002 – 31 December 2005
- Michael John Donovan 1 July 2006 – 2006
- Malcolm Kenyon Eckersall 6 June 2000 – 7 October 2003
- Stephen Lee Howard 1 July 2006 – 2006
- David Glyndwr John 15 August 2000 – 2006
- Paul John Lester 2000 – 28 June 2002
- Steven Marshall 1 November 2005 – 2006
- Henry Michael Pearson Miles 2000 – 16 May 2002
- Anthony Leon Philip Rabin 9 July 2002 – 2006
- Christopher Reginald Reeves 2000 – 15 May 2003
- Gordon Holden Sage 1 September 2003 – 2006
- Udo Gunter Stark 2000 – 10 June 2003
- Ian Paul Tyler 2000 – 2006

¹⁷⁰ Company Appointments Report, OFT Document Reference 11623.

¹⁷¹ Company Appointments Report, OFT Document Reference 11625.

- Hans Christoph Von Rohr 10 June 2003 – 2006
- Robert Joris Willem Walvis 26 September 2001 – 2006
- William Kenneth James Weir 2000 – 15 May 2003
- Michael William Welton 2000 – 31 December 2004
- Alistair James Wivell 9 July 2002 – 31 December 2005
- David John Wright 1 January 2003 – 31 December 2005
- Peter John Louis Zinkin 2000 – 2006

II.144. The directors of Mansell from 2000 to 2006 were as follows:¹⁷²

- David Eric Beardsmore 2000 – 1 January 2001
- Philip Arthur Cleaver 2000 – 23 April 2004
- Peter Herbert Coats 2000 – 6 September 2001
- Wendy Ann Courtman 2000 – 31 December 2004
- David Stuart Hurcomb 2000 – 30 November 2004
- Andrew Dale Mullins 2000 – 5 July 2002
- Michael John Peasland 5 April 2004 – 2006
- Barry Peter Perrin 15 November 2004 – 2006
- Patrick John Scannell 6 September 2001 – 31 December 2004
- Timothy Harry Spencer 9 August 2001 – 2006
- Stephen John Waite 2000 – 2006
- Robert Vincent Walker 2000 – 2006

II.145. The directors of Mansell plc from 2000 to 2006 were as follows:¹⁷³

- Eric Edward Anstee 1 January 2002 – 19 December 2003
- David Eric Beardsmore 2000 – 20 May 2002
- Philip Arthur Cleaver 2000 – 23 April 2004
- Peter Herbert Coats 2000 – 6 September 2001
- Peter Robert Howell 2000 – 19 December 2003
- David Stuart Hurcomb 2000 – 30 November 2004
- Michael Wolfgang Laurence 2000 – 19 December 2003
Naseby
- Michael John Peasland 5 April 2004 – 2006
- Barry Peter Perrin 15 November 2004 – 2006
- Patrick John Scannell 6 September 2001 – 31 December 2004
- Stephen John Waite 2000 – 2006
- John Wickerson 2000 – 4 April 2002
- Alistair James Wivell 19 December 2003 – 31 December 2005

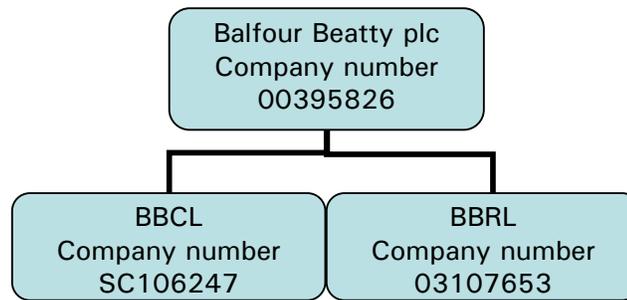
BBCL and BBRL 2000 – 19 December 2003

II.146. The relevant structure for this period was as follows:¹⁷⁴

¹⁷² Company Appointments Report, OFT Document Reference 11629.

¹⁷³ Company Appointments Report, OFT Document Reference 11630a.

¹⁷⁴ Annual Report and Accounts, OFT Document Reference 11621 and Annual Reports and Financial Statements, OFT Document Reference 11630b and 11630f.



II.147. During this period BBCL and BBRL had no subsidiaries.¹⁷⁵

II.148. The following directors have been on the Board of Directors of both BBCL and Balfour Beatty plc during the period mentioned below.¹⁷⁶ The OFT considers that this provides evidence that Balfour Beatty plc exercised decisive influence over BBCL's conduct during this period, at the time of the relevant Infringements.

- Paul John Lester 2000 – 28 June 2002
- Alistair James Wivell 9 July 2002 – 19 December 2003

II.149. The OFT considers that Balfour Beatty plc as 100 per cent indirect owner, ultimate parent company and controlling party¹⁷⁷ of BBCL, can be presumed to have exercised decisive influence over BBCL's commercial policy from 2000 until 19 December 2003 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Balfour Beatty plc and BBCL. Balfour Beatty plc and BBCL are therefore jointly and severally liable for BBCL's participation in the Infringements from 2000 until 19 December 2003.

II.150. The OFT considers that Balfour Beatty plc as 100 per cent indirect owner, ultimate parent company and controlling party¹⁷⁸ of BBRL, can be presumed to have exercised decisive influence over BBRL's commercial policy from 2000 until 19 December 2003 and therefore forms part of the same economic entity. Balfour Beatty plc and BBRL are therefore jointly and severally liable for BBRL's participation in the Infringements from 2000 until 19 December 2003.

II.151. In their response to the Statement, BBCL, BBRL, Balfour Beatty plc, Mansell, and Mansell plc ('the Balfour Beatty group') submitted that Balfour Beatty plc should not be held liable for the participation of its subsidiaries in the relevant Infringements. The OFT has considered this submission and sets out its response in paragraphs II.172 to II.179 below.

Mansell 2000 – 19 December 2003

II.152. Mansell's ultimate parent company was Mansell plc¹⁷⁹, a public limited company, company number 00265178.¹⁸⁰ Mansell plc's registered address was

¹⁷⁵ FAME reports, OFT Document Reference 11618 and 11630i.

¹⁷⁶ Company Appointments Reports, OFT Document Reference 11630m and 11623.

¹⁷⁷ Annual Report and Financial Statements, OFT Document Reference 11622 and 11624.

¹⁷⁸ Annual Report and Financial Statements, OFT Document Reference 11622 and 11630r.

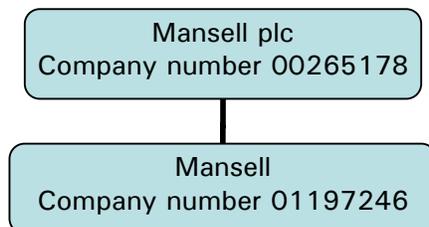
¹⁷⁹ Directors' Report and Financial Statements, OFT Document Reference 11628.

¹⁸⁰ FAME report, OFT Document Reference 11630j.

Roman House, Grant Road, Croydon, Gt. London, CR9 6BU.¹⁸¹ Mansell was wholly owned by Mansell plc.¹⁸²

II.153. As at 31 December 2000, Mansell plc had six wholly owned subsidiaries.¹⁸³

II.154. The relevant structure for this period was as follows:¹⁸⁴



II.155. Mansell's consolidated turnover for the financial year ending 31 December 2008 was £972,400,000.¹⁸⁵

II.156. From December 2004 all trading has been carried out through Mansell, therefore Mansell plc has no turnover.¹⁸⁶

II.157. The following directors have been on the Board of Directors of both Mansell and Mansell plc during the periods mentioned below.¹⁸⁷ The OFT considers that this provides evidence that Mansell plc exercised decisive influence over Mansell's conduct from 2000 until 19 December 2003.

- David Eric Beardmore	2000 – 1 January 2001
- Philip Arthur Cleaver	2000 – 19 December 2003
- Peter Herbert Coats	2000 – 6 September 2001
- David Stuart Hurcomb	2000 – 19 December 2003
- Patrick John Scannel	6 September 2001 – 19 December 2003
- Stephen John Waite	2000 – 19 December 2003

II.158. The OFT considers that Mansell plc as 100 per cent owner of Mansell, can be presumed to have exercised decisive influence over Mansell's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Mansell plc and Mansell. Mansell and Mansell plc are therefore jointly and severally liable for Mansell's participation in the Infringements from 2000 until 19 December 2003. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 89,104 and 116.

Balfour Beatty plc and Mansell 19 December 2003 – 2006

¹⁸¹ FAME report, OFT Document Reference 11630j.

¹⁸² Directors' Report and Financial Statements, OFT Document Reference 11628.

¹⁸³ Directors' Report, OFT Document Reference 11630d.

¹⁸⁴ Directors' Report and Financial Statements, OFT Document Reference 11628 and Directors' Report, OFT Document Reference 11630d.

¹⁸⁵ Letter from Linklaters, 25 June 2009.

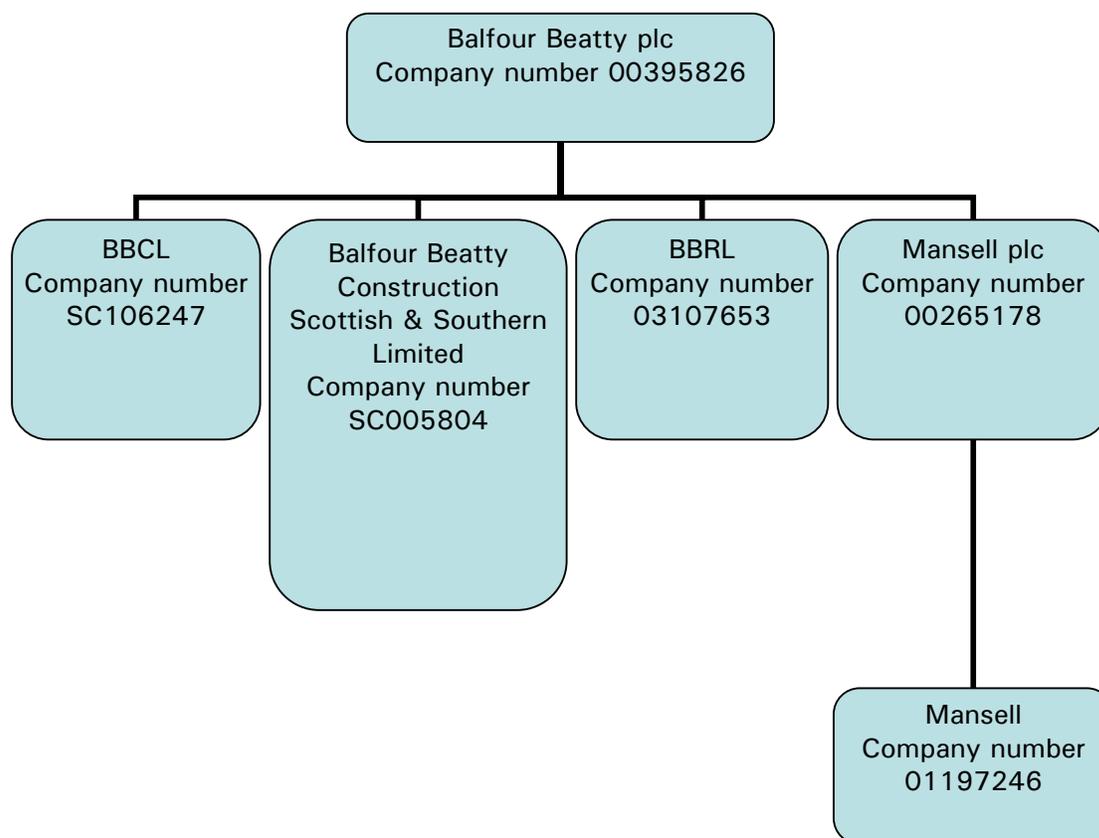
¹⁸⁶ Written representations of Balfour Beatty group, 27 June 2008, Annex 2.3.

¹⁸⁷ Company Appointments Reports, OFT Document Reference 11629 and 11630a.

II.159. Mansell and its ultimate parent company, Mansell plc, were acquired by Balfour Beatty plc on 19 December 2003.¹⁸⁸ Mansell is wholly owned by Mansell plc which is now wholly owned by Balfour Beatty plc.¹⁸⁹

II.160. As at 7 September 2007, Balfour Beatty plc had 201 subsidiaries.¹⁹⁰

II.161. The relevant structure for this period was as follows:¹⁹¹



II.162. Since January 2006, BBCL has operated through its sister company, Balfour Beatty Construction Scottish & Southern Limited.¹⁹²

II.163. BBRL is managed by Balfour Beatty Construction Scottish & Southern Limited.¹⁹³

II.164. From 1 January 2005, the Mansell group was reorganised in such a way that all trading activity is carried out through Mansell. Therefore, all assets, liabilities and trading activities of the group are conducted through Mansell. Mansell plc is now a non-trading company.¹⁹⁴

¹⁸⁸ Directors' Report, OFT Document Reference B2853.

¹⁸⁹ FAME report, OFT Document Reference 11627.

¹⁹⁰ FAME report, OFT Document Reference 11630h.

¹⁹¹ FAME report for Balfour Beatty plc, OFT Document Reference 11630h.

¹⁹² Leniency application, OFT Document Reference B1602, page 9. Balfour Beatty, in its written representations on the Statement (annex 1, item 4), referred to an explanation of contractual arrangement as stated in its response to the OFT's market definition questionnaire, OFT Document Reference B2876.

¹⁹³ Leniency application, OFT Document Reference B1602, page 8.

¹⁹⁴ Leniency application, OFT Document Reference B0734, page 9.

II.165. At the time of issue of the Statement, Mansell had 14 regional business units in England.¹⁹⁵ The regional business units were called:¹⁹⁶

- London Major Works
- London Special Projects
- Enfield
- South East
- Specialised Works
- Kirby MacLean
- Airports
- Thames Valley
- South
- North East
- Western
- North West
- East Anglia
- Eastern

II.166. The following director has been on the Board of Directors of both BBCL and Balfour Beatty plc during the period mentioned below.¹⁹⁷ The OFT considers that this provides evidence that Balfour Beatty plc exercised decisive influence over BBCL's conduct from 19 December 2003 until 1 November 2004.

- Alistair James Wivell 19 December 2003 – 1 November 2004

II.167. The OFT considers that Balfour Beatty plc, as 100 per cent indirect owner, ultimate parent company and controlling party¹⁹⁸ of Mansell, can be presumed to have exercised decisive influence over its commercial policy during the period from 19 December 2003 until 2006 and therefore forms part of the same economic entity. Balfour Beatty plc and Mansell are therefore jointly and severally liable for Mansell's participation in the Infringements.

II.168. The OFT considers that Balfour Beatty plc, as 100 per cent indirect owner, ultimate parent company and controlling party¹⁹⁹ of BBCL, can be presumed to have exercised decisive influence over BBCL's commercial policy during the period from 19 December 2003 until 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Balfour Beatty plc and BBCL. Balfour Beatty plc and BBCL are therefore jointly and severally liable for BBCL's participation in the Infringements.

II.169. The OFT considers that Balfour Beatty plc, as 100 per cent indirect owner, ultimate parent company and controlling party²⁰⁰ of BBRL, can be presumed to have exercised decisive influence over BBRL's commercial policy during the period from 19 December 2003 until 2006 and therefore forms part of the same economic entity. Balfour Beatty plc and BBRL are therefore jointly and severally liable for BBRL's participation in the Infringements.

¹⁹⁵ Leniency application, OFT Document Reference B0734, page 9.

¹⁹⁶ Divisional Structure chart, OFT Document Reference B2858.

¹⁹⁷ Company Appointments Reports, OFT Document Reference 11623 and 11625.

¹⁹⁸ Annual Report and Financial Statements, OFT Document Reference 11622 and Directors' Report and Financial Statements, OFT Document Reference 11630, page 18 and 11630c.

¹⁹⁹ Annual Report and Financial Statements, OFT Document Reference 11622 and 11624.

²⁰⁰ Annual Report and Financial Statements, OFT Document Reference 11622 and 11630r.

- II.170. BBCL and BBRL applied for, and Balfour Beatty plc has been granted, leniency in accordance with the OFT's leniency programme.²⁰¹
- II.171. Mansell applied for, and has been granted, leniency in accordance with the OFT's leniency programme.²⁰²
- II.172. In their response to the Statement, the Balfour Beatty group submitted that Balfour Beatty plc should not be held liable for the participation of its subsidiaries in the relevant Infringements.
- II.173. As a general matter, the Balfour Beatty group submitted that it operated on a decentralised business model, with day-to-day commercial and operational decisions largely being taken at the level of the group subsidiaries.²⁰³ However, the Balfour Beatty group did not adduce evidence as to economic and legal organisational links between its various companies to show that it is not a single economic entity. Specifically, it was submitted that Balfour Beatty plc had no involvement in or specific knowledge of the tenders which constitute the Infringements, since those tenders each had a value significantly below the level at which board approval from Balfour Beatty plc was required.²⁰⁴
- II.174. In addition, the Balfour Beatty group submitted:
- (a) that the common directorships identified by the OFT (as set out above) were very limited;²⁰⁵
 - (b) that there were no common directors as between Balfour Beatty plc and BBRL, BBCL and BBRL and Mansell and Balfour Beatty plc;²⁰⁶ and
 - (c) that the common directors identified by the OFT are not alleged to have been involved in or aware of the Infringements.²⁰⁷
- II.175. For the reasons set out in Section III (Legal Background), the OFT considers that a parent company may be held liable for an infringement committed by its subsidiary even though it had no specific involvement in or knowledge of the infringing conduct. The OFT refers specifically in this regard to the principle set out in paragraph III.18. It follows that Balfour Beatty plc cannot escape liability for the relevant Infringements by reference to its argument that it had no specific involvement in or knowledge of the infringing conduct.
- II.176. It must also follow that the fact that the common directors identified above are not alleged to have had knowledge of or involvement in the infringing conduct is not such as to enable Balfour Beatty plc to escape liability. The Balfour Beatty group submitted that its circumstances could be distinguished from those in

²⁰¹ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

²⁰² See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

²⁰³ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.3.

²⁰⁴ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.4.

²⁰⁵ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.5.

²⁰⁶ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.6.

²⁰⁷ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.7.

*Sepia Logistics*²⁰⁸, as Balfour Beatty plc's directors were not personally implicated in the Infringements and could not be said to be the 'controlling mind' of all the relevant entities.²⁰⁹ For the reasons set out in paragraphs III.17 to III.18 of the Legal Background section, the OFT does not consider that this is sufficient to rebut the presumption of decisive influence. Merely because in *Sepia Logistics* involvement in the infringement was an additional factor does not mean that it is a required for a finding of single economic entity.

- II.177. While the Balfour Beatty group sought to downplay the significance of the common directorships identified by the OFT, the OFT notes that the Balfour Beatty group has not denied the existence of those common directorships. The OFT considers that, in the light of the common directorships identified above and the 100 per cent shareholdings held by Balfour Beatty plc in the relevant subsidiaries, the OFT is entitled to rely on the presumption of decisive influence in accordance with the principles set out in paragraphs III.13 to III.18 below.
- II.178. Furthermore the OFT considers that the submissions put forward by the Balfour Beatty group are not sufficient to rebut that presumption and fall short of establishing that the relevant subsidiaries determined their conduct on the market autonomously.
- II.179. The Balfour Beatty group also submitted that the OFT should adopt the same approach as it did in *Mastic Asphalt*²¹⁰ in respect of Ruberoid and Briggs.²¹¹ In that case, the OFT concluded that the two companies formed part of the same undertaking, but addressed its decision only to Briggs (the infringing subsidiary). Whilst undertakings are the subjects of competition law, the OFT's decisions must be addressed to legal or natural persons. Where an undertaking is made up of two or more legal persons, the OFT considers that it has a margin of discretion as to which of those persons should be addressees of its decision and subject to penalties, in order to ensure effective enforcement of competition rules. In this respect, each case is specific to its own facts and circumstances, and the action taken by the OFT in one instance cannot necessarily be read across to another case. Moreover, the approach of competition authorities to the imposition of penalties is developing over time, together with the case law in this area.
- II.180. This Decision is therefore addressed to Mansell plc and Mansell for Mansell's participation in any Infringements during the period from 1 March 2000 until 19 December 2003.
- II.181. This Decision is therefore addressed to Balfour Beatty plc, BBCL and BBRL for their participation in any Infringements during the period from 1 March 2000 until 19 December 2003.
- II.182. This Decision is therefore addressed to Balfour Beatty plc, BBCL, BBRL and Mansell for their participation in any Infringements during the period from 19 December 2003 until 31 December 2006.

²⁰⁸ *Sepia Logistics Ltd (formerly Double Quick Supplyline Ltd) v Office of Fair Trading* [2007] CAT 13, at paragraphs 76-80.

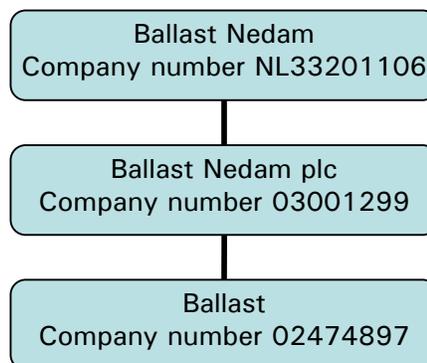
²⁰⁹ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.10.

²¹⁰ Case CE/1925-02 *Collusive tendering for mastic asphalt flat-roofing contracts in Scotland*, March 2005.

²¹¹ Written representations of the Balfour Beatty group, 27 June 2008, paragraph 9.12.

Ballast Nedam N.V. ('Ballast Nedam')

- II.183. Ballast Nedam was the ultimate parent company of its now dissolved subsidiary, Ballast plc ('Ballast'), the company that was involved in the Infringements described in this Decision.
- II.184. Ballast was a public limited company registered in England and Wales, company number 02474897.²¹² Ballast's registered address was Manor Court, High Street, Harmondsworth, Middlesex, UB7 0AQ.²¹³
- II.185. Ballast's activities were that of building, civil engineering and facilities management.²¹⁴ Ballast did not carry out work outside the United Kingdom.
- II.186. Ballast was previously known as Ballast Wiltshier plc and changed its name to Ballast plc on 7 September 2000.²¹⁵
- II.187. On 13 July 2006, Ballast was dissolved.²¹⁶
- II.188. As stated in paragraph II.183 above, Ballast's ultimate parent company was Ballast Nedam²¹⁷, a public limited company registered in the Netherlands, company number NL33201106, whose registered address is 1 Ringwade, 3439 LM NIEUWEGEIN, Netherlands.²¹⁸ Ballast was wholly owned by Ballast Nedam plc, which was a wholly owned subsidiary of Ballast Nedam.²¹⁹ Ballast Nedam plc's company number was 03001299 and its registered address was Manor Court, High Street, Harmondsworth, Middlesex, UB7 0AQ.²²⁰
- II.189. On 5 April 2005, Ballast Nedam plc was dissolved.²²¹
- II.190. Ballast did not have any subsidiaries.²²²
- II.191. The relevant company structure from 2000 to 5 April 2005 was therefore as follows:



²¹² FAME report, OFT Document Reference 11635.

²¹³ Annual Report and Accounts, OFT Document Reference 11644, page 5.

²¹⁴ Annual Report and Accounts 2000, OFT Document Reference 11644, page 4.

²¹⁵ FAME report, OFT Document Reference 11635.

²¹⁶ Companies House details, OFT Document Reference 11634.

²¹⁷ Annual Report and Accounts, OFT Document Reference 11644, page 23.

²¹⁸ FAME report, OFT Document Reference 11639.

²¹⁹ Annual Report and Accounts, OFT Document Reference 11644, page 23.

²²⁰ FAME report, OFT Document Reference 11636.

²²¹ Companies House details, OFT Document Reference 11634a.

²²² FAME report, OFT Document Reference 11635.

- II.192. Ballast Nedam plc had another 4 subsidiaries.²²³
- II.193. Ballast Nedam's worldwide turnover for the financial year ending 31 December 2008 was [...] [C].²²⁴
- II.194. The directors of Ballast from 2000 until its dissolution were as follows:²²⁵
- Douglas Anthony Barrat 2000 – 31 July 2002
 - Nigel Phillip Brook 2 July 2001 – dissolution
 - Phillip John Cooper 2 July 2001 – dissolution
 - Robert Heathfield 2000 – 31 December 2001
 - Han Schoonderbeek 1 March 2001 – 25 September 2003
 - Raymond Theodorus Antonius Steenvoorden 2000 – 1 August 2001
 - Michael Johannes Cornelly Van Galen 1 January 2002 – 13 August 2003
 - Martinus Johanes Frederik Weck 2000 – 1 April 2000
 - Gerardus Nicolaas Gigsbertus Wirken 1 January 2002 – 28 October 2002
- II.195. The directors of Ballast Nedam plc from 2000 until its dissolution were as follows:²²⁶
- Phillip John Cooper 1 January 2002 – 15 October 2003
 - Robert Heathfield 2000 – 31 December 2001
 - Rene Herman Philip Willem Kottman 2000 – dissolution
 - Theo Mulder 2000 – 1 April 2000
 - Michael Percy Snasdell 2000 – 1 November 2002
 - Michael Johannes Cornelix Van Galen 1 January 2002 – 1 January 2002
 - Martinus Johanes Frederik Weck 2000 – 1 April 2000
 - Gerardus Nicolaas Gigsbertus Wirken 2000 – 28 October 2002
- II.196. The directors of Ballast Nedam from 2000 to 2006 were as follows:²²⁷
- Theodorus Adrianus Carolus Bruijninx 12 February 2003 – 2006
 - Rene Herman Philip Willem Kottman 2000 – 2006
 - Theo Mulder 2000 – 1 June 2000
 - Martinus Johannes Frederik Weck 2000 – 15 March 2000
 - Gerardus Nicolaas 2000 – 28 October 2002

²²³ FAME report, OFT Document Reference 11636.

²²⁴ Letter from Ballest Nedam, 29 April 2009. All turnover converted from Euros using average ECB exchange rate for 2008 - <http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html>.

²²⁵ Company Appointments, OFT Document Reference 11640.

²²⁶ Company Appointments, OFT Document Reference 11641.

²²⁷ Company Appointments, OFT Document Reference 11631 and 11631a.

Gijsbertus Wirken

II.197. The following directors have been on the Board of Directors of both Ballast and Ballast Nedam plc during the periods mentioned below.²²⁸ The OFT considers that this provides evidence that Ballast Nedam plc exercised decisive influence over Ballast's conduct, at the time of the relevant Infringements.

- Phillip John Cooper 1 January 2002 – 15 October 2003
- Robert Heathfield 2000 – 31 December 2001
- Martinus Johannes Frederik Weck 2000 – 15 March 2000
- Gerardus Nicolaas Gigsbertus Wirken 1 January 2002 – 28 October 2002

II.198. The following directors have been on the Board of Directors of both Ballast Nedam plc and Ballast Nedam during the periods mentioned below.²²⁹ The OFT considers that this provides evidence that Ballast Nedam exercised decisive influence over Ballast Nedam plc's conduct, at the time of the relevant Infringements.

- Rene Herman Philip Willem Kottman 2000 – dissolution
- Theo Mulder 2000 – 1 April 2000
- Martinus Johannes Frederik Weck 2000 – 15 March 2000
- Gerardus Nicolaas Gigsbertus Wirken 2000 – 28 October 2002

II.199. Ballast did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Ballast Nedam, were given the opportunity of accepting the OFT's Fast Track Offer.²³⁰

II.200. The OFT considers that Ballast Nedam, as 100 per cent indirect owner of Ballast, can be presumed to have exercised decisive influence over Ballast's commercial policy during the relevant period and therefore formed part of the same economic entity. Accordingly, both Ballast Nedam and Ballast would have been jointly and severally liable for payment of the penalties that the OFT is imposing, if Ballast had not been dissolved on 13 July 2006.

II.201. In its response to the Statement, Ballast Nedam submitted that it should not be held liable for Ballast's participation in the relevant Infringements. In particular, Ballast Nedam submitted that:

- (a) Ballast was responsible for its own commercial policy²³¹ and for the development of the group business in the UK²³², and took the decision to enter administration independently of Ballast Nedam;²³³

²²⁸ Company Appointments, OFT Document Reference 11640 and 11641.

²²⁹ Company Appointments, OFT Document Reference 11641, 11631 and 11631a.

²³⁰ See paragraphs II.1481 to II.1487 below.

²³¹ Written representations of Ballast Nedam, 26 September 2008, paragraph 8.

²³² Written representations of Ballast Nedam, 26 September 2008, paragraph 30.

²³³ Written representations of Ballast Nedam, 26 September 2008, paragraph 34.

- (b) Ballast Nedam plc was a holding company which did not interfere in the day-to-day activities of Ballast or its policy-making.²³⁴ Ballast Nedam is merely a financial holding company which held its interest in Ballast as an investment.²³⁵
- II.202. The OFT considers that, in the light of Ballast Nedam's 100 per cent ownership of Ballast and the common directorships identified above, it is entitled to rely on the presumption of decisive influence in accordance with the principles set out in paragraphs III.13 to III.18 below.
- II.203. The OFT does not consider that the contentions put forward by Ballast Nedam are sufficient to rebut that presumption or to establish that Ballast determined its conduct on the market autonomously, see paragraph III.17 of the Legal Background section.
- II.204. This Decision is therefore addressed to Ballast Nedam.

Beaufort Construction (S-in-A) Limited ('Beaufort')
Beaufort Holdings U.K Limited ('Beaufort Holdings')

- II.205. Beaufort is a private limited company registered in England and Wales, company number 01076722.²³⁶ Beaufort's registered and primary trading address is Beaufort House, Brierley Park Close, Sutton in Ashfield, Nottinghamshire NG17 3FW.²³⁷
- II.206. At the time of issue of the Statement, Beaufort undertook new build and refurbishment work in both the public and private sectors. It operated within the education, heritage, housing and leisure sectors.²³⁸ At the time of issue of the Statement, Beaufort did not carry out work outside the United Kingdom.
- II.207. Beaufort's ultimate parent company is Beaufort Holdings, a private limited company, company number 03279482.²³⁹ Beaufort Holdings' registered address is Beaufort House, Brierley Park Close, Sutton in Ashfield, Nottinghamshire NG17 3FW. Beaufort Holdings is listed as a non-trading company.²⁴⁰ Beaufort is a wholly owned subsidiary of Beaufort Holdings.²⁴¹
- II.208. Beaufort has no subsidiaries.²⁴²
- II.209. The overall company structure from 2000 – 2006 is outlined below:

²³⁴ Written representations of Ballast Nedam, 26 September 2008, paragraph 28.

²³⁵ Written representations of Ballast Nedam, 26 September 2008, paragraphs 31 to 32.

²³⁶ FAME report, OFT Document Reference 11645.

²³⁷ FAME report, OFT Document Reference 11645.

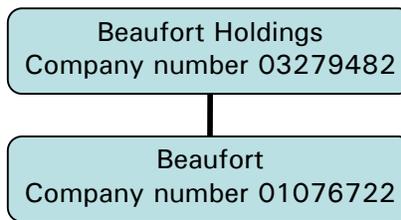
²³⁸ Beaufort's website, OFT Document Reference 11662.

²³⁹ FAME report, OFT Document Reference 11646.

²⁴⁰ Latest available FAME Report of Beaufort Holdings.

²⁴¹ Market definition response, OFT Document Reference 6452.

²⁴² FAME report, OFT Document Reference 11645.



- II.210. Beaufort's turnover for the financial year ending 31 March 2009 was [...] [C].²⁴³
- II.211. Beaufort Holdings is a non-trading company and therefore has no turnover of its own.²⁴⁴
- II.212. The directors of Beaufort from 2000 to 2006 were as follows:²⁴⁵
- Gillian Freda Froggatt 2000 – 2006
 - Roland Graham Froggatt 2000 – 2006
 - Michael Thomas Tomsett 2000 – 30 June 2002
- II.213. The directors of Beaufort Holdings from 2000 to 2006 were as follows:²⁴⁶
- Gillian Freda Froggatt 2000 – 2006
 - Roland Graham Froggatt 2000 – 2006
- II.214. The following directors have been on the Board of Directors of both Beaufort and Beaufort Holdings during the periods mentioned below. The OFT considers that this provides evidence that Beaufort Holdings exercised decisive influence over Beaufort's conduct at the time of the Infringements.
- Gillian Freda Froggatt 2000 – 2006
 - Roland Graham Froggatt 2000 – 2006
- II.215. Beaufort did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Beaufort Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.²⁴⁷
- II.216. The OFT considers that Beaufort Holdings, as 100 per cent owner of Beaufort, can be presumed to have exercised decisive influence over Beaufort's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Beaufort Holdings and Beaufort. Beaufort and Beaufort Holdings are therefore jointly and severally liable for Beaufort's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.217. This Decision is therefore addressed to Beaufort and Beaufort Holdings.

²⁴³ Email from Elliot Mather LLP, 2 September 2009.

²⁴⁴ Letter from Elliot Mather LLP, 18 December 2008.

²⁴⁵ Company Appointments Report, OFT Document Reference 11654.

²⁴⁶ Company Appointments Report, OFT Document Reference 11655.

²⁴⁷ See paragraphs II.1481 to II.1487 below.

Bodill & Sons (Contractors) Limited ('Bodill')

- II.218. Bodill is a private limited company registered in England and Wales, company number 01128085.²⁴⁸ Bodill's registered and primary trading address is Park Place, Robey Close, Linby, Nottingham, Nottinghamshire, NG15 8AA.²⁴⁹
- II.219. At the time of issue of the Statement, Bodill undertook general construction works, in the commercial, industrial and housing sectors for both public and private clients²⁵⁰ and it did not carry out work outside the United Kingdom.
- II.220. Bodill has no holding companies or subsidiaries.²⁵¹
- II.221. Bodill's turnover for the financial year ending 31 March 2009 was [...] [C].²⁵²
- II.222. The directors of Bodill from 2000 to 2006 were as follows:²⁵³
- | | |
|-----------------------------|-------------|
| - Howard Henry Bodill | 2000 – 2006 |
| - Richard Albert Bodill | 2000 – 2006 |
| - Robert Joseph Bodill | 2000 – 2006 |
| - Stuart John Bodill | 2000 – 2006 |
| - Philip John Gray Docherty | 2000 – 2006 |
- II.223. Bodill applied for, and has been granted, leniency in accordance with the OFT's leniency programme.²⁵⁴
- II.224. This Decision is addressed to Bodill. The OFT considers that Bodill is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringements 127, 160 and 204 on account of the participation in the Infringements of that undertaking.

Bowmer and Kirkland Limited ('Bowmer & Kirkland')
B & K Property Services Limited ('BKPS')

- II.225. Bowmer & Kirkland is a private limited company registered in England and Wales, company number 00701982.²⁵⁵ Bowmer & Kirkland's registered address is High Edge Court, Church Street, Heage, Belper, Derbyshire, DE56 2BW.²⁵⁶ Bowmer & Kirkland also operates from two regional offices based in Sunderland and Harrow.²⁵⁷

²⁴⁸ FAME report, OFT Document Reference 11689.

²⁴⁹ FAME report, OFT Document Reference 11689.

²⁵⁰ Market Definition response, OFT Document Reference 5432.

²⁵¹ FAME report, OFT Document Reference 11689.

²⁵² Letter from Maitland-Walker, 22 July 2009.

²⁵³ Company Appointments Report, OFT Document Reference 11692.

²⁵⁴ See Part 3 of OFT Guidance 423

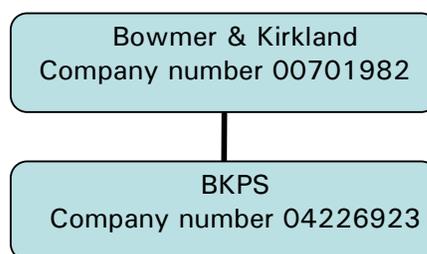
http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

²⁵⁵ FAME report, OFT Document Reference 11695.

²⁵⁶ FAME report, OFT Document Reference 11695.

²⁵⁷ FAME report, OFT Document Reference 11695.

- II.226. At the time of issue of the Statement, Bowmer & Kirkland's principal activities were those of building contracting, engineering and property development.²⁵⁸ At the time of issue of the Statement a member of the Bowmer & Kirkland group carried out work outside the United Kingdom.²⁵⁹
- II.227. BKPS is a private limited company registered in England and Wales, company number 04226923 and was incorporated on 1 June 2001²⁶⁰, and commenced trading in September 2002.²⁶¹ BKPS's registered and primary trading address is High Edge Court, Heage, Belper, Derbyshire, DE56 2BW.²⁶² BKPS is a wholly owned subsidiary of Bowmer & Kirkland.²⁶³
- II.228. At the time of issue of the Statement, BKPS carried out refurbishment, alteration, extension, new build, and planned maintenance projects.²⁶⁴
- II.229. Bowmer & Kirkland has no holding companies.²⁶⁵
- II.230. The relevant company structure from 2000 – 2006 is outlined below:



- II.231. Bowmer & Kirkland has another 35 subsidiaries.²⁶⁶
- II.232. Bowmer & Kirkland's worldwide²⁶⁷ consolidated turnover for the financial year ending 31 August 2008 was [...] [C].²⁶⁸
- II.233. The directors of Bowmer & Kirkland from 2000 to 2006, were as follows:²⁶⁹

- John Henry Betterton	2000 – 2006
- Ralph Charles Jones	2000 – 2006
- John Nigel Kirkland	2000 – 2006
- Robert Malcolm Kirkland	2000 – 2006
- Kenneth Sydney Lee	2000 – 4 May 2001
- John Paul Lomas	2000 – 2006
- Howard Parkin	2000 – 31 December 2000
- Melvin Stuart Sheldon	2000 – 2006
- David James Walker	2000 – 2006

²⁵⁸ Group Report and Financial Statements, OFT Document Reference 11696, page 5.

²⁵⁹ FAME report, OFT Document Reference 11695.

²⁶⁰ FAME report, OFT Document Reference 11705.

²⁶¹ Email from Geldards, OFT Document Reference 14392.

²⁶² FAME report, OFT Document Reference 11705.

²⁶³ FAME report, OFT Document Reference 11695.

²⁶⁴ Bowmer & Kirkland's website, OFT Document Reference 11711, page 1.

²⁶⁵ FAME report, OFT Document Reference 11695.

²⁶⁶ Latest available FAME report of Bowmer & Kirkland.

²⁶⁷ FAME report, OFT Document Reference 11695. Bowmer & Kirkland first received income from overseas interests in 2000.

²⁶⁸ Latest Group Report and Financial Statements.

²⁶⁹ Company Appointments Report, OFT Document Reference 11699.

- Keith Whitmore 1 April 2000 – 24 December 2004

II.234. The directors of BKPS from 2001 to 2006 were as follows:²⁷⁰

- Paul William Beet	1 August 2001 – 2006
- Stephen Michael Jepson	1 August 2001 – 31 August 2004
- Kevin John McGowan	27 June 2006 – 2006
- Melvin Stuart Sheldon	1 August 2001 – 2006
- St Andrews Company Services Limited	1 June 2001 – 1 August 2001

II.235. The following director has been on the Board of Directors of BKPS and Bowmer & Kirkland during the periods mentioned below.²⁷¹ The OFT considers that this provides evidence that Bowmer & Kirkland exercised decisive influence over the conduct of BKPS.

- Melvin Stuart Sheldon	2000 – 2006 (Bowmer & Kirkland) 2001 – 2006 (BKPS)
-------------------------	---

II.236. Bowmer & Kirkland did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.²⁷²

II.237. BKPS did not apply for leniency.

II.238. The OFT considers that Bowmer & Kirkland is liable for Infringements 18 and 85 described in this Decision and that it is therefore liable for payment of the penalties that the OFT is imposing in respect of those Infringements, on account of its participation in those Infringements.

II.239. In addition, for the period from 2001 to 2006 the OFT considers that Bowmer & Kirkland, as 100 per cent owner of BKPS, can be presumed to have exercised decisive influence over the commercial policy of BKPS during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Bowmer & Kirkland and BKPS. Bowmer & Kirkland and BKPS are therefore jointly and severally liable for BKPS's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringement 134.

II.240. In its response to the Statement, Bowmer & Kirkland submitted that liability for BKPS's participation in the relevant Infringement should not be attributed to Bowmer & Kirkland. Specifically, Bowmer & Kirkland submitted that:

- (a) Its subsidiaries enjoyed a high level of operational autonomy;²⁷³
- (b) The directorships held by Melvin Sheldon in BKPS reflected Mr Sheldon's role of strategic oversight and maintenance of financial

²⁷⁰ Company Appointments Report, OFT Document Reference 11708.

²⁷¹ Company Appointments Reports, OFT Document Reference 11699, 11703 and 11708.

²⁷² See paragraphs II.1481 to II.1487 below.

²⁷³ Written representations of Bowmer & Kirkland and BKPS, 4 July 2008, paragraph 15.

discipline and control. Mr Sheldon did not engage in operational matters or the pricing of contracts;²⁷⁴ and

- (c) There is no evidence of board-level involvement in cover pricing, and the matter was never discussed at board level within the Bowmer & Kirkland group of companies.²⁷⁵

II.241. Furthermore Bowmer & Kirkland submitted that the OFT has to demonstrate not only that Bowmer & Kirkland could have exercised decisive influence over BKPS, but that Mr Sheldon did in fact exert such influence.²⁷⁶

II.242. The OFT has had regard to all the submissions put forward by Bowmer & Kirkland in relation to this issue. The OFT notes that, in the light of the 100 per cent shareholdings held by Bowmer & Kirkland in BKPS and the directorships in both companies held by Mr Sheldon, the OFT is entitled to presume that Bowmer & Kirkland exercised decisive influence over its subsidiary BKPS between 2001 and 2006.²⁷⁷

II.243. The OFT does not consider that Mr Sheldon's purported lack of involvement in operational matters or the pricing of contracts detracts from this conclusion. Indeed, the OFT considers that his role of strategic oversight and maintenance of financial control constitutes an economic and legal organisational link which demonstrates the exercise of decisive influence by Bowmer & Kirkland over BKPS. Furthermore the OFT considers that it does not assist Bowmer & Kirkland to argue that there was no board-level knowledge of or involvement in cover pricing within the Bowmer & Kirkland group of companies. The OFT refers in this regard to the principle set out in paragraph III.18 below.

II.244. In the circumstances, the OFT considers that Bowmer & Kirkland has not put forward sufficient evidence to rebut the presumption of decisive influence or to establish that its subsidiary determined its conduct on the market autonomously.

II.245. This Decision is therefore addressed to Bowmer & Kirkland and BKPS.

Bramall Construction Limited ('Bramall')
Frank Haslam Milan & Company Limited ('Frank Haslam Milan')
Keepmoat Limited formerly known as Keepmoat plc ('Keepmoat')

II.246. Bramall is a private limited company registered in England and Wales, company number 01467161.²⁷⁸ Bramall's registered address is c/o Keepmoat plc, The Waterfront, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL.²⁷⁹ Bramall also has trading addresses in Liverpool, Rotherham and Salford.²⁸⁰

²⁷⁴ Written representations of Bowmer & Kirkland and BKPS, 4 July 2008, paragraph 15.

²⁷⁵ Written representations of Bowmer & Kirkland and BKPS, 4 July 2008, paragraph 15.

²⁷⁶ Written representations of Bowmer & Kirkland and BKPS, 4 July 2008, paragraph 16.

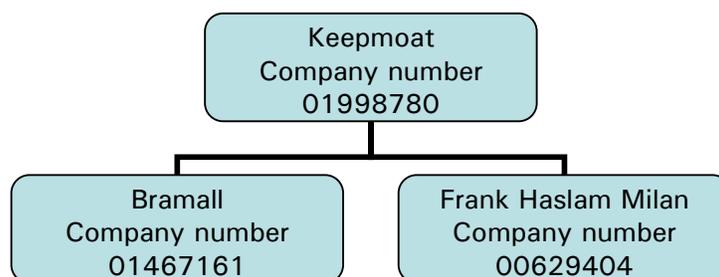
²⁷⁷ See paragraphs III.13 to III.18 of Section III (Legal Background).

²⁷⁸ FAME report, OFT Document Reference 11712.

²⁷⁹ FAME report, OFT Document Reference 11712.

²⁸⁰ FAME report, OFT Document Reference 11712.

- II.247. Frank Haslam Milan is a private limited company, registered in England and Wales, company number 00629404.²⁸¹ Frank Haslam Milan's registered address is c/o Keepmoat plc, The Waterfront, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL.²⁸² Frank Haslam Milan also has trading addresses in Sunderland, Birmingham and Newcastle Upon Tyne.²⁸³
- II.248. At the time of issue of the Statement, Bramall's principal activity was housing regeneration²⁸⁴ and it did not carry out work outside the United Kingdom.
- II.249. At the time of issue of the Statement, Frank Haslam Milan's principal activity was housing regeneration²⁸⁵ and it did not carry out work outside the United Kingdom.
- II.250. At the time of the Infringements, Bramall and Frank Haslam Milan's ultimate parent company was Keepmoat, a public limited company, company number 01998780.²⁸⁶ Keepmoat's registered and primary trading address is, The Waterfront, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL.²⁸⁷ Bramall and Frank Haslam Milan are both wholly owned subsidiaries of Keepmoat.²⁸⁸ Until 23 August 2007, Keepmoat was called Keepmoat plc.²⁸⁹
- II.251. Bramall and Frank Haslam Milan do not have any subsidiaries.²⁹⁰
- II.252. The relevant company structure is as follows:



- II.253. Keepmoat has 11 other subsidiaries.²⁹¹
- II.254. Keepmoat's consolidated turnover for the financial year ending 31 March 2009 was [...] [C].²⁹²
- II.255. The directors of Bramall from 2001 to 2006 were as follows:²⁹³
- | | |
|-----------------------|------------------------|
| - Neil Anthony Baxter | 2001 – 2006 |
| - Mark Timothy Davis | 1 November 2005 – 2006 |

²⁸¹ FAME report, OFT Document Reference 11713.
²⁸² FAME report, OFT Document Reference 11713.
²⁸³ Latest available FAME report of Frank Haslam Milan.
²⁸⁴ Annual Report, OFT Document Reference 11727, page 4.
²⁸⁵ Annual Report, OFT Document Reference 11725, page 4.
²⁸⁶ FAME report, OFT Document Reference 11714.
²⁸⁷ FAME report, OFT Document Reference 11714.
²⁸⁸ FAME report, OFT Document Reference 11714.
²⁸⁹ Latest available FAME report of Keepmoat.
²⁹⁰ FAME reports, OFT Document Reference 11712 and OFT Document Reference 11713.
²⁹¹ Latest available FAME report of Keepmoat.
²⁹² Email from DLA Piper LLP, 13 July 2009.
²⁹³ Company Appointments, OFT Document Reference 11722.

- Trevor Edward Jee 2001 – 2006
- David Prescott 1 September 2003 – 2006
- John Derek Thirlwall 2001 – 31 October 2005
- Roger Howard Ward 2001 – 2006

II.256. The directors of Frank Haslam Milan from 2001 to 2006 were as follows:²⁹⁴

- Terence Michael Stanley Bateman 2001 – 31 March 2005
- Mark Timothy Davis 2001 – 1 April 2003 and 1 November 2005 – 2006
- Allen Hickling 2001 – 2006
- Trevor Edward Jee 1 September 2003 – 2006
- David Mellor 1 April 2003 – 2006
- John Derek Thirlwall 2001 – 31 October 2005
- David Ward 1 April 2005 – 2006
- Roger Howard Ward 2001 – 2006

II.257. The directors of Keepmoat from 2001 to 2006 were as follows:²⁹⁵

- David Blunt 2001 – 2006
- Christopher Bovis 2001 – 2006
- Terence George Bramall 2001 – 2006
- David John Harding 1 February 2004 – 2006
- Eugien Jaruga 1 February 2004 – 2006
- John Derek Thirlwall 31 October 2005 – 2006
- Roger Howard Ward 1 February 2004 – 2006
- Richard Watson 2001 – 2006

II.258. The following director has been on the Board of Directors of both Keepmoat and Bramall during the period mentioned below.²⁹⁶ The OFT considers that this provides evidence that Keepmoat exercised decisive influence over Bramall's conduct at the time of the Infringements.

- Roger Howard Ward 1 February 2004 – 2006

II.259. Both Bramall and Frank Haslam Milan applied for, and have been granted, leniency in accordance with the OFT's leniency programme.²⁹⁷

II.260. The OFT considers that Keepmoat, as 100 per cent owner of Bramall, can be presumed to have exercised decisive influence over Bramall's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition, in respect of the period from 1 February 2004 to 2006, the evidence of the exercise of decisive influence in the form of directors in common between Keepmoat and Bramall. Keepmoat and Bramall are therefore jointly and severally liable for Bramall's participation in the Infringements which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringements 57 and 179.

²⁹⁴ Company Appointments, OFT Document Reference 11724.

²⁹⁵ Company Appointments, OFT Document Reference 11723.

²⁹⁶ Company Appointments, OFT Document Reference 11723 and 11722.

²⁹⁷ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf .

- II.261. The OFT considers that Keepmoat, as 100 per cent owner of Frank Haslam Milan, can be presumed to have exercised decisive influence over Frank Haslam Milan's commercial policy during the relevant period and therefore forms part of the same economic entity. Keepmoat and Frank Haslam Milan are therefore jointly and severally liable for Frank Haslam Milan's participation in the Infringement which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing in respect of Infringement 123.
- II.262. This Decision is therefore addressed to Bramall, Frank Haslam Milan and Keepmoat.

C.J. Ellmore & Company Limited ('C J Ellmore')

- II.263. C J Ellmore is a private limited company registered in England and Wales, company number 01085262.²⁹⁸ C J Ellmore's registered and primary trading address is Glendevon House, Hawthorn Park, Coal Road, Leeds, LS17 1PQ.²⁹⁹
- II.264. At the time of issue of the Statement, C J Ellmore undertook general construction work including new build, extensions, alterations and refurbishment services in commercial, industrial, schools, universities and health care sectors. C J Ellmore also specialised in bank and shop fitting, facilities management, bespoke joinery and restoration.³⁰⁰ At the time of issue of the Statement, C J Ellmore did not carry out work outside the UK.
- II.265. C J Ellmore has no holding companies or subsidiaries.
- II.266. On 13 May 2009 joint administrators were appointed for C J Ellmore.³⁰¹
- II.267. C J Ellmore's turnover for the first ten months of the financial year ending 30 November 2008 was [...] [C].³⁰²
- II.268. The directors of C J Ellmore from 2000 to 2006 were as follows:³⁰³
- | | |
|----------------------------|-------------------------|
| - Christopher John Ellmore | 2000 – 2006 |
| - Stephen David Ellmore | 2000 – 2006 |
| - Andrew John Ellmore | 2000 – 29 June 2005 |
| - Marjorie Ellmore | 2000 – 28 February 1999 |
| - Brian French | 1 December 2005 – 2006 |
| - John Martin Gregory | 2000 – 31 March 2002 |
| - Ian Usher | 1 December 2005 – 2006 |
- II.269. C J Ellmore did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.³⁰⁴

²⁹⁸ FAME report, OFT Document Reference 11771.

²⁹⁹ Latest available Companies House information.

³⁰⁰ C J Ellmore's website, OFT Document Reference 11774b.

³⁰¹ Notice of administrator's appointment, form 2.12B.

³⁰² Letter from Gordons LLP, 29 October 2008.

³⁰³ Company Appointments Report, OFT Document Reference 11774a.

³⁰⁴ See paragraphs II.1481 to II.1487 below.

II.270. This Decision is addressed to C J Ellmore. The OFT considers that C J Ellmore is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Caddick Construction Limited ('Caddick')
Caddick Group plc ('Caddick Group')

II.271. Caddick is a private limited company registered in England and Wales, company number 01435461.³⁰⁵ Caddick's registered and primary trading address is Calder Grange, Knottingley, West Yorkshire, WF11 8DA.³⁰⁶

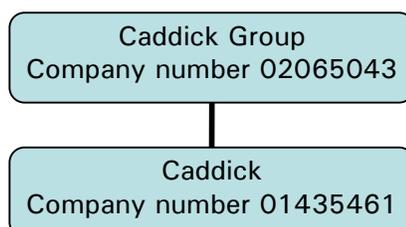
II.272. At the time of issue of the Statement, Caddick was a construction company which undertook projects predominantly in the industrial, commercial, retail, leisure and highways infrastructure sectors.³⁰⁷ At the time of issue of the Statement Caddick did not carry out work outside the United Kingdom.

II.273. Caddick's parent company is Caddick Group, a public limited company, company number 02065043.³⁰⁸ Caddick Group's registered and primary trading address is Castlegarth Grange, Scott Lane, Wetherby, West Yorkshire, LS22 6LH.³⁰⁹ Caddick is a wholly owned subsidiary of Caddick Group.³¹⁰

II.274. From 2000 until 7 May 2002, when it changed its name, Caddick Group was known as Paul Caddick (Holdings) plc.³¹¹

II.275. Caddick has three subsidiaries.³¹²

II.276. The relevant company group structure from 2000 - 2006 is outlined below:³¹³



II.277. Caddick Group has another 13 subsidiaries.³¹⁴

II.278. Caddick Group's consolidated turnover for the financial year ending 31 August was [...] [C].³¹⁵

II.279. The directors of Caddick from 2000 until 2006 were as follows:³¹⁶

³⁰⁵ FAME report, OFT Document Reference 11746.

³⁰⁶ Latest available FAME report of Caddick.

³⁰⁷ Caddick's website, OFT Document Reference 11753, page 1.

³⁰⁸ FAME report, OFT Document Reference 11745.

³⁰⁹ Latest available FAME report of Caddick Group.

³¹⁰ Annual Report, OFT Document Reference 11749, page 23.

³¹¹ FAME report, OFT Document Reference 11745.

³¹² Latest available FAME report of Caddick.

³¹³ FAME report, OFT Document Reference 11746.

³¹⁴ Latest available FAME report of Caddick Group.

³¹⁵ Letter from Addleshaw Goddard, 29 April 2009.

- Keith Bradley 2000 – 2006
- Alexandra Esther Caddick 2000 – 2006
- Paul Caddick 2000 – 2006
- Anthony Cullen 2000 – 8 September 2000
- Adrian Christopher Dobson 2000 – 2006
- James Harker 2000 – 2006
- Kenneth Roy Hinchliffe, 2000 – 2006
- Peter Graham Hirst 2000 – 2006
- Andrew Murray 2000 – 2006

II.280. The directors of Caddick Group from 2000 until 2006 were as follows:³¹⁷

- Alexandra Esther Caddick 2000 – 2006
- Paul Caddick 2000 – 2006
- Peter Graham Hirst 2000 – 2006

II.281. The following directors have been on the Board of Directors of both Caddick and Caddick Group during the periods mentioned below.³¹⁸ The OFT considers that this demonstrates that Caddick Group exercised decisive influence over Caddick's conduct.

- Alexandra Esther Caddick 2000 – 2006
- Paul Caddick 2000 – 2006
- Peter Graham Hirst 2000 – 2006

II.282. Caddick did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Caddick Group, were given the opportunity of accepting the OFT's Fast Track Offer.³¹⁹

II.283. The OFT considers that Caddick Group, as 100 per cent owner of Caddick and having Directors in common, can be presumed to have exercised decisive influence over Caddick's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Caddick Group and Caddick. Caddick and Caddick Group are therefore jointly and severally liable for Caddick's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the fine that the OFT is imposing.

II.284. This Decision is therefore addressed to Caddick and Caddick Group.

Carillion JM Limited ('Mowlem')

II.285. Mowlem is a private limited company registered in England and Wales, company number 00077628.³²⁰ Mowlem's registered and primary trading address is 24

³¹⁶ Company Appointments Report, OFT Document Reference 11751.

³¹⁷ Company Appointments Report, OFT Document Reference 11751, page 4.

³¹⁸ Company Appointments Reports, OFT Document Reference 11751.

³¹⁹ See paragraphs II.1481 to II.1487 below.

³²⁰ FAME report, OFT Document Reference 11754.

Birch Street, Wolverhampton, West Midlands, WV1 4HY.³²¹ Mowlem also trades from 12 other addresses in England.³²²

- II.286. At the time of issue of the Statement, Mowlem was an international provider of construction and support services to public and private sector clients operating across a comprehensive range of market sectors.³²³ At the time of issue of the Statement, Mowlem no longer carried out work outside the United Kingdom.
- II.287. Mowlem was named John Mowlem & Company plc until 31 December 2002, Mowlem plc from 31 December 2002 until 25 April 2006 and Mowlem Limited from 25 April 2006 until 24 May 2006. Mowlem has had its current name since 24 May 2006.³²⁴
- II.288. Carillion plc ('Carillion') acquired Mowlem plc on 23 February 2006.³²⁵ Carillion is a public limited company, company number 03782379.³²⁶ Mowlem is a wholly owned subsidiary of Carillion.³²⁷
- II.289. Mowlem has 147 subsidiaries.³²⁸
- II.290. Mowlem's worldwide consolidated turnover for the financial year ending 31 December 2008 was [...] [C].³²⁹
- II.291. The directors of Mowlem from 2000 to 2006 were as follows:³³⁰
- | | |
|-------------------------------|---------------------------------|
| - Gerald Thornton Brown | 2000 – 10 May 2005 |
| - Christopher Jonathan Bunker | 18 June 2001 – 23 February 2006 |
| - Joseph Darby | 2000 – 23 February 2006 |
| - Charles Murray Fisher | 2000 – 30 June 2005 |
| - Anthony Michael Fry | 2000 – 23 February 2006 |
| - John Christopher Gains | 2000 – 22 April 2005 |
| - Christopher Francis Gregory | 30 April 2006 – 2006 |
| Girling | |
| - Paul Richard Mainwaring | 10 May 2005 – 23 May 2006 |
| - John McDonough | 30 April 2006 – 2006 |
| - Arthur Harold Moore | 2000 – 23 May 2006 |
| - Roger William Robinson | 30 April 2006 – 2006 |
| - Rolf Wilhelm Heinrich | 2000 – 31 December 2001 |
| Stomberg | |
| - Simon Neil Vivian | 1 June 2004 – 23 May 2006 |
- II.292. Carillion applied for, and has been granted, leniency on behalf of its subsidiary Mowlem, in accordance with the OFT's leniency programme.³³¹

³²¹ FAME report, OFT Document Reference 11754.

³²² Latest available FAME report of Mowlem.

³²³ Market Definition response, OFT Document Reference B2796, page 2.

³²⁴ FAME report, OFT Document Reference 11754.

³²⁵ Annual Report and Accounts, OFT Document Reference 11758, page 11.

³²⁶ FAME report, OFT Document Reference 11755.

³²⁷ FAME report, OFT Document Reference 11755.

³²⁸ FAME report, OFT Document Reference 11754.

³²⁹ Email from Slaughter and May, 9 July 2009. The OFT was advised that the turnover figure provided was the turnover attributable to Mowlem within the Carillion group.

³³⁰ Company Appointments report, OFT Document Reference 11756.

³³¹ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf

- II.293. The OFT considers that Mowlem is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringements 27, 39 and 210³³², on account of the participation in the Infringements of that undertaking.
- II.294. Since the Infringements described in this Decision which relate to Mowlem, Mowlem has been acquired by Carillion. As Carillion did not form part of the same economic entity as Mowlem at the relevant times, it is not jointly and severally liable with Mowlem for payment of the fine which the OFT is imposing.
- II.295. This Decision is therefore addressed to Mowlem.

Clegg Construction Limited ('Clegg')
D E Clegg Holdings Limited ('D E Clegg')

- II.296. Clegg is a private limited company registered in England and Wales, company number 00667598.³³³ Clegg's registered and primary trading address is Bishops House, 42 High Pavement, The Lace Market, Nottingham, Nottinghamshire, NG1 1HN.³³⁴ Clegg has an additional trading address at, The Parsonage, Hallam Fields Road, Ilkeston, Derbyshire, DE7 4DZ.³³⁵ Until 8 August 2002, Clegg was named D E Clegg Limited.³³⁶
- II.297. At the time of issue of the Statement, Clegg's general construction activities took place within the Midlands, but extended throughout England and Wales. At the time of issue of the Statement, activities were generally in the private sector within commercial, industrial and housing sectors with some lower value education and health care schemes, which were predominately new build but with some repair and refurbishment.³³⁷ At the time of issue of the Statement, Clegg did not carry out work outside the United Kingdom.
- II.298. At the time of issue of the Statement Clegg's ultimate parent company was D E Clegg, a private limited company, company number 03995965.³³⁸ D E Clegg was incorporated on 17 May 2000.³³⁹ D E Clegg's registered office is 42 High Pavement, Nottingham, Nottinghamshire, NG1 1HN.³⁴⁰ Clegg is a wholly owned subsidiary of D E Clegg.³⁴¹ Until 30 June 2000, D E Clegg was named Castlegate 149 Limited.³⁴²
- II.299. Clegg has one wholly owned subsidiary.³⁴³
- II.300. The relevant company structure is outlined below:

³³² The penalty in respect of Infringement 27 is reduced to zero as this is a 'But for' Infringement.

³³³ FAME report, OFT Document Reference 11776.

³³⁴ FAME report, OFT Document Reference 11776.

³³⁵ FAME report, OFT Document Reference 11776.

³³⁶ Latest available FAME report of Clegg.

³³⁷ Market definition response, OFT Document Reference 5229.

³³⁸ FAME report, OFT Document Reference 11777.

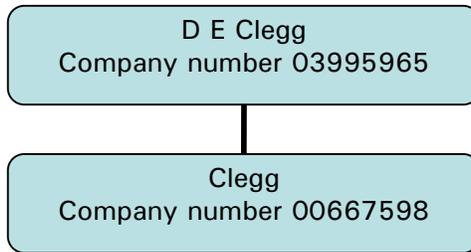
³³⁹ FAME report, OFT Document Reference 11777.

³⁴⁰ FAME report, OFT Document Reference 11777.

³⁴¹ FAME report, OFT Document Reference 11775.

³⁴² FAME report, OFT Document Reference 11775.

³⁴³ FAME report, OFT Document Reference 11776.



II.301. D E Clegg has two other wholly owned subsidiaries.³⁴⁴

II.302. D E Clegg's consolidated worldwide turnover for the financial year ending 31 December 2008 was [...] [C].³⁴⁵

II.303. The directors of Clegg from 2002 to 2006 were as follows:³⁴⁶

- Edwin Villiers Aldred	2002 – 28 July 2000
- Keith Anderson	2002 – 2006
- Jonathan Roy Ankers	8 August 2002 – 2006
- Simon John Blackburn	2 December 2002 – 2006
- William Graham Fiddian	8 August 2002 – 31 December 2003
- Jonathan Mark King	8 August 2002 – 2006
- Salvatore Martello	1 October 2004 – 2006
- Christopher Samuel Parnell	8 August 2002 – 31 December 2002
- David Raymond Short	2002 – 2006
- Gary Thomasson	5 January 2004 – 27 May 2004
- Allan Wagstaff	2002 – 28 July 2000
- Peter John Warren	8 August 2002 – 2006
- John William White	2002 – 2006

II.304. The directors of D E Clegg from 2002 to 2006 were as follows:³⁴⁷

- Keith Anderson	2002 – 2006
- Simon John Blackburn	1 January 2005 – 2006
- William Graham Fiddian	1 January 2003 – 31 December 2003
- Steven Mark Giltrap	1 January 2003 – 2006
- Timothy Stewart Richmond	2002 – 2006
- David Raymond Short	2002 – 2006
- John William White	2002 – 2006

II.305. The following directors have been on the Board of Directors of both Clegg and D E Clegg during the periods mentioned below.³⁴⁸ The OFT considers that this provides evidence that D E Clegg exercised decisive influence over Clegg's conduct at the time of the Infringements.

- Keith Anderson	2002 – 2006
- Simon John Blackburn	1 January 2005 – 2006
- William Graham Fiddian	1 January 2003 – 31 December 2003

³⁴⁴ Latest available FAME report of D E Clegg.

³⁴⁵ Email from Watson Burton LLP, 28 April 2009.

³⁴⁶ Company Appointments Report, OFT Document Reference 11778.

³⁴⁷ Company Appointments Report, OFT Document Reference 11779.

³⁴⁸ Company Appointments Report, OFT Document Reference 11778 and 11779.

- David Raymond Short 2002 – 2006
- John William White 2002 – 2006

- II.306. Clegg applied for, and has been granted, leniency in accordance with the OFT's leniency programme.³⁴⁹
- II.307. The OFT considers that D E Clegg, as 100 per cent indirect owner of Clegg can be presumed to have exercised decisive influence over Clegg's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between D E Clegg and Clegg. Clegg and D E Clegg are therefore jointly and severally liable for Clegg's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 139, 168 and 212.³⁵⁰
- II.308. Since the Infringements described in this Decision, Clegg and D E Clegg have been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Clegg and D E Clegg at the relevant times, it is not jointly and severally liable with Clegg and D E Clegg for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Clegg and D E Clegg.
- II.309. This Decision is therefore addressed to Clegg and D E Clegg.

Connaught Partnerships Ltd ('Connaught')
Connaught plc ('Connaught plc')

- II.310. Connaught is a private limited company registered in England and Wales, company number 01838150.³⁵¹ Connaught's registered and primary trading address is Connaught House, Grenadier Road, Exeter Business Park, Devon EX1 3QF.³⁵² Connaught also trades from offices located in Surrey, West Sussex, West Yorkshire, and Worcestershire.³⁵³
- II.311. At the time of issue of the Statement, Connaught's principal activity was to provide a comprehensive range of maintenance, specialist, and light refurbishment services of buildings.³⁵⁴ At the time of issue of the Statement Connaught did not carry on work outside the United Kingdom.
- II.312. From 1 September 1999 until 14 December 2005 Connaught was called Connaught Property Services Limited ('Connaught PS').³⁵⁵ On 14 December 2005 it changed its name to Connaught.³⁵⁶
- II.313. Connaught's ultimate parent company is Connaught plc, a public limited company registered in England and Wales, company number 03184319.³⁵⁷

³⁴⁹ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

³⁵⁰ The penalty in respect of Infringement 212 is reduced to zero as this is a 'But for' Infringement.

³⁵¹ FAME report, OFT Document Reference 14317.

³⁵² Latest available FAME report of Connaught.

³⁵³ Latest available FAME report of Connaught.

³⁵⁴ Directors' report and financial statements, OFT Document Reference 14327, page 4.

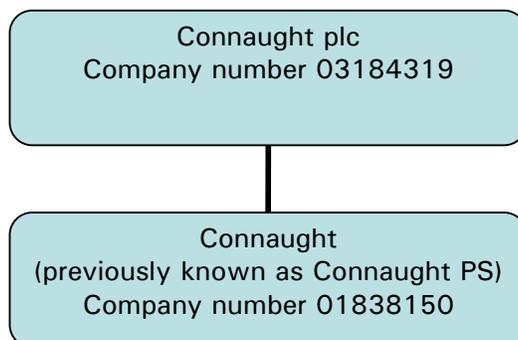
³⁵⁵ Directors' report and financial statements, OFT Document Reference 14320, page 14.

³⁵⁶ FAME report, OFT Document Reference 14317.

Connaught plc's registered and primary trading address is Connaught House, Grenadier Road, Exeter Business Park, Devon EX1 3QF.³⁵⁸ Connaught is a wholly owned subsidiary of Connaught plc.³⁵⁹

II.314. Connaught has no subsidiaries.³⁶⁰

II.315. The relevant structure company structure is outlined below:



II.316. Connaught plc has another 29 wholly owned subsidiaries.³⁶¹

II.317. Connaught plc's group worldwide consolidated turnover for the financial year ending 31 August 2008 was £552,900,000.³⁶²

II.318. The directors of Connaught from 2000 to 2006 were as follows:³⁶³

- Iain Richard Bray	20 September 2005 – 2006
- Geoffrey David Critchlow	2000 – 21 June 2001
- Andrew Darkin	2000 – 2006
- Mark Dingad Davies	4 March 2005 – 2006
- Jackie Ducker	2000 – 18 March 2003
- Terence Marvin Evans	2000 – 9 November 2000
- Timothy John Hancock	13 June 2006 – 2006
- Stephen Ronald Hill	1 September 2006 – 2006
- Peter Jones	2000 – 2006
- Stephen James Oldbury	17 March 2003 – 12 May 2006
- David Kenneth Pike	1 May 2000 – 21 September 2004
- Derek Anthony Quinn	2000 – 18 March 2003
- Michael John Roberts	2000 – 2006
- Ian Campbell Sprigings	2000 – 2006
- Roger Standing	2000 – 2006
- Andrew Philip Steele	15 March 2003 – 7 March 2005
- Mark William Tincknell	2000 – 2006
- David Francis Wells	1 April 2005 – 2006

II.319. The directors of Connaught plc from 2000 to 2006 were as follows:³⁶⁴

³⁵⁷ FAME report, OFT Document Reference 11784.

³⁵⁸ Latest available FAME report of Connaught plc.

³⁵⁹ FAME report, OFT Document Reference 11784.

³⁶⁰ FAME report, OFT Document Reference 14317.

³⁶¹ Latest available FAME report of Connaught plc.

³⁶² Letter from Allen & Overy, 29 April 2009.

³⁶³ Company Appointments Report, OFT Document Reference 14318.

³⁶⁴ Company Appointments Report, OFT Document Reference 11788.

- Robert Harding Alcock	1 September 2006 – 2006
- Andrew Darkin	5 May 2000 – 30 October 2006
- Mark Dingad Davies	9 August 2004 – 2006
- Robert Michael Henry	2000 – 31 March 2003
- Stephen Ronald Hill	1 September 2006 – 2006
- James McLaughlin	2000 – 30 October 2002
- Andrew Robert Paul McNaughton	5 May 2000 – 11 June 2002
- Garry John Peagram	21 September 2004 – 31 March 2005
- David Kenneth Pike	2000 – 21 September 2004
- Caroline Fiona Price	1 September 2006 – 2006
- Timothy Stuart Ross	2000 – 2006
- Mark William Tincknell	2000 – 2006
- David Wells	1 April 2005 – 1 September 2006
- Anthony John Williams	30 October 2002 – 31 August 2006

II.320. The following directors have been on the Board of Directors of both Connaught and Connaught plc during the periods mentioned below.³⁶⁵ The OFT considers that this provides evidence that Connaught plc exercised decisive influence over Connaught's conduct at the time of the Infringements.

- Andrew Darkin	5 May 2000 – 30 October 2006
- David Kenneth Pike	2000 – 21 September 2004
- Mark William Tincknell	2000 – 2006

II.321. Connaught plc did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.³⁶⁶

II.322. Connaught did not apply for leniency.

II.323. The OFT considers that Connaught plc, as 100 per cent owner of Connaught, can be presumed to have exercised decisive influence over Connaught's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Connaught plc and Connaught. Connaught and Connaught plc are therefore jointly and severally liable for Connaught's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.324. This Decision is therefore addressed to Connaught and Connaught plc.

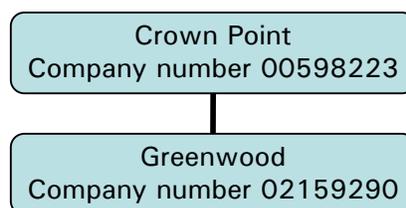
Crown Point Maintenance Group Limited ('Crown Point')
and its dissolved subsidiary Greenwood Building Contractors (Mansfield) Limited ('Greenwood')

II.325. Greenwood was a private limited company registered in England and Wales, company number 02159290.³⁶⁷ Greenwood's registered and trading address was Nursery Street, Mansfield, Nottinghamshire, NG18 2AG.³⁶⁸

³⁶⁵ Company Appointments Reports, OFT Document Reference 14318 and 11788.

³⁶⁶ See paragraphs II.1481 to II.1487 below.

- II.326. Prior to dissolution, Greenwood's principal activity was that of building contractors.³⁶⁹ Prior to dissolution, Greenwood did not carry out work outside the United Kingdom.
- II.327. On 24 June 2005 an administrator was appointed³⁷⁰ and on 28 March 2007, Greenwood was dissolved.³⁷¹
- II.328. Greenwood's ultimate parent company was Crown Point, a private limited company, company number 00598223.³⁷² Crown Point's registered address is Crown Point House, 169 Cross Green Lane, Leeds, West Yorkshire, LS9 0BD.³⁷³ From 11 June 2002, Greenwood was a wholly owned subsidiary of Crown Point.³⁷⁴
- II.329. Greenwood had no subsidiaries.³⁷⁵
- II.330. The overall company structure from 11 June 2002 until 2006 was therefore as follows:



II.331. Crown Point's turnover for the financial year ending 31 May 2008 was [...] [C].³⁷⁶

II.332. The directors of Greenwood from 2001 to 2006 were as follows:³⁷⁷

- Andrew Goodwin	11 June 2002 – 20 September 2005
- Bryan Goodwin	11 June 2002 – 2006
- Kenneth Taylor	2001 – 11 June 2002
- Robert Gregory Taylor	2001 – 11 June 2002

II.333. The directors of Crown Point from 2001 to 2006 were as follows:³⁷⁸

- Andrew Goodwin	7 February 2001 – 14 September 2005 and 18 January 2006 – 2006
- Mary Constance Goodwin	2001 – 18 January 2006
- Wayne Goodwin	2001 – 6 February 2001

³⁶⁷ FAME report, OFT Document Reference 11983.

³⁶⁸ FAME report, OFT Document Reference 11983.

³⁶⁹ Report and Accounts, OFT Document Reference 11992, page 2.

³⁷⁰ FAME report, OFT Document Reference 11983.

³⁷¹ Company Details, OFT Document Reference 11981.

³⁷² FAME report, OFT Document Reference 11985.

³⁷³ FAME report, OFT Document Reference 11985.

³⁷⁴ Report and Accounts, OFT Document Reference 11992, page 14.

³⁷⁵ FAME report, OFT Document Reference 11983.

³⁷⁶ Letter from Crown Point Maintenance, 27 April 2009.

³⁷⁷ Company Appointment Report, OFT Document Reference 11986.

³⁷⁸ Company Appointment Report, OFT Document Reference 11987.

II.334. The following director has been on the Board of Directors of both Greenwood and Crown Point during the period mentioned below.³⁷⁹ The OFT considers that this provides evidence that Crown Point exercised decisive influence over Greenwood's conduct, at the time of the relevant Infringements.

- Andrew Goodwin

11 June 2002 – 14 September 2005

II.335. Greenwood did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Crown Point, were given the opportunity of accepting the OFT's Fast Track Offer.³⁸⁰

II.336. The OFT considers that Crown Point as 100 per cent owner of Greenwood, can be presumed to have exercised decisive influence over Greenwood's commercial policy from 11 June 2002 to 28 March 2007, and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of a director in common between Crown Point and Greenwood. Greenwood and Crown Point would therefore have been jointly and severally liable for Greenwood's participation in the Infringements. Accordingly, they would have been jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 118, 133 and 158.

II.337. However, Greenwood has been dissolved and accordingly, the OFT considers that Crown Point is solely liable for the relevant Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringements 118, 133 and 158 on account of Greenwood's participation in those Infringements.

II.338. In response to the Statement, Crown Point submitted that liability for Greenwood's participation in the relevant Infringements should not be attributed to Crown Point.

II.339. In particular, Crown Point submitted that the presumption of decisive influence was rebutted in this instance, for the following principal reasons:

- (a) Following Crown Point's acquisition of Greenwood's shares in June 2002, Greenwood continued to be operated as an autonomous business with the same staff as previously.³⁸¹ There is no evidence that Crown Point issued direct instructions to Greenwood³⁸², and Greenwood's shares were held by Crown Point merely as an investment;³⁸³
- (b) There is also no evidence to suggest that Crown Point was involved in or had knowledge of the relevant Infringements;³⁸⁴
- (c) In particular, following its acquisition of Greenwood, Crown Point retained Greenwood's Managing Director, Mr Kenneth Taylor, under a

³⁷⁹ Company Appointment Reports, OFT Document Reference 11986 and 11987.

³⁸⁰ See paragraphs II.1481 to II.1487 below.

³⁸¹ Written representations of Crown Point, 27 June 2008, paragraph 5.4(iii) and (v); Witness Statement of Andrew Goodwin, 26 June 2008, paragraphs 10 and 12.

³⁸² Written representations of Crown Point, 27 June 2008, paragraph 5.4(viii).

³⁸³ Written representations of Crown Point, 27 June 2008, paragraph 5.4(xv).

³⁸⁴ Oral representations of Crown Point, 14 July 2008, page 3.

consultancy agreement to run Greenwood's business on the same basis as previously for a period of 24 months.³⁸⁵ Although from that time he was retained as a consultant, Mr Taylor held himself out as a director of Greenwood, retained day-to-day control of Greenwood's business and determined Greenwood's commercial policy;³⁸⁶

- (d) Until mid-2004, the holder of the common directorships identified above, Mr Andrew Goodwin, had no input into the commercial or operational policy of Greenwood, which was left to Mr Taylor.³⁸⁷ Andrew Goodwin held no key function on the management board of Greenwood and did not attend Greenwood's weekly management meetings.³⁸⁸ Furthermore, Andrew Goodwin had no knowledge of or involvement in the relevant Infringements;³⁸⁹
- (e) Andrew Goodwin also did not have any management input in the running of the parent company, Crown Point, which was run by his father, Bryan Goodwin. Andrew Goodwin's role at Crown Point was as Contracts Manager only;³⁹⁰
- (f) Other than Andrew Goodwin, there was no commonality between the management personnel of Crown Point and Greenwood;³⁹¹
- (g) At the time of the Infringements, the geographical areas and markets in which Crown Point operated were entirely separate and different from those of Greenwood³⁹², and Greenwood's business formed no part of Crown Point's business.³⁹³ Crown Point and Greenwood also operated under different commercial names and logos;³⁹⁴ and
- (h) Greenwood employed its own staff and compiled its own annual accounts and reports.³⁹⁵ The only financial link between the two companies was the cross guarantees provided by Crown Point to Greenwood's bankers, in support of Greenwood's overdraft facilities.³⁹⁶

II.340. The OFT considers that in the light of Crown Point's 100 per cent shareholding in Greenwood and the common directorship identified above, it is entitled to presume that Crown Point exercised decisive influence over Greenwood in accordance with the principles set out in paragraphs III.13 to III.18 below. The OFT notes that Crown Point does not dispute that this presumption applies in the circumstances.³⁹⁷

³⁸⁵ Written representations of Crown Point, 27 June 2008, paragraph 5.4(i) to (iii); Witness Statement of Andrew Goodwin, 26 June 2008, paragraph 9.

³⁸⁶ Written representations of Crown Point, 27 June 2008, paragraph 5.4(i) to (iii); Witness Statement of Andrew Goodwin, 26 June 2008, paragraph 11.

³⁸⁷ Written representations of Crown Point, 27 June 2008, paragraph 5.4(vi)-(vii).

³⁸⁸ Written representations of Crown Point, 27 June 2008, paragraph 5.4(vi); Witness Statement of Andrew Goodwin, 26 June 2008, paragraph 14.

³⁸⁹ Written representations of Crown Point, 27 June 2008, paragraphs 2.4, 5.4(ix); Witness Statement of Andrew Goodwin, 26 June 2008, paragraph 13.

³⁹⁰ Written representations of Crown Point, 27 June 2008, paragraph 5.4(vi).

³⁹¹ Written representations of Crown Point, 27 June 2008, paragraph 5.4(iv).

³⁹² Written representations of Crown Point, 27 June 2008, paragraph 5.4(x).

³⁹³ Written representations of Crown Point, 27 June 2008, paragraph 5.4(xi).

³⁹⁴ Written representations of Crown Point, 27 June 2008, paragraph 5.4(xiii).

³⁹⁵ Written representations of Crown Point, 27 June 2008, paragraph 5.4(xii).

³⁹⁶ Written representations of Crown Point, 27 June 2008, paragraph 5.4(xiv).

³⁹⁷ Written representations of Crown Point, 27 June 2008, paragraph 5.1.

- II.341. The OFT has taken into consideration all of the contentions put forward by Crown Point. In this regard, the OFT also notes that:
- (a) As noted in paragraph III.17 of the Legal Background section, the OFT considers that the presumption of decisive influence will not be rebutted by mere assertions that Crown Point was not involved in the day-to-day operations of Greenwood, or that Greenwood had its own management;
 - (b) Whilst Crown Point submitted that Mr Taylor determined Greenwood's commercial policy and operated Greenwood as an autonomous business, Mr Taylor was appointed to this role by Crown Point (rather than, for example, by Greenwood itself).³⁹⁸ The OFT considers that this further supports its conclusion that Crown Point exercised decisive influence over Greenwood;
 - (c) Furthermore, Mr Taylor reported to Mr Andrew Goodwin on the progress of Greenwood's existing contracts and 'pipeline', and Mr Goodwin reported back to Crown Point on Greenwood's dealings;³⁹⁹
 - (d) Although Crown Point submitted that Greenwood employed its own staff, as noted above, Greenwood did not employ or contract with Mr Taylor, despite the fact that he was (according to Crown Point) the 'managing body' of Greenwood;⁴⁰⁰
 - (e) The OFT considers that the cross-guarantees provided by Crown Point to Greenwood's bankers also support the conclusion that Crown Point exercised decisive influence over Greenwood;
 - (f) With respect to Mr Andrew Goodwin, whilst Crown Point submitted that he had no key function on the management board of Greenwood and did not attend weekly meetings, he nevertheless made regular visits to Greenwood (initially fortnightly and then weekly), occasionally visited clients and sites, and had a role in the financial running of Greenwood;⁴⁰¹
 - (g) Crown Point's submission that Andrew Goodwin was only a Contracts Manager at Crown Point and had no management input appears to be inconsistent with Andrew Goodwin's own evidence, in which he states that he was Crown Point's Construction Manager with a Contracts Manager reporting to him;⁴⁰²
 - (h) In the light of the quotation set out in paragraph III.18 below, Crown Point also cannot escape liability by reference to its contention that Crown Point and Mr Goodwin were not aware of Greenwood's participation in the relevant Infringements; and

³⁹⁸ Witness statement of Andrew Goodwin, dated 26 June 2008, paragraph 9 and Exhibit AG2.

³⁹⁹ Witness statement of Andrew Goodwin, dated 26 June 2008, paragraphs 11, 13 and 15.

⁴⁰⁰ Written representations of Crown Point, 27 June 2008, paragraph 5.4(i).

⁴⁰¹ Witness statement of Andrew Goodwin, dated 26 June 2008, paragraphs 11 and 15.

⁴⁰² Witness statement of Andrew Goodwin, dated 26 June 2008, paragraph 7.

- (i) In these circumstances, Crown Point's submissions that Greenwood compiled its own annual accounts and reports, operated under a different commercial name and logo, and in a different geographic area and market from Crown Point, do not lead the OFT to alter its conclusion.
- II.342. In the circumstances, the OFT does not consider that the contentions put forward by Crown Point are sufficient to rebut the presumption of decisive influence or to establish that Greenwood determined its conduct on the market autonomously.
- II.343. Therefore, this Decision is only addressed to Crown Point.
- II.344. Greenwood was under the ownership of and ultimately controlled by Crown Point from 11 June 2002. The OFT is therefore addressing this Decision to Crown Point only in respect of Infringements 118, 133 and 158, that is the Infringements involving Greenwood which are dated after 11 June 2002. For the avoidance of doubt, Crown Point is not liable in respect of Infringements 29 and 68, for which Greenwood's participation is mentioned solely due to the fact that it was a counter-party to cover pricing on those tenders with other Parties that are addressed in this Decision.

Davlyn Construction Limited ('Davlyn')

- II.345. Davlyn is a private limited company registered in England and Wales, company number 04653477.⁴⁰³ Davlyn's registered and primary trading address is Sir Francis Ley Industrial Park, Shaftesbury Street, Derby, Derbyshire, DE23 8XA.⁴⁰⁴
- II.346. At the time of issue of the Statement, Davlyn's principal activities were those of building, joinery and operations in the construction industry⁴⁰⁵ and it did not carry out work outside the United Kingdom.
- II.347. Davlyn was incorporated on 31 January 2003 under the name of Davlyn UK but changed its name to Davlyn on 7 April 2003.⁴⁰⁶ Davlyn started trading on 1 April 2003.⁴⁰⁷
- II.348. Davlyn UK Limited ('Davlyn UK') was a private limited company registered in England and Wales, company number 01337870.⁴⁰⁸ Davlyn UK's registered and trading address was Unit 5B, Sir Francis Ley Industrial Park, Shaftesbury Street, Derby, Derbyshire, DE23 8XA.⁴⁰⁹ Davlyn UK was previously known as Davlyn until it changed its name on 7 April 2003.⁴¹⁰ Davlyn UK was dissolved on 3 August 2004.⁴¹¹

⁴⁰³ FAME report, OFT Document Reference 11799.

⁴⁰⁴ FAME report, OFT Document Reference 11799.

⁴⁰⁵ Report of the Directors and Unaudited Financial Statements, OFT Document Reference 11801c, page 4.

⁴⁰⁶ FAME report, OFT Document Reference 11799.

⁴⁰⁷ Report of the Directors and Unaudited Financial Statements, OFT Document Reference 11801a, page 4.

⁴⁰⁸ FAME report, OFT Document Reference 11799a.

⁴⁰⁹ FAME report, OFT Document Reference 11799a.

⁴¹⁰ FAME report, OFT Document Reference 11799a.

⁴¹¹ FAME report, OFT Document Reference 11799a.

- II.349. Davlyn has no holding companies or subsidiaries.⁴¹²
- II.350. Davlyn's turnover for the financial year ending 31 March 2009 was [...] [C].⁴¹³
- II.351. The directors of Davlyn UK from 2001 to 3 August 2004 were as follows:⁴¹⁴
- | | |
|-----------------------|----------------------|
| - David John Charles | 2001 – 3 August 2004 |
| - Marilyn Ann Charles | 2000 – 3 August 2004 |
| - Ian David Gaskin | 2001 – 3 August 2004 |
- II.352. The directors of Davlyn from 31 January 2003 to 2006 were as follows:⁴¹⁵
- | | |
|-----------------------|------------------------|
| - Marilyn Ann Charles | 31 January 2003 – 2006 |
| - Ian David Gaskin | 31 January 2003 – 2006 |
- II.353. Davlyn applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁴¹⁶
- II.354. Davlyn, company number 04653477, was the successor of Davlyn, company number 01337870. The names of the two companies were identical and they carried on the same business from the same address. In addition, Marilyn Ann Charles and Ian David Gaskin were Directors of both companies.
- II.355. This Decision is addressed to Davlyn. The OFT considers that Davlyn itself and as successor to Davlyn, company number 01337870, is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of those undertakings.

Derwent Valley Construction Limited ('Derwent Valley')
Chevin Holdings Limited ('Chevin')

- II.356. Derwent Valley is a private limited company registered in England and Wales, company number 01089587.⁴¹⁷ Derwent Valley's registered and primary trading address is Acacia House, 29 Bridge Street, Belper, Derby, Derbyshire, DE56 1AY.⁴¹⁸
- II.357. At the time of issue of the Statement, Derwent Valley undertook refurbishment, extension and new build works mainly for public sector clients, built new houses for private clients and carried out works for commercial clients.⁴¹⁹ At the time of issue of the Statement Derwent Valley did not carry out work outside the United Kingdom.

⁴¹² FAME report, OFT Document Reference 11799.

⁴¹³ Letter from Davlyn, 13 July 2009.

⁴¹⁴ Company Appointments Report, OFT Document Reference 11801h.

⁴¹⁵ Company Appointments Report, OFT Document Reference 11800.

⁴¹⁶ See Part 3 of OFT Guidance 423

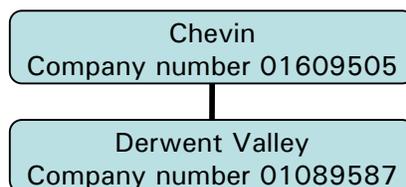
http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf.

⁴¹⁷ FAME report, OFT Document Reference 11789.

⁴¹⁸ FAME report, OFT Document Reference 11789.

⁴¹⁹ Market definition response, OFT Document Reference 5765.

- II.358. Derwent Valley's ultimate parent company is Chevin, a private limited company, company number 01609505.⁴²⁰ Chevin's registered address is Acacia House, 29 Bridge Street, Belper, Derby, Derbyshire, DE56 1AY.⁴²¹ Derwent Valley is a wholly owned subsidiary of Chevin.⁴²²
- II.359. Derwent Valley has no subsidiaries.⁴²³
- II.360. The relevant company structure is outlined below:



- II.361. Chevin has two other wholly owned subsidiaries.⁴²⁴
- II.362. Chevin's consolidated turnover for the financial year ending 31 December 2008 was [...] [C].⁴²⁵
- II.363. The directors of Derwent Valley from 2000 to 2006 were as follows:⁴²⁶
- | | |
|---------------------------|-------------------------|
| - Rachel Catherine Abbott | 1 January 2005 – 2006 |
| - Andrew Michael Stone | 1 January 2005 – 2006 |
| - David Stone | 2000 – 2006 |
| - Rex Stone | 2000 – 3 January 2005 |
| - Philip Duncan Taylor | 2000 – 31 December 2002 |
- II.364. The directors of Chevin from 2000 to 2006 were as follows:⁴²⁷
- | | |
|---------------|-------------|
| - David Stone | 2000 – 2006 |
| - Rex Stone | 2000 – 2006 |
- II.365. The following directors have been on the Board of Directors of both Derwent Valley and Chevin during the periods mentioned below.⁴²⁸ The OFT considers that this provides evidence that Chevin exercised decisive influence over Derwent Valley's conduct at the time of the Infringements.
- | | |
|---------------|-----------------------|
| - David Stone | 2000 – 2006 |
| - Rex Stone | 2000 – 3 January 2005 |
- II.366. Derwent Valley applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁴²⁹

⁴²⁰ FAME report, OFT Document Reference 11790.

⁴²¹ FAME report, OFT Document Reference 11790.

⁴²² FAME report, OFT Document Reference 11790.

⁴²³ FAME report, OFT Document Reference 11789.

⁴²⁴ FAME report, OFT Document Reference 11790.

⁴²⁵ Email from Pinsent Masons, 7 July 2009.

⁴²⁶ Company Appointment Report, OFT Document Reference 11791.

⁴²⁷ Company Appointments Report, OFT Document Reference 11792.

⁴²⁸ Company Appointments Reports, OFT Document Reference 11791 and 11792.

⁴²⁹ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

II.367. The OFT considers that Chevin, as 100 per cent owner of Derwent Valley, can be presumed to have exercised decisive influence over Derwent Valley's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Chevin and Derwent Valley. Derwent Valley and Chevin are therefore jointly and severally liable for Derwent Valley's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringements 144, 152 and 164.

II.368. This Decision is therefore addressed to Derwent Valley and Chevin.

Dukeries Building Company Limited ('Dukeries')
Gavco 159 Limited ('Gavco')

II.369. Dukeries is a private limited company registered in England and Wales, company number 01347103.⁴³⁰ Dukeries' registered and primary trading address is 93 Queen Street, Sheffield, South Yorkshire, S1 1WF.⁴³¹ It also trades from other premises in Mansfield.⁴³²

II.370. At the time of issue of the Statement, Dukeries provided both construction and responsive property maintenance services to the public sector, predominantly for social housing landlords but also to other public sector bodies such as local authorities, social services and health authorities.⁴³³ At the time of issue of the Statement, Dukeries did not carry out work outside the United Kingdom.

II.371. Dukeries' ultimate parent company was at the time of the Infringements Gavco, a private limited company, company number 03645365, whose registered address was Brookdale Farm Ossington Lane, Moorhouse, Newark, Nottinghamshire NG23 6LS.⁴³⁴ Dukeries was a wholly owned subsidiary of Gavco.⁴³⁵ On 11 May 2009 Gavco requested voluntary dissolution.⁴³⁶ Gavco was dissolved on 8 September 2009.

II.372. Dukeries has no subsidiaries.⁴³⁷

II.373. On 9 December 2008 joint administrators were appointed for Dukeries.⁴³⁸

II.374. The overall company structure from 2003 – 2006 is outlined below:

⁴³⁰ FAME report, OFT Document Reference 12684.

⁴³¹ Latest available FAME report of Dukeries.

⁴³² Latest available FAME report of Dukeries.

⁴³³ Market definition response, OFT Document Reference 6655, page 1.

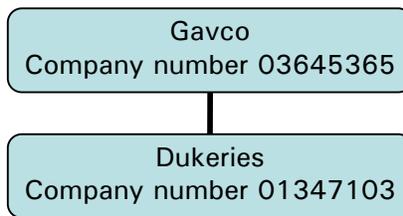
⁴³⁴ Latest available FAME report of Gavco.

⁴³⁵ FAME report, OFT Document Reference 12685.

⁴³⁶ Latest available FAME report of Gavco.

⁴³⁷ FAME report, OFT Document Reference 12684.

⁴³⁸ Notice of administrator's appointment, Form 2.12B.



II.375. Dukeries' turnover for the financial year ending 30 September 2007 was [...] [C].⁴³⁹ Gavco's own turnover for the same period consisted of only management charges of Dukeries.⁴⁴⁰

II.376. The directors of Dukeries from 2003 to 2006 were as follows:⁴⁴¹

- Glenn Victor Manners 2003 – 2006
- Stuart Phillips 2003 – 2006

II.377. The directors of Gavco from 2003 to 2006 were as follows:⁴⁴²

- Glenn Victor Manners 2003 – 2006
- Stuart Phillips 2003 – 2006

II.378. The following directors have been on the Board of Directors of both Dukeries and Gavco during the periods mentioned below.⁴⁴³ The OFT considers that this provides evidence that Gavco exercised decisive influence over Dukeries' conduct.

- Glenn Victor Manners 2003 – 2006
- Stuart Phillips 2003 – 2006

II.379. Dukeries did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Gavco, were given the opportunity of accepting the OFT's Fast Track Offer.⁴⁴⁴

II.380. The OFT considers that Gavco, as 100 per cent owner of Dukeries, can be presumed to have exercised decisive influence over Dukeries' commercial policy during the relevant period and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Gavco and Dukeries.

II.381. As Gavco was dissolved on 8 September 2009, this Decision is addressed to Dukeries.

⁴³⁹ Written representations of Dukeries, 27 June 2008, Annex A.

⁴⁴⁰ Email from Geldards, 11 December 2008.

⁴⁴¹ Company Appointments Report, OFT Document Reference 12686.

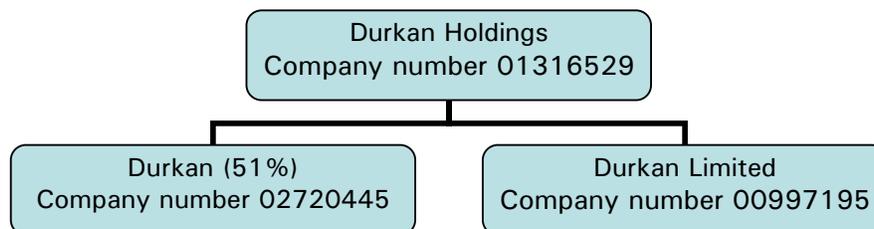
⁴⁴² Company Appointments Report, OFT Document Reference 12686, page 3.

⁴⁴³ Company Appointments Reports, OFT Document Reference 12686.

⁴⁴⁴ See paragraphs II.1481 to II.1487 below.

Concentra Limited formerly known as Durkan Pudelek Limited ('Durkan')
Durkan Limited ('Durkan Limited')
Durkan Holdings Limited ('Durkan Holdings')

- II.382. Durkan is a private limited company registered in England and Wales, company number 02720445.⁴⁴⁵ Durkan's registered and trading address is Durkan House, 214 – 224 High Street, Waltham Cross, Hertfordshire, EN8 7DR.⁴⁴⁶
- II.383. Durkan undertakes general construction work including new build, extensions, alterations and refurbishment services in commercial, public and private sectors.⁴⁴⁷ Durkan does not carry out work outside the United Kingdom. On 7 July 2008 Durkan changed its name to Concentra Limited.⁴⁴⁸
- II.384. At the time of issue of the Statement, Durkan Limited was a private limited company registered in England and Wales, company number 00997195.⁴⁴⁹ Durkan Limited's registered and trading address is Durkan House, 214 – 224 High Street, Waltham Cross, Hertfordshire, EN8 7DR.⁴⁵⁰
- II.385. At the time of issue of the Statement, Durkan Limited undertook building contract work for Local Authorities and Housing Associations⁴⁵¹ and did not carry out work outside the United Kingdom.
- II.386. At the time of the Infringements, Durkan and Durkan Limited's ultimate parent company was Durkan Holdings, a private limited company, company number 01316529.⁴⁵² Durkan Holdings' registered and trading address is Durkan House, 214 – 224 High Street, Waltham Cross, Hertfordshire, EN8 7DR.⁴⁵³
- II.387. Durkan Limited is (and was at the time of the Infringements) a wholly owned subsidiary of Durkan Holdings. At the time of the Infringements, Durkan Holdings held 51 per cent of the shares in Durkan, but disposed of this shareholding in September 2007 when Durkan was subject to a management buy out.
- II.388. Durkan has one subsidiary.⁴⁵⁴ Durkan Limited also has one subsidiary.⁴⁵⁵
- II.389. The relevant company structure from 2000 – 2006 is outlined below:



⁴⁴⁵ FAME report, OFT Document Reference 12690.

⁴⁴⁶ FAME report, OFT Document Reference 12690.

⁴⁴⁷ Durkan's website, OFT Document Reference 12697.

⁴⁴⁸ Companies House company information, OFT Document Reference SAB003.

⁴⁴⁹ FAME report, OFT Document Reference SAB001.

⁴⁵⁰ FAME report, OFT Document Reference SAB001.

⁴⁵¹ Durkan Limited Financial Reports 2008, OFT Document Reference SAB004.

⁴⁵² FAME report, OFT Document Reference 12691.

⁴⁵³ FAME report, OFT Document Reference 12691.

⁴⁵⁴ FAME report, OFT Document Reference 12690.

⁴⁵⁵ FAME report, OFT Document Reference SAB001.

- II.390. At the time of issue of the Statement, Durkan Holdings had another 11 subsidiaries.⁴⁵⁶
- II.391. Durkan's turnover for the 11 months ending 31 December 2008 was [...] [C].⁴⁵⁷
- II.392. Durkan Holdings' consolidated turnover for the financial year ending 31 January 2008 was [...] [C].⁴⁵⁸
- II.393. Durkan and Durkan Limited did not apply for leniency, but both they and their ultimate parent company at the time of the relevant Infringements, Durkan Holdings, have been given the opportunity of accepting the OFT's Fast Track Offer.

Durkan Limited & Durkan Holdings

II.394. The directors of Durkan Limited from 2002 to 2006 were as follows:⁴⁵⁹

- Robert James Barton	2002 – 2006
- James Philip Briggs	2002 – 2006
- Robert Clark	2002 – 2006
- Daniel Gerard Durkan	2002 – 2006
- William Durkan	2002 – 2006
- David Alan Fraher	2002 – 2006
- Patricia Gillis	3 November 2003 – 31 March 2006
- Julian Harajda	2 September 2002 – 2006
- John Francis Loughlin	1 February 2004 – 2006
- Michael Thomas Pudelek	2002 – 1 May 2005
- Lee Phillip Smith	1 December 2004 – 6 April 2006
- Nigel Francis Tenwick	1 December 2004 – 2006
- Brian Andrew Williams	1 December 2004 – 2006

II.395. The directors of Durkan Holdings from 2002 to 2006 were as follows:⁴⁶⁰

- Robert Clark ⁴⁶¹	24 June 2005 – 30 June 2005
- Daniel Gerard Durkan	2002 – 2006
- William Durkan	2002 – 2006
- David Alan Fraher	2002 – 2006

II.396. The following directors were on the Board of Directors of both Durkan Limited and Durkan Holdings for the periods mentioned below.⁴⁶² The OFT considers

⁴⁵⁶ FAME report, OFT Document Reference 12691

⁴⁵⁷ Letter from Mayer Brown, 20 July 2009.

⁴⁵⁸ Letter from Mayer Brown, 5 August 2009.

⁴⁵⁹ Company Appointments Report, OFT Document Reference SAB002.

⁴⁶⁰ Company Appointments Report, OFT Document Reference 12692.

⁴⁶¹ The OFT notes that Durkan Holdings has changed its position on whether Mr Clark was a director of Durkan Holdings during the period stated above. In its response to the Statement, Durkan Holdings stated that Mr Clark was a director of Durkan Holdings: see written representations of Durkan Holdings, 27 June 2008, paragraph 22, OFT Document Reference SAB014. In its response to the First Supplementary Statement, Durkan Holdings contended that Mr Clark was not a director, but merely exercised the functions of a director: see written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 33. The OFT considers the difference to be immaterial for present purposes.

⁴⁶² Company Appointments Reports, OFT Document Reference 12692 and SAB002.

that this provides evidence that Durkan Holdings exercised decisive influence over Durkan Limited's conduct, at the time of the relevant Infringement.

- Robert Clark	24 June 2005 – 30 June 2005
- Daniel Gerard Durkan	2002 – 2006
- William Durkan	2002 – 2006
- David Alan Fraher	2002 – 2006

II.397. The OFT considers that Durkan Holdings, as 100 per cent owner of Durkan Limited, can be presumed to have exercised decisive influence over Durkan Limited's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Durkan Holdings and Durkan Limited. Durkan Limited and Durkan Holdings are therefore jointly and severally liable for Durkan Limited's participation in the Infringement which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringement 220.

II.398. In its reply to the First Supplementary Statement, Durkan Holdings did not make any representations in respect of its liability for Durkan Limited's conduct.

Durkan and Durkan Holdings

II.399. The directors of Durkan from 2002 to 2006 were as follows:⁴⁶³

- Robert Francis Cummins	6 February 2006 – 2006
- Daniel Gerard Durkan	2002 – 2006
- William Durkan	2002 – 2006
- David Alan Fraher	2002 – 2006
- Michael Thomas Pudelek	2002 – 2006
- Robert John Scott	2002 – 2006
- Colin Simmons	2002 – 2006
- David Watts	17 October 2005 – 2006
- Maurice Williams	2002 – 24 February 2006

II.400. The following directors were on the Board of Directors of both Durkan and Durkan Holdings for the periods mentioned below.⁴⁶⁴ The OFT considers that, taken together with Durkan Holdings' shareholding of 51 per cent, this gives rise to a presumption that Durkan Holdings exercised decisive influence over Durkan's conduct, at the time of the relevant Infringements.

- Daniel Gerard Durkan	2002 – 2006
- William Durkan	2002 – 2006
- David Alan Fraher	2002 – 2006

II.401. In response to the Statement, Durkan Holdings made a number of representations that:

⁴⁶³ Company Appointments Report, OFT Document Reference 12692.

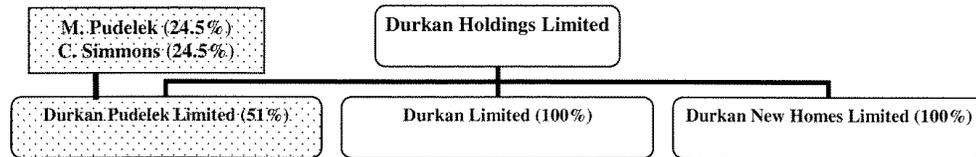
⁴⁶⁴ Company Appointments Reports, OFT Document Reference 12692 and 12693.

'...Durkan Holdings and Durkan Pudelek [Durkan] ...were not one economic unit at the time of the Alleged Infringements'.⁴⁶⁵

II.402. For the reasons outlined below the OFT does not accept this assertion, however.⁴⁶⁶

II.403. According to Durkan Holdings:

'...the company structure during that period [2000-2006] was as follows'.⁴⁶⁷



II.404. Durkan Holdings argued that it cannot be presumed from Durkan Holdings' 51 per cent shareholding in Durkan, that it was able to exercise decisive influence over Durkan's commercial policy.⁴⁶⁸

II.405. Durkan Holdings has further described its role as follows:

'...Durkan Pudelek [Durkan] was incorporated on 7 October 1992. From incorporation to 10 September 2007, Durkan Holdings held 51% of the equity share capital in Durkan Pudelek [Durkan]. In essence, the role of Durkan Holdings was that of a venture capitalist. Durkan Holdings provided financial support by way of loan financing, bond and guarantee support. The level of its shareholding interest was intended to protect its investment. The mere fact that Durkan Holdings had a 51% shareholding interest in the share capital of Durkan Pudelek [Durkan] is inconclusive for the issue of decisive influence'.⁴⁶⁹

II.406. Durkan's Articles of Association⁴⁷⁰ for the relevant period provide that each share carries one vote. As such, by holding 51 per cent of the equity share capital, Durkan Holdings exercised 51 per cent of the voting rights in Durkan. The OFT considers that Durkan Holdings' majority shareholding (and the attached voting rights) is, at the very least, indicative of the exercise of decisive influence over Durkan.

II.407. The OFT does not rely solely on Durkan Holdings' shareholding in Durkan in order to attribute liability to it for Durkan's conduct, however. In addition, as set out in the Statement, the OFT also relies on the fact that Durkan Holdings had three directors in common with Durkan, Daniel Gerald Durkan, William Durkan and David Alan Fraher.

⁴⁶⁵ Written representations of Durkan Holdings, 27 June 2008, paragraph 15(a), OFT Document Reference SAB014.

⁴⁶⁶ The OFT's position in this regard is not affected by Mike Pudelek's and Colin Simmons' subsequent management buyout of Durkan in September 2007. See written representations of Durkan Holdings, 27 June 2008, paragraph 53, OFT Document Reference SAB014.

⁴⁶⁷ Written representations of Durkan Holdings, 27 June 2008, paragraph 20, OFT Document Reference SAB014.

⁴⁶⁸ Written representations of Durkan Holdings, 27 June 2008, paragraph 32, OFT Document Reference SAB014.

⁴⁶⁹ Written representations of Durkan Holdings, 27 June 2008, paragraph 35, OFT Document Reference SAB014.

⁴⁷⁰ Durkan Articles of Association, OFT Document Reference SAB008, applying Regulation 54, Table A of the Companies (Tables A to F) Regulations 1985 as amended by SI 2000/3373.

- II.408. In its response to the First Supplementary Statement, Durkan Holdings submitted that *'the inferences the OFT draws from the Articles of Association are insufficient to demonstrate joint liability'*. In support of this submission, Durkan Holdings referred to Clause 24 of the subscription and shareholders agreement dated 7 October 1992 between Durkan Holdings and Michael Thomas Pudelek and Colin Simmons ('the Subscription Agreement').⁴⁷¹
- II.409. As regards Clause 24 of the Subscription Agreement, this provides as follows:
- 'In the event of any ambiguity or conflict arising between the terms of this Agreement and those of [Durkan's] Memorandum of Association and Articles the terms of this Agreement shall prevail as between the Shareholders'.*
- II.410. The OFT notes in this regard that Durkan Holdings has not pointed to any provision of the Subscription Agreement which would cast doubt on the extent of Durkan Holding's shareholding in Durkan or on the allocation of votes amongst shareholders as set out in Durkan's Articles of Association.
- II.411. Durkan Holdings argued in its response to the Statement, and again in its response to the First Supplementary Statement⁴⁷² that:
- '...the fact alone that the parent and the subsidiary have directors in common is not sufficient for a finding of joint liability. It is further required that the directors cover, and have exercised, key operational functions in both companies...'*⁴⁷³
- II.412. This is to mischaracterise the OFT's case, however. The OFT has not sought to argue that the fact that a parent and its subsidiary had directors in common is *alone* sufficient for a finding of joint liability. Rather, the OFT's case is that where a parent has a majority shareholding in a subsidiary and other indicia are also present (which may include having directors in common and/or other economic and legal organisational links), the OFT is entitled to presume that the parent exercised decisive influence. Moreover, the OFT does not accept that where a parent company is a majority shareholder and has directors in common with its subsidiary, the OFT must also show that the common directors were responsible for 'key operational functions' of the subsidiary and exercised those functions (see paragraphs III.19 to III.24 of the Legal Background section). Nevertheless, as set out below, the OFT considers that in this instance, there are factors which indicate that the directors of Durkan Holdings did in fact exercise such functions in relation to Durkan.
- II.413. In its response to the First Supplementary Statement, Durkan Holdings again disputed the OFT's entitlement to rely on the presumption that Durkan Holdings exercised decisive influence over Durkan.⁴⁷⁴ The OFT refers again in this regard to the points set out above and to the legal principles set out in paragraphs III.19 and III.24 below.
- II.414. In its response to the Statement, Durkan Holdings sought to rely on the Subscription Agreement in support of its assertion that Durkan Holdings and Durkan were not one economic unit at the time of the Infringements. In particular, Durkan Holdings made the following representations:

⁴⁷¹ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(a).

⁴⁷² Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(b).

⁴⁷³ Written representations of Durkan Holdings, 27 June 2008, paragraph 33(b), OFT Document Reference SAB014.

⁴⁷⁴ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraphs 42 to 45

'...the Subscription Agreement contains the following provisions:

- (a) *Clause 7.1: "[Mike] Pudelek shall act as Chief Executive and [Colin] Simmons shall act as Construction Director of the Company"*
- (b) *Clause 7.2: "Alan Fraher shall be appointed as Financial Director of the Company, Daniel Durkan as Executive Director and Tim Henessy as Secretary of the Company [Durkan] but their services shall be on a part time basis and Durkan [Holdings] shall continue to be full time employer of these executives".*

...[a]ccordingly, and consistent with their respective shareholdings, operational control of Durkan Pudelek [Durkan] vested in Michael Pudelek, as the Chief Executive, and in Colin Simmons as the Construction/Managing Director.⁴⁷⁵

- II.415. Moreover in its response to the First Supplementary Statement, Durkan Holdings submitted that clause 7.1 of the Subscription Agreement had the effect of conferring legal control over Durkan on Mike Pudelek and Colin Simmons, *'because they had the right to manage the activities and determine the business policy of Durkan Pudelek [Durkan]'*.
- II.416. The OFT does not accept Durkan Holdings' assertion that the operational control exercised by the minority shareholders over some of the activities of Durkan was such as to exclude Durkan Holdings from exerting decisive influence over Durkan, however (or indeed to exclude Durkan Holdings from exercising legal control over Durkan). On the contrary, the OFT considers that the fact that directors and full-time employees of Durkan Holdings held senior operational management positions within Durkan, namely Finance Director and Executive Director, is evidence that Durkan Holdings did exercise decisive influence over Durkan. Moreover, this receives further support from a number of additional factors, as set out below.
- II.417. In particular, the email dated 30 March 2004⁴⁷⁶ from Alan Fraher, a director of both the parent and subsidiary companies and full-time employee of Durkan Holdings, to Clive Perceval of Mansell is evidence, not only of Mr Fraher's influence over Durkan but also of his direct involvement in Infringement 135. The email records an exchange between Mr Fraher and Mr Perceval in which Mr Fraher refers to attending meetings and negotiating a *'financial committment'* [sic] for Durkan. This is clear evidence of a director and employee of Durkan Holdings taking business, financial and operational decisions for and on behalf of Durkan, even to the extent of having direct involvement in respect of an Infringement. In its response to the First Supplementary Statement, Durkan Holdings described Mr Fraher's role in this exchange as simply one of *"cash management"*.⁴⁷⁷ In the light of Mr Fraher's reference to attending meetings and negotiating a financial commitment as set out above, the OFT considers this explanation to be implausible.
- II.418. In its response to the Statement, Durkan Holdings stated that:

⁴⁷⁵ Written representations of Durkan Holdings, 27 June 2008, paragraphs 37 and 38, OFT Document Reference SAB014.

⁴⁷⁶ Email correspondence, OFT Document Reference B4036.

⁴⁷⁷ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(c).

*'...the Subscription Agreement obliges Durkan Holdings to use all reasonable endeavours to procure bonds and guarantees that may be required by Durkan Pudelek [Durkan] in order to carry out its business...'*⁴⁷⁸

II.419. The OFT considers that for an economic unit to be independent it must perform all of the main functions of an economic operator.⁴⁷⁹ Business units that are dependant on a corporate centre for their commercial strategy and operations, for their investments and finances, and/or for their legal affairs cannot be considered to constitute separate economic units in their own right.⁴⁸⁰ The OFT considers that the fact that Durkan was dependent on Durkan Holdings for finance and other commercial operations is strong evidence that Durkan and Durkan Holdings formed a single economic unit. Moreover that is not undermined by the fact that Durkan was required to pay for the financial and support services provided by Durkan Holdings.⁴⁸¹

II.420. Durkan Holdings also stated that:

*'...William Durkan [the Chairman and a director of both Durkan Holdings and Durkan rarely participated in the Board meetings of Durkan Pudelek [Durkan]'*⁴⁸²

II.421. The OFT does not accept that Mr Durkan's alleged infrequent participation in Durkan Board meetings affects the OFT's conclusions regarding the influence exercised by Durkan Holdings over Durkan. This is particularly evident when considered in conjunction with clauses 4.2 and 5.1.5.2 of the Durkan Subscription Agreement which provide:⁴⁸³

'...[i]f such Chairman is unable to attend any meeting of the Board, then William Durkan shall be entitled to appoint another Director to act as Chairman in his place...' (clause 4.2)

and

'...The quorum for any meeting of the Board shall be at least two Directors of whom at least one shall be a Director nominated by Durkan [Holdings] or the alternate of such Director and one of whom at least shall be either Pudelek or Simmons or an alternate of such Director...' (clause 5.1.5.2, emphasis added).

II.422. It is clear that in the event that the Chairman (William Durkan) or a Durkan Holdings' appointed director was unable to attend a Board meeting, the Subscription Agreement allowed for the Durkan Holdings Chairman or director to nominate an alternate to attend in their place. The OFT also considers the requirement for a director nominated by Durkan Holdings to be present at the Board meeting to establish a quorum as being further evidence of the influence exercised by Durkan Holdings over Durkan's commercial policy and decision making.

⁴⁷⁸ Written representations of Durkan Holdings, 27 June 2008, paragraph 44, OFT Document Reference SAB014.

⁴⁷⁹ See European Commission Decision No COMP/E-1/.37.773 – MCAA at 242.

⁴⁸⁰ See European Commission Decision No COMP/E-1/.37.773 – MCAA at 242.

⁴⁸¹ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(d).

⁴⁸² Written representations of Durkan Holdings, 27 June 2008, paragraph 50, OFT Document Reference SAB014; see also written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(e).

⁴⁸³ Durkan Subscription Agreement, OFT Document Reference SAB017.

II.423. The OFT also notes that the Durkan Subscription Agreement⁴⁸⁴ at clause 4.3 provides:

'...In the case of an equality of votes at any meeting of the Board, the Chairman shall be entitled to a second or casting vote...'

This is further evidence of the influence exercised by Durkan Holdings over Durkan.⁴⁸⁵

II.424. Durkan Holdings stated in its response to the Statement that:

*'...Colin Simmons and Mike Pudelek conceived the logo and corporate colours for Durkan Pudelek [Durkan] and used them from the date of incorporation. The logo and corporate colours are different from those of the Durkan Holdings' companies'.*⁴⁸⁶

II.425. The OFT does not accept the assertion that the Durkan logo was materially different from the Durkan Holdings logo. The OFT notes that both logos use the same font and point for their lettering and contain the word 'DURKAN' displayed prominently above the same 'brushstroke' design.⁴⁸⁷ The OFT's view is therefore that, contrary to Durkan Holdings' representations, the logos support the OFT's view that Durkan Holdings exercised decisive influence over Durkan. Moreover, the OFT does not consider that any differences in the companies' respective logos or corporate colours would, in any event, undermine the strength of the other evidence pointing towards Durkan Holdings' influence over Durkan.

II.426. Durkan Holdings also relied in its response to the Statement on a non-compete provision in the Subscription Agreement:

*'... that precludes Durkan Pudelek [Durkan] competing with Durkan Holdings. Such a provision would be unnecessary in the event that Durkan Holdings controlled Durkan Pudelek [Durkan]'.*⁴⁸⁸

II.427. Similarly in its response to the First Supplementary Statement, Durkan Holdings relied on the provisions in clause 15.2 of the Subscription Agreement regarding loans to be provided by Durkan Holdings to Durkan, which Durkan Holdings submitted *'would normally feature in a contract with third parties'*.⁴⁸⁹

II.428. The OFT does not accept that the inclusion of a non-compete provision in the Subscription Agreement, or the provision in clause 15.2 of the Subscription Agreement, is evidence that Durkan Holdings did not exercise decisive influence over Durkan. The inclusion of a non-compete provision does not demonstrate that Durkan Holdings' majority shareholding was ineffective nor does it demonstrate an inability to exercise decisive influence. The OFT considers the non-compete provision to be largely irrelevant to the question of control.

⁴⁸⁴ Durkan Subscription Agreement, OFT Document Reference SAB017.

⁴⁸⁵ Contrary to Durkan Holdings' submission in its response to First Supplementary Statement, paragraph 52(f), the OFT does not however rely on this factor as conclusive *'for a finding of joint liability'*.

⁴⁸⁶ Written representations of Durkan Holdings, 27 June 2008, paragraph 41, OFT Document Reference SAB014; see also written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(g).

⁴⁸⁷ Durkan's website, OFT Document Reference 12697.

⁴⁸⁸ Written representations of Durkan Holdings, 27 June 2008, paragraph 43, OFT Document Reference SAB014.

⁴⁸⁹ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(f); Written representations of Durkan Holdings, 27 June 2008, paragraph 46, OFT Document Reference SAB014.

Moreover, the OFT notes that Durkan Holdings has not put forward any evidence of its having had to rely on the provision to protect its interests. As noted above, the OFT considers that the fact that Durkan was dependent on Durkan Holdings for finance and other commercial operations is strong evidence that Durkan and Durkan Holdings formed a single economic unit.⁴⁹⁰

II.429. Durkan Holdings also stated in its response to the Statement that:

*'...throughout the present administrative procedure, Durkan Holdings has always presented itself as a separate interlocutor from Durkan Pudelek [Durkan] in its dealings with the OFT...'*⁴⁹¹

II.430. The OFT notes that Durkan Holdings, while presenting itself as separate from Durkan in its dealings with the OFT, has consistently presented itself and Durkan to the public as a single economic unit. One example is Durkan Holdings' website which provided seamless integrated information on both Durkan Holdings' and Durkan's activities.⁴⁹² Another example is the Durkan Holdings Consolidated Financial Statement for Year Ended 31 January 2006 where Durkan is described as performing the Group's *'private sector building contract work'*.⁴⁹³ This is also reflected in an article published on ContractJournal.com on 24 August 2007⁴⁹⁴, which recorded a discussion with Durkan Holdings' Chief Executive and which referred to Durkan as *'[o]ne of the other two smaller operating divisions'* of Durkan Holdings.⁴⁹⁵ The OFT considers these public communications to be strong supporting evidence that Durkan Holdings and Durkan operated as a single economic unit at the time of the Infringements.

II.431. Moreover, the OFT's conclusions on this are consistent with the fact that in its Consolidated Financial Statements for the years ended 31 January 2002⁴⁹⁶, 2003⁴⁹⁷, 2004⁴⁹⁸, 2005⁴⁹⁹ and 2006⁵⁰⁰, Durkan Holdings consistently reported on the activities of its subsidiary, Durkan.⁵⁰¹ The OFT also notes that Durkan Holdings reported in its Consolidated Financial Statements for the years ended 31 January 2002⁵⁰², 2003⁵⁰³, 2004⁵⁰⁴, 2005⁵⁰⁵ and 2006⁵⁰⁶ that Durkan paid

⁴⁹⁰ See above, paragraph II.419.

⁴⁹¹ Written representations of Durkan Holdings, 27 June 2008, paragraph 54, OFT Document Reference SAB014.

⁴⁹² Durkan's website, OFT Document Reference 12697.

⁴⁹³ Financial Statements, OFT Document Reference 12696, page 2.

⁴⁹⁴ Contract Journal Article, OFT Document Reference SAB013.

⁴⁹⁵ However the OFT accepts that this description was not directly attributed to Durkan Holdings' Chief Executive, as Durkan Holdings has submitted: Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(i).

⁴⁹⁶ 2002 Financial Statement, OFT Document Reference SAB009, page 22.

⁴⁹⁷ 2003 Financial Statement, OFT Document Reference SAB010, page 21.

⁴⁹⁸ 2004 Financial Statement, OFT Document Reference SAB011, page 21.

⁴⁹⁹ 2005 Financial Statement, OFT Document Reference SAB012, page 20.

⁵⁰⁰ 2006 Financial Statement, OFT Document Reference 12696, page 19.

⁵⁰¹ Under sections 229, 235(c) and 258 of the Companies Act 1985 [c.6] a parent company must include the activities of another member of its group in its financial reports if the parent holds a majority of the voting rights, exercises dominant influence or some other similar form of control over that group member. The inclusion of a subsidiary undertaking in a consolidated financial statement is optional where severe long-term restrictions substantially hinder the exercise of the rights of the parent company over the assets or management of that undertaking (section 229(3)(a)) or the parent company's interest in the subsidiary is held exclusively with a view to subsequent resale (section 229(3)(c)). Where that is the case, however, the parent company is still required to report the activities of the subsidiary but as assets controlled by the parent rather than as subsidiaries (Accounting Standards Board Financial Reporting Standard 2: Accounting for Subsidiary Undertakings July 1992 FSR2 as amended, paragraphs 27, 28 and 29).

⁵⁰² 2002 Financial Statement, OFT Document Reference SAB009, page 22.

⁵⁰³ 2003 Financial Statement, OFT Document Reference SAB010, page 21.

'management charges' to Durkan Holdings through Durkan Holdings' wholly owned subsidiaries Durkan Limited and Durkan New Homes Limited and that in its Consolidated Financial Statement for the year ended 31 January 2006⁵⁰⁷ Durkan described Durkan Holdings as its *'...parent company and controller'* (emphasis added). The OFT considers that these factors further support its conclusion that Durkan Holdings and Durkan belonged to a single economic entity at the time of the Infringements.

II.432. The OFT has also had regard to the further submissions put forward by Durkan Holdings in its response to the First Supplementary Statement and in its oral representations which are not expressly mentioned above. The OFT does not consider that those arguments are such as to affect the conclusions stated below.

II.433. In its separate response to the Statement, Durkan also made representations that:

*'...over the period in which the Alleged Infringements occurred, January 2003 – February 2006, Durkan Pudelek [Durkan] did not form one economic unit with Durkan Holdings...'*⁵⁰⁸

II.434. Similarly in its response to the First Supplementary Statement, Durkan submitted *'that the factual reality of the day to day operations of [Durkan] was that [Durkan] decided its own conduct in the market independently of Durkan Holdings'*.⁵⁰⁹

II.435. For the reasons set out in paragraphs II.403 to II.431 above, the OFT does not accept these assertions.

II.436. In its response to the Statement, Durkan described certain support services provided by Durkan Holdings to Durkan as follows:

'...Durkan Holdings provided Durkan Pudelek [Durkan] with support services. Such support services as were provided by Durkan Holdings were paid for by Durkan Pudelek [Durkan] at an annual cost of [calculated as a percentage] of the gross turnover of Durkan Pudelek [Durkan]. Support services included office space and related services such as secretarial services. ...Operational services and disciplines such as Client Marketing, Estimating, Surveying, Contracts management were not provided by Durkan Holdings'.⁵¹⁰

II.437. The OFT notes that this is inconsistent with Clause 1.1 of the Durkan Subscription Agreement⁵¹¹, however, which provided that:

'...the services to be provided by Durkan [Holdings] to the Company [Durkan are] to include all time devoted to the Company by any of its direct employees or consultants, provision of office space and related services to include

⁵⁰⁴ 2004 Financial Statement, OFT Document Reference SAB011, page 21.

⁵⁰⁵ 2005 Financial Statement, OFT Document Reference SAB012, page 20.

⁵⁰⁶ 2006 Financial Statement, OFT Document Reference 12696, page 19.

⁵⁰⁷ OFT Document Reference 12694, page 14.

⁵⁰⁸ Written representations of Durkan, 27 June 2009, paragraph 20, OFT Document Reference SAB015.

⁵⁰⁹ Written representations of Durkan, 6 February 2009,, paragraph 19.

⁵¹⁰ Written representations of Durkan, 27 June 2008, paragraph 20, OFT Document Reference SAB015.

⁵¹¹ Durkan Subscription Agreement, OFT Document Reference SAB017.

management, secretarial, estimating, surveying and any other services of whatsoever nature... (emphasis added).

The OFT considers the specific inclusion of management, estimating and surveying services is further evidence of the influence exercised by Durkan Holdings over Durkan's operations.

- II.438. As set out at paragraph II.412 above, the OFT considers that in circumstances where a subsidiary is majority owned by its parent company and there are other economic and legal indicia of influence, then it may be presumed that the parent company exercised decisive influence over the commercial activities of its subsidiary. In the Statement, the OFT relied on such indicia, namely that Durkan Holdings had three directors in common with Durkan (Daniel Gerald Durkan, William Durkan and David Alan Fraher), together with Durkan Holdings' majority shareholding in Durkan, to conclude that the exercise of decisive influence by Durkan Holdings over the commercial activities of Durkan at the time of the Infringements may be presumed.
- II.439. The OFT considers that nothing stated by Durkan Holdings or Durkan in their respective responses to the Statement or the First Supplementary Statement would serve to rebut that presumption. Rather, the OFT considers that the arguments and additional evidence advanced by Durkan Holdings and Durkan, together with the additional material set out in this Decision, overwhelmingly points to Durkan Holdings having exercised decisive influence over Durkan at the time of the Infringements and of both companies having formed part of one and the same economic entity.
- II.440. In particular, the OFT relies on the following factors in support of its conclusions in this regard:
- (a) Durkan Holdings' majority shareholding and associated voting rights in Durkan (see paragraph II.406 above);
 - (b) the fact that three of Durkan's directors, including its Chairman, were also directors of Durkan Holdings (see paragraph II.407 above);
 - (c) the fact that full-time employees of Durkan Holdings held senior operational management posts within Durkan (see paragraph II.415 above), together with evidence of a Durkan Holdings' director's involvement in the negotiation of a specific financial commitment for Durkan (see paragraph II.417 above);
 - (d) Durkan's dependence on Durkan Holdings for finance and other operations (see paragraph II.419 above) and the payment by Durkan to Durkan Holdings of management charges for services provided by Durkan Holdings to Durkan (see paragraph II.431 above);
 - (e) Durkan Holdings' right to have one of its nominated directors or an alternate of such a director present at Durkan Board meetings for a quorum to be established (see paragraph II.421 above);
 - (f) the right of Durkan's Chairman, who was also the Chairman of Durkan Holdings, to chair meetings or, in his absence, to appoint another director to do so, and his entitlement to a second or casting vote in the event of an equality of votes at Durkan Board meetings (see paragraph II.422 above);
 - (g) Durkan's use of its parent's name, 'Durkan', and the similarity between the companies' respective logos (see paragraph II.425 above);

- (h) public communications representing Durkan and Durkan Holdings as a single economic unit (see paragraph II.429 above); and
- (i) the fact that during the relevant period Durkan Holdings reported Durkan's activities in its Consolidated Financial Statements and that Durkan, in its Consolidated Financial Statement for the year ended 31 January 2006, described Durkan Holdings as its 'parent company and controller' (see paragraph II.431 above).

II.441. The OFT therefore considers that Durkan Holdings as 51 per cent owner of Durkan and having Directors in common, together with the other indicia as further set out above, can be presumed to have exercised decisive influence over Durkan's commercial policy during the relevant period and therefore forms part of the same economic entity. Moreover, the OFT also considers that the combination of factors listed in the above paragraph together demonstrate that Durkan Holdings in fact exercised decisive influence over Durkan. Durkan and Durkan Holdings are therefore jointly and severally liable for Durkan's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringements 135 and 240.

II.442. This Decision is therefore addressed to Durkan, Durkan Limited, and Durkan Holdings.

E. Manton Limited ('E Manton')

II.443. E Manton is a private limited company registered in England and Wales, company number 00570282.⁵¹² E Manton's registered and primary trading address is 100 Saltley Road, Nechells, Birmingham, West Midlands, B7 4TE.⁵¹³

II.444. At the time of issue of the Statement, E Manton undertook new construction and refurbishment work in both the public and private sectors. A large proportion of E Manton's work was for social housing, local authorities, health, and education sectors.⁵¹⁴ At the time of issue of the Statement, E Manton did not carry out work outside the United Kingdom.

II.445. E Manton has no holding companies or subsidiaries.⁵¹⁵

II.446. E Manton's turnover for the financial year ending 31 December 2008 was [...] [C].⁵¹⁶

II.447. The directors of E Manton from 2000 to 2006 were as follows:⁵¹⁷

- Anthony John Cotter	2 February 2005 – 2006
- Stanley Clement Hughes	2 February 2005 – 2006
- William Edward McMurray	2000 – 2006
- Graham Robert Morris	2 February 2005 – 2006
- Martyn Andrew Webb	2 February 2005 – 2006

⁵¹² FAME report, OFT Document Reference 12710.

⁵¹³ FAME report, OFT Document Reference 12710.

⁵¹⁴ E Manton's website, OFT Document Reference 12714 .

⁵¹⁵ FAME report, OFT Document Reference 12710.

⁵¹⁶ Email from Irwin Mitchell, 28 April 2009.

⁵¹⁷ Company Appointments Report, OFT Document Reference 12715.

- II.448. E Manton did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁵¹⁸
- II.449. This Decision is addressed to E Manton. The OFT considers that E Manton is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

E. Taylor & Sons (Southwell) Limited ('E Taylor')
Trading as Carmalor Construction ('Carmalor')

- II.450. E Taylor is a private limited company registered in England and Wales, company number 00666511.⁵¹⁹ E Taylor's registered and primary trading address is The Coach House, Savile Court, Main Street, Eakring, Newark, Nottinghamshire, NG22 0BL.⁵²⁰ E Taylor trades as Carmalor Construction.⁵²¹
- II.451. At the time of issue of the Statement, E Taylor carried out general construction work and house building for private, public and commercial sector clients⁵²² and it did not carry out work outside the United Kingdom.
- II.452. From 2000 to 4 August 2003, E Taylor had no holding companies and/or subsidiaries.
- II.453. E Taylor's turnover for the financial year ending 31 August 2008 was [...] [C].⁵²³
- II.454. The directors of E Taylor from 2000 to 2006 were as follows:⁵²⁴
- | | |
|-----------------------------|--------------------------|
| - Mark Brown | 14 June 2004 – 2006 |
| - Michael John Carby | 2000 – 24 July 2003 |
| - Nigel Andrew Carby | 2000 – 27 January 2006 |
| - Julie Jackson | 1 August 2005 – 2006 |
| - Mark David Jackson | 2000 – 2 June 2005 |
| - Barry Charles Malster | 2000 – 30 September 2002 |
| - Janice Elizabeth Malster | 2000 – 30 September 2002 |
| - Ian Southerland Whitehead | 1 August 2005 – 2006 |

- II.455. E Taylor did not apply for leniency, but was given the opportunity of accepting the OFT's Fast Track Offer.⁵²⁵
- II.456. Since the Infringements described in this Decision, E Taylor has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as E Taylor at the relevant times, it is not jointly and severally liable with E Taylor for payment of the penalties that the OFT is

⁵¹⁸ See paragraphs II.1481 to II.1487 below.

⁵¹⁹ FAME report, OFT Document Reference 11811.

⁵²⁰ FAME report, OFT Document Reference 11811.

⁵²¹ Letter to William Woodsend Limited from Carmalor Construction with the company number 666511, i.e. that of E Taylor, OFT Document Reference 4290.

⁵²² Market definition response, OFT Document Reference 6530.

⁵²³ Letter from E Taylor, 29 July 2009.

⁵²⁴ Company Appointments Report, OFT Document Reference 11821.

⁵²⁵ See paragraphs II.1481 to II.1487 below.

imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of E Taylor.

II.457. This Decision is therefore addressed to E Taylor. The OFT considers that E Taylor is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

F. Parkinson Limited ('F Parkinson')
Mowbray Holdings Limited ('Mowbray')

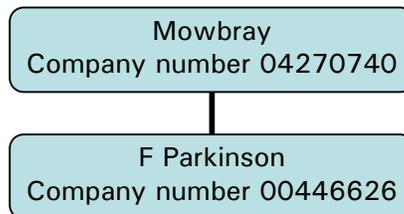
II.458. F Parkinson is a private limited company registered in England and Wales, company number 00446626.⁵²⁶ F Parkinson's registered and primary trading address is Mowbray Drive, Blackpool, Lancashire, FY3 7UU.⁵²⁷ F Parkinson also trades from premises in York.⁵²⁸

II.459. At the time of issue of the Statement, F Parkinson undertook new build and refurbishment works for both public and private sector clients. Market sectors included, but were not limited to educational, commercial, industrial and health and leisure.⁵²⁹ At the time of issue of the Statement F Parkinson did not carry out work outside the United Kingdom.

II.460. F Parkinson's ultimate parent company is currently Mowbray, a private limited company, company number 04270740.⁵³⁰ It was incorporated on 15 August 2001. Mowbray's registered address is 50 Mowbray Drive, Blackpool, Lancashire, FY3 7UU.⁵³¹

II.461. F Parkinson has no subsidiaries.

II.462. The overall company structure from 2002 – 2006 is outlined below:



II.463. Mowbray's consolidated turnover for the financial year ending 30 September 2008 was £23,556,298.⁵³²

II.464. The directors of F Parkinson from 2002 to 2006 were as follows:⁵³³

- | | |
|---------------------|-------------------|
| - Raymond John Eyre | 4 May 2004 – 2006 |
| - Peter Glenn | 2002 – 2006 |

⁵²⁶ FAME report, OFT Document Reference 11849.

⁵²⁷ FAME report, OFT Document Reference 11849.

⁵²⁸ FAME report, OFT Document Reference 11849.

⁵²⁹ F Parkinson's website, OFT Document Reference 11867, page 2.

⁵³⁰ FAME report, OFT Document Reference 11849.

⁵³¹ FAME report, OFT Document Reference 11849.

⁵³² Letter from Pannone LLP, 11 May 2009.

⁵³³ Company Appointments Report, OFT Document Reference 11859.

- Allan Graham Hollick 2002 – 30 April 2004
- Francis Hull 2002 – 2006
- Colin Oakley 2002 – 2006
- Roger Parkinson 2002 – 28 September 2001
- Andrew Smith 1 December 2005 – 2006

II.465. The directors of Mowbray from 2002 to 2006 were as follows:⁵³⁴

- Peter Glenn 2002 – 2006
- Allan Graham Hollick 2002 – 30 April 2004
- Francis Hull 2002 – 2006
- Colin Oakley 2002 – 2006

II.466. The following directors have been on the Board of Directors of both F Parkinson and Mowbray during the periods mentioned below.⁵³⁵ The OFT considers that this provides evidence that Mowbray exercised decisive influence over F Parkinson’s conduct at the time of the Infringements.

- Peter Glenn 2002 – 2006
- Allan Graham Hollick 2002 – 30 April 2004
- Francis Hull 2002 – 2006
- Colin Oakley 2002 – 2006

II.467. F Parkinson did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Mowbray, were given the opportunity of accepting the OFT’s Fast Track Offer.⁵³⁶

II.468. The OFT considers that Mowbray, as 100 per cent owner of F Parkinson, can be presumed to have exercised decisive influence over F Parkinson’s commercial policy and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between F Parkinson and Mowbray. F Parkinson and Mowbray are therefore jointly and severally liable for F Parkinson’s participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.469. This Decision is therefore addressed to F Parkinson and Mowbray.

Francis Construction Limited ('Francis')
Barrett Estate Services Limited ('Barrett')

II.470. Francis is a private limited company registered in England and Wales, company number 00384619.⁵³⁷ Francis’s registered and primary trading address is Armour House, Colthrop Lane, Thatcham, Berkshire, RG19 4PD.⁵³⁸

II.471. At the time of issue of the Statement, Francis undertook general building contracting work, both new build and refurbishment, in sectors such as

⁵³⁴ Company Appointments Report, OFT Document Reference 11858.

⁵³⁵ Company Appointments Reports, OFT Document Reference 11859 and 11858.

⁵³⁶ See paragraphs II.1481 to II.1487 below.

⁵³⁷ FAME report, OFT Document Reference 11868.

⁵³⁸ FAME report, OFT Document Reference 11868.

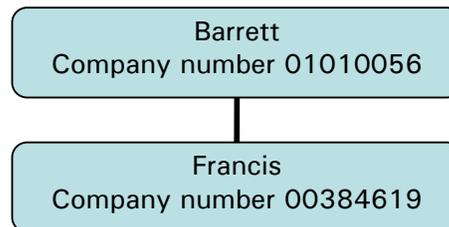
housing, commercial, health and education.⁵³⁹ At the time of issue of the Statement Francis did not carry out work outside the United Kingdom.

II.472. Prior to 21 October 2002 Francis was known as Francis Contractors Limited.⁵⁴⁰

II.473. Francis's ultimate parent company is Barrett, a private limited company, company number 01010056.⁵⁴¹ Barrett's registered address is Armour House, Colthorp Lane, Thatcham, Berkshire, RG19 4PD.⁵⁴² Francis is a wholly owned subsidiary of Barrett.⁵⁴³

II.474. Francis has no subsidiaries.⁵⁴⁴

II.475. The relevant company structure from 2000 – 2006 is outlined below:



II.476. Barrett has two other majority-owned subsidiaries.⁵⁴⁵

II.477. Barrett's consolidated turnover for the financial year ending 31 December 2008 was [...] [C].⁵⁴⁶

II.478. The directors of Francis from 2000 to 2006 were as follows:⁵⁴⁷

- David William Jermyn 2000 – 2006
Barrett
- Etienne Mark Christopher 2000 – 2006
Barrett
- Andrew Mark Burroughs 2000 – 30 June 2000
- Stewart James Smith 1 January 2002 – 2006

II.479. The directors of Barrett from 2000 to 2006 were as follows:⁵⁴⁸

- David William Jermyn 2000 – 2006
Barrett
- Etienne Mark Christopher 2000 – 2006
Barrett

⁵³⁹ Market definition response, OFT Document Reference 6870.

⁵⁴⁰ FAME report, OFT Document Reference 11868.

⁵⁴¹ FAME report, OFT Document Reference 11869.

⁵⁴² FAME report, OFT Document Reference 11869.

⁵⁴³ FAME report, OFT Document Reference 11869.

⁵⁴⁴ FAME report, OFT Document Reference 11868.

⁵⁴⁵ Latest available FAME report of Barrett.

⁵⁴⁶ Letter from Boyes Turner, 24 July 2009. The OFT has been advised that the group turnover figure is net of intercompany charges.

⁵⁴⁷ Company Appointment Report, OFT Document Reference 11870.

⁵⁴⁸ Company Appointment Report, OFT Document Reference 11871.

II.480. The following directors have been on the Board of Directors of both Francis and Barrett during the periods mentioned below.⁵⁴⁹ The OFT considers that this provides evidence that Barrett exercised decisive influence over Francis's conduct at the time of the Infringements.

- David William Jermyn 2000 – 2006
Barrett
- Etienne Mark Christopher 2000 – 2006
Barrett

II.481. Francis did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Barrett, were given the opportunity of accepting the OFT's Fast Track Offer.⁵⁵⁰

II.482. The OFT considers that Barrett, as 100 per cent owner of Francis, can be presumed to have exercised decisive influence over Francis's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Francis and Barrett. Francis and Barrett are therefore jointly and severally liable for Francis's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.483. This Decision is therefore addressed to Francis and Barrett.

Frudd Construction Limited ('Frudd')

II.484. Frudd is a private limited company registered in England and Wales, company number 01673323.⁵⁵¹ Frudd's registered address is c/o Ernst & Young LLP, 1 Bridgewater Place, Water Lane, Leeds, LS11 5QR.⁵⁵² Frudd also has a trading address at Byidon House, 92 Rolleston Drive, Arnold, Nottingham, Nottinghamshire, NG5 7JP.⁵⁵³

II.485. At the time of issue of the Statement, Frudd undertook construction, contract maintenance and building services in sectors such as commercial, industrial, leisure and domestic for both public and private sector clients.⁵⁵⁴ At the time of issue of the Statement, Frudd did not carry out work outside the United Kingdom.

II.486. Until 17 August 2005, Frudd was called Frudd Building Services Limited.⁵⁵⁵

II.487. An administrator was appointed for Frudd on 4 January 2007⁵⁵⁶ and a liquidator was subsequently appointed on 3 July 2008.⁵⁵⁷

II.488. Frudd has no holding company or subsidiaries.⁵⁵⁸

⁵⁴⁹ Company Appointment Report, OFT Document Reference 11870 and 11874b.

⁵⁵⁰ See paragraphs II.1481 to II.1487 below.

⁵⁵¹ FAME report, OFT Document Reference 11890.

⁵⁵² Latest available FAME report of Frudd.

⁵⁵³ Latest available FAME report of Frudd.

⁵⁵⁴ Frudd's website, OFT Document Reference 11894.

⁵⁵⁵ FAME report, OFT Document Reference 11890.

⁵⁵⁶ Company details, OFT Document Reference 11889 and FAME report, OFT Document Reference 11890.

⁵⁵⁷ Companies Form No 600, notice of appointment of liquidator – voluntary winding up.

II.489. Frudd's turnover for the period 1 April 2006 to 31 October 2006 was [...] [C].⁵⁵⁹

II.490. The directors of Frudd from 2002 to 2006 were as follows:⁵⁶⁰

- David Ian Frudd	2002 – 2006
- Jenna Frudd	2002 – 2006
- John Christopher Frudd	2002 – 2006
- Andrew Neil Smith	2002 – 31 January 2004
- Stanley Yeomans	2002 – 6 May 2004

II.491. Frudd applied for leniency in accordance with the OFT's leniency programme.⁵⁶¹ Notwithstanding the fact that Frudd has not signed up to the leniency agreement⁵⁶², the OFT intends, given the circumstances to recognise in any penalty calculation the voluntary assistance provided by Frudd as a result of its application for leniency. This means that the offered leniency reduction has been taken into account when calculating the penalties that the OFT is imposing on Frudd and the information provided by Frudd in the context of its leniency application has been used by the OFT as if it had signed up to the leniency agreement.

II.492. This Decision is addressed to Frudd. The OFT considers that Frudd is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

GAJ Construction Limited ('GAJ')
GAJ (Holdings) Limited ('GAJ Holdings')

II.493. GAJ is a private limited company registered in England and Wales, company number 02650862.⁵⁶³ GAJ's registered and primary trading address is West Oak House, Westwood Way, Westwood Business Park, Coventry, West Midlands, CV4 8LB.⁵⁶⁴

II.494. At the time of issue of the Statement, GAJ was a general building contractor and had its core area of business in the West Midlands serving an area within a radius of 75 miles of its office. GAJ undertook works within sectors such as healthcare, education, commercial, leisure and sport, housing and industrial.⁵⁶⁵ At the time of issue of the Statement, GAJ did not carry out work outside the United Kingdom.

II.495. GAJ did not have an ultimate parent for the period 2000 to 4 June 2002.

⁵⁵⁸ FAME report, OFT Document Reference 11890.

⁵⁵⁹ Email from Ernst & Young, 28 October 2008.

⁵⁶⁰ Company Appointments Report, OFT Document Reference 11892.

⁵⁶¹ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

⁵⁶² The company lacks the 'controlling mind' in order to sign up to the leniency agreement.

⁵⁶³ FAME report, OFT Document Reference 11900.

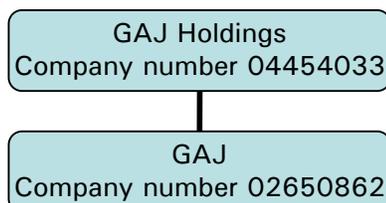
⁵⁶⁴ FAME report, OFT Document Reference 11900.

⁵⁶⁵ GAJ's website, OFT Document Reference 11908.

II.496. GAJ Holdings was incorporated on 5 June 2002. GAJ Holdings is a private limited company, company number 04454033.⁵⁶⁶ GAJ Holdings' registered and trading address is West Oak House, Westwood Way, Westwood Business Park, Coventry, Warwickshire, CV4 8LB.⁵⁶⁷ Since the incorporation of GAJ Holdings, GAJ Holdings has become GAJ's ultimate parent company.⁵⁶⁸

II.497. GAJ has one subsidiary.⁵⁶⁹

II.498. The company structure from 5 June 2002 to 2006 is as follows;



II.499. GAJ Holdings has two other wholly owned subsidiaries.⁵⁷⁰

II.500. GAJ Holdings' consolidated turnover for the financial year ending 30 June 2008 was £20,525,508.⁵⁷¹

II.501. The directors of GAJ from 2000 to 2006 were as follows:⁵⁷²

- Roy Butcher	2000 – 30 June 2000
- Ian Frederick Goodwin	2000 – 31 March 2004
- Gordon James Harker	1 July 2001 – 2006
- Geoffrey Arthur Jordan	2000 – 2006
- Richard John Pope	2000 – 16 August 2002
- Michael Desmond Scott	2000 – 2006

II.502. The directors of GAJ Holdings from 5 June 2002 to 2006 were as follows:⁵⁷³

- Ian Frederick Goodwin	5 June 2002 – 31 March 2004
- Gordon James Harker	25 June 2002 – 2006
- Geoffrey Arthur Jordan	5 June 2002 – 2006
- Michael Desmond Scott	5 June 2002 – 2006

II.503. The following directors have been on the Board of Directors of both GAJ and GAJ Holdings during the periods mentioned below.⁵⁷⁴ The OFT considers that this provides evidence that GAJ Holdings exercised decisive influence over GAJ's conduct at the time of Infringement 174.

- Ian Frederick Goodwin	5 June 2002 – 31 March 2004
- Gordon James Harker	25 June 2002 – 2006

⁵⁶⁶ FAME report, OFT Document Reference 11901.

⁵⁶⁷ FAME report, OFT Document Reference 11901.

⁵⁶⁸ FAME report, OFT Document Reference 11900.

⁵⁶⁹ Latest available FAME report of GAJ.

⁵⁷⁰ FAME report, OFT Document Reference 11901.

⁵⁷¹ Letter from GAJ, 20 July 2009.

⁵⁷² Company Appointments Report, OFT Document Reference 11911.

⁵⁷³ Company Appointments Report, OFT Document Reference 11910.

⁵⁷⁴ Company Appointments Report, OFT Document Reference 11911 and 11910.

- Geoffrey Arthur Jordan 5 June 2002 – 2006
- Michael Desmond Scott 5 June 2002 – 2006

- II.504. GAJ did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, GAJ Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.⁵⁷⁵
- II.505. The OFT considers that GAJ Holdings, as 100 per cent owner of GAJ, can be presumed to have exercised decisive influence over GAJ's commercial policy from 5 June 2002 and therefore forms part of the same economic entity. GAJ and GAJ Holdings are therefore jointly and severally liable for GAJ's participation in the relevant Infringement. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringement 174.
- II.506. This Decision is therefore addressed to GAJ and GAJ Holdings.

G Carter Construction Limited ('G Carter')

- II.507. G Carter is a private limited company registered in England and Wales, company number 01362535.⁵⁷⁶ G Carter's registered address is 93 Queen Street, Sheffield, South Yorkshire, S1 1EF.⁵⁷⁷ G Carter also has a listed address at Richardson Street, Derby, Derbyshire, DE22 3GR.⁵⁷⁸
- II.508. Prior to liquidation, G Carter was primarily involved in the general construction of buildings and civil engineering works including new commercial, residential, industrial buildings and civil engineering projects.⁵⁷⁹ Prior to liquidation, G Carter did not carry out work outside the United Kingdom.
- II.509. G Carter has no holding company or any subsidiaries.⁵⁸⁰
- II.510. A liquidator was appointed on 19 March 2008.⁵⁸¹
- II.511. G Carter's turnover for the period 1 May 2007 to 31 January 2008 was [...] [C].⁵⁸²
- II.512. The directors of G Carter from 2001 to 2006 were as follows:⁵⁸³

- Victoria Anne Brookes 3 April 2001 – 27 February 2004
- Anne Carter 2001 – 3 April 2001
- Daniel Richard Carter 3 April 2001 – 1 April 2004
- Geoffrey Ian Carter 2001 – 3 April 2001
- Roger Ian Carter 2001 – 2006
- Ian Dennis 3 April 2001 – 12 July 2001

⁵⁷⁵ See paragraphs II.1481 to II.1487 below.

⁵⁷⁶ FAME report, OFT Document Reference 11895.

⁵⁷⁷ Latest available FAME report of G Carter.

⁵⁷⁸ Latest available FAME report of G Carter.

⁵⁷⁹ FAME report, OFT Document Reference 11895 and website, OFT Document Reference 11899.

⁵⁸⁰ FAME report, OFT Document Reference 11895.

⁵⁸¹ Notice of appointment of liquidator, 18 March 2008.

⁵⁸² Letter from The P&A Partnership, 13 July 2009.

⁵⁸³ Current appointment report, OFT Document Reference 11897.

- II.513. G Carter did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁵⁸⁴
- II.514. The OFT has been listed as a 'Known Creditor'⁵⁸⁵ in the liquidation of G Carter for any financial penalty that the OFT may in due course impose.
- II.515. This Decision is addressed to G Carter. The OFT considers that G Carter is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

G.F. Tomlinson Building Limited ('G F Tomlinson')
G.F. Tomlinson Group Limited ('G F Tomlinson Group')

- II.516. G F Tomlinson is a private limited company registered in England and Wales, company number 02332956.⁵⁸⁶ G F Tomlinson's registered address and primary trading is Tomlinson House Duffield Road, Little Eaton, Derby, Derbyshire, DE21 5DR.⁵⁸⁷ G F Tomlinson also has a trading address at 16-18 City Road, Derby, Derbyshire, DE1 3RQ.⁵⁸⁸
- II.517. At the time of issue of the Statement, G F Tomlinson carried out a wide spectrum of construction services including new build and refurbishment of commercial and industrial buildings and refurbishment of private sector housing.⁵⁸⁹ At the time of issue of the Statement, G F Tomlinson did not carry out work outside the United Kingdom.
- II.518. G F Tomlinson's ultimate parent company is G F Tomlinson Group, a private limited company, company number 00233721.⁵⁹⁰ G F Tomlinson Group's registered office and primary trading is Tomlinson House Duffield Road, Little Eaton, Derby, Derbyshire, DE21 5DR.⁵⁹¹ G F Tomlinson Group also has a trading address at 16-18 City Road, Derby, Derbyshire, DE1 3RQ.⁵⁹² G F Tomlinson is a wholly owned subsidiary of G F Tomlinson Group.⁵⁹³
- II.519. G F Tomlinson has no subsidiaries.
- II.520. The relevant company group structure from 2000 – 2006 is outlined below:

⁵⁸⁴ See paragraphs II.1481 to II.1487 below.

⁵⁸⁵ Letter from Liquidators, OFT Document Reference SA023.

⁵⁸⁶ FAME report, OFT Document Reference 11951.

⁵⁸⁷ Latest available FAME report of G F Tomlinson.

⁵⁸⁸ Latest available FAME report of G F Tomlinson.

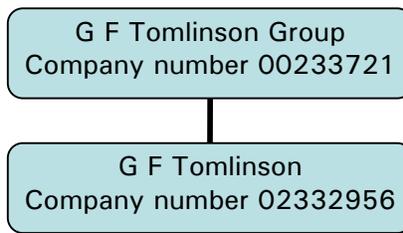
⁵⁸⁹ G F Tomlinson's website, OFT Document Reference 11956 and Market definition response, OFT Document Reference 6589.

⁵⁹⁰ FAME report, OFT Document Reference 11952.

⁵⁹¹ Latest available FAME report of G F Tomlinson.

⁵⁹² Latest available FAME report of G F Tomlinson..

⁵⁹³ FAME report, OFT Document Reference 11952.



II.521. G F Tomlinson Group has six other subsidiaries.⁵⁹⁴

II.522. G F Tomlinson Group's consolidated turnover for the financial year ending 31 December from 2006 to 2008 was [...] [C].⁵⁹⁵

II.523. The directors of G F Tomlinson from 2000 to 2006 were as follows:⁵⁹⁶

- Nicholas Michael Banks	1 June 2006 – 2006
- Roy Collis	2000 – 2006
- Christopher Flint	1 June 2006 – 2006
- Stuart Lawrence	2000 – 2006
- Barry Edward Swards	2000 – 2006
- Martin Cyril Tomlinson	2000 – 30 August 2002

II.524. The directors of G F Tomlinson Group from 2000 to 2006 were as follows:⁵⁹⁷

- Roy Collis	2000 – 2006
- Andrew James Spencer Swards	25 August 2005 – 2006
- Barry Edward Swards	2000 – 2006
- Martin Cyril Tomlinson	2000 – 29 November 2002

II.525. The following directors have been on the Board of Directors of both G F Tomlinson and G F Tomlinson Group during the periods mentioned below. The OFT considers that this provides evidence that G F Tomlinson Group exercised decisive influence over G F Tomlinson's conduct at the time of the Infringements.

- Martin Cyril Tomlinson	2000 – 30 August 2002
- Roy Collis	2000 – 2006
- Barry Edward Swards	2000 – 2006

II.526. G F Tomlinson did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, G F Tomlinson Group, were given the opportunity of accepting the OFT's Fast Track Offer.⁵⁹⁸

II.527. The OFT considers that G F Tomlinson Group, as 100 per cent owner of G F Tomlinson, can be presumed to have exercised decisive influence over G F Tomlinson's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between G

⁵⁹⁴ Latest available FAME report of G F Tomlinson.

⁵⁹⁵ Letter from J H Powell & Co Solicitors, 28 May 2009.

⁵⁹⁶ Company Appointments, OFT Document Reference 11957.

⁵⁹⁷ Company Appointments, OFT Document Reference 11958.

⁵⁹⁸ See paragraphs II.1481 to II.1487 below.

F Tomlinson Group and G F Tomlinson. G F Tomlinson and G F Tomlinson Group are therefore jointly and severally liable for G F Tomlinson's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.528. This Decision is therefore addressed to G F Tomlinson and G F Tomlinson Group.

G G Middleton & Sons Limited ('G G Middleton')

II.529. G G Middleton is a private limited company registered in England and Wales, company number 02564190.⁵⁹⁹ G G Middleton's registered and trading address is 30 Hartland Road, Worksop, Nottinghamshire, S80 1XN. G G Middleton also has a listed trading address at Sandy Lane Industrial Estate, Sandy Lane, Worksop, Nottinghamshire, S80 1TN.⁶⁰⁰

II.530. G G Middleton's principal activities are those of building and public works contractors.⁶⁰¹ G G Middleton does not carry out work outside the United Kingdom.

II.531. G G Middleton has no holding company.⁶⁰²

II.532. G G Middleton has one subsidiary.⁶⁰³

II.533. Prior to issue of the Statement, G G Middleton advised the OFT that, due to retirement, the company was closing down and as from 23 March 2007 all future correspondence should be directed to a new address.⁶⁰⁴ Although the OFT has since been informed that the company ceased active construction operations in March 2007⁶⁰⁵, the OFT has received no evidence to substantiate this assertion and notes that G G Middleton is still listed as a live company on Companies House.

II.534. G G Middleton's unconsolidated turnover for the financial year ending 31 March 2009 was [...] [C].⁶⁰⁶

II.535. The directors of G G Middleton from 2003 to 2006 were as follows:⁶⁰⁷

- Eileen Mary Stott	2003 – 2006
- Jonathan David Stott	27 June 2006 – 2006
- Nadine Louise Stott	27 June 2006 – 2006
- Stephen Robert Stott	2003 – 2006

II.536. G G Middleton did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁶⁰⁸

⁵⁹⁹ FAME report, OFT Document Reference 11959.

⁶⁰⁰ Latest available FAME report of G G Middleton.

⁶⁰¹ Directors' Report and Financial Statements, OFT Document Reference 6538.

⁶⁰² FAME report, OFT Document Reference 11959.

⁶⁰³ FAME report, OFT Document Reference 11959.

⁶⁰⁴ Letter from GG Middleton, OFT Document Reference 6536

⁶⁰⁵ Written representations of G G Middleton, 20 June 2008.

⁶⁰⁶ Email from William Knowles & Co, 16 July 2009.

⁶⁰⁷ Company Appointments Report, OFT Document Reference 11960.

⁶⁰⁸ See paragraphs II.1481 to II.1487 below.

II.537. This Decision is addressed to G G Middleton. The OFT considers that G G Middleton is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

G. & J. Seddon Limited ('G & J Seddon')
Seddon Group Limited ('Seddon')

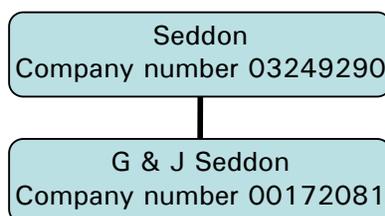
II.538. G & J Seddon is a private limited company registered in England and Wales, company number 00172081.⁶⁰⁹ G & J Seddon's registered and primary trading address is Plodder Lane, Edge Fold, Bolton, Lancashire, BL4 ONN.⁶¹⁰

II.539. At the time of issue of the Statement, G & J Seddon undertook work as a building contractor operating in a broad range of sectors including, public and private sector housing, commercial and industrial construction.⁶¹¹ At the time of issue of the Statement, G & J Seddon did not carry out work outside the United Kingdom.

II.540. G & J Seddon's ultimate parent company is Seddon, a private limited company, company number 03249290.⁶¹² Seddon's registered address is Manor House, Manor Lane, Holmes Chapel, Nr Crewe, Cheshire, CW4 8AF.⁶¹³ G & J Seddon is a wholly owned subsidiary of Seddon.⁶¹⁴

II.541. G & J Seddon has thirteen subsidiaries.⁶¹⁵

II.542. The relevant company structure from 2000 to 2006 is outlined below;



II.543. Seddon has thirteen other subsidiaries.⁶¹⁶

II.544. Seddon's consolidated group turnover for the financial year ending 31 December 2008 was [...] [C].⁶¹⁷

II.545. The directors of G & J Seddon from 2000 to 2006 were as follows:⁶¹⁸

- Peter James Francis 17 August 2006 – 2006

⁶⁰⁹ FAME report, OFT Document Reference 12457.

⁶¹⁰ FAME report, OFT Document Reference 12457.

⁶¹¹ Market definition response, OFT Document Reference 6709.

⁶¹² FAME report, OFT Document Reference 12456.

⁶¹³ FAME report, OFT Document Reference 12456.

⁶¹⁴ Latest available FAME report of Seddon.

⁶¹⁵ Latest available FAME report of G & J Seddon.

⁶¹⁶ FAME report, OFT Document Reference 12456.

⁶¹⁷ Email from Watson Burton LLP, 29 April 2009.

⁶¹⁸ Current Appointments Report, OFT Document Reference 12466.

Jackson	
- Christopher John Seddon	2000 – 2006
- Jonathan Frank Seddon	2000 – 2006
- John Howard Shaw	17 August 2006 – 2006
- Michael Stephen Slack	2000 – 2006
- Brian Kevin Smethurst	2000 – 2006
- Keith Waddington	2000 – 2006
- Andrew John Wilcox	2000 – 2006
- David James Cork	2000 – 31 October 2002
- John Stanley Davies	2000 – 31 December 2005
- Shaun Thomas Taylor	2000 – 31 December 2006

II.546. The directors of Seddon from 2000 to 2006 were as follows:⁶¹⁹

- Christopher John Seddon	2000 – 2006
- George Seddon	2000 – 2006
- John Seddon	2000 – 2006
- John Stuart Seddon	2000 – 2006
- Stephen John Seddon	2000 – 2006
- Jonathan Frank Seddon	30 November 2001 – 2006
- Rodney Horrocks Sellers	3 April 2006 – 2006
- Kenton Lloyd Whitaker	16 December 2002 – 2006

II.547. The following directors have been on the Board of Directors of both G & J Seddon and Seddon during the periods mentioned below.⁶²⁰ The OFT considers that this provides evidence that Seddon exercised decisive influence over G & J Seddon's conduct at the time of the Infringements.

- Christopher John Seddon	2000 – 2006
- Jonathan Frank Seddon	20 November 2001 – 2006

II.548. G & J Seddon did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Seddon, were given the opportunity of accepting the OFT's Fast Track Offer.⁶²¹

II.549. The OFT considers that Seddon, as 100 per cent owner of G & J Seddon, can be presumed to have exercised decisive influence over G & J Seddon's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Seddon and G & J Seddon. Seddon and G & J Seddon are therefore jointly and severally liable for G & J Seddon's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.550. This Decision is therefore addressed to Seddon and G & J Seddon.

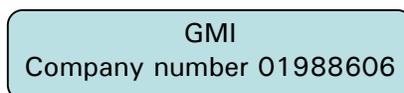
⁶¹⁹ Current Appointments Report, OFT Document Reference 12464.

⁶²⁰ Current Appointments Report, OFT Document Reference 12464 and 12466.

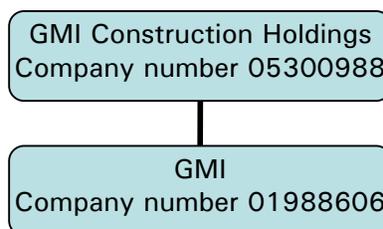
⁶²¹ See paragraphs II.1481 to II.1487 below.

GMI Construction Group plc ('GMI')
GMI Construction Holdings plc ('GMI Construction Holdings')

- II.551. GMI is a public limited company registered in England and Wales, company number 01988606.⁶²² GMI's registered and primary trading address is Middleton House, Westland Road, Leeds, West Yorkshire, LS11 5UH.⁶²³
- II.552. At the time of issue of the Statement, GMI's principal activity was that of property construction⁶²⁴ and it did not carry out work outside the United Kingdom.
- II.553. GMI changed its name to Blacksco40 plc on 6 April 2005 and back to GMI Construction Group plc on 26 April 2005.⁶²⁵
- II.554. At the time of issue of the Statement, GMI had one subsidiary.⁶²⁶
- II.555. From 2000 to 6 February 2005 GMI did not have an ultimate parent company.
- II.556. GMI Construction Holdings, a public limited company, company number 05300988, became GMI's ultimate parent company on 7 February 2005.⁶²⁷ GMI Construction Holdings' registered address is Middleton House, Westland Road, Leeds, West Yorkshire, LS11 5UH.⁶²⁸ GMI is a wholly owned subsidiary of GMI Construction Holdings.⁶²⁹
- II.557. GMI Construction Holdings was incorporated on 30 November 2004 and was called Blacksco40 plc.⁶³⁰ It changed its name to GMI Construction Group plc on 6 April 2005 and then to GMI Construction Holdings plc on 26 April 2005.⁶³¹
- II.558. The relevant structure from 2000 until 6 February 2005⁶³² was therefore as follows:



- II.559. The overall structure from 7 February 2005⁶³³ until 2006 was as follows:



⁶²² FAME report, OFT Document Reference 11965.

⁶²³ FAME report, OFT Document Reference 11965.

⁶²⁴ Financial Statements for year ended 30 September 2006, OFT Document Reference 11974.

⁶²⁵ FAME report, OFT Document Reference 11965.

⁶²⁶ FAME report, OFT Document Reference 11965.

⁶²⁷ FAME report, OFT Document Reference 11965.

⁶²⁸ FAME report, OFT Document Reference 11964.

⁶²⁹ FAME report, OFT Document Reference 11965.

⁶³⁰ FAME report, OFT Document Reference 11964.

⁶³¹ FAME report, OFT Document Reference 11964.

⁶³² Form 363 Annual Return, OFT Document Reference 11978.

⁶³³ Form 363 Annual Return, OFT Document Reference 11978.

II.560. GMI's turnover for the financial year ending 30 September 2008 was [...] [C]. GMI's turnover is the only turnover of GMI Construction Holdings.⁶³⁴

II.561. The directors of GMI from 2000 to 2006 were as follows:⁶³⁵

- John Alan Austin	2000 – 2006
- Jarrod Best	7 February 2005 – 2006
- Gerald Ellingham	2000 – 2006
- Peter John Gilman	2000 – 2006
- Andrew Leslie Kemp	2000 – 2006
- John Stephen Naylor	2000 – 2006
- Ronald Stephen Pollard	2000 – 26 April 2003
- David James Shann	7 February 2005 – 2006
- James Shann	2000 – 2006
- Paul Whitaker	25 October 2000 – 2006

II.562. The directors of GMI Construction Holdings from 2004 to 2006 were as follows.⁶³⁶

- John Alan Austin	7 February 2005 – 2006
- Jarrod Best	30 November 2004 – 2006
- Gerald Ellingham	7 February 2005 – 2006
- Peter John Gilman	30 November 2004 – 2006
- Andrew Leslie Kemp	30 November 2004 – 2006
- John Stephen Naylor	30 November 2004 – 2006
- David James Shann	30 November 2004 – 2006
- James Shann	7 February 2005 – 2006
- Paul Whitaker	30 November 2004 – 2006

II.563. The following directors have been on the Board of Directors of both GMI and GMI Construction Holdings during the periods mentioned below.⁶³⁷ The OFT considers that this provides evidence that GMI Construction Holdings exercised decisive influence over GMI's conduct at the time of the Infringement.

- John Alan Austin	7 February 2005 – 2006
- Jarrod Best	7 February 2005 – 2006
- Gerald Ellingham	7 February 2005 – 2006
- Peter John Gilman	30 November 2004 – 2006
- Andrew Leslie Kemp	30 November 2004 – 2006
- John Stephen Naylor	30 November 2004 – 2006
- David James Shann	7 February 2005 – 2006
- James Shann	7 February 2005 – 2006
- Paul Whitaker	30 November 2004 – 2006

II.564. GMI did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, GMI Construction Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.⁶³⁸

⁶³⁴ Letter from McCormicks Solicitors, 13 May 2009.

⁶³⁵ Company Appointments, OFT Document Reference 11976.

⁶³⁶ Company Appointments, OFT Document Reference 11977.

⁶³⁷ Company Appointments, OFT Document Reference 11976 and 11977.

⁶³⁸ See paragraphs II.1481 to II.1487 below.

- II.565. The OFT considers that GMI is liable for the relevant Infringement during the period 2000 to 6 February 2005, described in this Decision and that it is liable for payment of the penalty that the OFT is imposing, in respect of Infringement 14, on account of the participation in the relevant Infringement of that undertaking.
- II.566. The OFT considers that GMI Construction Holdings, as 100 per cent owner of GMI, can be presumed to have exercised decisive influence over GMI's commercial policy from 7 February 2005 until 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between GMI Construction Holdings and GMI. GMI and GMI Construction Holdings are therefore jointly and severally liable for GMI's participation in the relevant Infringement. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringement 228.
- II.567. This Decision is therefore addressed to GMI and GMI Construction Holdings.

Geo Houlton & Sons Limited ('Geo Houlton')
Geo. Houlton & Sons (Holdings) Limited ('Geo Houlton Holdings')

- II.568. Geo Houlton is a private limited company registered in England and Wales, company number 01632717.⁶³⁹ Geo Houlton's registered and primary trading address is Hyperion Street, Hull, East Yorkshire, HU9 1BD.⁶⁴⁰
- II.569. At the time of issue of the Statement, Geo Houlton's principal market was in industrial, commercial and public authority sectors. Geo Houlton typically constructed schools, offices, factories and warehouses and high specification buildings, for example, in the health, pharmaceutical and food processing sectors.⁶⁴¹ At the time of issue of the Statement, Geo Houlton did not carry out work outside the United Kingdom.
- II.570. Geo Houlton's ultimate parent company is Geo Houlton Holdings, a private limited company, company number 00300842.⁶⁴² Geo Houlton Holdings' registered address is Hyperion Street, Witham, Hull, Yorkshire, HU9 1BD.⁶⁴³ Geo Houlton is a wholly owned subsidiary of Geo Houlton Holdings.⁶⁴⁴
- II.571. Geo Houlton has no subsidiaries.⁶⁴⁵
- II.572. The relevant company structure from 2000 to 2006 is outlined below:

⁶³⁹ FAME report, OFT Document Reference 11944.

⁶⁴⁰ FAME report, OFT Document Reference 11944.

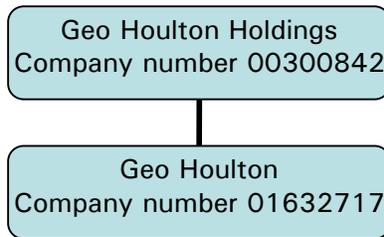
⁶⁴¹ Geo Houlton's website, OFT Document Reference 11950, pages 2 and 3.

⁶⁴² FAME report, OFT Document Reference 11945.

⁶⁴³ FAME report, OFT Document Reference 11945.

⁶⁴⁴ FAME report, OFT Document Reference 11945.

⁶⁴⁵ FAME report, OFT Document Reference 11944.



- II.573. Geo Houlton Holdings has four other wholly owned subsidiaries.⁶⁴⁶
- II.574. Geo Houlton Holdings' group consolidated turnover for the financial year ending 30 April 2009 was [...] [C].⁶⁴⁷
- II.575. The directors of Geo Houlton from 2001 to 2006 were as follows:⁶⁴⁸
- | | |
|---------------------------|--------------------|
| - Paul Simon Dickerson | 2001 – 2006 |
| - Keith Gilson | 2001 – 2006 |
| - Richard Gregory Houlton | 2001 – 2006 |
| - Andrew Mark Kingston | 1 June 2002 – 2006 |
| - Keith William Knights | 2001 – 2006 |
| - David James Padden | 1 June 2002 – 2006 |
- II.576. The directors of Geo Houlton Holdings from 2001 to 2006 were as follows:⁶⁴⁹
- | | |
|---------------------------|------------------------|
| - Paul Simon Dickerson | 2001 – 2006 |
| - Peter Frank Houlton | 2001 – 1 February 2002 |
| - Richard Edward Houlton | 2001 – 7 May 2006 |
| - Richard Gregory Houlton | 2001 – 2006 |
| - Keith William Knights | 2001 – 2006 |
| - Colin Roderick Palmer | 2001 – 2006 |
- II.577. The following directors have been on the Board of Directors of both Geo Houlton and Geo Houlton Holdings during the periods mentioned below.⁶⁵⁰ The OFT considers that this provides evidence that Geo Houlton Holdings exercised decisive influence over Geo Houlton's conduct at the time of Infringements.
- | | |
|---------------------------|-------------|
| - Paul Simon Dickerson | 2001 – 2006 |
| - Richard Gregory Houlton | 2001 – 2006 |
| - Keith William Knights | 2001 – 2006 |
- II.578. Geo Houlton did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Geo Houlton Holdings were given the opportunity of accepting the OFT's Fast Track Offer.⁶⁵¹
- II.579. The OFT considers that Geo Houlton Holdings, as 100 per cent owner of Geo Houlton, can be presumed to have exercised decisive influence over Geo Houlton's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the

⁶⁴⁶ Latest available FAME report.

⁶⁴⁷ Email from Gosschalks, 6 July 2009.

⁶⁴⁸ Company Appointments Report, OFT Document Reference 11946.

⁶⁴⁹ Company Appointments Report, OFT Document Reference 11947.

⁶⁵⁰ Company Appointments Reports, OFT Document Reference 11946 and 11947.

⁶⁵¹ See paragraphs II.1481 to II.1487 below.

exercise of decisive influence in the form of directors in common between Geo Houlton Holdings and Geo Houlton. Geo Houlton and Geo Houlton Holdings are therefore jointly and severally liable for Geo Houlton's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.580. This Decision is therefore addressed to Geo Houlton and Geo Houlton Holdings.

Greswolde Construction Limited ('Greswolde')
Mantisson Limited ('Mantisson')

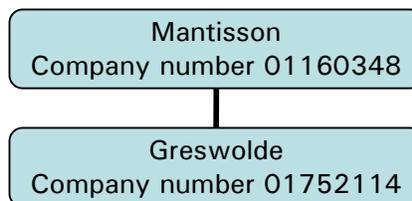
II.581. Greswolde is a private limited company registered in England and Wales, company number 01752114.⁶⁵² Greswolde's registered and primary trading address is Greswolde House, 197A Station Road, Knowle, Solihull, West Midlands, B93 0PU.⁶⁵³

II.582. At the time of issue of the Statement, Greswolde undertook new build and refurbishment work in both the public and private sectors and operated primarily in the Midlands. The majority of its work was carried out in the education, health, leisure and commercial sectors.⁶⁵⁴ At the time of issue of the Statement, Greswolde did not carry out work outside the United Kingdom.

II.583. Greswolde's ultimate parent company is Mantisson, a private limited company, company number 01160348.⁶⁵⁵ Mantisson's registered and primary trading address is Greswolde House, 197A Station Road, Knowle Solihull, West Midlands, B93 0PU.⁶⁵⁶ Greswolde is a wholly owned subsidiary of Mantisson.

II.584. Greswolde has no subsidiaries.⁶⁵⁷

II.585. The relevant company structure from 2000 to 2006 is outlined below:



II.586. Mantisson has three other wholly owned subsidiaries.⁶⁵⁸

II.587. Mantisson's consolidated group turnover for the financial year ending 31 December 2008 was [...] [C].⁶⁵⁹

II.588. The directors of Greswolde from 2000 to 2006 were as follows:⁶⁶⁰

⁶⁵² FAME report, OFT Document Reference 11996.

⁶⁵³ FAME report, OFT Document Reference 11996.

⁶⁵⁴ Greswolde's website, OFT Document Reference 12004.

⁶⁵⁵ FAME report, OFT Document Reference 11997.

⁶⁵⁶ FAME report, OFT Document Reference 11997.

⁶⁵⁷ FAME report, OFT Document Reference 11996.

⁶⁵⁸ FAME report, OFT Document Reference 11997.

⁶⁵⁹ Letter from Pinsent Masons, 3 June 2009.

⁶⁶⁰ Company Appointments, OFT Document Reference 12001.

- Malcom John Priest 2000 – 2006
- Dirk William Sandels 2000 – 28 July 2000

II.589. The director of Mantisson from 2000 to 2006 was as follows:⁶⁶¹

- Malcolm John Priest 2000 – 2006

II.590. The following director has been on the Board of Directors of both Greswolde and Mantisson during the period mentioned below.⁶⁶² The OFT considers that this provides evidence that Mantisson exercised decisive influence over Greswolde's conduct at the time of the Infringements.

- Malcolm John Priest 2000 – 2006

II.591. Greswolde did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Mantisson, were given the opportunity of accepting the OFT's Fast Track Offer.⁶⁶³

II.592. The OFT considers that Mantisson, as 100 per cent owner of Greswolde, can be presumed to have exercised decisive influence over Greswolde's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Mantisson and Greswolde. Greswolde and Mantisson are therefore jointly and severally liable for Greswolde's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.593. This Decision is therefore addressed to Greswolde and Mantisson.

Hall Construction Group Limited ('Hall')

II.594. Hall is a private limited company registered in England and Wales, company number 00458044.⁶⁶⁴ Hall's registered and primary trading address is Clay Street, Hull, Yorkshire, HU8 8HE.⁶⁶⁵

II.595. At the time of issue of the Statement, Hall undertook construction works, refurbishment, new build and design projects, in the education, health, commercial, industrial, retail, leisure, housing and community sectors for public and private sector clients.⁶⁶⁶ At the time of issue of the Statement, Hall did not carry out work outside the United Kingdom.

II.596. Until 27 September 2001, Hall was named F Hall & Sons Limited.⁶⁶⁷

II.597. Hall has six subsidiaries and has no holding companies.⁶⁶⁸

⁶⁶¹ Company Appointments, OFT Document Reference 12003.

⁶⁶² Company Appointments, OFT Document Reference 12001 and 12003.

⁶⁶³ See paragraphs II.1481 to II.1487 below.

⁶⁶⁴ FAME report, OFT Document Reference 12716.

⁶⁶⁵ FAME report, OFT Document Reference 12716.

⁶⁶⁶ Hall's website, OFT Document Reference 12723, pages 2 and 4.

⁶⁶⁷ FAME report, OFT Document Reference 12716.

⁶⁶⁸ Latest available FAME report.

- II.598. Hall's consolidated turnover for the financial year ending 30 September 2008 was [...] [C].⁶⁶⁹
- II.599. The directors of Hall from 2001 to 2006 were as follows:⁶⁷⁰
- Charles Norman Abbott 21 September 2001 – 4 March 2003
 - John Hugh Richard Hall 2001 – 3 August 2004
 - Martin Charles Sheridan Hall 2001 – 2006
 - Desmond Neil Moore 2001 – 16 September 2001
 - Paul Richardson 2001 – 28 September 2001
 - Neil Michael Symmonds 21 September 2001 – 2006
- II.600. Hall did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁶⁷¹
- II.601. This Decision is addressed to Hall. The OFT considers that Hall is liable for the Infringements described in this Decision and that it would be liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Harlow and Milner Limited ('Harlow & Milner')

- II.602. Harlow & Milner is a private limited company registered in England and Wales, company number 00330619.⁶⁷² Harlow & Milner's registered and primary trading address is Trident House, Milner Way, Ossett, West Yorkshire, WF5 9JE.⁶⁷³
- II.603. At the time of issue of the Statement, Harlow & Milner's principal activity was that of building and civil engineering contractors,⁶⁷⁴ including building new houses for both the public and private sectors and carrying out repairs and maintenance.⁶⁷⁵ At the time of issue of the Statement, Harlow & Milner did not carry out work outside the United Kingdom.
- II.604. Harlow & Milner has no holding companies or subsidiaries.⁶⁷⁶
- II.605. Harlow & Milner's turnover for the financial year ending 31 March 2008 was [...] [C].⁶⁷⁷
- II.606. The directors of Harlow & Milner from 2002 to 2006 were as follows:⁶⁷⁸
- John Allsop 1 August 2006 – 2006
 - Brian Denham 2002 – 5 April 2004
 - Diane Catherine Milner 2002 – 2006
 - John Milner 2002 – 2006

⁶⁶⁹ Email from Gosschalks, 13 July 2009.

⁶⁷⁰ Company Appointments Report, OFT Document Reference 12718.

⁶⁷¹ See paragraphs II.1481 to II.1487 below.

⁶⁷² FAME report, OFT Document Reference 12005.

⁶⁷³ Latest available Companies House information.

⁶⁷⁴ Financial Statement, OFT Document Reference 12007, page 4.

⁶⁷⁵ Market definition response, OFT Document Reference A2508.

⁶⁷⁶ FAME report, OFT Document Reference 12005.

⁶⁷⁷ Letter from Addleshaw Goddard LLP, 12 May 2009.

⁶⁷⁸ Company Appointment Report, OFT Document Reference 12006.

- II.607. Harlow & Milner applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁶⁷⁹
- II.608. This Decision is addressed to Harlow & Milner. The OFT considers that Harlow & Milner is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringement 138, 237 and 241⁶⁸⁰, on account of the participation in the Infringements of that undertaking.

Harold Adkin & Sons (Sutton-In-Ashfield) Limited ('Harold Adkin')

- II.609. Harold Adkin is a private limited company registered in England and Wales, company number 00845648.⁶⁸¹ Harold Adkin's registered and primary trading address is Oxford Street, Sutton-In-Ashfield, Nottinghamshire, NG17 2EG.⁶⁸²
- II.610. At the time of issue of the Statement, Harold Adkin undertook general construction and civil engineering works, in particular in commercial construction and both the public and private housing sectors.⁶⁸³ At the time of issue of the Statement, Harold Adkin did not carry out work outside the United Kingdom.
- II.611. Harold Adkin has no holding company or subsidiaries.⁶⁸⁴
- II.612. Harold Adkin's turnover for the financial year ending 31 March 2008 was [...] [C].⁶⁸⁵
- II.613. The directors of Harold Adkin from 2002 to 2006 were as follows:⁶⁸⁶
- | | |
|--------------------------|-------------|
| - Ian Barrington Douglas | 2002 – 2006 |
| - Michael Sankey | 2002 – 2006 |
- II.614. Harold Adkin did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁶⁸⁷
- II.615. This Decision is addressed to Harold Adkin. The OFT considers that Harold Adkin is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

⁶⁷⁹ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

⁶⁸⁰ The penalties in respect of Infringements 138 and 237 are reduced to zero as they are 'But for' Infringements.

⁶⁸¹ FAME report, OFT Document Reference 12008.

⁶⁸² FAME report, OFT Document Reference 12008.

⁶⁸³ FAME report, OFT Document Reference 12008 and market definition response, OFT Document Reference 6455.

⁶⁸⁴ FAME report, OFT Document Reference 12008.

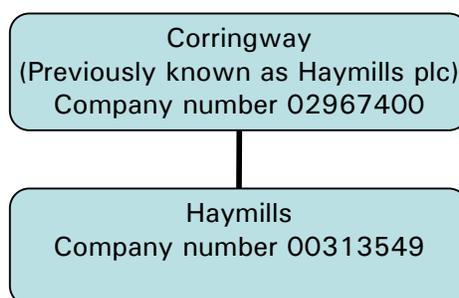
⁶⁸⁵ Written representations of Harold Adkin, 25 June 2008.

⁶⁸⁶ Company Appointments, OFT Document Reference 12012.

⁶⁸⁷ See paragraphs II.1481 to II.1487 below.

Haymills (Contractors) Limited now trading as Straw Realisations (No1) Limited ('Haymills')
Corringway Conclusions plc ('Corringway') previously known as Haymills plc ('Haymills plc')
Haymills Group Limited ('Haymills Group')

- II.616. Haymills is a private limited company registered in England and Wales, company number 00313549.⁶⁸⁸ Haymills' registered address is 14 Red Lion Square, London, WC1R 4QF.⁶⁸⁹ It also operates out of trading addresses in Surrey, Suffolk, Middlesex and Cambridgeshire.⁶⁹⁰
- II.617. At the time of issue of the Statement, Haymills' principal activities were that of buildings and civil engineering contracting and property maintenance.⁶⁹¹ At the time of issue of the Statement, Haymills did carry out work outside the United Kingdom.⁶⁹²
- II.618. From 2000 until 27 July 2004⁶⁹³, Haymills' ultimate parent company was Haymills plc, a public limited company, company number 02967400.⁶⁹⁴ Haymills plc's registered address was Wesley House, 1-7 Wesley Avenue, London, NW10 7BZ.⁶⁹⁵ Haymills was a wholly owned subsidiary of Haymills plc.⁶⁹⁶
- II.619. On 28 July 2004, Haymills plc changed its name to Corringway.⁶⁹⁷ Corringway's registered address is Farringdon Place, 20 Farringdon Road, London, EC1M 3AP.⁶⁹⁸ Corringway's trading address is in Cambridgeshire.⁶⁹⁹
- II.620. Joint liquidators for Corringway were appointed on 27 September 2004.⁷⁰⁰ An administrator was appointed for Haymills and Haymills Group on 13 August 2009.⁷⁰¹
- II.621. The relevant company structure from 2000 until 27 July 2004 was therefore as follows:



⁶⁸⁸ FAME report, OFT Document Reference 12027.

⁶⁸⁹ FAME report of Haymills, obtained on 12 February 2009

⁶⁹⁰ FAME report of Haymills, obtained on 12 February 2009

⁶⁹¹ Report and Financial Statements, OFT Document Reference 12043, page 6.

⁶⁹² Report and Financial Statements, OFT Document Reference 12043, page 3.

⁶⁹³ Directors' report, contained within the Annual Accounts of Haymills, up to 31 March 2005.

⁶⁹⁴ FAME report, OFT Document Reference 12028a.

⁶⁹⁵ Report and Financial Statements, OFT Document Reference 12043a, page 3.

⁶⁹⁶ Report and Financial Statements, OFT Document Reference 12043a, page 3.

⁶⁹⁷ FAME report, OFT Document Reference 12028a.

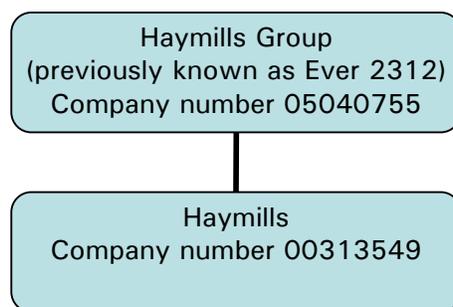
⁶⁹⁸ FAME report, OFT Document Reference 12028a.

⁶⁹⁹ FAME report for Corringway, obtained on 12 February 2009.

⁷⁰⁰ Written representations of Corringway, 27 June 2008, paragraph 1.2.

⁷⁰¹ Notice of administrator's appointment, form 2.12B.

- II.622. At the time of issue of the Statement, Haymills had six wholly owned subsidiaries, five of which are dormant.⁷⁰²
- II.623. At the time of issue of the Statement, Corringway⁷⁰³ had another three wholly owned subsidiaries.⁷⁰⁴
- II.624. On 26 May 2004, Ever 2312 Limited ('Ever 2312') purchased the share capital of Haymills to become Haymills' ultimate parent company⁷⁰⁵ and the consequent change of control was effected on 27 July 2004.⁷⁰⁶ Ever 2312 changed its name to Haymills Group on 2 August 2004.⁷⁰⁷ Haymills Group is a private limited company, company number 05040755 and its registered address is 14 Red Lion Square, London, WC1R 4QF.⁷⁰⁸ Haymills also has a trading address at Wesley House, 1-7 Wesley Avenue, London, NW10 7BZ.⁷⁰⁹
- II.625. Haymills is a wholly owned subsidiary of Haymills Group.⁷¹⁰
- II.626. The relevant company structure from 27 July 2004 until 2006 was therefore as follows:



- II.627. Haymills Group has another three subsidiaries, two of which are wholly owned.⁷¹¹
- II.628. Haymills has six subsidiaries, four of which are wholly owned.⁷¹²
- II.629. Corringway's⁷¹³ group consolidated turnover for the financial year ending 31 March 2003 was £118,866,000.⁷¹⁴
- II.630. Haymills' group turnover for the financial year ending 31 March 2008 was £181,555,000.⁷¹⁵

⁷⁰² Report and Financial Statements, OFT Document Reference 12041, page 20.

⁷⁰³ Previously known as Haymills plc.

⁷⁰⁴ Report and Financial Statements, OFT Document Reference 12043a, page 3.

⁷⁰⁵ Appendix to the Resolution of Haymills passed on 28 June 2004 refers to a sale agreement dated 26 May 2004, OFT Document Reference 12029.

⁷⁰⁶ Annual Accounts of Haymills for year end 31 March 2005.

⁷⁰⁷ FAME report, OFT Document Reference 12028.

⁷⁰⁸ FAME report of Haymills Group, obtained on 12 February 2009.

⁷⁰⁹ FAME report of Haymills Group, obtained on 12 February 2009.

⁷¹⁰ FAME report, OFT Document Reference 12028.

⁷¹¹ Latest available FAME report of Haymills Group.

⁷¹² Latest available FAME report of Haymills.

⁷¹³ Previously known as Haymills plc until 28 July 2004.

⁷¹⁴ FAME report, OFT Document Reference 12028a.

⁷¹⁵ Annual Report and Financial Statements year ending 31 March 2008.

II.631. Haymills Group's worldwide consolidated turnover for the financial year ending 31 March 2008 was £181,195,000.⁷¹⁶

II.632. The directors of Haymills from 2002 to 2006 were:⁷¹⁷

- Julian Andrew Brandon	30 September 2002 – 2006
- Ian Richard Brown	6 October 2003 – 22 June 2004
- Graham Charles Colthorpe	2002 – 24 June 2004
- Martin Courtenay Clarke	2002 – 6 October 2003
- Terry Day	2002 – 30 September 2002
- Stephen Ben Farrant	26 July 2002 – 2006
- Stephen Joseph Feery	2002 – 30 September 2003
- Stephen John Firman	1 October 2002 – 2006
- Phillip Peter Giles	2002 – 2006
- Colin David Harvey	2 April 2003 – 6 October 2003
- Peter Raymond Jackson	13 February 2003 – 2006
- Vivienne Laraine Lavis	1 August 2004 – 2006
- Christopher James Maryon	18 August 2006 – 2006
- Dean Murphy	1 August 2004 – 2006
- Gary Jonathan Nunn	1 August 2004 – 2006
- Jason Alexander Smith	13 February 2003 – 2006
- John Woodhouse	6 October 2003 – 22 June 2004
- John Leonard Youle	1 October 2002 – 10 March 2003

II.633. The directors of Corringway⁷¹⁸ from 2002 to 2006 were:⁷¹⁹

- Julian Andrew Brandon	30 September 2002 – 26 April 2004
- Ian Richard Brown	6 October 2003 – 2006
- Martin Courtenay Clarke	2002 – 6 October 2003
- Terry Day	2002 – 30 September 2002 ⁷²⁰
- Stephen Joseph Feery	2002 – 30 September 2003
- Colin David Harvey	2002 – 6 October 2003
- Anthony Gavin Herron	2002 – 6 October 2003
- William Greaves Underwood	6 October 2003 – 2006
- John Woodhouse	6 October 2003 – 2006

II.634. The directors of Haymills Group from incorporation to 2006 were:⁷²¹

- Julian Andrew Brandon	26 May 2004 – 2006
- Ian Richard Brown	1 August 2004 – 2006

II.635. The following directors have been on the Board of Directors of both Haymills and Corringway during the periods mentioned below.⁷²² The OFT considers that this provides evidence that Corringway exercised decisive influence over Haymills' conduct, at the time of the Infringements preceding 27 July 2004.

⁷¹⁶ Annual Report and Financial Statements year ending 31 March 2008.

⁷¹⁷ Company Appointments, OFT Document Reference 12031.

⁷¹⁸ Previously known as Haymills plc until 28 July 2004.

⁷¹⁹ Company Appointments, OFT Document Reference 12033a.

⁷²⁰ Corringway in its written representations has stated that Terry Day ceased being a director on 20 September 2002, see paragraph 4.3. The OFT notes the difference of date between Corringway and Companies House but prefers the recorded information of Companies House in this instance.

⁷²¹ Company Appointments, OFT Document Reference 12032.

⁷²² Company Appointments, OFT Document Reference 12031 and 12032.

- Terry Day 2000 – 20 September 2002
- Stephen Joseph Feery 2000 – 30 September 2003
- Martin Courtenay Clarke 2002 – 6 October 2003

II.636. The following directors have been on the Board of Directors of both Haymills and Haymills Group during the periods mentioned below.⁷²³ The OFT considers that this provides evidence that Haymills Group exercised decisive influence over Haymills's conduct, at the time of the Infringement following 27 July 2004.

- Julian Andrew Brandon 27 July 2004 – 2006

II.637. Haymills did not apply for leniency, but both it and its ultimate parent companies at the time of the relevant Infringements, Corringway and Haymills Group, were given the opportunity of accepting the OFT's Fast Track Offer.⁷²⁴

II.638. The OFT considers that Corringway, as 100 per cent owner of Haymills, can be presumed to have exercised decisive influence over Haymills' commercial policy from 2000 until 27 July 2004 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Corringway and Haymills. Haymills and Corringway are therefore jointly and severally liable for Haymills's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the fine that the OFT is imposing, in respect of Infringements 103 and 119.

II.639. The OFT considers that Haymills Group, as 100 per cent owner of Haymills, can be presumed to have exercised decisive influence over Haymills's commercial policy from 27 July 2004 until 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Haymills Group and Haymills. Haymills and Haymills Group are therefore jointly and severally liable for Haymills' participation in the Infringement. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringement 232.

II.640. In its response to the Statement, Corringway submitted that it should not be held liable for Haymills' participation in the Infringements between 2000 and 27 July 2004. Corringway submitted for example that:

- (a) The mere fact of a 100 per cent shareholding does not of itself suffice for a finding that a parent company is liable for an infringement committed by its subsidiary; instead the OFT is required '*to demonstrate that the parent company, through its conduct, has responsibility for the infringement*';⁷²⁵
- (b) There is no evidence that Corringway had any involvement or participation in the Infringements⁷²⁶, and moreover Corringway was a mere holding company.⁷²⁷ Similarly the OFT has not provided evidence

⁷²³ Company Appointments, OFT Reference 12031 and 12033a.

⁷²⁴ See paragraphs II.1481 to II.1487 below.

⁷²⁵ Written representations of Corringway, 27 June 2008, paragraph 2.3.

⁷²⁶ Written representations of Corringway, 27 June 2008, paragraph 2.4.

⁷²⁷ Written representations of Corringway, 27 June 2008, paragraph 3.1 *et seq.*

that the directors of Corringway were involved in or aware of the Infringements.⁷²⁸

- (c) The fact that there were common directors on the Boards of Corringway and Haymills is insufficient to establish liability on the part of Corringway, and Corringway's Board minutes in the relevant period provide no indication that the Corringway Board was involved in the day-to-day business of Haymills.⁷²⁹
- (d) Since Corringway is in liquidation it should not be held liable for Haymills' participation in the relevant Infringements, by analogy with Case T-134/94 *NMH Stahlwerke* [1999] ECR II-239.⁷³⁰

II.641. In their separate response to the Statement, Haymills Group and Haymills agreed with the OFT that Corringway and Haymills constituted the same undertaking during the period 2000 to 27 July 2004.⁷³¹ However Haymills Group and Haymills submitted that Haymills and Corringway should not be held jointly and severally liable for the relevant Infringements in the period 2000 to 27 July 2004, but rather that the OFT should impose liability for those Infringements solely on Corringway. Otherwise, in the light of Corringway's liquidation, liability for the Infringements in the period 2000 to 27 July 2004 may fall indirectly on Haymills Group as the subsequent purchaser of Haymills.⁷³²

II.642. The OFT has had regard to all of the submissions put forward by Corringway and by Haymills Group and Haymills in relation to this issue. For the reasons set out in paragraphs III.13 to III.18 below, the OFT considers that a parent company may be held liable for an infringement committed by its subsidiary even though it had no specific involvement in or knowledge of the infringing conduct. The OFT refers specifically in this regard to the quotation set out in paragraph III.18. It follows that Corringway cannot escape liability for the Infringements by reference to its argument that it had no specific involvement in or knowledge of the infringing conduct. It must also follow that the fact that the common directors identified above are not alleged to have had knowledge of or involvement in the infringing conduct is not such as to enable Corringway to escape liability.

II.643. While Corringway has sought to downplay the significance of the common directorships identified by the OFT, the OFT notes that Corringway has not denied the existence of those common directorships. The OFT considers that, in the light of the common directorships identified above and the 100 per cent shareholding held by Corringway in Haymills, the OFT is entitled to rely on the presumption of decisive influence as set out in paragraph III.13 below. Furthermore the OFT considers that the submissions put forward by Corringway are insufficient to rebut that presumption, since they fall short of establishing that Haymills determined its conduct on the market autonomously.

⁷²⁸ Written representations of Corringway, 27 June 2008, paragraph 4.2.

⁷²⁹ Written representations of Corringway, 27 June 2008, paragraph 4.2. Corringway has not however provided the OFT with copies of Corringway's board minutes in the relevant period.

⁷³⁰ Written representations of Corringway, 27 June 2008, paragraph 6.4.

⁷³¹ Written representations of Haymills Group and Haymills, 27 June 2008, paragraph 2.2.

⁷³² Written representations of Haymills Group and Haymills, 27 June 2008, paragraphs 2.6 to 2.8.

- II.644. The OFT does not consider that Corringway should escape liability by analogy with Case T-134/94 *NMH Stahlwerke* [1999] ECR II-239 I. In particular, the CFI imputed liability in that case to the economic successor of the infringing company, in order to ensure that the effectiveness of the competition rules would not be compromised by changes to the legal form of the undertakings concerned. The OFT considers in this case that effectiveness is best served by holding both Corringway and Haymills jointly and severally liable for Haymills' participation in the Infringements during the period of Corringway's ownership.
- II.645. Nor does the OFT consider that Corringway should be held solely responsible for Haymills' participation in the Infringements between 2000 and 27 July 2004. It follows from the case law of the CFI that joint and several liability of a parent and subsidiary, where they are found to constitute the same undertaking for competition law purposes, is permitted in EC law.⁷³³ Were the OFT not to impose joint and several liability on Corringway and Haymills, this would enable Haymills to escape the consequences of its participation in the Infringements in the period 2000 to 27 July 2004.
- II.646. This Decision is therefore addressed to Haymills, Corringway and Haymills Group.

Henry Boot Construction (UK) Limited ('Henry Boot')
Henry Boot plc ('Henry Boot plc')

- II.647. Henry Boot is a private limited company registered in England and Wales, company number 02880202.⁷³⁴ Henry Boot's registered address is Banner Cross Hall, Ecclesall Road, Sheffield, South Yorkshire, S11 9PD.⁷³⁵ Henry Boot's head office is Callywhite Lane, Dronfield, Derbyshire, S18 2XN.⁷³⁶ Henry Boot also trades from 71 Ardwick Green, Ardwick, Manchester, M12 6FX.⁷³⁷
- II.648. At the time of issue of the Statement, Henry Boot undertook construction and refurbishment works in the housing, retail, education, health, leisure, industrial and commercial sectors for both private and public clients.⁷³⁸ At the time of issue of the Statement Henry Boot did not carry out work outside the United Kingdom.
- II.649. Henry Boot's ultimate parent company is Henry Boot plc, a public limited company, company number 00160996.⁷³⁹ Henry Boot plc's registered address is Banner Cross Hall, Sheffield, South Yorkshire, S11 9PD.⁷⁴⁰ Henry Boot is a wholly owned subsidiary of Henry Boot plc.⁷⁴¹

⁷³³ See Case C-97/08P *Akzo Nobel* ECJ Judgment of 10 September 2009; also Case T-69/04 *Schunk*, judgment of the Court of First Instance of 8 October 2008 (not yet reported), at paragraphs 53 et seq (in particular paragraphs 75 and 76).

⁷³⁴ FAME report, OFT Document Reference 12045.

⁷³⁵ FAME report, OFT Document Reference 12045.

⁷³⁶ FAME report, OFT Document Reference 12045 and Henry Boot's website, OFT Document Reference 12052 page 2.

⁷³⁷ FAME report, OFT Document Reference 12045 and Henry Boot's website, OFT Document Reference 12052 page 2.

⁷³⁸ Henry Boot's website, OFT Document Reference 12052.

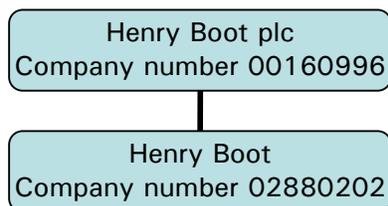
⁷³⁹ FAME report, OFT Document Reference 12046.

⁷⁴⁰ FAME report, OFT Document Reference 12046.

⁷⁴¹ FAME report, OFT Document Reference 12046.

II.650. Henry Boot has two subsidiaries.⁷⁴²

II.651. The relevant company structure is outlined below:



II.652. Henry Boot plc has 43 other subsidiaries.⁷⁴³

II.653. Henry Boot plc's consolidated turnover for the financial year ending 31 December 2008 was [...] [C].⁷⁴⁴

II.654. The directors of Henry Boot from 2000 to 2006 were as follows:⁷⁴⁵

- Roger Balme	2000 – 20 December 2002
- Edward James Boot	2000 – 2006
- John Patrick Burbidge	2000 – 19 December 2000
- Timothy Lawrence	2000 – 29 December 2006
- Michael Douglas Mosley	1 August 2001 – 2006
- John Savage	2000 – 30 November 2006

II.655. The directors of Henry Boot plc from 2000 to 2006 were as follows:⁷⁴⁶

- David Henry Boot	2000 – 24 March 2006
- Edward James Boot	2000 – 2006
- Anthony Paul Cooper	2000 – 30 September 2006
- Douglas Greaves	2000 – 2006
- John Albert Bryan Redgrave	2000 – 19 May 2006
- John Spencer Reis	2000 – 2006
- John Trevor Sutcliffe	1 October 2006 – 2006

II.656. The following director has been on the Board of Directors of both Henry Boot and Henry Boot plc during the period mentioned below.⁷⁴⁷ The OFT considers that this provides evidence that Henry Boot plc exercised decisive influence over Henry Boot's conduct at the time of the Infringements.

- Edward James Boot	2000 – 2006
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II.657. Henry Boot applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁷⁴⁸

⁷⁴² FAME report, OFT Document Reference 12045.

⁷⁴³ Latest available FAME report of Henry Boot plc.

⁷⁴⁴ Letter from DLA Piper, 15 July 2009.

⁷⁴⁵ Company Appointments Report, OFT Document Reference 12047.

⁷⁴⁶ Company Appointments Report, OFT Document Reference 12048.

⁷⁴⁷ Company Appointments Reports, OFT Document Reference 12047 and 12048.

⁷⁴⁸ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

- II.658. The OFT considers that Henry Boot plc, as 100 per cent owner of Henry Boot, can be presumed to have exercised decisive influence over Henry Boot's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Henry Boot plc and Henry Boot. Henry Boot and Henry Boot plc are therefore jointly and severally liable for Henry Boot's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 47, 149 and 175.⁷⁴⁹
- II.659. In their response to the Statement, Henry Boot plc and Henry Boot submitted that Henry Boot plc should not be held liable for Henry Boot's participation in the Infringements. Henry Boot plc and Henry Boot submitted that:
- (a) Henry Boot plc did not determine Henry Boot's commercial strategy. Henry Boot plc approved contracts to be entered into by Henry Boot only where they had a value above a certain level (tens of millions) and all of the relevant Infringements involved contracts below that threshold.⁷⁵⁰ Henry Boot plc also approved Henry Boot's business plan;⁷⁵¹ and
 - (b) The holder of the common directorships identified above, Edward Boot, had no involvement in the day-to-day running of Henry Boot.⁷⁵²
- II.660. The OFT considers that in the light of Henry Boot plc's 100 per cent shareholding in Henry Boot and the common directorships held by Mr Boot, the OFT is entitled to rely on the presumption of decisive influence in accordance with the principles set out in paragraph III.13 below. It therefore falls to Henry Boot plc and Henry Boot to adduce sufficient evidence to rebut that presumption.
- II.661. In this regard, the OFT considers that the fact that Henry Boot plc approved contracts to be entered into by Henry Boot which had a value above a certain level (tens of millions), and approved Henry Boot's business plan, demonstrates that Henry Boot plc retained the power of final decision with regard to Henry Boot's conduct on the market.⁷⁵³ Furthermore the OFT considers that, in accordance with the principle set out in paragraph III.18 below, the contention that Henry Boot plc was not involved in decision-making on the contracts which are subject of the relevant Infringements does not enable Henry Boot plc to escape liability. Finally, the OFT notes that all the members of Henry Boot plc's Board attended the Board meetings of Henry Boot in order to '*advise on strategy but they [did] not dictate on strategy*'.⁷⁵⁴
- II.662. In the circumstances the OFT considers that the contentions put forward by Henry Boot plc and Henry Boot are not sufficient to rebut the presumption of decisive influence and establish that Henry Boot determined its conduct on the market autonomously.

⁷⁴⁹ The penalty in respect of Infringements 149 and 175 is reduced to zero as this is a 'But for' Infringement.

⁷⁵⁰ Written representations of Henry Boot and Henry Boot plc, 27 June 2008, paragraphs 2.6 and 2.7.

⁷⁵¹ Oral representations of Henry Boot and Henry Boot plc, 21 July 2008, pages 5 and 7.

⁷⁵² Written representations of Henry Boot and Henry Boot plc, 27 June 2008, paragraph 2.6.

⁷⁵³ See for example Case T-112/05 *Akzo Nobel* [2007] ECR II-5049 at paragraphs 74 and 82, upheld by the ECJ on 10 September 2009, Case C-97/08P.

⁷⁵⁴ Oral representations of Henry Boot and Henry Boot plc, 21 July 2008, pages 5 and 6 (as amended on 14 September 2009)

II.663. This Decision is therefore addressed to Henry Boot and Henry Boot plc.

Herbert Baggaley Construction Limited ('Herbert Baggaley')
Baggaley Group Limited ('Baggaley Group')

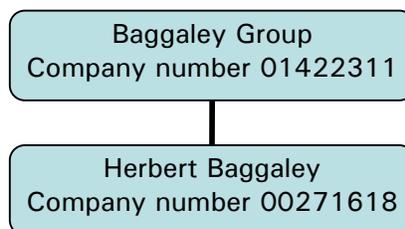
II.664. Herbert Baggaley is a private limited company registered in England and Wales, company number 00271618.⁷⁵⁵ Herbert Baggaley's registered primary and trading address is 1 Melton Way, Mansfield, Nottinghamshire, NG18 5FU.⁷⁵⁶

II.665. At the time of issue of the Statement, Herbert Baggaley undertook construction, maintenance and joinery works throughout the Midlands and South Yorkshire. The construction and maintenance divisions focused on works for private and public clients in the education, health, retail, commercial and industrial sectors.⁷⁵⁷ At the time of issue of the Statement, Herbert Baggaley did not carry out work outside the United Kingdom.

II.666. Herbert Baggaley's ultimate parent company is Baggaley Group, a private limited company, company number 01422311.⁷⁵⁸ Baggaley Group's registered address is 1 Melton Way, Mansfield, Nottinghamshire, NG18 5FU.⁷⁵⁹ Herbert Baggaley is a wholly owned subsidiary of Baggaley Group.⁷⁶⁰

II.667. Herbert Baggaley has no subsidiaries.⁷⁶¹

II.668. The relevant company structure is outlined below:



II.669. Baggaley Group has 1 other subsidiary.⁷⁶²

II.670. Baggaley Group's worldwide consolidated turnover for the financial year ending 30 June 2009 was [...] [C].⁷⁶³

II.671. The directors of Herbert Baggaley from 2000 to 2006 were as follows:⁷⁶⁴

- Herbert Howard Baggaley 2000 – 2006
- Richard Ian Baggaley 2000 – 2006
- Patrick James Cassidy 2000 – 30 March 2001

⁷⁵⁵ FAME report, OFT Document Reference 11600.

⁷⁵⁶ FAME report, OFT Document Reference 11600.

⁷⁵⁷ Herbert Baggaley's website, OFT Document Reference 11606, pages 1 and 3.

⁷⁵⁸ FAME report, OFT Document Reference 11601.

⁷⁵⁹ FAME report, OFT Document Reference 11601.

⁷⁶⁰ FAME report, OFT Document Reference 11601.

⁷⁶¹ FAME report, OFT Document Reference 11600.

⁷⁶² FAME report, OFT Document Reference 11601.

⁷⁶³ Letter from Actons Solicitors, 30 July 2009.

⁷⁶⁴ Company Appointments Report, OFT Document Reference 11602.

- Christopher John Collison 1 October 2001 – 2 December 2005
- Barrington Dalby 1 July 2006 – 2006
- Sharon Valerie Gibbs 7 August 2000 – 2006
- Peter Vernon Jubb 2000 – 31 January 2003
- Desmond Neil Moore 1 July 2004 – 31 December 2006
- Michael Anthony Strobin 2000 – 31 July 2000

II.672. The directors of Baggaley Group from 2000 to 2006 were as follows:⁷⁶⁵

- Arthur James Colin Baggaley 2000 – 6 June 2005
- Beverley Jo Baggaley 2 June 2000 - 2006
- Herbert Howard Baggaley 2000 – 2006
- Richard Ian Baggaley 5 January 2006 – 2006
- Antony Vincent Dearden 1 July 2001 - 2006
- Michael John Feazey 2000 – 24 August 2001

II.673. The following directors have been on the Board of Directors of both Herbert Baggaley and Baggaley Group during the periods mentioned below.⁷⁶⁶ The OFT considers that this provides evidence that Baggaley Group exercised decisive influence over Herbert Baggaley's conduct at the time of the Infringements.

- Herbert Howard Baggaley 2000 – 2006
- Richard Ian Baggaley 5 January 2006 – 2006

II.674. Herbert Baggaley applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁷⁶⁷

II.675. The OFT considers that Baggaley Group, as 100 per cent owner of Herbert Baggaley, can be presumed to have exercised decisive influence over Herbert Baggaley's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Baggaley Group and Herbert Baggaley. Herbert Baggaley and Baggaley Group are therefore jointly and severally liable for Herbert Baggaley's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 146, 158 and 168.

II.676. This Decision is therefore addressed to Herbert Baggaley and Baggaley Group.

Hill Bros. (Nottingham) Limited ('Hill')

II.677. Hill is a private limited company registered in England and Wales, company number 00421464.⁷⁶⁸ Hill's registered and trading address is 34 Marlborough Road, Woodthorpe, Nottingham, Nottinghamshire, NG5 4GB.⁷⁶⁹

⁷⁶⁵ Company Appointments Report, OFT Document Reference 11603.

⁷⁶⁶ Company Appointments Reports, OFT Document Reference 11602 and 11603.

⁷⁶⁷ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

⁷⁶⁸ FAME report, OFT Document Reference 12053.

⁷⁶⁹ FAME report, OFT Document Reference 12053.

- II.678. At the time of issue of the Statement, Hill undertook alterations, extensions, improvements, refurbishment and repair works in the construction industry, for clients in the public and private sector.⁷⁷⁰ At the time of issue of the Statement, Hill did not carry out work outside the United Kingdom.
- II.679. Hill has no holding company or subsidiaries.⁷⁷¹
- II.680. Hill's turnover for the financial year ending 30 November 2008 was [...] [C].⁷⁷²
- II.681. The directors of Hill from 2000 to 2006 were as follows:⁷⁷³
- | | |
|----------------------------|--------------------|
| - Antony Steven Hallam | 2000 – 2006 |
| - Nicholas Parish Matthews | 2000 – 2006 |
| - Eric Geoffrey Wilkinson | 2000 – 27 May 2005 |
| - Janice Marian Wilkinson | 2000 – 27 May 2005 |
- II.682. Hill did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁷⁷⁴
- II.683. This Decision is addressed to Hill. The OFT considers that Hill is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Hobson and Porter Limited ('Hobson & Porter')

- II.684. Hobson & Porter is a private limited company registered in England and Wales, company number 01448193.⁷⁷⁵ Hobson & Porter's registered and primary trading address is Clifford House, Malmo Road, Sutton Fields Industrial Estate, Hull, Yorkshire, HU7 0YF.⁷⁷⁶
- II.685. At the time of issue of the Statement, Hobson & Porter was a major regional building contractor based in Hull and operated within the Yorkshire and North Lincolnshire area for clients such as local authorities, housing associations, education providers and leading companies involved in the commercial and industrial sectors.⁷⁷⁷ At the time of issue of the Statement Hobson & Porter did not carry out work outside the United Kingdom.
- II.686. Hobson & Porter has no holding company and no subsidiaries.⁷⁷⁸
- II.687. Hobson & Porter's turnover for the financial years ending 30 September 2008 was [...] [C].⁷⁷⁹

⁷⁷⁰ Market Definition response, OFT Document Reference 6576.

⁷⁷¹ FAME report, OFT Document Reference 12053.

⁷⁷² Email from Andersons Solicitors, 5 August 2009.

⁷⁷³ Company Appointments Report, OFT Document Reference 12054.

⁷⁷⁴ See paragraphs II.1481 to II.1487 below.

⁷⁷⁵ FAME report, OFT Document Reference 12075.

⁷⁷⁶ FAME report, OFT Document Reference 12075.

⁷⁷⁷ Hobson & Porter's website, OFT Document Reference 12078 and market definition response, OFT Document Reference A1642 and A1648.

⁷⁷⁸ FAME report, OFT Document Reference 12075.

⁷⁷⁹ Email from Watson Burton LLP, 30 April 2009.

II.688. The directors of Hobson & Porter from 2000 to 2006 were as follows:⁷⁸⁰

- David Malcolm Blades	26 June 2001 – 2006
- Jacqueline Louise Blades	26 June 2001 – 2006
- Ian Gibbins	26 June 2001 – 2006
- Sean Henderson	6 June 2001 – 17 October 2003
- Gillian Hobson	2000 – 2006
- Peter Leslie Hobson	2000 – 2006
- Russell John Horner	26 June 2001 – 2006
- Julie Annette Smee	26 June 2001 – 2006
- David Watson	2000 – 2006

II.689. Hobson & Porter applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁷⁸¹

II.690. This Decision is addressed to Hobson & Porter. The OFT considers that Hobson & Porter is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, in respect of Infringements 230, 236 and 238, on account of the participation in the Infringements of that undertaking.

Holroyd Construction Limited ('Holroyd')
Holderness Investments Limited ('Holderness')
Holroyd Construction Group Limited ('Holroyd Group')

II.691. Holroyd is a private limited company registered in England and Wales, company number 00899440.⁷⁸² Holroyd's registered address is Benson House, 33 Wellington Street, Leeds, LS1 4JP.⁷⁸³

II.692. At the time of issue of the Statement, Holroyd undertook building and refurbishment works in the Yorkshire and Humber region for public and private clients across a range of market sectors including industrial, commercial, design and build, retail, leisure and education.⁷⁸⁴ At the time of issue of the Statement, Holroyd did not carry out work outside the United Kingdom.

II.693. From 2000 until 29 March 2005 Holroyd's ultimate parent company was Holderness⁷⁸⁵ a private limited company, company number 00750963.⁷⁸⁶ Holderness's registered and primary trading address is Parkhill, Walton Road, Wetherby, West Yorkshire, LS22 5DZ.⁷⁸⁷ Holderness also has a trading address at Sandbeck Way, Wetherby, West Yorkshire, LS22 7.⁷⁸⁸ Holroyd was a wholly owned subsidiary of Holderness.

⁷⁸⁰ Company Appointments Report, OFT Document Reference 12076.

⁷⁸¹ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

⁷⁸² FAME report, OFT Document Reference 12072.

⁷⁸³ Latest available FAME report of Holroyd.

⁷⁸⁴ Holroyd's website, OFT Document Reference 12066.

⁷⁸⁵ Group Financial Statement, OFT Document Reference 12059 and Consolidated financial statements, OFT Document Reference 12064, page 24.

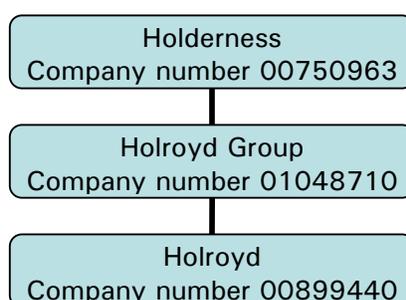
⁷⁸⁶ FAME report, OFT Document Reference 12057.

⁷⁸⁷ Latest available FAME report of Holroyd Group.

⁷⁸⁸ Latest available FAME report of Holroyd Group.

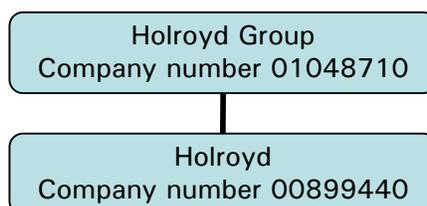
- II.694. Also during the period from 2000 until 29 March 2005, Holroyd's immediate parent company was Holroyd Group⁷⁸⁹, a private limited company, company number 01048710.⁷⁹⁰ Holroyd Group's registered address is Benson House, 33 Wellington Street, Leeds, LS1 4JP.⁷⁹¹ Holroyd Group's trading address is listed as Parkhill, Walton Road, Wetherby, West Yorkshire, LS22 5DZ.⁷⁹²
- II.695. Since 30 March 2005, Holroyd's ultimate parent company has been Holroyd Group.⁷⁹³ Holroyd is a wholly owned subsidiary of Holroyd Group.⁷⁹⁴
- II.696. On 20 June 2008 joint administrators were appointed for Holroyd and Holroyd Group.⁷⁹⁵
- II.697. The relevant group structure is set out below:

2000 – 29 March 2005



- II.698. Holroyd had one wholly owned subsidiary during this period.⁷⁹⁶

30 March 2005 – 2006



- II.699. Holroyd has one wholly owned subsidiary.⁷⁹⁷
- II.700. Holroyd Group has one other wholly owned subsidiary.⁷⁹⁸
- II.701. Holroyd's consolidated turnover for the financial year ending 30 June 2007 was £15,541,822.⁷⁹⁹

⁷⁸⁹ Group Financial Statement, OFT Document Reference 12059 and Consolidated financial statements, OFT Document Reference 12064, page 24.

⁷⁹⁰ FAME report, OFT Document Reference 12073.

⁷⁹¹ Latest available FAME report of Holroyd Group.

⁷⁹² Latest available FAME report of Holroyd Group.

⁷⁹³ Consolidated financial statements, OFT Document Reference 12064, page 24.

⁷⁹⁴ FAME report, OFT Document Reference 12073.

⁷⁹⁵ Notice of administrator's appointment, form 2.12B.

⁷⁹⁶ Group Financial Statement, OFT Document Reference 12059 and consolidated financial statements, OFT Document Reference 12064.

⁷⁹⁷ FAME report, OFT Document Reference 12072.

⁷⁹⁸ Latest available FAME report of Holroyd Group.

II.702. Holderness's turnover for the financial year ending 30 June 2007 was £4,573,453.⁸⁰⁰

II.703. Holroyd Group's consolidated turnover for the financial year ending 30 June 2007 was £15,541,822.⁸⁰¹

II.704. The directors of Holroyd from 2000 to 2006 were as follows:⁸⁰²

- Hans-Werner Hermann	2000 – 2006
Andrew Allott	
- Mark Bowling	18 April 2006 – 2006
- Christopher Malcolm	28 October 2002 – 12 April 2006
Deighton	
- Charles Edward Holroyd	2000 – 2006
- Richard David Light	2000 – 14 October 2005
- David Michael Parker	1 October 2001 – 22 February 2003
- Damian Edward Rawson	2000 – 31 January 2006

II.705. The directors of Holderness from 2000 to 2006 were as follows:⁸⁰³

- Charles Edward Holroyd	2000 – 2006
- Amy Elisabeth Holroyd	18 November 2000 – 2006
- Joan Audrey Haithwaithe	2000 – 18 November 2000
- Elizabeth Holbrook	2000 – 18 November 2000

II.706. The directors of Holroyd Group from 2000 to 2006 were as follows:⁸⁰⁴

- Christopher Malcolm	23 December 2003 – 12 April 2006
Deighton	
- Charles Edward Holroyd	2000 – 2006
- Neil Philip Gillott	2000 – 28 April 2001
- Donald Simpson	2000 – 2006

II.707. The following directors have been on the Board of Directors of both Holroyd and Holderness during the period mentioned below.⁸⁰⁵ The OFT considers that this provides evidence that Holderness exercised decisive influence over Holroyd's conduct at the time of the relevant Infringements.

- Charles Edward Holroyd	2000 – 2006
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II.708. The following directors have been on the Board of Directors of both Holroyd and Holroyd Group during the periods mentioned below.⁸⁰⁶ The OFT considers that this provides evidence that Holroyd exercised decisive influence over Holroyd's conduct at the time of the relevant Infringement.

⁷⁹⁹ Directors report and consolidated financial statements.

⁸⁰⁰ Report and financial statements.

⁸⁰¹ Directors report and consolidated financial statements.

⁸⁰² Company Appointments Report, OFT Document Reference 12070.

⁸⁰³ Company Appointments Report, OFT Document Reference 12067.

⁸⁰⁴ Company Appointment Report, OFT Document Reference 12068.

⁸⁰⁵ Company Appointments Reports, OFT Document Reference 12070 and 12067.

⁸⁰⁶ Company Appointments Reports, OFT Document Reference 12070 and 12068.

- Christopher Malcolm Deighton 23 December 2003 – 12 April 2006
- Charles Edward Holroyd 2000 – 2006

II.709. The following directors have been on the Board of Directors of both Holroyd Group and Holderness during the periods mentioned below.⁸⁰⁷ The OFT considers that this provides evidence that Holderness exercised decisive influence over Holroyd Group's conduct at the time of the relevant Infringements.

- Charles Edward Holroyd 2000 – 2006

II.710. Holroyd did not apply for leniency, but both it and its ultimate parent companies at the time of the relevant Infringements, Holderness and Holroyd Group, were given the opportunity of accepting the OFT's Fast Track Offer.⁸⁰⁸

II.711. The OFT considers that Holderness, as 100 per cent owner of Holroyd, can be presumed to have exercised decisive influence over Holroyd's commercial policy from 2000 until 29 March 2005 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Holderness and Holroyd. Holroyd and Holderness are therefore jointly and severally liable for Holroyd's participation in the relevant Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 31 and 125.

II.712. The OFT considers that Holroyd Group, as 100 per cent owner of Holroyd, can be presumed to have exercised decisive influence over Holroyd's commercial policy from 30 March 2005 until 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Holroyd Group and Holroyd. Holroyd Group and Holroyd are therefore jointly and severally liable for Holroyd's participation in the relevant Infringement. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringement 231.

II.713. This Decision is therefore addressed to Holroyd, Holroyd Group and Holderness.

Interclass Public Limited Company ('Interclass')
Interclass Holdings Limited ('Interclass Holdings')

II.714. Interclass is a public limited company registered in England and Wales, company number 02317072.⁸⁰⁹ Interclass's registered and primary trading address is Heathmill Road, Wombourne, Wolverhampton, West Midlands, WV5 8AP.⁸¹⁰

II.715. At the time of issue of the Statement, Interclass undertook construction projects throughout central England in sectors such as education, industrial,

⁸⁰⁷ Company Appointment Reports, OFT Document Reference 12068 and 12067.

⁸⁰⁸ See paragraphs II.1481 to II.1487 below.

⁸⁰⁹ FAME report, OFT Document Reference 12079.

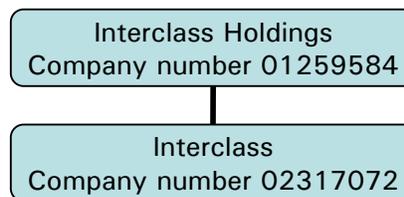
⁸¹⁰ FAME report, OFT Document Reference 12079.

health, housing, public buildings and retail.⁸¹¹ At the time of issue of the Statement, Interclass did not carry out work outside the United Kingdom.

II.716. Interclass's ultimate parent company is Interclass Holdings⁸¹², a private limited company, company number 01259584.⁸¹³ Interclass Holdings' registered address is Interclass plc, HeathMill Road, Wombourne, Wolverhampton, West Midlands, WV5 8AP.⁸¹⁴ Interclass is a wholly owned subsidiary of Interclass Holdings.⁸¹⁵

II.717. Interclass has no subsidiaries.⁸¹⁶

II.718. The relevant company structure for 2000 to 2006 is outlined below:



II.719. Interclass Holdings has another two wholly owned subsidiaries.⁸¹⁷

II.720. Interclass Holdings' consolidated turnover for the financial year ending 31 October 2008 was [...] [C].⁸¹⁸

II.721. The directors of Interclass from 2000 to 2006 were as follows:⁸¹⁹

- Adrian Colin Green 1 June 2000 – 25 May 2001
- Peter Robert Hood 1 June 2000 – 31 January 2004
- David Paul Jones 2000 – 2006
- Donald Peter Ward 2000 – 2006
- Christopher Melville Watkins 2000 – 2006

II.722. The director of Interclass Holdings during the period 2000 to 2006 was as follows:⁸²⁰

- Christopher Melville Watkins 2000 – 2006

II.723. The following director has been on the Board of Directors of both Interclass and Interclass Holdings during the period mentioned below.⁸²¹ The OFT considers that this provides evidence that Interclass Holdings exercised decisive influence over Interclass's conduct at the time of the Infringements.

- Christopher Melville Watkins 2000 – 2006

⁸¹¹ Interclass's website, OFT Document Reference 12086.

⁸¹² FAME report, OFT Document Reference 12079.

⁸¹³ FAME report, OFT Document Reference 12080.

⁸¹⁴ FAME report, OFT Document Reference 12080.

⁸¹⁵ FAME report, OFT Document Reference 12080.

⁸¹⁶ FAME report, OFT Document Reference 12079.

⁸¹⁷ FAME report, OFT Document Reference 12080.

⁸¹⁸ Email from Watson Burton, 27 July 2009.

⁸¹⁹ Company Appointments, OFT Document Reference 12085.

⁸²⁰ Company Appointments, OFT Document Reference 12084.

⁸²¹ Company Appointments, OFT Document Reference 12085 and 12084.

- II.724. Interclass did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Interclass Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.⁸²²
- II.725. The OFT considers that Interclass Holdings, as 100 per cent owner of Interclass, can be presumed to have exercised decisive influence over Interclass's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Interclass Holdings and Interclass. Interclass and Interclass Holdings are therefore jointly and severally liable for Interclass's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.726. This Decision is therefore addressed to Interclass and Interclass Holdings.

Interserve Project Services Limited ('Interserve')
Interserve plc ('Interserve plc')

- II.727. Interserve is a private limited company registered in England and Wales, company number 00303359.⁸²³ Interserve's registered and primary trading address is 395 George Road, Erdington, Birmingham, West Midlands, B23 7RZ.⁸²⁴ Interserve has other trading addresses in Cleveland, Devon, Hampshire, Kent, Lancashire, Middlesex, Nottinghamshire, West Lothian and West Yorkshire.⁸²⁵
- II.728. At the time of issue of the Statement, Interserve provided civil engineering, building construction and associated management/facilities management services.⁸²⁶ It operated across a variety of sectors including education, health, prisons, water, power, waste, transport infrastructure and commercial.⁸²⁷ At the time of issue of the Statement, Interserve did not carry out work outside the United Kingdom.
- II.729. Prior to 31 August 2001, Interserve was called Tilbury Douglas Construction Limited.⁸²⁸ Prior to 7 March 2001, Interserve plc was called Tilbury Douglas plc.⁸²⁹
- II.730. Interserve's ultimate parent company is Interserve plc, a quoted public limited company, company number 00088456.⁸³⁰ Interserve plc's registered and primary trading address is Interserve House, Ruscombe Park, Twyford, Reading, Berkshire, RG10 9JU.⁸³¹ Interserve plc also has a listed trading address at Building 40, Brompton Barracks, Gillingham, Kent, ME7 1UP.⁸³²

⁸²² See paragraphs II.1481 to II.1487 below.

⁸²³ FAME report, OFT Document Reference 14371.

⁸²⁴ FAME report, OFT Document Reference 14371.

⁸²⁵ Latest available FAME report of Interserve.

⁸²⁶ Market Definition response, OFT Document Reference 6914.

⁸²⁷ Market Definition response, OFT Document Reference 6914.

⁸²⁸ FAME report, OFT Document Reference 14371.

⁸²⁹ Latest available FAME report of Interserve plc.

⁸³⁰ FAME report, OFT Document Reference 14372.

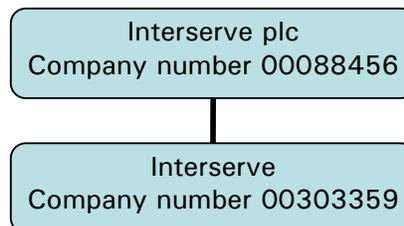
⁸³¹ Latest available FAME report of Interserve plc.

⁸³² Latest available FAME report of Interserve plc.

II.731. At the time of the Infringements, Interserve was a wholly owned subsidiary of Interserve plc.⁸³³

II.732. Interserve has three subsidiaries.⁸³⁴

II.733. The relevant company group structure from 2000 to 2006 is outlined below:



II.734. Interserve plc has a further 117 subsidiaries.⁸³⁵

II.735. Interserve plc's worldwide consolidated turnover for the financial year ending 31 December 2008 was [...] [C].⁸³⁶

II.736. The directors of Interserve from 2000 to 2006 were as follows:⁸³⁷

- Julian Cedric Clive Atkins	2000 – 2006
- Martin Ballard	1 January 2006 – 2006
- John Stockdale Spence Brown	2000 – 1 April 2005
- Andrew George Franks	1 July 2005 – 2006
- Roger David Lowe	2000 – 31 December 2005
- John Matthews	1 August 2001 – 31 March 2002
- David John Paterson	2000 – 2006
- Ian Renhard	1 January 2006 – 2006
- Keith Ridgway	2000 – 2006
- Cyril John Robinson	2000 – 2006
- Franklin Thornley	1 April 2002 – 31 December 2005
- John Henry Vyse	2000 – 2006

II.737. The directors of Interserve plc from 2000 to 2006 were as follows:⁸³⁸

- George Patrick Balfour	1 January 2003 – 2006
- Lord Norman Roy Blackwell	1 September 2005 – 2006
- Michael Colin Bottjer	2000 – 31 December 2005
- Leslie Gray Cullen	1 October 2005 – 2006
- Clive Jeremy Groom	16 January 2001 – 31 December 2003
- Stewart Boyd Hagerty	1 January 2002 – 20 July 2006
- Allan Richardson Hannah	2000 – 10 June 2004
- Timothy Charles Jones	11 March 2003 – 2006
- Nicholas Francis Keegan	11 July 2003 – 2006

⁸³³ FAME report, OFT Document Reference 14371.

⁸³⁴ FAME report, OFT Document Reference 14371.

⁸³⁵ FAME report, OFT Document Reference 14372.

⁸³⁶ Letter from Eversheds LLP, 29 April 2009.

⁸³⁷ Company Appointments Report, OFT Document Reference 12091.

⁸³⁸ Company Appointments Report, OFT Document Reference 12092.

- David Chaloner Keys	2000 – 14 May 2003
- Malcolm Stuart Lee	2000 – 30 September 2003
- John Mario Faskally Padovan	2000 – 30 September 2005
- Adrian Michael Ringrose	1 January 2002 – 2006
- William Scofield Rogers	2000 – 31 December 2002
- David Arnold Trapnell	11 July 2003 – 2006
- John Henry Vyse	1 January 2002 – 2006
- Graham John Wentzell	2000 – 9 May 2002

- II.738. Interserve's ultimate parent undertaking and ultimate controlling party from 2000 until 2006 was Interserve plc.⁸³⁹ The OFT considers that this provides evidence that Interserve plc exercised decisive influence over Interserve's conduct.
- II.739. Interserve plc did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁸⁴⁰
- II.740. Interserve did not apply for leniency.
- II.741. The OFT considers that Interserve plc, as 100 per cent owner of Interserve, can be presumed to have exercised decisive influence over Interserve's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in that Interserve plc was the ultimate controlling party of Interserve during the relevant period. Interserve and Interserve plc are therefore jointly and severally liable for Interserve's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.742. In response to the Statement, Interserve and Interserve plc submitted that Interserve plc should not be held liable for Interserve's participation in the relevant Infringements. In particular, Interserve and Interserve plc submitted that:
- (a) there is no evidence that the Board of Interserve or of Interserve plc was involved in the relevant Infringements,⁸⁴¹
 - (b) there is no evidence that Interserve plc had any influence in relation to the relevant Infringements, and there were no reporting lines in place which would have brought the relevant Infringements to Interserve plc's attention,⁸⁴² and
 - (c) the relevant Infringements involved operational matters which were managed and controlled within the Project Services division of Interserve.⁸⁴³
- II.743. The OFT has had regard to all the contentions put forward by Interserve and Interserve plc in relation to this issue. The OFT considers that, in the light of Interserve plc's 100 per cent shareholding in Interserve, it is entitled to rely on

⁸³⁹ Financial Statements, OFT Document Reference 12093a and 12090.

⁸⁴⁰ See paragraphs II.1481 to II.1487 below.

⁸⁴¹ Written representations of Interserve and Interserve plc, 25 June 2008, paragraph 1.3.

⁸⁴² Written representations of Interserve and Interserve plc, 25 June 2008, paragraph 3.2.

⁸⁴³ Written representations of Interserve and Interserve plc, 25 June 2008, paragraph 3.3.

the presumption of decisive influence in accordance with the principles set out in paragraph III.13 to III.18 below.

- II.744. The OFT considers that, in accordance with the principle set out in paragraph III.18 below, Interserve plc cannot escape liability by reference to its argument that it had no knowledge of or involvement in the relevant Infringements.
- II.745. In the circumstances the OFT considers that the contentions put forward by Interserve and Interserve plc are not sufficient to rebut the presumption of decisive influence or to establish that Interserve determined its conduct on the market autonomously.
- II.746. This Decision is therefore addressed to Interserve and Interserve plc.

Irwins Limited ('Irwins')
Jack Lunn (Construction) Limited ('Jack Lunn')
Jack Lunn (Holdings) Limited ('Jack Lunn Holdings')

- II.747. Irwins is a private limited company registered in England and Wales, company number 03145905.⁸⁴⁴ Irwins' registered and primary trading address is Woodbottom Mills, Low Hall Road, Horsforth, West Yorkshire, LS18 4EW.⁸⁴⁵
- II.748. Jack Lunn is a private limited company registered in England and Wales, company number 01440874.⁸⁴⁶ Jack Lunn's registered and primary trading address is Progress House, 99 Bradford Road, Pudsey, Leeds, West Yorkshire, LS28 6AT.⁸⁴⁷
- II.749. At the time of issue of the Statement, Irwins was '*... engaged in the alteration to, and construction of, buildings of all types. It operates throughout the North of England and to a much smaller extent in the Thames Valley*'.⁸⁴⁸ At the time of issue of the Statement, Irwins did not carry out work outside the United Kingdom.
- II.750. At the time of issue of the Statement, Jack Lunn's principal activity was '*... that of building contractors*'⁸⁴⁹ and it did not carry out work outside the United Kingdom.
- II.751. Irwins' ultimate parent company was Jack Lunn Holdings, a private limited company, company number 01473324.⁸⁵⁰ Irwins was '*controlled by the shareholders of Jack Lunn Holdings*'.⁸⁵¹ Jack Lunn Holdings' registered address is Progress House, 99 Bradford Road, Stanningley, Pudsey, LS28 6AT.⁸⁵² Jack Lunn Holdings had a 51 per cent share holding in Irwins.⁸⁵³ Jack Lunn's ultimate parent company is also Jack Lunn Holdings.⁸⁵⁴

⁸⁴⁴ FAME report, OFT Document Reference 12112.

⁸⁴⁵ FAME report, OFT Document Reference 12112.

⁸⁴⁶ FAME report, OFT Document Reference 12111.

⁸⁴⁷ FAME report, OFT Document Reference 12111.

⁸⁴⁸ Abbreviated Financial Statements, OFT Document Reference 12128.

⁸⁴⁹ Abbreviated Financial Statements, OFT Document Reference 12121.

⁸⁵⁰ FAME Report, OFT Document Reference 12112.

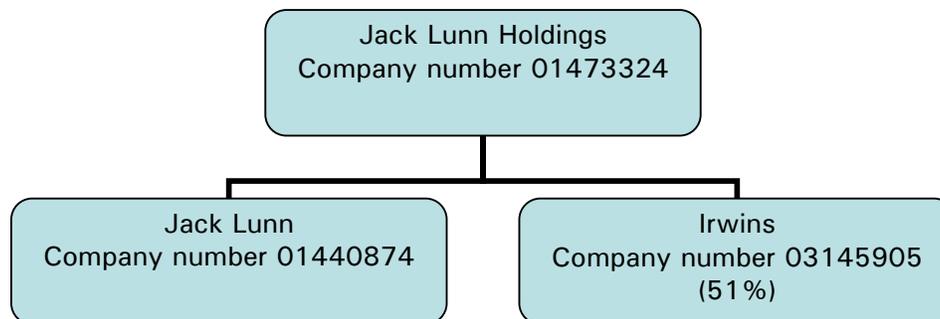
⁸⁵¹ Abbreviated Financial Statements, OFT Document Reference 12128 page 22.

⁸⁵² FAME report, OFT Document Reference 12114.

⁸⁵³ Group Structure Chart, OFT Document Reference A0679.

⁸⁵⁴ FAME report, OFT Document Reference 12111.

- II.752. Irwins and Jack Lunn do not have any subsidiaries.⁸⁵⁵
- II.753. The OFT has carefully considered Irwins' position within the Jack Lunn Holdings group structure. The other 49 per cent share holding in Irwins was held by various individuals, thereby giving Jack Lunn Holdings the controlling share. In addition, Irwins states that *'the company was controlled by the shareholders of Jack Lunn (Holdings) Limited'*.⁸⁵⁶
- II.754. The overall structure of Irwins and Jack Lunn was therefore as follows during the relevant period:



- II.755. Jack Lunn Holdings also has another six subsidiaries.⁸⁵⁷
- II.756. Irwins' turnover for the financial year ending 30 September 2007 was £27,408,055.⁸⁵⁸
- II.757. Jack Lunn Holdings' turnover for the financial year ending 30 September 2008 was £17,340,180.⁸⁵⁹
- II.758. The directors of Irwins from 2000 to 2006 were as follows:⁸⁶⁰

- Graeme Banks	2000 – 31 January 2006
- Ronald Farrar	2000 – 2006
- David Hutchinson	2000 – 2006
- Derek Lunn	2000 – 16 January 2006
- Graham Lunn	2000 – 2006
- Roy Lunn	2000 – 2006
- Paul Eon Moorhouse	2000 – 2006
- Ivan Peter Nelson	2000 – 2006
- Anthony William John Worcester	2000 – 2006
- Paul Richard Worcester	2000 – 2006

- II.759. The directors of Jack Lunn from 2000 to 2006 were as follows:⁸⁶¹
- | | |
|-----------------------|----------------------|
| - Dennis Stanley Bott | 2000 – 31 March 2003 |
|-----------------------|----------------------|

⁸⁵⁵ FAME Report, OFT Document Reference 12112 and 12111.

⁸⁵⁶ Abbreviated Financial Statements, OFT Document Reference 12128, page 22.

⁸⁵⁷ Latest available FAME report of Jack Lunn Holdings.

⁸⁵⁸ Email from Watson Burton LLP, 28 April 2009.

⁸⁵⁹ Email from Watson Burton LLP, 29 April 2009.

⁸⁶⁰ Company Appointments, OFT Document Reference 12116.

⁸⁶¹ Company Appointments, OFT Document Reference 12117.

- Stephen Bradbury	1 March 2004 – 2006
- Richard Andrew Bryan	31 March 2003 – 2006
- Alan Grey	29 July 2002 – 17 November 2004
- John James Hall	2000 – 28 February 2003
- Andrew Lunn	2000 – 2006
- Derek Lunn	2000 – 16 January 2006
- Graham Lunn	2000 – 2006
- Hilda Lunn	2000 – 2006
- Roy Lunn	2000 – 30 September 2002
- Dean Mark Smith	12 May 2003 – 5 September 2003
- Brian Ward May	14 February 2005 – 30 September 2005

II.760. The directors of Jack Lunn Holdings from 2000 to 2006 were as follows:⁸⁶²

- Ronald Farrar	2000 – 2006
- Alan Grey	29 July 2002 – 17 November 2004
- Andrew Lunn	17 January 2006 – 2006
- Derek Lunn	2000 – 16 January 2006
- Graham Lunn	2000 – 2006
- Hilda Lunn	2000 – 2006
- Roy Lunn	2000 – 2006
- Brian Ward May	14 February 2005 – 30 September 2005

II.761. The following directors have been on the Board of Directors of both Irwins and Jack Lunn Holdings during the periods mentioned below.⁸⁶³ The OFT considers that this provides evidence that Jack Lunn Holdings exercised decisive influence over Irwins' conduct at the time of the Infringements.

- Ronald Farrar	2000 – 2006
- Derek Lunn	2000 – 16 January 2006
- Graham Lunn	2000 – 2006
- Roy Lunn	2000 – 2006

II.762. The following directors have been on the Board of Directors of both Jack Lunn and Jack Lunn Holdings during the periods mentioned below.⁸⁶⁴ The OFT considers that this provides evidence that Jack Lunn Holdings exercised decisive influence over Jack Lunn's conduct at the time of the Infringements.

- Alan Grey	29 July 2002 – 17 November 2004
- Andrew Lunn	17 January 2006 – 2006
- Derek Lunn	2000 – 16 January 2006
- Graham Lunn	2000 – 2006
- Hilda Lunn	2000 – 2006
- Roy Lunn	2000 – 30 September 2002
- Brian Ward May	14 February 2005 – 30 September 2005

II.763. Irwins applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁸⁶⁵

⁸⁶² Company Appointments, OFT Document Reference 12115.

⁸⁶³ Company Appointments, OFT Document Reference 12115 and 12116.

⁸⁶⁴ Company Appointments, OFT Document References 12117 and 12115.

⁸⁶⁵ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

- II.764. Jack Lunn applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁸⁶⁶
- II.765. The OFT considers that Jack Lunn Holdings, as 100 per cent owner of Jack Lunn, can be presumed to have exercised decisive influence over Jack Lunn's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Jack Lunn Holdings and Jack Lunn. Jack Lunn and Jack Lunn Holdings are therefore jointly and severally liable for Jack Lunn's participation in the Infringements, which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringement 205 and 241.
- II.766. The OFT also considers that Jack Lunn Holdings, as the controlling party, and majority shareholder of Irwins, can be presumed to have exercised decisive influence over Irwins' commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Jack Lunn Holdings and Irwins. Irwins and Jack Lunn Holdings are therefore jointly and severally liable for Irwins' participation in the Infringement, which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringements 231.
- II.767. Since the Infringements described in this Decision, Irwins has been subject to a change in ownership.⁸⁶⁷ As the new parent company did not form part of the same economic entity as Irwins at the relevant times, it is not jointly and severally liable with Jack Lunn Holdings and Irwins for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Irwins.
- II.768. This Decision is therefore addressed to Jack Lunn Holdings, Jack Lunn and Irwins.

J. Harper & Sons (Leominster) Limited ('J Harper')
Harper Group plc ('Harper plc')

- II.769. J Harper is a private limited company registered in England and Wales, company number 00782078. J Harper's registered address is Beeches Road, Rowley Regis, Warley, West Midlands, B65 0BB.⁸⁶⁸ J Harper also has trading addresses at 101 Beeches Road, Rowley Regis, Warley, West Midlands, B65 0BD and Southern Avenue, Leominster, Herefordshire, HR6 0QF.⁸⁶⁹
- II.770. At the time of issue of the Statement, J Harper undertook new build and repair, maintenance and improvements work, including commercial and industrial construction, private and public sector housing work.⁸⁷⁰

⁸⁶⁶ See Part 3 of OFT Guidance 423

http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf.

⁸⁶⁷ Written representations of Irwins and Jack Lunn, 27 June 2008, paragraph 10.

⁸⁶⁸ FAME report, OFT Document Reference 14369.

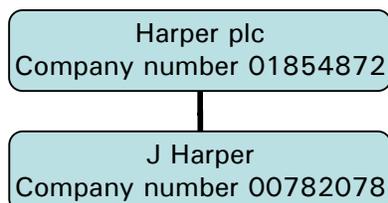
⁸⁶⁹ Harper's website, OFT Document Reference 12026, page 8.

⁸⁷⁰ Market Definition response, OFT Document Reference 6443, page 2.

II.771. J Harper's ultimate parent company is Harper plc, an unquoted public limited company, company number 01854872.⁸⁷¹ Harper plc's registered address is Beeches Road, Rowley Regis, Warley, West Midlands, B65 0BB.⁸⁷² J Harper is a wholly owned subsidiary of Harper plc.⁸⁷³

II.772. J Harper has no subsidiaries.⁸⁷⁴

II.773. The relevant company group structure is outlined below:



II.774. Harper plc has eight other subsidiaries.⁸⁷⁵

II.775. Harper plc's consolidated turnover for the financial year ending 31 December 2008 was [...] [C].⁸⁷⁶

II.776. The directors of J Harper from 2000 to 2006 were as follows:⁸⁷⁷

- Raymond Leslie Amos	2000 – 31 December 2000
- Joseph Stuart Harper	2000 – 28 June 2001
- Michael Harvey	2000 – 2006
- Mark William Lennox	2000 – 31 March 2004
- Peter Nigel Mondon	20 May 2000 – 2006
- Anthony Paul Rees	1 January 2004 – 2006
- Walter Paul Rees	2000 – 31 May 2000
- Peter John Underhill	2000 – 2006
- Richard Anthony Withers	2000 – 5 April 2002

II.777. The directors of Harper plc from 2000 to 2006 were as follows:⁸⁷⁸

- Raymond Leslie Amos	2000 – 31 December 2000
- Joseph Stuart Harper	2000 – 28 June 2001
- Mark William Lennox	2000 – 31 March 2004
- Peter Nigel Mondon	2000 – 2006
- Walter Paul Rees	2000 – 31 December 2000
- Peter John Underhill	2000 – 2006

II.778. The following directors have been on the Board of Directors of both J Harper and Harper plc during the periods mentioned below.⁸⁷⁹ The OFT considers that

⁸⁷¹ FAME report, OFT Document Reference 14370.

⁸⁷² FAME report, OFT Document Reference 14370.

⁸⁷³ FAME report, OFT Document Reference 14368.

⁸⁷⁴ FAME report, OFT Document Reference 14369.

⁸⁷⁵ Latest available FAME report.

⁸⁷⁶ Email from Salans LLP, 29 June 2009.

⁸⁷⁷ Company Appointments Report, OFT Document Reference 12022.

⁸⁷⁸ Company Appointments Report, OFT Document Reference 12021.

⁸⁷⁹ Company Appointments Reports, OFT Document Reference 12022 and 12021.

this provides evidence that Harper plc exercised decisive influence over J Harper's conduct at the time of the Infringements.

- Raymond Leslie Amos	2000 – 31 December 2000
- Joseph Stuart Harper	2000 – 28 June 2001
- Mark William Lennox	2000 – 31 March 2004
- Peter Nigel Mondon	20 May 2000 – 2006
- Walter Paul Rees	2000 – 31 May 2000
- Peter John Underhill	2000 – 2006

- II.779. J Harper did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Harper plc, were given the opportunity of accepting the OFT's Fast Track Offer.⁸⁸⁰
- II.780. The OFT considers that Harper plc, as 100 per cent owner of J Harper, can be presumed to have exercised decisive influence over the commercial policy of J Harper during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Harper plc and J Harper. J Harper and Harper plc are therefore jointly and severally liable for the participation of J Harper in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.781. This Decision is therefore addressed to J Harper and Harper plc.

JH Hallam (Contracts) Limited ('J H Hallam')
JH Hallam (R & J) Limited ('Hallam')

- II.782. J H Hallam is a private limited company registered in England and Wales, company number 02219570.⁸⁸¹ J H Hallam's registered and primary trading address is Brooks House, 81 Leicester Road, Oadby, Leicester, Leicestershire, LE2 4AN.⁸⁸²
- II.783. At the time of issue of the Statement, J H Hallam undertook the construction of private housing, student accommodation, schools, other educational establishments and places of worship. It also carried out new build and refurbishment in the healthcare, industrial and commercial sectors.⁸⁸³ At the time of issue of the Statement, J H Hallam did not carry out work outside the United Kingdom.
- II.784. J H Hallam's ultimate parent company is Hallam, a private limited company, company number 02916995.⁸⁸⁴ Hallam's registered address is Brooks House, 81 Leicester Road, Oadby, Leicester, Leicestershire, LE2 4AN.⁸⁸⁵ J H Hallam is a wholly owned subsidiary of Hallam.⁸⁸⁶

⁸⁸⁰ See paragraphs II.1481 to II.1487 below.

⁸⁸¹ FAME report, OFT Document Reference 12094.

⁸⁸² FAME report, OFT Document Reference 12094.

⁸⁸³ Market Definition response, OFT Document Reference 5699.

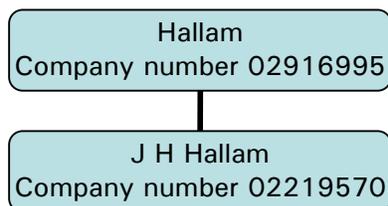
⁸⁸⁴ FAME report, OFT Document Reference 12095.

⁸⁸⁵ FAME report, OFT Document Reference 12095.

⁸⁸⁶ Abbreviated Accounts, OFT Document Reference 13080.

II.785. J H Hallam has one wholly owned subsidiary.⁸⁸⁷

II.786. The relevant company structure is outlined below:



II.787. Hallam has one other subsidiary.⁸⁸⁸

II.788. J H Hallam's turnover for the financial year ending 31 March 2009 was [...] [C].⁸⁸⁹

II.789. Hallam is a holding company for J H Hallam and has no turnover of its own.⁸⁹⁰

II.790. The directors of J H Hallam from 2001 to 2006 were as follows:⁸⁹¹

- Richard Marlow Blount 2001 – 2006
- Christopher John Hallam 2001 – 2006
- John Clifford Hallam 2001 – 2006
- Richard Marvin Hallam 2001 – 2006
- Robert Sheldon Hefford 2001 – 2006

II.791. The directors of Hallam from 2001 to 2006 were as follows:⁸⁹²

- John Clifford Hallam 2001 – 2006
- Richard Marvin Hallam 2001 – 2006

II.792. The following directors have been on the Board of Directors of both J H Hallam and Hallam during the periods mentioned below.⁸⁹³ The OFT considers that this provides evidence that Hallam exercised decisive influence over J H Hallam's conduct.

- John Clifford Hallam 2001 – 2006
- Richard Marvin Hallam 2001 – 2006

II.793. J H Hallam applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁸⁹⁴

II.794. The OFT considers that Hallam, as 100 per cent owner of J H Hallam, can be presumed to have exercised decisive influence over J H Hallam's commercial policy during the relevant period and therefore forms part of the same economic

⁸⁸⁷ FAME report, OFT Document Reference 12094.

⁸⁸⁸ Latest available FAME report.

⁸⁸⁹ Email from Watson Burton LLP, 16 July 2009.

⁸⁹⁰ Email from Watson Burton LLP, 29 April 2009.

⁸⁹¹ Company Appointments Report, OFT Document Reference 12096.

⁸⁹² Company Appointments Report, OFT Document Reference 12097.

⁸⁹³ Company Appointments Reports, OFT Document Reference 12096 and 12097.

⁸⁹⁴ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf

entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Hallam and J H Hallam. J H Hallam and Hallam are therefore jointly and severally liable for J H Hallam's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 95, 96 and 183.

II.795. This Decision is therefore addressed to J H Hallam and Hallam.

J. J. & A. R. Jackson Limited ('J J & A R Jackson')

II.796. J J & A R Jackson is a private limited company registered in England and Wales, company number 00805204.⁸⁹⁵ J J & A R Jackson's registered and trading address is Bone Mill Lane, Worksop, Nottinghamshire, S81 7BA.⁸⁹⁶

II.797. At the time of issue of the Statement, J J & A R Jackson was a building contractor which undertook work in the areas of new social housing, repair and maintenance of social housing and public buildings, bar-fitting and shop-fitting, and housing development.⁸⁹⁷ At the time of issue of the Statement, J J & A R Jackson did not carry out work outside the United Kingdom.

II.798. J J & A R Jackson has no holding company and no subsidiaries.⁸⁹⁸

II.799. J J & A R Jackson's turnover for the financial year ending 30 November 2008 was [...] [C].⁸⁹⁹

II.800. The director of J J & A R Jackson from 2000 to 2006 was as follows:⁹⁰⁰

- Cameron Stewart Gray 2000 – 2006

II.801. J J & A R Jackson did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁹⁰¹

II.802. This Decision is addressed to J J & A R Jackson. The OFT considers that J J & A R Jackson is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

J. J. McGinley Limited ('J J McGinley')
McGinley Holdings Limited ('McGinley Holdings')

II.803. J J McGinley is a private limited company registered in England and Wales, company number 00716654.⁹⁰² J J McGinley's registered and primary trading address is Lancaster House, Centurion Way, Leyland, Lancashire, PR26 6TX.⁹⁰³

⁸⁹⁵ FAME report, OFT Document Reference 12105.

⁸⁹⁶ FAME report, OFT Document Reference 12105.

⁸⁹⁷ Market Definition response, OFT Document Reference 6551.

⁸⁹⁸ FAME report, OFT Document Reference 12105.

⁸⁹⁹ Letter from J J & A R Jackson, 20 July 2009.

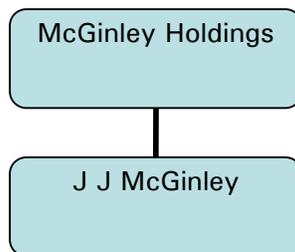
⁹⁰⁰ Company Appointments Report, OFT Document Reference 12110.

⁹⁰¹ See paragraphs II.1481 to II.1487 below.

⁹⁰² FAME report, OFT Document Reference 11828.

⁹⁰³ FAME report, OFT Document Reference 11828.

- II.804. At the time of issue of the Statement, J J McGinley's main business activities were new build social housing and school extensions, planned maintenance and cyclical maintenance programmes for social housing and schools, and response maintenance for social housing.⁹⁰⁴ At the time of issue of the Statement J J McGinley did not carry out work outside the United Kingdom.
- II.805. From 2000 until 22 September 2004 J J McGinley's ultimate parent company was McGinley Holdings.⁹⁰⁵
- II.806. McGinley Holdings is a private limited company registered in England and Wales, company number 01764969.⁹⁰⁶ McGinley Holdings' registered and primary trading address is Highstone House, 165 High Street, Barnet, Hertfordshire, EN5 5SU.⁹⁰⁷
- II.807. McGinley Holdings' main business activities are general construction of buildings and civil engineering works.⁹⁰⁸
- II.808. From 22 September 2004 until 24 March 2005⁹⁰⁹ J J McGinley did not have an ultimate parent company or controlling party.⁹¹⁰
- II.809. J J McGinley has no subsidiaries.⁹¹¹
- II.810. The overall company structure from 2000 to 22 September 2004 is outlined below:



- II.811. At the time of issue of the Statement, McGinley Holdings had 6 other subsidiaries.⁹¹²
- II.812. J J McGinley's turnover for the financial year ending 31 December 2008 was £25,408,877.⁹¹³
- II.813. McGinley Holdings' turnover for the financial year ending 31 December 2008 was [...] [C].⁹¹⁴

⁹⁰⁴ Market Definition response, OFT Document Reference 12823, page 2.

⁹⁰⁵ Directors' Report and Financial Statements, OFT Document Reference 11838 and 363s Annual Return, OFT Document Reference 11845.

⁹⁰⁶ FAME report, OFT Document Reference 11830.

⁹⁰⁷ FAME report, OFT Document Reference 11830.

⁹⁰⁸ FAME report, OFT Document Reference 11830.

⁹⁰⁹ 363s Annual Return, OFT Document Reference 11846.

⁹¹⁰ Abbreviated Accounts, OFT Document Reference 11842.

⁹¹¹ FAME report, OFT Document Reference 11828.

⁹¹² FAME report, OFT Document Reference 11830.

⁹¹³ Letter from DLA Piper, 6 May 2009.

⁹¹⁴ Letter from Evans Mockler, 13 July 2009.

II.814. The directors of J J McGinley from 2000 to 2006 were as follows:⁹¹⁵

- Stuart Rigby Ambrose	2000 – 24 March 2005
- Stephen John Day	24 March 2005 – 18 April 2006
- John Vincent Gavan	24 March 2005 – 30 September 2006
- Robert Benjamin Irvine	15 July 2005 – 2006
- Martin John Joyce	20 April 2005 – 2006
- Neil Robert Ernest Kirkby	24 March 2005 – 2006
- Owen Gerard McLaughlin	30 September 2006 – 2006
- Dermot Francis McGinley	2000 – 24 March 2005
- John Joseph McGinley	2000 – 24 March 2005
- Seamus Patrick McGinley	2000 – 24 March 2005
- Jack McGrory	24 March 2005 – 6 April 2006
- Margaret Rose Sullivan	2000 – 24 March 2005

II.815. The directors of McGinley Holdings from 2000 to 2006 were as follows:⁹¹⁶

- Dermot Francis McGinley	2000 – 2006
- John Joseph McGinley	2000 – 2006
- Seamus Patrick McGinley	2000 – 2006

II.816. The following directors were on the Board of Directors of both J J McGinley and McGinley Holdings during the periods mentioned below.⁹¹⁷ The OFT considers that this provides evidence that McGinley Holdings exercised decisive influence over J J McGinley's conduct at the time of the Infringements.

- Dermot Francis McGinley	2000 – 24 March 2005
- John Joseph McGinley	2000 – 24 March 2005
- Seamus Patrick McGinley	2000 – 24 March 2005

II.817. J J McGinley did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, McGinley Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.⁹¹⁸

II.818. The OFT considers that McGinley Holdings, as 100 per cent owner of J J McGinley, can be presumed to have exercised decisive influence over J J McGinley's commercial policy from 2000 until 22 September 2004 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between McGinley Holdings and J J McGinley. McGinley Holdings and J J McGinley are therefore jointly and severally liable for J J McGinley's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.819. Since the events described in this Decision, J J McGinley has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as J J McGinley at the relevant times, it is not jointly and

⁹¹⁵ Company Appointments, OFT Document Reference 11832. The OFT notes that J J McGinley has advised that Stephen John Day ceased to be a director on 16 April 2006. This is not the date recorded by Companies House and the OFT prefers information provided by Companies House in this case. In any event, this is not material to the OFT's findings of infringement.

⁹¹⁶ Company Appointments, OFT Document Reference 11833.

⁹¹⁷ Company Appointments, OFT Document References 11832 and 11833.

⁹¹⁸ See paragraphs II.1481 to II.1487 below.

severally liable with J J McGinley and McGinley Holdings for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of J J McGinley.

II.820. In its response to the Statement, McGinley Holdings submitted that it should not be held liable for J J McGinley's participation in the relevant Infringements. In support of its submission, McGinley Holdings put forward the following contentions:

- (a) It is not alleged that the directors of J J McGinley were involved in the relevant Infringements;⁹¹⁹
- (b) McGinley Holdings was a holding company only, and J J McGinley ran its business autonomously;⁹²⁰ and
- (c) The holders of the common directorships identified above did not in practice exercise management control over J J McGinley.⁹²¹

II.821. The OFT has had regard to all the contentions put forward by McGinley Holdings in relation to this issue. The OFT considers that, in the light of the common directorships identified above and the 100 per cent shareholding held by McGinley Holdings in J J McGinley, the OFT is entitled to rely on the presumption of decisive influence in accordance with the principles set out in paragraph III.13 below.

II.822. The OFT considers that, in accordance with the principle set out in paragraph III.18 below, McGinley Holdings cannot escape liability by reference to its argument that the directors of J J McGinley had no knowledge of or involvement in the relevant Infringements.

II.823. In the circumstances the OFT considers that the contentions put forward by McGinley Holdings are not sufficient to rebut the presumption of decisive influence or to establish that J J McGinley determined its conduct on the market autonomously.

II.824. This Decision is therefore addressed to McGinley Holdings and J J McGinley.

John Cawley Limited now trading as John Cawley Developments Limited ('John Cawley')

II.825. John Cawley is a private limited company registered in England and Wales, company number 00317314.⁹²² John Cawley's registered and primary trading address is 2 Nuthall Road, Bobbers Mill, Nottingham, Nottinghamshire, NG8 5AZ.⁹²³ On 3 January 2009 John Cawley changed its name to John Cawley Developments Limited.

II.826. At the time of issue of the Statement, John Cawley was a specialist joinery and building contractor working with private, retail and commercial sector clients.

⁹¹⁹ Written representations of McGinley Holdings, 27 June 2008, paragraph 11.

⁹²⁰ Written representations of McGinley Holdings, 27 June 2008, paragraph 15.

⁹²¹ Written representations of McGinley Holdings, 27 June 2008, paragraph 15.

⁹²² FAME report, OFT Document Reference 12143.

⁹²³ FAME report, OFT Document Reference 12143.

Typical projects included specialist joinery and furniture, total refurbishments and fit-outs, maintenance contracts, local authority and education work.⁹²⁴ At the time of issue of the Statement, John Cawley did not carry out work outside the United Kingdom.

- II.827. John Cawley has no holding company and no subsidiaries.⁹²⁵
- II.828. John Cawley's turnover for the financial year ending 31 December 2008 was [...] [C].⁹²⁶
- II.829. The directors of John Cawley from 2000 to 2006 were as follows:⁹²⁷
- | | |
|---------------------------|-------------|
| - David John Edwin Greene | 2000 – 2006 |
| - Nicholas John Greene | 2000 – 2006 |
| - Richard Charles Greene | 2000 – 2006 |
- II.830. John Cawley applied for, and has been granted, leniency in accordance with the OFT's leniency programme.⁹²⁸
- II.831. This Decision is addressed to John Cawley. The OFT considers that John Cawley is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

John Sisk & Son Limited ('John Sisk')
Sicon Limited ('Sicon')

- II.832. John Sisk is a private limited company registered in England and Wales, company number 01973332.⁹²⁹ John Sisk's registered and primary trading address is 1 Curo Park, Frogmore, St. Albans, Herts, AL2 2DD.⁹³⁰ John Sisk also trades from premises in Birmingham, Bristol, Farnborough and Manchester.⁹³¹
- II.833. At the time of issue of the Statement, John Sisk was a national building contractor with customers throughout England and Wales. John Sisk offered expertise in sectors such as hotel and leisure, industrial, commercial, retail, residential apartments and rail support infrastructure.⁹³² At the time of issue of the Statement, John Sisk did not carry out work outside the United Kingdom.
- II.834. John Sisk is wholly owned by Sisk Consolidated Investments Limited ('Sisk Consolidated'), a private limited company, company number 02437455.⁹³³ Sisk Consolidated's registered address is 1 Curo Park, Frogmore, St. Albans,

⁹²⁴ Market definition response, OFT Document Reference 5163.

⁹²⁵ FAME report, OFT Document Reference 12143.

⁹²⁶ Email from John Cawley, 6 August 2009.

⁹²⁷ Company Appointments Report, OFT Document Reference 12144.

⁹²⁸ See Part 3 of OFT Guidance 423

⁹²⁹ http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf.

⁹²⁹ FAME report, OFT Document Reference 12148.

⁹³⁰ FAME report, OFT Document Reference 12148.

⁹³¹ FAME report. OFT Document Reference 12148.

⁹³² John Sisk's website, OFT Document Reference 12164.

⁹³³ FAME report, OFT Document Reference 12151.

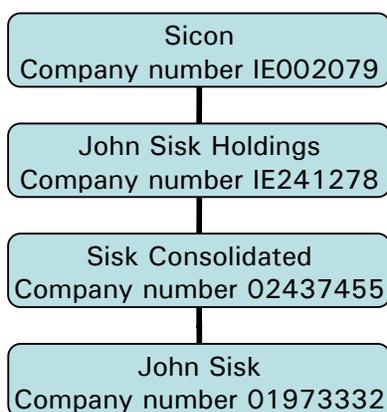
Herts.⁹³⁴ Sisk Consolidated is wholly owned by John Sisk & Son (Holdings) Limited.⁹³⁵

II.835. John Sisk & Son (Holdings) Limited ('John Sisk Holdings') is a private limited company registered in Ireland, company number IE241278.⁹³⁶ John Sisk Holding's registered address is Wilton Works Naas Road, Clondalkin, Dublin 22, County Dublin.⁹³⁷ John Sisk Holdings is a 100 per cent owned subsidiary of Sicon Limited.⁹³⁸

II.836. Sicon Limited ('Sicon'), is a private limited company, registered in Ireland, company number IE002079.⁹³⁹ Sicon's registered address is Wilton Works, Naas Road, Clondalkin, Dublin 22, County Dublin.⁹⁴⁰ John Sisk's ultimate parent company is Sicon.⁹⁴¹

II.837. John Sisk has two wholly owned subsidiaries.⁹⁴²

II.838. The overall company structure is outlined below:



II.839. Sicon's worldwide consolidated turnover for the financial year ending 31 December 2008 was [...] [C].⁹⁴³

II.840. The directors of John Sisk from 2002 to 2006 were as follows:⁹⁴⁴

- Liam Bernard Halton	2002 – 2006
- Paul Hickey	2002 – 2006
- Clive Anthony Marsh	1 January 2004 – 30 August 2006
- Bernard Joseph O'Connell	20 March 2002 – 2006
- Pierce Michael O'Shea	2002 – 2006

⁹³⁴ FAME report, OFT Document Reference 12151.

⁹³⁵ FAME report, OFT Document Reference 12151.

⁹³⁶ FAME report, OFT Document Reference 12150.

⁹³⁷ FAME report, OFT Document Reference 12150.

⁹³⁸ Market Definition response, OFT Document Reference 7425, page 2: 'Capwell Investments Limited owns the remaining 0.1 per cent shareholding in John Sisk Holdings. Sicon owns 99.6 per cent of Capwell Investments Limited. Elvington Limited owns the remaining 0.4 per cent shareholding. Sicon owns 99.9% of Elvington Limited and the remaining 0.4 per cent shareholding is held by Capwell Investments'.

⁹³⁹ FAME report, OFT Document Reference 12149.

⁹⁴⁰ FAME report, OFT Document Reference 12149.

⁹⁴¹ FAME report, OFT Document Reference 12148.

⁹⁴² Latest available FAME report of John Sisk.

⁹⁴³ Letter from Mayer Brown International LLP, 5 June 2009. All turnover converted from Euros using average ECB exchange rate for 2008 - <http://www.ecb.int/stats/exchange/eurofxref/html/index.en.html>.

⁹⁴⁴ Company Appointments Report, OFT Document Reference 12152.

- George Herbert Sisk 2002 – 20 March 2002
- Paul Wilson 2002 – 2006

II.841. The directors of Sicon from 2002 to 2006 were as follows:⁹⁴⁵

- William Lyster 2002 – 2006
- Liam Nagle 9 March 2005 – 2006
- Bernard O’Connell 3 November 2004 – 2006
- Desmond Ormsby 1 May 2002 – 2006
- Gerard Penny 4 May 2005 – 2006
- Sylvester W Riorden 1 May 2002 – 31 December 2006
- George Herbert Sisk 2002– 2006
- Henry Benjamin Sisk 2002 – 2006
- John Olan Sisk 2002 – 2006
- James Philip Sykes 3 November 2004 – 2006

II.842. John Sisk did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringement, Sicon, were given the opportunity of accepting the OFT’s Fast Track Offer.⁹⁴⁶

II.843. The OFT considers that Sicon, as 100 per cent indirect owner of John Sisk can be presumed to have exercised decisive influence over John Sisk’s commercial policy during the relevant period and therefore forms part of the same economic entity. John Sisk and Sicon are therefore jointly and severally liable for John Sisk’s participation in the Infringement which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing.

II.844. In response to the OFT’s Statement of Objections, John Sisk and Sicon (together ‘Sisk’) appeared to accept that they together constituted a single undertaking.⁹⁴⁷ Nonetheless Sisk also represented that Sicon is a non-trading company which has no influence over or involvement in the day-to-day operations of John Sisk.⁹⁴⁸

II.845. The OFT considers that, in the light of Sicon’s 100 per cent indirect ownership of John Sisk, the OFT is entitled to rely on the presumption of decisive influence in accordance with the principles set out in paragraph III.13 below. The OFT considers that Sisk’s contentions fall short of rebutting that presumption or establishing that John Sisk determined its conduct on the market independently of Sicon. The OFT therefore considers that Sicon and John Sisk form a single undertaking for present purposes.

II.846. Sisk also submitted in its response that it was John Sisk’s Northern Division (‘Sisk Northern’) which participated in the relevant Infringement, and that Sisk Northern was an autonomous undertaking at the time of the Infringement. In support of this submission, Sisk put forward the following contentions:

⁹⁴⁵ Director’s Report and Financial Statement, OFT Document Reference 7426 pages 53, 95 and 99; OFT Document Reference 12164b.

⁹⁴⁶ See paragraphs II.1481 to II.1487 below.

⁹⁴⁷ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 28 (and see also paragraph 1).

⁹⁴⁸ Written representations of John Sisk and Sicon, 27 June 2008, paragraphs 98 and 122; oral representations of John Sisk and Sicon, 15 July 2008, page 9.

- (a) Sisk Northern managed its own business, with its own regional board of directors and its own staff. It produced its own budget and business plan and had responsibility for its own profitability. It also had its own separate profit and loss account and cash management system.⁹⁴⁹
- (b) Sisk Northern marketed its services separately, took its own decisions on which tenders to pursue, and priced its tenders and built its own projects separately.⁹⁵⁰
- (c) Neither the board of John Sisk nor the board of Sicon were involved in Sisk Northern's day-to-day operations or decisions on tenders.⁹⁵¹

II.847. The OFT considers that Sisk's contentions are not sufficient to establish that Sisk Northern was an autonomous undertaking. In this regard, the OFT notes the following:

- (a) Certain functions were carried out centrally by John Sisk on behalf of Sisk Northern (and John Sisk's other divisions), including compliance and quality assurance;⁹⁵²
- (b) Sisk Northern reported to the John Sisk board on its activities;⁹⁵³
- (c) Certain tendering decisions were taken centrally by John Sisk.⁹⁵⁴ The OFT considers that this illustrates that John Sisk retained the power of final decision with regard to Sisk Northern's conduct on the market.⁹⁵⁵ The OFT notes that the relevant Infringement related to a tender which did not fall to be addressed centrally by John Sisk.⁹⁵⁶ However the OFT considers that, in the light of the principle set out in paragraph III.16 below, it does not assist Sisk to contend that John Sisk was not aware of the relevant Infringement, nor indeed that John Sisk and Sicon were not involved in the day-to-day operations of Sisk Northern; and
- (d) There is no indication that there were any restrictions on John Sisk's ability, as the legal owner of its business, to interfere in or alter the structure or running of Sisk Northern's operations if it so chose.

II.848. The OFT therefore considers that Sisk Northern formed part of the same single undertaking as Sicon and John Sisk for present purposes.

II.849. The OFT notes that, even if Sisk Northern did constitute a separate undertaking from John Sisk (which is not accepted), its participation in the relevant Infringement would fall to be attributed to the legal person responsible for the operation of Sisk Northern at the relevant time.⁹⁵⁷ In light of the fact that Sisk

⁹⁴⁹ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 94.

⁹⁵⁰ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 94; Oral representations of John Sisk and Sicon, 15 July 2008, page 11.

⁹⁵¹ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 95.

⁹⁵² Oral representations of John Sisk and Sicon, 15 July 2008, page 11.

⁹⁵³ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 95.

⁹⁵⁴ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 94.

⁹⁵⁵ See for example Case T-112/05 *Nobel* [2007] ECR II-5049 at paragraphs 74 and 82, upheld by the ECJ on 10 September 2009, Case C-97/08P.

⁹⁵⁶ Written representations of John Sisk and Sicon Ltd, 27 June 2008, paragraph 94.

⁹⁵⁷ See the judgment of the CFI in Case T-327/94 *SCA Holding* [1998] ECR II-1373 at paragraphs 63 to 65, upheld by the ECJ on appeal in Case C-297/98P *SCA Holding* [2000] ECR I-10101 at paragraphs 25 to 27.

Northern was a division of John Sisk, the OFT considers that John Sisk was the legal person responsible for the operation of Sisk Northern at the relevant time.

II.850. This Decision is therefore addressed to John Sisk and Sicon.

K. J. Bryan (Builders) Limited ('K J Bryan')

II.851. K J Bryan is a private limited company registered in England and Wales, company number 01731592.⁹⁵⁸ K J Bryan's registered and primary trading address is Unit 5, John Davies Workshops, Main Street, Huthwaithe, Sutton in Ashfield, Nottinghamshire, NG17 2LQ.⁹⁵⁹

II.852. At the time of issue of the Statement, K J Bryan undertook construction, maintenance and improvement works in sectors such as education, public sector housing and commercial buildings.⁹⁶⁰ At the time of issue of the Statement, K J Bryan did not carry out work outside the United Kingdom.

II.853. K J Bryan has no holding company and no subsidiaries.⁹⁶¹

II.854. K J Bryan's turnover for the financial year ending 31 July 2008 was [...] [C].⁹⁶²

II.855. The directors of K J Bryan from 2000 to 2006 were as follows:⁹⁶³

- Joan Marie Bryan	2000 – 2006
- John David Bryan	2000 – 2006
- Keith John Bryan	2000 – 2006
- Michael Matthew Mason	2000 – 31 March 2001
- Marie Suzzanne Webster	2000 – 2006

II.856. K J Bryan did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁹⁶⁴

II.857. This Decision is addressed to K J Bryan. The OFT considers that K J Bryan is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Kier Regional Limited ('Kier')

Kier Group plc ('Kier Group')

II.858. Kier is a private limited company registered in England and Wales, company number 02099533.⁹⁶⁵ Kier's registered and primary trading address is Tempsford Hall, Sandy, Bedfordshire, SG19 2BD.⁹⁶⁶ At the time of issue of the

⁹⁵⁸ FAME report, OFT Document Reference 12165.

⁹⁵⁹ FAME report, OFT Document Reference 12165.

⁹⁶⁰ Market definition response, OFT Document Reference 6694.

⁹⁶¹ FAME report, OFT Document Reference 12165.

⁹⁶² Email from Elliot Mather LLP, 2 July 2009.

⁹⁶³ Company Appointments Report, OFT Document Reference 12166.

⁹⁶⁴ See paragraphs II.1481 to II.1487 below.

⁹⁶⁵ FAME report, OFT Document Reference 12181.

⁹⁶⁶ FAME report, OFT Document Reference 12181.

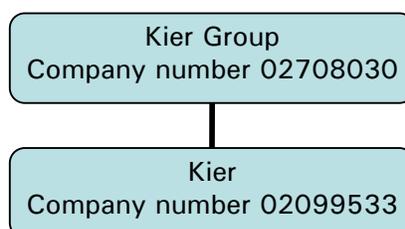
Statement, Kier also traded through 29 offices based across the United Kingdom.⁹⁶⁷

II.859. At the time of issue of the Statement, Kier provided construction services to both public and private sector clients and undertook both new build and refurbishment projects. Kier undertook works in sectors such as commercial, industrial, residential, hotels, leisure, education, health, transport, utilities, retail, and defence.⁹⁶⁸ At the time of issue of the Statement, Kier did not carry out work outside the United Kingdom.

II.860. Kier's ultimate parent company is Kier Group, a public limited company, company number 02708030.⁹⁶⁹ Kier Group's registered address is Tempsford Hall, Sandy, Bedfordshire, SG19 2BD.⁹⁷⁰

II.861. Kier has 22 subsidiaries.⁹⁷¹

II.862. The relevant structure from 2000 to 2006 is outlined below:



II.863. Kier Group's consolidated turnover for the financial year ending 30 June 2008 was £2,332,400,000.⁹⁷²

II.864. The directors of Kier from 2001 to 2006 were as follows:⁹⁷³

- Stewart Martin Atkinson	2001 – 11 July 2002
- Colin Busby	2001 – 30 June 2004
- Richard Herbert Bush	1 July 2005 – 2006
- Paul Peter James Cullen	2001 – 2006
- Michael John Desmond	2001 – 3 November 2006
- John Dodds	22 September 2003 – 2006
- James Stewart French	2001 – 4 July 2003
- Ian Michael Lawson	1 February 2003 – 11 November 2005
- Andrew Dale Mullins	12 May 2003 – 2006
- Roy Williams Murphy	1 October 2004 – 2006
- Andrew William Saul	1 July 2006 – 2006
- Martin Peter Weston Scarth	2001 – 7 May 2003
- Michael Paul Sheffield	1 January 2004 – 2006
- Richard William Side	2001 – 2006
- Stewart Arthur Tilley	30 November 2001 – 2006
- Richard John Charles Turner	2001 – 12 May 2003

⁹⁶⁷ Market definition response, OFT Document Reference 6908, page 2.

⁹⁶⁸ Market definition response, OFT Document Reference 6902, pages 10 and 11.

⁹⁶⁹ FAME report, OFT Document Reference 12179.

⁹⁷⁰ FAME report, OFT Document Reference 12179.

⁹⁷¹ Latest available FAME report of Kier.

⁹⁷² Letter from Simmons & Simmons, 9 July 2009.

⁹⁷³ Company Appointments Report, OFT Document Reference 12184.

- Martyn Wright 1 April 2002 – 3 October 2004

II.865. The directors of Kier Group from 2001 to 2006 were as follows:⁹⁷⁴

- Peter Fremantle Berry	2001 – 2006
- Duncan Valentine Brand	2001 – 24 November 2001
- Colin Busby	2001 – 13 December 2004
- Simon William De Mussenden Leathes	12 March 2001 – 2006
- John Dodds	2001 – 2006
- Robert William Gregory	30 June 2003 – 27 April 2005
- David Homer	2001 – 30 June 2003
- Ian Michael Lawson	1 October 2005 – 2006
- Deena Elizabeth Mattar	12 September 2001 – 2006
- Michael O'Farrell	1 October 2006 – 2006
- Martin Peter Weston Scarth	2001 – 7 May 2003
- Michael Paul Sheffield	1 October 2005 – 2006
- Richard William Side	1 January 2003 – 2006
- Richard William Simkin	1 January 2003 – 2006
- Peter Thomas Warry	2001 – 2006
- Philip Michael White	1 July 2006 – 2006

II.866. The following directors have been on the Board of Directors of both Kier and Kier Group during the periods mentioned below.⁹⁷⁵ The OFT considers that this provides evidence that Kier Group exercised decisive influence over Kier's conduct at the time of the Infringements.

- Colin Busby	2001 – 30 June 2004
- John Dodds	22 September 2003 – 2006
- Ian Michael Lawson	1 October 2005 – 11 November 2005
- Martin Peter Weston Scarth	2001 – 7 May 2003
- Michael Paul Sheffield	1 October 2005 – 2006
- Richard William Side	1 January 2003 – 2006

II.867. Kier Group did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁹⁷⁶

II.868. Kier did not apply for leniency.

II.869. The OFT considers that Kier Group, as 100 per cent owner of Kier, can be presumed to have exercised decisive influence over Kier's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Kier Group and Kier. Kier and Kier Group are therefore jointly and severally liable for Kier's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

⁹⁷⁴ Company Appointments Report, OFT Document Reference 12185. The OFT notes that Kier has advised that Robert William Gregory was appointed on 1 July 2003. This is not the date recorded by Companies House and the OFT prefers the information provided by Companies House in this case. In any event, this is not material to the OFT's findings of infringement.

⁹⁷⁵ Company Appointments Reports, OFT Document Reference 12184 and 12185.

⁹⁷⁶ See paragraphs II.1481 to II.1487 below.

II.870. This Decision is therefore addressed to Kier and Kier Group.

Lemmeleg Limited ('Lemmeleg')
Rok plc ('Rok')

- II.871. Lemmeleg is a private limited company registered in England and Wales, company number 03794829.⁹⁷⁷ Lemmeleg's registered and primary trading address is Rok Centre, Guardian Road, Exeter Business Park, Exeter, Devon, EX1 3PD.⁹⁷⁸ Lemmeleg also has a trading address in Wakefield, West Yorkshire.⁹⁷⁹
- II.872. At the time of issue of the Statement, Lemmeleg traded as a holding company to its subsidiary undertaking, Lemmeleg Building & Contracting Limited ('Lemmeleg Building'), which operated as a buildings contractor.⁹⁸⁰ At the time of issue of the Statement, Lemmeleg did not carry out work outside the United Kingdom.
- II.873. Lemmeleg Building is a private limited company registered in England and Wales, company number 03024911.⁹⁸¹ Lemmeleg Building's registered and primary trading address is Rok Centre, Guardian Road, Exeter Business Park, Exeter, Devon, EX1 3PD.⁹⁸² Lemmeleg Building also trades from an address in West Yorkshire.⁹⁸³
- II.874. At the time of issue of the Statement, Lemmeleg Building's principal activity was that of buildings, contracting and development⁹⁸⁴ and it did not carry out work outside the United Kingdom.
- II.875. From 2000 until 5 July 2005⁹⁸⁵ Lemmeleg did not have a holding company.
- II.876. On 5 July 2005, Lemmeleg was acquired by Rok.⁹⁸⁶ Therefore from 5 July 2005 until 2006, Lemmeleg's ultimate parent company was Rok.⁹⁸⁷
- II.877. Rok is a public limited company, company number 00358466.⁹⁸⁸ Rok's registered and primary trading address is Rok Centre, Guardian Road, Exeter Business Park, Exeter, Devon, EX1 3PD.⁹⁸⁹ Rok also has trading addresses in Taunton and Oxford.⁹⁹⁰ Until 5 May 2006, Rok was called Rok Property Solutions plc.⁹⁹¹

⁹⁷⁷ FAME report, OFT Document Reference 12198.

⁹⁷⁸ FAME report, OFT Document Reference 12198.

⁹⁷⁹ Latest available FAME report of Lemmeleg.

⁹⁸⁰ Financial Statements, OFT Document Reference 12201.

⁹⁸¹ FAME report, OFT Document Reference 12199.

⁹⁸² FAME report, OFT Document Reference 12199.

⁹⁸³ FAME report, OFT Document Reference 12199.

⁹⁸⁴ Director's Report and Financial Statements, OFT Document Reference 12204.

⁹⁸⁵ OFT Briefing Note from Maclay Murray & Spens LLP, OFT Document Reference 10502.

⁹⁸⁶ OFT Briefing Note from Maclay Murray & Spens LLP, OFT Document Reference 10502.

⁹⁸⁷ Director's Report and Financial Statements, OFT Document Reference 12202.

⁹⁸⁸ FAME report, OFT Document Reference 12204d.

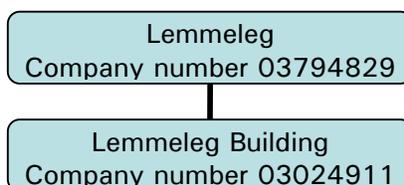
⁹⁸⁹ FAME report, OFT Document Reference 12204d.

⁹⁹⁰ Latest available FAME report of Rok.

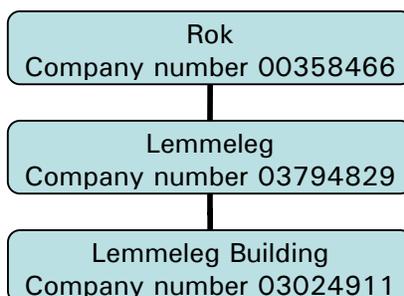
⁹⁹¹ Latest available FAME report of Rok.

II.878. At the time of issue of the Statement, Rok's core businesses were building, maintenance and development.⁹⁹² At the time of issue of the Statement, Rok did not carry out work outside the United Kingdom.

II.879. The overall structure of Lemmeleg from 2000 until 5 July 2005 was as follows:



II.880. The overall structure of Lemmeleg from 5 July 2005 until 2006 was as follows:



II.881. Rok has 42 other subsidiaries.⁹⁹³

II.882. In their response to the Statement, Lemmeleg and Rok confirmed that after Rok's acquisition of Lemmeleg and Lemmeleg Building on 5 July 2005, the businesses of Lemmeleg and Lemmeleg Building were transferred to another wholly owned subsidiary of Rok. Since then, both Lemmeleg and Lemmeleg Building continue to exist as legal entities but do not trade and have no turnover.⁹⁹⁴

II.883. In respect of Lemmeleg's turnover Rok confirmed that the turnover of Rok Building Limited attributable to the Lemmeleg business for the financial year ending 31 December 2008 was [...] [C].⁹⁹⁵

II.884. The directors of Lemmeleg from 2002 to 2006 were as follows:⁹⁹⁶

- Trevor Harold Cooper 2002 – 30 June 2006
- Terence Hodgkinson 2002 – 12 July 2005
- Christopher David Hopkinson 2002 – 6 August 2003
- Howard Kitson 2002 – 28 February 2006
- Keith Brian Watson 12 July 2005 – 2006

II.885. The directors of Lemmeleg Building from 2002 to 2006 were as follows:⁹⁹⁷

- Mark Andrew Cardwell 7 January 2002 – 2006

⁹⁹² Annual Report, OFT Document Reference 12204b page 7.

⁹⁹³ Latest available FAME report of Rok.

⁹⁹⁴ Written representations of Lemmeleg and Rok, 26 June 2008, paragraph 3.1.2.

⁹⁹⁵ Letter from Maclay, Murray & Spens LLP, 29 April 2009.

⁹⁹⁶ Company Appointments, OFT Document Reference 12204e.

⁹⁹⁷ Company Appointments, OFT Document Reference 12203.

- Trevor Harold Cooper 2002 – 30 June 2006
- Richard James Hildrick 1 April 2004 – 2006
- Terence Hodgkinson 2002 – 22 July 2004
- Christopher David Hopkinson 2002 – 6 August 2003
- Philip Roy Hughes 1 September 2003 – 31 July 2006
- Howard Kitson 2002 – 28 February 2006
- Keith Brian Watson 11 July 2005 – 2006

II.886. The following directors have been on the Board of Directors of both Lemmeleg Building and Lemmeleg during the periods mentioned below.⁹⁹⁸ The OFT considers that this provides evidence that Lemmeleg exercised decisive influence over Lemmeleg Building's conduct at the time of the Infringements.

- Trevor Harold Cooper 2002 – 30 June 2006
- Terence Hodgkinson 2002 – 22 July 2006
- Christopher David Hopkinson 2002 – 6 August 2003
- Howard Kitson 2002 – 28 February 2006
- Keith Brian Watson 12 July 2005 – 2006

II.887. Lemmeleg did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.⁹⁹⁹

II.888. Rok would not normally be held directly liable for any Infringements committed by Lemmeleg that occurred prior to the acquisition of Lemmeleg by Rok, in circumstances where the acquired subsidiary, Lemmeleg, remained in existence. However, Lemmeleg had nil turnover for 2006, as its business was accounted for in the accounts of Rok Building Limited, a wholly-owned subsidiary of Rok. The OFT therefore considers that in these circumstances, it is appropriate also to address any Decision to Rok, as the economic successor to which the business of Lemmeleg has been transferred.¹⁰⁰⁰

II.889. The OFT considers that Rok, as 100 per cent owner of Lemmeleg and being the economic successor to which the business of Lemmeleg has been transferred, therefore forms part of the same economic entity. Rok and Lemmeleg are therefore jointly and severally liable for Lemmeleg's participation in the Infringements. Accordingly, Lemmeleg and Rok are jointly and severally liable for payment of the fine that the OFT is imposing.

II.890. This Decision is therefore addressed to Rok and Lemmeleg.

Lindum Construction Co. Limited ('Lindum')
Lindum Group Limited ('Lindum Group')

II.891. Lindum is a private limited company registered in England and Wales, company number 00659452.¹⁰⁰¹ Lindum's registered and primary trading address is

⁹⁹⁸ Company Appointments, OFT Document Reference 12204e and 12203.

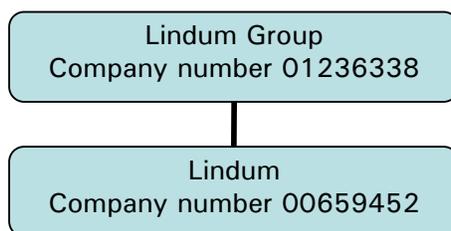
⁹⁹⁹ See paragraphs II.1481 to II.1487 below.

¹⁰⁰⁰ The case law of the European courts confirms that a successor undertaking may be held responsible for the unlawful conduct of an undertaking which it has acquired, even where the legal person responsible for the operation of that undertaking at the time the infringement occurred continues to exist. See, for example, Case T-134/94 *NMH Stahlwerke GmbH v Commission* ECR [1999] II 239.

¹⁰⁰¹ FAME report, OFT Document Reference 14418.

Lindum Business Park, Station Road, North Hykeham, Lincoln, Lincolnshire LN6 3QX.¹⁰⁰²

- II.892. At the time of issue of the Statement, Lindum specialised in carrying out fast track 'one-stop-shop' construction projects, undertaking work for both public and private sector clients. Lindum operated in the commercial, education, food processing, health, industrial, leisure and retail sectors, working nationally but especially within the East Midlands and East Anglia regions.¹⁰⁰³ At the time of issue of the Statement, Lindum did not carry out work outside the United Kingdom.
- II.893. Lindum ultimate parent company is Lindum Group, a private limited company, company number 01236338.¹⁰⁰⁴ Lindum Group's registered and primary trading address is Lindum Business Park, Station Road, North Hykeham, Lincoln, Lincolnshire LN6 3QX.¹⁰⁰⁵
- II.894. Lindum has no subsidiaries.¹⁰⁰⁶
- II.895. The relevant structure of Lindum Group is outlined below:



- II.896. Lindum Group has 27 other subsidiaries.¹⁰⁰⁷
- II.897. Lindum is a dormant company.¹⁰⁰⁸
- II.898. Lindum Group's group consolidated turnover for the financial year ending 30 November 2008 was [...] [C].¹⁰⁰⁹
- II.899. The directors of Lindum from 2000 to 2006 were as follows:¹⁰¹⁰

- David Christopher Chambers 2000 – 2006
- Kevin Edward Damarell 2000 – 2006
- Anthony David Gamwell 2000 – 2006
- Simon John Gregory 22 May 2001 – 2006
- Richard John Howgate 2000 – 5 December 2004
- Herman Frans Frederik Kok 2000 – 2006
- Paul Nigel Philip McSorley 2000 – 2006
- David Trinder 2000 – 31 January 2001

¹⁰⁰² FAME report, OFT Document Reference 14418.

¹⁰⁰³ Lindum Group's website, OFT Document Reference 12229, pages 18 and 19.

¹⁰⁰⁴ FAME report, OFT Document Reference 12223.

¹⁰⁰⁵ FAME report, OFT Document Reference 12223.

¹⁰⁰⁶ FAME report, OFT Document Reference 14418.

¹⁰⁰⁷ Latest available FAME report of Lindum Group.

¹⁰⁰⁸ FAME report, OFT Document Reference 14418, 14417 and 14435.

¹⁰⁰⁹ Letter from Langleys, 1 May 2009.

¹⁰¹⁰ Company Appointments, OFT Document Reference 14423.

II.900. The directors of Lindum Group from 2000 to 2006 were as follows:¹⁰¹¹

- Allen Blackwell 30 November 2003 – 28 November 2005
- David Christopher Chambers 2000 – 2006
- Kevin Edward Damarell 2000 – 2006
- Nicola Jenny Duncumb 2000 – 1 September 2000
- Simon John Gregory 30 November 2003 – 2006
- Peter Edward Hogan 2000 – 8 May 2004
- Richard John Howgate 2000 – 29 November 2004
- Herman Frans Frederik Kok 2000 – 2006
- Paul Nigel Philip McSorley 2000 – 2006
- Michael James Papworth 13 July 2006 – 2006
- Stuart William Tindall 2000 – 8 May 2004
- George Douglas Whitaker 2000 – 30 April 2005

II.901. The following directors have been on the Board of Directors of both Lindum and Lindum Group during the periods mentioned below.¹⁰¹² The OFT considers that this provides evidence that Lindum Group exercised decisive influence over Lindum's conduct at the time of the Infringements.

- David Christopher Chambers 2000 – 2006
- Kevin Edward Damarell 2000 – 2006
- Simon John Gregory 30 November 2003 – 2006
- Richard John Howgate 2000 – 29 November 2004
- Herman Frans Frederik Kok 2000 – 2006
- Paul Nigel Philip McSorley 2000 – 2006

II.902. Lindum Group did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁰¹³

II.903. Lindum did not apply for leniency.

II.904. The OFT considers that Lindum Group is liable for Infringement 37 described in this Decision and that it is therefore liable for payment of the penalty that the OFT is imposing in respect of that Infringement, on account of its participation in that Infringement.

II.905. In addition, the OFT considers that Lindum Group, as 100 per cent owner of Lindum, can be presumed to have exercised decisive influence over the commercial policy of Lindum during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Lindum Group and Lindum. Lindum and Lindum Group will therefore be jointly and severally liable for the participation of Lindum in Infringements 182¹⁰¹⁴ and 189. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.906. This Decision is therefore addressed to Lindum and Lindum Group.

¹⁰¹¹ Company Appointments, OFT Document Reference 12226.

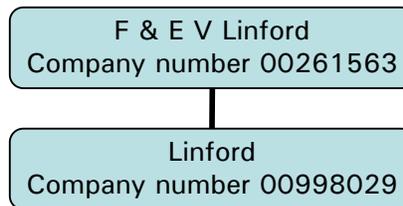
¹⁰¹² Company Appointments Reports, OFT Document Reference 14423 and 12226.

¹⁰¹³ See paragraphs II.1481 to II.1487 below.

¹⁰¹⁴ In the alternative, in the event that the Participant Company for Infringement 182 is Lindum Group, then paragraph II.904 applies in respect of Infringement 182.

Linford Group Limited ('Linford')
F. & E. V. Linford Limited ('F & E V Linford')

- II.907. Linford is a private limited company registered in England and Wales, company number 00998029.¹⁰¹⁵ Linford's registered and primary trading address is Quonians, Lichfield, Staffordshire, WS13 7LB.
- II.908. At the time of issue of the Statement, Linford undertook new build and restoration work for both public and private sector clients throughout England and Wales. A large proportion of its work was carried out in the heritage, education, health, defence, residential and commercial sectors.¹⁰¹⁶ At the time of issue of the Statement, Linford did not carry out work outside the United Kingdom.
- II.909. Linford's ultimate parent company is F & E V Linford, a private limited company, company number 00261563.¹⁰¹⁷ F & E V Linford's registered address is Quonians, Lichfield, Staffordshire, WS13 7LB.¹⁰¹⁸ Linford is a wholly owned subsidiary of F & E V Linford.¹⁰¹⁹
- II.910. Linford has eight subsidiaries.¹⁰²⁰
- II.911. The relevant company structure for 2000 – 2006 is outlined below:



- II.912. F & E V Linford has nine subsidiaries.¹⁰²¹
- II.913. F & E V Linford's group consolidated turnover for the financial year ending 30 September 2008 was [...] [C].¹⁰²²
- II.914. The directors of Linford from 2000 to 2006 were as follows:¹⁰²³
- | | |
|----------------------------|----------------------------------|
| - Paul Vincent Baines | 3 April 2006 – 2006 |
| - Michael William Buck | 23 June 2000 – 2006 |
| - Stuart Carter | 1 July 2003 – 2006 |
| - Steven Gregory Chinn | 17 November 2000 – 3 August 2001 |
| - Peter George Lee | 2000 – 2006 |
| - David Linford | 2000 – 2006 |
| - Simon John Louis Linford | 10 January 2006 – 2006 |

¹⁰¹⁵ FAME Report, OFT Document Reference 12205.
¹⁰¹⁶ Linford's website, OFT Document Reference 12214.
¹⁰¹⁷ FAME Report, OFT Document Reference 12206.
¹⁰¹⁸ FAME Report, OFT Document Reference 12206.
¹⁰¹⁹ FAME Report, OFT Document Reference 12206.
¹⁰²⁰ Latest available FAME Report of Linford.
¹⁰²¹ Latest available FAME Report of F & E V Linford.
¹⁰²² Letter from Pinsent Masons, 28 April 2009.
¹⁰²³ Company Appointments, OFT Document Reference 12211.

- Sean Colin Millichamp 1 March 2005 – 1 July 2005
- Richard Arthur Newman 23 June 2000 – 2006
- Robert John Pearson 1 July 2005 – 2006
- Martin Richard Smith 23 June 2000 – 25 August 2004
- Michael John Thompson 23 June 2000 – 2006
- Neil Andrew David Walters 1 March 2006 – 2006
- David Worthington 23 June 2000 – 9 August 2002

II.915. The directors of F & E V Linford from 2000 to 2006 were as follows:¹⁰²⁴

- David John Evans 2000 – 2006
- Cheryl Ann Hall 2000 – 2006
- Peter George Lee 31 October 2005 – 2006
- David Linford 2000 – 2006
- Diana Jane Linford 31 October 2005 – 2006
- Peter Frank David Linford 31 October 2005 – 2006
- Simon John Louis Linford 23 March 2001 – 2006
- Richard Geoffrey Noake 1 July 2003 – 2006
- Sally Anne Orton 31 October 2005 – 2006
- Robert John Titterton 31 October 2005 – 2006

II.916. The following director has been on the Board of Directors of both Linford and F & E V Linford during the periods mentioned below.¹⁰²⁵ The OFT considers that this provides evidence that F & E V Linford exercised decisive influence over Linford's conduct at the time of the Infringements.

- David Linford 2000 – 2006

II.917. Linford did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, F & E V Linford, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁰²⁶

II.918. The OFT considers that F & E V Linford, as 100 per cent owner of Linford, can be presumed to have exercised decisive influence over Linford's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between F & E V Linford and Linford. Linford and F & E V Linford are therefore jointly and severally liable for Linford's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.919. This Decision is therefore addressed to Linford and F & E V Linford.

Loach Construction & Development Limited ('Loach')

II.920. Loach is a private limited company registered in England and Wales, company number 00638884.¹⁰²⁷ Loach's registered and trading address is Mile End Road, Colwick, Nottingham, Nottinghamshire, NG4 2EE.¹⁰²⁸

¹⁰²⁴ Company Appointments, OFT Document Reference 12213.

¹⁰²⁵ Company Appointments, OFT Document Reference 12211 and 12213.

¹⁰²⁶ See paragraphs II.1481 to II.1487 below.

¹⁰²⁷ FAME Report, OFT Document Reference 12244.

¹⁰²⁸ FAME Report, OFT Document Reference 12244.

- II.921. At the time of issue of the Statement, Loach undertook design, new build and refurbishment work in sectors such as industrial, commercial, retail, education, leisure, health and residential.¹⁰²⁹ At the time of issue of the Statement, Loach did not carry out work outside the United Kingdom.
- II.922. Loach has no holding company or subsidiaries.¹⁰³⁰
- II.923. Loach's turnover for the financial year ending 31 March 2009 was [...] [C].¹⁰³¹
- II.924. The directors of Loach from 2000 to 2006 were as follows:¹⁰³²
- Andrew Robert Arbon Davis 1 April 2003 – 2006
 - Richard Stanislaw Franczak 2000 – 2006
 - Michael John Garland 2000 – 2006
 - Andrew Mark Hopewell 1 September 2006 – 2006
 - Peter Vernon Jubb 1 May 2003 – 31 January 2005
 - Kenneth Alfred Tyler 2000 – 30 April 2003
- II.925. Loach applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁰³³
- II.926. This Decision is addressed to Loach. The OFT considers that Loach is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, in respect of Infringements 54, 66 and 143, on account of the participation in the Infringements of that undertaking.

Lotus Construction Limited ('Lotus')

- II.927. Lotus is a private limited company registered in England and Wales, company number 02800054.¹⁰³⁴ Lotus's registered address is 1 Bridgewater Place, Water Lane, Leeds, West Yorkshire, LS11 5QR.¹⁰³⁵
- II.928. At the time of issue of the Statement, Lotus's principal activity was the construction and refurbishment of educational, civic, commercial and industrial properties.¹⁰³⁶ At the time of issue of the Statement, Lotus did not carry out work outside the United Kingdom.
- II.929. On 7 November 2008 an administrator was appointed for Lotus.¹⁰³⁷
- II.930. At the time of issue of the Statement, Lotus had no holding company and no subsidiaries.¹⁰³⁸

¹⁰²⁹ Website, OFT Document Reference 12248.

¹⁰³⁰ FAME report for Loach, OFT Document Reference 12244.

¹⁰³¹ Letter from Loach, 23 April 2009.

¹⁰³² Company Appointment Report, OFT Document Reference 12245.

¹⁰³³ See Part 3 of OFT Guidance 423,

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf

¹⁰³⁴ FAME report, OFT Document Reference 12249.

¹⁰³⁵ Latest available FAME report of Lotus.

¹⁰³⁶ Directors' Report and Financial Statement, OFT Document Reference 12252.

¹⁰³⁷ Notice of administrator's appointment, form 2.12B.

¹⁰³⁸ FAME report, OFT Document Reference 12249.

- II.931. Lotus's turnover for the period 1 October 2007 to 30 June 2008 was £23,565,466.¹⁰³⁹
- II.932. The directors of Lotus from 2000 to 2006 were as follows:¹⁰⁴⁰
- | | |
|-------------------------|----------------------------------|
| - Richard Frank Elam | 1 April 2003 – 2006 |
| - Tracey Lynne Lloyd | 2000 – 19 September 2006 |
| - Richard Albert Lumley | 2000 – 19 September 2006 |
| - Walter Malcolm White | 6 April 2000 – 19 September 2006 |
| - Steven Lee Withy | 1 April 2003 – 2006 |
- II.933. Lotus did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁰⁴¹
- II.934. Since the events described in this Decision, Lotus has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Lotus at the relevant times, it is not jointly and severally liable with Lotus for the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Lotus.
- II.935. This Decision is addressed to Lotus. The OFT considers that Lotus is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Milward Construction (Belper) Limited ('Milward')

- II.936. Milward is a private limited company registered in England and Wales, company number 02645916.¹⁰⁴² Milward's registered and primary trading address is 30 Market Place, Belper, Derby, Derbyshire, DE56 1FZ.¹⁰⁴³
- II.937. At the time of issue of the Statement, Milward undertook general construction works within the industrial, commercial, residential, leisure and health sectors for both private, public and industrial sector clients.¹⁰⁴⁴ At the time of issue of the Statement, Milward did not carry out work outside the United Kingdom.
- II.938. Milward has no holding company or subsidiaries.¹⁰⁴⁵
- II.939. Milward's turnover for the financial year ending 31 March 2009 was [...] [C].¹⁰⁴⁶
- II.940. The directors of Milward from 2002 to 2006 were as follows:¹⁰⁴⁷

¹⁰³⁹ Directors' Report and Financial Statement.

¹⁰⁴⁰ Company Appointments report, OFT Document Reference 12250.

¹⁰⁴¹ See paragraphs II.1481 to II.1487 below.

¹⁰⁴² FAME report, OFT Document Reference 12266.

¹⁰⁴³ FAME report, OFT Document Reference 12266.

¹⁰⁴⁴ Milward's website, OFT Document Reference 12271, page 1 and Market definition response, OFT Document Reference 6459.

¹⁰⁴⁵ FAME report, OFT Document Reference 12266.

¹⁰⁴⁶ Letter from Addleshaw Goddard, 1 June 2009.

¹⁰⁴⁷ Company Appointments Report, OFT Document Reference 12267.

- Keith Joseph Arthur Holmes 2002 – 2006
- Adrian Milward 2002 – 2006
- Stephen Milward 2002 – 2006

- II.941. Milward did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁰⁴⁸
- II.942. This Decision is addressed to Milward. The OFT considers that Milward is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Morgan Ashurst plc formerly known as Bluestone plc ('Bluestone')
Morgan Sindall plc ('Morgan Sindall')

- II.943. Bluestone is a public company registered in England and Wales, company number 04273754.¹⁰⁴⁹ Bluestone's registered address is Kent House, 14-17 Market Place, London, W1W 8AJ¹⁰⁵⁰ Bluestone has 21 other trading addresses throughout England.¹⁰⁵¹
- II.944. At the time of issue of the Statement, Bluestone was a national construction business with a network of local offices across England and Wales which provided new build, refurbishment and maintenance projects to the private and public sectors under a variety of procurement routes.¹⁰⁵² At the time of issue of the Statement, Bluestone did not carry out work outside the United Kingdom.
- II.945. On 27 July 2007 Bluestone changed its name, by special resolution, to Morgan Ashurst plc.¹⁰⁵³
- II.946. Bluestone's ultimate parent company is Morgan Sindall, a public limited company, company number 00521970.¹⁰⁵⁴ Morgan Sindall's registered address is Kent House, 14-17 Market Place, London, W1W 8AJ.¹⁰⁵⁵ Bluestone is a wholly owned subsidiary of Morgan Sindall.¹⁰⁵⁶
- II.947. Bluestone has 8 subsidiaries.¹⁰⁵⁷
- II.948. The overall company structure from 2003 – 2006 is outlined below:

¹⁰⁴⁸ See paragraphs II.1481 to II.1487 below.

¹⁰⁴⁹ FAME report, OFT Document Reference 11677.

¹⁰⁵⁰ Latest available FAME report of Bluestone.

¹⁰⁵¹ Latest available FAME report of Bluestone.

¹⁰⁵² Report and Financial Statements, OFT Document Reference 11679.

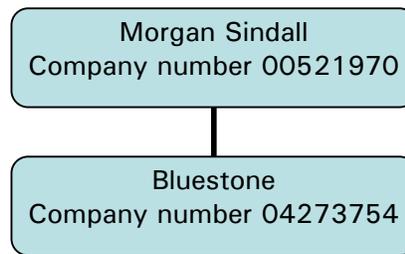
¹⁰⁵³ Certificate of Incorporation on change of name, OFT Document Reference 11676b.

¹⁰⁵⁴ FAME report, OFT Document Reference 11677.

¹⁰⁵⁵ Latest available FAME report of Morgan Sindall.

¹⁰⁵⁶ FAME report, OFT Document Reference 11680.

¹⁰⁵⁷ Latest available FAME report of Bluestone.



II.949. Morgan Sindall's worldwide consolidated turnover for the financial year ending 31 December 2008 was [...] [C].¹⁰⁵⁸

II.950. The directors of Bluestone from 2003 to 2006 were as follows:¹⁰⁵⁹

- John Berry	2003 – 2006
- John Michael Bishop	2003 – 1 June 2005
- Philip Russell Brand	2003 – 26 February 2004
- Jason Paul Farnell	12 September 2005 – 10 November 2006
- Douglas Allan Gray	2003 – 25 February 2004
- John Homer	1 November 2006 – 2006
- William Raymond Johnston	2003 – 3 February 2005
- David Kevin Mulligan	25 February 2004 – 2006
- Martin Clive Pitt	2003 – 2006
- John Rawlinson	1 November 2006 – 2006
- Gordon Ray	1 November 2006 – 2006
- Christopher Anthony Saxton	2003 – 3 February 2004
- Stephen Scard	1 November 2006 – 2006
- Graham Alexander Shennan	2003 – 2006
- Robert John Smith	25 February 2004 – 27 October 2006
- Keith Brian Watson	2003 – 30 June 2003
- Paul Whitmore	2003 – 2006

II.951. The directors of Morgan Sindall from 2003 to 2006 were as follows:¹⁰⁶⁰

- Bernard Harry Asher	2003 – 2006
- Gill Barr	2 September 2004 – 2006
- John Michael Bishop	2003 – 12 April 2005
- Geraldine Gallacher	2003 – 2 September 2004
- William Raymond Johnston	2003 – 3 February 2005
- John James Clifford Lovell	2003 – 2006
- John Christopher Morgan	2003 – 2006
- David Kevin Mulligan	1 April 2004 – 2006
- Paul Raymond Smith	3 March 2003 – 2006
- Jon Walden	2003 – 2006
- Paul Whitmore	2003 – 2006

II.952. The following directors have been on the Board of Directors of Bluestone and Morgan Sindall during the periods mentioned below.¹⁰⁶¹ The OFT considers that this provides evidence that Morgan Sindall exercised decisive influence over Bluestone's conduct at the time of the Infringements.

¹⁰⁵⁸ Letter from Pinsent Masons, 5 May 2009.

¹⁰⁵⁹ Company Appointments, OFT Document Reference 11678.

¹⁰⁶⁰ Company Appointments, OFT Document Reference 11681.

¹⁰⁶¹ Company Appointments, OFT Document Reference 11678 and 11681.

- John Michael Bishop 2003 – 12 April 2005
- William Raymond Johnston 2003 – 3 February 2005
- David Kevin Mulligan 1 April 2004 – 2006
- Paul Whitmore 2003 – 2006

- II.953. Bluestone applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁰⁶²
- II.954. The OFT considers that Morgan Sindall, as 100 per cent owner of Bluestone, can be presumed to have exercised decisive influence over its commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Morgan Sindall and Bluestone. Morgan Sindall and Bluestone are therefore jointly and severally liable for Bluestone's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 206, 239 and 243.¹⁰⁶³
- II.955. This Decision is therefore addressed to Bluestone and Morgan Sindall.
- II.956. [...] [C – information relating to a subsidiary of Morgan Sindall which is] not being pursued separately in regard to any Infringements in this Decision.

North Midland Construction plc ('North Midland')

- II.957. North Midland is a public limited company registered in England and Wales, company number 00425188.¹⁰⁶⁴ North Midland's registered and primary trading address is Nunn Close, The County Estate, Huthwaite, Sutton-in-Ashfield, Nottinghamshire, NG17 2HW.¹⁰⁶⁵
- II.958. At the time of issue of the Statement, North Midland's principal activities consisted of civil engineering, building and public works contracting¹⁰⁶⁶ and it did not carry out work outside the United Kingdom.
- II.959. North Midland has no holding company.¹⁰⁶⁷
- II.960. North Midland has two subsidiaries.¹⁰⁶⁸
- II.961. North Midland's consolidated turnover for the financial year ending 31 December 2008 was [...] [C].¹⁰⁶⁹

¹⁰⁶² See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

¹⁰⁶³ The penalties in respect of Infringements 239 and 243 are reduced to zero as they are 'But for' Infringements.

¹⁰⁶⁴ FAME report, OFT Document Reference 12272.

¹⁰⁶⁵ FAME report, OFT Document Reference 12272.

¹⁰⁶⁶ Annual report and accounts, OFT Document Reference 12273, page 6.

¹⁰⁶⁷ FAME report, OFT Document Reference 12272.

¹⁰⁶⁸ Latest available FAME report of North Midland.

II.962. The directors of North Midland from 2000 to 2006 were as follows:¹⁰⁷⁰

- Gerald Beetles	2000 – 24 May 2006
- Mark Blakeway	24 May 2006 – 2006
- Douglas Bleakley	15 May 2003 – 2006
- Stephen John Thursfield Brown	25 March 2004 – 2006
- Ian Elliott	29 March 2006 – 2006
- Brian Alan Evans	2000 – 2006
- Michael Steven Garratt	2000 – 2006
- Trevor John Kayes	2000 – 24 May 2005
- John Oliver Knight	2000 – 3 September 2003
- Robert Moyle	2000 – 2006

II.963. North Midland did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁰⁷¹

II.964. This Decision is addressed to North Midland. The OFT considers that North Midland is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

P D H Developments Limited ('PDH')
G. Hurst & Sons Limited ('G Hurst')

II.965. PDH is a private limited company registered in England and Wales, company number 00619334.¹⁰⁷² PDH's registered address is Woodstock, London Road, Retford, Notts, DN22 7EB.¹⁰⁷³ PDH trades from its registered address and another two trading addresses in Retford, Nottinghamshire.¹⁰⁷⁴

II.966. At the time of issue of the Statement, PDH carried out construction work in the Midlands region and it did not carry out work outside the United Kingdom.

II.967. PDH has changed name twice since 2000. Prior to 23 April 2004 it was named G. Hurst & Sons (Contractors) Limited and between 23 April 2004 and 14 May 2004 it was named G. Hurst & Sons (Developments) Limited.¹⁰⁷⁵

II.968. PDH's ultimate parent company is G Hurst, a private limited company, company number 00423423.¹⁰⁷⁶ G Hurst's registered address is Woodstock, London Road, Retford, Notts, DN22 7EB.¹⁰⁷⁷

II.969. At the time of the relevant Infringements G Hurst held 75 per cent of the share capital in PDH.¹⁰⁷⁸ A further 20.5 per cent was held by P D Hurst.¹⁰⁷⁹

¹⁰⁶⁹ Letter from Browne Jacobson LLP, 24 April 2009.

¹⁰⁷⁰ Company Appointments report, OFT Document Reference 12274.

¹⁰⁷¹ See paragraphs II.1481 to II.1487 below.

¹⁰⁷² FAME Report, OFT Document Reference 11913.

¹⁰⁷³ FAME Report, OFT Document Reference 11913.

¹⁰⁷⁴ FAME Report, OFT Document Reference 11913.

¹⁰⁷⁵ FAME Report, OFT Document Reference 11913.

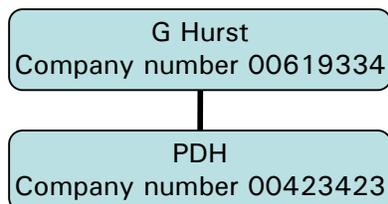
¹⁰⁷⁶ FAME Report, OFT Document Reference 11914.

¹⁰⁷⁷ FAME Report, OFT Document Reference 11914.

¹⁰⁷⁸ Abbreviated Accounts, OFT Document Reference 11917.

II.970. PDH does not have any subsidiaries.¹⁰⁸⁰

II.971. The overall structure was therefore as follows:



II.972. G Hurst's group consolidated turnover for the financial year ending 31 December 2008 was [...] [C].¹⁰⁸¹

II.973. The directors of PDH from 2000 to 2006 were as follows:¹⁰⁸²

- Deirdre Anne Hurst 14 May 2004 – 2006
- Peter David Hurst 2000 – 2006
- Graham Peter Rye 2000 – 28 April 2004

II.974. The director of G Hurst from 2000 to 2006 was as follows:¹⁰⁸³

- Peter David Hurst 2000 – 2006

II.975. The following director has been on the Board of Directors of both PDH and G Hurst during the periods mentioned below.¹⁰⁸⁴ The OFT considers that this provides evidence that G Hurst exercised decisive influence over PDH's conduct.

- Peter David Hurst 2000 – 2006

II.976. PDH did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, G Hurst, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁰⁸⁵

II.977. The OFT considers that G Hurst, as 75 per cent owner of PDH with a further 20.5 per cent being held by Peter David Hurst, a director of both G Hurst and PDH, can be presumed to have exercised decisive influence over PDH's commercial policy from 2000 to 2006 and therefore forms part of the same economic entity. PDH and G Hurst are therefore jointly and severally liable for PDH's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.978. Since the Infringement described in this Decision, the business assets and trading name of G Hurst & Sons (Contractors) Limited (PDH) were sold to another company. As this company did not form part of the same economic

¹⁰⁷⁹ FAME Report, OFT Document Reference 11913.

¹⁰⁸⁰ Fame Report, OFT Document Reference 11913.

¹⁰⁸¹ Email from G Hurst, 19 June 2009.

¹⁰⁸² Company Appointments Report, OFT Document Reference 11915.

¹⁰⁸³ Company Appointments Report, OFT Document Reference 11916.

¹⁰⁸⁴ Company Appointment Reports, OFT Document References 11915 and 11916.

¹⁰⁸⁵ See paragraphs II.1481 to II.1487 below.

entity as PDH at the relevant time, it is not jointly and severally liable with PDH and G Hurst for payment of the penalties that the OFT is imposing.

II.979. This Decision is therefore addressed to PDH and G Hurst.

P. Casey & Co. Limited ('P Casey')
The Casey Group Limited ('The Casey Group')

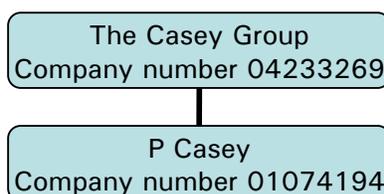
II.980. P Casey is a private limited company registered in England and Wales, company number 01074194.¹⁰⁸⁶ P Casey's registered and primary trading address is Rydings Road, Wardle, Rochdale, Greater Manchester, OL12 9PS.¹⁰⁸⁷ P Casey also has a trading address at 12 Third Avenue, Oldham, Lancashire, OL8 3SD.¹⁰⁸⁸

II.981. At the time of issue of the Statement, P Casey's main business activity was the building, repair, maintenance and improvement of housing for both private and public sector clients.¹⁰⁸⁹ It also undertook works in sectors such as education and health.¹⁰⁹⁰ At the time of issue of the Statement, P Casey did not carry out work outside the United Kingdom.

II.982. Since 1 July 2001¹⁰⁹¹, P Casey's ultimate parent company has been The Casey Group, a private limited company, company number 04233269.¹⁰⁹² The Casey Group's registered address is Rydings Road, Wardle, Rochdale Greater Manchester, OL12 9PS.¹⁰⁹³

II.983. P Casey has no subsidiaries.¹⁰⁹⁴

II.984. The relevant company structure is set out below:



II.985. The Casey Group has another four wholly owned subsidiaries.¹⁰⁹⁵

II.986. The Casey Group's consolidated turnover for the financial year ending 31 July 2008 was £44,773,139.¹⁰⁹⁶

II.987. The directors of P Casey from 2000 to 2006 were as follows:¹⁰⁹⁷

¹⁰⁸⁶ FAME report, OFT Document Reference 12280.

¹⁰⁸⁷ FAME report, OFT Document Reference 12280.

¹⁰⁸⁸ FAME report, OFT Document Reference 12280.

¹⁰⁸⁹ Market definition response, OFT Document Reference 6876.

¹⁰⁹⁰ P Casey's website, OFT Document Reference 12295 pages 9 and 11.

¹⁰⁹¹ Abbreviated Accounts, OFT Document Reference 12282.

¹⁰⁹² FAME report, OFT Document Reference 12280a.

¹⁰⁹³ FAME report, OFT Document Reference 12280a.

¹⁰⁹⁴ FAME report, OFT Document Reference 12280.

¹⁰⁹⁵ Latest available FAME report of The Casey Group.

¹⁰⁹⁶ Letter from DLA Piper LLP, 1 May 2009.

¹⁰⁹⁷ Company Appointments Report, OFT Document Reference 12293.

- Christopher Casey	2000 – 2006
- Peter Casey	2000 – 2006
- Anthony John Chell	2000 – 2006
- Christopher Shaw Griffin	2000 – 2006
- Mark Ian Holt	31 March 2006 – 2006
- Paul Turner	1 August 2005 – 2006
- Michael Anthony Walsh	2000 – 31 October 2006
- Jeremy Paul Warren	1 September 2006 – 2006

II.988. The directors of The Casey Group from 2001 to 2006 were as follows:¹⁰⁹⁸

- Christopher Casey	1 July 2001 – 2006
- Christopher Peter Casey	8 September 2006 – 2006
- Peter Casey	12 June 2001 – 2006
- Anthony John Chell	1 July 2001 – 2006
- Christopher Shaw Griffin	1 July 2001 – 2006
- Peter John York	1 March 2002 – 2006

II.989. The following directors have been on the Board of Directors of both P Casey and The Casey Group during the periods mentioned below.¹⁰⁹⁹ The OFT considers that this provides evidence that The Casey Group exercised decisive influence over P Casey's conduct at the time of the Infringements.

- Christopher Casey	1 July 2001 – 2006
- Peter Casey	12 June 2001 – 2006
- Anthony John Chell	1 July 2001 – 2006
- Christopher Shaw Griffin	1 July 2001 – 2006

II.990. P Casey did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, The Casey Group, were given the opportunity of accepting the OFT's Fast Track Offer.¹¹⁰⁰

II.991. The OFT considers that The Casey Group, as 100 per cent owner of P Casey, can be presumed to have exercised decisive influence over P Casey's commercial policy from 1 July 2001 until 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between The Casey Group and P Casey. P Casey and The Casey Group are therefore jointly and severally liable for P Casey's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.992. This Decision is therefore addressed to P Casey and The Casey Group.

P. Waller Limited ('P Waller')

¹⁰⁹⁸ Company Appointments Report, OFT Document Reference 12294.

¹⁰⁹⁹ Company Appointments Reports, OFT Document Reference 12293 and 12294.

¹¹⁰⁰ See paragraphs II.1481 to II.1487 below.

- II.993. P Waller is a private limited company registered in England and Wales, company number 01447007.¹¹⁰¹ P Waller's registered and primary trading address is Unit 5, Greasley Street, Bulwell, Nottingham, Nottinghamshire, NG6 8ND.¹¹⁰²
- II.994. At the time of issue of the Statement, P Waller undertook new build and refurbishment building projects for local government departments, the health sector, the educational sector and the renovation of churches. At the time of issue of the Statement, P Waller also carried out mechanical and electrical work, painting and decorating and joinery works.¹¹⁰³ At the time of issue of the Statement, P Waller did not carry out work outside the United Kingdom.
- II.995. P Waller has no holding company and no subsidiaries.¹¹⁰⁴
- II.996. P Waller's turnover for the financial year ending 30 September 2008 was [...] [C].¹¹⁰⁵
- II.997. The directors of P Waller from 2000 to 2006 were as follows:¹¹⁰⁶
- | | |
|-----------------------------|-----------------------|
| - Michael Boddy | 1 October 2006 – 2006 |
| - Robert Mark Comer | 1 October 2006 – 2006 |
| - Jonathan Charles Highwood | 1 October 2006 – 2006 |
| - Phillip Robert Passmore | 2000 – 2006 |
| - Glynn Russel Wade | 1 October 2006 – 2006 |
| - Hilary Jane Waller | 2000 – 2006 |
| - Philip Waller | 2000 – 2006 |
- II.998. P Waller applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹¹⁰⁷
- II.999. This Decision is addressed to P Waller. The OFT considers that P Waller is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Pearce Construction (Midlands) Limited ('Pearce')
ISG Pearce Limited (formerly Pearce Group Limited formerly Pearce Group plc)
('Pearce Group')
Crest Nicholson plc ('Crest Nicholson')

- II.1000. Pearce is a private limited company registered in England and Wales, company number 00212645.¹¹⁰⁸ Pearce's registered and primary trading address is Parklands, Hambrook Lane, Stoke Gifford, Bristol, Avon, BS34 8QU.¹¹⁰⁹

¹¹⁰¹ FAME report, OFT Document Reference 12296.

¹¹⁰² FAME report, OFT Document Reference 12296.

¹¹⁰³ P Waller's website, OFT Document Reference 12300, pages 14 and 15.

¹¹⁰⁴ FAME report, OFT Document Reference 12296.

¹¹⁰⁵ Email from P Waller, 18 June 2009.

¹¹⁰⁶ Company Appointment Report, OFT Document Reference 12297.

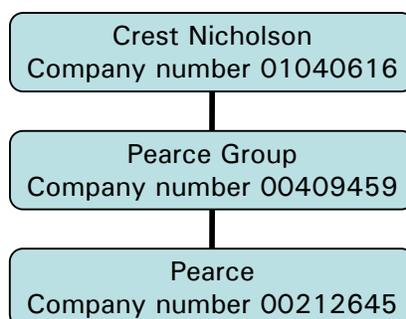
¹¹⁰⁷ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

¹¹⁰⁸ FAME report, OFT Document Reference 12312.

¹¹⁰⁹ FAME report, OFT Document Reference 12312.

- II.1001. Pearce is a non-trading company which acts as an 'undisclosed agent' of Pearce Group, a private limited company, company number 00409459.¹¹¹⁰ Pearce Group's registered address is Parklands, Hambrook Lane, Stoke Gifford, Bristol, Avon, BS34 8QU.¹¹¹¹ Pearce is a wholly owned subsidiary of Pearce Group. Pearce does not carry out work outside the United Kingdom.
- II.1002. On 29 January 2003, Pearce Group changed its name from Pearce Group plc to Pearce Group Limited, and on 1 July 2008 from Pearce Group Limited to its current name.
- II.1003. From 2000 until 31 January 2003¹¹¹² Pearce's and Pearce Group's ultimate parent company was Crest Nicholson, a public limited company, company number 01040616.¹¹¹³ Pearce was wholly owned by Pearce Group, which was wholly owned by Crest Nicholson.¹¹¹⁴
- II.1004. On 9 May 2007, Crest Nicholson changed its name to Crest Nicholson Limited.¹¹¹⁵ Crest Nicholson Limited's registered address is Crest House, Pycroft Road, Chertsey, Surrey, KT16 9GN.¹¹¹⁶ On 1 August 2007, Crest Nicholson Limited changed its name back to Crest Nicholson plc.¹¹¹⁷
- II.1005. On 31 January 2003 a management buy-out of Pearce Group was completed.¹¹¹⁸
- II.1006. Pearce has no subsidiaries.¹¹¹⁹ Pearce Group has 3 subsidiaries.¹¹²⁰
- II.1007. The relevant structure from 2000 until 31 January 2003 was therefore as follows:



- II.1008. Crest Nicholson's group consolidated turnover for the financial year ending 31 October 2008 was [...] [C].¹¹²¹

¹¹¹⁰ Directors' Report and Accounts 2001, OFT Document Reference SAE005, page 2.

¹¹¹¹ Latest Companies House details.

¹¹¹² Letter from Burges Salmon, OFT Document Reference 10753.

¹¹¹³ FAME report, OFT Document Reference 12310.

¹¹¹⁴ Letter from Burges Salmon, OFT Document Reference 10753.

¹¹¹⁵ FAME report, OFT Document Reference 12310.

¹¹¹⁶ FAME report, OFT Document Reference 12310.

¹¹¹⁷ Company details, OFT Document Reference SAE002.

¹¹¹⁸ Letter from Burges Salmon, OFT Document Reference 10753.

¹¹¹⁹ FAME report, OFT Document Reference 12312.

¹¹²⁰ Pearce Directors Reports and Accounts 1999-2008, OFT Document References SAE012 to SAE019.

¹¹²¹ FAME Report, OFT Document Reference 12310.

II.1009. Pearce Group's consolidated turnover for 14 months ending 30 June 2008 was £214,619,000.¹¹²²

II.1010. The directors of Pearce from 2000 to 2006 were as follows:¹¹²³

- Anne Bowes	2000 – 30 April 2004
- John Darby	2000 – 17 April 2003
- Colin Ian Forrest	31 July 2006 – 2006
- Robert Henry Johnson	2000 – 31 May 2002
- Alan Charles Jones	2000 – 30 April 2003
- Timothy Nicholas Leigh	17 April 2003 – 2006
- John William Rackstraw	31 January 2003 – 12 July 2006
- Donald Ross	2000 – 31 January 2003

II.1011. The directors of Pearce Group from 2000 to 2003 were as follows:¹¹²⁴

- John Callcutt	2000 – 30 January 2003
- Donald Ross	2000 – 31 January 2003
- James Ritchie	2000 – 31 January 2003
- Timothy Nicholas Leigh	2000 – current

II.1012. The directors of Crest Nicholson from 2000 to 2006 were as follows:¹¹²⁵

- John Callcutt	2000 – 31 March 2006
- Paul Callcutt	23 May 2000 – 2006
- David Peter Darby	27 August 2003 – 2006
- Robert Felix Erith	2000 – 8 August 2003
- Robert Stephen Lidgate	29 April 2003 – 2006
- John Clive Littler	2000 – 27 August 2003
- John Waylett Matthews	2000 – 2006
- Peter Renwick Murray	2000 – 31 October 2003
- Peter Charles Nicholson	2000 – 31 March 2002
- Donald Ross	2000 – 29 January 2003
- Richard Thomas Scholes	1 July 2003 – 2006
- Stephen Stone	2000 – 2006
- Bruce Gordon Walker	2000 – 21 March 2002
- Lloyd John Wigglesworth	19 September 2000 – 2006

II.1013. The following director was on the Board of Directors of both Crest Nicholson and Pearce during the period mentioned below.¹¹²⁶ The OFT considers that this provides evidence that Crest Nicholson exercised decisive influence over Pearce's conduct at the time of the Infringement.

- Donald Ross	2000 – 29 January 2003
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II.1014. The following director was on the Board of Directors of both Pearce Group and Pearce during the period mentioned below.¹¹²⁷ The OFT considers that this

¹¹²² Pearce Group Report and Financial Statements.

¹¹²³ Company Appointments report, OFT Document Reference 12306.

¹¹²⁴ Pearce Group Directors' Reports and Accounts filed with Companies House 2000-2008, OFT Document References SAE004 to SAE011.

¹¹²⁵ Company Appointments report, OFT Document Reference 12308.

¹¹²⁶ Company Appointments reports, OFT Document Reference 12308 and 12306.

¹¹²⁷ Company Appointments reports, OFT Document Reference 12307 and 12306.

of doubt, this Decision is not addressed to the new parent company of Pearce Group and Pearce.

Liability of Pearce Group

II.1021. In its response to a Supplementary Statement,¹¹³³ Pearce Group accepted that the OFT was entitled to hold it liable as intermediate parent company of Pearce. It submitted, however, that the OFT was not holding other intermediate parent companies liable and, consequently, was discriminating against Pearce Group when compared to the OFT's treatment of other Parties in this case, without objective justification.¹¹³⁴

II.1022. The OFT is holding Pearce Group liable, however, as the undisclosed principal of Pearce and, therefore, because it was directly involved in the relevant Infringement.¹¹³⁵ Its treatment is therefore equivalent to that of other Parties directly involved in Infringements. In its response to the Supplementary Statement, Pearce Group disputed that the OFT was entitled to hold it liable on this basis, stating that neither 'direct involvement' nor 'participation' are established concepts in UK or EC case law: '*...the concept of direct involvement is entirely novel as a basis for attributing liability in competition cases*'. Rather, Pearce Group submitted that the attribution of liability rests solely on the concept of 'decisive influence'.¹¹³⁶

II.1023. The OFT does not accept Pearce Group's representations in this respect. Direct involvement is not a legal concept or novel basis for attributing liability, but is a statement of fact. As noted above, the OFT considers that Pearce Group exercised decisive influence over Pearce at the relevant time, but this does not preclude the OFT from also concluding that Pearce Group was directly involved in the relevant Infringement as a result of the agency relationship which existed between it and Pearce.

II.1024. In addition to disputing the legal basis for liability, Pearce Group also contended that the OFT had no evidence of its direct involvement in the Infringement and that, in fact, it was not so involved.¹¹³⁷ In particular, Pearce Group submitted that the relationship between itself and Pearce was no different from that of any other parent and wholly owned subsidiary; the undisclosed agency agreement was simply an accounting tool to simplify audit and corporation tax requirements.¹¹³⁸ In support of this submission, Pearce Group stated that:

- (a) Pearce had its own board and separate management, approximately 150 staff, its own separate payroll and bank accounts;
- (b) Pearce was independently responsible for all marketing, estimating, building, sub-contracting and financing in relation to all projects,

¹¹³³ On 16 April 2009, the OFT issued a Supplementary Statement to Pearce, Pearce Group, Crest Nicholson, and the counter-Parties to Infringement 75 referred to in this company profile as 'the Supplementary Statement'.

¹¹³⁴ Written representations of Pearce Group, 1 June 2009, paragraphs 1.7, 2.8, 2.11 to 2.13 and 2.19; and oral representations of Pearce Group, 5 June 2009, page 5.

¹¹³⁵ Whilst Pearce Group submitted that the Supplementary Statement was not clear in this respect, it is apparent from its representations that it understood the basis for the OFT's finding of liability against it (see written representations of Pearce Group, 1 June 2009, paragraphs 2.4, 2.14, 2.17).

¹¹³⁶ Written representations of Pearce Group, 1 June 2009, paragraphs 1.6, 2.7 and 2.17 to 2.19.

¹¹³⁷ Written representations of Pearce Group, 1 June 2009, paragraphs 1.6, 2.17 and 2.20.

¹¹³⁸ Written representations of Pearce Group, 1 June 2009, paragraphs 1.6, 2.20 to 2.22 and 2.28.

including receiving payments from clients and making payments to sub-contractors;

- (c) Pearce Group had no involvement in the day-to-day management of Pearce;
- (d) whilst Pearce Group received monthly summary reports of Pearce's activities, and was required to sign-off contracts with a value over £3 million, according to Pearce Group the same is true of many other subsidiaries;
- (e) Pearce bid for, entered into and undertook contracts in its own name;
- (f) Pearce did not require any specific authority to bid for the contract which was the subject of the Infringement, and Pearce Group would only have received summary details of the contract after the event; and
- (g) all of the work involved in preparing the tender giving rise to the Infringement was carried out by Pearce, the bid was submitted in Pearce's name and, had it been successful, Pearce would have undertaken the work and received payment. The customer involved in the Infringement also considered Pearce to be the contracting party and provider of the tender services.

Pearce Group therefore concluded (and, in particular, from points (e) and (g)) that Pearce was selling its own services.¹¹³⁹

II.1025. The OFT does not consider the factors described in sub-paragraphs II.1024(a) to (g) to be inconsistent with an undisclosed agency relationship operating between Pearce Group and Pearce, and therefore they do not undermine the OFT's conclusion that Pearce Group was directly involved in the relevant Infringement as undisclosed principal of Pearce. The OFT does not accept, however, Pearce Group's conclusion that Pearce was selling its own services. Rather, the OFT is of the view that Pearce was providing services in its own name, but on behalf of its undisclosed principal Pearce Group, and that any monies received were held by Pearce for the benefit of Pearce Group. Pearce Group's analysis is also inconsistent with the terms of the agency agreement which existed between Pearce and Pearce Group, a copy of which has been provided to the OFT¹¹⁴⁰, and with Pearce's statutory accounts (see paragraph II.1018 above).

II.1026. Pearce Group also made representations about the payment of dividends by Pearce and the treatment of assets and liabilities in Pearce's accounts.¹¹⁴¹ According to Pearce Group, these factors supported the view that Pearce provided services in its own right. In the OFT's view, however, Pearce's statutory accounts do not accord with a trading company generating its own turnover and paying dividends to its parent companies from its own profits, but rather are consistent with Pearce acting as undisclosed agent of Pearce Group, and with the terms of the agency agreement between them.

¹¹³⁹ Written representations of Pearce Group, 1 June 2009, paragraphs 2.22 to 2.26.

¹¹⁴⁰ Letter to the OFT from Pearce Group, 12 June 2009, attaching the Agency Agreement, dated 29 October 1989, between Pearce (formerly W.A. Cox (Evesham) Limited) and Pearce Group (formerly C.H. Pearce & Sons plc).

¹¹⁴¹ Written representations of Pearce Group, 1 June 2009, paragraph 2.27.

II.1027. The OFT therefore remains of the view that Pearce Group is liable for the relevant Infringement, not only because it exercised decisive influence over Pearce, but because of its direct involvement in the relevant tender as undisclosed principal of Pearce. The agency relationship also means that Pearce Group is not in the same position as other intermediate parent companies in this case, and the OFT is therefore not discriminating against Pearce Group by including it as an addressee of this Decision.

II.1028. In its separate response to the Supplementary Statement, Crest Nicholson concurred with the OFT's analysis that Pearce was acting as the undisclosed agent of Pearce Group during the relevant period, and that Pearce could be correctly classified as an auxiliary to Pearce Group's business. Crest Nicholson agreed that Pearce Group should therefore be held jointly and severally liable as a result of having been directly involved in the Infringement.¹¹⁴²

Liability of Crest Nicholson

II.1029. In its response to the Statement, Pearce did not dispute that Pearce and Crest Nicholson formed part of the same undertaking at the time of the relevant Infringement.¹¹⁴³ In support of its position, Pearce cited the following factors:

- (a) Pearce's overall business plan was agreed by Crest Nicholson; and
- (b) Pearce's activities were reported to Crest Nicholson in summary form, and Don Ross, the holder of the common directorships identified above, ordinarily attended Pearce's board meetings.¹¹⁴⁴

II.1030. However Pearce submitted that Crest Nicholson should be held solely liable for Pearce's participation in the relevant Infringement, on the grounds that Crest Nicholson retained any resulting benefit by way of dividend payments or as proceeds of its subsequent sale of Pearce.¹¹⁴⁵

II.1031. In its separate responses to the Statement and Supplementary Statement, Crest Nicholson submitted that it should not be held liable for Pearce's and Pearce Group's participation in the relevant Infringement. In support of its submissions, Crest Nicholson put forward the following contentions:

- (a) Pearce and Pearce Group were autonomous businesses, and Crest Nicholson had no involvement in the operation of either business.¹¹⁴⁶ Moreover there is no evidence that Crest Nicholson was involved in or aware of the relevant Infringement;¹¹⁴⁷
- (b) Pearce and Pearce Group together had delegated decision-making authority in relation to contracts with a value below a certain level (tens

¹¹⁴² Written representations of Crest Nicholson, 29 April 2009, paragraph 3.3.

¹¹⁴³ Written representations of Pearce, 14 July 2008, paragraph 6.1.

¹¹⁴⁴ Written representations of Pearce, 14 July 2008, paragraph 6.1.

¹¹⁴⁵ Written representations of Pearce, 14 July 2008, paragraph 6.2; and written representations of Pearce Group, 1 June 2009, paragraph 5.9.

¹¹⁴⁶ Written representations of Crest Nicholson, 27 June 2008, paragraphs 4.5 and 4.6; and written representations of Crest Nicholson, 29 April 2009, paragraph 3.7. See also oral representations of Crest Nicholson, 25 July 2008, pages 4 to 5.

¹¹⁴⁷ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.34; and written representations of Crest Nicholson, 29 April 2009, paragraph 3.7.

of millions), while contracts above this threshold had to be reported to Crest Nicholson's Executive Committee, and decisions on contracts with a value of double that level had to be approved by that Committee. The tender which was the subject of the relevant Infringement had a value below £3.5 million, with the consequence that it would not have been brought to the attention of Crest Nicholson.¹¹⁴⁸ Similarly all of Pearce's business in 2000 and 2001 would have been conducted without the authorisation of Crest Nicholson;¹¹⁴⁹

- (c) By 2000, Crest Nicholson was actively considering a disposal of Pearce Group and its involvement in its subsidiary diminished. Pearce Group was subsequently acquired by its management team, who were central to the commercial behaviour and strategy of Pearce Group and Pearce during the relevant period;¹¹⁵⁰
- (d) Mr Ross, the holder of directorships in Crest Nicholson, Pearce Group and Pearce as identified above, was Chief Executive of Pearce Group at the time of the relevant Infringement. Mr Ross reported to the board of Crest Nicholson on the Pearce Group's results¹¹⁵¹ and on any financial and major operational issues.¹¹⁵² Mr Callcutt, the holder of directorships in both Crest Nicholson and Pearce Group as identified above, was Chief Executive of Crest Nicholson at the time of the relevant Infringement¹¹⁵³, and chaired meetings of the board of Pearce Group;¹¹⁵⁴
- (e) Pearce operated autonomously within the Pearce Group.¹¹⁵⁵ Mr Ross was not involved in the operational or strategic decisions of Pearce and had no executive responsibilities within Pearce. Pearce had its own separate operational board and its own managing director, John Darby, who had primary responsibility for Pearce's day-to-day operation. Mr Ross's role as a director of Pearce was primarily to monitor Pearce's financial performance.¹¹⁵⁶ Mr Ross would only visit Pearce in order to attend board meetings, or approve a proposed acquisition of land for residential development, or where difficulties arose in the carrying out of projects.¹¹⁵⁷ Mr Ross had no involvement in the negotiation of tenders at Pearce and took a 'hands-off' approach in relation to Pearce's operations;¹¹⁵⁸
- (f) The commercial name and logo of Crest Nicholson were not used interchangeably with those of Pearce for marketing purposes;¹¹⁵⁹

¹¹⁴⁸ Written representations of Crest Nicholson, 27 June 2008, paragraphs 4.7 and 4.13; and written representations of Crest Nicholson, 29 April 2009, paragraphs 3.7 and 3.10.

¹¹⁴⁹ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.7 and paragraph 1.10.

¹¹⁵⁰ Written representations of Crest Nicholson, 29 April 2009, paragraphs 3.8 to 3.9.

¹¹⁵¹ Witness statement of John Callcutt, 24 June 2008, paragraph 3.6; and written representations of Crest Nicholson, 29 April 2009, paragraph 3.8.

¹¹⁵² Witness statement of John Callcutt, 24 June 2008, paragraph 4.3.

¹¹⁵³ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.8

¹¹⁵⁴ Witness statement of John Callcutt, 24 June 2008, paragraph 4.1; and written representations of Crest Nicholson, 29 April 2009, paragraph 3.8.

¹¹⁵⁵ Witness Statement of James Ritchie, 24 June 2008, paragraph 2.3.

¹¹⁵⁶ Written representations of Crest Nicholson, 27 June 2008, paragraphs 4.9, 4.11, 4.12, 4.14, and 4.16.

¹¹⁵⁷ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.16; and oral representations of Crest Nicholson, 25 July 2008, page 5.

¹¹⁵⁸ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.34.

¹¹⁵⁹ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.31.

- (g) Pearce operated in different markets from Crest Nicholson's core business. Crest Nicholson was involved in private residential developments and mixed-use development projects through the services of sub-contractors. Pearce's business involved the provision of construction services¹¹⁶⁰, and in this regard Pearce and Pearce Group were functionally separate from Crest Nicholson.¹¹⁶¹

II.1032. Crest Nicholson also observed that the 100 per cent shareholding in Pearce was held directly by Pearce Group and only indirectly by Crest Nicholson.¹¹⁶²

II.1033. The OFT has taken into account all of the submissions put forward by Crest Nicholson in relation to this issue. The OFT considers that in the light of Crest Nicholson's 100 per cent ownership of Pearce and Pearce Group, and the common directorships identified above, it is entitled to presume that Crest Nicholson exercised decisive influence over Pearce and Pearce Group. Pursuant to the case law of the CFI, that presumption arises whether the parent's 100 per cent shareholding in its subsidiary is direct or indirect¹¹⁶³, and it therefore makes no difference that Crest Nicholson's shareholding in Pearce was held indirectly through its shareholding in Pearce Group.

II.1034. In the circumstances it falls to Crest Nicholson to rebut that presumption. The OFT considers that Crest Nicholson's arguments fall short of rebutting the presumption and do not establish that either Pearce or Pearce Group was able to determine its conduct on the market autonomously. In this regard, the OFT notes in particular the following:

- (a) There appears to have been significant integration of the management teams of Crest Nicholson, Pearce Group and Pearce by means of the roles carried out by Mr Ross and Mr Callcutt as identified above;
- (b) Pearce reported to Pearce Group and had its budgets set by Pearce Group¹¹⁶⁴, while Pearce Group's budgets were submitted to Crest Nicholson annually for approval.¹¹⁶⁵ Pearce Group reported on its performance against that budget at Pearce Group board meetings, which were chaired by Mr Callcutt (who was Chief Executive of Crest Nicholson)¹¹⁶⁶, and Mr Ross reported to the Crest Nicholson board on Pearce Group's results;¹¹⁶⁷
- (c) As set out above, Crest Nicholson retained the power to direct commercial strategy in relation to high-value contracts;¹¹⁶⁸

¹¹⁶⁰ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.32; and written representations of Crest Nicholson, 29 April 2009, paragraphs 3.7 and 3.10.

¹¹⁶¹ Written representations of Crest Nicholson, 27 June 2008, paragraph 4.33; and written representations of Crest Nicholson, 29 April 2009, paragraph 3.7.

¹¹⁶² Oral representations of Crest Nicholson, 25 July 2008, page 3; and written representations of Crest Nicholson, 27 June 2008, paragraph 4.22.

¹¹⁶³ See the judgment of the CFI in Case T-112/05 *Akzo Nobel* [2007] ECR II-5049 at paragraph 67, upheld by the ECJ on 10 September 2009, Case C-97/08P.

¹¹⁶⁴ Oral representations of Crest Nicholson, 25 July 2008, page 5.

¹¹⁶⁵ Witness statement of John Callcutt, 24 June 2008, paragraph 4.1.

¹¹⁶⁶ Witness statement of John Callcutt, 24 June 2008, paragraph 4.1.

¹¹⁶⁷ See above, paragraph II.1031(d).

¹¹⁶⁸ See Case T-112/05 *Akzo Nobel* [2007] ECR II-5049 at paragraphs 74 and 82, upheld by the ECJ on 10 September 2009, Case C-97/08P.

- (d) It has been suggested that the Crest Nicholson board on one occasion noted the poor margins being achieved by Pearce's business and that its future should be considered.¹¹⁶⁹ However the OFT has not been provided with any more evidence in this regard; and
- (e) For the reasons set out in paragraphs III.13 to III.18 below, the OFT considers that a parent company may be held liable for an infringement committed by its subsidiary even though it had no specific involvement in or knowledge of the infringing conduct. The OFT refers specifically in this regard to the quotation set out in paragraph III.18. Crest Nicholson cannot therefore escape liability for the Infringement by reference to its argument that it had no specific involvement in or knowledge of the infringing conduct.

II.1035. It follows that for present purposes Crest Nicholson, Pearce Group and Pearce formed part of the same undertaking at the time of the relevant Infringement. In those circumstances, the OFT is entitled to hold Crest Nicholson, Pearce Group and Pearce jointly and severally liable for Pearce's and Pearce Group's participation in the relevant Infringement.¹¹⁷⁰

II.1036. In light of the above, this Decision is addressed to Crest Nicholson, Pearce Group and Pearce.

Peter Baines Limited ('Peter Baines')

II.1037. Peter Baines is a private limited company registered in England, company number 01099776.¹¹⁷¹ Peter Baines's registered and primary trading address is Woods Lane, Derby, Derbyshire, DE22 3UD.¹¹⁷²

II.1038. At the time of issue of the Statement, Peter Baines operated as general building contractors specialising in refurbishment in the commercial sector and private and public housing. At the time of issue of the Statement, it also manufactured joinery products.¹¹⁷³ Peter Baines did not carry out work outside the United Kingdom.

II.1039. Peter Baines does not have any holding companies or subsidiaries.¹¹⁷⁴

II.1040. Peter Baines's turnover for the financial year ending 31 March 2008 was [...] [C].¹¹⁷⁵

II.1041. The directors of Peter Baines from 2000 to 2006 were as follows:¹¹⁷⁶

¹¹⁶⁹ Witness statement of William George Hague, 19 June 2008, paragraph 3.

¹¹⁷⁰ See Case C-97/08P *Akzo Nobel* ECJ Judgment of 10 September 2009; also Case T-69/04 *Schunk*, judgment of the CFI of 8 October 2008 (not yet reported), at paragraphs 53 et seq. (in particular paragraphs 75 and 76).

¹¹⁷¹ FAME report, OFT Document Reference 12301.

¹¹⁷² FAME report, OFT Document Reference 12301.

¹¹⁷³ FAME report OFT Document Reference 12301, and Market definition response, OFT Document Reference 6554.

¹¹⁷⁴ FAME report, OFT Document Reference 12301.

¹¹⁷⁵ Letter from Peter Baines, 28 April 2009.

¹¹⁷⁶ Company Appointments, OFT Document Reference 12304.

- Peter Baines 2000 – 2006
- Stephen Baines 2000 – 2006
- Iris Norah Windsor Baines 2000 – 2006

II.1042. Peter Baines did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹¹⁷⁷

II.1043. This Decision is addressed to Peter Baines. The OFT considers that Peter Baines is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Phoenix Contracts (Leicester) Limited ('Phoenix')

II.1044. Phoenix is a private limited company registered in England and Wales, company number 02715613.¹¹⁷⁸ Phoenix's registered and trading address is Townsend Road, Enderby, Leicester, Leicestershire, LE19 4PG.¹¹⁷⁹

II.1045. The principal activity of Phoenix is the refitting of leisure and entertainment venues.¹¹⁸⁰ Phoenix does not carry out work outside the United Kingdom.

II.1046. Phoenix has two wholly owned subsidiaries.¹¹⁸¹

II.1047. Phoenix's consolidated turnover for the financial year ending 31 May 2009 was [...] [C].¹¹⁸²

II.1048. The directors of Phoenix from 2003 to 2006 were as follows:¹¹⁸³

- Martin Stuart Shepherd 2003 – 2006
- Michael Roy Williamson 2003 – 2006

II.1049. Phoenix applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹¹⁸⁴

II.1050. This Decision is addressed to Phoenix. The OFT considers that Phoenix is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

¹¹⁷⁷ See paragraphs II.1481 to II.1487 below.

¹¹⁷⁸ FAME report, OFT Document Reference 12329.

¹¹⁷⁹ FAME report, OFT Document Reference 12329.

¹¹⁸⁰ Abbreviated Accounts, OFT Document Reference 12332.

¹¹⁸¹ Latest available FAME report of Phoenix.

¹¹⁸² Letter from Harvey Ingram LLP, 28 July 2009.

¹¹⁸³ Company Appointment Report, OFT Document Reference 12330.

¹¹⁸⁴ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

ISG Jackson Limited ('Jackson')
ISG Regions Limited formerly known as Totty Construction Group Limited ('Totty')
ISG Regions Building Limited formerly known as Totty Building Services Limited ('Totty Building')
Propensity Limited
Propensity Group Limited ('Propensity')

Jackson

- II.1051. Jackson is a private limited company registered in England and Wales, company number 00767259.¹¹⁸⁵ Jackson's registered and trading address is Jackson House, 86 Sandyhill Lane, Ipswich, Suffolk, IP3 0NA.¹¹⁸⁶
- II.1052. At the time of the Infringements, Jackson undertook a range of construction and design projects in all construction sectors including private and public sector housing, commercial and industrial construction in markets such as, education, health and leisure. At the time of the Infringements Jackson operated across East Anglia and the South East of England.¹¹⁸⁷
- II.1053. Jackson was named Jackson Building Limited until 8 April 2002 when it changed its name to Jackson Construction Limited. On 1 September 2006 it changed to its current name, Jackson.¹¹⁸⁸

30 June 2002 until 29 September 2005

- II.1054. On 30 June 2002 ownership of Jackson was transferred to Propensity Limited.¹¹⁸⁹ From 30 June 2002 until 29 September 2005 Jackson's immediate parent company was Propensity Limited.¹¹⁹⁰ During this period Jackson was a wholly owned subsidiary of Propensity Limited.¹¹⁹¹
- II.1055. At the time of the Infringements Jackson had four wholly owned subsidiaries.¹¹⁹²

Totty

- II.1056. Totty is a private limited company registered in England and Wales, company number 00450103.¹¹⁹³ Totty's registered address is Building 1, Exchange Quay, Salford Quays, M5 3EA.¹¹⁹⁴ Totty's primary trading address is Woodland House, Woodland Park, Bradford Road, Chain Bar, Bradford, West Yorkshire, BD19 6BW.¹¹⁹⁵

¹¹⁸⁵ FAME report, OFT Document Reference 12347.

¹¹⁸⁶ FAME report, OFT Document Reference 12347.

¹¹⁸⁷ Market definition response, OFT Document Reference A2424.

¹¹⁸⁸ FAME report, OFT Document Reference 12347.

¹¹⁸⁹ Written representations of Propensity Group, 27 June 2008 (as amended on 31 March 2009), paragraph 2.2.13 and Annex 1 (copy of register of transfers). See further footnote II.1240 below.

¹¹⁹⁰ FAME report, OFT Document Reference 12347, written representations of Propensity Group paragraph 2.2.13 and Annex 4

¹¹⁹¹ FAME report, OFT Document Reference 12344.

¹¹⁹² FAME report, OFT Document Reference 12347.

¹¹⁹³ FAME report, OFT Document Reference 12346.

¹¹⁹⁴ Latest available FAME report for Totty.

¹¹⁹⁵ Written representation of Propensity Group, 27 June 2008 (as amended on 31 March 2009), paragraph 2.2.7.

II.1057. At the time of the relevant Infringement, Totty undertook both construction and design projects for refurbished and new buildings and provided services mainly to the private sector housing market and the commercial construction market.¹¹⁹⁶

II.1058. Totty was named Totty Construction Group plc until 2 January 2003 when it changed its name to Totty Construction Group Limited. On 1 September 2006, Totty Construction Group Limited changed its name to ISG Totty Limited.¹¹⁹⁷ On 2 July 2007, Totty changed its name to ISG Regions Limited.¹¹⁹⁸

3 January 2003 to 2006

II.1059. From 3 January 2003 to 2006 Totty's immediate parent company was Propensity Limited.¹¹⁹⁹ Totty was a wholly owned subsidiary of Propensity Limited.¹²⁰⁰

II.1060. At the time of the relevant Infringement Totty had eight wholly owned subsidiaries, including Totty Building.¹²⁰¹

Totty Building

II.1061. Totty Building is a private limited company registered in England and Wales, company number 00315305.¹²⁰² Totty Building's registered and primary trading address is Building 1, Exchange Quay, Salford Quays, M5 3EA.¹²⁰³

II.1062. At the time of the Infringements, Totty Building undertook both construction and design projects for refurbished and new buildings and was active primarily in the commercial construction market.¹²⁰⁴

II.1063. Prior to 1 September 2006, Totty Building was called Totty Building Services Limited.¹²⁰⁵ On 14 July 2008 Totty Building changed its name to ISG Regions Building Limited.¹²⁰⁶

II.1064. At the time of the Infringements Totty Building's immediate parent company was Totty.¹²⁰⁷ Totty Building was a wholly owned subsidiary of Totty.¹²⁰⁸

II.1065. Totty Building has no subsidiaries.¹²⁰⁹

Propensity Limited

¹¹⁹⁶ Market definition response, OFT Document Reference A2424.

¹¹⁹⁷ FAME report, OFT Document Reference 12346.

¹¹⁹⁸ Company details, OFT Document Reference SA039.

¹¹⁹⁹ FAME report, OFT Document Reference 12344 and written representations of Propensity Group, 27 June 2008 (as amended on 31 March 2009) paragraph 2.2.13 and Annex 3 (statutory register of transfers).

¹²⁰⁰ FAME report, OFT Document Reference 12344.

¹²⁰¹ FAME report, OFT Document Reference 12346.

¹²⁰² FAME report, OFT Document Reference 14412.

¹²⁰³ Latest available FAME report for Totty Building

¹²⁰⁴ Market definition response, OFT Document Reference A2424.

¹²⁰⁵ FAME report, OFT Document Reference 14412.

¹²⁰⁶ Companies House details.

¹²⁰⁷ FAME report, OFT Document Reference 14412

¹²⁰⁸ FAME report, OFT Document Reference 14412

¹²⁰⁹ FAME report, OFT Document Reference 14412.

- II.1066. Propensity Limited is a private limited company registered in England and Wales, company number 02517333.¹²¹⁰ Propensity Limited's registered address is c/o Interior Services Group Plc, Aldgate House, 33 Aldgate High Street, London, EC3N 1AG.¹²¹¹ Propensity Limited also has a trading address in West Yorkshire.¹²¹²
- II.1067. Prior to 14 March 2002, Propensity Limited was named Totty Group plc. Between 14 March 2002 and 2 January 2003 Propensity Limited was called Propensity plc.¹²¹³
- II.1068. From 30 June 2002 to 2006 Propensity Limited was the immediate parent company of Jackson.¹²¹⁴
- II.1069. From 3 January 2003 to 2006 Propensity Limited was also the immediate parent of Totty and hence an intermediate parent company of Totty Building.¹²¹⁵
- II.1070. On 3 January 2003 ownership of Propensity Limited was acquired by Propensity.¹²¹⁶ From 3 January 2003 to 29 September 2005 Propensity Limited was a wholly owned subsidiary of Propensity.¹²¹⁷

Propensity

- II.1071. Propensity is a private limited company registered in England and Wales, company number 04545988.¹²¹⁸ Propensity's registered address is c/o Interior Services Group plc, Aldgate House, 33 Aldgate High Street, London, EC3N 1AG.¹²¹⁹ Propensity was incorporated on 26 September 2002 as Inhoco 2739 Limited and changed its name to Propensity on 21 November 2002.¹²²⁰ On 3 January 2003 it acquired 100 per cent of the issued share capital of Propensity Limited at which time Propensity became the ultimate parent company of Propensity Limited and Jackson.¹²²¹ On 3 January 2003, when Propensity Limited became the immediate parent of Totty, Propensity thereby also became the ultimate parent company of Totty and Totty Building.¹²²²
- II.1072. The relevant company structure for Jackson from 30 June 2002 until 2 January 2003 was therefore as follows:

¹²¹⁰ FAME report, OFT Document Reference 12344.

¹²¹¹ Latest available FAME report.

¹²¹² Latest available FAME report.

¹²¹³ FAME report, OFT Document Reference 12344.

¹²¹⁴ Written representations of Propensity Group, 27 June 2008 (as amended on 31 March 2009), paragraph 2.2.13 and Annexes 1 and 4.

¹²¹⁵ Written representations of Propensity Group, 27 June 2008 (as amended on 31 March 2009), paragraph 2.2.13 and annexes 3 and 4.

¹²¹⁶ Special resolution, passed by written resolution, of Propensity Limited, dated 3 January 2003.

¹²¹⁷ FAME report, OFT Document Reference 12344.

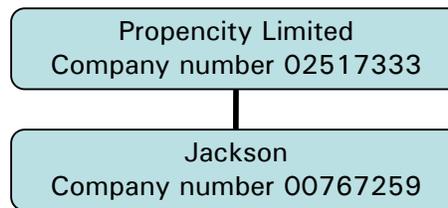
¹²¹⁸ FAME report, OFT Document Reference 12351.

¹²¹⁹ FAME report, OFT Document Reference 12351.

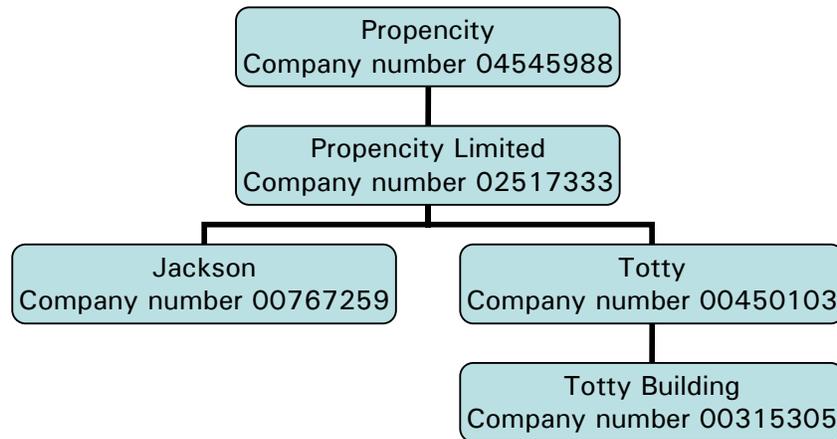
¹²²⁰ Report and Financial Statements, OFT Document Reference 12365 page 5.

¹²²¹ Special resolution, passed by written resolution, of Propensity Limited, dated 3 January 2003

¹²²² Report and Financial Statements, OFT Document Reference 12365 page 22 and written representations of Propensity Group paragraph 2.2.13 and annex 5



II.1073. The overall structure from 3 January 2003 until 29 September 2005 was as follows:



II.1074. At the time of issue of the Statement Propensity had 19 wholly owned subsidiaries.¹²²³

II.1075. At the time of issue of the Statement Propensity Limited had 18 wholly owned subsidiaries.¹²²⁴

II.1076. Jackson's consolidated turnover for the financial year ending 30 June 2008 was £108,847,000.¹²²⁵

II.1077. Totty's turnover for the financial year ending 30 June 2008 was [...] [C].¹²²⁶

II.1078. Propensity's consolidated turnover for the financial year ending 30 June 2008 was [...] [C].¹²²⁷

II.1079. The directors of Jackson from 2000 to 2006 were as follows:¹²²⁸

- Phillip Allerton	2000 – 2006
- David Martin Best	2 May 2001 – 31 January 2003
- David Matthew Bramwell	2 May 2001 – 31 March 2002
- Philip Brierley	2000 – 28 June 2006

¹²²³ Written representations of Propensity Group, 27 June 2008 (as amended on 31 March 2009), paragraph 2.2.17

¹²²⁴ Written representations of Propensity Group, 27 June 2008 (as amended on 31 March 2009), paragraph 2.2.18

¹²²⁵ Letter from Jacksons, 14 August 2009.

¹²²⁶ Letter from Totty, 14 August 2009.

¹²²⁷ Letter from Propensity, 14 August 2009.

¹²²⁸ Company Appointments Report, OFT Document Reference 12358a.

- Bernard Francis Clarke 2000 – 2006
- Peter Kenneth Fryer 2000 – 31 December 2000
- Christopher Brian Harrall 4 February 2003 – 2006
- Mark Anthony Hart 1 November 2005 – 2006
- Richard James Jones 4 February 2003 – 22 September 2006
- Samuel David Lawther 1 July 2006 – 2006
- John William Murphy 2000 – 30 November 2001
- Michael John Phillips 17 September 2001 – 2006
- Thomas Albert Sayer 4 February 2003 – 9 December 2005
- Terence James Travers 1 December 2001 – 27 August 2002

II.1080. The directors of Totty from 2000 to 2006 were as follows:¹²²⁹

- David Martin Best 2000 – 2 January 2003
- Stephen William Bolton 15 April 2002 – 6 December 2004
- David Matthew Bramwell 2000 – 31 March 2002
- Philip Brierley 2000 – 28 June 2006
- Neil Brown 2000 – 30 June 2001
- Terry Cook 1 March 2000 – 7 July 2006
- Graham Stephen Cragg 18 April 2002 – 1 July 2006
- Andrew Mark Finn 6 October 2003 – 2006
- Mark Barry Fairclough 20 June 2001 – 7 July 2006
- John Joseph Gittins 21 May 2004 – 2006
- Jonathan Charles Bennett
Houlton 1 August 2006 – 2006
- David James Jackson 2000 – 2 January 2003
- Richard James Jones 29 October 2001 – 21 July 2006
- Samuel David Lawther 1 July 2006 – 2006
- Michael James Parkinson 2000 – 8 June 2004
- Mark John Peatfield 3 April 2000 – 8 April 2002
- David Stones 1 January 2005 – 26 May 2006
- Craig Nicholas Tatton 1 July 2006 – 2006
- Joseph Patrick Martin Webb 1 July 2006 – 2006

II.1081. The directors of Totty Building from 2000 to 2006 were as follows:¹²³⁰

- David Martin Best 2000 – 3 January 2003
- David Matthew Bramwell 2000 – 31 March 2002
- Philip Brierley 2000 – 28 June 2006
- Neil Brown 2000 – 30 June 2001
- Andrew Mark Finn 6 October 2003 – 2006
- Jonathan Charles Bennett
Houlton 1 August 2006 – 2006
- David James Jackson 2000 – 3 January 2003
- Richard James Jones 29 October 2001 – 21 July 2006
- Samuel David Lawther 1 July 2006 – 2006
- Brian Gareth Anthony Moore 1 January 2004 – 30 July 2007
- Michael James Parkinson 4 April 2003 – 8 June 2004
- Anthony Rogan 2000 – 15 April 2003
- Philip Ryder 4 April 2003 – 2006
- Simon Lawrence Smith 11 June 2001 – 15 April 2003

¹²²⁹ Company Appointments Report, OFT Document Reference 12362.

¹²³⁰ Company Appointments Report, OFT Document Reference 14413.

- Craig Nicholas Tatton 1 July 2006 – 2006
- Joseph Patrick Martin Webb 1 July 2006 – 2006

II.1082. The directors of Propensity Limited from 2000 to 2006 were as follows:¹²³¹

- David Martin Best 2000 – 3 January 2003
- David Matthew Bramwell 2000 – 31 March 2002
- Philip Brierley 2000 – 28 June 2006
- Neil Brown 2000 – 30 June 2001
- Bernard Francis Clarke 1 May 2002 – 2006
- Graham Stephen Cragg 1 May 2002 – 2006
- Andrew Mark Finn 26 September 2006 – 2006
- Jonathan Charles Bennett 1 August 2006 – 2006
Houlton
- David James Jackson 2000 – 3 January 2003
- Richard James Jones 29 October 2001 – 22 September 2006
- Michael James Parkinson 1 May 2002 – 8 June 2004

II.1083. The directors of Propensity from 2002 to 2006 are set out below.¹²³²
Propensity was incorporated on 29 September 2002.

- Richard Jeremy Archer 1 May 2003 – 28 June 2004
- Phillip Brierley 20 November 2002 – 28 June 2006
- Bernard Francis Clarke 20 November 2002 – 2006
- Philip Arthur Cleaver 1 October 2004 – 26 September 2005
- Graham Stephen Cragg 20 November 2002 – 2006
- Andrew Mark Finn 26 September 2006 – 2006
- Jonathan Charles Bennett 1 August 2006 – 2006
Houlton
- Richard James Jones 20 November 2002 – 22 September 2006
- John David King 28 September 2005 – 30 June 2006
- Samuel David Lawther 28 September 2005 – 2006
- Michael James Parkinson 20 November 2002 – 8 June 2004

II.1084. The following directors have been on the Board of Directors of both Jackson and Propensity Limited during the period mentioned below.¹²³³ The OFT considers that this provides evidence that Propensity Limited exercised decisive influence over Jackson's conduct for periods including the time of the relevant Infringement (September 2002).

- David Martin Best 2 May 2001 – 3 January 2003
- David Matthew Bramwell 2 May 2001 – 31 March 2002
- Philip Brierley 2000 – 28 June 2006
- Bernard Francis Clarke 1 May 2002 – 2006

II.1085. The following directors have been on the Board of Directors of both Jackson and Propensity during the period mentioned below.¹²³⁴ The OFT considers that this provides evidence that Propensity exercised decisive influence over Jackson's conduct for periods including the time of the relevant Infringements (May 2004 to September 2005).

¹²³¹ Company Appointments Report, OFT Document Reference 12359.

¹²³² Company Appointments Report, OFT Document Reference 12355.

¹²³³ Company Appointments Report, OFT Document Reference 12358a and 12359.

¹²³⁴ Company Appointments Report, OFT Document Reference 12358a and 12355.

- Phillip Brierley 20 November 2002 – 28 June 2006
- Bernard Francis Clarke 20 November 2002 – 2006
- Richard James Jones 4 February 2003 – 22 September 2006

II.1086. The following directors¹²³⁵ have been on the Board of Directors of both Totty and Propensity during the period mentioned below.¹²³⁶ The OFT considers that this provides evidence that Propensity exercised decisive influence over Totty's conduct for periods including the time of the relevant Infringement (June 2005).

- Philip Brierley 20 November 2002 – 28 June 2006
- Graham Stephen Cragg 20 November 2002 – 1 July 2006
- Richard James Jones 20 November 2002– 21 July 2006

II.1087. The following directors¹²³⁷ have been on the Board of Directors of both Totty Building and Propensity during the period mentioned below.¹²³⁸ The OFT considers that this provides evidence that Propensity exercised decisive influence over Totty Building's conduct for periods including the time of the relevant Infringements (February 2003 and December 2004).

- Phillip Brierley 20 November 2002 – 28 June 2006
- Richard James Jones 20 November 2002 – 21 July 2006

II.1088. Propensity applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹²³⁹

II.1089. The OFT considers that Jackson is liable for the Infringements described in this Decision prior to 30 June 2002.¹²⁴⁰

II.1090. The OFT considers that Propensity Limited, as 100 per cent owner of Jackson, can be presumed to have exercised decisive influence over Jackson's commercial policy at the time of Infringement 119 and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Propensity Limited and Jackson. Propensity Limited and Jackson will therefore be jointly and severally liable for Jackson's participation in Infringement 119.

II.1091. The OFT considers that Propensity, as 100 per cent indirect owner of Jackson, can be presumed to have exercised decisive influence over Jackson's commercial policy from 3 January 2003 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Propensity and

¹²³⁵ The listed directors were also directors of Propensity Limited, Totty's intermediate parent company, at the time stated.

¹²³⁶ Company Appointments Report, OFT Document Reference 12362 and 12355.

¹²³⁷ The listed directors were also directors of Totty and Propensity Limited, Totty Building's intermediate parent company, at the time stated.

¹²³⁸ Company Appointments Report, OFT Document Reference 12355 and 12359

¹²³⁹ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

¹²⁴⁰ The OFT notes that it could have exercised its discretion to seek to find jointly and severally liable Peterhouse Group Limited as Jackson's parent company at the time of infringements 77 and 103. As no penalty is being imposed in respect of those infringements and as the Statement was not addressed to Peterhouse Group Limited in its capacity as Jackson's parent, the OFT is making no finding of liability in relation to Peterhouse Group Limited in respect of infringements 77 and 103.

Jackson. Jackson and Propensity are therefore jointly and severally liable for Jackson's participation in the relevant Infringements. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing, in respect of Infringement 235.¹²⁴¹

- II.1092. The OFT considers that Propensity, as 100 per cent indirect owner of Totty, can be presumed to have exercised decisive influence over Totty's commercial policy from 3 January 2003 to 2006 and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Propensity and Totty. Totty and Propensity are therefore jointly and severally liable for Totty's participation in the relevant Infringement.
- II.1093. The OFT considers that Propensity, as 100 per cent indirect owner of Totty Building can be presumed to have exercised decisive influence over Totty Building's commercial policy from 3 January 2003 to 2006 and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Propensity and Totty Building. Totty Building and Propensity are therefore jointly and severally liable for Totty Building's participation in the relevant Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 138 and 213.
- II.1094. Since the Infringements described in this Decision, Propensity has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Propensity at the relevant times, it is not jointly and severally liable with Propensity for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Propensity.
- II.1095. This Decision is therefore addressed to Propensity, Propensity Limited, Jackson, Totty and Totty Building.

Quarmby Construction Company Limited ('Quarmby')
St James Securities Holdings Limited ('St James Securities')

- II.1096. Quarmby is a private limited company registered in England and Wales, company number 01553002.¹²⁴² Quarmby's registered and trading address is 2 Grove Promenade, Ilkley, West Yorkshire, LS29 8AF.¹²⁴³
- II.1097. Quarmby undertakes building and civil engineering work, mainly in the Yorkshire and Humberside areas.¹²⁴⁴ Quarmby does not carry out work outside the United Kingdom.
- II.1098. At the time of issue of the Statement, Quarmby was 80 per cent¹²⁴⁵ owned by Quarmby Design Build Limited ('Quarmby Design'), which was wholly owned by St James Securities.¹²⁴⁶

¹²⁴¹ The penalty in respect of Infringement 235 is reduced to zero as this is a 'But for' Infringement.

¹²⁴² FAME report, OFT Document Reference 12388.

¹²⁴³ FAME report, OFT Document Reference 12388.

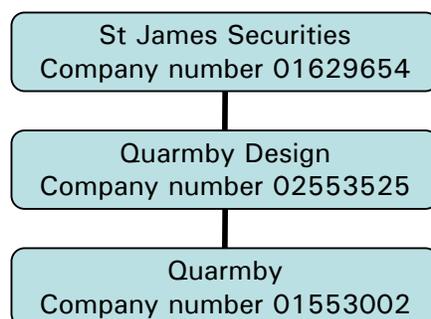
¹²⁴⁴ Market Definition response, OFT Document Reference 6469, page 1.

¹²⁴⁵ FAME report, OFT Document Reference 12388.

II.1099. Quarmby's ultimate parent company is St James Securities a private limited company, company number 01629654.¹²⁴⁷ St James Securities' registered address is 4th Floor Bridgewater Place, Water Lane, Leeds, West Yorkshire LS11 5BZ.¹²⁴⁸ St James Securities also has a trading address in West Yorkshire.¹²⁴⁹

II.1100. Quarmby has no subsidiaries.¹²⁵⁰

II.1101. The overall company structure from 2000 – 2006 is outlined below:



II.1102. St James Securities has six other subsidiaries.¹²⁵¹

II.1103. St James Securities' consolidated group turnover for the financial year ending 31 March 2009 was [...] [C].¹²⁵²

II.1104. The directors of Quarmby from 2000 to 2006 were as follows:¹²⁵³

- James Arthur Barrie	2000 – 12 August 2003
Corscadden	
- Robert Russell Hicks	1 January 2002 – 2006
- David Anthony Jones	2000 – 2006
- Roger Nelson	1 January 2002 – 2006
- James Roger Quarmby	2000 – 2006

II.1105. The directors of St James Securities from 2000 to 2006 were as follows:¹²⁵⁴

- Ian Firth Barraclough	2000 – 2006
- James Arthur Barrie	2000 – 12 August 2003
Corscadden	
- James Roger Quarmby	2000 – 2006
- Roland Peter Stross	2000 – 2006

II.1106. The following directors have been on the Board of Directors of both Quarmby and St James Securities during the periods mentioned below.¹²⁵⁵ The OFT

¹²⁴⁶ FAME reports, OFT Document Reference 12388 and 12389.

¹²⁴⁷ FAME report, OFT Document Reference 12389.

¹²⁴⁸ FAME report, OFT Document Reference 12389.

¹²⁴⁹ Latest available FAME report of St James Securities.

¹²⁵⁰ FAME report, OFT Document Reference 12388.

¹²⁵¹ FAME report, OFT Document Reference 12389.

¹²⁵² Email from Walker Morris, 30 July 2009.

¹²⁵³ Company Appointments Report, OFT Document Reference 12393.

¹²⁵⁴ Company Appointments Report, OFT Document Reference 12394.

considers that this provides evidence that St James Securities exercised decisive influence over Quarmby's conduct at the time of the Infringements.

- James Arthur Barrie 2000 – 12 August 2003
 Corscadden
- James Roger Quarmby 2000 – 2006

II.1107. Quarmby did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, St James Securities, were given the opportunity of accepting the OFT's Fast Track Offer.¹²⁵⁶

II.1108. The OFT considers that St James Securities, as the ultimate owner of 80 per cent of Quarmby and having Directors in common, can be presumed to have exercised decisive influence over Quarmby's commercial policy during the relevant period and therefore forms part of the same economic entity. Quarmby and St James Securities are therefore jointly and severally liable for Quarmby's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.1109. In its response to the Statement, St James Securities submitted that it should not be held liable for Quarmby's participation in the relevant Infringements. In support of its submission, St James Securities put forward the following contentions:

- (a) Quarmby and St James Securities operated as independent autonomous businesses and were active in different sectors: St James Securities operated a property development business while Quarmby was a construction business.¹²⁵⁷ Quarmby carried out work for St James Securities, but did so pursuant to contracts negotiated on an arms-length commercial basis.¹²⁵⁸ There were no reporting lines between Quarmby and St James Securities¹²⁵⁹ and there was no routine managerial contact between Quarmby and St James Securities.¹²⁶⁰
- (b) Quarmby's day-to-day affairs were controlled by its Managing Director, David Jones¹²⁶¹, who determined its commercial strategy and was responsible for its tendering and purchasing decisions.¹²⁶² The holder of the shared directorships identified above, James Roger Quarmby, was the Chairman of Quarmby and a non-executive director.¹²⁶³ Mr Quarmby attended board meetings of Quarmby solely in an advisory capacity.¹²⁶⁴ Furthermore Mr Quarmby was not informed of all Quarmby bidding

¹²⁵⁵ Company Appointments Reports, 12393 and 12394.

¹²⁵⁶ See paragraphs II.1481 to II.1487 below.

¹²⁵⁷ Written representations of St James Securities, 27 June 2008, paragraph 10; Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 39.

¹²⁵⁸ Written representations of St James Securities, 27 June 2008, paragraph 9(b); Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 13.

¹²⁵⁹ Written representations of St James Securities, 27 June 2008, paragraph 19; Witness Statement of James Roger Quarmby, dated 27 June 2008, paragraph 71.

¹²⁶⁰ Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 72.

¹²⁶¹ Written representations of St James Securities, 27 June 2008, paragraph 12; Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 43.

¹²⁶² Written representations of St James Securities dated 27 June 2008, paragraphs 12-13; Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 61.

¹²⁶³ Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 1.

¹²⁶⁴ Written representations of St James Securities, 27 June 2008, paragraph 22(a); Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 43.

decisions, and had no knowledge of the tenders which are the subject of the relevant Infringements.¹²⁶⁵

- (c) The holder of the additional shared directorships identified above, Mr Corscadden, had a reduced role in Quarmby's business until his retirement as a director of Quarmby in August 2003.¹²⁶⁶
- (d) St James Securities had no involvement in setting Quarmby's budget, approving its expenditure or approving its business plan.¹²⁶⁷ Occasionally St James Securities was asked to guarantee Quarmby's contractual obligations, but did so only on an arm's length basis and with separate advice from St James Securities' internal legal director.¹²⁶⁸

II.1110. The OFT has taken into account all of St James Securities' submissions in relation to this issue. The OFT considers that, in the light of St James Securities' 80 per cent shareholding in Quarmby and the common directorships identified above, it is entitled to presume that St James Securities exercised decisive influence over Quarmby in accordance with the principles set out in paragraphs III.19 to III.24 below.

II.1111. In any event, the OFT considers that the available factual information shows that St James Securities exercised decisive influence over Quarmby at the time of the relevant Infringements. In this regard the OFT refers in particular to the following:

- (a) Mr Quarmby's evidence indicates that there was significant financial interdependence between St James Securities and Quarmby at the time of the relevant Infringements. From 1991, the financial results of Quarmby were consolidated in St James Securities' financial statements and the banking functions of St James Securities and Quarmby were amalgamated.¹²⁶⁹ This improved the overall financial picture and both St James Securities' and Quarmby's ability to trade¹²⁷⁰, and allowed St James Securities to benefit from the merged entities cash position to provide working capital for its property development activities.¹²⁷¹ In addition, the OFT refers to St James Securities' reliance on Quarmby's cash position during the entirety of the period during which the relevant Infringements occurred.¹²⁷²
- (b) Mr Quarmby, the Chairman of St James Securities, was also Chairman of Quarmby and attended Quarmby board meetings.¹²⁷³ At those meetings Mr Quarmby participated in discussions regarding the financial

¹²⁶⁵ Witness Statement of James Roger Quarmby, 27 June 2008, paragraphs 61 and 63.

¹²⁶⁶ Witness Statement of James Roger Quarmby, 27 June 2008, paragraphs 42 to 43; see also written representations of St James Securities, 27 June 2008, paragraph 22(b).

¹²⁶⁷ Written representations of St James Securities, dated 27 June 2008, paragraph 17; Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 75.

¹²⁶⁸ Written representations of St James Securities, 27 June 2008, paragraph 18; Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 74.

¹²⁶⁹ Witness Statement of James Roger Quarmby, 27 June 2008, paragraphs 26 to 27.

¹²⁷⁰ Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 29.

¹²⁷¹ Witness Statement of James Roger Quarmby, 27 June 2008, paragraphs 23 and 31.

¹²⁷² Witness Statement of James Roger Quarmby, 27 June 2008, paragraphs 38 and 45 to 48.

¹²⁷³ See above, II.1109(b); Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 1.

and commercial aspects of Quarmby's business.¹²⁷⁴ Where issues arose within the Quarmby business which were of *'direct relevance'* to St James Securities, Mr Quarmby would refer those issues to other St James Securities board members¹²⁷⁵, and Mr Quarmby has given evidence to the effect that *'there [was] a general understanding at St James Securities that if anyone were to want [him] to raise a specific issue with the Quarmby Board they could mention it to [him] in advance'*.¹²⁷⁶

- (c) Mr Quarmby's evidence indicates that there were no restrictions on the exercise of St James Securities' 80 per cent shareholding in Quarmby and the associated ownership rights.¹²⁷⁷

II.1112. In addition, for the reasons set out in Section III (Legal Background), the OFT considers that a parent company may be held liable for an infringement committed by its subsidiary even though it had no specific involvement in or knowledge of the infringing conduct. The OFT refers specifically in this regard to paragraph III.18 and III.19 to III.24. It follows that St James Securities cannot escape liability for the Infringements by reference to its argument that it, or that Mr Quarmby, had no specific involvement in or knowledge of the infringing conduct.

II.1113. This Decision is therefore addressed to Quarmby and St James Securities.

***Quarmby Construction (Special Projects) Limited ('Quarmby (Special Projects)')
Justgrade Limited ('Justgrade')***

II.1114. Quarmby (Special Projects) is a private limited company registered in England and Wales, company number 02339260.¹²⁷⁸ Quarmby (Special Projects)'s registered and primary trading address is 9 The Grove, Ilkley, West Yorkshire, LS29 9LW.¹²⁷⁹

II.1115. At the time of issue of the Statement, Quarmby (Special Projects) undertook new build and regeneration work for both public and private clients. It carried out work in the commercial, education, healthcare, leisure and retail sectors.¹²⁸⁰ At the time of issue of the Statement, Quarmby (Special Projects) did not carry out work outside the United Kingdom.

II.1116. Quarmby (Special Projects)'s ultimate parent company is Justgrade, a private limited company, company number 02590016.¹²⁸¹ Justgrade's registered address is 9 The Grove, Ilkley, Leeds, West Yorkshire, LS29 9LW.¹²⁸² Quarmby (Special Projects) is a wholly owned subsidiary of Justgrade.¹²⁸³

¹²⁷⁴ Witness Statement of James Roger Quarmby, 27 June 2008, paragraphs 56 to 60.

¹²⁷⁵ Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 66.

¹²⁷⁶ Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 68.

¹²⁷⁷ Witness Statement of James Roger Quarmby, 27 June 2008, paragraph 69; see also written representations of St James Securities, 27 June 2008, paragraphs 27 to 28.

¹²⁷⁸ FAME report, OFT Document Reference 12396.

¹²⁷⁹ FAME report, OFT Document Reference 12396.

¹²⁸⁰ Quarmby (Special Projects)'s website, OFT Document Reference 12403.

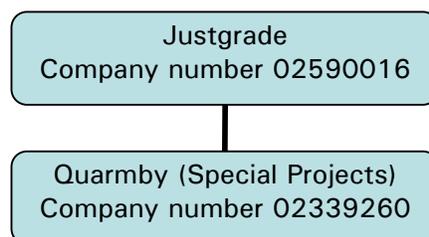
¹²⁸¹ FAME report, OFT Document Reference 12397.

¹²⁸² FAME report, OFT Document Reference 12397.

¹²⁸³ FAME report, OFT Document Reference 12397.

II.1117. Quarmby (Special Projects) has no subsidiaries.¹²⁸⁴

II.1118. The overall company structure from 2000 – 2006 is outlined below:



II.1119. Justgrade has another two subsidiaries, one of which is wholly owned.¹²⁸⁵

II.1120. Justgrade's consolidated group turnover for the financial years ending 31 March 2008 was £9,626,514.¹²⁸⁶

II.1121. The directors of Quarmby (Special Projects) from 2003 to 2006 were as follows:¹²⁸⁷

- Christopher David Fielden 2003 – 2006
- Jeanne Carole Fielden 2003 – 2006
- Iryna Anna Senyk 2003 – 2006
- Martyn Paul Senyk 2003 – 2006

II.1122. The directors of Justgrade from 2003 to 2006 were as follows:¹²⁸⁸

- Christopher David Fielden 2003 – 2006
- Jeanne Carole Fielden 2003 – 2006
- Iryna Anna Senyk 2003 – 2006
- Martyn Paul Senyk 2003 – 2006

II.1123. The following directors have been on the Board of Directors of both Quarmby (Special Projects) and Justgrade during the periods mentioned below.¹²⁸⁹ The OFT considers that this provides evidence that Justgrade exercised decisive influence over Quarmby (Special Projects)'s conduct at the time of the Infringements.

- Christopher David Fielden 2003 – 2006
- Jeanne Carole Fielden 2003 – 2006
- Iryna Anna Senyk 2003 – 2006
- Martyn Paul Senyk 2003 – 2006

II.1124. Quarmby (Special Projects) did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Justgrade, were given the opportunity of accepting the OFT's Fast Track Offer.¹²⁹⁰

¹²⁸⁴ FAME report, OFT Document Reference 12396.

¹²⁸⁵ Latest available FAME report of Quarmby (Special Projects).

¹²⁸⁶ Email from Quarmby (Special Projects), 19 July 2009.

¹²⁸⁷ Company Appointments Report, OFT Document Reference 12401.

¹²⁸⁸ Company Appointments Report, OFT Document Reference 12402.

¹²⁸⁹ Company Appointments Reports, OFT Document Reference 12401 and 12402.

¹²⁹⁰ See paragraphs II.1481 to II.1487 below.

- II.1125. The OFT considers that Justgrade as 100 per cent owner of Quarmby (Special Projects) can be presumed to have exercised decisive influence over Quarmby (Special Projects)'s commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Justgrade and Quarmby (Special Projects). Quarmby (Special Projects) and Justgrade are therefore jointly and severally liable for Quarmby (Special Projects)'s participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.1126. This Decision is therefore addressed to Quarmby (Special Projects) and Justgrade.

R Durtnell & Sons Limited ('R Durtnell')
R Durtnell & Sons (Holdings) Limited ('Durtnell Holdings')¹²⁹¹

- II.1127. R Durtnell is a private limited company registered in England and Wales, company number 01848570.¹²⁹² R Durtnell's registered and primary trading address is Rectory Lane, Brasted, Westerham, Kent, TN16 1JR.¹²⁹³ R Durtnell also trades from 101 Alexandra Road, Farnborough, Hampshire, GU14 6BN.¹²⁹⁴
- II.1128. At the time of issue of the Statement, R Durtnell undertook new build, design and build, refurbishment and restoration for both private and public sector clients in markets such as education, health and community projects, sports and leisure, churches, heritage, industrial and commercial and bespoke housing.¹²⁹⁵ At the time of issue of the Statement, R Durtnell did not carry out work outside the United Kingdom.
- II.1129. R Durtnell's ultimate parent company is Durtnell Holdings, a private limited company, company number 04375916.¹²⁹⁶ Durtnell Holdings's registered address is Rectory Lane, Brasted, Westerham, Kent, TN16 1JR.¹²⁹⁷ Durtnell Holdings was incorporated on 18 February 2002. R Durtnell is a wholly owned subsidiary of Durtnell Holdings.¹²⁹⁸
- II.1130. R Durtnell has no subsidiaries.¹²⁹⁹
- II.1131. The overall company structure from 18 February 2002 to 2006 is outlined below:

¹²⁹¹ In their written representations R Durtnell and Durtnell Holdings, 27 June 2008, advised that the correct corporate names were R Durtnell & Sons Limited and Durtnell (Holdings) Limited, paragraph 7. The OFT notes however that Companies House information does not show that Durtnell (Holdings) Limited is the parent company of either R Durtnell or Durtnell Holdings. The OFT further notes that since the receipt of the written representations Durtnell (Holdings) Limited has not been referred to in any correspondence.

¹²⁹² FAME report, OFT Document Reference 12404.

¹²⁹³ FAME report, OFT Document Reference 12404.

¹²⁹⁴ FAME report, OFT Document Reference 12404.

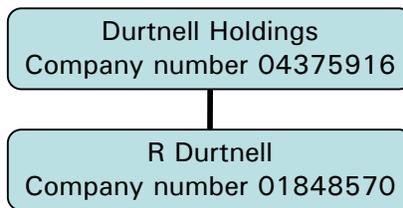
¹²⁹⁵ R Durtnell's website, OFT Document Reference 12413.

¹²⁹⁶ FAME report, OFT Document Reference 12405.

¹²⁹⁷ FAME report, OFT Document Reference 12405.

¹²⁹⁸ FAME report, OFT Document Reference 12405.

¹²⁹⁹ FAME report, OFT Document Reference 12404.



II.1132. Durnnell Holdings's consolidated turnover for the financial year ending 31 December from 2007 was £47,745,432.¹³⁰⁰

II.1133. The directors of R Durnnell from 2002 to 2006 were as follows:¹³⁰¹

- James John Chandler	2002 – 2006
- John Alexander Durnnell	2002 – 2006
- Paul Matthews	2002 – 2006
- Robert Henry Thomas Neal	2002 – 2006
- Evan Rosser Valente	2002 – 2006

II.1134. The director of Durnnell Holdings from 2002 to 2006 was as follows:¹³⁰²

- John Alexander Durnnell	18 February 2002 – 2006
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II.1135. The following director has been on the Board of Directors of both R Durnnell and Durnnell Holdings during the period mentioned below.¹³⁰³ The OFT considers that this provides evidence that Durnnell Holdings exercised decisive influence over R Durnnell's conduct at the time of the Infringements.

- John Alexander Durnnell	18 February 2002 – 2006
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II.1136. R Durnnell did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Durnnell Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.¹³⁰⁴

II.1137. The OFT considers that Durnnell Holdings, as 100 per cent owner of R Durnnell, can be presumed to have exercised decisive influence over R Durnnell's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Durnnell Holdings and R Durnnell. R Durnnell and Durnnell Holdings are therefore jointly and severally liable for R Durnnell's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.1138. This Decision is therefore addressed to R Durnnell and Durnnell Holdings.

¹³⁰⁰ FAME report, OFT Document Reference 12405.

¹³⁰¹ Company Appointments Report, OFT Document Reference 12412.

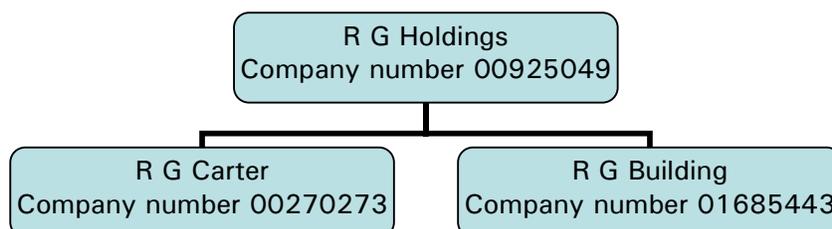
¹³⁰² Company Appointments Report, OFT Document Reference 12412a.

¹³⁰³ Company Appointments Report, OFT Document Reference 12412 and 12412a.

¹³⁰⁴ See paragraphs II.1481 to II.1487 below.

R.G. Carter Limited ('R G Carter')
R.G. Carter Building Limited ('R G Building')
R.G. Carter Holdings Limited ('R G Holdings')

- II.1139. R G Carter is a private limited company registered in England and Wales, company number 00270273.¹³⁰⁵ R G Carter's registered and primary trading address is 9 Drayton High Road, Drayton, Norwich, Norfolk, NR8 6AH.¹³⁰⁶ It also trades from an address in Lincolnshire.¹³⁰⁷
- II.1140. At the time of issue of the Statement, R G Carter's principal activity was that of building contractor, including small works and plumbing¹³⁰⁸ and it did not carry out work outside the United Kingdom.
- II.1141. R G Building is a private limited company registered in England and Wales, company number 01685443.¹³⁰⁹ R G Building's registered and primary trading address is Drayton, Norwich, Norfolk, NR8 6AH.¹³¹⁰
- II.1142. At the time of issue of the Statement, R G Building's principal activity was that of building contractor and small works conducted through its branch in King's Lynn¹³¹¹, and it did not carry out work outside the United Kingdom.
- II.1143. R G Carter's and R G Building's ultimate parent company is R G Holdings, a private limited company, company number 00925049.¹³¹² R G Holdings' registered address is Drayton, Norwich, Norfolk, NR8 6AH.¹³¹³ R G Carter and R G Building are wholly owned subsidiaries of R G Holdings.¹³¹⁴
- II.1144. R G Carter has two subsidiaries¹³¹⁵ and R G Building has one subsidiary.¹³¹⁶
- II.1145. The relevant company structure from 2003 – 2006 is outlined below:



- II.1146. R G Holdings has another 11 subsidiaries.¹³¹⁷
- II.1147. R G Holdings' consolidated turnover for the financial year ending 31 December 2008 was [...] [C].¹³¹⁸

¹³⁰⁵ FAME report, OFT Document Reference 14425.
¹³⁰⁶ FAME report, OFT Document Reference 14425.
¹³⁰⁷ FAME report, OFT Document Reference 14425, page 10.
¹³⁰⁸ Report and Accounts, OFT Document Reference 14427, page 3.
¹³⁰⁹ FAME report, OFT Document Reference 14429.
¹³¹⁰ FAME report, OFT Document Reference 14429.
¹³¹¹ Report and Accounts, OFT Document Reference 14431, page 3.
¹³¹² FAME report, OFT Document Reference 14425, 14429 and 12378a.
¹³¹³ FAME report, OFT Document Reference 12380a.
¹³¹⁴ FAME report, OFT Document Reference 14425, 14429 and 12378a.
¹³¹⁵ Latest available FAME report of R G Carter.
¹³¹⁶ Latest available FAME report of R G Building.
¹³¹⁷ Latest available FAME report of R G Holdings.
¹³¹⁸ Letter from R G Carter, 20 May 2009.

II.1148. The directors of R G Carter from 2003 to 2006 were as follows:¹³¹⁹

- Roy Arthur Burton 20 February 2003 – 2006
- Robert George Russell Carter 2003 – 2006
- Christopher Snowling 2003 – 2006

II.1149. The directors of R G Building from 2003 to 2006 were as follows:¹³²⁰

- Robert George Russell Carter 2003 – 2006
- Francis Ian Chandler 26 August 2003 – 31 January 2001
- Anthony Robert Chilvers 2003 – 2006
- Peter Cecil Dixon 2003 – 31 January 2005
- David Drake 2003 – 2006
- Paul Faux 1 February 2005 – 2006
- Kevin Peter O'Reilly 2003 – 9 June 2004
- Peter Smith 1 February 2005 – 2006

II.1150. The directors of R G Holdings from 2003 to 2006 were as follows:¹³²¹

- Thomas Hector Atkins 2003 – 2006
- Jonathan Robert Barclay 24 May 2006 – 2006
- Roy Arthur Burton 1 February 2006 – 2006
- Robert George Russell Carter 2003 – 2006
- Anthony Nicholas 24 May 2006 – 2006
- Duckworth Chad
- Raymond Charles Frostick 2003 – 28 May 2005
- Brian Henry Neale 2003 – 2006
- David Victor Woods 2003 – 24 May 2006

II.1151. The following director has been on the Board of Directors of both R G Carter and R G Holdings during the period mentioned below.¹³²² The OFT considers that this provides evidence that R G Holdings exercised decisive influence over R G Carter's conduct at the time of the Infringement.

- Robert George Russell Carter 2003 – 2006

II.1152. The following director has been on the Board of Directors of both R G Building and R G Holdings during the period mentioned below.¹³²³ The OFT considers that this provides evidence that R G Holdings exercised decisive influence over R G Building's conduct at the time of the Infringements.

- Robert George Russell Carter 2003 – 2006

II.1153. R G Carter and R G Building did not apply for leniency, but both they and their ultimate parent company at the time of the Infringements, R G Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.¹³²⁴

¹³¹⁹ Company Appointments Report, OFT Document Reference 14426.

¹³²⁰ Company Appointments Report, OFT Document Reference 14430.

¹³²¹ Company Appointments Report, OFT Document Reference 12384.

¹³²² Company Appointments Reports, OFT Document Reference 12384 and 14426.

¹³²³ Company Appointments Reports, OFT Document Reference 12384 and 14430.

¹³²⁴ See paragraphs II.1481 to II.1487 below.

- II.1154. The OFT considers that R G Holdings, as 100 per cent owner of R G Carter, can be presumed to have exercised decisive influence over R G Carter's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of a director in common between R G Holdings and R G Carter. R G Carter and R G Holdings are therefore jointly and severally liable for R G Carter's participation in Infringement 202. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing.
- II.1155. The OFT considers that R G Holdings, as 100 per cent owner of R G Building, can be presumed to have exercised decisive influence over R G Building's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of a director in common between R G Holdings and R G Building. R G Building and R G Holdings are therefore jointly and severally liable for R G Buildings' participation in Infringements 210 and 222.¹³²⁵ Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.1156. This Decision is therefore addressed to R G Carter, R G Building and R G Holdings.

Richardson Projects Limited ('Richardson Projects')

- II.1157. Richardson Projects is a private limited company registered in England and Wales, company number 01709943.¹³²⁶ Richardson Projects' registered and primary trading address is Rok Centre Guardian Road, Exeter Business Park, Exeter, Devon, EX1 3PD.¹³²⁷
- II.1158. Richardson Projects has two other trading addresses, one in Leeds and the other in Lancashire.¹³²⁸
- II.1159. At the time of issue of the Statement, Richardson Projects specialised in the construction and restoration of residential properties for housing associations, local authorities and commercial clients across Northern England.¹³²⁹ At the time of issue of the Statement, Richardson Projects did not carry out work outside the United Kingdom.
- II.1160. Richardson Projects has one subsidiary.¹³³⁰
- II.1161. Richardson Projects' turnover for the financial year ending 31 August 2008 was [...] [C].¹³³¹
- II.1162. The directors of Richardson Projects from 2003 to 2006 were as follows:¹³³²

¹³²⁵ In the alternative, in the event that the Participant Company for Infringement 222 is R G Carter, then paragraph II.1154 applies in respect of Infringement 222.

¹³²⁶ FAME report, OFT Document Reference 12415.

¹³²⁷ Latest available FAME report of Richardson Projects.

¹³²⁸ Market definition response, OFT Document Reference 6473.

¹³²⁹ Website, OFT Document Reference 12429, page 1.

¹³³⁰ Latest available FAME report of Richardson Projects.

¹³³¹ Email from Watson Burton LLP, 19 June 2009.

¹³³² Company Appointments Report, OFT Document Reference 12421.

- Stuart Arthur Belfield 1 July 2003 – 2006
- Alan Richardson 2003 – 2006
- Patricia Richardson 2003 – 2006
- Clive Churchill Walker 2003 – 2006

II.1163. Richardson Projects did not apply for leniency, but was given the opportunity of accepting the OFT's Fast Track Offer.¹³³³

II.1164. This Decision is addressed to Richardson Projects. The OFT considers that Richardson Projects is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

II.1165. Since the Infringements described in this Decision, Richardson Projects has been subject to two changes in ultimate ownership. As neither of the new parent companies formed part of the same economic entity as Richardson Projects at the relevant times, neither is jointly and severally liable with Richardson Projects for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to either of the subsequent new ultimate parent companies of Richardson Projects.

II.1166. This Decision is therefore addressed to Richardson Projects.

Robert Woodhead Limited ('Robert Woodhead')
Robert Woodhead Holdings Limited ('Woodhead Holdings')

II.1167. Robert Woodhead is a private limited company registered in England and Wales, company number 01360957.¹³³⁴ Robert Woodhead's registered and primary trading address is Brailwood Road, Bilsthorpe, Newark, Nottinghamshire, NG22 8UA.¹³³⁵

II.1168. At the time of issue of the Statement, Robert Woodhead specialised in design, construction, refurbishment and restoration of buildings. It undertook construction projects throughout the East Midlands and South Yorkshire in sectors such as education, leisure, heritage, churches, housing, private residential, commercial and industrial, defence, community and health.¹³³⁶ At the time of issue of the Statement, Robert Woodhead did not carry out work outside the United Kingdom.

II.1169. Robert Woodhead's ultimate parent company is Woodhead Holdings, a private limited company, company number 01735075.¹³³⁷ Woodhead Holdings' registered address is Brailwood Road, Bilsthorpe, Newark, Nottinghamshire, NG22 8QA.¹³³⁸ Robert Woodhead is a wholly owned subsidiary of Woodhead Holdings.¹³³⁹

II.1170. Robert Woodhead has no subsidiaries.¹³⁴⁰

¹³³³ See paragraphs II.1481 to II.1487 below.

¹³³⁴ FAME report, OFT Document Reference 12442.

¹³³⁵ FAME report, OFT Document Reference 12442.

¹³³⁶ Robert Woodhead's website, OFT Document Reference 12450, pages 2 and 4.

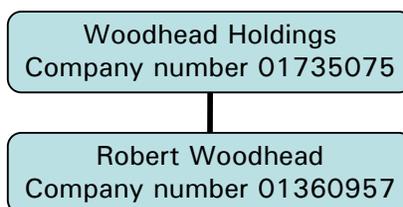
¹³³⁷ FAME report, OFT Document Reference 12443

¹³³⁸ FAME report, OFT Document Reference 12443.

¹³³⁹ FAME report, OFT Document Reference 12443.

¹³⁴⁰ FAME report, OFT Document Reference 12442.

II.1171. The overall company structure from 2000 – 2006 is outlined below:



II.1172. Woodhead Holdings' consolidated group turnover for the financial year ending 31 October 2008 was [...] [C].¹³⁴¹

II.1173. The directors of Robert Woodhead from 2000 to 2006 were as follows:¹³⁴²

- Hilary Ailsa Cheshire	2000 – 2006
- Robert Eric Johnson	29 May 2001 – 2006
- Alan Leonard Maisey	2000 – 2006
- Derek John McGrath	30 May 2006 – 2006
- Peter Michael Rhodes	2000 – 2 May 2003
- David Paul Woodhead	2000 – 2006

II.1174. The directors of Woodhead Holdings from 2000 to 2006 were as follows:¹³⁴³

- Hilary Alisa Cheshire	2000 – 2006
- Peter Michael Rhodes	2000 – 2 May 2003
- David Paul Woodhead	2000 – 2006

II.1175. The following directors have been on the Board of Directors of both Robert Woodhead and Woodhead Holdings during the periods mentioned below.¹³⁴⁴ The OFT considers that this provides evidence that Woodhead Holdings exercised decisive influence over Robert Woodhead's conduct at the time of the Infringements.

- Hilary Alisa Cheshire	2000 – 2006
- Peter Michael Rhodes	2000 – 2 May 2003
- David Paul Woodhead	2000 – 2006

II.1176. Robert Woodhead did not apply for leniency, but both it and its ultimate parent company at the time of the relevant Infringements, Woodhead Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.¹³⁴⁵

II.1177. The OFT considers that Woodhead Holdings, as 100 per cent owner of Robert Woodhead, can be presumed to have exercised decisive influence over Robert Woodhead's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Woodhead Holdings and Robert Woodhead. Robert Woodhead and Woodhead Holdings are therefore jointly and severally liable for Robert Woodhead's

¹³⁴¹ Letter from DLA Piper, 6 August 2009.

¹³⁴² Company Appointments Report, OFT Document Reference 12444.

¹³⁴³ Company Appointment Report, OFT Document Reference 12445.

¹³⁴⁴ Company Appointments Reports, OFT Document Reference 12444 and 12445.

¹³⁴⁵ See paragraphs II.1481 to II.1487 below.

participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.1178. This Decision is therefore addressed to Robert Woodhead and Woodhead Holdings.

Robinson & Sawdon Limited ('Robinson & Sawdon')

II.1179. Robinson & Sawdon is a private limited company registered in England and Wales, company number 00237888.¹³⁴⁶ Robinson & Sawdon's registered address is 1 Melton Park Office Village, Redcliff Road, Melton, North Ferriby, North Humberside, HU14 3RS.¹³⁴⁷

II.1180. At the time of issue of the Statement, Robinson & Sawdon was a building and joinery contractor which undertook work in the commercial, industrial and housing sectors¹³⁴⁸ and it did not carry out work outside the United Kingdom.

II.1181. Robinson & Sawdon has no subsidiaries.¹³⁴⁹

II.1182. Robinson & Sawdon's turnover for the financial year ending 31 March 2008 was [...] [C].¹³⁵⁰

II.1183. The directors of Robinson & Sawdon from 2004 to 2006 were as follows:¹³⁵¹

- Charles Frederick Robinson 2004 – 2 October 2006
- Richard Michael Sawdon 2004 – 2 October 2006
- Robert Wilson Sawdon 2004 – 27 August 2004

II.1184. Robinson & Sawdon did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹³⁵²

II.1185. Since the Infringements described in this Decision, Robinson & Sawdon has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Robinson & Sawdon at the relevant times, it is not jointly and severally liable with Robinson & Sawdon for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Robinson & Sawdon.

II.1186. This Decision is addressed to Robinson & Sawdon. The OFT considers that Robinson & Sawdon is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Shaylor Construction Limited ('Shaylor')

¹³⁴⁶ FAME report, OFT Document Reference 12451.

¹³⁴⁷ Latest Companies House details.

¹³⁴⁸ Market Definition response, OFT Document Reference 6494.

¹³⁴⁹ FAME report, OFT Document Reference 12451.

¹³⁵⁰ Letter from Langleys, 10 July 2009.

¹³⁵¹ Company Appointments Report, OFT Document Reference 12452.

¹³⁵² See paragraphs II.1481 to II.1487 below.

II.1187. Shaylor is a private limited company registered in England and Wales, company number 01182885.¹³⁵³ Shaylor's registered and primary trading address is 52 Wharf Approach, Aldridge, Walsall, West Midlands, WS9 8BX.¹³⁵⁴

II.1188. At the time of issue of the Statement, Shaylor undertook new build, design and build, refurbishment, restoration and development works within the East and West Midlands¹³⁵⁵ and it did not carry out work outside the United Kingdom.

II.1189. Until 1 October 2002, Shaylor was named F. J. Shaylor (Builders) Limited.¹³⁵⁶

II.1190. Shaylor has four subsidiaries.¹³⁵⁷

II.1191. Shaylor's turnover for the financial year ending 31 March 2008 was £34,684,000.¹³⁵⁸

II.1192. The directors of Shaylor from 2000 to 2006 were as follows:¹³⁵⁹

- Mark Bevan	26 August 2004 – 3 April 2006
- David Roderick Harwood	2000 – 3 April 2006
- Frederick James Shaylor	2000 – 2006
- Paul Frederick Shaylor	2000 – 2006
- Richie Lee Shaylor	19 February 2003 – 2006
- Stephen Charles Shaylor	2000 – 2006
- Gary Peter Turley	1 July 2002 – 2006

II.1193. Shaylor did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹³⁶⁰

II.1194. The OFT considers that Shaylor is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

II.1195. Since the Infringements described in this Decision, Shaylor has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Shaylor at the relevant times, it is not jointly and severally liable with Shaylor for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Shaylor.

II.1196. This Decision is therefore addressed to Shaylor.

¹³⁵³ FAME report, OFT Document Reference 12470.

¹³⁵⁴ FAME report, OFT Document Reference 12470.

¹³⁵⁵ Market Definition response, OFT Document Reference 6802, page 1.

¹³⁵⁶ Company House details.

¹³⁵⁷ FAME report, OFT Document Reference 12470.

¹³⁵⁸ Letter from Eversheds LLP, 29 April 2009.

¹³⁵⁹ Company Appointments report, OFT Document Reference 12472.

¹³⁶⁰ See paragraphs II.1481 to II.1487 below.

Simons Construction Limited ('Simons')
Wrights Construction (Lincoln) Limited ('Wrights (Lincoln)')
Simons Group Limited ('Simons Group')

- II.1197. Wrights (Lincoln) is a private limited company registered in England and Wales, company number 03555477.¹³⁶¹ Wrights (Lincoln)'s registered and primary trading address is 991 Doddington Road, Lincoln, Lincolnshire, LN6 3AA.¹³⁶² It also trades from Crofton Close, Lincoln, Lincolnshire, LN3 4NT.¹³⁶³
- II.1198. During the period to which this Decision applies, Wrights (Lincoln) undertook construction and refurbishment works in sectors such as education, ecclesiastical, industrial and commercial for both public and private clients in Lincoln and the surrounding regions.¹³⁶⁴ During the period to which this Decision applies, Wrights (Lincoln) did not carry out work outside the United Kingdom.
- II.1199. Simons Group's legal representatives informed the OFT on 30 January 2007 that Wrights (Lincoln) had ceased trading.¹³⁶⁵ The OFT was subsequently informed that this cessation occurred on 31 March 2006.¹³⁶⁶ However the OFT notes that Wrights (Lincoln) is still listed as a live company at Companies House.
- II.1200. Wrights (Lincoln) has one subsidiary.¹³⁶⁷
- II.1201. Wrights (Lincoln)'s immediate parent company is Simons, a private limited company registered in England and Wales, company number 00961095.¹³⁶⁸ Simons' registered and primary trading address is 991 Doddington Road, Lincoln, Lincolnshire, LN6 3AA.¹³⁶⁹ Simons also has seven further registered trading addresses throughout England.¹³⁷⁰ Wrights (Lincoln) is a wholly owned subsidiary of Simons.
- II.1202. Simons undertakes the construction of new buildings, fitting out and maintenance services. It specialises in services to retail, leisure, health care and commercial businesses. Eighty-five per cent of its construction activities derive from key account customers.¹³⁷¹ During the period to which this Decision applies, Simons did carry out work outside the United Kingdom.¹³⁷²
- II.1203. Simons' ultimate parent company is Simons Group, a private limited company, company number 02147887.¹³⁷³ Simons Group's registered address is 991 Doddington Road, Lincoln, Lincolnshire, LN6 3AA.¹³⁷⁴ Wrights (Lincoln) is a wholly owned subsidiary of Simons¹³⁷⁵, which in turn is wholly owned by Simons Group.

¹³⁶¹ FAME report, OFT Document Reference 12483.

¹³⁶² FAME report, OFT Document Reference 12483.

¹³⁶³ FAME report, OFT Document Reference 12483.

¹³⁶⁴ Wrights (Lincoln)'s website, OFT Document Reference 12492a.

¹³⁶⁵ Email, OFT Document Reference B3730.

¹³⁶⁶ Written representations of Simons Group, Simons and Wrights (Lincoln), 26 June 2008, Appendix 1

¹³⁶⁷ Latest available FAME report of Wrights (Lincoln).

¹³⁶⁸ FAME report, OFT Document Reference 12484.

¹³⁶⁹ FAME report, OFT Document Reference 12484.

¹³⁷⁰ FAME report of Simons obtained on 13/02/09.

¹³⁷¹ Financial Statements, OFT Document Reference 12490.

¹³⁷² Written representations of Simons Group, Simons and Wrights (Lincoln), 26 June 2008, Appendix 1.

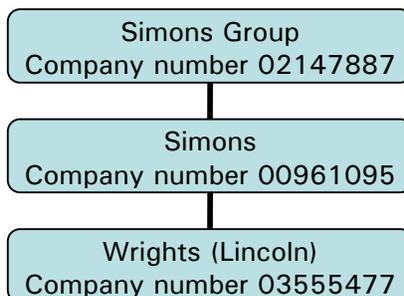
¹³⁷³ FAME report, OFT Document Reference 12485.

¹³⁷⁴ FAME report, OFT Document Reference 12485.

¹³⁷⁵ FAME report, OFT Document Reference 12484.

II.1204. Simons has seven wholly owned subsidiaries including Wrights (Lincoln).¹³⁷⁶

II.1205. The relevant company structure is outlined below:¹³⁷⁷



II.1206. Simons Group has four other wholly owned subsidiaries.¹³⁷⁸

II.1207. Simons Group's consolidated turnover for the financial year ending 31 March 2009 was [...] [C].¹³⁷⁹

II.1208. The directors of Wrights (Lincoln) from 2001 to 2006 were as follows:¹³⁸⁰

- Clifford Thomas Bryant	2001 – 6 January 2003
- Graham Leslie Conroy	2001 – 31 January 2001
- Arthur John Fox	2001 – 11 April 2003
- Roger Alan Hall	2001 – 2006
- Philip James Kendall	12 February 2001 – 2006
- Andrew John Rowe	2001 – 30 April 2003
- Colin Sargeant	2001 – 2006
- Stephen Paul Trebble	5 June 2003 – 26 May 2006

II.1209. The directors of Simons from 2001 to 2006 were as follows:¹³⁸¹

- Clifford Thomas Bryant	2001 – 6 January 2003
- Graham Leslie Conroy	2001 – 31 January 2001
- Fiona Guthrie	20 September 2005 – 2006
- Paul Richard Hodgkinson	2001 – 2006
- Roger Alan Hall	2001 – 2006
- Philip James Kendall	12 February 2001 – 2006
- Colin Sargeant	1 April 2004 – 2006
- Christopher John Witting	1 January 2002 – 2006

II.1210. The directors of Simons Group from 2001 to 2006 were as follows:¹³⁸²

- Clifford Thomas Bryant	2001 – 6 January 2003
- Graham Leslie Conroy	2001 – 31 January 2001
- Paul Samuel Cross	3 March 2003 – 31 December 2006

¹³⁷⁶ Latest available FAME report of Simons.

¹³⁷⁷ FAME report, OFT Document Reference 12485.

¹³⁷⁸ Latest available FAME report of Simons Group.

¹³⁷⁹ Letter from Simons Group, 1 June 2009.

¹³⁸⁰ Company Appointments Report, OFT Document Reference 12488.

¹³⁸¹ Company Appointments Report, OFT Document Reference 12486.

¹³⁸² Company Appointments Report, OFT Document Reference 12487.

- Fiona Guthrie 20 September 2005 – 2006
- Paul Richard Hodgkinson 2001 – 2006
- Philip David Hodgkinson 2001 - 2006
- Anthony James Jackson 2001 – 31 March 2003
- Robert Llewellyn John 2001 – 17 November 2005
- Sandi Rhys Jones 1 April 2002 – 2006
- Philip James Kendall 12 February 2001 – 2006
- James William Murphy 16 May 2006 – 2006
- Victor William Semmens 1 April 2004 – 2006

II.1211. The following directors have been on the Board of Directors of both Wrights (Lincoln) and Simons Group during the periods mentioned below.¹³⁸³ The OFT considers that this provides evidence that Simons Group exercised decisive influence over Wrights (Lincoln)'s conduct at the time of the Infringements.

- Clifford Thomas Bryant 2001 – 6 January 2003
- Philip James Kendall 12 February 2001 – 2006

II.1212. The following directors have been on the Board of Directors of both Simons and Simons Group during the periods mentioned below.¹³⁸⁴ The OFT considers that this provides evidence that Simons Group exercised decisive influence over Simons' conduct at the time of the Infringements.

- Clifford Thomas Bryant 2001 – 6 January 2003
- Paul Richard Hodgkinson 2001 – 2006
- Philip James Kendall 12 February 2001 – 2006

II.1213. The following directors have been on the Board of Directors of both Wrights (Lincoln) and Simons during the periods mentioned below.¹³⁸⁵ The OFT considers that this provides evidence that Simons exercised decisive influence over Wrights (Lincoln)'s conduct at the time of the Infringements.

- Clifford Thomas Bryant 2001 – 6 January 2003
- Roger Alan Hall 2001 – 2006
- Philip James Kendall 12 February 2001 – 2006
- Colin Sargeant 1 April 2004 – 2006

II.1214. Wrights (Lincoln) and Simons applied for, and have been granted, leniency in accordance with the OFT's leniency programme.¹³⁸⁶ Their application was endorsed by Simons Group.¹³⁸⁷

II.1215. The OFT considers that Simons Group, as 100 per cent indirect owner of Wrights (Lincoln), can be presumed to have exercised decisive influence over Wrights (Lincoln)'s commercial policies during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Simons Group and Wrights (Lincoln). Simons Group and Wrights (Lincoln) are therefore jointly and severally liable for Wrights (Lincoln)'s

¹³⁸³ Company Appointments, OFT Document Reference 12488 and 12487.

¹³⁸⁴ Company Appointments, OFT Document Reference 12487 and 12486.

¹³⁸⁵ Company Appointments, OFT Document Reference 12488 and 12486.

¹³⁸⁶ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf .

¹³⁸⁷ Leniency application, OFT Document Reference B3580.

participation in the Infringement which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing in respect of Infringement 141.

II.1216. The OFT considers that Simons Group, as 100 per cent owner of Simons, can be presumed to have exercised decisive influence over Simons' commercial policies during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Simons Group and Simons. Simons Group and Simons are therefore jointly and severally liable for Simons' participation in the Infringements which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringements 59 and 218.

II.1217. This Decision is therefore addressed to Simons, Wrights (Lincoln), and Simons Group.

SOL Construction Limited ('Sol')
Barkbury Limited ('Barkbury')

II.1218. Sol is a private limited company registered in England and Wales, company number 00329348.¹³⁸⁸ Sol's registered and primary trading address is Rok Centre, Guardian Road, Exeter Business Park, Exeter, Devon, EX1 3PD.¹³⁸⁹ Sol also has trading addresses at Acom House, Coventry Road, Warwick, Warwickshire, CV34 4RT and Vale Road, Colwick, Nottingham, Nottinghamshire, NG4 2EG.¹³⁹⁰

II.1219. At the time of issue of the Statement, Sol undertook new build and refurbishment projects over a diverse range of contract type, size and complexity. Sol also had done work in sectors such as commercial, industrial, retail, residential, health, education, leisure and public buildings for both public and private sector clients.¹³⁹¹ At the time of issue of the Statement, Sol did not carry out work outside the United Kingdom.

II.1220. Sol's ultimate parent company is Barkbury, a private limited company, company number 02929082.¹³⁹² Barkbury's registered address is Rok Centre, Guardian Road, Exeter Business Park, Exeter, Devon, EX1 3PD. Barkbury also has a trading address at Vale Road, Colwick, Nottingham, Nottinghamshire, NG4 2EG.¹³⁹³ Sol is a wholly owned subsidiary of Barkbury.¹³⁹⁴

II.1221. Sol has no subsidiaries.¹³⁹⁵

II.1222. The relevant company structure is outlined below:

¹³⁸⁸ FAME report, OFT Document Reference 12493.

¹³⁸⁹ Latest available FAME report of Sol.

¹³⁹⁰ FAME report, OFT Document Reference 12493.

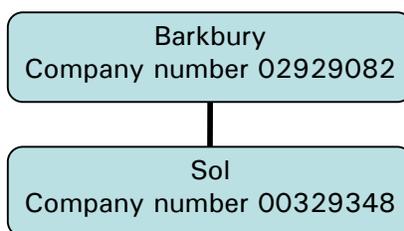
¹³⁹¹ Sol's website, OFT Document Reference 12499.

¹³⁹² FAME report, OFT Document Reference 12494.

¹³⁹³ FAME report, OFT Document Reference 12494.

¹³⁹⁴ FAME report, OFT Document Reference 12494.

¹³⁹⁵ FAME report, OFT Document Reference 12493.



II.1223. Barkbury has three other subsidiaries.¹³⁹⁶

II.1224. Sol's turnover for the financial year ending 31 March 2008 was [...] [C].¹³⁹⁷

II.1225. Barkbury is a holding company for Sol and has no turnover of its own.¹³⁹⁸

II.1226. The directors of Sol from 2000 to 2006 were as follows:¹³⁹⁹

- Stephen Geoffrey Bird 2000 – 22 November 2002
- William Graham Fiddian 2000 – 12 October 2001
- John Alec Heard 2000 – 2006
- Christopher John Truman 2000 – 2006
- Adrian George Whiteside 2000 – 2006

II.1227. The directors of Barkbury from 2000 to 2006 were as follows:¹⁴⁰⁰

- Stephen Geoffrey Bird 2000 – 22 November 2002
- John Alec Heard 2000 – 2006
- Michael William Hoy McKay 1 October 2001 – 9 June 2004
- Christopher John Truman 2000 – 2006
- Adrian George Whiteside 2000 – 2006

II.1228. The following directors have been on the Board of Directors of both Sol and Barkbury during the periods mentioned below.¹⁴⁰¹ The OFT considers that this provides evidence that Barkbury exercised decisive influence over Sol's conduct at the time of the Infringements.

- Stephen Geoffrey Bird 2000 – 22 November 2002
- John Alec Heard 2000 – 2006
- Christopher John Truman 2000 – 2006
- Adrian George Whiteside 2000 – 2006

II.1229. Sol applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁴⁰²

II.1230. The OFT considers that Barkbury, as 100 per cent owner of Sol, can be presumed to have exercised decisive influence over Sol's commercial policy during the relevant period and therefore forms part of the same economic

¹³⁹⁶ Latest available FAME report of Barkbury.

¹³⁹⁷ Email from Browne Jacobson LLP, 13 August 2009.

¹³⁹⁸ Letter from Sol, 18 August 2009.

¹³⁹⁹ Company Appointments, OFT Document Reference 12497.

¹⁴⁰⁰ Company Appointments, OFT Document Reference 12498.

¹⁴⁰¹ Company Appointments Reports, OFT Document Reference 12497 and 12498.

¹⁴⁰² See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf .

entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Barkbury and Sol. Sol and Barkbury will therefore be jointly and severally liable for Sol's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 142, 156 and 187.

II.1231. Since the Infringements described in this Decision, Sol and Barkbury have been subject to a change in ultimate ownership. As the new parent company did not form part of the same economic entity as Barkbury at the relevant times, it is not jointly and severally liable with Sol and Barkbury for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Sol and Barkbury.

II.1232. This Decision is therefore addressed to Sol and Barkbury.

Speller-Metcalfe Malvern Limited formerly known as Speller-Metcalfe Limited ('Speller-Metcalfe')

II.1233. Speller-Metcalfe is a private limited company registered in England and Wales, company number 03127386.¹⁴⁰³ Speller-Metcalfe's registered and primary trading address is Maple Road, Enigma Business Park, Malvern, Hereford & Worcestershire, WR14 1GQ.¹⁴⁰⁴

II.1234. At the time of issue of the Statement, Speller-Metcalfe's business activity was general building construction and it undertook commercial, industrial and private sector housing projects in the education, health, retail, leisure, housing and industrial sectors for both public and private clients.¹⁴⁰⁵ At the time of issue of the Statement, Speller-Metcalfe did not carry out work outside the United Kingdom.

II.1235. On 31 December 2008 Speller-Metcalfe changed its name to Speller-Metcalfe Malvern Limited.¹⁴⁰⁶

II.1236. Speller-Metcalfe has no holding company and no subsidiaries.¹⁴⁰⁷

II.1237. Speller-Metcalfe's turnover for the financial year ending 31 March 2008 was [...] [C].¹⁴⁰⁸

II.1238. The directors of Speller-Metcalfe from 2000 to 2006 were as follows:¹⁴⁰⁹

- Andrew John Metcalfe	2000 – 2006
- Stephen Robert Speller	2000 – 2006

II.1239. Speller-Metcalfe did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁴¹⁰

¹⁴⁰³ FAME report, OFT Document Reference 12500.

¹⁴⁰⁴ FAME report, OFT Document Reference 12500.

¹⁴⁰⁵ Market definition response, OFT Document Reference 6683.

¹⁴⁰⁶ Companies House details.

¹⁴⁰⁷ FAME report, OFT Document Reference 12500.

¹⁴⁰⁸ Written representations of Speller-Metcalfe, 27 June 2008.

¹⁴⁰⁹ Company Appointments Report, OFT Document Reference 12501.

II.1240. This Decision is addressed to Speller-Metcalf. The OFT considers that Speller-Metcalf is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Stainforth Construction Limited ('Stainforth')

II.1241. Stainforth is a private limited company registered in England and Wales, company number 02649920.¹⁴¹¹ Stainforth's registered and primary trading address is 1 Butterfield Park, Otley Road, Shipley, West Yorkshire BD17 7HE.¹⁴¹²

II.1242. At the time of issue of the Statement, Stainforth undertook construction work in the private housing, industrial, commercial, retail, leisure, faith and educational sectors¹⁴¹³ and it did not carry out work outside the United Kingdom.

II.1243. Stainforth has no holding company and no subsidiaries.¹⁴¹⁴

II.1244. Stainforth's turnover for the financial year ending 31 March 2008 was £19,244,316.¹⁴¹⁵

II.1245. The directors of Stainforth from 2000 to 2006 were as follows:¹⁴¹⁶

- Lee Terence Barnes	1 November 2001 – 2006
- Dean Martyn Slingsby	2000 – 2006
- Christopher Daniel Wilson	2000 – 2006
- Alan John Wrightson	1 November 2001 – 2006

II.1246. Stainforth did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁴¹⁷

II.1247. This Decision is addressed to Stainforth. The OFT considers that Stainforth is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Strata Construction Limited ('Strata')

II.1248. Strata is a private limited company registered in England and Wales, company number 00351517.¹⁴¹⁸ Strata's registered address is Quay Point, Lakeside, Doncaster, South Yorkshire, DN4 5PL and its registered trading address is Key

¹⁴¹⁰ See paragraphs II.1481 to II.1487 below.

¹⁴¹¹ FAME report, OFT Document Reference 12513.

¹⁴¹² FAME report, OFT Document Reference 12513.

¹⁴¹³ Stainforth's website, OFT Document Reference 12519.

¹⁴¹⁴ FAME report, OFT Document Reference 12513.

¹⁴¹⁵ Letter from Addleshaw Goddard, 29 April 2009.

¹⁴¹⁶ Company Appointments Report, OFT Document Reference 12514.

¹⁴¹⁷ See paragraphs II.1481 to II.1487 below.

¹⁴¹⁸ FAME report, OFT Document Reference 12520.

Point, Lakeside Boulevard, Doncaster, South Yorkshire, DN4 5PL.¹⁴¹⁹ It also has a trading address at Loversall Court, Tickhill Road, Balby, Doncaster, DN4 8QG.¹⁴²⁰

II.1249. At the time of issue of the Statement, Strata undertook new build and refurbishment work for both public and private sector clients, in areas such as housing, education, health, commercial and defence sectors.¹⁴²¹ At the time of issue of the Statement, Strata did not carry out work outside the United Kingdom.

II.1250. Prior to 17 January 2002, Strata's previous name was Weaver Construction Limited.¹⁴²²

II.1251. Strata has no holding company and one subsidiary.¹⁴²³

II.1252. Strata's turnover for the financial year ending 31 December 2008 was [...] [C].¹⁴²⁴

II.1253. The directors of Strata from 2000 to 2006 were as follows:¹⁴²⁵

- David George Bolton	2000 – 2006
- Jonathan Anderson Croll	1 January 2005 – 3 November 2005
- John David Geraghty	1 June 2006 – 1 November 2006
- Norman Arthur Hudson	2000 – 30 June 2002
- Julian Martin Kaweck	2000 – 31 August 2005
- Stephen Paul Marshall	2000 – 7 November 2001
- John McCredie	2000 – 31 October 2001
- Douglas Page	2000 – 30 April 2000
- Mark Rosindale	1 January 2005 – 2006
- Andrew Stevenson	1 January 2006 – 2006
- Richard Irving Weaver	2000 – 2006

II.1254. Strata applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁴²⁶

II.1255. This Decision is addressed to Strata. The OFT considers that Strata is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringements 221, 225 and 227, on account of the participation in the Infringements of that undertaking.

T. & C. Williams (Builders) Limited ('T & C Williams')

II.1256. T & C Williams is a private limited company registered in England and Wales, company number 00729679.¹⁴²⁷ T & C Williams's registered and primary trading address is 5 Norton Lees Lane, Sheffield, South Yorkshire, S8 9BA.¹⁴²⁸

¹⁴¹⁹ FAME report, OFT Document Reference 12520.

¹⁴²⁰ Strata's website, OFT Document Reference 12523, page 3.

¹⁴²¹ Strata's website, OFT Document Reference 12523, pages 2 and 5.

¹⁴²² FAME report, OFT Document Reference 12520.

¹⁴²³ Latest available FAME report.

¹⁴²⁴ Letter from Herbert Smith, 28 April 2009.

¹⁴²⁵ Strata Company Appointments Report, OFT Document Reference 12521.

¹⁴²⁶ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf .

II.1257. At the time of issue of the Statement, T & C Williams's main business activity included the construction of all types of new buildings, listed building restoration, extensions and refurbishments in the general commercial field, in a variety of areas including education, health, industrial, and churches.¹⁴²⁹ At the time of issue of the Statement, T & C Williams did not carry out work outside the United Kingdom.

II.1258. T & C Williams has no holding company or subsidiaries.¹⁴³⁰

II.1259. T & C Williams's turnover for the financial year ending 30 June 2009 was [...] [C].¹⁴³¹

II.1260. The directors of T & C Williams from 2003 to 2006 were as follows:¹⁴³²

- Brian Barker	2003 – 2006
- Philip Grayson	2003 – 2006
- Ian Jinkinson	1 July 2003 – 2006
- David Wilshaw	2003 – 2006

II.1261. T & C Williams applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁴³³

II.1262. This Decision is addressed to T & C Williams. The OFT considers that T & C Williams is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

T. Denman & Sons (Melton Mowbray) Limited ('T Denman')

II.1263. T Denman is a private limited company registered in England and Wales, company number 00552129.¹⁴³⁴ T Denman's registered and trading address is Cardigan House, 55 Burton Street, Melton Mowbray, Leicestershire, LE13 1AW.¹⁴³⁵

II.1264. At the time of issue of the Statement T Denman carried out new build, maintenance and refurbishment works and was an approved contractor for a number of local authorities and insurance companies. T Denman undertook works in sectors such as housing, health, education, office building and leisure facilities.¹⁴³⁶ At the time of issue of the Statement, T Denman did not carry out work outside the United Kingdom.

¹⁴²⁷ FAME report, OFT Documents Reference 12524.

¹⁴²⁸ FAME report, OFT Documents Reference 12524.

¹⁴²⁹ Market definition response, OFT Document Reference A2420.

¹⁴³⁰ FAME report, OFT Documents Reference 12524.

¹⁴³¹ Email from hlw Commercial Lawyers, 21 July 2009.

¹⁴³² Company Appointment Report, OFT Document Reference 12525.

¹⁴³³ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf.

¹⁴³⁴ FAME Report, OFT Document Reference 12528.

¹⁴³⁵ FAME Report, OFT Document Reference 12528.

¹⁴³⁶ T Denman's website, OFT Document Reference 12533.

II.1265. T Denman has no holding company and one subsidiary.¹⁴³⁷

II.1266. T Denman's turnover for the financial year ending 31 December 2008 was [...] [C].¹⁴³⁸

II.1267. The directors of T Denman from 2000 to 2006 were as follows:¹⁴³⁹

- Walter Barry Cragg	2000 – 2006
- Joyce May Denman	2000 – 22 March 2002
- Kay Denman	2000 – 2006
- Mark Thomas Denman	1 April 2000 – 2006
- Mildred Joan Denman	2000 – 2006
- Richard Neville Denman	2000 – 22 March 2002
- Stephen Thomas Denman	2000 – 2006
- Thomas Hugh Denman	2000 – 2006
- Simon William Gilbert	1 April 2000 – 2006

II.1268. T Denman did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁴⁴⁰

II.1269. This Decision is addressed to T Denman. The OFT considers that T Denman is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

TF Realisations Limited formerly known as Thomas Fish & Sons Limited ('Thomas Fish')
Fish Holdings Limited ('Fish Holdings')

II.1270. Thomas Fish is a private limited company registered in England and Wales, company number 00368573.¹⁴⁴¹ Thomas Fish's registered and primary trading address is Cartwright House, Tottle Road, Nottingham, Nottinghamshire, NG2 1 RT.¹⁴⁴²

II.1271. At the time of issue of the Statement, Thomas Fish undertook all types of construction projects including design and build, building renovation and development projects in commercial, housing, education and health sectors for both private and public clients across the East Midlands region.¹⁴⁴³ At the time of issue of the Statement, Thomas Fish did not carry out work outside the United Kingdom.

II.1272. An administrator for Thomas Fish was appointed on 21 April 2008¹⁴⁴⁴, with joint liquidators appointed on 6 April 2009.¹⁴⁴⁵

II.1273. On 10 June 2008 Thomas Fish changed its name to TF Realisations Limited.¹⁴⁴⁶

¹⁴³⁷ Latest available FAME report.

¹⁴³⁸ Letter from Berryman, 29 April 2009.

¹⁴³⁹ Company Appointments Report, OFT Document Reference 12529.

¹⁴⁴⁰ See paragraphs II.1481 to II.1487 below.

¹⁴⁴¹ FAME report, OFT Document Reference 12580.

¹⁴⁴² Latest available FAME report of Thomas Fish.

¹⁴⁴³ Website, OFT Document Reference 12587.

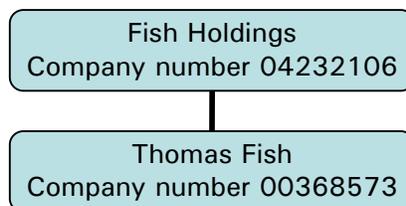
¹⁴⁴⁴ Notice of administrator's appointment, form 2.12B.

¹⁴⁴⁵ Notice of move from administration to creditor's voluntary liquidation, form 2.34B

II.1274. Thomas Fish's ultimate parent company is Fish Holdings, a private limited company, company number 04232106.¹⁴⁴⁷ Fish Holdings' registered address is 14 Park Row, Nottingham, Nottinghamshire, NG1 6GR.¹⁴⁴⁸ Fish Holdings also has a trading address at Little Tennis Street, Nottingham, Nottinghamshire, NG2 4EZ.¹⁴⁴⁹ Fish Holdings was incorporated on 11 June 2001.¹⁴⁵⁰ Thomas Fish is a wholly owned subsidiary of Fish Holdings.¹⁴⁵¹

II.1275. Thomas Fish has no subsidiaries.¹⁴⁵²

II.1276. The relevant company structure is outlined below:



II.1277. Fish Holdings has another four wholly owned subsidiaries.¹⁴⁵³

II.1278. Thomas Fish's turnover for the six month period ending 31 March 2008 was [...] [C].¹⁴⁵⁴

II.1279. Fish Holdings is a holding company for Thomas Fish and has no turnover of its own.¹⁴⁵⁵

II.1280. The directors of Thomas Fish from 2000 to 2006 were as follows:¹⁴⁵⁶

- Stephen James Bradbury	17 March 2006 – 2006
- Charles Joseph Fish	2000 – 2006
- George Fish	2000 – 2006
- George William Fish	2000 – 2006
- Paul Graham Smith	17 March 2006 – 30 September 2006
- Peter Donald Woodhouse	2000 – 2006

II.1281. The directors of Fish Holdings from 2001 to 2006 were as follows:¹⁴⁵⁷

- Charles Joseph Fish	11 June 2001 – 2006
- George Fish	11 June 2001 – 2006
- George William Fish	11 June 2001 – 2006
- Peter Donald Woodhouse	11 June 2001 – 2006

¹⁴⁴⁶ Companies House details.

¹⁴⁴⁷ Latest available FAME report of Fish Holdings.

¹⁴⁴⁸ FAME report, OFT Document Reference 12581.

¹⁴⁴⁹ Latest available FAME report of Fish Holdings.

¹⁴⁵⁰ FAME report, OFT Document Reference 12581.

¹⁴⁵¹ FAME report, OFT Document Reference 12581.

¹⁴⁵² FAME report, OFT Document Reference 12580.

¹⁴⁵³ Latest available FAME report of Fish Holdings.

¹⁴⁵⁴ Email from Berryman, 20 August 2009.

¹⁴⁵⁵ Letter from Berryman, 6 July 2009.

¹⁴⁵⁶ Company Appointment Report, OFT Document Reference 12582.

¹⁴⁵⁷ Company Appointment Report, OFT Document Reference 12583.

II.1282. The following directors have been on the Board of Directors of both Thomas Fish and Fish Holdings during the periods mentioned below.¹⁴⁵⁸ The OFT considers that this provides evidence that Fish Holdings exercised decisive influence over Thomas Fish's conduct at the time of the relevant Infringements.

- Charles Joseph Fish	11 June 2001 – 2006
- George Fish	11 June 2001 – 2006
- George William Fish	11 June 2001 – 2006
- Peter Donald Woodhouse	11 June 2001 – 2006

II.1283. Thomas Fish applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁴⁵⁹

II.1284. The OFT considers that Fish Holdings, as 100 per cent owner of Thomas Fish, can be presumed to have exercised decisive influence over Thomas Fish's commercial policy from 11 June 2001 to 2006 and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Fish Holdings and Thomas Fish. Thomas Fish and Fish Holdings are therefore jointly and severally liable for Thomas Fish's participation in the relevant Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 89 and 126.

II.1285. This Decision is therefore addressed to Thomas Fish and Fish Holdings.

Thomas Long & Sons Limited ('Thomas Long')
Radford Holdings Limited ('Radford')

II.1286. Thomas Long is a private limited company registered in England and Wales, company number 01892184.¹⁴⁶⁰ Thomas Long's registered and primary trading address is Park House, Mile End Road, Colwick, Nottingham, Nottinghamshire, NG4 2DW.¹⁴⁶¹

II.1287. At the time of issue of the Statement, Thomas Long was a general building contractor which undertook work in sectors such as housing, commercial and industrial construction for both public and private sector clients.¹⁴⁶² At the time of issue of the Statement, Thomas Long did not carry out work outside the United Kingdom.

II.1288. Thomas Long's ultimate parent company is Radford, a private limited company, company number 00285811.¹⁴⁶³ Radford's registered address is Park House, Mile End Road, Colwick, Nottingham, Nottinghamshire, NG4 2DW.¹⁴⁶⁴ Thomas Long is a wholly owned subsidiary of Radford.¹⁴⁶⁵

¹⁴⁵⁸ Company Appointment Reports, OFT Document Reference 12582 and 12583.

¹⁴⁵⁹ See Part 3 of OFT Guidance 423,

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf .

¹⁴⁶⁰ FAME report, OFT Document Reference 12543.

¹⁴⁶¹ FAME report, OFT Document Reference 12543.

¹⁴⁶² Market definition response, OFT Document Reference 6623.

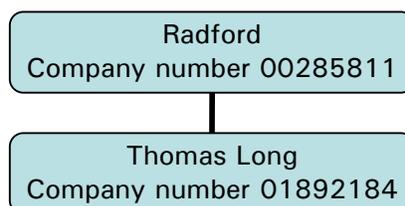
¹⁴⁶³ FAME report, OFT Document Reference 12544.

¹⁴⁶⁴ FAME report, OFT Document Reference 12544.

¹⁴⁶⁵ FAME report, OFT Document Reference 12544.

II.1289. Thomas Long has one subsidiary.¹⁴⁶⁶

II.1290. The group structure from 2000 to 2006 is set out below:



II.1291. Radford's consolidated turnover for the financial year ending 31 December 2008 was £11,738,142.¹⁴⁶⁷

II.1292. The directors of Thomas Long from 2000 to 2006 were as follows:¹⁴⁶⁸

- Philip George Attenborough 29 February 2000 – 3 February 2003
- David Allen Burrows 1 January 2002 – 2006
- Richard Alan Manning 29 February 2000 – 31 January 2002
- Roger Inger Radford 2000 – 2006
- Ian Ellis Scott 1 April 2002 – 2006

II.1293. The directors of Radford from 2000 to 2006 were as follows:¹⁴⁶⁹

- Philip George Attenborough 2000 – 29 February 2000
- David Allen Burrows 1 January 2002 – 2006
- Richard Alan Manning 2000 – 29 February 2000
- Adam William Radford 1 December 2000 – 2006
- Roger Inger Radford 2000 – 2006

II.1294. The following directors have been on the Board of Directors of both Thomas Long and Radford during the periods mentioned below.¹⁴⁷⁰ The OFT considers that this provides evidence that Radford exercised decisive influence over Thomas Long's conduct at the time of the Infringements.

- David Allen Burrows 1 January 2002 – 2006
- Roger Inger Radford 2000 – 2006

II.1295. Thomas Long did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Radford, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁴⁷¹

II.1296. The OFT considers that Radford, as 100 per cent owner of Thomas Long, can be presumed to have exercised decisive influence over Thomas Long's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Radford and Thomas Long. Thomas Long and Radford are therefore jointly and severally

¹⁴⁶⁶ FAME report, OFT Document Reference 12543.

¹⁴⁶⁷ Email from Maitland Walker, 13 July 2009.

¹⁴⁶⁸ Company Appointments Report, OFT Document Reference 12545.

¹⁴⁶⁹ Company Appointments Report, OFT Document Reference 12546.

¹⁴⁷⁰ Company Appointments Reports, OFT Document Reference 12545 and 12546.

¹⁴⁷¹ See paragraphs II.1481 to II.1487 below.

liable for Thomas Long's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.1297. This Decision is therefore addressed to Thomas Long and Radford.

Thomas Vale Construction plc ('Thomas Vale')
Thomas Vale Holdings Limited ('Thomas Vale Holdings')

II.1298. Thomas Vale is a public limited company registered in England and Wales, company number 00078521.¹⁴⁷² Thomas Vale's registered and primary trading address is Lombard House, Worcester Road, Stourport-On-Severn, Herefordshire and Worcestershire, DY13 9BZ.¹⁴⁷³ Thomas Vale also has offices in Birmingham, Reading and Stoke-on-Trent.¹⁴⁷⁴

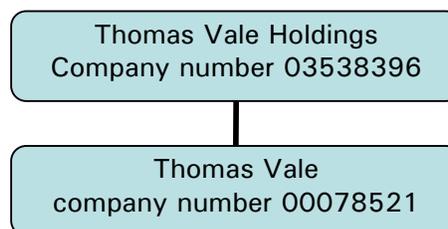
II.1299. At the time of issue of the Statement, Thomas Vale carried out construction work in a number of areas including housing, education, healthcare, retail, commercial, infrastructure and industrial for both public and private clients.¹⁴⁷⁵ At the time of issue of the Statement, Thomas Vale did not carry out work outside the United Kingdom.

II.1300. On 30 October 2002, Thomas Vale changed its name from Thomas Vale Construction Limited.¹⁴⁷⁶

II.1301. Thomas Vale's ultimate parent company is Thomas Vale Holdings, a private limited company, company number 03538396.¹⁴⁷⁷ Thomas Vale Holdings' registered office is Lombard House, Worcester Road, Stourport-on-Severn, Herefordshire and Worcestershire, DY13 9BZ.¹⁴⁷⁸

II.1302. Thomas Vale has no subsidiaries.¹⁴⁷⁹

II.1303. The relevant company structure is outlined below:



II.1304. Thomas Vale Holdings has seven other wholly owned subsidiaries.¹⁴⁸⁰

II.1305. Thomas Vale Holdings' group consolidated turnover for the financial year ending 31 March 2009 was [...] [C].¹⁴⁸¹

¹⁴⁷² FAME report, OFT Document Reference 12534.

¹⁴⁷³ FAME report, OFT Document Reference 12534.

¹⁴⁷⁴ Latest available FAME report of Thomas Vale.

¹⁴⁷⁵ Thomas Vale's website, OFT Document Reference 12542, pages 16 and 17.

¹⁴⁷⁶ FAME report, OFT Document Reference 12534.

¹⁴⁷⁷ FAME report, OFT Document Reference 12539.

¹⁴⁷⁸ FAME report, OFT Document Reference 12539.

¹⁴⁷⁹ FAME report, OFT Document Reference 12539.

¹⁴⁸⁰ Latest available FAME report of Thomas Vale Holdings.

II.1306. The directors of Thomas Vale from 2000 to 2006 were as follows:¹⁴⁸²

- Robert Frederick Atkinson	2000 – 2006
- Colin John Briley	2000 – 2006
- Nicholas Andrew Coley	1 April 2005 – 2006
- Ian Cameron Cox	1 October 2006 – 2006
- Richard John Green	1 August 2003 – 2006
- Stephen Anthony Hyde	2000 – 2006
- John David Insall	2000 – 1 November 2000
- Michael John Kitchen	2000 – 1 November 2000
- Gary Mail	2 January 2003 – 2006
- William Leslie Munn	1 April 2005 – 2006
- Michael James Plimmer	2000 – 12 June 2003
- Gerald Stewart Pool	2 July 2001 – 8 November 2004
- Eamonn Desmond O’ Brien	2000 – 29 May 2000
- Richard Francis O’Connor	1 April 2006 – 2006
- Keith John Reeves	1 November 2000 – 2006
- Michael Cyril Rolls	1 November 2000 – 30 March 2001
- Glen Franklyn Schofield	1 April 2005 – 2006
- Michael Wallis	2000 – 31 March 2004
- Peter Thomas Wardman	1 November 2000 – 2006

II.1307. The directors of Thomas Vale Holdings from 2000 to 2006 were as follows:¹⁴⁸³

- Robert Frederick Atkinson	1 November 2000 – 2006
- Bryan William Baker	2000 – 28 April 2000
- Colin John Briley	2000 – 2006
- Stephen Anthony Hyde	1 November 2000 – 2006
- John David Insall	1 November 2000 – 30 September 2005
- Richard William Morris	1 November 2000 – 2006
- Michael James Plimmer	2000 – 12 June 2003
- Michael Wallis	2000 – 2006
- Peter Thomas Wardman	19 April 2002 – 2006

II.1308. The following directors have been on the Board of Directors of both Thomas Vale and Thomas Vale Holdings during the periods mentioned below.¹⁴⁸⁴ The OFT considers that this provides evidence that Thomas Vale Holdings exercised decisive influence over Thomas Vale’s conduct at the time of the Infringements.

- Robert Frederick Atkinson	1 November 2000 – 2006
- Colin John Briley	2000 – 2006
- Stephen Anthony Hyde	1 November 2000 – 2006
- Michael Wallis	2000 – 31 March 2004
- Peter Thomas Wardman	19 April 2002 – 2006
- Michael James Plimmer	2000 – 12 June 2003

¹⁴⁸¹ Letter from Thomas Vale, 10 June 2009.

¹⁴⁸² Company Appointments, OFT Document Reference 12536.

¹⁴⁸³ Company Appointments, OFT Document Reference 12541.

¹⁴⁸⁴ Company Appointments Reports, OFT Document Reference 12536 and 12541.

- II.1309. Thomas Vale applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁴⁸⁵
- II.1310. The OFT considers that Thomas Vale Holdings, as 100 per cent owner of Thomas Vale, can be presumed to have exercised decisive influence over Thomas Vale's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Thomas Vale Holdings and Thomas Vale. Thomas Vale and Thomas Vale Holdings are therefore jointly and severally liable for Thomas Vale's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing, in respect of Infringements 30, 107 and 197.
- II.1311. This Decision is therefore addressed to Thomas Vale and Thomas Vale Holdings.

Thorndyke Limited ('Thorndyke')

- II.1312. Thorndyke is a private limited company registered in England and Wales, company number 03057276.¹⁴⁸⁶ Thorndyke's registered address is PriceWaterhouseCoopers LLP, Hill House, Richmond Hill, Bournemouth, BH2 6HR.¹⁴⁸⁷ Thorndyke's registered trading address is Spa Place, 36-42 Humberstone Road, Leicester, Leicestershire, LE5 0AE.¹⁴⁸⁸
- II.1313. Prior to liquidation, Thorndyke was primarily engaged in building, construction, maintenance contracts and contract painting for both public and private sector clients.¹⁴⁸⁹ Prior to liquidation, Thorndyke did not carry out work outside the United Kingdom.
- II.1314. An administrator was appointed on 13 January 2005 for Thorndyke¹⁴⁹⁰ and a voluntary liquidation creditor was appointed on 22 December 2005.¹⁴⁹¹
- II.1315. Thorndyke's ultimate parent company was M. Thorndyke & Sons Limited ('Thorndyke & Sons'), a private limited company, company number 00525066.¹⁴⁹² Thorndyke & Sons' registered address was School Farm, Launde Road, Loddington, Leicester, Leicestershire, LE7 9XB.¹⁴⁹³ Thorndyke was a wholly owned subsidiary of Thorndyke & Sons.¹⁴⁹⁴ Thorndyke & Sons was dissolved on 4 October 2005.¹⁴⁹⁵
- II.1316. Thorndyke has no subsidiaries.¹⁴⁹⁶

¹⁴⁸⁵ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf .

¹⁴⁸⁶ FAME report, OFT Document Reference 12552.

¹⁴⁸⁷ FAME report, OFT Document Reference 12552.

¹⁴⁸⁸ FAME report, OFT Document Reference 12552.

¹⁴⁸⁹ Financial statements, OFT Document Reference 12557, page 4.

¹⁴⁹⁰ Notice of administrator's appointment for Thorndyke, form 2.12B.

¹⁴⁹¹ Companies House Insolvency report.

¹⁴⁹² FAME report, OFT Document Reference 12554a.

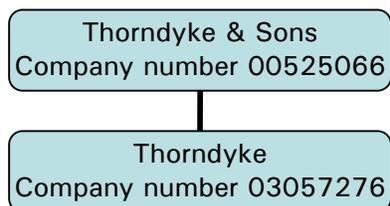
¹⁴⁹³ FAME report, OFT Document Reference 12554a.

¹⁴⁹⁴ FAME report, OFT Document Reference 12554a.

¹⁴⁹⁵ Companies House details, OFT Document Reference 12554.

¹⁴⁹⁶ FAME report, OFT Document Reference 12552.

II.1317. The overall company structure from 2000 to 4 October 2005¹⁴⁹⁷ was therefore as follows:



II.1318. From 4 October 2005 until 2006, Thorndyke did not have a holding company.

II.1319. Thorndyke's turnover for the financial year ending 31 December 2004 was [...] [C].¹⁴⁹⁸

II.1320. The directors of Thorndyke from 2000 to 2006 were as follows:¹⁴⁹⁹

- Stephen Richard Crayfound 2000 – 31 July 2000
- William Mark Davison 2000 – 18 April 2002
- Geoffrey John Drake 2000 – 26 March 2005
- Christopher Robert Johnson 2000 – 14 January 2005
- Stephen James Key 2000 – 24 March 2005
- Michael John Kitchener 2000 – 27 June 2002
- Ian Barrie Thorndyke 2000 – 26 March 2005

II.1321. The directors of Thorndyke & Sons from 2000 to 4 October 2005 were as follows:¹⁵⁰⁰

- William Mark Davison 2000 – 18 April 2002
- Geoffrey John Drake 2000 – 22 February 2005
- Christopher Robert Johnson 29 March 2001 – 14 January 2005
- Stephen James Key 2000 – 18 February 2005
- Michael John Kitchener 2000 – 27 June 2002
- Ian Barrie Thorndyke 2000 – 4 October 2005

II.1322. The following directors have been on the Board of Directors of both Thorndyke and Thorndyke & Sons during the periods mentioned below.¹⁵⁰¹ The OFT considers that this provides evidence that Thorndyke & Sons exercised decisive influence over Thorndyke's conduct at the time of the Infringements.

- William Mark Davison 2000 – 18 April 2002
- Geoffrey John Drake 2000 – 22 February 2005
- Christopher Robert Johnson 29 March 2001 – 14 January 2005
- Stephen James Key 2000 – 18 February 2005
- Michael John Kitchener 2000 – 27 June 2002
- Ian Barrie Thorndyke 2000 – 26 March 2005

¹⁴⁹⁷ Companies House details, OFT Document Reference 12554.

¹⁴⁹⁸ Information supplied by PriceWaterhouseCoopers on 21 May 2008.

¹⁴⁹⁹ Company Appointments, OFT Document Reference 12555.

¹⁵⁰⁰ Company Appointments, OFT Document Reference 12556.

¹⁵⁰¹ Company Appointments, OFT Document Reference 12555 and 12556.

- II.1323. Thorndyke did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁰²
- II.1324. The OFT considers that Thorndyke & Sons, as 100 per cent owner of Thorndyke, can be presumed to have exercised decisive influence over Thorndyke's commercial policy from 2000 until 4 October 2005 and therefore formed part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Thorndyke & Sons and Thorndyke. Accordingly, both Thorndyke & Sons and Thorndyke would have been jointly and severally liable for payment of the penalties that the OFT is imposing if Thorndyke and Sons had not been dissolved on 4 October 2005.
- II.1325. At the time of issue of the Statement, the OFT had been listed as having a potential 'contingent claim' in the liquidation of Thorndyke¹⁵⁰³ for any financial penalty that the OFT may in due course impose.
- II.1326. This Decision is therefore addressed to Thorndyke.

Try Accord Limited ('Try Accord')
Galliford Try Construction Limited ('Galliford Construction')
Galliford Try plc ('Galliford Try')

- II.1327. Try Accord is a private limited company registered in England and Wales, company number 01894256.¹⁵⁰⁴ Try Accord's registered address is Cowley Business Park, Cowley, Uxbridge, Middlesex, UB8 2AL. It also has two other trading addresses in Plymouth and Uxbridge.¹⁵⁰⁵
- II.1328. At the time of issue of the Statement, the principal activities of Try Accord were providing building infrastructure and maintenance services in Southern England¹⁵⁰⁶ and it did not carry out work outside the United Kingdom.
- II.1329. Galliford Construction is a private limited company registered in England and Wales, company number 02472080.¹⁵⁰⁷ Galliford Construction's registered address is Cowley Business Park, Cowley, Uxbridge, Middlesex, UB8 2AL. At the time of issue of the Statement, Galliford Construction operated from regional centres in the north, central and southern England.¹⁵⁰⁸
- II.1330. At the time of issue of the Statement, Galliford Construction operated via divisions undertaking work in building, infrastructure, house building, affordable housing and regeneration projects¹⁵⁰⁹ and it did not carry out work outside the United Kingdom.
- II.1331. On 17 April 2003 Galliford Construction changed its name from Galliford (U.K.) Limited.¹⁵¹⁰

¹⁵⁰² See paragraphs II.1481 to II.1487 below.

¹⁵⁰³ File note, OFT Document Reference 10889a.

¹⁵⁰⁴ FAME report, OFT Document Reference 11921.

¹⁵⁰⁵ FAME report, OFT Document Reference 11921.

¹⁵⁰⁶ Annual report and accounts, OFT Document Reference 11925, page 4.

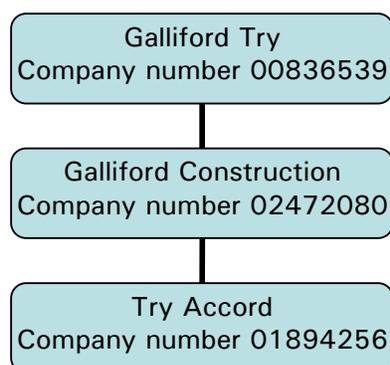
¹⁵⁰⁷ FAME report, OFT Document Reference 11920.

¹⁵⁰⁸ Annual report and accounts, OFT Document Reference 11924, page 4.

¹⁵⁰⁹ Market Definition response, OFT Document Reference 6889, pages 1 and 2.

¹⁵¹⁰ FAME report, OFT Document Reference 11920.

- II.1332. Try Accord is wholly owned by Galliford Construction, which is wholly owned by Galliford Try.¹⁵¹¹ Try Accord is therefore ultimately owned by Galliford Try.
- II.1333. Galliford Try is a public limited company registered in England and Wales, company number 00836539.¹⁵¹² Galliford Try's registered and primary trading address is Cowley Business Park, Cowley, Uxbridge, Middlesex, UB8 2AL.¹⁵¹³ It also has a trading address in Hinckley, Leicestershire.¹⁵¹⁴
- II.1334. On 18 September 2000 Galliford Try changed its name from Galliford plc¹⁵¹⁵ as a result of a merger between Galliford plc and Try Group plc.¹⁵¹⁶
- II.1335. The relevant group structure from 2000 - 2006 is outlined below:



- II.1336. At the time of issue of the Statement, Galliford Try had 57 other subsidiaries.¹⁵¹⁷
- II.1337. Galliford Construction has 10 other subsidiaries.¹⁵¹⁸
- II.1338. Try Accord Limited has no subsidiaries.¹⁵¹⁹
- II.1339. Galliford Try's worldwide consolidated turnover for the financial year ending 30 June 2009 was [...] [C].¹⁵²⁰
- II.1340. The directors of Try Accord from 2000 to 2006 were as follows:¹⁵²¹

- Joseph James Armitage	26 July 2004 – 2006
- Richard Barraclough	2000 – 2006
- David Calverley	2000 – 1 September 2001
- Andrew Crawford	1 October 2000 – 1 July 2002
- Anthony John Dalton	2000 – 31 August 2003
- Adrian John Farrant	1 May 2002 – 2006

¹⁵¹¹ FAME reports, OFT Document Reference 11919, 11920 and 11921.

¹⁵¹² FAME report, OFT Document Reference 11919.

¹⁵¹³ FAME report, OFT Document Reference 11919.

¹⁵¹⁴ Latest available FAME report of Galliford Try.

¹⁵¹⁵ FAME report, OFT Document Reference 11919.

¹⁵¹⁶ Galliford Try's website, OFT Document Reference 11934, page 1.

¹⁵¹⁷ Latest available FAME report of Galliford Try.

¹⁵¹⁸ Latest available FAME report of Galliford Construction.

¹⁵¹⁹ FAME report, OFT Document Reference 11921.

¹⁵²⁰ Email from Pinsent Masons LLP, 30 July 2009.

¹⁵²¹ Company Appointments, OFT Document Reference 11928.

- David Edward Hinton	2000 – 2006
- Christopher King	1 November 2002 – 30 May 2003
- George Robert Marsh	1 September 2001 – 31 October 2002
- Simon John McCausland	2000 – 27 February 2002
- Francis Eamon Nelson	2000 – 2006
- Stephen Godfrey Pollard	2000 – 6 September 2002
- Malcolm Arthur Ward	11 January 2002 – 31 August 2003
- Martin Lee White	2000 – 31 July 2003

II.1341. The directors of Galliford Construction from 2000 to 2006 were as follows:¹⁵²²

- Joseph James Armitage	26 July 2004 – 2006
- Dean Marlow Ashton	1 April 2001 – 1 July 2006
- Christopher Paul Bond	2000 – 2006
- Brian Thomas Branson	2000 – 31 December 2003
- Peter Kenneth Bullock	1 March 2001 – 31 December 2001
- Colin Crumlin	1 January 2004 – 2006
- David Downie	1 July 2006 – 2006
- Crevan Francis Dunlop	2000 – 19 April 2002
- Mark Robert Farnham	15 November 2001 – 2006
- Adrian John Farrant	1 January 2004 – 2006
- John Fidler	25 April 2003 – 31 May 2004
- Steven Matthew Foxcroft	2000 – 6 May 2003
- Stephen Wilson Jennings	2000 – 29 April 2003
- Christopher King	2000 – 30 May 2003
- George Robert Marsh	2000 – 31 October 2002
- John Paul Owen	25 April 2003 – 29 October 2004
- Colin James Robertson	2000 – 28 February 2001
- Andrew Frank Sturgess	25 April 2003 – 2006
- Anthony Charles Welch	2000 – 6 May 2003

II.1342. The directors of Galliford Try from 2000 to 2006 were as follows:¹⁵²³

- Christopher David Bucknall	15 September 2000 – 2006
- Amanda Jane Burton	1 July 2005 – 2006
- David Calverley	15 September 2000 – 2006
- Jonathan Donald Sherlock Dawson	1 January 2004 – 2006
- Paul Gregory Fitzgerald	1 July 2003 – 2006
- Kenneth Gillespie	31 March 2006 – 2006
- Michael Jackson	2000 – 29 October 2004
- Christopher King	2000 – 30 May 2003
- John Livingston	2000 – 15 September 2000
- Barry Kenneth Lockett	5 September 2000 – 21 January 2002
- George Robert Marsh	2000 – 31 October 2002
- Francis Eamon Nelson	15 September 2000 – 2006
- Michael Anthony Noble	2000 – 30 June 2003
- Horace Anthony Palmer	2000 – 28 October 2005
- Andrew Frank Sturgess	2 January 2003 – 2006
- Hugh William Try	2000 – 31 December 2003

¹⁵²² Company Appointments, OFT Document Reference 11929.

¹⁵²³ Company Appointments, OFT Document Reference 11930.

II.1343. The following directors have been on the Board of Directors of both Galliford Construction and Try Accord during the periods mentioned below.¹⁵²⁴ The OFT considers that this provides evidence that Galliford Construction exercised decisive influence over Try Accord's conduct at the time of the Infringements.

- Joseph James Armitage 26 July 2004 – 2006
- Adrian John Farrant 1 January 2004 – 2006
- Christopher King 1 November 2002 – 30 May 2003
- George Robert Marsh 1 September 2001 – 31 October 2002

II.1344. The following directors have been on the Board of Directors of both Try Accord and Galliford Try during the periods mentioned below.¹⁵²⁵ The OFT considers that this provides evidence that Galliford Try exercised decisive influence over Try Accord's conduct at the time of the Infringements.

- David Calverley 15 September 2000 – 1 September 2001
- Christopher King 1 November 2002 – 30 May 2003
- George Robert Marsh 1 September 2001 – 31 October 2002
- Francis Eamon Nelson 15 September 2000 – 2006

II.1345. The following directors have been on the Board of Directors of both Galliford Construction and Galliford Try during the periods mentioned below.¹⁵²⁶ The OFT considers that this provides evidence that Galliford Try exercised decisive influence over Galliford Construction's conduct at the time of the Infringements.

- Christopher King 2000 – 30 May 2003
- George Robert Marsh 2000 – 31 October 2002
- Andrew Frank Sturgess 25 April 2003 – 2006

II.1346. Galliford Try did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁵²⁷

II.1347. Try Accord and Galliford Construction did not apply for leniency.

II.1348. The OFT considers that Galliford Try, as 100 per cent owner of Galliford Construction, can be presumed to have exercised decisive influence over Galliford Construction's commercial policies during the relevant period and therefore they form part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Galliford Try and Galliford Construction. Galliford Try and Galliford Construction are therefore jointly and severally liable for the participation of Galliford Construction in the Infringements which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing in respect of Infringements 142 and 186.

II.1349. The OFT considers that Galliford Try, as 100 per cent indirect owner of Try Accord, can be presumed to have exercised decisive influence over Try Accord's commercial policies during the relevant period and therefore they form part of the same economic entity. The OFT notes in addition the evidence of

¹⁵²⁴ Company Appointments, OFT Document Reference 11928 and 11929.

¹⁵²⁵ Company Appointments, OFT Document Reference 11930 and 11928.

¹⁵²⁶ Company Appointments, OFT Document Reference 11930 and 11929.

¹⁵²⁷ See paragraphs II.1481 to II.1487 below.

the exercise of decisive influence in the form of directors in common between Galliford Try and Try Accord. Galliford Try and Try Accord are therefore jointly and severally liable for the participation of Try Accord in the Infringement which occurred during that period. Accordingly, they are jointly and severally liable for payment of the penalty that the OFT is imposing in respect of Infringement 42.

II.1350. This Decision is therefore addressed to Try Accord, Galliford Construction and Galliford Try.

W.R. Bloodworth & Sons Limited ('W R Bloodworth')

II.1351. W R Bloodworth is a private limited company registered in England and Wales, company number 00527271.¹⁵²⁸ W R Bloodworth's registered and primary trading address is 23 Wilford Lane, West Bridgford, Nottingham, Nottinghamshire, NG2 7QZ.¹⁵²⁹

II.1352. At the time of issue of the Statement, W R Bloodworth undertook general construction and building works mainly in the private housing sector and commercial sectors within the Nottinghamshire area¹⁵³⁰ and it did not carry out work outside the United Kingdom.

II.1353. W R Bloodworth has no holding company or subsidiaries.¹⁵³¹

II.1354. W R Bloodworth's turnover for the financial year ending 31 March 2008 was [...] [C].¹⁵³²

II.1355. The directors of W R Bloodworth from 2002 to 2006 were as follows:¹⁵³³

- Barbara Bloodworth	2002 – 2006
- David Rawson Bloodworth	2002 – 2006
- Stewart David Bloodworth	2002 – 2006
- Sarah Patricia Wells	2002 – 2006
- Anthony Robinson	2002 – 2006

II.1356. W R Bloodworth applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁵³⁴

II.1357. This Decision is addressed to W R Bloodworth. The OFT considers that W R Bloodworth is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

¹⁵²⁸ FAME report, OFT Document Reference 12561.

¹⁵²⁹ FAME report, OFT Document Reference 12561.

¹⁵³⁰ Market Definition response, OFT Document Reference 5739.

¹⁵³¹ FAME report, OFT Document Reference 12561.

¹⁵³² Written representations of W R Bloodworth, 27 June 2008.

¹⁵³³ Company Appointments Report, OFT Document Reference 12562.

¹⁵³⁴ See Part 3 of OFT Guidance 423

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf .

Wiggett Bros & Co Limited ('Wiggett')

II.1358. Wiggett is a private limited company registered in England and Wales, company number 00566060.¹⁵³⁵ Wiggett's registered and primary trading address is 3 Portland Road, Hucknall, Nottingham, Nottinghamshire, NG15 7SL.¹⁵³⁶

II.1359. At the time of issue of the Statement, Wiggett undertook predominantly refurbishment of commercial buildings¹⁵³⁷ and it did not carry out work outside the United Kingdom.

II.1360. Wiggett has no holding companies or subsidiaries.¹⁵³⁸

II.1361. Wiggett's turnover for the financial year ending 30 November 2008 was [...] [C].¹⁵³⁹

II.1362. The directors of Wiggett from 2002 to 2006 were as follows:¹⁵⁴⁰

- Elizabeth Mary Wiggett	2002 – 2006
- Paul Wiggett	2002 – 2006
- Tony Wiggett	2002 – 2006

II.1363. Wiggett did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁴¹

II.1364. This Decision is addressed to Wiggett. The OFT considers that Wiggett is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Wildgoose Construction Limited ('Wildgoose')

II.1365. Wildgoose is a private limited company registered in England and Wales, company number 00178605.¹⁵⁴² Wildgoose's registered and primary trading address is Fallgate, Milltown, Ashover, Chesterfield, Derbyshire, S45 0EY.¹⁵⁴³

II.1366. At the time of issue of the Statement, Wildgoose was a building contractor and private house builder undertaking works in the commercial, leisure, health, education, licensed premises, housing and listed buildings areas for both public and private clients.¹⁵⁴⁴ At the time of issue of the Statement, Wildgoose did not carry out work outside the United Kingdom.

II.1367. Wildgoose has no holding company.¹⁵⁴⁵

¹⁵³⁵ FAME report, OFT Document Reference 12566.

¹⁵³⁶ FAME report, OFT Document Reference 12566.

¹⁵³⁷ Market Definition response, OFT Document Reference 6561.

¹⁵³⁸ FAME report, OFT Document Reference 12566.

¹⁵³⁹ Letter from Maitland Walker, 30 July 2009.

¹⁵⁴⁰ Company Appointments Report, OFT Document Reference 12567.

¹⁵⁴¹ See paragraphs II.1481 to II.1487 below.

¹⁵⁴² FAME report, OFT Document Reference 12570.

¹⁵⁴³ FAME report, OFT Document Reference 12570.

¹⁵⁴⁴ Wildgoose's website, OFT Document Reference 12574, and Market definition response, OFT Document Reference 5721.

¹⁵⁴⁵ FAME report, OFT Document Reference 12570.

II.1368. Wildgoose has two subsidiaries.¹⁵⁴⁶

II.1369. Wildgoose's consolidated turnover for the financial year ending 30 September 2008 was [...] [C].¹⁵⁴⁷

II.1370. The directors of Wildgoose from 2000 to 2006 were as follows:¹⁵⁴⁸

- Graham Barber	2000 – 2006
- Brian Bennett	2000 – 2006
- Eric Alan Clarke	2000 – 2006
- Laura Rebecca Harcourt	2000 – 2006
- Mark David Stevenson	1 April 2002 – 15 September 2004
- Michael John Storey	2000 – 2006
- Timothy Walker	2000 – 19 October 2001 and 17 December 2004 – 2006
- John Wildgoose	2000 – 2006
- Jonathan Nigel Wildgoose	2000 – 2006
- Marjory Jean Wildgoose	2000 – 2006

II.1371. Wildgoose applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁵⁴⁹

II.1372. This Decision is addressed to Wildgoose. The OFT considers that Wildgoose is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringements 136, 158 and 159, on account of the participation in the Infringements of that undertaking.

William Sapcote and Sons Limited ('William Sapcote')
Sapcote Holdings Limited ('Sapcote Holdings')

II.1373. William Sapcote is a private limited company registered in England and Wales, company number 00476119.¹⁵⁵⁰ William Sapcote's registered address is Beaufort House, 94-96 Newhall Street, Birmingham, B3 1PB.¹⁵⁵¹

II.1374. At the time of issue of the Statement, William Sapcote undertook construction and refurbishment in the health, education, commercial and retail development sectors and provides specialist conservation and restoration work of listed properties and monuments.¹⁵⁵² At the time of issue of the Statement, William Sapcote did not carry out work outside the United Kingdom.

II.1375. William Sapcote's ultimate parent company is Sapcote Holdings, a private limited company, company number 02923454.¹⁵⁵³ Sapcote Holdings' last registered address was c/o Smith Cooper, Wilmot House, St James Court Friar

¹⁵⁴⁶ Latest available FAME report of Wildgoose.

¹⁵⁴⁷ Letter from DLA Piper LLP, 29 April 2009.

¹⁵⁴⁸ Company Appointments for Wildgoose, OFT Document Reference 12573.

¹⁵⁴⁹ See Part 3 of OFT Guidance 423,

http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of423.pdf .

¹⁵⁵⁰ FAME report, OFT Document Reference 12588.

¹⁵⁵¹ Latest Companies House details.

¹⁵⁵² Market definition response. OFT Document Reference 6817.

¹⁵⁵³ FAME report, OFT Document Reference 12589.

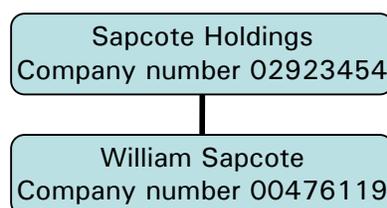
Gate, Derby, Derbyshire, DE1 1BT. William Sapcote is a wholly owned subsidiary of Sapcote Holdings.¹⁵⁵⁴

II.1376. An administrator was appointed for William Sapcote on 15 October 2007, and a voluntary liquidation creditor was appointed on 21 December 2008.¹⁵⁵⁵

II.1377. An administrator was appointed for Sapcote Holdings on 15 October 2007, and a compulsory liquidation order was made on 15 October 2008.¹⁵⁵⁶

II.1378. William Sapcote has no subsidiaries.¹⁵⁵⁷

II.1379. The relevant company structure at the time of the Infringements is outlined below:



II.1380. Sapcote Holdings had another six subsidiaries.¹⁵⁵⁸

II.1381. Sapcote Holdings' consolidated turnover for the financial year ending 31 March 2008 was £41,330,094.¹⁵⁵⁹

II.1382. The directors of William Sapcote from 2001 to 2006 were as follows:¹⁵⁶⁰

- Rodney Clive Blake	2001 – 16 April 2004
- Ian Andrew Burford	1 April 2001 – 31 January 2005
- Paul Dockerill	1 April 2002 – 2006
- Andrew John Lunson	2001 – 2006
- Peter Ambrose Perry	2001 – 8 December 2003
- Alan Clive Picton	2001 – 31 July 2001
- Richard Elwin Sapcote	2001 – 2006
- Colin Stanley Williamson	1 December 2004 – 31 August 2006

II.1383. The directors of Sapcote Holdings from 2001 to 2006 were as follows:¹⁵⁶¹

- Rodney Clive Blake	2001 – 16 April 2004
- Paul Dockerill	1 August 2005 – 2006
- Andrew John Lunson	2001 – 2006
- Peter Ambrose Perry	2001 – 8 December 2003
- Richard Elwin Sapcote	2001 – 2006
- Colin Stanley Williamson	2001 – 31 August 2006

¹⁵⁵⁴ Latest available FAME report of Sapcote Holdings.

¹⁵⁵⁵ Companies House insolvency history.

¹⁵⁵⁶ Companies House insolvency history.

¹⁵⁵⁷ FAME report, OFT Document Reference 12588.

¹⁵⁵⁸ FAME report, OFT Document Reference 12589.

¹⁵⁵⁹ Financial Statements.

¹⁵⁶⁰ Company Appointments Report, OFT Document Reference 12590.

¹⁵⁶¹ Company Appointments Report, OFT Document Reference 12591.

II.1384. The following directors have been on the Board of Directors of both William Sapcote and Sapcote Holdings during the periods mentioned below.¹⁵⁶² The OFT considers that this provides evidence that Sapcote Holdings exercised decisive influence over William Sapcote's conduct at the time of the Infringements.

- Rodney Clive Blake	2001 – 16 April 2004
- Andrew John Lunson	2001 – 2006
- Peter Ambrose Perry	2001 – 8 December 2003
- Richard Elwin Sapcote	2001 – 2006

II.1385. William Sapcote did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Sapcote Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁶³

II.1386. The OFT considers that Sapcote Holdings, as 100 per cent owner of William Sapcote, can be presumed to have exercised decisive influence over William Sapcote's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Sapcote Holdings and William Sapcote. William Sapcote and Sapcote Holdings are therefore jointly and severally liable for William Sapcote's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.1387. This Decision is therefore addressed to William Sapcote and Sapcote Holdings.

William Woodsend Limited ('William Woodsend')

II.1388. William Woodsend is a private limited company registered in England and Wales, company number 00205767.¹⁵⁶⁴ William Woodsend's registered and trading address is Newcastle Wharf, Castle Boulevard, Nottingham, Nottinghamshire, NG7 1GH.¹⁵⁶⁵

II.1389. At the time of issue of the Statement, William Woodsend undertook building contracting works throughout the Midlands and specialised in the housing, commercial and education sectors. It carried out both new build and renovation and repair work, especially insurance repairs.¹⁵⁶⁶ At the time of issue of the Statement, William Woodsend did not carry out work outside the United Kingdom.

II.1390. William Woodsend has no holding companies or subsidiaries.¹⁵⁶⁷

II.1391. William Woodsend's turnover for the financial year ending 30 September 2008 was [...] [C].¹⁵⁶⁸

II.1392. The directors of William Woodsend from 2002 to 2006 were as follows:¹⁵⁶⁹

¹⁵⁶² Company Appointments Reports, OFT Document Reference 12590 and 12591.

¹⁵⁶³ See paragraphs II.1481 to II.1487 below.

¹⁵⁶⁴ FAME Report, OFT Document Reference 12575.

¹⁵⁶⁵ FAME Report, OFT Document Reference 12575.

¹⁵⁶⁶ Website, OFT Document Reference 12579.

¹⁵⁶⁷ FAME Report, OFT Document Reference 12575.

¹⁵⁶⁸ Letter from Geldards LLP, 29 April 2009.

- Trevor David Newton 1 October 2002 – 2006
- Thomas Richard Scothorne 2000 – 2006
- Charles William Woodsend 2000 – 2006

II.1393. William Woodsend did not apply for leniency, but it was given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁷⁰

II.1394. This Decision is addressed to William Woodsend. The OFT considers that William Woodsend is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing, on account of the participation in the Infringements of that undertaking.

Willmott Dixon Construction Limited ('Willmott Dixon')
Willmott Dixon Holdings Limited formerly known as Willmott Dixon Limited ('Willmott Dixon Limited')

II.1395. Willmott Dixon is a private limited company registered in England and Wales, company number 00768173.¹⁵⁷¹ Willmott Dixon's registered and primary trading address is Spirella 2, Icknield Way, Letchworth Garden City, Hertfordshire, SG6 4GY.¹⁵⁷² Willmott Dixon has another trading address in Letchworth Garden City, as well as trading addresses in Hitchin, Birmingham, Cobham, Leeds Bristol, Gloucester, London and Nottingham.¹⁵⁷³

II.1396. At the time of issue of the Statement, Willmott Dixon was a national construction business which undertook predominantly high value new building projects in the commercial sector for both public and private clients. Projects included the construction of office, retail and leisure premises and healthcare and educational facilities.¹⁵⁷⁴ At the time of issue of the Statement Willmott Dixon did not carry out work outside the United Kingdom.

II.1397. At the time of issue of the Statement Willmott Dixon's ultimate parent company was Willmott Dixon Limited, a private limited company, company number 00198032.¹⁵⁷⁵ Willmott Dixon Limited's registered address is Spirella 2, Icknield Way, Letchworth Garden City, Hertfordshire, SG6 4GY.¹⁵⁷⁶ Willmott Dixon is a wholly owned subsidiary of Willmott Dixon Limited.¹⁵⁷⁷ On 29 April 2009 Willmott Dixon Limited changed its name to Willmott Dixon Holdings Limited.¹⁵⁷⁸

II.1398. Willmott Dixon has two subsidiaries.¹⁵⁷⁹

II.1399. The relevant company structure from 2003 to 2006 is outlined below:

¹⁵⁶⁹ Company Appointments, OFT Document Reference 12576.

¹⁵⁷⁰ See paragraphs II.1481 to II.1487 below.

¹⁵⁷¹ FAME report, OFT Document Reference 12596.

¹⁵⁷² Latest available FAME report of Willmott Dixon.

¹⁵⁷³ Latest available FAME report of Willmott Dixon.

¹⁵⁷⁴ Market definition response, OFT Document Reference 6863.

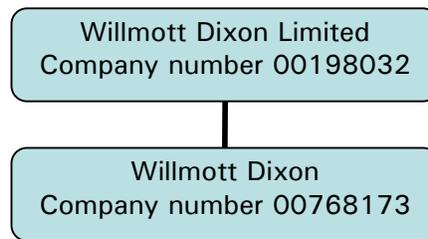
¹⁵⁷⁵ FAME report, OFT Document Reference 12597.

¹⁵⁷⁶ Companies House details.

¹⁵⁷⁷ FAME report, OFT Document Reference 12597.

¹⁵⁷⁸ Latest available FAME report of Willmott Dixon Limited.

¹⁵⁷⁹ FAME report, OFT Document Reference 12596.



II.1400. Willmott Dixon Limited has 22 other subsidiaries.¹⁵⁸⁰

II.1401. Willmott Dixon Limited's consolidated turnover for the financial year ending 31 December 2008 was [...] [C].¹⁵⁸¹

II.1402. The directors of Willmott Dixon from 2003 to 2006 were as follows:¹⁵⁸²

- Graham Carr	2003 – 30 June 2005
- Christine Elaine Chadney	2003 – 2006
- Steven Ian Graham Dixon	2003 – 1 June 2005
- Brian Douglas Drysdale	2003 – 2006
- Colin Enticknap	2003 – 2006
- John Frankiewicz	2003 – 2006
- Michael Leornard Hart	2003 – 2006
- James Ian Marler	2003 – 1 January 2004
- Matthew Anthony Organ	2003 – 1 September 2003
- Peter John Owen	1 January 2005 – 2006
- Mark Dominic Charles Tant	1 July 2004 – 2006
- Richard John Willmott	2003 – 2006

II.1403. The directors of Willmott Dixon Limited from 2003 to 2006 were as follows:¹⁵⁸³

- Steven Ian Graham Dixon	2003 – 2006
- Colin Enticknap	2003 – 2006
- Michael Anthony Latham	2003 – 2006
- Christopher Julian Sheridan	1 January 2003 – 31 January 2003
- Richard John Willmott	2003 – 2006

II.1404. The following directors have been on the Board of Directors of both Willmott Dixon and Willmott Dixon Limited during the periods mentioned below.¹⁵⁸⁴ The OFT considers that this provides evidence that Willmott Dixon Limited exercised decisive influence over Willmott Dixon's conduct at the time of the Infringements.

- Steven Ian Graham Dixon	2003 – 1 June 2005
- Colin Enticknap	2003 – 2006
- Richard John Willmott	2003 – 2006

¹⁵⁸⁰ Latest available FAME report of Willmott Dixon.

¹⁵⁸¹ Turnover information provided by Willmott Dixon Limited on 28 April 2009.

¹⁵⁸² Company Appointments Report, OFT Document Reference 12598.

¹⁵⁸³ Company Appointments Report, OFT Document Reference 12599.

¹⁵⁸⁴ Company Appointments Report, OFT Document Reference 12598 and 12599.

- II.1405. Willmott Dixon did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, Willmott Dixon Limited, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁸⁵
- II.1406. The OFT considers that Willmott Dixon Limited, as 100 per cent owner of Willmott Dixon, can be presumed to have exercised decisive influence over Willmott Dixon's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Willmott Dixon Limited and Willmott Dixon. Willmott Dixon and Willmott Dixon Limited are therefore jointly and severally liable for Willmott Dixon's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.1407. Since the Infringements described in this Decision, Willmott Dixon and Willmott Dixon Limited have been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Willmott Dixon and Willmott Dixon Limited at the relevant times, it is not jointly and severally liable with Willmott Dixon and Willmott Dixon Limited for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Willmott Dixon and Willmott Dixon Limited.
- II.1408. This Decision is therefore addressed to Willmott Dixon and Willmott Dixon Limited.

Wright (Hull) Limited ('Wright (Hull)')
T. Wright & Son (Holdings) Limited ('T Wright Holdings')

- II.1409. Wright (Hull) is a private limited company registered in England and Wales, company number 01567965.¹⁵⁸⁶ Wright (Hull)'s registered and trading address is Pricewaterhouse Coopers LLP, Benson House, 33 Wellington Street, Leeds, West Yorkshire, LS1 4JP.¹⁵⁸⁷
- II.1410. At the time of issue of the Statement, Wright (Hull) undertook construction work in sectors such as housing, education, commercial, retail, and health for both private and public clients.¹⁵⁸⁸ At the time of issue of the Statement, Wright (Hull) did not carry out work outside the United Kingdom.
- II.1411. From 2000 until 16 August 2006¹⁵⁸⁹ Wright (Hull)'s ultimate parent was T Wright Holdings, company number 00459004.¹⁵⁹⁰ T Wright Holdings' registered address is The Wright Group, Main St, Fountain Road, Kingston Upon Hull, Hull The East, Yorkshire, HU2 0LA.¹⁵⁹¹

¹⁵⁸⁵ See paragraphs II.1481 to II.1487 below.

¹⁵⁸⁶ FAME report, OFT Document Reference 12604.

¹⁵⁸⁷ Latest Companies House details.

¹⁵⁸⁸ Website, OFT Document Reference 12617.

¹⁵⁸⁹ Report of the Directors and Financial Statements, OFT Document Reference 12610.

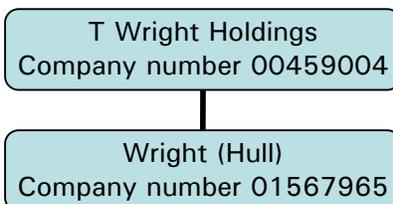
¹⁵⁹⁰ FAME report, OFT Document Reference 12605.

¹⁵⁹¹ Latest available FAME report of T Wright Holdings.

II.1412. An administrator was appointed on 3 February 2009 for Wright (Hull) and T Wright Holdings.¹⁵⁹²

II.1413. Wright (Hull) has no subsidiaries.¹⁵⁹³

II.1414. The relevant structure is outlined below:



II.1415. T Wright Holdings' consolidated turnover for the financial year ending 28 February 2007 was £19,457,233.¹⁵⁹⁴

II.1416. The directors of Wright (Hull) from 2004 to 2006 were as follows:¹⁵⁹⁵

- Christopher John Davis	2004 – 2006
- Julie Jessie Landlands	2004 – 19 November 2004
- Matthew Blake Watts	14 July 2005 – 2006
- Anne Marie Wright	2004 – 2006
- Michael Philip Wright	2004 – 2006
- Nicholas John Wright	2004 – 2006
- Philip Wright	2000 – 2006

II.1417. The directors of T Wright Holdings from 2004 to 2006 were as follows:¹⁵⁹⁶

- John Charles Groves	2004 – 2006
- John Michael Wardell	2004 – 2006
- Anne Marie Wright	2004 – 2006
- Michael Philip Wright	2004 – 2006
- Nicholas John Wright	2004 – 2006
- Philip Wright	2004 – 2006

II.1418. The following directors have been on the Board of Directors of both Wright (Hull) and T Wright Holdings during the periods mentioned below.¹⁵⁹⁷ The OFT considers that this provides evidence that T Wright Holdings exercised decisive influence over Wright (Hull)'s conduct at the time of the Infringements.

- Anne Marie Wright	2004 – 2006
- Michael Philip Wright	2004 – 2006
- Nicholas John Wright	2004 – 2006
- Philip Wright	2004 – 2006

¹⁵⁹² Notice of administrator's appointment, form 2.12B

¹⁵⁹³ FAME report, OFT Document Reference 12604.

¹⁵⁹⁴ Written representations of Wright (Hull) and T Wright Holdings, 27 June 2008.

¹⁵⁹⁵ Company Appointments Report, OFT Document Reference 12607.

¹⁵⁹⁶ Company Appointments Report, OFT Document Reference 12608.

¹⁵⁹⁷ Company Appointments Reports, OFT Document References 12607 and 12608.

- II.1419. Wright (Hull) did not apply for leniency, but both it and its ultimate parent company at the time of the Infringements, T Wright Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁵⁹⁸
- II.1420. The OFT considers that T Wright Holdings, as 100 per cent owner of Wright (Hull), can be presumed to have exercised decisive influence over Wright (Hull)'s commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between T Wright Holdings and Wright (Hull). Wright (Hull) and T Wright Holdings are therefore jointly and severally liable for Wright (Hull)'s participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.
- II.1421. Since the Infringements described in this Decision, Wright (Hull) has been subject to a change in ownership. As the new parent company did not form part of the same economic entity as Wright (Hull) at the relevant times, it is not jointly and severally liable with Wright (Hull) and T Wright Holdings for payment of the penalties that the OFT is imposing. For the avoidance of doubt, this Decision is not addressed to the new parent company of Wright (Hull).
- II.1422. This Decision is therefore addressed to Wright (Hull) and T Wright Holdings.

Wygar Construction Co Limited ('Wygar')
Wygar (Holdings) Limited ('Wygar Holdings')

- II.1423. Wygar is a private limited company registered in England and Wales, company number 01097872.¹⁵⁹⁹ Wygar's registered and primary trading address is 22 Broadway North, Walsall, West Midlands, WS1 2AJ.¹⁶⁰⁰
- II.1424. At the time of issue of the Statement, Wygar undertook mainly commercial construction work in sectors such as education, health, leisure, office and retail for both public and private clients¹⁶⁰¹ and it did not carry out work outside the United Kingdom.
- II.1425. Wygar's ultimate parent company is Wygar Holdings, a private limited company, company number 03654440.¹⁶⁰² Wygar Holdings' registered address is 22 Broadway North, Walsall, West Midlands, WS1 2AJ.¹⁶⁰³ Wygar is a wholly owned subsidiary of Wygar Holdings.¹⁶⁰⁴
- II.1426. Wygar has no subsidiaries.¹⁶⁰⁵
- II.1427. The overall company structure from 2001 to 2006 is outlined below:

¹⁵⁹⁸ See paragraphs II.1481 to II.1487 below.

¹⁵⁹⁹ FAME report, OFT Document Reference 12630.

¹⁶⁰⁰ FAME report, OFT Document Reference 12630.

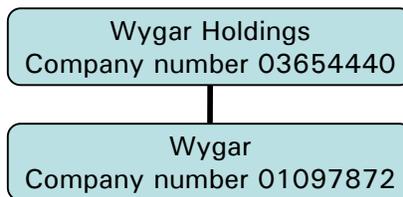
¹⁶⁰¹ Website, OFT Document Reference 12636 and Market definition response, OFT Document Reference 6435.

¹⁶⁰² FAME report, OFT Document Reference 12631.

¹⁶⁰³ FAME report, OFT Document Reference 12631.

¹⁶⁰⁴ FAME report, OFT Document Reference 12631.

¹⁶⁰⁵ FAME report, OFT Document Reference 12630.



II.1428. Wygar's turnover for the financial year ending 31 January 2009 was [...] [C].¹⁶⁰⁶

II.1429. Wygar Holdings has no turnover of its own.¹⁶⁰⁷

II.1430. The directors of Wygar from 2001 to 2006 were as follows:¹⁶⁰⁸

- David Hugh Court	2001 – 2006
- Susan Court	1 January 2004 – 2006
- Christopher Horobin	2001 – 2006
- Elisabeth Jayne Horobin	1 January 2004 – 2006

II.1431. The directors of Wygar Holdings from 2001 to 2006 were as follows:¹⁶⁰⁹

- David Hugh Court	2001 – 2006
- Christopher Horobin	2001 – 2006

II.1432. The following directors have been on the Board of Directors of both Wygar and Wygar Holdings during the periods mentioned below.¹⁶¹⁰ The OFT considers that this provides evidence that Wygar Holdings exercised decisive influence over Wygar's conduct at the time of the Infringements.

- David Hugh Court	2001 – 2006
- Christopher Horobin	2001 – 2006

II.1433. Wygar did not apply for leniency, but both it and its ultimate parent company at the time of the Alleged Infringements, Wygar Holdings, were given the opportunity of accepting the OFT's Fast Track Offer.¹⁶¹¹

II.1434. The OFT considers that Wygar Holdings, as 100 per cent owner of Wygar, can be presumed to have exercised decisive influence over Wygar's commercial policy during the relevant period and therefore forms part of the same economic entity. The OFT notes in addition the evidence of the exercise of decisive influence in the form of directors in common between Wygar Holdings and Wygar. Wygar and Wygar Holdings are therefore jointly and severally liable for Wygar's participation in the Infringements. Accordingly, they are jointly and severally liable for payment of the penalties that the OFT is imposing.

II.1435. This Decision is therefore addressed to Wygar and Wygar Holdings.

¹⁶⁰⁶ Email from Watson Burton, 23 June 2009.

¹⁶⁰⁷ Email from Watson Burton, 23 June 2009.

¹⁶⁰⁸ Company Appointments Report, OFT Document Reference 12632.

¹⁶⁰⁹ Company Appointments Report, OFT Document Reference 12633.

¹⁶¹⁰ Company Appointments Reports, OFT Document Reference 12632 and 12633.

¹⁶¹¹ See paragraphs II.1481 to II.1487 below.

York House Construction Limited ('York House')

- II.1436. York House is a private limited company registered in England and Wales, company number 03359049.¹⁶¹² York House's registered and primary trading address is 1 Bridgewater Place, Water Lane, Leeds, West Yorkshire, LS11 5QR.¹⁶¹³ York House also has two other trading addresses in Leeds.¹⁶¹⁴
- II.1437. At the time of issue of the Statement, York House's construction services included new build, refurbishment, and alteration works in Yorkshire and the North East of England in market sectors such as industrial, commercial, retail, healthcare, education, residential and leisure.¹⁶¹⁵ At the time of issue of the Statement, York House did not carry out work outside the United Kingdom.
- II.1438. On 26 November 2008 joint administrators were appointed for York House.¹⁶¹⁶
- II.1439. York House has no holding company but does have one subsidiary.¹⁶¹⁷
- II.1440. York House's unconsolidated turnover for the financial year ending 31 December 2007 was [...] [C].¹⁶¹⁸
- II.1441. The directors of York House from 2003 to 2006 were as follows:¹⁶¹⁹
- | | |
|------------------------|-----------------------|
| - Robert Andrew Bruce | 2003 – 2006 |
| - James William Grice | 2003 – 2006 |
| - Stephen William Hall | 1 January 2005 – 2006 |
| - Frank Kofler | 1 May 2005 – 2006 |
| - Arthur Richardson | 1 January 2005 – 2006 |
| - Simon Robert Smith | 1 January 2005 – 2006 |
- II.1442. York House applied for, and has been granted, leniency in accordance with the OFT's leniency programme.¹⁶²⁰
- II.1443. This Decision is addressed to York House. The OFT considers that York House is liable for the Infringements described in this Decision and that it is liable for payment of the penalties that the OFT is imposing in respect of Infringements 195, 211 and 233¹⁶²¹, on account of the participation in the Infringements of that undertaking.

¹⁶¹² FAME report, OFT Document Reference 12637.

¹⁶¹³ Latest available FAME report.

¹⁶¹⁴ Latest available FAME report.

¹⁶¹⁵ Website, OFT Document Reference 12640.

¹⁶¹⁶ Notice of administrator's appointment, form 2.12B.

¹⁶¹⁷ FAME report, OFT Document Reference 12637.

¹⁶¹⁸ Written representations of York House, 27 June 2008.

¹⁶¹⁹ Company Appointments Report, OFT Document Reference 12638.

¹⁶²⁰ See Part 3 of OFT Guidance 423

http://www.offt.gov.uk/shared_offt/business_leaflets/ca98_guidelines/oft423.pdf.

¹⁶²¹ The penalties in respect of Infringements 211 and 233 are reduced to zero as these are 'But for' Infringements.

B. The OFT's Investigation

The initial contact

II.1444. The OFT was contacted by an Internal Audit Manager acting for the Queens' Medical Centre Nottingham University Hospital NHS Trust in Nottingham on 1 April 2004. The Internal Audit Manager alleged that, amongst other things, there had been collusion in the bidding process for tenders for works at the Queens' Medical Centre.

Section 27 inspections in November 2004

II.1445. As a result of this contact and the initial information gathered by the OFT which gave reasonable grounds to suspect collusive tendering in the construction industry in the East Midlands area, and possibly more widely throughout England, the OFT exercised its powers under section 27 of the Act to inspect the premises of the following eight companies without notice.

Name of undertaking	Power used	Date inspected
Baggaley & Jenkins	section 27 without notice	19 November 2004
Bodill	section 27 without notice	19 November 2004
GF Tomlinson	section 27 without notice	18 November 2004
Greenwood	section 27 without notice	19 November 2004
Herbert Baggaley	section 27 without notice	18 November 2004
John Cawley	section 27 without notice	19 November 2004
Thomas Fish	section 27 without notice	18 November 2004
Wildgoose	section 27 without notice	18 November 2004

II.1446. As a result of these inspections the OFT received applications for leniency from the following companies:

Company	Date leniency marker granted
John Cawley	19 November 2004
Wildgoose	23 November 2004
Bodill	9 December 2004

Section 28 searches of premises in June and July 2005

II.1447. As a result of these inspections and leniency applications, the OFT obtained considerable evidence of the widespread nature of collusive tendering in the construction industry throughout the East Midlands – see paragraph II.1460 below – and in particular the OFT obtained evidence that many other companies had engaged, along with those companies listed in the table following paragraph II.1445 above, in cover pricing and other bid rigging activities in relation to specific tenders. The OFT decided to focus its investigation on those companies which, according to the evidence in the OFT's possession at that time, appeared to have engaged in bid rigging activities in connection with at least **five** different Suspect Tenders. The OFT therefore proceeded to obtain

warrants to enter and search the premises of the following 22 companies (including the five companies which had been the subject of the section 27 visits described in paragraph II.1445 above but had not applied for leniency), using its powers under section 28 of the Act.

Name of undertaking	Power used	Date inspected
Ackroyd & Abbott	section 28	05 July 2005
Adam Eastwood	section 28	29 June 2005
ARG	section 28	28 June 2005 ¹⁶²²
Baggaley & Jenkins	section 28	14 June 2005
Beaufort	section 28	29 June 2005
Derwent Valley	section 28	05 July 2005
Frudd	section 28	29 June 2005
G Carter	section 28	06 July 2005
G F Tomlinson	section 28	14 June 2005
Greenwood	section 28	15 June 2005
Harold Adkin	section 28	28 June 2005
Herbert Baggaley	section 28	14 June 2005
J H Hallam	section 28	06 July 2005
Loach	section 28	28 June 2005
P Waller	section 28	06 July 2005
Robert Woodhead	section 28	05 July 2005
Strata	section 28	06 July 2005 ¹⁶²³
Thomas Fish	section 28	15 June 2005
Thomas Long	section 28	28 June 2005
Wiggett	section 28	05 July 2005
William Woodsend	section 28	29 June 2005
W R Bloodworth	section 28	28 June 2005

II.1448. As a result of these searches the OFT received applications for leniency from the following 11 companies:

¹⁶²² The OFT conducted an additional search of the premises of ARG on 15 September 2005, with the company's consent.

¹⁶²³ The OFT conducted an additional search of the premises of Strata on 7 July 2005, with the company's consent.

Company	Date leniency marker granted
Herbert Baggaley	14 June 2005
Derwent Valley	5 July 2005
P Waller	6 July 2005
Strata	6 July 2005
W R Bloodworth	7 July 2005
Thomas Fish	12 July 2005
Loach	19 July 2005
Frudd	1 September 2005
Adam Eastwood	6 September 2005
ARG	11 October 2005
J H Hallam	21 April 2006

II.1449. The section 28 visits in June and July 2005 and the subsequent leniency applications produced considerable amounts of additional evidence of collusive tendering, not only in the East Midlands, but also in areas adjoining the East Midlands (most notably Yorkshire and Humberside and areas to the south and west of the East Midlands) and also nationally across England – see paragraph II.1460 below. The OFT also obtained for the first time significant evidence that collusive tendering was being undertaken not only by small and medium sized companies but also by the larger nationally-operating companies. As a result of this additional evidence the OFT instigated two additional investigations in addition to the existing East Midlands investigation: one into collusive tendering in the Yorkshire and Humberside areas, and another into collusive tendering by national construction companies. The OFT then proceeded to undertake a further series of inspections and searches of premises as detailed in the following paragraphs.

Section 27 inspections in January 2006

II.1450. In relation to the East Midlands investigation, the OFT decided to focus its investigation on those companies which, according to the evidence in the OFT's possession at that time, had engaged in collusive tendering in relation to at least **five** separate Suspect Tenders. This led the OFT to exercise its powers under section 27 of the Act to inspect the premises of the following further 14 companies without notice.

Name of undertaking	Power used	Date inspected
Admiral	section 27 without notice	24 January 2006
Carmalor	section 27 without notice	19 January 2006
Clegg	section 27 without notice	18 January 2006
Davlyn	section 27 without notice	25 January 2006
Dukeries	section 27 without notice	19 January 2006
E Taylor	section 27 without notice	20 January 2006
G Hurst	section 27 without notice	18 January 2006
J J & A R Jackson	section 27 without notice	18 January 2006
K J Bryan	section 27 without notice	19 January 2006
Lindum	section 27 without notice	26 January 2006
Phoenix	section 27 without notice	25 January 2006
Sol	section 27 without notice	18 January 2006
T Denman	section 27 without notice	24 January 2006
Thomas Vale	section 27 without notice	24 January 2006

II.1451. As a result of these further inspections the OFT received applications for leniency from the following six companies:

Company	Date leniency marker granted
Clegg	18 January 2006
Admiral	24 January 2006
Phoenix	26 January 2006
Thomas Vale	27 January 2006
Sol	30 January 2006
Davlyn	9 November 2006

Section 28 searches of premises in February/March 2006

II.1452. As noted above, the OFT instigated an additional investigation to focus in particular on the bid rigging activities of the larger, nationally operating construction companies. As in the case of the East Midlands investigation, the OFT focused its investigation on those companies which, according to the evidence in the OFT's possession at that time, appeared to have engaged in collusive tendering in connection with at least **five** separate Suspect Tenders. This led the OFT to obtain further warrants to enter and search the premises of the following nine additional companies, using its powers under section 28 of the Act.

Name of undertaking	Power used	Date inspected
Allenbuild	section 28	09 March 2006
Bluestone	section 28	23 February 2006
Bowmer & Kirkland	section 28	07 March 2006
Bramall	section 28	23 February 2006
Henry Boot	section 28	21 February 2006
Mansell	section 28	21 February 2006
Mowlem	section 28	02 March 2006
Simons	section 28	28 February 2006
Wrights (Lincoln)	section 28	28 February 2006

II.1453. Following these searches, the OFT received applications for leniency from the following eight companies:¹⁶²⁴

Company	Date leniency marker granted
Mansell	23 February 2006
Bluestone	23 February 2006
Balfour Beatty	8 March 2006
Bramall	10 March 2006
Frank Haslam Milan	10 March 2006
Mowlem	13 March 2006
Henry Boot	28 April 2006
Simons	20 December 2006
Wrights (Lincoln)	20 December 2006

Section 28 searches of premises in March 2006

II.1454. In relation to the Yorkshire and Humberside investigation, the OFT decided to focus on those companies which, according to the evidence in the OFT's possession at that time, appeared to have engaged in collusive tendering in connection with at least **five** separate Suspect Tenders, or had engaged in bid rigging activities on at least **three tenders each having a contract value exceeding £0.5 million**.¹⁶²⁵ The OFT proceeded to obtain warrants to enter and search the premises of the following eight additional companies, using its powers under section 28 of the Act. For a ninth company, York House, the OFT's search of the premises was conducted with the company's consent since it had applied for leniency shortly before the OFT's scheduled date for a search.¹⁶²⁶

¹⁶²⁴ One further company applied for leniency on 4 October 2006 but the OFT's subsequent investigation did not reveal sufficient evidence for it to meet the OFT's objective selection criteria (see paragraphs II.1459 to II.1469 below) and the OFT did not proceed against that company on the grounds of administrative priority. This company is not therefore a party to the investigation.

¹⁶²⁵ High tender values would generally indicate the possibility of greater consumer detriment.

¹⁶²⁶ York House submitted its leniency application on 23 March 2006, prior to the OFT's search with the consent of York House on 28 March 2006.

Name of undertaking	Power used	Date inspected
Harlow & Milner	section 28	22 March 2006
Hobson & Porter	section 28	28 March 2006
Irwins	section 28	21 March 2006
Jack Lunn	section 28	21 March 2006
Propensity	section 28	22 March 2006 ¹⁶²⁷
Richardson Projects	section 28	21 March 2006
Stainforth	section 28	22 March 2006
T & C Williams	section 28	28 March 2006

II.1455. Following these searches, the OFT received applications for leniency from the following seven companies.

Company	Date leniency marker granted
Harlow & Milner	23 March 2006
Jack Lunn	31 March 2006
Irwins	31 March 2006
Propensity	5 April 2006
T & C Williams	20 April 2006
Hobson & Porter	4 May 2006
Arthur M Griffiths ¹⁶²⁸	22 June 2006

Interviews conducted in October/November 2006

II.1456. From October to December 2006, the OFT conducted interviews with employees, consultants and ex-employees of the following companies, focusing in particular on two discrete issues relating to the investigations, namely alleged compensation payments (see paragraphs IV.147 to IV.155 of the General comments on cover pricing section below) and trade associations alleged to have facilitated the bid rigging activities undertaken by the Parties to the investigation (the Nottingham Builders' Guild and the North Nottinghamshire Contractors' Guild – see paragraphs IV.128 to IV.146 of the General comments on cover pricing section below).

¹⁶²⁷ The OFT conducted an additional examination of documents from Propensity at the premises of its legal representatives on 9 August 2006, with the consent of the company which had applied for leniency by that date.

¹⁶²⁸ Although no search of Arthur M Griffiths' premises was conducted prior to this date, it applied for leniency after the incident of bid rigging described in paragraphs IV.6803 to IV.6837 of the Conduct of the Parties section below.

Name of undertaking	Date(s) of interview(s)	Transcript reference(s)
ARG	15 November 2006	11101, 11098, 11112, 11113
Bodill	2 November 2006	6337, 6338, 6339, 6340
Frudd	15 November 2006, 21 December 2006	6350, 6351, 6352
Greenwood (ex-employee)	12 October 2006	6362
Herbert Baggaley	2 November 2006 5 December 2006	6370, 6371, 6372, 13399
John Cawley	1 November 2006	11297, 11298
Loach	24 November 2006	11311, 11312, 11313
P Waller	25 October 2006	6366, 6367
Sol	15 November 2006	6381, 6382, 6383, 6384
Strata	14 November 2006, 23 November 2006	6374, 6379
Thomas Fish	2 November 2006, 15 November 2006	6355, 6356, 6360
Wildgoose	1 November 2006, 2 November 2006, 5 December 2006.	6319, 6320, 6321, 6330, 6331, 6332, 6333, 6334, 6335, 13399
W R Bloodworth	16 November 2006	6347, 6348

Section 27 inspections in January 2007

II.1457. Following these interviews, the OFT undertook some final inspections of premises in order to ensure that it had all of the relevant evidence in relation to the suspected instances of compensation payments. The OFT exercised its powers under section 27 of the Act to inspect the premises of the following two companies without notice.¹⁶²⁹

Name of undertaking	Power used	Date inspected
Hill	section 27 without notice	24 January 2007
Durkan	section 27 without notice	24 January 2007

Section 26 notices sent during the course of the investigation

II.1458. Over 500 notices requiring documents and information under section 26 of the Act¹⁶³⁰ were sent during the course of the investigation. Full details of these

¹⁶²⁹ One additional company was visited by the OFT on 24 January 2007 but the OFT's subsequent investigation did not reveal sufficient evidence for it to meet the OFT's objective selection criteria (see paragraphs II.1463 to II.1466 below) and it was not therefore taken forward as a party to the investigation.

¹⁶³⁰ Section 26 of the Act empowers the OFT, for the purposes of an investigation under section 25

notices were made available to the Parties as part of the OFT's access to file process. In summary, the OFT issued the following main sets of section 26 notices to the following parties prior to issue of the Statement:

- a number of section 26 notices, issued to some of the Parties visited by the OFT either during or shortly after those visits;
- 450 section 26 notices to each of the clients whose tenders were the subject of alleged bid rigging, from 23 March 2007 to 29 March 2007, requesting details of those tenders including dates, tendering companies and bid amounts, as well as more general information to assist with the OFT's definition of the relevant markets (the OFT's 'Clients' Survey');
- 77 section 26 notices to each of the non-leniency Parties, on 10 May 2007 and 14 May 2007, requesting information to assist with the OFT's definition of relevant markets (the OFT's 'Suppliers' Survey'); and
- section 26 notices to liquidators and administrators of companies which were in the process of being liquidated or in administration, requesting information to assist the OFT in determining successor liability issues.

Consolidation of the investigation

II.1459. Following the searches in March 2006, the OFT conducted a comprehensive analysis of the information obtained at the premises of all of the companies visited, and through leniency applications. The information obtained included a considerable quantity of electronic material seized by the OFT during the section 28 visits in 2005 and 2006 using its 'seize and sift' powers under the Criminal Justice and Police Act 2001 (the 'CJPA').¹⁶³¹ This electronic material was sifted for relevance during August 2005 and during July and August 2006 respectively, and each relevant company was given the opportunity to examine the material considered by the OFT to be relevant to its investigations, and to make representations on relevance and legal privilege, before any agreed relevant non-privileged material was added to the OFT's file.

II.1460. By the autumn of 2006 the OFT had considerable general evidence relating to the widespread nature of collusive tendering in the construction industry throughout England – see paragraphs IV.10 to IV.18 below. In addition, the OFT had specific evidence of collusive tendering, including cover pricing and/or compensation payments, involving over 1,000 companies in connection with over 4,000 tenders, estimated to be worth around £3 billion. The companies alleged to be involved ranged from very small organisations with perhaps only one or two employees, through to organisations that ranked amongst the forty largest construction companies operating in Europe.¹⁶³² Geographically there was an emphasis on the East Midlands and neighbouring areas (in particular Yorkshire and Humberside) in view of the focus of the OFT's investigations, but it was clear to the OFT from the evidence that the practice of cover pricing in

of the Act, to require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.

¹⁶³¹ Section 50 of the CJPA empowers the OFT to seize electronic material from premises and to sift that material at a later date, in circumstances where it believes the electronic material contains data relevant to the investigation, and either it is not reasonably practicable to determine on the premises the extent to which this is the case and/or it is not reasonably practicable on the premises to separate out the relevant data without compromising its evidential value.

¹⁶³² See www.deloitte.com/dtt/whitepaper/0,1017,cid%253D36401,00.html.

particular was widespread and that a concentrated focus on any different area in England would in all likelihood have produced considerable additional evidence of cover pricing in each new area and surrounding districts.

II.1461. The OFT's mission is to make markets work well for consumers. It achieves this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are fair and competitive. It was clear to the OFT that bid rigging, and more specifically cover pricing, was widespread in the construction industry in England. The OFT therefore needed to send a clear message to construction companies of all sizes that such practices are illegal and that companies found to have engaged in bid rigging can expect to receive appropriate financial penalties for such activities.

II.1462. Given the OFT's limited resources, it was necessary to consolidate the investigations in order to ensure that resources were targeted as effectively as possible, ensuring not only that those companies which had allegedly participated in such activity were subject to penalties accordingly, but also crucially that companies throughout the construction industry were effectively deterred from engaging in bid rigging, and more specifically cover pricing, going forward. In addition it was uppermost in the OFT's mind that effective enforcement also meant that the OFT should seek to complete its investigation, and proceed to any infringement decision, in as short a time as possible. The OFT therefore decided at this stage of its investigation to undertake a significant consolidation exercise involving the following five key steps.

II.1463. The first consolidation step undertaken by the OFT was to amalgamate the evidence from the three investigations, which previously had targeted separately companies in the East Midlands, companies in Yorkshire and Humberside, and the nationally-operating companies. This enabled the OFT to establish the total number of tenders in relation to which each company was suspected of collusive tendering.

II.1464. Secondly, the OFT undertook an initial categorisation of the evidence, using the following categories.

Evidence category	Description of evidence	Examples of evidence
1	Two stand-alone pieces of evidence of collusion on a specific tender from two <u>different</u> Parties corroborating each other	<ul style="list-style-type: none"> • Tender log from Party A and tender log from Party B • Tender log from Party A and witness statement from Party B
2	Two stand-alone pieces of evidence of collusion on a specific tender from <u>one</u> Party corroborating each other	<ul style="list-style-type: none"> • Tender log by Party A and witness statement by Party A
3	<p>One uncorroborated piece of evidence which falls within one of the below scenarios:</p> <ul style="list-style-type: none"> • From a leniency Party: A witness statement or summary table produced for the purposes of leniency which has been corroborated generally by other evidence but where there is no specific corroboration of the individual tender in question; • From a non-lenieny Party: A contemporaneous tender log book which has been corroborated generally by other evidence but where there is no specific corroboration of the individual tender in question; or Any other piece of unambiguous and strong contemporaneous documentary evidence (e.g. a fax, email or contemporaneous note) 	

II.1465. The third consolidation step undertaken by the OFT was to limit its further investigation to those companies for which there was category 1, 2 or 3 evidence as described above of collusive tendering in relation to a minimum of five Suspect Tenders. The OFT considered that its investigation should focus on those companies for which it had the best available evidence, and those companies for which it had evidence of the most repeat behaviour. With a minimum of five Suspect Tenders, the OFT's investigation was able to focus on those companies that, on the evidence then available to the OFT, appeared to have engaged in bid rigging activities on the most occasions. That is not to say, however, that the OFT does not regard a single isolated occurrence of cover pricing as constituting a serious infringement of the Act.

II.1466. As a result of the consolidation steps described above, the OFT was able to reduce the scope of its investigation to a total of 122 companies, of which 37 had applied for leniency ('leniency Parties') and the remaining 85 had not ('non-lenieny Parties'). Of these remaining 85, only 20 companies were at this stage aware that they were under investigation following an inspection of their premises by the OFT as described in the above paragraphs.¹⁶³³

¹⁶³³ See paragraphs II.1502 to II.1506 below which explain how the OFT reached the final number of 112 Parties taken forward to the Statement.

- II.1467. The fourth consolidation step undertaken by the OFT was to continue to investigate only five Suspect Tenders for each of the non-leniency Parties. Only a few of these non-leniency Parties were involved in only the minimum of five Suspect Tenders necessary for inclusion in the investigation as described in paragraph II.1465 above, whereas most were involved in more and in several cases considerably more than five Suspect Tenders.
- II.1468. The five Suspect Tenders for each of the non-leniency Parties were chosen according to a set of objective criteria, the most important of which was the quality of the known evidence. Where the quality of the evidence in respect of two or more Suspect Tenders was identical, other factors were brought into play, being primarily the value of the tender (since high tender values would generally indicate the possibility of greater consumer detriment) and the time period over which the suspected infringements occurred thus demonstrating a pattern of repeated behaviour over time. The OFT also sought to ensure that the resulting general spread of Suspect Tenders amongst the leniency Parties was as even as possible (see paragraph II.1469 below); and sought to avoid tenders where this would implicate companies that had not made the objective minimum threshold for inclusion in the investigation described in paragraph II.1465 above.
- II.1469. For the leniency Parties, these companies were mostly party to at least five Suspect Tenders by virtue of their being counter-parties to Suspect Tenders chosen for the non-leniency Parties. Where this was not the case and a leniency Party was implicated in fewer than five such Suspect Tenders following completion of the process described in the preceding two paragraphs, the OFT undertook a fifth consolidation step and selected additional contracts for investigation in respect of that leniency Party, again using the objective criteria described in the preceding paragraph.

The position of the non-leniency Parties

- II.1470. The OFT's aim was that, at the conclusion of the investigation stage, it should proceed to a Statement of Objections for a maximum of **three** Alleged Infringements for each of the non-leniency Parties.¹⁶³⁴ The OFT considers that three proven instances of bid rigging by a company is sufficient to establish a pattern of behaviour, and that in order to balance the OFT's objectives of completing its investigation as quickly as possible whilst sending a clear deterrence message, it was therefore unnecessary to include more than three Alleged Infringements in the Statement for any of the non-leniency Parties. Notwithstanding this, the OFT takes this opportunity to emphasise that it regards even one proven occurrence of cover pricing as constituting a serious infringement of the Act, warranting enforcement action and the imposition of a penalty.
- II.1471. The OFT's decision to investigate at this stage five Suspect Tenders for each of the non-leniency Parties, discussed in paragraphs II.1467 to II.1469 above, was intended to ensure that in most cases there would be sufficient evidence to include in the Statement at least three tenders for each Party, allowing for the possibility that, at the conclusion of the investigation and prior to issue of the Statement, there might prove to be insufficient evidence in respect of one or

¹⁶³⁴ Where corporate group structures had changed during the period of the Alleged Infringements, the wider group structure was taken into account so that no parent or former parent was proceeded against for more than three Alleged Infringements.

more of the five Suspect Tenders selected. The OFT did not consider it necessary or appropriate to investigate more than five Suspect Tenders for each of the non-leniency Parties, given the additional resources and time that would be required and also the initial assessment of the quality of the evidence in the OFT's possession.

The position of the leniency Parties

- II.1472. For the 37 companies that had successfully applied for leniency, there was generally evidence in the OFT's possession of involvement in collusive tendering in relation to considerably more than five Suspect Tenders. With five Suspect Tenders for each of the 85 non-leniency Parties, there was potentially a total of 425 Suspect Tenders, which would equate to an average of over ten contracts each for the 37 leniency Parties. However, many of the Suspect Tenders involved more than two Parties, some involved only non-leniency Parties, others involved only leniency Parties, and some leniency Parties provided evidence of many more Suspect Tenders than other leniency Parties. At this stage of the investigation, the numbers of Suspect Tenders were therefore highly variable between each of the leniency Parties, partly due to the differing quantities of evidence found at the leniency Parties' premises, and partly due to the varying quality of the applications for leniency in terms of the number of tenders admitted and the documentary evidence provided to support those admissions.
- II.1473. If the OFT had proceeded against the leniency Parties and penalised them in relation to each of the Alleged Infringements in which they had admitted involvement, this would have resulted, following the consolidation steps outlined in paragraph II.1459 to II.1469 above, in the non-leniency Parties facing penalties for a maximum of three tenders each, while the leniency Parties, whose information had contributed significantly to the OFT's investigation, would have faced penalties for many more tenders, often mainly as a result of the information they had provided.
- II.1474. The effectiveness of the OFT's leniency policy is a fundamental component of the enforcement regime under the Act. The OFT considered that to impose penalties on leniency Parties in relation to significantly more Alleged Infringements than in relation to non-leniency Parties (in particular given that the OFT had evidence of many more infringements by both leniency Parties and non-leniency Parties alike) risked significantly undermining its leniency programme. The OFT therefore decided to take the following two steps.

But For tenders

- II.1475. The first step taken by the OFT was to decide that each of the leniency Parties would incur no penalty in relation to any instance of bid rigging on a tender about which the OFT would not have been aware **but for** the evidence provided by that leniency Party. For such But For tenders, that leniency Party would effectively receive 100 per cent immunity from any penalty, in the same way as a party coming to the OFT with information about cartel activity of which the OFT is not previously aware, will generally obtain 100 per cent immunity from penalty.¹⁶³⁵

¹⁶³⁵ Where two leniency Parties both informed the OFT, prior to being questioned by the OFT in interview, of bid rigging on a tender that involved both Parties, the Party that *applied first for leniency* is obtaining the benefit of the 100 per cent But For immunity on that tender. Where there were two instances of bid rigging

II.1476. For many of the leniency Parties, the majority of their Alleged Infringements were indeed But For tenders and this step was therefore sufficient to put them in no worse a position with respect to penalties than the non-lenieny Parties.

Fining for a maximum of three Not But For tenders

II.1477. However, some of the leniency Parties had many more than three Not But For tenders and would still have faced penalties for more than three tenders despite the step described in paragraphs II.1475 and II.1476 above. This generally occurred where the OFT had found a significant quantity of evidence at that leniency Party's premises or at another Party's premises before the leniency Party concerned had applied for leniency, and/or where information came to the OFT from another leniency Party's earlier leniency application.

II.1478. The OFT therefore decided to take a second step in respect of the leniency Parties. Although each leniency Party is named as a party to often many more than three Infringements, the OFT is imposing penalties on each leniency Party for no more than three Not But For tenders. In this way, any company found to have infringed the Chapter I prohibition, whether a leniency Party or a non-lenieny Party, is having penalties imposed in respect of no more than three Infringements, thus ensuring that the leniency Parties are in no worse a position with respect to penalties than the non-lenieny Parties and thereby safeguarding the integrity of the OFT's leniency programme.

Further interviews conducted

II.1479. The next stage of the investigation was for the OFT to conduct further interviews with those employees suspected of involvement in bid rigging activities in relation to the Suspect Tenders, that worked for the leniency Parties at the time of those Suspect Tenders. The OFT conducted interviews between February 2007 and December 2007 with employees and ex-employees that had worked for the following companies.

Name of undertaking	Date(s) of further interview(s) ¹⁶³⁶	Transcript reference(s)
ARG	16 April 2007	13125
Adam Eastwood	21 February 2007	11094 - 11095
Admiral	30 March 2007	13297 - 13299
Arthur M Griffiths	12 April 2007	13291 - 13292
Balfour Beatty	29 March 2007, 30 March 2007, 30 April 2007	11137 - 11145
Bluestone	12 April 2007, 18 April 2007, 25 April 2007, 1 May 2007, 16 May 2007	12670 - 12683, 13100, 13142, 13150
Bodill	26 April 2007	11151 - 11154,

on a tender, each involving a different leniency Party, it is possible for both leniency Parties to obtain 100 per cent But For immunity from penalty. The OFT's assessment of 100 per cent But For immunity is set out in relation to each involved leniency Party for each Infringement in the Conduct of the Parties section below.

¹⁶³⁶ See also the table which follows paragraph II.1456 above, which contains details of earlier interviews held with certain of these companies.

Name of undertaking	Date(s) of further interview(s) ¹⁶³⁶	Transcript reference(s)
Bramall	27 March 2007, 21 August 2007	11167 - 11170, 13460 - 13463
Carillion	21 February 2007, 24 February 2007, 11 April 2007, 16 April 2007, 18 April 2007, 25 April 2007, 2 May 2007	12743 - 12749
Clegg	21 February 2007, 22 March 2007	13276 - 13278
Davlyn	22 March 2007	11177 - 11180
Derwent Valley	27 April 2007, 9 May 2007	13478 - 13479, 14237
Frank Haslam Milan	23 April 2007, 24 April 2007, 12 October 2007	12851 - 12858, 13547, 13549
Frudd	15 March 2007, 21 March 2007, 12 April 2007, 13 April 2007	6360, 13104, 13115, 13120, 13145
Harlow & Milner	30 March 2007, 9 August 2007	12731 - 12733, 13468, 13469
Henry Boot	22 March 2007, 23 March 2007	11210 - 11215
Herbert Baggaley	13 February 2007, 19 April 2007, 4 December 2007, 6 December 2007	11317, 13503, 13391, 13395
Hobson & Porter	7 March 2007, 11 October 2007	11229 - 11232, 13882, 13883
Irwins / Jack Lunn	8 March 2007, 8 April 2007, 25 April 2007	11289 - 11295, 11253, 11255
J H Hallam	21 February 2007	12754 - 12757
John Cawley	21 March 2007	, 11304 - 11305
Loach	19 April 2007	11321, 11322
Mansell	12 April 2007, 17 April 2007, 18 April 2007, 1 May 2007, 3 May 2007, 6 November 2007	11505 - 11518, 11520, 13557
P Waller	21 March 2007	13285
Phoenix	20 February 2007, 7 November 2007	11327 - 11328, 13494 - 13495
Propensity	17 April 2007, 18 April 2007, 8 May 2007	11343 - 11354
Simons / Wrights	15 March 2007, 26 April 2007, 15 May 2007	12793 - 12796, 12815, 12817, 12819 - 12820, 13131
Sol	25 April 2007, 8 August 2007	11367 - 11369, 13474
Strata	28 March 2007, 29 March 2007	6374, 6379, 11380 - 11382, 13138, 13153, 13156
T & C Williams	27 March 2007, 16 April 2007	12762 - 12763
Thomas Fish	3 April 2007, 11 April 2007, 8 May 2007	13312 - 13315

Name of undertaking	Date(s) of further interview(s) ¹⁶³⁶	Transcript reference(s)
Thomas Vale	19 April 2007, 20 April 2007, 9 August 2007, 6 November 2007, 7 November 2007, 6 December 2007	11413 - 11425, 13416, 13855, 13865, 13563
W R Bloodworth	22 February 2007	13281
Wildgoose	17 April 2007, 19 September 2007	11445 - 11447, 11451 - 11456, 13402, 13442 - 13444, 13446 - 13447, 13450
York House	6 March 2007	11466 - 11467

Closure of availability of leniency in the investigation

II.1480. By the beginning of 2007 the OFT had, as stated above, obtained evidence of bid rigging activities in relation to many thousands of tenders throughout England. The OFT needed to focus its resources in order to produce an outcome that would provide the most effective deterrent to all companies, in as short a time as possible. If other companies applied for leniency they would have been likely to have provided evidence not only in relation to the tenders that the OFT had decided to investigate further, but in relation to many other tenders and companies. It would not have been possible to progress the investigation in an efficient and sufficiently timely way due to the need to investigate all of these new tenders and make a fresh selection of tenders and companies for investigation. The OFT therefore decided that, at the same time as making the selection of tenders for investigation, it should close the door to further leniency applications in this case. This decision was announced by way of two press releases on 22 March 2007 – see www.of.gov.uk/news/press/2007/50-07 and www.of.gov.uk/news/press/2007/49-07.

The Fast Track Offer to non-leniency Parties

II.1481. In many investigations the OFT would seek also to obtain reports from those companies implicated in its investigation that had not applied for leniency, and in addition to request interviews with the employees that worked for those companies at the time of the alleged infringements. In the present case, however, it would have proved too time-consuming to conduct such an exercise in view of the number of companies involved, notwithstanding the extensive rationalisation of the investigation undertaken by the OFT. Nevertheless, the OFT wanted to give these companies early warning that they were under investigation, to inform them of the Suspect Tenders in respect of which they were suspected of engaging in bid rigging activities, and as part of its ongoing investigation to give them an opportunity to admit to those bid rigging activities and make certain ancillary promises in exchange for a guarantee that they would be given a 25 per cent reduction of any financial penalty that the OFT ultimately imposed in respect of any Suspect Tenders for which admissions were received.

II.1482. At this stage the OFT had not yet selected the Suspect Tenders for inclusion in the Statement (as described in paragraphs II.1495 to II.1503 below). Nor had it completed the process of interviewing witnesses as described in paragraph II.1479 above. Rather, the OFT intended that by giving the non-leniency Parties

the opportunity to make admissions this would further assist the OFT in deciding which Suspect Tenders to include in the Statement and what further investigative steps it should undertake.

II.1483. The OFT wrote to 85 non-leniency Parties on 22 March 2007.¹⁶³⁷ The letter sent to each company informed them that the opportunity for leniency applications in the investigation had now ended, as discussed above in paragraph II.1480. It stated that the relevant company was implicated in the OFT's investigation, and included a schedule of Suspect Tenders in respect of which the OFT suspected the company had engaged in bid rigging activities. The OFT's evidence that gave rise to these suspicions comprised, in most cases:

- one contemporaneous incriminatory document (such as an annotated tender register of one of the implicated Parties); and
- an express written admission of participation in bid rigging activities by one of the leniency Parties which directly implicated that company in relation to that suspect tender.

II.1484. For each company, the OFT set out in the schedule a minimum of five and a maximum of twenty Suspect Tenders.¹⁶³⁸ For some companies, the OFT had evidence of bid rigging in relation to many more than twenty tenders, but the schedules were restricted to a maximum of twenty tenders for ease of administration by the OFT and the companies concerned.

II.1485. No evidence was provided to the Parties with the schedules, for a number of reasons:

- Firstly, the investigation was still ongoing and the OFT had not completed the compilation of the evidence.
- Secondly, compilation and presentation of the evidence in respect of so many Suspect Tenders would have taken many months and would also have duplicated the work necessary to prepare the Statement. The OFT's Fast Track Offer would have been unfeasible to operate at all if it could only have been sent after this work had been completed.
- Thirdly, the OFT did not intend to take forward all of the Suspect Tenders listed to Statement of Objections stage, therefore much of the preparation work would have been wasted and distracted the OFT from the focus of the investigation.

¹⁶³⁷ In November 2007, the OFT also wrote to those ultimate parent companies of the companies involved in the Infringements which had not been sent the March 2007 letter. See paragraphs II.1488 to II.1494 below.

¹⁶³⁸ The five Suspect Tenders for each non leniency party ultimately taken forward for further investigation by the OFT were selected from these schedules of five to twenty Suspect Tenders during the creation of the schedules – see paragraphs II.1467 to II.1468 above. In contrast with the representations made by Ackroyd & Abbott in paragraph 38 of its representations on the Statement, this was made clear by way of this explanation in footnote 1907 of the Statement. Furthermore, in response to Ackroyd & Abbott's comments in paragraph 39 of its representations, the OFT emphasises that it did have a contemporaneous incriminatory document and an express written admission of participation in bid rigging in the vast majority of cases, as set out in the Fast Track Offer letter and in paragraph II.1483 above. The OFT was able to select the five Suspect Tenders for investigation by differentiating according to the quality of the evidence, but all of the evidence for the Suspect Tenders in the Fast Track Offer schedules met the category 1, 2 or 3 standard as set out in the table following paragraph II.1464 above.

- Fourthly, the Parties were subsequently given ample opportunity to view and comment on the Infringements that were taken forward in the Statement, together with the supporting evidence for those Infringements, in accordance with the OFT's access to file procedures.¹⁶³⁹
- Fifthly, the letter made it clear that the company was under no obligation to reply to the letter.
- Sixthly, the letter gave each company time to conduct its own investigations and assess whether in its view and from its own records, the OFT's allegations had any credibility.
- Finally, all Parties had the option of withdrawing from the OFT's Fast Track Offer at any time up to issue of the OFT's Decision, including after seeing the evidence and the OFT's analysis of it in the Statement, although of course they would lose the benefit of the 25 per cent reduction in respect of any Suspect Tenders for which they withdrew.

II.1486. For any Suspect Tenders to which a company admitted engaging in bid rigging activities, in exchange for the 25 per cent reduction of any financial penalty in respect of that tender the company agreed to the following:

- (i) admission of participation in bid rigging activities in relation to the specified Suspect Tender;
- (ii) specification of the details of the other company or companies with which it engaged in bid rigging activities in relation to the admitted Suspect Tender. Where the company was unable to confirm the identity of one or more of the other implicated company or companies, it was asked to confirm that it had used its best efforts to establish the identity of these companies but was unable to do so¹⁶⁴⁰;
- (iii) agreement to make no representations as to the company's participation in bid rigging activities in relation to the admitted Suspect Tender in response to any Statement of Objections or any supplementary Statement of Objections that the OFT may issue in this case. This would not, however, preclude the company from making representations on any other matters; and
- (iv) noting that if the company should appeal any OFT finding in a final decision that it had participated in bid rigging activities in relation to one or more admitted Suspect Tender(s), the OFT reserved the right to make an application to the court inviting the court to increase the penalty imposed by the OFT on that company for the relevant Suspect Tender and to require that company to pay the OFT's full costs of the appeal proceedings.¹⁶⁴¹

II.1487. Of the 85 non-leniency Parties that were sent Fast Track Offer letters by the OFT, 45 admitted engaging in bid rigging activities in all or some of the Suspect Tenders set out in their schedule.

¹⁶³⁹ Rule 5 of the Office of Fair Trading Rules (The rules are contained in Statutory Instrument 2004 No. 2751 [The Competition Act 1998 \(Office of Fair Trading's Rules\) Order 2004.](#))

¹⁶⁴⁰ This may, for example, have been the case where the staff that dealt with the Suspect Tender no longer worked for that party and/or the relevant records relating to the Suspect Tender had been destroyed.

¹⁶⁴¹ Note that as in the case of (iii), this would not affect any appeals on any other matters, for example the level of the penalty imposed by the OFT.

The supplementary Fast Track Offer to ultimate parents of non-leniency Parties

- II.1488. In reviewing the responses to the OFT's Fast Track Offer and as part of its ongoing investigation more generally, it became clear to the OFT that a number of companies were owned by, or had previously been owned by, parent companies. For the reasons discussed in paragraphs III.10 to III.24 of the Legal Background section below, this Decision is addressed to each of the companies involved in the Infringements, and in addition where applicable to their respective ultimate parent companies which formed part of the same undertaking at the time of the Infringements.
- II.1489. It was therefore necessary for the OFT to write to those ultimate parents and to give them the opportunity to comment on their respective current or former subsidiaries' responses to the OFT's Fast Track Offer.
- II.1490. The OFT wrote to the ultimate parents in November 2007. The letters to the ultimate parents set out the details of the original Fast Track Offer made to their subsidiaries, as described in paragraphs II.1481 to II.1486 above, and in addition invited the ultimate parents to comment on their respective subsidiaries' acceptance or rejection of the OFT's Fast Track Offer.
- II.1491. Some of the ultimate parents chose expressly to endorse the original response from their subsidiary, while others decided to make no comment at that time. None of the ultimate parents' responses contradicted the response from their subsidiary. In three cases, the responses from the ultimate parents were in effect the first response received by the OFT from that corporate group, as follows.
- II.1492. In the case of Ballast and Greenwood, there had been no substantive response to the original Fast Track Offer since these companies had been dissolved. As described in paragraphs II.183 to II.204 above, the OFT decided that Ballast's ultimate parent at the time of the infringements, Ballast Nedam NV, should be liable for Ballast's infringements. Ballast Nedam NV accepted the OFT's Fast Track Offer in its entirety.
- II.1493. As described in paragraphs II.325 to II.344 above, the OFT decided that Greenwood's ultimate parent at the time of the infringements, Crown Point, should be liable for Greenwood's infringements. Crown Point rejected the OFT's Fast Track Offer.
- II.1494. In the case of Pearce, there were several issues relating to the company's corporate structure which the OFT needed to resolve before being in a position to decide on liability for the relevant Infringement. The OFT considered that it should hold both Pearce and its ultimate parent at the time of the relevant Infringement, Crest Nicholson, liable for the relevant Infringement and it therefore wrote to both of these Parties on 7 November 2007, with the OFT's Fast Track Offer. Both Pearce and Crest Nicholson rejected the OFT's Fast Track Offer. Upon further review of this issue following receipt of the Parties' representations on the Statement, and following the issue of a supplementary Statement of Objections in connection with this specific issue (see paragraph II.1589 below), the OFT has now concluded that, together with Crest Nicholson, it should also hold Pearce's immediate parent and principal, Pearce Group, jointly and severally liable for Pearce's involvement in the relevant Infringement, as described in paragraphs II.1000 to II.1036 above. Pearce Group also rejected the OFT's Fast Track Offer.

Final selection of tenders for the Statement

Non-leniency Parties

- II.1495. As discussed in paragraph II.1470 above, following receipt of the responses to the OFT's Fast Track Offer and having concluded the interview process the OFT proceeded to select a maximum of three Alleged Infringements for each non-leniency Party, to include in the Statement. The reasons for selecting a maximum of three Alleged Infringements are set out at paragraphs II.1470 to II.1471 above. The Alleged Infringements selected for each of the Parties were described in full in the OFT's Statement. Following consideration of the Parties' representations on the Statement, the OFT has decided not to proceed with a limited number of the Alleged Infringements (see paragraphs II.1591 to II.1593 below). The Infringements in respect of which the OFT is proceeding to decision are set out in full in the Conduct of the Parties section below, and are listed (together with paragraph numbers, for ease of reference) in the Navigation Table in Annex A, towards the end of this Decision.
- II.1496. The maximum of three Alleged Infringements for each non-leniency Party were chosen according to a set of objective criteria, the most important of which was the quality of the available evidence, including the admissions made in response to the OFT's Fast Track Offer. Where the quality of the evidence in respect of two or more Suspect Tenders was identical, other factors were brought into play, being primarily the value of the tender (since high tender values would generally indicate the possibility of greater consumer detriment) and the time period over which the suspected infringements occurred, thus demonstrating a pattern of repeated behaviour over time. The OFT also tried to ensure that the resulting general spread of Alleged Infringements amongst the leniency Parties was as even as possible; and avoided tenders that brought in companies that had not made the objective minimum threshold for inclusion in the investigation as discussed in paragraph II.1465 above.
- II.1497. In most cases the maximum of three Alleged Infringements to take forward to Statement of Objections were selected from the Suspect Tenders on which the OFT had carried out interviews, as described in paragraph II.1470 above. In some instances, however, the OFT considered that the interviews provided insufficient corroboration of the contemporaneous evidence for it to proceed with those Suspect Tenders. The OFT therefore selected alternative tenders with sufficient evidence from the relevant Party's Fast Track Offer schedule of five to twenty Suspect Tenders discussed in paragraph II.1484 above, in order to complete the relevant Party's maximum of three Alleged Infringements, and in most cases carried out supplementary interviews with leniency Parties on those alternative tenders. The OFT then took these alternative tenders forward to the Statement of Objections where there was sufficient corroboration of the contemporaneous evidence.
- II.1498. As a result of the OFT's selection process and sifting of the evidence, the Statement included fewer than three Alleged Infringements involving each of the following non-leniency Parties: B & A, John Sisk, PDH and Quarmby (Special Projects). Following the OFT's consideration of the Parties' representations on the Statement, the OFT's findings in relation to the following additional non-leniency Parties are also limited to fewer than the maximum of three Alleged Infringements per non-leniency party: E Manton, GAJ, GMI, Harper, Interclass, Interserve, Linford, North Midland, Pearce and Speller-

Metcalfe. As stated in paragraph II.1465 above, even one isolated occurrence of cover pricing constitutes an infringement of the Act and the OFT has therefore continued to proceed against those Parties in relation to one or two Infringements.

Leniency Parties

II.1499. For the leniency Parties, in most instances at least three Alleged Infringements were automatically chosen during the processes described in the preceding paragraphs, by virtue of their being counter-parties to the Alleged Infringements selected for the non-leniency Parties, and/or Parties to Alleged Infringements involving compensation payments (see next paragraph). However, where after completion of those processes a leniency Party still had fewer than three Alleged Infringements, the OFT proceeded to make a further selection from the list of tenders investigated for that leniency Party described in paragraph II.1469 above, in order bring the number of Alleged Infringements for that Party up to three.

Compensation payments

II.1500. A number of the instances of bid rigging that came to light during the OFT's investigation involved compensation payments. These are discussed in more detail in general terms in paragraphs IV.147 to IV.155 of the General comments on cover pricing section below. Two of these instances involved non-leniency Parties, Bowmer & Kirkland and Durkan, and were selected during the process of selecting three Alleged Infringements for each of those Parties. The remaining instances of compensation payments involved only leniency Parties.

II.1501. As discussed in paragraph VI.114 below, the OFT views compensation payments as a particularly serious form of bid rigging and therefore considers it necessary to include all infringements involving compensation payments for which there is sufficient evidence, even though this inevitably increases the number of Infringements involving some of the leniency Parties, in order to send the proper deterrent message regarding this type of behaviour.

Company groups

II.1502. In reviewing the responses to the first Fast Track Offer it became clear to the OFT that in some instances, two companies were actually part of one and the same undertaking. The OFT therefore made an assessment of all Parties to determine where these in fact formed part of the same undertaking.¹⁶⁴² This was necessary because the OFT had decided to include in the Statement a maximum of only three Alleged Infringements for each non-leniency Party. If two companies in fact formed part of a single undertaking, that undertaking might face fines on six Infringements rather than three, in the absence of this assessment.

II.1503. For the leniency Parties, as discussed above in paragraph II.1478, even where this Decision contains more than three Not But For Infringements for a leniency Party, that Party is only being fined for a maximum of three Infringements. Again, it was important to establish where two leniency Parties formed part of the same undertaking, so that the undertaking would be fined for a maximum of only three Infringements.

¹⁶⁴² See paragraphs III.10 to III.36 below.

Dissolved companies and companies in liquidation

- II.1504. For any dissolved companies, the OFT investigated whether there was any party with undertaking identity (see paragraphs III.26 to III.27 of the Legal Background section below). This would arise where the dissolved company had transferred significant assets to a successor during the process of liquidation. The OFT ascertained that two companies, Ballast and Greenwood, had transferred assets in this way and that there was therefore an appropriate entity to pursue in respect of the Alleged Infringements in which they had been involved.
- II.1505. For four other companies, including K W Brookes and Craske, the OFT was unable to establish an entity with undertaking identity and these four companies were therefore excluded from further investigation. However, both K W Brookes and Craske were counter-parties to Infringements that are the subject of this Decision. It has therefore been necessary to mention them in relation to those Infringements, but although the OFT finds that they engaged in bid rigging in those Infringements, no penalties can be levied on those companies in that regard.
- II.1506. For any companies in liquidation or administration, the OFT contacted their liquidators or administrators with a section 26 notice requesting details of the liquidation/administration procedure. Information relating to the anticipated dissolution date, the sale of any business as a going concern and the transfer of assets was sought. The OFT informed these companies that the OFT might have a contingent claim against the company for any infringement of the Act. Confirmation of the OFT's interest in the Party was therefore obtained. By these means the OFT preserved its ability to penalise the companies concerned for their involvement in the bid rigging Infringements that are the subject of this Decision.

Issue of the Statement

- II.1507. On 16 April 2008 the OFT issued the Statement to the Parties.¹⁶⁴³ In light of the adjustments discussed in paragraphs II.1502 to II.1503 above, and by virtue of the exclusion of certain dissolved companies, the number of Parties in the investigation at the time of the issue of the Statement was 112, comprising 33 leniency Parties and 79 non-leniency Parties, 45 of which had admitted engaging in bid rigging activities in all or some of the Suspect Tenders set out in their Fast Track Offer schedule.

Replies to the Statement

- II.1508. Following the issue of the Statement, the Parties were given the opportunity to consider the OFT's detailed allegations together with the documents on the OFT's file, and to make written representations to the OFT, supplemented by oral representations where requested. The OFT received written representations from over 100 Parties and one third party, the Construction Confederation, and in addition heard oral representations from 49 Parties.
- II.1509. This section summarises the main arguments advanced by the Parties in relation to the OFT's Investigation in their replies to the Statement, and the OFT's

¹⁶⁴³ The press release which accompanied the Statement may be found at www.of.gov.uk/news/press/2008/52-08.

response to those representations. In summary, the OFT received representations on the following broad issues:

- (a) Representations on alternative remedies;
- (b) Representations on the length of the investigation;
- (c) Representations on the conduct of the OFT's investigation;
- (d) Representations on the consolidation of the OFT's investigation;
- (e) Representations on the leniency process; and
- (f) Representations on the OFT's Fast Track Offer.

(a) Representations on Alternative Remedies

II.1510. In response to the Statement, some Parties suggested that the OFT should not have conducted an investigation under the Act and that it should instead have educated the industry in relation to the illegality of cover pricing. For example, Stainforth, Caddick and Quarmby stated that as the conduct was endemic in the construction industry, the OFT should have educated the industry that 'simple' cover pricing was illegal.¹⁶⁴⁴ Several Parties also suggested that the OFT's investigation had already eradicated the practice of cover pricing and that it was therefore unnecessary for the OFT to take enforcement action against the Parties.¹⁶⁴⁵

II.1511. In addition, Thomas Vale commissioned RBB Economics to '*conduct an economic evaluation of the rationale for cover pricing and to assess the adverse effects that may result from the imposition of a discriminatory/ excessive level of financial penalties*'.¹⁶⁴⁶ Thomas Vale stated that the RBB Report noted:

*'From an economic perspective it would be entirely perverse if the impact of penalties imposed on firms as a result of conduct which was deemed to restrict competition was to restrict competition on the same relevant markets. However, this is precisely what can be expected if the OFT makes an unqualified decision that the relevant construction companies have acted illegally. It would also be economically perverse, as well as inequitable, given the apparently widespread involvement in cover pricing within the industry, if the selection of a few firms for punishment were arbitrarily to cause high quality contractors to be displaced by low quality contractors who were also involved in cover pricing, but which the OFT chose not to pursue.'*¹⁶⁴⁷

II.1512. In response to this, first, the OFT does not accept that any presumption can be made that those companies penalised in this Decision were of 'higher quality' than any other contractors in the construction industry. Second, where

¹⁶⁴⁴ Written representations of Stainforth, 27 June 2008, paragraph 3.4; Written representations of Quarmby, 27 June 2008, paragraph 6.8 and written representations of Caddick, 24 June 2008, paragraph 2.4.

¹⁶⁴⁵ See for example written representations of Stainforth, 27 June 2008, paragraph 3.4; Written representations of Quarmby, 27 June 2008, paragraph 6.8 and written representations of Caddick, 24 June 2008, paragraph 2.4.

¹⁶⁴⁶ Written representations of Thomas Vale, 27 June 2008, paragraph 1.6.

¹⁶⁴⁷ Written representations of Thomas Vale, 27 June 2008, paragraph 7.8 citing RBB Economic Report "*Thomas Vale Construction: Economic assessment of cover pricing arrangements and regulatory responses*" pages 27-28.

penalties threaten the financial viability of firms and properly substantiated representations have been made to that effect, the need for a reduction in penalty has been considered at step 3 of the penalty calculation – see paragraphs VI.284 to VI.288 below.

- II.1513. Thomas Vale further stated that the scale of the cover pricing problem more properly merited a market investigation by the OFT and that it was not appropriate for the OFT to act under the Act. It stated that *'...the greater the scale of the problem; the more appropriate, fair and effective a market investigation reference will be, as opposed to an action under the [Act]. Further ... due to the scale of the investigation, together with the impact on the construction industry as a whole ... a market reference would have been more appropriate.'*¹⁶⁴⁸
- II.1514. However, the OFT cannot accept that the most widespread infringements of competition law should automatically be dealt with in ways that would not result in financial penalties for the parties involved. Such a suggestion would create perverse incentives for companies to ensure that cartel activity was endemic and maximised within an industry, resulting in greater harm to consumers. On the contrary, the prevalence of illegal practices makes it all the more necessary for the OFT to ensure that a proper deterrence message is given not only to the construction industry but also to all other industries where work is allocated by means of competitive tendering procedures.
- II.1515. The OFT does not consider that in the present case such deterrence would have been achieved by means of education alone. As noted above, the OFT had initial evidence of cover pricing in over 4,000 tenders involving over 1,000 companies and the industry had itself described the practice as endemic. In these circumstances, it is all the more necessary to demonstrate how seriously the OFT takes breaches of competition law in order to prevent their recurrence in the future.
- II.1516. Notwithstanding this, the OFT does recognise that there are several features of this case that would militate against imposing penalties at the highest possible levels in the present investigation. The Parties' representations on these matters, and the OFT's assessment of those representations, are discussed in section VI below.

(b) Representations on the length of the investigation

- II.1517. In response to the Statement, one Party, Pearce, contended that its rights of defence had been adversely affected due to the considerable time that had elapsed since the Infringements had taken place, the alleged delay by the OFT in bringing its case, and the fact that it was not given the opportunity to review the evidence against it until the issue of the Statement in April 2008.¹⁶⁴⁹
- II.1518. As noted in paragraph II.1523 below, the OFT considers that its procedures have been conducted fairly and that each Party has been afforded a reasonable opportunity to review the evidence against it and to make representations in response to the Statement.

¹⁶⁴⁸ Written representations of Thomas Vale, 27 June 2008, paragraph 8.7.

¹⁶⁴⁹ Written representations of Pearce Construction (Midlands) Limited, 14 July 2008, paragraph 1.6.

II.1519. Insofar as the alleged delay by the OFT is concerned, Pearce referred to *FEG v Commission*¹⁶⁵⁰ in which the ECJ considered the general principle of Community law that decisions adopted following administrative proceedings in competition matters should be adopted within a reasonable time.¹⁶⁵¹ However, this principle applies only to delays *during* the administrative procedure, which commences on the date when the Commission '*takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow.*'¹⁶⁵² This principle does not relate to the period of time between the infringements taking place and the commencement of an investigation. In the case of Pearce, the OFT first contacted Pearce Group in March 2007 alleging an infringement, and issued the Statement to Pearce on 30 April 2008 (as well as a supplementary Statement on 19 April 2009). The OFT does not consider the intervening period of time to be unreasonable.

II.1520. From the full description given in this section, it can be clearly understood that the OFT has, since the origins of this investigation in April 2004, been fully committed to, and engaged in, taking steps to bring the case to a final Decision as quickly as possible.

II.1521. Furthermore, the ECJ has also made clear that any breach of the 'reasonable time' principle must have adversely affected the rights of defence of the undertakings concerned. In this respect, it is insufficient to make general arguments to this effect; specific details would be required to support such a claim.¹⁶⁵³ The domestic courts have also noted that '*the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed.*'¹⁶⁵⁴ Whilst refuting the allegation that there has been any unreasonable delay in issuing this Decision, the OFT also considers that Pearce has failed to meet this threshold.

(c) Representations on the conduct of the OFT's investigation

II.1522. In response to the Statement, GMI criticised the OFT for not attending its premises, examining its records or interviewing its personnel as part of the OFT's investigation.¹⁶⁵⁵

II.1523. However, each Party has been made aware of the allegations made against it and the supporting evidence in the Statement, and has been able to inspect the evidence on the OFT's file, to make both written and oral representations in response to the Statement, and to address the infringements particularised therein. The OFT considers that its procedures have been fair and that each Party has been afforded a proper opportunity to defend itself.

¹⁶⁵⁰ Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725.

¹⁶⁵¹ See Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, at paragraph 35, and the cases cited therein.

¹⁶⁵² Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, at paragraph 38.

¹⁶⁵³ Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725, at paragraphs 42 and 55-59.

¹⁶⁵⁴ *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379, at paragraph 52. Cited in *Office of Communications v Floe Telecom* [2006] EWCA Civ 768, [2006] 4 All E.R. 688, at paragraph 47.

¹⁶⁵⁵ Written representations of GMI and GMI Construction Holdings, 26 June 2008, paragraph 10.3 and oral representations of GMI and GMI Construction Holdings (transcript), 31 July 2008, page 4.

(d) Representations on the consolidation of the OFT's investigation

Selection of companies

II.1524. In response to the Statement, a number of Parties argued that it was unfair that the OFT had selected specific companies to investigate when cover pricing in the construction industry was endemic. Their arguments were two-fold.

II.1525. First, several Parties stated that due to the endemic nature of cover pricing, *'the OFT could, in truth, have started its investigation with almost any construction company in England or elsewhere in the United Kingdom'*.¹⁶⁵⁶ These Parties stated that the fact that the OFT's investigation started following contact from the Queens' Medical Centre in Nottingham was a matter of chance.¹⁶⁵⁷

II.1526. Secondly, several Parties stated that the OFT's selection process was arbitrary and flawed. In short, these Parties argued that the fact that the OFT had 'singled out' the companies in the Statement was essentially a matter of chance.¹⁶⁵⁸ They claimed that the fact that the OFT was holding these companies responsible (accounting for 6 per cent of construction activity in the UK and, according to these representations, by implication clearing the remaining 94 per cent) was *'arbitrary and fundamentally unjust'*.¹⁶⁵⁹ These Parties further argued that *'it cannot be fair and consistent with principles of justice for an arbitrarily selected few to be so heavily punished for an industry wide practice'*.¹⁶⁶⁰

II.1527. In response to these representations, the OFT has a discretion to decide which cases it will pursue, and does not have a duty to investigate every case. When deciding which cases to pursue, the OFT targets behaviour that poses the greatest threat to consumer welfare, such as mass-marketed scams and cartel activity.¹⁶⁶¹ However, the OFT does not have unlimited resources and therefore targets its resources according to its prioritisation principles, including *'the need to ensure that we make appropriate decisions about which projects and programmes of work we undertake across all areas of our responsibility'*¹⁶⁶² and *'in seeking to target both our resources and enforcement strategy ... the ... need ... to consider a range of factors including impact on consumers, strategic significance, risks and resources'*.¹⁶⁶³ The decision to pursue this case was consistent with these prioritisation principles.¹⁶⁶⁴

II.1528. Furthermore, it is well established in both the case law of the Community Courts and the UK domestic courts, including the CAT, that a competition

¹⁶⁵⁶ For example, written representations of F Parkinson, 25 June 2008, paragraph 10.

¹⁶⁵⁷ For example, written representations of F Parkinson, 25 June 2008, paragraph 11.

¹⁶⁵⁸ For example, written representations of F Parkinson, 25 June 2008, paragraph 11.

¹⁶⁵⁹ For example, written representations of F Parkinson, 25 June 2008, paragraphs 10 to 13 and 76 to 80.

¹⁶⁶⁰ For example, written representations of F Parkinson, 25 June 2008, paragraph 80.–Further, several Parties stated that *'the OFT's plea of "limited resources" is, ironically, the same reason that companies engaged in cover pricing in the first place'*, contending that cover prices were submitted so as *'not to incur wasted overheads on putting together tenders for contracts ... they did not wish to secure'* (written representations of F Parkinson, 25 June 2008, paragraph 79). However, see paragraph III.111 below which explain why subjective intent is irrelevant to a finding of an infringement.

¹⁶⁶¹ www.of.gov.uk/of at work/enforcement regulation/.

¹⁶⁶² www.of.gov.uk/shared_of/about_of/of953.pdf, paragraph 1.4.

¹⁶⁶³ www.of.gov.uk/shared_of/about_of/of953.pdf, paragraph 1.5.

¹⁶⁶⁴ Please see www.of.gov.uk/shared_of/about_of/of953.pdf. It is noted that the prioritisation and consolidation in this case pre-dated the publication of these principles; nevertheless, the OFT considers that it acted consistently with these principles.

authority has an administrative discretion in the way it exercises its statutory duties. The High Court judgment of Mr Justice Foskett in *Cityhook*¹⁶⁶⁵, for example, stated that ‘...ordinarily the allocation of limited resources to the implementation of statutory duties (and the discretionary exercises that inevitably arise) is a matter left to the body with which the responsibility lies...’.¹⁶⁶⁶

- II.1529. Neither was the OFT’s investigation either ‘arbitrary’ or ‘unjust’. The OFT’s investigation was focused initially on the East Midlands area because the initial contact drawing the OFT’s attention to the Parties’ unlawful activities was made by an auditor in Nottingham. At all times up to 22 March 2007, it was open to construction firms in any area that had engaged in anti-competitive activities to approach the OFT under the OFT’s leniency programme and thereby obtain either complete immunity (before the commencement of the investigation) or a reduction in penalty. In terms of focusing the investigation, as stated above, the OFT used fair and objective criteria to determine which companies should be taken forward for further investigation. As discussed in section VI below, the OFT is not imposing excessive penalties on the Parties.
- II.1530. Furthermore, the OFT can only proceed against cases in respect of which it has evidence. It is inherent in the rationale for imposing penalties that in doing so the OFT acts to deter not only those companies themselves from reoffending, but also those other companies which have not been proceeded against.¹⁶⁶⁷
- II.1531. In conclusion, the OFT’s decisions to investigate bid rigging conduct in the particular regions, and to focus its investigation in the manner that it did, are not inconsistent with either the OFT’s remit or the case law.

Maximum Number of Tenders

- II.1532. Several Parties also made representations on the number of Infringements per Party being pursued by the OFT. In response to the Statement, GMI claimed that ‘the OFT considers and accepts that three instances of alleged bid rigging are required in order to establish a pattern of behaviour’ and argued that if the OFT eventually succeeded in proving fewer than three infringements against GMI, then ‘any remaining (alleged infringements) should be dismissed on the basis that no pattern of behaviour has been established’.¹⁶⁶⁸ Further, G Hurst and PDH noted that in the Statement it was already being pursued for fewer than the maximum of three Alleged Infringements¹⁶⁶⁹, while Bullock also claimed that the fact that it was being pursued for only one Alleged Infringement was insufficient to establish a pattern of behaviour and that this should be taken into account in relation to penalty calculations.¹⁶⁷⁰
- II.1533. In response, the OFT makes the following points. Firstly, the OFT did not accept in the Statement that three instances of alleged bid rigging were required in order to establish a pattern of behaviour (that is, that three was a minimum number). Rather, the OFT stated that three instances were **sufficient** to establish a pattern of behaviour, that is, that it did not need to include more than three instances in the Statement and that three was a maximum number.

¹⁶⁶⁵ *Cityhook Ltd & Anor, R (on the application of) v OFT* [2009] EWHC 57 (Admin) 20 January 2009.

¹⁶⁶⁶ *Ibid* at paragraph 88. See also the judgments cited by Mr Justice Foskett at paragraph 88.

¹⁶⁶⁷ OFT’s Guidance as to the appropriate amount of penalty (*OFT 423, December 2004*) at paragraph 2.11.

¹⁶⁶⁸ Written representations of GMI, 26 June 2008, paragraph 75 and 76.

¹⁶⁶⁹ Written representations of G Hurst and PDH, 27 May 2008, page 2.

¹⁶⁷⁰ Written representations of Bullock, 26th June 2008, paragraph 6.16.37.

- II.1534. Secondly, the purpose of focusing the investigation in this way was to ensure that the OFT maximised the efficient use of its limited resources. In light of the widespread incidence of cover pricing within the construction industry, it was necessary for the OFT to focus its investigation at many stages – for example, by not visiting every one of the over 1000 companies against which it had initial evidence, by not investigating every one of the tenders for those companies that exceeded the initial threshold of five Suspect Tenders, and by not including every one of the Suspect Tenders for those companies in its Statement. The OFT has focused its investigation in a demonstrably objective way that does not discriminate between companies according to factors such as their size or target business and having regard to the need to ensure equal treatment. It would not have been in any company’s interest or in the public interest for the OFT to have taken the many years and consumed the vast amount of resources that would have been required to progress every one of the original Suspect Tenders through to decision. Establishing a ‘pattern of behaviour’ was merely one of the tools used by the OFT to focus its investigation on those companies against which the OFT held the most initial evidence of cover pricing.
- II.1535. Thirdly, the OFT considers that even a single instance of bid rigging constitutes a serious infringement of the Act. Although in this case, because of the widespread nature of cover pricing, there are many companies that have been proven to have infringed the Act on more than one occasion, this does not diminish in any way the seriousness of the Infringements for those companies which have been proven to have infringed on only one occasion. The OFT is, as discussed in section VI below, applying a separate penalty for each proven instance of bid rigging in this case, and the number of proven infringements is not a mitigating factor as Bullock has suggested. Rather, where a company is found to have engaged in bid rigging on more than one occasion, this is reflected in a higher penalty for that undertaking.
- II.1536. In the particular case of Bullock, its parent at the time of its Infringement, Renew, was being pursued for a total of three Alleged Infringements in the Statement and the OFT considered that it would have been inappropriate in the circumstances to pursue Renew for any more than those three Alleged Infringements, and did not therefore seek to pursue additional Suspect Tenders for Bullock.¹⁶⁷¹
- II.1537. Other Parties have claimed that the OFT should not pursue them for more than one infringement. For example, Wright (Hull) stated that:
- ‘(It) accepts that as a matter of law, each of the Alleged Infringements constitutes a separate and discrete infringement of the Chapter I prohibition and that the OFT is entitled to impose a penalty in respect of each Alleged Infringement. At the same time, the OFT should not use that to inflate artificially the total amount of the penalty imposed ... an organised, structured and formal bid-rigging cartel – could be expected to be far more serious an infringement and far more harmful to competition than three discrete “cover pricing” infringements of the type at issue here.’¹⁶⁷²*
- II.1538. However, in relation to pursuing a maximum of three Infringements, the OFT notes that it is not artificially inflating the penalty as it is entitled to impose a

¹⁶⁷¹ See also paragraph II.1470 above.

¹⁶⁷² Written representations of Wright (Hull), 27 June 2008, paragraph 28.

penalty for each Infringement. Indeed, in imposing penalties for a maximum of three Infringements per Party, the OFT has limited the number of penalties that could otherwise have been levied in relation to many companies. As regards the seriousness of the Infringements relative to broader bid rigging schemes, this is reflected in the starting point of the penalty calculations and is discussed in full in the section relating to step 1 of the penalty calculations in section VI below.

Selection of Tenders

- II.1539. The OFT also received a number of representations on its contract selection process. In response to the Statement, Caddick and Quarmby suggested that the OFT's contract selection process may have discriminated against some Parties because the OFT avoided tenders where evidence implicated companies that had not originally made the objective minimum threshold for inclusion in the investigation, and because *'the fact that some firms dropped down to fewer than three infringements is also arbitrary, when compared with other firms who were investigated initially but fell outside the scope because they had the good fortune of engaging in cover pricing with non-leniency parties, so the quality of evidence was poorer.'*¹⁶⁷³
- II.1540. However, the OFT does not consider that its contract selection process resulted in any form of discrimination. The OFT carried out its tender selection on the basis of an objective, reasoned process consistent with both the OFT's remit and the case law, as discussed in paragraphs II.1467 to II.1469 and in paragraphs II.1527 to II.1528 above.
- II.1541. In its representations, Ackroyd & Abbott questioned whether the OFT had indeed held evidence in respect of each of the Suspect Tenders when making the initial selection of contracts for investigation described in paragraph II.1468 above.¹⁶⁷⁴ In response, the OFT stresses that this was the evidence available to the OFT at the time, notwithstanding that the OFT had not yet concluded its investigation. It was not the case that the OFT *'did not have evidence'* in relation to any of the Suspect Tenders – the OFT had evidence of category 1, 2 or 3 in relation to each Suspect Tender investigated and in relation to each Suspect Tender included in the Fast Track Offer schedules.
- II.1542. Ackroyd & Abbott further suggested that the OFT's contract selection process had been irrational because the OFT had selected three Suspect Tenders in respect of which Ackroyd & Abbott had denied engaging in bid rigging, in preference to those Suspect Tenders in respect of which Ackroyd & Abbott had admitted engaging in bid rigging.¹⁶⁷⁵ However, while admissions from non leniency Parties did form a key piece of evidence in respect of several Infringements as discussed in paragraph II.1567 below, this formed only a part of the overall evidential matrix and the OFT had to look at the overall quality of all the available evidence in respect of each Infringement when selecting the Suspect Tenders to take forward to the Statement. It is not the case that the quality of the evidence took second place to ensuring an even spread amongst leniency Parties – all of the leniency Parties that are counter-parties to Ackroyd & Abbott's Infringements have more than three Infringements in this Decision.

¹⁶⁷³ Written representations of Quarmby, 27 June 2008, paragraph 6.8 and written representations of Caddick, 24 June 2008, paragraph 2.4.

¹⁶⁷⁴ Written representations of Ackroyd & Abbott, 2 July 2008, paragraphs 35 and 36.

¹⁶⁷⁵ Written representations of Ackroyd and Abbott, 2 July 2008, paragraph 49.

The OFT does not agree that Ackroyd & Abbott has been discriminated against by virtue of the contract selection process.

II.1543. In response to the Statement, Caddick and Quarmby acknowledged that the OFT had a discretion as to which cases to pursue but suggested that the OFT should have focused on a minimum size of tender.¹⁶⁷⁶ However, given that cover pricing occurred across a broad range of tender sizes, the OFT considered that it was important to deter all bid rigging activity irrespective of the size of the tender, and accordingly rejected that approach in favour of the criteria described above.

(e) Representations on the leniency process

Availability of leniency

II.1544. In response to the Statement, Wright (Hull) argued that it did not have the same opportunity as was available to other undertakings to seek leniency.¹⁶⁷⁷ However, leniency was, prior to 22 March 2007, open to any company that had engaged in anti-competitive activity and it is notable that two firms¹⁶⁷⁸ applied for leniency prior to any contact with them initiated by the OFT. Until the OFT's Fast Track Offer was issued, there was nothing to prevent Wright (Hull) from availing itself of the OFT's leniency programme, and indeed obtaining complete immunity if it had come forward before the OFT's investigation started in April 2004.

Impact of the consolidation process on leniency parties

II.1545. In response to the Statement, Balfour Beatty expressed concerns over the fairness of the OFT's approach to the selection of the Alleged Infringements to be pursued, in relation to the leniency Parties. Balfour Beatty noted that the methodology used by the OFT to select the Alleged Infringements had resulted in non-leniency Parties being pursued for at most three Alleged Infringements, while several of the leniency Parties featured in more than three instances of cover pricing.¹⁶⁷⁹ It considered that this had the potential to distort future competition and noted that the OFT had initial evidence of many more than three instances of cover pricing in respect of the non-leniency Parties, and additional evidence against companies that did not satisfy the OFT's minimum criteria for inclusion in the investigation. Balfour Beatty noted that it had not been aware that the OFT would adopt its approach to consolidation of the investigation when it applied for leniency. Balfour Beatty also commented on the considerable assistance that had been provided to the OFT by the leniency Parties in this case at considerable expense, and contrasted this with the position of the non-leniency Parties which were not interviewed by the OFT.¹⁶⁸⁰ Thomas Vale also made representations that the selection process was unfair to leniency applicants¹⁶⁸¹, while Propensity suggested that the OFT should have only pursued 'But For' tenders in the Decision.¹⁶⁸²

¹⁶⁷⁶ Written representations of Quarmby, 27 June 2008, paragraph 6.8 and written representations of Caddick, 24 June 2008, paragraph 2.4.

¹⁶⁷⁷ Written representations of Wright (Hull), 27 June 2008, paragraph 23.

¹⁶⁷⁸ York House and AM Griffiths.

¹⁶⁷⁹ Written representations of Balfour Beatty group, 27 June 2008, pages 1 and 2.

¹⁶⁸⁰ Written representations of Balfour Beatty group, 27 June 2008, pages 1 and 2.

¹⁶⁸¹ Written representations of Thomas Vale, 27 June 2008, paragraph 7.

¹⁶⁸² Written representations of Propensity, 27 June 2008, paragraph 3.16.

II.1546. As explained above in paragraph II.1529, the OFT considers that it focused this investigation in a fair and objectively justifiable way having regard to its resource limitations and the endemic nature of the practice of cover pricing. Pursuing additional infringements against non-leniency parties would not have alleviated the discrepancy in the number of Infringements for each leniency and non-leniency Party, as to do so would in almost all cases have implicated a leniency Party in addition to the non-leniency Party. In relation to the leniency Parties, the OFT considers that adequate steps were taken in this case to safeguard the integrity of the leniency process. First, the leniency Parties are receiving complete immunity in relation to any instance of bid rigging about which the OFT would not have known but for the evidence provided by that leniency Party. Secondly, the leniency Parties are receiving a substantial discount of between 35 per cent and 65 per cent on any Not But For tenders. Thirdly, the leniency Parties are only being penalised for a maximum of three Infringements. Given these safeguards, the OFT does not consider that it would have been appropriate to base its selection process on giving particular priority to But For tenders, rather than making an objective selection on the basis of the best evidence. Moreover, to focus exclusively on But For tenders would have resulted in leniency applicants effectively avoiding any penalty at all. The OFT does not consider that this would have been appropriate when none of the leniency parties qualified for 100 per cent immunity (as opposed to leniency) under the OFT's leniency policy.

II.1547. The OFT also notes that leniency Parties benefited from the OFT's consolidation and contract selection procedures, as the OFT has not pursued every tender in respect of which leniency applications were made. The OFT further notes that in the case of almost all of the leniency Parties, the OFT already had considerable evidence in relation to those Parties, having visited their premises prior to their leniency applications, and that this initial evidence almost invariably implicated them in many more tenders than were included in the Statement.

II.1548. Furthermore, it is clear from this Decision and from the accompanying publicity, which Parties took proactive steps to cooperate with the OFT under the leniency programme and hence can be expected to have taken steps to ensure their compliance with competition law.

(f) Representations on the Fast Track Offer

II.1549. In response to the Statement, several Parties claimed that the OFT's Fast Track Offer was unfair.¹⁶⁸³ Representations centred on the following five main points:

- that Parties were not shown the evidence that the OFT had in its possession at the time the OFT's Fast Track Offer was made;
- that Parties were unaware as to what would happen with their admissions and what further consolidation exercise, if any, the OFT would undertake in order to arrive at a final selection of tenders for inclusion in the Statement and any infringement decision;

¹⁶⁸³ For example written representations of Ackroyd and Abbott, 2 July 2008, paragraph 13; Written representations of B&A, 27 June 2008, paragraph 15; Written representations of Crown Point, 27 June 2008, paragraph 4.6; Written representations of GAJ Holdings, 26 June 2008, Appendix E, paragraph 5; Written representations of Pearce, 14 July 2008, paragraph 7.3 and written representations of Crest Nicholson, 27 June 2008, paragraph 8.28.

- that the OFT should provide a 25 per cent discount to Parties which admitted liability after viewing the OFT's evidence in the Statement;
- that the OFT's Fast Track Offer was unfair to leniency Parties as they had provided more assistance to the OFT's investigation; and
- that the Supplementary Fast Track Offer to parent companies was unfair.

(i) Representations regarding the fact that evidence was not provided to the Parties with the Fast Track Offer

II.1550. In its representations on the Statement, the Construction Confederation stated:

*'...companies were unduly pressurised into making admissions of "guilt" without...being aware of the evidence available to the OFT and unable to verify whether it was correct, accurate or reliable or alternatively they were unfairly denied the opportunity to benefit from the reduction of penalty offer. In our view, this could be regarded as unfair and effectively as a form of entrapment... the OFT should have incorporated two key elements into the terms of any "plea bargaining" offer: (i) the evidence on which the OFT purported to rely should have been disclosed up front to the companies involved, and (ii) the companies involved should have been able to understand what the relevant reduction in penalty would actually represent and how it would be calculated.'*¹⁶⁸⁴

II.1551. Several Parties also made representations on this issue. For example, Ackroyd and Abbott claimed that it could not be expected to admit to an infringement *'without being in possession of the full facts against it'*.¹⁶⁸⁵ It also drew similarities between the OFT's Fast Track Offer and settlement proceedings and claimed that it was fundamental to an admission of liability that the parties saw the key evidence against them.¹⁶⁸⁶ Ackroyd and Abbott stated that *'The process was unfair and settlement procedures should not be based on assertions by the OFT without providing the evidence upon which these are based'* and *'The process gives rise to discrimination between participants and breaches the principles of equal treatment'*.¹⁶⁸⁷ GAJ Holdings stated that *'we feel we were pressurised into admitting guilt without any knowledge of the evidence against us'*.¹⁶⁸⁸

II.1552. The OFT considers these concerns to be unwarranted. First, the OFT's Fast Track Offer was a specific initiative made in response to the unusual size of the case, and whose features were specific to the Offer such that direct comparisons cannot be drawn with settlements in other cases or, for that matter, with the OFT's leniency policy. To the extent that the OFT's Fast Track Offer may be compared with settlement or leniency, however, the OFT considers that of the two it was more akin to leniency than settlement, comprising as it did an offer made to the Parties voluntarily to admit to specified Suspect Tenders, at the point when the OFT had 'closed the door' on any further leniency applications. In the same way as under leniency, Parties had the opportunity to examine their own records and determine whether from their own perspective they considered they had engaged in bid rigging

¹⁶⁸⁴ Written representations of Construction Confederation, 16 June 2008, paragraph 4.6.

¹⁶⁸⁵ Written representations of Ackroyd and Abbott, 2 July 2008, paragraph 14.

¹⁶⁸⁶ Written representations of Ackroyd and Abbott, 2 July 2008, paragraph 17.

¹⁶⁸⁷ Written representations of Ackroyd and Abbott, 2 July 2008, paragraph 13.

¹⁶⁸⁸ Written representations of GAJ Holdings, 26 June 2008, Appendix E, paragraph 5.

activities. Also, as with leniency, those that accepted the offer received a percentage reduction from a penalty yet to be calculated, rather than 'settling' a final sum.

- II.1553. Secondly, the OFT considers that arguments relating to equal treatment are misconceived since all Parties were treated equally in relation to the OFT's Fast Track Offer, and no Party was in a materially different position from any other. The OFT provided all companies with the same information about the types of evidence the OFT held, along with specific details (dates and names) of the tenders in respect of which the OFT had reasonable grounds to suspect involvement in bid rigging. In response to any requests for further information, the OFT provided those Parties with the names of estimators involved and/or tender values where this information was already available to it.
- II.1554. Invariably, in any large investigation by the OFT into historic infringements of competition law, some companies will have more information about the conduct in question than others. Some companies had disposed of their records or sold subsidiaries, and in some cases employees and directors had moved on. Many Parties had destroyed the records of tenders – it was apparently common practice for companies to destroy individual tender records where they did not win the tender, meaning that this had happened in most cases where companies took a cover price and in many cases where they gave a cover price – and the OFT had no way of knowing what further evidence, if any (such as tender registers) individual companies might themselves have retained in order to verify the OFT's suspicions.
- II.1555. The OFT does not accept that a fast track offer can be made only where a company is able to carry out its own internal investigations and determine for itself whether or not the OFT's suspicion of an infringement is well-founded. Indeed, it is noted that under the OFT's leniency programme a leniency applicant may be awarded a reduction of up to 100 per cent of any penalty that would otherwise have been imposed, in return for reporting its involvement in cartel activity and on-going cooperation with the OFT; the difficulty that some potential leniency applicants may have in identifying a possible infringement does not preclude the availability of leniency to other potential applicants without such difficulties.
- II.1556. There was no compulsion on the Parties to accept the OFT's offer. The alternative was to go through the normal process of receiving and responding to the Statement. The OFT's Fast Track Offer did not undermine that normal process for those unable or unwilling to accept it. If anything, the normal process was made quicker because of the number of Parties that were able and/or willing to assist the OFT by accepting the OFT's Fast Track Offer.
- II.1557. Some companies chose not to admit liability apparently because they were unable to establish the existence of the suspected illegal activity for themselves from an independent source. However, a significant number of other companies accepted the OFT's Fast Track Offer. Some of those companies may have accepted the offer simply because they regarded participation in bid rigging as very likely, or knew that it was widespread at the time; some may have been willing to accept liability on the basis of the description of specific tenders in the OFT's letter. Some companies informed the OFT that they were accepting the offer as a 'commercial' decision, having no evidence of illegal activity but wishing to benefit from the penalty reduction on offer, in the knowledge that

the OFT would ultimately need to support any decision by reference to evidence and that they could withdraw from the OFT's Fast Track Offer later if they wished to do so.

- II.1558. Thirdly, one of the key reasons for not providing evidence with the OFT's Fast Track Offer, as set out in paragraph II.1485 above, was that the OFT's investigation was still ongoing and the OFT had not completed the compilation of the evidence or the consolidation of its investigation as described in paragraphs II.1479 and II.1495 to II.1499 above. Interviews had not been conducted and letters to procurers had not been sent. The OFT was therefore not in a position to make available all of the evidence on which it was subsequently to rely in the Statement. Moreover, any disclosure at that stage would have been only partial, and would therefore have been misleading, and have unfairly altered Parties' incentives as to whether to accept the offer.
- II.1559. Furthermore, the compilation and presentation of the evidence, including making the necessary confidentiality redactions prior to disclosure, would have taken many months. To some extent, this would have duplicated the work necessary to prepare the Statement, but much of this preparation would have been rendered unnecessary in the light of the subsequent focusing of the investigation to a maximum of three tenders per non leniency Party. Put simply, the OFT would not have made the offer given these difficulties and, following the necessary withdrawal of leniency in this case, the non leniency Parties would therefore have lost any opportunity to obtain a penalty discount.
- II.1560. Finally, had the OFT provided the Parties with the evidence in its possession, any admission by a Party in response to the OFT's Fast Track Offer could only be taken to reflect that Party's analysis of the evidence already available to the OFT, which would have been of limited value to the investigation. Instead, admissions and related facts provided without sight of the evidence have a much stronger corroborative value. From this it can be seen that in addition to calling into question one of the functions of the OFT's Fast Track Offer (to gain admissions that would enable the OFT to frame and advance its investigation), accepting admissions with no corroborative value would also not have justified the substantial 25 per cent discount, given the diminished benefit to the OFT.

(iii) Representations regarding the fact that Parties were unaware as to what would happen with their admissions and what further consolidation exercise, if any, the OFT would undertake in order to arrive at a final selection of tenders

- II.1561. In its representations on the Statement, Ackroyd and Abbott suggested that the OFT's subsequent consolidation exercise (explained by the OFT above and in paragraphs II.1596 – II.1602 of the Statement) should have been explained to the OFT's Fast Track Offer recipients as part of the offer, since it considered that all of the non-leniency Parties were of the understanding that all of the Suspect Tenders in their schedule would be pursued and that the OFT had the same level of evidence against each Suspect Tender.¹⁶⁸⁹
- II.1562. The OFT does not consider that it was incumbent on the OFT to set out its ongoing and future consolidation process at the stage it made the OFT's Fast Track Offer. The OFT asked each non leniency Party to make its own assessment of whether it had engaged in bid rigging activities from its own knowledge. Informing the Parties of the Suspect Tenders for which the OFT had

¹⁶⁸⁹ Written representations of Ackroyd and Abbott, 2 July 2008. paragraph 28 and 37.

the best evidence and the fact that these were the ones most likely to be included in the Statement (a) would have been impossible given that the OFT had not compiled all of the evidence at the time (as discussed above) and given that the responses to the OFT's Fast Track Offer were to form part of that evidence and part of the OFT's final selection process, and (b) would have altered the incentives for companies to accept or reject the OFT's Fast Track Offer on individual Suspect Tenders according to the extent to which they thought the OFT would be likely to take those tenders forward, rather than basing the decision on their own assessment of whether they had engaged in bid rigging activities on the particular Suspect Tenders. The fact that some Parties made admissions to some infringements that were not included in the Statement does not mean that they were discriminated against or that the process was unfair.

II.1563. Ackroyd & Abbott also stated in its representations that the OFT's Fast Track Offer did not explain that the reduction in penalty applied only in relation to each individual Suspect Tender listed or that individual tenders would be pursued as separate infringements.¹⁶⁹⁰ However, as explained in paragraph II.1486 above the Fast Track Offer letter did make it clear that any admissions were to be made on a tender by tender basis and that reductions in penalty would similarly apply only in respect of those Suspect Tenders that were admitted.

(iii) Representations that the OFT should provide a 25 per cent discount to Parties who admitted liability after viewing the OFT's evidence in the Statement

II.1564. In response to the Statement, several companies claimed that they wished to be afforded the equivalent of the 25 per cent discount granted under the OFT's Fast Track Offer as they were now prepared to admit to one or more of their Infringements, having viewed the contents of the Statement and the evidence presented against them.¹⁶⁹¹

II.1565. For example, B & A justified this claim for an equivalent discount by reference to the guidance given by the OFT to another Party at the time of the OFT's Fast Track Offer to the effect that the OFT *'did not want [that company] to admit to anything they were uncertain of'*. B & A claimed that because the companies were 'legal fictions' they could only know what their employees and records told them, and that for many unsuccessful tenders that took place many years ago, they had not retained the records.¹⁶⁹² B&A claim that consequently, the Parties did not always have a proper opportunity to accept the offer at the time it was made. B & A also stated that *'the effect of a policy of granting discounts only for admissions at the fast track offer stage and not now would also be to discriminate against smaller companies'*.¹⁶⁹³ B & A further stated, *'Nor can the OFT justify the discrimination in question by reference to a saving in work on its part. It has had to collect and present evidence even in cases where a fast-track admission has been made...'*¹⁶⁹⁴

¹⁶⁹⁰ Written representations of Ackroyd and Abbott, 2 July 2008, paragraph 29.

¹⁶⁹¹ Written representations of B&A, 27 June 2008, paragraph 10; Written representations of Ackroyd and Abbott, 2 July 2008, paragraph 25 and written representations of T Denman and Sons, 27 June 2008, paragraph 19.

¹⁶⁹² Written representations of B&A, 27 June 2008, paragraph 11 and 14.

¹⁶⁹³ Written representations of B&A, 27 June 2008, paragraph 14.

¹⁶⁹⁴ Written representations of B&A, 27 June 2008, paragraph 15.

II.1566. However, the OFT does not accept that smaller companies were in any different position from larger companies in relation to the OFT's Fast Track Offer. All companies faced the same potential issues with regard to record keeping and staff turnover. The OFT has discussed the general issues surrounding provision of evidence with the OFT's Fast Track Offer in the paragraphs above, including the fact that the OFT had not completed the compilation of the evidence at that time it made the OFT's Fast Track Offer to the Parties.

II.1567. In addition, and contrary to B & A's assertion, the responses to the OFT's Fast Track Offer provided considerable benefit to the OFT since the independent corroboration of the OFT's evidence provided by non-leniency Parties' admissions, often accompanied by the naming of counter-parties, in the absence of sight of the OFT's evidence, provided valuable additional evidence and assisted the OFT with the final selection of tenders as discussed above in paragraphs II.1495 to II.1506. This opportunity to focus the investigation was completed by the time the Statement was issued and the OFT cannot therefore justify granting a discount of a similar amount to Parties which make admissions having seen the OFT's evidence.

II.1568. Nevertheless, the OFT's penalty guidance recognises that cooperation in the course of an investigation that enables the OFT to conclude its enforcement process more effectively and speedily, can on occasions be a basis for a reduction at step 4 of the penalty calculation. The fact that some Parties have now admitted their involvement in certain Infringements has therefore been taken into account by the OFT in the setting of penalties, as described in section VI below. However, for the reasons outlined above, the OFT does not accept that new admissions made after the issue of the Statement should attract the same level of discount as that awarded for acceptance of the OFT's Fast Track Offer.

II.1569. Following the issue of the Statement, one Party, Crest Nicholson, specifically asked the OFT to reopen the OFT's Fast Track Offer so that it could consider whether to accept it, now that it had seen the evidence against it. The OFT refused to reopen the offer, which, in the OFT's view, would have resulted in unequal and preferential treatment being given to Crest Nicholson. Crest Nicholson applied for permission to judicially review the OFT's decision. The subsequent events are described in more detail in paragraphs II.1576 to II.1580 below.

(iv) Representations that the Fast Track Offer was unfair to leniency Parties as they had provided more assistance to the OFT's investigation

II.1570. In response to the Statement, Thomas Vale suggested that the OFT's Fast Track Offer was unfair to leniency Parties¹⁶⁹⁵ and stated that:

'This offer seriously undermined Thomas Vale's position as a proactive immunity and leniency applicant, by favouring companies who had not assisted the OFT's investigation; who had not provided detailed and practical information; and who would not usually have had the option of participating in a leniency programme. Unjustly, these companies were therefore able to obtain a reduction in financial penalties for much less costs, management time and effort than that which were

¹⁶⁹⁵ Written representations of Thomas Vale, 27 June 2008, page 61.

offered to Thomas Vale, but, nonetheless, these companies still received offers of “significant”¹⁶⁹⁶ reductions in penalties.’

II.1571. The OFT does not consider that the leniency Parties have been treated unfairly in relation to the non leniency Parties that accepted the OFT’s Fast Track Offer. As stated above, the OFT’s Fast Track Offer discount was granted because of the considerable benefit to the OFT’s enforcement process provided by admissions from Parties that had not been granted sight of the evidence, and at a stage of the case which helped the OFT to select the tenders that would be included in the Statement. In all cases, leniency Parties have been granted a significantly larger reduction in penalty than the 25 per cent OFT’s Fast Track Offer discount. Furthermore, the leniency Parties have been granted the substantial additional concession of immunity from financial penalty on But For Infringements as described above in paragraph II.1475.

(v) Representations that the Supplementary Fast Track Offer to parent companies was unfair.

II.1572. In response to the Statement, Renew claimed that its rights of defence had *‘been seriously undermined by the fact that Renew was only notified by the OFT that it intended to find Renew jointly and severally liable for Bullock’s participation in any Alleged Infringements after Bullock had already accepted the OFT Offer [the OFT’s Fast Track Offer]. Renew was not then given any opportunity to comment on or influence Bullock’s response’.*¹⁶⁹⁷

II.1573. However, the OFT considers that it was open to Renew to reject the OFT’s Fast Track Offer when it was informed of Bullock’s admissions on 6 November 2007. The decision made by Renew not to comment on the factual admissions made by Bullock does not mean that Renew’s rights of defence have been compromised. The OFT has granted Renew and Bullock a 25 per cent discount based on Bullock’s admissions, but as discussed in II.1485 above, it remained open to any party to withdraw from the OFT’s Fast Track Offer at any time up to issue of the OFT’s Decision, including after seeing the evidence and the OFT’s analysis of it in the Statement. In terms of rights of defence, it remains open to Renew to appeal on liability for the Infringements as discussed in II.1486 above.

II.1574. In response to the Statement, McGinley Holdings claimed that *‘the OFT seeks to impose liability on MHL [McGinley Holdings] following [...] [C – its current parent’s] “admission”, extracted on a false pretence, and without MHL [McGinley Holdings] having the means to answer the allegations against JJM [J J McGinley]...’.*¹⁶⁹⁸

II.1575. The OFT notes that the original Fast Track Offer was addressed to [.....] [C], the current parent of J J McGinley. However the response to the OFT’s Fast Track Offer was received from J J McGinley, not [...] [C – its current parent]. In its response J J McGinley accepted the OFT’s Fast Track Offer, in respect of the majority of the Suspect Tenders on its schedule. The OFT subsequently wrote to McGinley Holdings, informing it of its former subsidiary’s response to the OFT’s Fast Track Offer. At that time it was open to McGinley Holdings to provide a different response to the OFT’s Fast Track Offer, if it wanted. The

¹⁶⁹⁶ Press Release: OFT makes ‘fast track’ offer in biggest ever UK cartel investigation, 22 March 2007.

¹⁶⁹⁷ Written representations of Renew and Allenbuild, 4 July 2008, paragraph 3.1.

¹⁶⁹⁸ Written representations of McGinley Holdings, 27 June 2008, paragraph 29.

decision made by McGinley Holdings not to comment on the factual admissions made by J J McGinley does not mean that McGinley Holdings' rights of defence have been compromised. The OFT has granted McGinley Holdings and J J McGinley a 25 per cent discount based on J J McGinley's admissions, but as discussed in II.1485 above, it remained open to any party to withdraw from the OFT's Fast Track Offer at any time up to issue of the OFT's Decision, including after seeing the evidence and the OFT's analysis of it in the Statement.

Judicial review of the OFT's refusal to reopen the Fast Track Offer to Crest Nicholson after the Statement had been issued

II.1576. As noted above in paragraph II.1569, following the issue of the Statement, one Party, Crest Nicholson, applied for judicial review of the OFT's decision not to reopen the OFT's Fast Track Offer to it, now that Crest Nicholson had had the opportunity to see the OFT's evidence against it. Crest Nicholson claimed that the OFT's decision not to reopen the OFT's Fast Track Offer following the issue of the Statement was contrary to the principles of equal treatment and procedural fairness.¹⁶⁹⁹ Crest Nicholson considered that it had been at a particular disadvantage when responding to the OFT's Fast Track Offer, given that it was a historical parent company of the infringing companies, Pearce and its principal Pearce Group.¹⁷⁰⁰

II.1577. In its judgment on 24 July 2009, the Court ruled that the OFT has a wide discretion in the conduct of its investigations and in its penalty setting.¹⁷⁰¹ In particular the court rejected Crest Nicholson's claim that the OFT's decision not to reopen the OFT's Fast Track Offer following the issue of the Statement was contrary to the principles of equal treatment and procedural fairness.¹⁷⁰² Furthermore, the judgment went on to state that the OFT was entitled to adopt the approach it did in making the OFT's Fast Track Offer, including the non provision of evidence to the recipients of the OFT's Fast Track Offer, and that it was not required to reopen the OFT's Fast Track Offer for Crest Nicholson following the issue of the Statement.¹⁷⁰³

II.1578. However, the judgment did state that the OFT should have acknowledged that Crest Nicholson might have been in an objectively different position to other parties who were offered the OFT's Fast Track Offer.¹⁷⁰⁴ Then, if a difference was established, the OFT had to decide what effect, if any, that should have on any penalty.¹⁷⁰⁵

II.1579. Following the judgment the OFT wrote to all Parties, including Crest Nicholson, and invited them to make submissions on

- *'Whether, and if so how, [the Party] was in an objectively different position compared to other Fast Track Offer recipients which put it in a position where it could not fairly admit the allegations and accept the Fast Track Offer at the time it was made;*

¹⁶⁹⁹ Written representations of Crest Nicholson, 27 June 2008, paragraphs 1.13 and 8.39.

¹⁷⁰⁰ Written representations of Crest Nicholson, 10 August 2009, paragraphs 2.4 and 2.6.

¹⁷⁰¹ Mr Justice Cranston's Judgment, paragraphs 84 and 86.

¹⁷⁰² Mr Justice Cranston's Judgment, paragraph 81.

¹⁷⁰³ Mr Justice Cranston's Judgment, paragraphs 77 and 89.

¹⁷⁰⁴ Mr Justice Cranston's Judgment, paragraph 82.

¹⁷⁰⁵ <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1875.html>

- *If so, what effect, if any, that claimed different position should have on any penalty which the OFT may subsequently impose for alleged cover pricing*.¹⁷⁰⁶

II.1580. The further submissions received by the OFT are addressed in paragraphs VI.343 to VI.368 in the penalties section below.

Amendments to representations by certain non leniency Parties in order to comply with the terms of their acceptance of the Fast Track Offer

II.1581. In response to the Statement, two non-leniency Parties¹⁷⁰⁷ made representations about their participation in the Infringements which, if maintained, the OFT considered would have contravened the terms of their acceptance of the OFT's Fast Track Offer. The OFT therefore wrote to these Parties on 4 December and 23 December 2008 respectively, asking them to confirm whether they intended to deny participation in the Infringements and thereby lose the benefit of the OFT's Fast Track Offer. Both Parties confirmed that they intended to maintain their acceptance of involvement in the Infringements and that their representations should be read in this light.¹⁷⁰⁸

Amendments to representations by certain leniency Parties in order to comply with the terms of their leniency agreement

II.1582. In response to the Statement, several leniency Parties¹⁷⁰⁹ made representations about the legal characterisation of their conduct which, if maintained, the OFT considered would have contravened the terms of their respective leniency agreements. The OFT therefore wrote to these Parties on 23 December 2008 expressing concern that their representations were inconsistent with their status as leniency applicants. Following further communications with the OFT, all of these Parties subsequently amended their representations to make them comply with the terms of their leniency agreements.¹⁷¹⁰

II.1583. One party, Wildgoose, later suggested that it had been unfairly pressured by the OFT into admitting liability.¹⁷¹¹ The OFT does not accept this suggestion. Wildgoose was perfectly free to decide whether it wished to apply for and sustain its leniency application. Furthermore, it is clear from the OFT's leniency policy that it is an integral requirement for an award of leniency that the applicant should admit its participation in cartel activity in breach of the Act and/or Article 81.¹⁷¹² Notwithstanding these representations, the OFT notes that Wildgoose has not in fact withdrawn its admission of cartel activity and the OFT accordingly relies on it in this Decision and is granting Wildgoose a penalty discount for leniency.

¹⁷⁰⁶ Excerpt from letter sent to the parties on 27 July 2009 inviting further submissions following Mr Justice Cranston's Judgment on 24 July.

¹⁷⁰⁷ E Manton and Durkan Pudelek.

¹⁷⁰⁸ Email from E Manton, 10 December 2008 and letter from Concentra, 4 March 2009.

¹⁷⁰⁹ Admiral, Bramall, Derwent Valley, Harlow & Milner, Henry Boot, Herbert Baggaley, Propensity, Thomas Vale and Wildgoose.

¹⁷¹⁰ Letter from Admiral, 15 January 2009; Letter from Bramall, 30 March 2009; Letter from Chevin Holdings and Derwent Valley, 26 January 2009; Letter from Harlow and Milner, 6 January 2009; written representations of Henry Boot, 27 June 2008, paragraph 1.3; Letter from Herbert Baggaley, 26 January 2009; Letter from Thomas Vale, 19 January 2009; Letter from Propensity, 31 March 2009 and letter from Wildgoose, 1 April 2009.

¹⁷¹¹ Letter from Wildgoose, 10 August 2009, page 2.

¹⁷¹² OFT 423 *OFT's Guidance as to the appropriate amount of a Penalty* (December 2004), paragraph 3.1.

Supplementary Statements of Objections

II.1584. In the light of information that came to the OFT's attention following the issue of the Statement, the OFT issued the following supplementary Statements of Objections ('Supplementary Statements') to certain Parties. In each case, the addressees of the Supplementary Statements were given the opportunity to make written and oral representations.

1. Durkan company group and Infringements

II.1585. On 23 December 2008, the OFT issued a Supplementary Statement to Durkan Limited, Durkan Holdings, Concentra, and the counter-Parties to their Infringements, Mansell and Balfour Beatty. The need for this Supplementary Statement arose from the fact that the OFT now considers that Durkan Limited, and not Concentra as provisionally found in the Statement, was the company directly involved in Infringement 220. This Supplementary Statement also addressed certain representations made by Durkan Holdings and by Concentra in response to the Statement, regarding their liability for three of the Alleged Infringements described in the Statement, Alleged Infringements 135, 220 and 240. The content of and responses to the first Supplementary Statement are described in the Durkan company profile at paragraphs II.382 to II.442 above, and in the descriptions of Infringements 135, 220 and 240 in section IV below.

2. Lindum liability for Infringement 182

II.1586. On 9 February 2009, the OFT issued a Supplementary Statement to Lindum and Lindum Group, and the counter-Parties to Infringement 182, Jack Lunn and its ultimate parent at the time of this Infringement, Jack Lunn (Holdings). The need for this Supplementary Statement arose from the fact that the OFT now considers that Lindum, and not Lindum Homes as provisionally found in the Statement, was the company directly involved in Infringement 182. The content of and responses to this Supplementary Statement are described in the description of Infringement 182 in section IV below.

3. Amendments to relevant markets for certain Infringements

II.1587. On 18 March 2009, the OFT issued a Supplementary Statement to the Parties set out below. The need for this Supplementary Statement arose from the fact that the OFT considered the relevant product and/or geographic markets for Infringements 9, 20, 29, 54, 78, 108, 114, 128, 136, 141, 155, 204 and 208 to be different from the markets set out in the Statement. The content of and responses to this Supplementary Statement are described in the market definition section in section II below.

- ARG;
- Adam Eastwood and its controlling party the Eastwood Foundation;
- Admiral;
- Allenbuild and its ultimate parent Renew;
- Bodill;
- Derwent Valley and its ultimate parent Chevin Holdings;
- E Taylor;
- F Parkinson and its ultimate parent Mowbray;
- Francis and its ultimate parent Barrett;
- Greswolde and its ultimate parent Mantisson;
- Herbert Baggaley and its ultimate parent Baggaley Group;

- J J & A R Jackson;
- Loach;
- Mansell and its former ultimate parent Mansell plc and current ultimate parent Balfour Beatty plc;
- Milward;
- R Durtnell & Sons and its ultimate parent Durtnell Holdings;
- Robert Woodhead and its ultimate parent Woodhead Holdings;
- Simons and Wrights (Lincoln) together with their ultimate parent company Simons Group;
- Strata;
- Thomas Vale and its ultimate parent Thomas Vale Holdings;
- Thorndyke;
- W R Bloodworth;
- Wildgoose; and
- William Woodsend.

4. A H Willis liability for Infringement 224

II.1588. On 30 March 2009, the OFT issued a Supplementary Statement to A H Willis and the counter-Parties to Infringement 224, Mansell and Balfour Beatty. The need for this Supplementary Statement arose from the fact that the OFT considered it needed to adduce additional factual evidence and rely on additional legal reasoning relating to the creation of an agency relationship and an undertaking's liability for the acts of its agents, in relation to Infringement 224. The content of and responses to this Supplementary Statement are described in the description of Infringement 224 in section IV below.

5. Pearce Group liability for Infringement 75

II.1589. On 16 April 2009, the OFT issued a Supplementary Statement to Pearce, Pearce Group and Crest Nicholson, and the counter-Parties to Infringement 75, Thomas Vale, Balfour Beatty and Interclass. The need for this Supplementary Statement arose from the fact that the OFT considered that, by virtue of the fact that Pearce acted as the 'undisclosed agent' of its parent Pearce Group, Pearce Group should be regarded, together with Pearce, as having been directly involved in Infringement 75, and that Crest Nicholson, Pearce Group and Pearce should therefore be held jointly and severally liable for Pearce Group's and Pearce's participation in that Infringement. The content of and responses to this Supplementary Statement are described in the company profiles section at paragraphs II.1000 to II.1036 above, and in the description of Infringement 75 in section IV below.

6. Amendments to relevant markets for certain Infringements

II.1590. On 19 May 2009, the OFT issued a Supplementary Statement to the Parties set out below. The need for this Supplementary Statement arose from the fact that the OFT considered the relevant product markets for Infringements 8, 43, 80, 97, 129, 176, 220 and 240, all relating to work for Local Authorities, to be Public Housing rather than Private Housing as originally set out in the Statement. The content of and responses to this Supplementary Statement are described in the market definition section in section II below.

- Balfour Beatty and Mansell;
- Bodill;

- Durkan Holdings;
- Durkan;
- G & J Seddon and its ultimate parent Seddon;
- J J & A R Jackson;
- J J McGinley and its former parent McGinley Holdings;
- Richardson Projects;
- Strata; and
- William Woodsend.

Decision not to pursue certain Alleged Infringements

II.1591. Following consideration of the Parties' representations on the Statement, the OFT has decided not to make infringement findings in relation to 40 Alleged Infringements for which, in the OFT's view, the evidence was ultimately insufficient to sustain a finding that there had been an infringement of the Act in the terms set out in the Statement. For the following 38 Alleged Infringements, the evidence depended wholly or almost wholly on a single document where, in the OFT's view, the surrounding circumstances meant that the document alone¹⁷¹³ would have been insufficient to meet the requisite standard of proof:

- Alleged Infringements 10, 11, 12, 13, 15, 16, 19, 24, 25, 26, 28, 33, 51, 60, 71, 73, 76, 81, 87, 92, 99, 109, 111, 113, 117, 130, 131, 132, 145, 148, 151, 153, 161, 167, 170, 177, 200 and 223.

II.1592. New evidence was supplied in relation to Alleged Infringement 101, indicating that in that particular instance the client had not been deceived into thinking that a cover bid was genuine, such that the object or effect of the arrangement differed from other instances of cover bidding described in this Decision. Alleged Infringement 185 involved documentary evidence with conflicting witness explanations which, in the OFT's view, meant that the requisite standard of proof was not met.

II.1593. In addition, the OFT has decided not to pursue to Decision the following 5 Alleged Infringements, the commencement of which pre-dated the coming into force of the Act, as, by virtue of the transitional provisions of the Act, the Chapter I prohibition may not apply, despite elements of the arrangements occurring after 1 March 2000 (see paragraph III.220 below):

- Alleged Infringements 1, 2, 3, 4 and 5.

II.1594. As a result of this, the following nine of the parties to which the Statement was addressed are not addressees of this Decision as they have not been found to have engaged in any breach of the Act and are therefore entitled to the presumption of innocence:

- Adonis Construction Limited;
- Chase Norton Construction Limited together with its ultimate parent company Chase Midland plc;
- E.G. Carter Limited;

¹⁷¹³ See further paragraph III.203 regarding the need to take into account the particular context and particular circumstances when placing reliance on a single item of evidence.

- Frank Galliers Limited together with its former ultimate parent company Frank Galliers Holdings Limited;
- George Law Limited together with its ultimate parent company, then named Bosworth & Wakeford Limited;
- J. Guest Limited;
- Piper Construction Midlands Limited together with its ultimate parent company Piper Securities Holdings Limited;
- Robert Bruce Construction Limited; and
- Spicers (Builders) Limited.

II.1595. The number of Parties found to have infringed in this Decision is therefore 103, as compared with the 112 addressees of the Statement.

II.1596. Infringements in this Decision are numbered according to the numbering of the respective Alleged Infringements in the Statement, hence the inclusion of numbers up to 244 when only 199 infringement findings are made.

C. Definition of Relevant Markets

Industry background

- II.1597. The Parties to the Infringements described in this Decision are building contractors that provide construction and support services. The building contracting industry is classified as Division 45 of the UK Standard Industrial Classification ('SIC') 2003, which comprises '*general construction and special trade construction for buildings and civil engineering, building installation and building completion. It includes new work, repair, additions and alterations, the erection of prefabricated buildings or structures on site and also constructions of a temporary nature*'.¹⁷¹⁴
- II.1598. The latest Construction Statistics Annual Report prior to the issue of the Statement on 16 April 2008¹⁷¹⁵ prepared by the Department for Business, Enterprise & Regulatory Reform (BERR)¹⁷¹⁶ indicated that Contractors' output in the construction industry was £111.7 billion¹⁷¹⁷ at then current prices in 2006.¹⁷¹⁸ The report showed that the market can be divided into two main types of work: new works which recorded an output of £64.4 billion, and repair and maintenance which had an output of £47.3 billion in 2006. Within the new works the report indicated that of the contractors' output, roughly three quarters (£48.8 billion) was accounted for by private sector works.¹⁷¹⁹ New works were split into the following categories of work: private sector housing (£19.6 billion), public sector housing (£3.4 billion), infrastructure (£6.5 billion), industrial (£5.0 billion) and commercial (£29.8 billion). Within repair and maintenance work, two thirds (£31.4 billion) was private sector work with this work split fairly equally between housing and non-housing works.
- II.1599. The Construction Statistics Annual report showed that there were 186,107 contractors' firms¹⁷²⁰ engaged in construction work in 2006. However, of these, 180,131 (97 per cent) had fewer than 25 employees and accounted for only just over a quarter of output¹⁷²¹ in terms of the value of work done in 2006. This shows the fragmented structure of the industry.

Approach to market definition in cartel cases

- II.1600. The primary purpose of defining the relevant market in cartel cases is to assist in the calculation of penalties. The CAT and the Court of Appeal have accepted that it is not necessary for the OFT to carry out a formal analysis of the relevant

¹⁷¹⁴ Building Contracting; Key Note – Market Report 2006 (ISBN 1-84168-984-X), page 2.

¹⁷¹⁵ Table 2.4 Contractors' Output - Construction Statistics Annual 2007 – Department for Business, Enterprise & Regulatory Reform (BERR) – August 2007.

¹⁷¹⁶ BERR has since become BIS (Department for Business Innovation and Skills) on 5 June 2009 but is referred to as BERR in this Decision when mentioning documents published before that day.

¹⁷¹⁷ All 2006 figures are provisional and comprise output by contractors, estimates of unrecorded output by small firms and self-employed workers and a small amount of output by public sector direct labour departments classified to construction.

¹⁷¹⁸ The Office of National Statistics Annual Business Inquiry First Release (16 November 2007) shows provisional results for the UK Construction Industry of £176.1bn measured in terms of turnover. This compares to £113.6bn figure for output of the construction industry based on BERR statistics shown in Table 2.1 Output – Construction Statistics Annual 2007.

¹⁷¹⁹ Table 2.8 Contractors' output by type of work – Construction Statistics Annual 2007.

¹⁷²⁰ Table 3.1 Private contractors: number of firms – Construction Statistics Annual 2007. Information relates to the number of private contractors' firms on the register of the Department for Business, Enterprise & Regulatory Reform (BERR) Register.

¹⁷²¹ Table 3.3 Private contractors: Value of work done - Construction Statistics Annual 2007.

product market in order to assess the appropriate level of the penalty.¹⁷²² Rather, the OFT must be '*satisfied on a reasonable, and properly reasoned basis, of what is the relevant product market affected by the infringement*'.¹⁷²³ Consideration of the '*commercial reality*', insofar as it '*can reasonably be shown that the products so grouped were "affected" by the infringement*', is also a relevant consideration.¹⁷²⁴ The OFT considers that this principle also applies when assessing the relevant geographic market.

II.1601. The OFT is not bound by market definitions adopted in previous cases, either by itself or by other competition authorities, although earlier definitions can sometimes be informative when considering the appropriate market definition. Equally, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

Product market definition in the present case

II.1602. The process of defining the relevant market starts with the focal product that is the subject of the investigation. In this case, this is the supply of building works for a particular construction project (the 'Focal Product'). Market definition establishes the closest substitutes to the Focal Product. Such products are usually the most immediate competitive constraints on the behaviour of the undertaking controlling the Focal Product.¹⁷²⁵ When identifying the closest substitute products, it is necessary to consider both demand side substitution, that is, how customers of the Focal Product would respond to a small but significant increase in its price¹⁷²⁶, and supply side substitution, that is, how potential producers of the Focal Product would respond to a similar increase in its price.¹⁷²⁷

II.1603. On the demand side there is limited possibility for demand side substitution. Typically when customers seek quotes from building contractors it is for a particular type of building project, for example for a new shopping mall or a new house, or to refurbish an existing building. Although a customer may be able to vary the specification in response to a price increase, or even not enter into a contract at all, a customer is unlikely to enter into an entirely new contract in response to a small price rise.

II.1604. On the supply side there appears to be much greater ability to switch between different types of building works. The extent of supply side substitutability is determined by the extent to which firms can commence supply of a particular type of construction work quickly and without significant extra cost in response to a small increase in prices. Where this can be done within a year and without

¹⁷²² *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] ECWA Civ 1318, paragraphs 169-173 and 189 and CAT judgment on Penalty, *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, paragraph 178.

¹⁷²³ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] ECWA Civ 1318, paragraph 170.

¹⁷²⁴ *Ibid*, at paragraphs 170 to 173 and 228.

¹⁷²⁵ OFT Guideline 403, *Market Definition*, December 2004, paragraph 2.5.

¹⁷²⁶ Usually a five to ten per cent increase. See OFT Guideline 403, *Market Definition*, December 2004, paragraph 3.3.

¹⁷²⁷ This is known as the hypothetical monopolist test. See OFT Guideline 403, *Market Definition*, December 2004, paragraphs 2.5 to 2.13.

incurring substantial sunk costs¹⁷²⁸, it is likely that the products fall within the same relevant market.

- II.1605. To assess the extent to which different types of construction work fall within the same relevant market, questionnaires were sent to all of the construction companies under investigation in order to obtain information regarding the characteristics of the firms, the categories of work and sectors they work in, and the constraints they face to expanding output and the geographic reach of their work (Suppliers' Survey, reproduced in Annex D (1)). Questionnaires were also sent to all clients of Suspect Tenders both in the public and private sector to find out what types of construction work were being undertaken in these tenders and what factors affected the choice of contractors during the selection process (Clients' Survey, reproduced in Annex D (2)). Responses to the Suppliers Survey showed that all parties under investigation were general contractors that are defined in the Building Contracting – Key Note report as 'establishments engaged in building and civil engineering work (not sufficiently specialised to be classified elsewhere in the construction industry) and demolition work'.¹⁷²⁹
- II.1606. As discussed in the Statement, the OFT has constructed a database from the information supplied in the responses to the Suppliers' Survey and the Clients' Survey namely, ***the OFT's Construction Database (2007)***, from which the tables set out below have been prepared.
- II.1607. It is relevant to note that the data analysis was carried out in relation to the 244 Alleged Infringements as set out in the Statement. Despite the fact that not every Alleged Infringement is found to be an Infringement in this Decision and minor variations in the classification of certain specific infringements, given the size of the database and the comparatively minor reduction in the number of Parties since the Statement the OFT considers that the results of the survey and analysis of the Alleged Infringement data remain valid support for the definition of the relevant product and geographical markets in this case.
- II.1608. Similarly, this section incorporates many statistics and references to reports published during the year prior to the issue of the Statement. The OFT has received no information to suggest that more recent statistics or reports would indicate the need for changes to the OFT's definitions of relevant product and geographic markets in this case.
- II.1609. Table 1 provides some summary statistics taken from these initial surveys. These show a large variation in the size of companies under investigation, from those with a turnover of less than £1 million to those with a turnover of over £2 billion. Responses to the Suppliers' Survey indicated that some were small regionally based construction companies whilst others were much larger national construction companies albeit that many of these were structured on a regional basis.
- II.1610. Contract values for Alleged Infringements¹⁷³⁰ also varied considerably from as little as £2,215 to £8.5 million, with an average value of £1.2 million. In

¹⁷²⁸ *Market Definition - Competition Law Guideline* published by the OFT in December 2004 states that 'In this context sunk cost is a cost incurred on entering a market that is not recoverable on exiting the market'.

¹⁷²⁹ Building Contracting; Key Note – Market Report 2006 (ISBN 1-84168-984-X), Definitions.

¹⁷³⁰ Alleged Infringements are those tenders that were selected from the pool of Suspect Tenders, for inclusion in the Statement, as described in paragraphs II.1495 to II.1506 above

addition, it can be seen from Table 1 that the practice of collusive tendering was spread across both public and private sector tenders with 57 per cent of Alleged Infringements falling within the public sector.¹⁷³¹ Amongst Alleged Infringements just over 60 per cent were accounted for by new building ('NB') works, 34 per cent by repair, maintenance and improvement ('RMI') works and the remainder involved an element of both NB and RMI. The survey also provided an indication of the distances that suppliers are prepared to travel to undertake work. Although amongst the Alleged Infringements there was quite a wide variation in distance travelled by suppliers from less than a mile to over 114 miles, on average they travelled around 23 miles.

- II.1611. The Infringements relate to tendered contracts both in the private sector and the public sector. One respondent described the tendering process as follows, *'The process for price-based competitive tendering in the construction industry is that the client (e.g. the Council or Local Authority) issues a number of invitations to specific companies to tender. The number can vary significantly – there can be as few as 2 or 3 or as many as 20 or 25 for example.'*¹⁷³²

¹⁷³¹ 'Public work' is work for any public authority such as government departments, public utilities, nationalised industries, universities, the Post Office, new town corporations and housing associations. 'Private work' is for a private owner or organisation or a private developer and includes work carried out by firms on their own initiative. It includes work where the private sector carries out the majority of the risk/gain, i.e. in principle, all PFI contracts are private. See ONS sector classification guide - <http://www.statistics.gov.uk/StatBase/Product.asp?vlnk=7163>.

¹⁷³² Henry Boot's market definition response to question 15 of questionnaire, OFT Document Reference B3247b.

Table 1: Summary characteristics

Suppliers' Survey - number of respondents	120		
Customers' Survey - number of respondents	333		
Turnover of parties	£678,611 min	£2,025m max	£97.6m average
Number of tenders - for all Suspect Tenders - for Alleged Infringements	527 tenders 244 tenders		
Tender Size - for all Suspect Tenders - for Alleged Infringements	£2,215 min £2,215 min	£22.3m max £8.5m max	£1.0m average £1.2m average
Split of tenders between public and private work - for all Suspect Tenders - for Alleged Infringements	53.1% (Public) 56.6% (Public)	46.9% (Private) 43.4% (Private)	
Split of tenders between new build (NB) or repair, maintenance and improvement (RMI) - for all Suspect Tenders - for Alleged Infringements	57.1% (NB) 61.1% (NB)	36.2% (RMI) 34.0% (RMI)	6.1% (Both) 4.9% (Both)
Distance of suppliers to - all Suspect Tender project sites - Alleged Infringement project sites	0.2 miles (closest) 0.4 miles (closest)	120 miles (furthest) 114 miles (furthest)	22.9 miles (average) 22.7 miles (average)

Source: OFT's Construction Database (2007)

II.1612. A tender is defined in a book on Procurement in the Construction Industry as *'an offer to carry out work for a stated price'*.¹⁷³³ The book notes that for the client, tendering traditionally involves both selecting a contractor and agreeing a price. Under selective tendering the *'Client chooses to restrict competition to a selected number of contractors (usually between four to six) and this commonly*

¹⁷³³ *Procurement in the Construction Industry – The impact and cost of alternative market and supply processes*, W Hughes, P Hillebrandt, D Greenwood and W Kwawu, Taylor & Francis, 2006.

involves a pre-qualification procedure for those wishing to make a tender list.¹⁷³⁴ The OFT notes that both traditional and selective (non-traditional) tendering constitute a tender process, and price is a part of the process regardless of which procurement method is utilised (see paragraphs II.1682 and II.1687 below).

II.1613. Table 2 below shows that for the Alleged Infringements the number of firms tendering ranged from two to 13, and the average number of firms tendering was 5.4.

Table 2: Analysis of the number of suppliers that tendered for Alleged Infringements, grouped by sector

Sector	Number of suppliers tendering			Total number of tenders in sector
	Min	Max	Average	
Private Sector Housing ¹⁷³⁵	4	10	5.7	37
Public Sector Housing ¹⁷³⁶	2	13	5.7	32
Commercial				
Defence	6	6	6.0	1
Education	3	9	5.5	72
Entertainment (incl. Leisure)	3	7	5.0	16
Garages	4	4	4.0	1
Health	4	7	5.6	25
Office	3	7	5.1	31
Places of Worship	3	7	5.5	6
Police/Fire & Rescue	5	7	6.0	5
Prisons	5	6	5.5	2
Retail	4	6	5.2	5
Industrial				
Distribution	7	7	7.0	1
Other Industrial Buildings	2	7	4.4	8
Warehousing	4	5	4.5	2
Average	3.9	7.2	5.4	

Source: Clients' Survey, OFT's Construction Database (2007)

II.1614. Clients were also asked in another part of the survey to rank certain factors in terms of their importance to whether a supplier was included on a tender list. Table 1 in Annex D (3) indicates that a key factor in selecting a contractor to bid for a tender is that it can demonstrate that it has already carried out a similar type of work. Firms can demonstrate that they have a proven track record in a particular type of work by showing in their promotional material that they have undertaken similar work for the client or other clients.¹⁷³⁷ The latter is an important factor as clients sometimes delegate the tendering process to local firms of architects or quantity surveyors. In many cases they will seek the advice of local firms of architects or quantity surveyors at the point where they

¹⁷³⁴ Ibid, page 120.

¹⁷³⁵ Public sector housing category includes the construction of student accommodation for public sector clients.

¹⁷³⁶ Private sector housing category includes the construction of student accommodation for private sector clients.

¹⁷³⁷ Firms provided examples of their promotional material in their market definition responses. For example, documents provided by Bodill and Loach in their market definition responses to the questionnaire, OFT Document Reference 5431 and 5692, contained pictures of a number of recently completed projects.

are choosing their final tender list as these firms have experience of which contractors have carried out similar types of projects.

II.1615. The type of work undertaken by a building contractor is characterised in two main ways. Firstly, the work is undertaken within a particular sector as shown in the Construction Statistics Annual report.¹⁷³⁸ Secondly, the work involves either NB or RMI. The extent to which this categorisation impacts on the definition of the relevant market is discussed below.

The relevant product market

II.1616. As indicated above, each Infringement involves the provision of construction works which fall into a certain sector (for example, Retail). However in defining the relevant product market it is necessary to consider whether competition is constrained at the sector level or whether building firms actually compete according to the broader category of work (for example, Commercial). BERR categorises the following five main categories of construction work:

Public Sector Housing ('Public Housing');
Private Sector Housing ('Private Housing');
Infrastructure;
Commercial; and
Industrial.

II.1617. Infrastructure falls outside the scope of this investigation. Parties to the investigation are general building contractors and consider that infrastructure projects are principally undertaken by firms specialising in civil engineering work that have specialist skills needed for these types of projects. One respondent to the survey indicated that the infrastructure market is dominated by much larger companies that operate nationally – and involve contracts of a large value.¹⁷³⁹ Another respondent considered '*Infrastructure to be a market for civil engineering firms only*' and not for a general construction company like itself.¹⁷⁴⁰ There were no infrastructure projects amongst the Alleged Infringements and hence infrastructure falls outside the scope of this investigation.

II.1618. The BERR statistics show that each sector can be assigned to a particular category of work, along the lines indicated in Table 3 below.

¹⁷³⁸ See Notes and Definitions – Construction Statistics Annual 2007.

¹⁷³⁹ Strata's market definition response to question 6 of questionnaire, OFT Document Reference 5964.

¹⁷⁴⁰ Ackroyd & Abbott's market definition response to question 6 of questionnaire, OFT Document Reference 6789.

Table 3: Mapping of sectors to categories of work

Public Housing	Private Housing	Commercial	Industrial
Public Housing ¹⁷⁴¹	Private Housing	Education (inc Schools, Colleges & Universities)	Distribution
		Health	Warehouses
		Retail	Factories
		Entertainment (incl. Leisure)	Other Industrial Buildings
		Office	
		Garages	
		Places of Worship	
		Prisons	
		Police/Fire & Rescue	
		Defence	

Source: BERR Annual Statistics (2007)

Switching between sectors of work

II.1619. Table 4 provides a summary of information contained in the OFT's database showing the allocation of the 244 Alleged Infringements by sector¹⁷⁴² and category of work, and by NB and RMI.

Table 4: Analysis of Alleged Infringements by sector and category of work

Sector	All contracts	Only NB contracts	Only RMI contracts	Both NB and RMI contracts
Private Housing	37	15	20	2
Public Housing	32	8	24	0
Commercial				
Defence	1	1	0	0
Education	72	51	15	6
Entertainment (incl. Leisure)	16	11	4	1
Garages	1	1	0	0
Health	25	20	3	2
Office	31	21	10	0
Places of Worship	6	6	0	0
Police/Fire & Rescue	5	3	2	0
Prisons	2	0	2	0
Retail	5	3	2	0
Industrial				
Distribution	1	1	0	0
Other Industrial Buildings	8	6	1	1
Warehousing	2	2	0	0
All sectors	244	149	83	12

Source: OFT's Construction Database (2007)

II.1620. Some contracts cover more than one sector, for example where a tender involves a development that includes both retail outlets and private housing. A high proportion (67 per cent) of the Alleged Infringements fell within the

¹⁷⁴¹ Note the term 'Social Housing' is often used in the industry instead of 'Public Housing'.

¹⁷⁴² In those instances where the construction work falls into more than one sector the contract is attributed to the sector that represents the highest proportion of work.

commercial category of work, amongst which education, office and health work were well represented. The next most important categories of work were private sector housing and public sector housing which accounted respectively for 15 per cent and 13 per cent of all Alleged Infringements. Table 4 shows that some Alleged Infringements involved both NB and RMI. For example, of the 72 Alleged Infringements in the education sector, 51 contained only NB, 15 contained only RMI and 6 contained both NB and RMI elements of work.

Extent of supply side substitutability

- II.1621. The ability and ease with which construction companies can reposition their work is dependent on the extent to which the skills and resources required for different types of construction work are generic. To the extent that specialist skills and/or experience are required for certain types of construction work this would support a segmentation of the market by sector or category of work.
- II.1622. To assist in the OFT's assessment of the relevant market the Suppliers' Survey included questions aimed at determining the time required to switch between sectors of work and what factors influenced the time required.¹⁷⁴³ The survey results revealed some variation between respondents, with 43 per cent of respondents who answered the question saying they were capable of entering another sector of work within a year, while 57 per cent said it would take longer.¹⁷⁴⁴ In addition 15 respondents reported that they were not considering new sectors of work – these are excluded from the analysis, shown in Table 5 below. For some this reflected the fact that they had been trading in a particular sector for a considerable time. For example one respondent noted that to start up in a new sector *'would require them to "break into" new markets that are outside the trading areas we have operated in since our inception [...] [C]'*.¹⁷⁴⁵
- II.1623. Amongst the companies that considered that there are no significant barriers to entry and that they could easily enter a new sector were larger companies that were already active in a number of sectors. These companies said they could quite easily start work in a new sector by buying in specialist skills through sub contractors and suppliers. One respondent indicated that it is the norm in construction where typically 80 to 90 per cent of the cost is accounted for by 'bought in' services and products.¹⁷⁴⁶ Some of the responses pointed to the ease of switching to another sector within the public sector, which may reflect the fact that they were already conversant with public sector procurement methods. However, other construction companies considered that to enter a new sector successfully requires careful planning and the availability of suitable management and staff resources, and that in many cases it is impeded by the need to show a proven track record.

¹⁷⁴³ Note that the survey examined the ability aspect of supply side substitution, i.e. whether building contractors faced constraints to switching. This did not ask whether suppliers have the incentive to switch in response to a small price increase. However, some respondents in their responses indicated that they had no intention of switching as they operate in a particular segment of the market and that is where their expertise lies.

¹⁷⁴⁴ OFT's Construction Database (2007).

¹⁷⁴⁵ [...] [C]

¹⁷⁴⁶ Balfour Beatty's market definition response to question 8 of questionnaire, OFT Document Reference B2876.

**Table 5: Factors that influence time required to change sector of work
Responses to question 8 of the Suppliers' Survey**

Factor	Time required > 1 year	
Management and staff resources	41	73%
Ability to obtain new clients	28	50%
Additional finances	14	25%
Need to undertake market research	15	27%
Need to incur marketing costs	17	30%
Difficulty in entering defence sector	10	18%
Availability of work in that sector	6	11%
Difficulty in obtaining insurance	2	4%
Lead in time on specialist materials	5	9%

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1624. Table 5 summarises the survey results for those companies that considered it would take more than a year to change sector.¹⁷⁴⁷ To the extent that the time to change sectors is greater than one year, then the factor represents a barrier to switching and contributes to a partitioning of the market. Many of the factors identified as constraining the switching of sectors apply equally at the category of work level. It is notable that those companies that considered there were no significant barriers to entry were already active in all sectors. The factors constraining the ability to switch are considered in greater detail below.

1. Management and staff resources

II.1625. The most significant factor influencing the time required by building contractors to change sector of work is the availability of management and staff resources. The constraint on bidding for new work can be not only having insufficient resources to provide estimates and bid for projects but also having the resources needed to carry out the work. One respondent already active in a number of sectors said that the only constraint was being given the opportunity to tender at a time when there was capacity in the estimating department and that costs were minimal.¹⁷⁴⁸

II.1626. Some respondents identified skill shortages as a constraint to switching to a new sector. For example, one respondent noted that *'Social Housing is generally not regarded as being as technically demanding as other types of construction and our staff would have difficulties if forced by us to retrain in order to undertake other work types'*.¹⁷⁴⁹ It indicated that staff would leave, resulting in a need to incur considerable recruitment costs at a time when there was a severe skill shortage, making it almost impossible to replace large numbers of staff.

¹⁷⁴⁷ Table 5: Percentage figures show the proportion of respondents who believed switching sector would take more than a year and identified the factor as influencing the time required to change sector of work.

¹⁷⁴⁸ Admiral's market definition response to question 6 of questionnaire, OFT Document Reference 5749.

¹⁷⁴⁹ Richardson Projects' market definition response to question 7 of questionnaire, OFT Document Reference 6473.

2. Ability to obtain new clients

II.1627. A lack of a proven track record was also seen as a constraint to switching. One respondent already active in the public housing sector said that it would be difficult to switch to private sector housing as clients have preferred contractors with ongoing relationships that have been established over many years.¹⁷⁵⁰ An established track record in a closely related sector can make it easier to switch. An example of this was given by a company which was already active in private sector housing and considered that it would be easy and cost little or nothing for it to switch to public sector work.¹⁷⁵¹ Other constraints were identified such as a lack of a rating on Constructionline¹⁷⁵² acting as a barrier to entry.¹⁷⁵³

3. Additional finance/capital required

II.1628. The level of financing required can differ according to the sector or category of work. One respondent considered that financial risks are such that in particular markets clients will insist on a contractor providing significant increased levels of cover or larger than normal surety bonds.¹⁷⁵⁴ Opportunities in new sectors may require a move away from undertaking general construction work obtained by competitive tendering or negotiation to speculative developments with increased levels of capital required. Speculative developments are those where a company provides finance, buys land and develops it before finding the purchaser for the development.¹⁷⁵⁵

4. Need to undertake market research

II.1629. Survey responses also pointed to the need to undertake market research. One respondent noted that, *'to establish a credible presence in a new market sector, one has to know and to have formed a view as to our ability to work with them, the probable procurement routes, the nature and extent of competition, the potential risk/reward earnings ratios, the extent of available supply chain to support the initiative, and to have established that the company has the management experience capacity and competence to work in such sectors over the medium to long term'*.¹⁷⁵⁶ Another respondent indicated that a switch to retail work would require the allocation of suitable marketing resources and would be difficult as the competition was established and very keen.¹⁷⁵⁷

5. Need to incur marketing costs

II.1630. In addition to market research a building company must incur marketing costs, which are usually considered to be sunk costs in that they cannot be recouped

¹⁷⁵⁰ Hobson & Porter's market definition response to question 6 of questionnaire, OFT Document Reference A1642.

¹⁷⁵¹ York House's market definition response to question 6 of questionnaire, OFT Document Reference A1632.

¹⁷⁵² Constructionline is a directory of more than 12,500 pre-qualified UK construction contractors and consultants. Endorsed by the BIS.

¹⁷⁵³ Bramall's market definition response to question 6 of questionnaire, OFT Document Reference B2609.

¹⁷⁵⁴ Jack Lunn's market definition response to question 6 of questionnaire, OFT Document Reference A2479.

¹⁷⁵⁵ Ackroyd & Abbott's market definition response to question 1 of questionnaire, OFT Document Reference 6789.

¹⁷⁵⁶ Bluestone's market definition response to questions 6 and 8 of questionnaire, OFT Document Reference B2370.

¹⁷⁵⁷ [...] [C]

by the firm if entry to the sector is unsuccessful. Survey responses indicated that marketing costs can be substantial, amounting to £100,000 or more.

6. Lead in time on specialist materials

II.1631. To switch to a new sector of work a company must have access to the supply chain for materials needed for that type of construction. One respondent indicated that *'the company does not have established relationships with the supply chain in other categories. It would take considerable time to build such relationships. In addition, there are considerable pressures on the existing resources due to the high level of construction activity within the country and this would be likely to have detrimental effect on the company's ability to secure resources'*.¹⁷⁵⁸

7. Difficulties in entering certain sectors

(a) Housing

II.1632. For some construction companies switching between more closely related sectors such as private sector housing and public sector housing can be fairly easy. However, some companies noted that the ability to switch can be constrained by a lack of access to a key resource such as suitable land upon which to build.

(b) Healthcare

II.1633. One respondent indicated that despite a turnover in excess of £40 million they found it difficult to enter the Healthcare market as *'larger schemes seem to be let under PFI, a facility we do not offer, and the smaller schemes tend to be bundled up and let under Framework arrangements'*.¹⁷⁵⁹

(c) Defence

II.1634. A number of responses to the survey indicated that the defence sector was one market which companies found difficult to enter. Reasons given included lengthy pre-qualification procedures, opportunities that were strictly limited due to the location of defence sites, and the fact that most of the work was already covered by long term contracts. Defence work is largely undertaken through Regional Prime Contracts, whereby one large construction company is responsible for undertaking all of the contracting within a defined geographic region. If the Prime Contractor is unwilling or unable to allocate its work to another contractor other local firms will not secure defence works. It is notable that most of the respondents worked as main contractors which may explain their reluctance to work in the defence sector if it meant working for the Prime Contractor.

8. Costs associated with switching

II.1635. For work within different sectors to fall within the same relevant market, companies wishing to switch to a different sector must not incur significant extra costs. The responses to the OFT's questionnaire indicated that the costs of switching vary quite considerably, and in certain cases can be considerable,

¹⁷⁵⁸ Bullock's market definition response to question 6 of questionnaire, OFT Document Reference 6849.

¹⁷⁵⁹ [...] [C]

although relative to total turnover the costs are on average a small proportion. Table 6 shows the costs associated with change of sector of work.

II.1636. Some quite small companies saw minimal costs (i.e. costs related solely to tendering) of entering a new sector and the only constraint was having capacity in the estimating department.¹⁷⁶⁰ As indicated above certain larger firms saw few constraints to switching and considered the costs of switching to be moderate. One respondent indicated that *'they could start operations in another customer sector within the construction and housing categories (for example, defence) fairly quickly, within a year, and at modest cost (typically recruiting a few individuals with experience and/or knowledge of the customer and their specific requirements – say an investment of around £100,000.)'*¹⁷⁶¹

Table 6: Costs associated with change of sector of work
Responses to question 8 of the Suppliers' survey

Cost	No. of responses	%	Average 2005 turnover (millions)	Average cost of change (thousands)	Proportion of turnover
£0 – £50k	9	20%	£56.7	£32	0.06%
£51k – £100k	8	18%	£172.9	£92	0.05%
£101k – £200k	14	32%	£33.0	£149	0.45%
£201k – £500k	7	16%	£51.0	£374	0.73%
£500k – £999k	3	7%	£275.5	£733	0.27%
£1m – £3m	3	7%	£328.0	£1,667	0.51%

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1637. However certain large companies in their responses identified substantial upfront investment costs to expansion into a new sector of £1 million excluding any specific investment in plant, equipment and people.¹⁷⁶² Even some of those companies such as Thomas Vale that already operated in all categories of work and most sectors, identified investment costs of £0.5 million associated with a requirement to set up a new regional office.¹⁷⁶³ Another company that was then active in public sector housing refurbishment considered that it faced no barriers to access the public sector. Costs of entry were considered to be minimal, as it could be undertaken on a controlled gradual basis and new work could be secured using existing marketing and estimating resources with initial entry costs likely to be in the region of £10,000 to £50,000.¹⁷⁶⁴

II.1638. It is clear from the above that views on the ease of moving between different sectors of work were highly varied, with the majority of companies suggesting that it would take longer than a year, citing principally management and staff resource issues and the ability to obtain new clients, but a significant minority suggesting that less time would be needed. Although the evidence is mixed, particularly in relation to the costs associated with such moves, the OFT has decided to take a cautious approach in relation to this issue, and concluded that

¹⁷⁶⁰ Admiral's market definition response to questions 6 and 8 of questionnaire, OFT Document Reference 5749.

¹⁷⁶¹ [...] [C]

¹⁷⁶² Bluestone's market definition response to questions 6 and 8 of questionnaire, OFT Document Reference B2370.

¹⁷⁶³ Thomas Vale's market definition response to question 8 of questionnaire, OFT Document Reference 5711.

¹⁷⁶⁴ Bramall's market definition response to question 6 of questionnaire, OFT Document Reference B2609.

for the purposes of this case each sector constitutes a different relevant product market.

Switching between categories of work

- II.1639. In reaching the conclusion set out in the previous section, the OFT also considered the extent to which it would be appropriate to adopt a wider market definition than sector of work, based on the categories of work undertaken by firms. As regards public housing work and private housing work there is no distinction between category and sector. However, for the remaining categories of work the surveys supplied evidence of constraints to switching at the sector level, as described in the previous section, which would not lend support to the market being defined more widely.
- II.1640. When contractors were asked whether there were constraints to moving between categories of work, as shown in Table 7 below, many of the factors identified were the same as those mentioned in response to the questions regarding constraints to switching to different sectors. 29 per cent of respondents who answered the question said they were capable of entering another category of work within a year, while the majority (71 per cent) said it would take longer.¹⁷⁶⁵ Amongst those firms that considered that they could switch within a year to another category of work were those that were already active in most categories of work. Sometimes this response was given by quite small firms who said they were quite flexible and could subcontract work. However, it was not clear to what extent this reflected quite a small scale of entry rather than a sustainable entry strategy which could represent a competitive constraint on the market.
- II.1641. Table 7 shows that amongst those factors that constrain switching, availability of management and staff resources was the factor most cited as a constraint. Lack of opportunities given geographic location could also be a constraint. Significant costs of switching were also identified including costs relating to establishing that the market is available and its long term viability, research into the availability of specialist staff/equipment, producing marketing material and establishing sources for procuring tender enquiries, recruiting related personnel and redundancy or training costs for other staff, estimated by some companies at around £100,000 to £250,000 without taking into account loss of revenues from existing workstreams. One respondent noted that there was little construction activity in the industrial category within its geographic location.¹⁷⁶⁶

¹⁷⁶⁵ OFT's Construction Database (2007).

¹⁷⁶⁶ R Durnnell's market definition response to question 6 of questionnaire, OFT Document Reference 6729.

**Table 7: Factors that influence time required to change category of work
Analysis of responses to question 6 of the Suppliers' Survey**

Factor	Time required > 1 year	
	Management and staff resources	55
Ability to obtain new clients	30	50%
Additional finances	20	33%
Need to undertake market research	25	42%
Need to incur marketing costs	18	30%
Loss of revenues from existing work streams	4	7%
Time required to establish meaningful business	20	33%
Current workload considerations	0	0%
Materials, supply chain considerations	8	13%
Availability of work in that category	9	15%

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1642. In addition, views sometimes differed, for example a company that was already involved in private housing indicated that it was relatively easy to switch to public housing work. However, another respondent with a turnover of £38.5m¹⁷⁶⁷ already active in public housing indicated that it *'would not operate in the private housing or infrastructure markets as we do not have the relevant skills or track record. We do not have a land bank suitable for private dwelling development'*.¹⁷⁶⁸

II.1643. Switching to industrial construction work can also pose challenges. One respondent with a turnover of £28 million¹⁷⁶⁹ indicated that it had tried to get into industrial construction but with little success as it was not able to match the competitive price levels of established operators, it lacked a track record of successful previous delivery, and that these contracts tend to be of higher value, well outside its financial operating range.¹⁷⁷⁰ Another respondent active in private housing, commercial construction and industrial construction with a turnover of £41 million¹⁷⁷¹ indicated that any significant change in core categories of work would require changes in senior management, recruitment of new personnel and retraining of existing employees, and additional finance and capital, market research, assessment and product marketing expenditure estimated to cost in the region of £250,000 each year.¹⁷⁷²

II.1644. The OFT has therefore concluded that it would not be appropriate to adopt a wider market definition than sector of work.

II.1645. In the following sections the OFT considers the possibility of further subdividing the markets according to other factors, namely type of work, size of contract and method of procurement.

¹⁷⁶⁷ Directors' Report and Financial Statements, OFT Document Reference 11604.

¹⁷⁶⁸ [...] [C]

¹⁷⁶⁹ [...] [C]

¹⁷⁷⁰ [...] [C]

¹⁷⁷¹ [...] [C]

¹⁷⁷² [...] [C]

Type of work

NB and RMI

- II.1646. The Infringements also relate to two principal types of work, namely NB and RMI work. The BERR statistics define RMI as work which is either repairing something which is broken, or maintaining it to an existing standard.¹⁷⁷³ The BERR statistics define Housing RMI as including repairs, maintenance, improvements, house/flat conversions, extensions, alterations, redecorations etc on existing housing. However, the BERR statistics define Non-housing RMI as including only repairs, maintenance and redecoration to existing buildings, because in the Non-housing area, extensions, major alterations/improvements, site preparation and demolition are classified by BERR as NB.
- II.1647. In response to the Statement, some Parties argued that the fact that the distinction between NB and RMI is recognised by the Office of National Statistics ('ONS') is *prima facie* evidence that the OFT should segment the market according to type of work in this case.¹⁷⁷⁴ However, as discussed above in paragraphs II.1600 to II.1602, the OFT has an approach to market definition in cartel cases that follows a logical set of steps and that has been supported by the CAT and the Court of Appeal. If the results of this approach are supported to a greater or lesser extent by ONS statistics then this may provide additional foundation for the OFT's conclusions but the OFT does not consider that such statistics would normally provide the sole or primary basis for market definition, particularly where the OFT has other evidence and analysis available to support its approach.
- II.1648. As discussed in the Statement, the OFT is of the view that in relation to substitutability between NB and RMI, on the demand side it is clear that clients request building contractors to supply either NB or RMI and there is little possibility of substitution. However, on the supply side, contractors may be able to switch amongst these different types of work. The extent to which contractors would switch in response to a small increase in price will determine whether different markets are identified for each sector split into NB and RMI. In summary, the OFT has concluded that although it is unlikely that NB and RMI are demand side substitutes, these types of work are supply side substitutes and the markets for each sector should not therefore be split between NB and RMI, for the reasons outlined below.

**Table 8: Analysis of split of work between NB and RMI
Analysis of responses to question 4 of Suppliers' Survey**

NB only	RMI only	Both
4% (4)	7% (8)	89% (95)

Source: Suppliers' Survey, OFT's Construction Database (2007)

- II.1649. Table 8 shows that amongst the Parties, while a minority specialised in either NB or RMI, the vast majority (89 per cent) of surveyed companies carried out both types of work. This would suggest that it is relatively easy for a firm to switch between different types of work. To examine this further the responses

¹⁷⁷³ Notes and Definitions – Construction Statistics Annual 2007 – BERR – August 2007.

¹⁷⁷⁴ For example, written representations of John Sisk and Sicon, 27 June 2008, paragraph 145; written representations of William Woodsend, 27 June 2008, paragraph 43; and written representations of Baggaley & Jenkins, 27 June 2008, paragraph 59.

are broken down to assess the extent to which firms specialised by type of work (NB or RMI) at the category level. Table 9 shows the extent to which the Parties specialised between NB and RMI according to the category where work was undertaken. The headings show the percentage of suppliers' work that falls within NB – this figure can be deducted from 100 per cent to obtain the percentage that falls within RMI. For example, it can be seen that only 15 per cent of suppliers providing services to the private sector housing category undertook zero per cent of their work in NB, and therefore focused 100 per cent of their work on RMI.

Table 9: Extent to which suppliers specialise between NB/RMI
Analysis of responses to question 4 of Suppliers' Survey

Category of work	NB						
	0%	1-24%	25-39%	40-60%	61-75%	76-99%	100%
Private Housing	15%	8%	2%	10%	9%	26%	31%
Public Housing	28%	11%	5%	22%	9%	9%	16%
Infrastructure	15%	2%	2%	8%	10%	38%	25%
Commercial	10%	6%	6%	26%	17%	22%	14%
Industrial	8%	3%	4%	11%	10%	37%	28%
Miscellaneous	20%	16%	16%	0%	0%	36%	12%

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1650. Table 9¹⁷⁷⁵ shows that some firms did choose to operate predominantly in NB or RMI according to the category of work. For example amongst respondents there was quite a high level of specialisation in private housing NB with 31 per cent of respondents being engaged in NB only. In the industrial category of work 28 per cent specialised in NB. Amongst those respondents active within public housing, almost 30 per cent specialised in RMI. However, in every category of work the majority of firms undertook at least some work in both NB and RMI, and overall as outlined in Table 8 above, the vast majority of firms surveyed carried out both types of work.

II.1651. In the Statement, the OFT also considered why sectoral specialisation was apparent from some of the responses to the Suppliers' Survey. One respondent, with a turnover in excess of £30 million and specialising in RMI, indicated that the company's then present structure was specifically dedicated to the refurbishment and repair market.¹⁷⁷⁶ It stated, *'For example our Site Managers would not be able to use equipment to set out new buildings nor would our bricklayers be able to work economically on the line with large quantities of brickwork'*. It noted that *'Our market is very specialised, we are working in peoples' houses and not on a building site. We employ specialist labour and subcontractors'*.¹⁷⁷⁷ Another smaller contractor specialising in RMI noted that *'Breaking into new sectors is very difficult as we are established locally in refurbishment of these areas. Architects and surveyors tend to only consider us for schemes of this nature. As noted previously to enter into new build markets*

¹⁷⁷⁵ Source: Suppliers' Survey, OFT's Construction Database.

¹⁷⁷⁶ [...] [C]

¹⁷⁷⁷ [...] [C]

on a large scale would lead to us replacing trained staff with subcontractors to be competitive'.¹⁷⁷⁸

- II.1652. Another respondent remarked that a move into RMI might take more than a year as *'this is a highly specific market, based on large volumes of low value orders for works undertaken on a 24/7 basis, and does not align itself well with resources of a construction contractor*'.¹⁷⁷⁹ This company undertook improvement work in private housing and commercial construction, suggesting that for this company, the latter work was a closer substitute to construction activity than repair and maintenance work. Another company mentioned the specialist nature of property services work which it delivered through a separate business unit. It noted that property services work grew rapidly in the 1990s as a result of local authorities' decisions to outsource their maintenance departments.¹⁷⁸⁰
- II.1653. However, despite the particular reasons that some firms may have had for specialising in either NB or RMI, it is clear from the overall results as set out in Tables 8 and 9 that for most firms there is the potential for supply side substitutability with regard to type of work. The OFT does not therefore accept the contentions from some Parties that there are significant barriers to switching due to NB and RMI work requiring access to significantly different types of assets, skills and experience.¹⁷⁸¹ The OFT has instead concluded that NB and RMI are supply side substitutes, for the reasons explained below.
- II.1654. First, as outlined above and illustrated in Table 8, by far the majority of firms surveyed operated in both NB and RMI. Only 4 per cent of firms surveyed exclusively carried out NB work, whilst only 7 per cent of the firms surveyed carried out exclusively RMI work.¹⁷⁸² On this point, the OFT notes that Haymills has argued in its representations on the Statement that the fact that most firms undertook both NB and RMI work does not make them supply side substitutes.¹⁷⁸³ William Woodsend and Baggaley & Jenkins also contended that the fact that many construction firms chose to operate in both segments does not mean that a segmentation between NB and RMI should not occur.¹⁷⁸⁴ The OFT accepts that although a company may perform two different operations, this does not prove definitively that these operations are supply side substitutes and hence part of the same relevant market. However the OFT does not agree with Haymills' assertion that *'this evidence tells us nothing about supply-side substitution*'.¹⁷⁸⁵ When the overall majority of firms perform two activities, the logical conclusion is that there are close complementarities between the two activities. That is, the performing of one activity makes it easier and less expensive to perform the other activity. As set out above, the OFT has found that over 89 per cent of companies surveyed were active in both RMI and NB.

¹⁷⁷⁸ Peter Baines's market definition response to question 9 of questionnaire, OFT Document Reference 6554.

¹⁷⁷⁹ Strata's market definition response to question 6 of questionnaire, OFT Document Reference 5964.

¹⁷⁸⁰ Haymills's market definition response to question 5 of questionnaire, OFT Document Reference 6753 and information provided with the response in Annex 2, OFT Document Reference 6759.

¹⁷⁸¹ Written representations of Haymills, 27 June 2008, page 2 of LECG report.

¹⁷⁸² See Table 8 in paragraph II.1649 above.

¹⁷⁸³ Written representations of Haymills, 27 June 2008, page 1 of LECG report.

¹⁷⁸⁴ Written representations of William Woodsend, 27 June 2008, paragraph 43; and written representations of Baggaley & Jenkins, 27 June 2008, paragraph 59.

¹⁷⁸⁵ Written Representations of Haymills, 27 June 2008, page 2 of LECG report.

This evidence is entirely consistent with NB and RMI activities being supply side substitutes.¹⁷⁸⁶

II.1655. The second reason for the OFT's conclusion that NB and RMI are supply side substitutes is that there is no clear distinction evident either from the BERR categories or from within the body of Infringements in this case that would allow clear categorisation between types of work. The Infringement types range from obvious RMI projects to obvious NB projects, but there are many projects in between that are relatively arbitrary to classify as one or the other. For example, it is not clear at what point an extension moves away from being an improvement and becomes a new build. This is especially the case when one considers renovations or conversions of public buildings into flats. This is pertinent because the same skills needed for a large scale conversion of a public building (RMI) are needed for building a new one (NB). This indicates that a clear segmentation into different markets as some Parties have suggested, is unwarranted. This blurring of the different types of work can be seen from the evidence set out below.

- (a) First, the BERR categories¹⁷⁸⁷ do not provide a clear distinction between NB and RMI projects. For example, BERR classifies all 'Improvements, Extensions and Alterations' projects within the public and private housing sectors as RMI. However it classifies the same 'Improvements, Extensions and Alterations' projects as NB if they are in the non-housing sector. Furthermore, even within housing projects BERR classifies houses converted to other uses as NB, but housing converted to flats, as RMI. In essence, it is far from clear that the same skills are not required for both such projects.
- (b) Secondly, there are a substantial number of Infringements within this Decision which could be classified either as RMI or NB depending upon relatively arbitrary interpretations. For example, in the Suppliers' Survey, four firms indicated that they had not worked in NB Housing or NB Non-Housing; however, using the BERR definition, all of these Parties had Infringements which could be classified within precisely these segments.¹⁷⁸⁸ This indicates that even the Parties find it difficult to distinguish whether a project is NB or RMI.
- (c) Thirdly, it is not possible to make a clear distinction between the two types of work based on the segment in which the Infringements took place. There were substantial numbers of Infringements in both the RMI and NB segments and many of these could be ambiguously categorised. For example, Infringement 220, 'External Structural Refurbishment Works', could be interpreted as either RMI or NB depending on the extent of the structural work.

¹⁷⁸⁶ A possible exception to this might be if there was an asymmetric constraint between NB and RMI activities. That is, whilst companies performing NB activities may be able easily to enter RMI activities, the opposite may not be true. If this were the case one would expect to see a high number of companies that only carry out RMI work, but a very low number of companies that only carry out NB work. In fact, as shown in Table 8, there is very little difference. Only seven per cent of companies completely specialise in RMI whilst only four per cent completely specialise in NB. This does not suggest that the constraint is asymmetric or that supply side substitution would not flow from RMI to NB.

¹⁷⁸⁷ Construction Statistics Annual 2007 – BERR – August 2007.

¹⁷⁸⁸ B&A (Infringements 95 and 229), Beaufort (Infringement 152), Dukeries (Infringement 207) and Francis (Infringement 234).

- (d) Fourthly, in several Infringements, the fact that the tender preparation work for both RMI and NB Infringements was carried out by the exact same individuals within particular Parties is also consistent with RMI and NB being supply side substitutes. Of the ten companies which had Infringements in both RMI and NB, to the OFT's knowledge at least six involved a common individual working on both RMI and NB tenders.¹⁷⁸⁹ Thus it was the same individual making the proposal for both RMI and NB tenders. This suggests that the relevant individuals in all of these companies had expertise in tendering for both RMI and NB work. Furthermore, in most cases the Parties subcontracted out much of the more specialised work to electrical, plumbing, roofing etc subcontractors, making it even less likely that specialist skills would be needed for NB or for RMI projects.

II.1656. In response to the Statement, the OFT also received a number of representations from Parties claiming that their own business operations illustrated the barriers to supply side substitution. For example, Dukeries contended that because the responsive property maintenance division of its company does not carry out the type of RMI work typically performed by building contractors, the turnover of that division should be deducted from the relevant market.¹⁷⁹⁰ On this point, it is important to note that the OFT defines the relevant product market according to '*what is the relevant product market affected by the infringement*'¹⁷⁹¹, and in this instance it does not follow that the fact that the work of this Party's property maintenance division does not involve a competitive tender in some instances, would mean that the turnover of its responsive property maintenance division should be deducted from penalty calculations.

II.1657. Another example is Haymills, which stated that it operates NB and RMI as two separate operations under separate managements, with RMI now undertaken by a separate subsidiary, and that these divisions are subject to different tendering processes. Haymills further stated that the two operations use separate staff with different skill sets, require estimators with different skills and experience, use two different types of equipment and require different management skills. Lastly, it stated that NB contractors usually need to provide a completion bond, and a firm with little experience in NB would find this more difficult to obtain. It further stated that some of the barriers to switching from NB to RMI can be overcome by hiring equipment and using sub-contractors, but that this would not overcome all barriers to switching. A H Willis also claimed that despite the fact that it participates in both types of work, this is carried out through separate segments of its business and there is little scope for substitution between these types of work.¹⁷⁹²

II.1658. Although it is clear that some companies do choose to structure their operations according to a split between NB and RMI, the OFT considers that the majority of companies are at least able to carry out both types of work, and the facts set out in paragraphs II.1649 to II.1655 above lead to the conclusion that there is supply side substitutability between NB and RMI.

¹⁷⁸⁹ These companies are Mansell, Bodill, Derwent Valley, Henry Boot, P Waller and Thomas Vale.

¹⁷⁹⁰ Written representations of Dukeries, 27 June 2008, paragraph 64.

¹⁷⁹¹ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] ECWA Civ 1318, paragraph 170.

¹⁷⁹² Written representations of A H Willis, 27 June 2008, paragraphs 20 and 27.

- II.1659. In their representations on the Statement, two Parties contended that the OFT should differentiate between NB and RMI due to some examples they gave of contractors choosing or refusing to bid for a particular project because the type of work was more or less suited to the work profile of that company.¹⁷⁹³ However, the OFT considers that the fact that in a few instances contractors expressed a preference based on type of work does not indicate more general difficulties in supply side substitution as these parties contended. A preference for type of work, taking into consideration resource, skills sets and experience of a firm, does not mean that the company, with sufficient financial incentive, would not be able to supply the service at short notice or without incurring substantial sunken costs. Indeed, the fact that the contractor in each example given by these Parties gave consideration to undertaking different types of work means that it may have remained a consideration for the company to undertake the work.
- II.1660. In response to the Statement, some Parties made representations that although they agreed with the OFT that there is little possibility of demand side substitution according to type of work, they disagreed that NB and RMI are supply side substitutes, citing significant barriers to supply side substitution.¹⁷⁹⁴ For example, Durkan submitted that the OFT's provisional conclusion in the Statement that NB and RMI form part of the same market, disregarded the lack of demand side substitution between NB and RMI and attached too much emphasis to alleged supply side substitution between the two sectors.¹⁷⁹⁵ John Sisk and Sicon also stated that the recognition by the OFT that there is little possibility for demand side substitution coupled with the fact that there are limits on supply side substitutability indicate that segmentation of the market should occur.¹⁷⁹⁶ Durkan submitted that, according to the OFT's guidelines, *'supply-side substitution should not be taken into account "unless it is reasonably likely to take place and already has an impact by constraining the supplier of the product or group of products in question"'*.¹⁷⁹⁷
- II.1661. However the OFT does not consider that its guidelines preclude the OFT from considering supply side substitutability in this case. The paragraph cited by Durkan goes on to state *'What matters ultimately is that all competitive constraints from the supply side are properly taken into account in the analysis of market power. Whether a potential competitive constraint is labelled supply side substitution (and so part of market definition) or potential entry (and so not within the market) should not matter for the overall competitive assessment. If there is any serious doubt about whether or not to account for possible supply side substitution when defining the market and calculating market shares, the market will be defined only on the basis of demand side substitutability, and the supply side constraint in question will be considered when analysing potential entry.'* It is clear from this that the OFT has a duty to consider supply side substitutability in relation to the definition of the market in this case, in order to ensure that all competitive constraints from the supply side are properly taken into account.

¹⁷⁹³ Written representations of William Woodsend, 27 June 2008, paragraph 43; and written representations of Baggaley & Jenkins, 27 June 2008, paragraph 59.

¹⁷⁹⁴ For example, see representations of A H Willis, 27 June 2008, paragraph 30; written representations of William Woodsend, 27 June 2008, paragraph 43; and written representations of Haymills, 27 June 2008, paragraph 4.

¹⁷⁹⁵ Written representations of Durkan, 27 June 2008, paragraph 35.

¹⁷⁹⁶ Written representations of John Sisk and Sicon, 27 June 2008, paragraph 147.

¹⁷⁹⁷ Written representations of Durkan, 27 June 2008, paragraph 37, referring to OFT Market Definition Guidelines (OFT 403), December 2004, paragraph 3.18.

II.1662. Durkan also submitted in its representations that in the Statement the OFT *'further notes that its Survey showed that a move into the repair and maintenance sector may take more than a year, because 'this is a highly specific market... and does not align itself well with resources of a construction contractor ''*.¹⁷⁹⁸ However this interpretation of the Statement is incorrect. It is clear that the OFT did not necessarily adopt the above or even consider it to be representative of Parties' responses to the Survey. The above quote was merely a reproduction of one Party's opinion on the question relating to supply side substitutability in the survey, and is not indicative of the OFT's conclusion on this point.

II.1663. In conclusion, for all of the reasons outlined above, the OFT has concluded that the vast majority of firms are capable of carrying out both NB and RMI activities within a reasonable period of time, and that there is no justification for further segmentation of the market by type of work.

Segmentation of education sector

II.1664. In its response to the Statement, Milward stated that although it is broadly comfortable with regard to the market definition adopted by the OFT in the Statement, it believes that *'the "Education" sector within the "Commercial" category of work should be split further so as to distinguish between projects for schools and those for universities and other providers of tertiary education'*.¹⁷⁹⁹ Milward argued that it would take a construction company some time to be able to switch from providing works for schools to works for universities (or vice versa). Milward claimed that this is due to the different procurement process often involved and the size of the contract. Milward argued that the OFT should therefore segment out 'education' contracts which relate to universities.¹⁸⁰⁰

II.1665. However, for the reasons outlined in paragraphs II.1687 to II.1688 below, the OFT has concluded that traditional and non-traditional methods of procurement belong in the same market, as evidence on both the demand and supply sides shows that consumers and suppliers are able to switch between procurement methods without incurring significant switching costs. Further, as outlined in paragraphs II.1666 to II.1672 below, the OFT has concluded that there is no clear segmentation of the market according to size of contract and that there is therefore no justification for separating the market in relation to this factor. For these reasons, the OFT concludes that there is sufficient supply side substitutability between schools and universities and therefore does not exclude universities from the education sector.

Size of contract

II.1666. Table 10 shows that there are a number of constraints that prevent companies from bidding for work, one of the most significant of which is contract size. There were 118 respondents to this question in the survey. Amongst respondents to the market definition questionnaire some argued that the market should be segmented by size of contract. As shown above in Table 1 the Parties in the Statement operated across a wide variation in the size of Alleged

¹⁷⁹⁸ Written representations of Durkan, 27 June 2008, paragraph 40.

¹⁷⁹⁹ Written representations of Milward, 26 June 2008.

¹⁸⁰⁰ Written representations of Milward, 26 June 2008, paragraph 5.

Infringements, ranging from £2,215 - £22.3 million with an average of £1.0 million.

II.1667. The range of contract values undertaken by construction companies varies considerably and even quite small firms undertake some contracts with high values and large firms undertake some low value contracts. Charts 1 and 2 in Annex D (4) show the extent of overlap between small and large values in terms of the size of contracts undertaken by construction companies. From this it is clear that it would be difficult to delineate the relevant markets in terms of contract size. Indeed it seems that contract size reflects primarily the type of construction work being undertaken and that it is this that differentiates the market rather than simply the value of the contract.

II.1668. Responses to the questionnaires indicated that some companies did split their internal organisation into small works and large works. However, this varied quite widely and there was no clear distinction as to where the line was drawn between small and large works and it was more a reflection of the individual way that a firm chooses to operate rather than a market-wide distinction upon which inferences about market segmentation might be drawn.

**Table 10: Constraints that prevent companies from bidding for work
Analysis of responses to question 13 of the Suppliers' Survey**

Factor		Responses	
Location	Geographical limitations	37	31%
Business Fit	Different sector of operation	28	24%
	Contract too large	55	47%
	Contract too small	12	10%
	Financial limitations	31	26%
Resources	Capacity of estimating department	31	26%
	Capacity of delivery teams	44	37%
	Management expertise	13	11%
	Performance bond capacity	14	12%
Tender Specific – General	Technical complexities	32	27%
	Timing of contract	9	8%
	Type of project	4	3%
	Issues with client	25	21%
	Perceived risk and complexity	39	33%
Tender Specific – Financial	Terms of payment	11	9%
	Onerous conditions and warranties	17	14%
	Viable competitive tender	8	7%
Tendering Process	Procurement route	16	14%
	Tender process causes problems	8	7%
	Previous experience of the work involved	2	2%
	Access to approved tender lists	6	5%
	Cost of tendering	9	8%
	No significant constraints	5	4%

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1669. Ranges of contract values differed amongst the larger construction companies. There were some large companies where the minimum contract value was quite

low, for example, Haymills which had a turnover of £106.7 million¹⁸⁰¹ in 2006 and a minimum contract value of [.....] [C].¹⁸⁰² Other large companies had much higher minimum contract values, for example, Willmott Dixon which had a turnover of £279.6 million¹⁸⁰³ in 2006 and a minimum contract value of [.....] [C].¹⁸⁰⁴ However, even some medium sized companies had quite high minimum contract values, for example R Durtnell with a turnover of £43.1 million¹⁸⁰⁵ in 2006 and a minimum contract value of [...] [C].¹⁸⁰⁶

II.1670. The maximum contract values for some companies were very high, for example Mowlem had contracts of up to [...] [C]¹⁸⁰⁷ and Balfour Beatty had several contracts in excess of [...] [C]¹⁸⁰⁸ (both of which were Public Private Partnership ('PPP') contracts). One respondent noted that *'common sense dictates that companies such as Balfour Beatty and Mowlem would be less likely to appear on a tender list for a contract of relatively low value; and smaller companies such as Wildgoose would be unlikely to appear on a tender list for a large contract value. These are, however, merely assumptions which are sometimes incorrect. For many reasons a company may choose to operate outside its usual sector e.g. to maintain an existing client relationship'*.¹⁸⁰⁹

II.1671. As indicated above, in infrastructure work the market is dominated by companies that operate nationally and involves contracts of a large value. Similarly, for industrial construction involving high value contracts to build oil or gas works it is the nature of the work rather than the value of the contract that segments the market. The above suggests that there may not be a clear segmentation of the construction market by contract size and that instead contract size is often a reflection of the category of work being undertaken.

II.1672. From the foregoing, the OFT has concluded that there is no clear segmentation of the market according to size of contract and that there is therefore no justification for separating the market in relation to this factor.

Method of procurement

II.1673. The OFT has considered the extent to which non-traditional methods of procurement (which include negotiated, framework, partnered and two stage bids) might be in separate product markets from traditional methods of procurement (single stage open tenders).

II.1674. Negotiated arrangements are sometimes part of a framework arrangement where a contractor is one of a number of contractors with whom a client has decided to work on a regular basis. Partnered arrangements are an approach used by contractors and the client to work together to maximise the

¹⁸⁰¹ Directors' Report and Financial Statements, OFT Document Reference 12043.

¹⁸⁰² Haymills's market definition response to question 9 of questionnaire, OFT Document Reference 6764.

¹⁸⁰³ Directors' Report and Financial Statements, OFT Document Reference 12602.

¹⁸⁰⁴ Willmott Dixon's market definition response to question 9 of questionnaire, OFT Document Reference 6863.

¹⁸⁰⁵ FAME Report, OFT Document Reference 12404.

¹⁸⁰⁶ R Durtnell's market definition response to question 9 of questionnaire, OFT Document Reference 6729.

¹⁸⁰⁷ Mowlem's market definition response to question 9 of questionnaire, OFT Document Reference B2796.

¹⁸⁰⁸ Balfour Beatty's market definition response to question 9 of questionnaire, OFT Document Reference B2876.

¹⁸⁰⁹ Henry Boot's market definition response to question 15 of questionnaire, OFT Document Reference B3247b.

effectiveness of each of the participants' resources. The approach is based on mutual objectives, an agreed method of problem resolution, and an agreement to achieve continuous improvement by working together. Two-stage bids occur where a number of contractors are provided with a limited amount of information on a project by a client and are asked to provide the client with an outline of the contract programme and an estimate of preliminary costs, overheads and profit margins. The client then selects his contractor based on the information provided and then finalises the details and price of the project with this contractor.

II.1675. Table 11 sets out the time required and costs of bidding for both traditional and non-traditional tendered contracts. Whilst the time taken and costs are greater for non-traditional tendered contracts than for traditional tendered contracts, such additional costs will be recoverable through the price set for the project. Hence on cost grounds there are limited reasons to consider that building contractors would be prevented from entering into such arrangements. In addition the Survey responses showed that many building contractors engage with the market place through a combination of competitive tendering, framework and negotiation. This suggests that on the supply side there is a high degree of substitution and that these arrangements do not segment the market.

Table 11: Cost of tendering
Analysis of responses to question 14 of the Suppliers' Survey¹⁸¹⁰

	Time required (weeks)		Cost incurred	
		no. of responses		no. of responses
Traditional	3.7	92	£6,793	99
Two Stage	8.5	2	£10,619	4
Design & Build	7.6	7	£26,167	9
Framework	20.0	1	£32,500	2
Partnered	27.0	2	£73,500	2
PFI	52.7	3	£1,380,000	5

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1676. In response to the Survey, some Parties suggested that the market might be segmented according to the type of contract entered into. For example, one respondent to the Survey suggested that a distinction should be drawn between traditional building contracts and design and build contracts. The main difference between these types of contract is the risk that the contractor takes in relation to the responsibilities for the design.¹⁸¹¹ In response to the Statement, some Parties have also argued that design and build contracts should form a separate market from single stage tendering based on the different types of contracts involved.¹⁸¹² For example, Galliford Try stated that two stage Design and Build tenders are not substitutable for traditional methods of procurement. This point is addressed below.

¹⁸¹⁰ Note that only a few respondents provided detailed cost breakdown by method of procurement so the figures shown in this table are indicative rather than statistically representative of those surveyed.

¹⁸¹¹ Kier's section 3 of market definition questionnaire, OFT Document Reference 6902.

¹⁸¹² For example, written representations of Galliford Try, 27 June 2008, paragraph 3.11.

II.1677. Under traditional contracts the contractor is responsible for the project as specified in the contract in accordance with the information from the client and works to an agreed timetable. The client will provide design and drawings and normally the bills of quantities which the contractor will use to prepare his quote. Under traditional contracts the architect is responsible for designing the building and certifying the work done. In response to the Survey, building contractors pointed to a growing market for design and build projects where it is the contractor, not the architect, who is responsible for ensuring that the design of the building conforms to the criteria and specification set out by the client. One building contractor explained, *'This involves the client providing prospective construction companies with an "Employer's Requirements" document giving details of the performance and use requirements of the building. This leaves the contractor to select materials and methods of construction to create a building meeting the requirements. The details are then returned to the client with a build programme and brief cost analysis'*.¹⁸¹³

II.1678. Table 11 indicates that the cost differential between traditional and design and build projects is not that great and is presumably reflected in the final price that clients have to pay for this type of building work. Increasingly many of the companies surveyed undertake building works using both traditional and design and build contracts and the OFT does not consider that the distinctions between them are sufficient to justify a further segmentation of the market.

The different characteristics of traditional and non-traditional methods of procurement and the scope for cover pricing

II.1679. In their responses to the Statement, some Parties argued that non-traditional methods of procurement and traditional methods of procurement are not in the same relevant market due to their different characteristics.¹⁸¹⁴ Some Parties claimed that non-traditional methods of procurement could not be affected by cover pricing as the commercial reality is that there is no scope for giving or receiving cover prices in respect of non-traditional methods of procurement because these methods are not tendered works.¹⁸¹⁵ For example, Simons Group stated that cover pricing relates exclusively to competitive tendering.¹⁸¹⁶ Several companies claimed¹⁸¹⁷ *'...the practice of cover pricing, by definition, only arose in relation to work that was put out to tender by clients. The practice of cover pricing has no conceivable relevance to non-tendered work, such as work in which a client negotiated directly with a selected construction company and for which no tenders were invited'*.¹⁸¹⁸ They further stated that *'The OFT should have found different markets within each of the product markets for tendered and non-tendered work and that only the former is a market affected by the infringements in question.'*¹⁸¹⁹

¹⁸¹³ Baggaley & Jenkins' market definition response to question 1 of questionnaire, OFT Document Reference 6735.

¹⁸¹⁴ For example, written representations of Dukeries, 27 June 2008, paragraph 63; and written representations of Durkan, 27 June 2008, paragraph 23.

¹⁸¹⁵ For example written representations of Dukeries, 27 June 2008, paragraph 63; and written representations of Durkan, 27 June 2008, paragraph 23.

¹⁸¹⁶ Written representations of Simons Group, 26 June 2008, paragraph 6.3.

¹⁸¹⁷ For example, written representations of Interclass, 27 June 2008, paragraph 18. Also refer to written representations of Clegg and F Parkinson.

¹⁸¹⁸ Written representations of Interclass, 27 June 2008, paragraph 18.

¹⁸¹⁹ Written representations of Interclass, 27 June 2008, paragraph 19.

II.1680. In response to this, although the Parties have asserted that it is not possible to enter into a collusive agreement when using non-traditional methods of procurement, they have not provided sufficient evidence to the OFT in order to substantiate this claim. Indeed, six of the Infringements occurred by way of non-traditional methods of procurement.¹⁸²⁰ Four of these Infringements were design and build contracts and two of them were two stage bids. This provides conclusive proof that it is possible to enter into collusive agreements for non-traditional methods of procurement.

II.1681. Parties also contended that a non traditional procurement process is based largely on reputation and contains no price element, and therefore cannot be subject to cover pricing.¹⁸²¹ Parties stated that negotiated arrangements are not tendered works and there are very different conditions of competition between a tendered and non-tendered work. John Sisk and GMI argued that the practice of cover pricing only arose in relation to tendered work¹⁸²² and Durkan stated that in a negotiated arrangement there are no competing parties.¹⁸²³ Stainforth also stated that the turnover for relevant markets should exclude negotiated contracts which are not tendered for¹⁸²⁴, whilst Willmott Dixon claimed that the commercial reality is that it is not possible to engage in cover pricing in relation to projects that are not tendered.¹⁸²⁵ Ackroyd & Abbott and Harlow & Milner also represented that cover pricing cannot affect *'negotiated contracts and therefore these cannot fall within the market affected by the infringement'*.¹⁸²⁶

II.1682. The OFT does not accept that non-traditional methods of procurement contain no consideration by the client or supplier of the cost of the contract, either by way of example of past contracts completed by the client or an estimation of future costs. Although the selection process for a negotiated agreement or a framework agreement involves various elements of quality and reputation, there is usually some form of price competition at some stage of the process.¹⁸²⁷ In any event, if the reputational aspect does indeed form a large part of entering into a framework or negotiated agreement, it follows that if a company has previously, or at the time of entering the negotiated or framework agreement, engaged in cover pricing, that reputation will be largely a result of work completed, including work that was subject to cover pricing. This link illustrates that cover pricing does affect negotiated and framework agreements.

II.1683. Wright (Hull) also stated that its in-house works were not procured, therefore there was no element of competition for the construction element.¹⁸²⁸ Therefore, it claimed that the OFT should exclude development work carried out in-house by the company. However, for the reasons outlined above in the 'Type of work' section¹⁸²⁹, the OFT does not consider that in-house construction

¹⁸²⁰ Infringements 100, 104, 135, 168, 179 and 195.

¹⁸²¹ [...] [C]

¹⁸²² Written representations of GMI, 26 June 2008, paragraph 89; and written representations of John Sisk and Sicon, 27 June 2008, paragraph 136.

¹⁸²³ Written representations of Durkan, 27 June 2008, paragraph 28.

¹⁸²⁴ Written representations of Stainforth, 27 June 2008, paragraph 4.38(a).

¹⁸²⁵ Written representations of Willmott Dixon, 27 June 2008, paragraph 45.

¹⁸²⁶ Written representations of Ackroyd & Abbott, 2 July 2008, paragraph 90; written representations of Harlow & Milner, 27 June 2008, paragraph 5.2.

¹⁸²⁷ For example, oral representations of Richardson Projects, 30 July 2008, page 11.

¹⁸²⁸ Written representations of Wright (Hull), 27 June 2008, paragraph 31.

¹⁸²⁹ See paragraphs II.1656 to II.1663 above.

turnover should be excluded from relevant turnover in the context of penalty calculations unless its inclusion would result in double counting.¹⁸³⁰

II.1684. Finally, even if it were not possible to directly enter into cover price agreements using non-traditional methods of procurement, the relevant question when determining market segmentation is whether entering into cover price agreements using traditional methods of procurement could have resulted in higher prices for non-traditional procurement methods. This question turns on whether traditional and non-traditional methods of procurement are in the same relevant market and is considered below.

Demand and supply side substitutability between different methods of procurement

II.1685. A number of Parties argued that non-traditional methods of procurement should be in separate product markets from single-stage open tenders, citing a lack of substitutability which they said reflected the different customers' requirements and appetite for risk in each case.¹⁸³¹

II.1686. For the purposes of market definition, the relevant question is whether there exists sufficient demand and supply side switching from traditional methods of procurement, such that a hypothetical monopolist controlling all traditionally procured contracts, could not profitably raise the price of these contracts by 10 per cent. To address this, the OFT has considered evidence as set out above and in the Statement, on both the supply and demand side.

II.1687. On the demand side, the evidence outlined above shows that non-traditional methods of procurement are likely to constrain the price of traditional methods for the reasons set out below.

- (a) First, evidence presented to the OFT indicates that customers weigh up their choice of procurement methods on the basis of the best value for money, taking account of the price, time, reliability and risk of the process.¹⁸³² Evidence presented to the OFT indicates that all procurement methods have some element of price negotiation in them.¹⁸³³ It may be that non-traditional procurement methods such as framework and negotiated agreements are more costly than traditional procurement methods to use initially, however non-traditional methods of procurement may cost less in the longer term.¹⁸³⁴ The PCS Paper published by the OGC in 2007 indicates that the principle behind adopting a procurement method should be on the basis of *'value for money over the life of the facility and not the initial capital cost*

¹⁸³⁰ See paragraph 4 of the Schedule to SI2000/309.

¹⁸³¹ For example, oral representations of Clegg, 21 July 2008, page 10; and oral representations of R Durnell, 14 July 2008, page 13.

¹⁸³² The Procurement and Contract Strategies ('PCS') Paper - Office of Government Commerce ('OGC') - 2007.

¹⁸³³ For example oral representations of Hobson & Porter, 23 July 2008 and Framework Agreements OGC Guidance September 2008 at paragraph 4.

¹⁸³⁴ The PCS paper at page 14 states "*The expectation is that savings in cost and time will come from the following: • no requirement for rebidding of each individual project; • continuous improvement by transferring learning from one project to another; • improved working relationships; • continuous workflow; • speed of procurement.*"

alone'.¹⁸³⁵ It states that '*... a traditional procurement process may result in the lowest cost contract but a non traditional procurement process may mean that there is more scope for the overall risk of the project to be transferred to the supplier, as well as improved working relationships, continuous workflow and better value for money for the client.*'¹⁸³⁶

- (b) Secondly, the evidence provided to the OFT does not indicate that there are significant barriers to switching methods of procurement for customers.
- (c) Thirdly, even if there were small switching costs, most customers would find it profitable to switch because a five to ten per cent increase in the price of a non-traditional method of procurement could amount to over £100,000 on some of the large projects involved in the Infringements.¹⁸³⁷
- (d) Fourthly, evidence has been presented to the OFT indicating that in April 2000, the government introduced a policy promoting projects to be procured by non-traditional methods when more efficient than traditional methods. Customers operating in the public sector are aware of this policy. The OFT understands that a majority of procurers who previously conducted tenders using traditional methods of procurement have switched to non-traditional methods. Further, a significant number of respondents to the Statement have suggested that procurers that previously conducted traditional tenders have now shifted to open tenders.¹⁸³⁸ For example, the Construction Confederation has stated that '*in recent years, there have been major changes in public procurement practices. Bids are increasingly being judged on best value rather than lowest price and long term relationships governed by framework contracts are fast replacing cut price competition for individual contracts. This rapid trend towards two (or more) stages of tendering, which now dominates the way in which construction work is procured in the UK...*'¹⁸³⁹ It has not been suggested to the OFT that procurers had any difficulties with this transition, which strongly suggests that traditional and non-traditional projects are likely to be demand side substitutes.
- (e) Fifthly, some of the Infringements in this Decision show that the same procurers can and do use different methods of procurement. For example, Infringements 110 and 144 illustrate that Tuntum Housing

¹⁸³⁵ The PCS Paper at page 4 outlines that the same outcomes can be achieved by different types of procurement models: "*Using a single contractor as the sole point of responsibility to a public sector client for the management and delivery of a construction project on time, within budget (defined over the lifetime of the project) and fit for the purpose for which it was intended, including demonstrating during the initial period of operation that operating cost and performance parameters can be met in accordance with a pre-agreed cost model*". The paper further states that "*Traditional contract strategies, where the design and construction are provided separately, should only be used where it can be clearly demonstrated that this approach will provide better value for money than the preferred integrated procurement routes highlighted above.*"

¹⁸³⁶ The PCS paper at page 4.

¹⁸³⁷ The average value of all of the Alleged Infringements is equal to approximately £1.2 million.

¹⁸³⁸ For example, written representations of Durkan, 27 June 2008, paragraph 33; and written representations of John Sisk and Sicon, 27 June 2008, paragraph 137.

¹⁸³⁹ Written representations of Construction Confederation, 16 June 2008, paragraph 2.5.

Association has used both traditional and non-traditional methods of procurement.

II.1688. Further, on the supply side, non-traditional methods of procurement are likely to constrain the price of traditional methods for the following reasons:

- (a) First, at the time of the Infringements, the OFT understands that there were no significant barriers to switching procurement methods for suppliers.¹⁸⁴⁰ In addition, the OFT understands that there were no regulatory barriers that impeded firms from freely supplying under a range of different procurement methods, nor have the respondents to the Statement provided any evidence of such barriers.
- (b) Secondly, as stated above, in April 2000 the government introduced a new policy to promote projects to be procured by non-traditional methods of procurement where they are more efficient than traditional methods. Firms working in the public sector have been aware of this policy. The OFT understands that procurers which previously conducted bids using traditional methods of procurement have switched to non-traditional methods. The OFT also understands that firms managed this transition with minimal problems. It follows that traditional and non-traditional methods of procurement are likely to be supply side substitutes.
- (c) Thirdly, as with the demand side, even if there were small switching costs most suppliers would find it profitable to switch. A hypothetical monopolist which controlled all traditionally tendered projects increasing the price by five to ten per cent would effectively increase the price of a project by hundreds of thousands of pounds.¹⁸⁴¹ Such an increase would rapidly generate interest from non-traditional tendering suppliers to enter into the traditionally tendered projects.
- (d) Fourthly, the Statement (and the evidence outlined above) reports several instances of the same companies using both traditional and non-traditional tenders. This evidence is consistent with suppliers being able to switch from one method to the other with relative ease.

II.1689. In light of the foregoing, the OFT has concluded that traditional and non-traditional methods of procurement belong in the same market. First, there were Infringements in both traditional and non-traditional segments. Second, the evidence on both the demand and supply side shows that consumers and suppliers are able to switch between procurement methods without incurring significant switching costs. Further, the OFT has been provided with evidence that both consumers and suppliers have switched in the past, as well as evidence that consumers and suppliers can, and do, use the two methods. Parties' representations that non-traditional methods of procurement contain no price element are unsubstantiated and as described above, even if this were the case, the pertinent question is whether non-traditional and traditional processes are part of the same relevant market. Given the factors identified by the OFT, it would be expected that any increase in the price of a traditional tendering

¹⁸⁴⁰ As stated in paragraph II.1675 above.

¹⁸⁴¹ See average infringement value at footnote 1837.

process would result in an increase in the price of a non-traditional tendering process through either demand or supply side forces.

Partnered agreements

II.1690. One area where activity of building contractors may be more restricted is for PFI projects or other major PPP programmes such as NHS Local Improvement Finance Trust¹⁸⁴² and NHS ProCure 21¹⁸⁴³, due to high start up costs and the need to tie up capital for long periods of time.¹⁸⁴⁴ Some respondents to the Survey indicated that PFI projects are in a separate product market as the competition that occurs is focused on the bid to run and invest in the PFI project, rather than the subsequent construction work that is undertaken.¹⁸⁴⁵ PFI projects represent one of a number of PPP projects which, according to the Office of the Deputy Prime Minister, bring the public and private sector together in a long term partnership for mutual benefit. PFI is a procurement mechanism by which the public sector contracts to purchase quality services on a long term basis, in order to take advantage of private sector management skills incentivised by having private finance at risk.¹⁸⁴⁶ PFI projects are often of long duration, 10 or 20 years and cover all elements of a major contract e.g. finance, build, operation of completed project and provisions of long-term building services.¹⁸⁴⁷

II.1691. Smaller building contractors may be prevented from directly bidding for PFI projects as they do not have sufficient financial strength to provide the guarantees required by funders.¹⁸⁴⁸ The cost of bidding for PFI/PPP contracts is greater and the negotiation phase more protracted. For example, one respondent estimated that for PFI/PPP related construction contracts the cost of bidding is one per cent of the value of the contract to preferred bidder stage, increasing to three per cent to financial close. Time costs are estimated at an initial 12 to 18 weeks plus a further eight to 10 weeks for contractual clarification.¹⁸⁴⁹ Tendering costs for complex projects are greater when account is taken of the likelihood of winning the contract. Professor Hughes' book indicates that *'Taking the estimates of costs of tendering previously mentioned of ½-1 per cent for traditional contracts and 2-3 per cent for those involving finance, and assuming that for traditional contracts contractors obtain one in six contracts bid for and one in four for complex projects, then the total costs of obtaining work becomes 3-6 per cent for traditional work and 8-12 per cent for complex projects'*.¹⁸⁵⁰

II.1692. Smaller construction companies may nevertheless participate in PFI/PPP contracts as sub-contractors. For example, one company noted that in recent years it had acted as a sub-contractor to a main contractor in 'strategic' PFI

¹⁸⁴² The NHS Local Improvement Finance Trust (Lift) is the primary care sector's version of a PPP. See www.publicfinance.co.uk.

¹⁸⁴³ NHS ProCure 21 introduces a partnering framework for the Department of Health and the NHS. See www.nhs-procure21.gov.uk.

¹⁸⁴⁴ Chase Norton's market definition response to question 1 of questionnaire, OFT Document Reference 6921.

¹⁸⁴⁵ Kier section 3 of market definition questionnaire, OFT Document Reference 6902.

¹⁸⁴⁶ Definition of the Office of Deputy Prime Minister referred to in Construction Industry Key Note Market Report – 2006, page 5.

¹⁸⁴⁷ Construction Industry Key Note Market Report – 2006, page 6.

¹⁸⁴⁸ Linford's market definition response to question 8 of questionnaire, OFT Document Reference 6768.

¹⁸⁴⁹ Balfour Beatty's market definition response to question 14 of questionnaire, OFT Document Reference B2876.

¹⁸⁵⁰ See footnote 20 above. *Procurement in the Construction Industry*, page 83.

contracts in the education sector with three projects with a total value of £11 million. In each case the sub-contract was for a complete package of building works (not a specialist trade), for example for the provision of a complete new school or accommodation block that formed part of a larger project.¹⁸⁵¹ However these smaller companies do not enter directly into the bidding process and hence are unlikely to exert a competitive constraint.

II.1693. In conclusion, for more complex projects such as larger PPP projects including PFI projects, supply side substitution by construction companies may be more limited and as such for the purposes of this investigation the OFT has concluded that such contracts fall outside the relevant market definition.

Conclusion on market segmentation by method of procurement

II.1694. The OFT has examined arguments that a narrower relevant market should be adopted in this investigation based on the different methods of procurement. With the exception of large PPP projects (inclusive PFI projects), where lack of financial resources and expertise restrict supply side substitution, the remaining methods of procurement are accessible to most building contractors. For the reasons set out above, the OFT has concluded that for the purposes of this investigation it is appropriate to exclude large PPP projects from the definition of the relevant market, but that all other traditional and non-traditional methods of procurement should be in the same market.

Conclusion on the relevant product market

II.1695. The OFT has considered the possibilities for demand and supply side substitution between sectors of work. On the demand side there is limited possibility for demand side substitution, since a customer is unlikely to enter into an entirely new contract in response to a small price rise. In terms of supply side substitution between sectors of work there is evidence that almost 60 per cent of suppliers that would consider switching said it would take longer than a year to switch sector. These companies considered that to enter a new sector successfully requires careful planning, the availability of suitable management and staff resources and the need to show a proven track record. A significant minority, 13 per cent, indicated that they had no intention of switching. Amongst those who find it easier to switch were larger companies many of whom are already active in a number of sectors.

II.1696. Although it may be possible to group some sectors of work in the same market given the findings in the previous paragraph, the OFT is taking a cautious approach, and has concluded that in the case of the Infringements, the relevant product market can be defined in terms of the identifiable **sector of work**.

II.1697. As regards further segmentation of the product market according to other factors, namely type of work, size of contract and method of procurement, however, for the reasons set out above, the OFT does not consider that such segmentation of the relevant market can be supported.

II.1698. Within these relevant product markets all construction works are included with the exception of those relating to PFI projects or other major PPP programmes. The Survey indicated that with the exception of large private public partnership

¹⁸⁵¹ Strata's market definition response to question 6 of questionnaire, OFT Document Reference 5964.

tenders the costs of bidding is unlikely to be a constraint on switching sector. Even for PPP projects it is not the absolute cost that constrains the ability to compete but having the financial strength and established reputation required to bid for such projects. For these reasons the relevant market comprises all construction works in the sectors listed below with the exception of those relating to large PPP projects.

II.1699. The OFT therefore concludes that for the purpose of calculating penalties each of the Infringements falls into one of the relevant product markets listed below.

- Private Housing
- Public Housing
- Defence
- Education
- Entertainment (including Leisure)
- Garages
- Health
- Office
- Places of Worship
- Police/Fire & Rescue
- Prisons
- Retail
- Distribution
- Other Industrial Buildings
- Warehousing

II.1700. The table in Annex B sets out the relevant product market and the relevant geographic market (as to which, see further below) into which the OFT considers each of the Infringements falls, and which forms the basis of the starting point for the OFT's calculation of the penalty for each of the Parties in respect of each of those Infringements.

The relevant geographic market

II.1701. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.¹⁸⁵²

II.1702. The OFT considers that a building contractor is likely to compete most directly with other building contractors that offer comparable building services. The survey results indicate that building contractors competing for the tenders that were under investigation prefer to work near to their offices, suggesting that competition is relatively localised and is likely to form into a series of regional markets. Table 12 provides a breakdown of the Alleged Infringements by administrative boundaries using information taken from the Clients' Survey.¹⁸⁵³

II.1703. Although the OFT recognises that competition does not take place according to administrative boundaries, for the purpose of calculating relevant turnover and

¹⁸⁵² Paragraph 8 of the *Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law*, OJ 1997 C372/5, [1998] 4 CMLR 177.

¹⁸⁵³ Notes: EM = East Midlands, EoE = East of England, Lon = London, NE = North East, NW = North West, SE = South East, WM = West Midlands, YH = Yorkshire & Humberside.

determining penalties, it is necessary to adopt a precise definition of the market boundaries. Administrative boundaries can be defined in terms of Government Office Regions ('GOR') according to the classification set out by the ONS.¹⁸⁵⁴ Since 1996 these regions have become the '*primary classification for the presentation of regional statistics*' (National Statistics (2004)). These regions do not have an average size, as they are formed of complete unitary authorities.¹⁸⁵⁵ Table 1 shows that over 50 per cent of the Alleged Infringements involved construction work for public authorities that had structural links to GOR. It is notable that a number of larger companies that were under investigation were structured on a regional basis on a broadly similar basis to GORs. This approach has been adopted in several cartel construction cases involving the roofing sector¹⁸⁵⁶ and there are no reasons to believe that any other set of geographic aggregations would give more reliable results. In response to the Statement, some Parties argued that the OFT has 'arbitrarily' adopted GOR to define the geographical regions. However, the OFT believes that the GORs do represent an appropriate basis for the relevant geographical markets in this case and the specific representations on this point are addressed below.

Table 12: Alleged Infringements by Government Office Region

	EM	EoE	Lon	NE	NW	SE	SW	WM	YH
Private Housing	9	2	4			6		7	9
Public Housing	13			1		2		8	8
Commercial									
Defence	1								
Education	29	1	2	1	1	4		21	13
Entertainment (incl. Leisure)	5	1			2			3	5
Garages								1	
Health	8	2						11	4
Office	9		1			1		10	10
Places of Worship	1							2	3
Police/Fire & Rescue	1			1				3	
Prisons	2								
Retail	2		1					1	1
Industrial									
Distribution		1							
Other Ind. Buildings	3				1			2	2
Warehousing								1	1
	83	7	8	3	4	13	0	70	56

Source: Clients' Survey, OFT's Construction Database (2007)

II.1704. Table 12 shows that the regions where the greatest numbers of Alleged Infringements were located were East Midlands, West Midlands and Yorkshire & Humberside, which is to be expected given that these were the areas on which the OFT's investigation was centred. However some Alleged Infringements were found in the East of England, London, North East, North West and South

¹⁸⁵⁴ See ONS 'Standard Names and Codes (SNAC) for statistical geographies', link for the ONS database: <http://www.statistics.gov.uk/geography/snac.asp>.

¹⁸⁵⁵ See http://www.visionofbritain.org.uk/types/type_page.jsp?unit_type=MOD_REG.

¹⁸⁵⁶ See previous OFT Decisions such as Felt & Single ply flat-roofing contracts in the North East of England – April 2005, http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/ne-roofing and Flat-roofing contracts in the West Midlands – March 2004, http://www.oft.gov.uk/advice_and_resources/resource_base/ca98/decisions/wm-roofing.

East regions showing that the practice of cover pricing was pervasive across different regions and sectors of the construction industry, as discussed in Section IV.B (General Section on Cover Pricing) below.

The demand side

- II.1705. As with the product market, the objective of market definition is to identify substitutes which are sufficiently close that they would prevent a hypothetical monopolist of the Focal Product in one area from profitably sustaining prices above competitive levels.¹⁸⁵⁷ The process starts by looking at the **Focal Area**, which in this case would be defined for each Infringement centred on where the work was supplied and determined by the distance within which suppliers participating in the tenders were drawn.
- II.1706. The Clients' Survey provided a list of those building contractors that were asked to bid for each Alleged Infringement. Using geographic postcode data this information was used in combination with MapInfo¹⁸⁵⁸ to show the GOR from which building contractors bidding for the projects were drawn.¹⁸⁵⁹ Annex D (5) provides a summary for each Alleged Infringement of the administrative regions from which competitors were drawn. This shows that for some Alleged Infringements competitors were drawn solely from the region in which the project was located. For other Alleged Infringements building contractors were also drawn from neighbouring administrative regions which may reflect the geographic location of the project with respect to administrative boundaries.
- II.1707. The Clients' Survey results summarised in Table 13 below indicate that almost 65 per cent of Suspect Tenders were located within 25 miles of the nearest office of the building contractor bidding for that project. This is quite a high percentage and suggests that competition is relatively localised. This result is confirmed by further analysis of the Clients' Survey of the distances between those competing for Suspect Tenders. Responses to Schedule A of the Clients' Survey provide information concerning which building contractors competed for each of the 527 Suspect Tenders. Using geographic mapping techniques, information on the postcodes of competitors was used to determine the distances between competitors for each Suspect Tender. Table 14 shows that over half of the companies bidding for tenders were located within 25 miles of each other rising to over 80 per cent within a 50 mile radius. Almost 18 per cent of those building contractors asked to tender came from within a 10 mile radius. One reason for this is that clients often include in tender lists firms that have been recommended by local firms of architects and other professionals for whom they have worked.¹⁸⁶⁰

The supply side

- II.1708. Suppliers generally have a preference for work situated close to their main areas of operation, both in terms of convenience and also because where it is further away the company incurs additional costs. One respondent to the Survey

¹⁸⁵⁷ See OFT Guideline 403 'Market Definition', December 2004, paragraph 4.1 to 4.10.

¹⁸⁵⁸ For the geographical mapping, Mapinfo Professional 7.8 was used. The underlying road data is the Streetline 2004 road network. Drive times were calculated using Drivetime 6.2. The distances given are by road, rather than as the crow flies, and are those associated with the fastest drive time between two points.

¹⁸⁵⁹ This confirms with classification of GORs shown in ONS' SNAC 2006 database which is available from <http://www.statistics.gov.uk/geography/snac.asp>.

¹⁸⁶⁰ E Manton's market definition response to question 6 of questionnaire, OFT Document Reference 6664.

indicated that it set pricing in terms of local market conditions such that if work was further away the company had to pay travelling time etc to its employees.¹⁸⁶¹ In Table 13, Suppliers' Survey results are based on the distance travelled between the suppliers and the construction projects. The table shows that building contractors chose to undertake work relatively close to their offices with almost 70 per cent of work taking place within 25 miles and that only in certain exceptional circumstances were they prepared to travel longer distances.

Table 13: Distance traveled between suppliers and construction projects

Range	Suppliers' Survey		Clients' Survey
	% of work from Head Office	% of work from Local Office	% of work from Nearest Office ¹⁸⁶²
Less than 25 miles	61.1%	69.3%	64.5%
25 – 50 miles	24.2%	23.6%	24.7%
50 – 75 miles	7.7%	6.0%	9.0%
75 - 100 miles	3.4%	0.8%	1.6%
Greater than 100 miles	3.6%	0.4%	0.3%

Source: Question 17 of Suppliers' Survey, Schedule A of Clients' Survey, OFT's Construction Database (2007)

II.1709. A number of respondents to the Suppliers' Survey pointed to competition occurring at a regional level. For example, Henry Boot submitted that *'Whilst some of HBC (UK)'s competitors may not operate within the same regional boundaries, we would submit that the likely regional markets would be the Liverpool/Manchester area as one region (HBC UK) NW and Yorkshire/East Midlands is another (HBC (UK) NE) with (GWD) being a combination of the two regions'*.¹⁸⁶³ Mansell noted that its businesses were defined either by geographic region and/or by nature of work.¹⁸⁶⁴ Its general definition of 'geographic area' for each business unit was work within a 50 mile radius or within 1 ½ hours' travelling time, and the projects for each business area would be carried out within such a radius.¹⁸⁶⁵

II.1710. Amongst those surveyed there were a few companies that operated on a national basis. One respondent noted that it operated nationally principally in the commercial sector where its main area of business activity was the construction of motor dealerships.¹⁸⁶⁶ Another respondent noted that retailers tend to roll out an image across their outlets and therefore use shop fitting companies who travel throughout the country rather than more regional contractors.¹⁸⁶⁷ That said, competitor analysis from the Clients' Survey shows that for the majority of the Alleged Infringements in the retail sector,

¹⁸⁶¹ A H Willis's market definition response to question 19 of questionnaire, OFT Document Reference 6642.

¹⁸⁶² This shows the distance between the location of the Suspect Tenders and where building contractors competing for the tenders are located.

¹⁸⁶³ Leniency Application, OFT Document Reference B1584, page 4. GWD = General Works Division.

¹⁸⁶⁴ Mansell had regional business units separated into: North East, North West, Western, Eastern, East Anglia, Thames Valley, Enfield, South East, South, Scotland North and Scotland Central.

¹⁸⁶⁵ Leniency application, OFT Document Reference B0734, page 11.

¹⁸⁶⁶ Adonis's market definition response to question 15, Appendix B of questionnaire, OFT Document Reference 6811.

¹⁸⁶⁷ Baggaley & Jenkins's market definition response to question 8 of questionnaire, OFT Document Reference 6735.

competitors for construction work were drawn from within the administrative region where the work took place or from adjacent administrative regions.

Table 14: Competitor analysis

Competitor analysis based on distance between competitors

Distance between competitors	Supplier Responses to Questionnaire	Client Responses to Questionnaire
Less than 5 miles	11.0%	8.1%
5 – 10 miles	12.1%	9.2%
10 – 25 miles	36.4%	32.4%
25 – 50 miles	26.4%	30.3%
50 – 75 miles	11.6%	13.9%
75 – 100 miles	2.1%	5.1%
Greater than 100 miles	0.4%	1.0%

Source: Suppliers' Survey, Clients' Survey, OFT's Construction Database (2007)

II.1711. For the Suppliers' Survey, information on the location of competitors was obtained from responses to a question asking them to provide a list broken down by sector, category of work and geographic location (as appropriate) of those companies who they considered to be their main competitors. The Suppliers' Survey responses showed that of the building contractors under investigation, almost 25 per cent of their competitors were drawn from within a 10 mile radius, 60 per cent within 25 miles and 86 per cent within 50 miles.

II.1712. The responses given by firms to the question relating to the basis for setting contract prices also supported the view that the markets are local or regional, rather than national. Table 15 shows that the majority of building contractors priced on the basis of local market conditions or identified factors on which they based pricing which were local in nature (e.g. firms' costs at local level).

Table 15: Extent to which pricing reflects local market conditions

Analysis of responses to question 18 of Suppliers' Survey

Types of responses	Proportion of responses
Prices reflect local market conditions	25%
Prices based on factors which were local in nature	42%
Prices based on factors (not clear whether local or otherwise)	29%
Prices determined at national level	4%

Source: Suppliers' Survey, OFT's Construction Database (2007)

II.1713. The view that the relevant geographic market is local or regional rather than national is supported by comments given by contractors. For example, one firm's response noted that *'pricing is set purely on local market conditions with each scheme pricing to reflect the individual characteristics of the scheme. There are no national pricing arrangements'*.¹⁸⁶⁸ Another respondent remarked that all contracts were priced on a bespoke basis, based solely on local market conditions.¹⁸⁶⁹ Another large building contractor indicated that competitive tenders were priced based on local market conditions and never determined at a

¹⁸⁶⁸ Bramall's market definition response to question 19 of questionnaire, OFT Document Reference B2629.

¹⁸⁶⁹ Frank Haslam Milan's market definition response to question 19 of questionnaire, OFT Document Reference B2682.

national level.¹⁸⁷⁰ Another respondent explained that the price of each contract was built up on a bottom-up basis from the cost of subcontractors, labour, materials and plant, to which a risk-adjusted margin was added. It indicated that a large majority of the cost elements was sourced either locally or regionally and pricing was largely on the basis of local or regional market conditions and was not determined nationally.¹⁸⁷¹ One respondent noted that *'the closer the contract is to London the higher a premium is charged again because of increased costs of travelling and extent of wear and tear on equipment'*.¹⁸⁷²

- II.1714. Further evidence of the regional nature of the market is provided by the analysis prepared by independent consultants, Regional Construction Research ('RCR').¹⁸⁷³ RCR prepares quarterly bulletins that monitor the activity of construction industry on a regional basis.¹⁸⁷⁴ RCR also prepares forecasts for the annual value of output, in constant prices, for each of the 13 regions up to three years ahead with national forecasts up to four years ahead. The forecasts are shown by nine sectors of activity for each region, six for new work and three for refurbishment. The detailed forecasts broken down by region and sector indicate the extent to which the activity of construction companies can be analysed on a regional basis.¹⁸⁷⁵
- II.1715. As mentioned above, in response to the Statement, a number of Parties argued that the OFT's provisional conclusions did not properly reflect its extensive market research (as reproduced above), suggesting that it 'arbitrarily' adopted GORs to define the geographical regions.¹⁸⁷⁶ R Durnell argued that the OFT divided England into nine large groups of administrative regions for the sake of convenience.¹⁸⁷⁷ The OFT does not accept these contentions, for the reasons set out below. The analysis carried out by the OFT led directly to the OFT's conclusion that the adoption of GORs for geographical market definition in this case was both appropriate and justified.
- II.1716. As previously discussed, the starting point for the relevant geographic market comprises the area in which the undertakings are involved in the supply and demand of construction services. The relevant geographic market is distinguished from neighbouring areas because the conditions of competition are different in those areas. The relevant geographic market is defined by taking into account both the competitive constraints faced by the building contractors

¹⁸⁷⁰ Henry Boot's market definition response to question 19 of questionnaire, OFT Document Reference B3247b.

¹⁸⁷¹ Balfour Beatty's market definition response to question 19 of questionnaire, OFT Document Reference B2876.

¹⁸⁷² A H Willis's market definition response to question 19 of questionnaire, OFT Document Reference 6642.

¹⁸⁷³ RCR has been providing construction companies with forecasts and research for over two decades. See company's *statement regarding our services for the construction industry*, OFT Document Reference 14433.

¹⁸⁷⁴ Lemmeleg copies of market research provided with market definition response to questionnaire, Construction Bulletin, dated May 2006 (prepared by Regional Construction Forecasts) OFT Document Reference 13900.

¹⁸⁷⁵ Lemmeleg copies of market research provided with market definition response to questionnaire, Regional Construction Forecasts Bulletin, dated May 2006 (prepared by Regional Construction Forecasts) OFT Document Reference 13900.

¹⁸⁷⁶ Written representations of R Durnell, 27 June 2008, paragraph 37; written representations of Durkan, 27 June 2008, paragraph 49; and written representations of John Sisk and Sicon, 27 June 2008, paragraph 153.

¹⁸⁷⁷ Written representations of R Durnell, 27 June 2008, paragraph 37.

and the necessity to standardise boundaries in order to facilitate a practical geographic market definition that does not involve defining separate markets for each Infringement.

II.1717. In summary, the OFT has concluded that the GORs are a good approximation of the geographic market for the following reasons:

- (a) Over half of the Alleged Infringements involved construction work for public authorities that had structural links to GORs.
- (b) A number of larger companies were structured on a regional basis that was similar to GORs.
- (c) The use of GORs has a precedent in the roofing sector.¹⁸⁷⁸
- (d) Firms compete on a regional basis rather than on a national basis.
- (e) The use of GORs is a practical alternative to defining individual geographic markets for each Infringement.

II.1718. In their responses to the Statement, some Parties argued that the GORs are greater in radius (one party quoted East of England as 48.5 miles) than evidence from the Statement would suggest to be representative¹⁸⁷⁹ and questioned the relevance of the GORs for market definition.

II.1719. In response, the OFT has further considered the adoption of GORs in this case and has concluded that the GORs are indeed an appropriate and valid basis for its geographic market definition. The OFT's conclusions are informed by the evidence outlined below.

- (a) First, although Haymills noted that the East of England GOR is equivalent in size to a catchment area with a radius of 48.5 miles, this GOR is in fact one of the largest regions in England and on average the GORs are 40.6 miles in radius. A conservative estimate of the survey data indicates that approximately 18 per cent of an average firm's construction jobs lie between 25 and 40 miles from the firm's location.¹⁸⁸⁰ Given this is nearly one-fifth of an average construction firm's jobs, it is highly likely that the firm will provide a competitive constraint within this area (i.e. 25 to 40 miles from its location – equivalent in size to the average GOR). Expanding the area to 50 miles, on average 30 per cent of a construction firm's jobs lie between 25 miles and 50 miles. Once again it is highly likely that, given this number, firms travelling outside of their 25 mile radius will constitute an important competitive constraint. Furthermore, 92 per cent of all construction firms surveyed had completed at least one job between 25 miles and 50 miles from their respective locations.

¹⁸⁷⁸ See previous OFT Decisions such as Felt & Single ply flat-roofing contracts in the North East of England – April 2005, http://www.offt.gov.uk/advice_and_resources/resource_base/ca98/decisions/ne-roofing and Flat-roofing contracts in the West Midlands – March 2004, http://www.offt.gov.uk/advice_and_resources/resource_base/ca98/decisions/wm-roofing.

¹⁸⁷⁹ For example, written representations of Haymills including economic report by LECG Ltd at page 5.

¹⁸⁸⁰ On average 63 per cent of firm jobs are below 25 miles, whilst 93 per cent are below 50 miles. Making the conservative assumption that the jobs are uniformly distributed across the distance from 25 miles to 50 miles, 81 per cent would be distributed between 0 and 40 miles.

- (b) Secondly, in considering the differences between GORs and in particular the largest GORs, it is important to consider the possibility of wider relevant markets in areas with low population density. It follows that in lower density areas construction firms have to travel longer distances in order to address the same population. For example, the data from the suppliers' survey shows a weak but positive relationship between the size of the GOR and the distance that construction firms travel. This is consistent evidence with the hypothesis that firms are likely to be willing to travel further in larger GORs than in smaller GORs, and hence the GORs are a useful approximation to the relevant geographic market.
- (c) Thirdly, the relevant question in considering whether 25 miles to 50 miles is relevant to the geographic market definition is not the number of clients that firms already have, but the willingness of firms to travel if there is a five to ten per cent relative price difference between the 0 to 25 mile and 25 to 50 mile areas. The data in the Tables above represents the *actual* distance travelled by firms to jobs without a price differential, not the firms' *willingness* to travel given an additional price differential. The fact that nearly all (92 per cent) of the construction firms surveyed were already accepting jobs from clients beyond 40 miles (and up to 50 miles), suggests that up to 50 miles is a reasonable geographic market definition. This is particularly significant when one considers that the survey does not factor in the increased willingness to travel if the job provided five to ten per cent more revenue.
- (d) Finally, in geographic markets, chains of substitution are particularly important when determining the extent of the relevant geographic market. These chains of substitution can arise from the demand side, or the supply side. Even if firms were only willing to travel 25 miles, the existence of chains of substitution is likely to lead to a wider geographic market definition of 50 miles. For example, a customer might be located between two firms, on the 25 mile boundary of each of them. When tendering for a contract the customer can consider whether to accept an offer from the firm 25 miles to the east of it, or from the firm 25 miles to the west of it. Each firm knows that it faces competition from the other firm, and hence the firms' prices are constraining each other even though they may be 50 miles apart. Furthermore when it is also taken into account that 92 per cent of firms travel up to 50 miles, this suggests that the actual geographic market may actually be significantly larger (up to 100 miles radius) than the 40 miles implied by the average GOR. For this reason the market definition defined in the GORs is likely to be a conservative estimate of the actual constraints that firms apply. This was supported by representations from Balfour Beatty, which considered that competition for major projects takes place at a national level, and that there is no clear delineation between regions within which smaller companies operate and, in effect, a chain of substitution operates across different regions.¹⁸⁸¹

¹⁸⁸¹ Written representations of Balfour Beatty, 27 June 2008, paragraphs 11.17 and 11.19.

- II.1720. In addition to the above, certain Parties argued in their representations that the OFT provided evidence in the Statement that geographic markets were local, yet adopted a regional approach to defining relevant geographic markets. These Parties argued that the two terms are not interchangeable.¹⁸⁸² These Parties also stated that the OFT had presented a GOR region as being narrower than a local market when they argued that the reverse was the case. In response, the OFT considers that in the light of the above analysis and because of the appropriateness of utilising GORs, the interchangeability of the terms 'local' and 'regional' would have no effect on the geographical market definition.
- II.1721. Several Parties suggested in their representations that the OFT should conduct a thorough analysis of market definition in relation to each Infringement.¹⁸⁸³ Robert Woodhead argued that the Infringements affected isolated, discrete contracts and had no effect on the market in general, and therefore claimed it was inappropriate for the OFT to adopt a company's turnover in the relevant market as the basis for step 1 of the penalty calculation.¹⁸⁸⁴ It further stated that the relevant geographic markets identified by the OFT were markets of convenience based on administrative boundaries and had the effect of discriminating against it due to the fact that most if not all of its turnover was derived from the East Midlands. It stated that those undertakings which derived their turnover from a concentrated area would be similarly affected, whereas large companies with a wider geographical spread of turnover would benefit. It claimed that such a definition breaches the principle of equal treatment.¹⁸⁸⁵
- II.1722. However, the OFT considers that analysis of the market individually in relation to each Infringement is both excessive and unwarranted in a Chapter I case.¹⁸⁸⁶ Further, the OFT considers that no breach of the equal treatment principle has occurred as the GORs are an appropriate and valid approximation for the relevant geographic market definition for each of the Infringements and each of the Parties. Therefore, the reason for selecting GORs is objectively justified.
- II.1723. Taking each of the points discussed above in paragraph II.1719 both separately and together, the OFT has concluded that the relevant geographic market is likely to be at least 50 miles in radius and hence the GORs are a good approximation. Indeed, the OFT considers that the GORs may well be a conservative approximation for the true relevant geographic market of each construction firm.

Conclusion on the relevant geographic market

- II.1724. The OFT concludes from the above analysis that, in the case of the Infringements, the relevant geographic market is localised and that appropriate regional markets for the purposes of calculating penalties can be identified based on administrative boundaries defined in terms of GOR.
- II.1725. The OFT has therefore concluded that each of the Infringements falls into one of the following geographic markets:

¹⁸⁸² Written representations of Linford, 26 June 2008, paragraph 5.5; written representations of Greswolde, 27 June 2008, paragraph 4.6; and written representations of Bullock, 26 June 2008, paragraph 4.1.

¹⁸⁸³ For example, written representations of Greswolde, 27 June 2008, paragraph 4.3; written representations of Linford, 26 June 2008, at paragraph 5.8; and written representations of Lotus, 26 June 2008, at paragraph 6.10.

¹⁸⁸⁴ Written representations of Robert Woodhead, 2 July 2008, paragraph 4.1.5.

¹⁸⁸⁵ Written representations of Robert Woodhead, 2 July 2008, paragraph 4.1.10.

¹⁸⁸⁶ See for example, *Argos Ltd and another v Office of Fair Trading* [2005] CAT 13.

- East Midlands
- West Midlands
- Yorkshire & Humberside
- North East
- North West
- East of England
- London
- South East

II.1726. The table in Annex B sets out the relevant product market and the relevant geographic market into which the OFT considers each of the Infringements falls, and which forms the basis of the starting point for the OFT's calculation of the penalty for each of the Parties in respect of each of those Infringements.

Conclusion on Definition of Relevant Markets

II.1727. In summary, the OFT has maintained its position as set out in the Statement and concluded that for the purpose of calculating penalties each of the Infringements falls into one of the relevant product markets based on the sectors listed below. This is without prejudice to the OFT's discretion to adopt a wider or narrower definition in any subsequent case, in particular where further evidence becomes available.

- Private Housing
- Public Housing
- Defence
- Education
- Entertainment (including Leisure)
- Garages
- Health
- Office
- Places of Worship
- Police/Fire & Rescue
- Prisons
- Retail
- Distribution
- Other Industrial Buildings
- Warehousing

II.1728. In reaching this conclusion it must be noted that the relevant markets may well be broader than an individual sector of work and there is no evidence sufficient to support defining a relevant market that is narrower than an individual sector of work. Within the relevant product markets all construction works are included with the exception of those relating to major PPP programmes.

II.1729. In summary, the OFT has maintained its position as set out in the Statement and concluded that for the purpose of calculating penalties each of the Infringements falls into one of the regional geographic markets listed below defined in terms of GOR. This is without prejudice to the OFT's discretion to adopt a wider or narrower definition in any subsequent case, in particular where further evidence becomes available.

- East Midlands
- West Midlands
- Yorkshire & Humberside
- North East
- North West
- East of England
- London
- South East

II.1730. Annex D (5) shows that competitors for each Infringement may be drawn from more than one GOR. However the relevant geographic market for the purpose of calculating penalties for each Infringement as shown in Annex D (4) is defined in terms of the administrative region within which that construction tender is located. Whilst the geographic market is likely to be wider than the GOR in which the work is located a cautious approach is being adopted given the difficulties of defining precisely the exact geographic boundaries for such a large number of Infringements. However what is clear is that whilst it may well be possible to adopt a wider geographic market definition for each Infringement, there is very little evidence to support a narrower market definition.

II.1731. The table in Annex B sets out the relevant product market and the relevant geographic market into which the OFT considers each of the Infringements falls, and which forms the basis of the starting point for the OFT's calculation of the penalty for each of the Parties in respect of each of those Infringements.

Reclassification of market for certain Infringements

II.1732. In response to the Statement, the OFT received a number of representations on the classification of the Infringements set out in Annex B of the Statement.

II.1733. In light of these responses, the OFT conducted a review of its market classifications and considered that a number of changes should be made to those classifications. For this reason, the OFT issued two Supplementary Statements of Objections in relation to the reclassification of Infringements ('Market Definition Supplementary Statements') to those Parties affected by the reclassification ('the Affected Parties'). In some instances, the OFT took account of new information and/or evidence, in which case the additional information and evidence was set out in the relevant Supplementary Statement. In other instances, the OFT simply altered its appreciation of the information and evidence already relied on in the Statement.

First Market Definition Supplementary Statement – 18 March 2009

II.1734. On 18 March 2009, the OFT issued the first Market Definition Supplementary Statement in respect of the following Infringements, Affected Parties and market classifications:

Infringement Number	Date	Name	Product market	Geographic market	Affected Parties
9	11/4/2000	Residential training centre, Ollerton	Police Fire & Rescue changed to Office	East Midlands	ARG, J J & A R Jackson
20	18/8/2000	Mason House Shirley	Public Housing changed to Private Housing	West Midlands	Greswolde, Thomas Vale
29	8/11/2000	Refurbishment of a house, 143 Sneinton Dale Sneinton Nottingham	Private Housing changed to Public Housing	East Midlands	Greenwood, E Taylor
54	27/4/2001	Toilet refurbishment – CPS King Edward Court Nottingham	Office	West Midlands changed to East Midlands	Bodill, Loach, Thorndyke
78	8/10/2001	15 dwellings Station Road Kimberly Phase 2	Private Housing changed to Public Housing	East Midlands	Bodill, Robert Woodhead, Strata
108	15/5/2002	Office block, Sherwood Rise, Nottingham	Office	West Midlands changed to East Midlands	Adam Eastwood, Herbert Baggaley
114	8/7/2002	Conversion & extension of CCTV control room Beeston Police Station Nottinghamshire	Office changed to Police Fire & Rescue	East Midlands	Bodill, W R Bloodworth
128	22/11/2002	Sports Hall Extension at Robert Atkinson Youth & Community Centre Thornaby	Education changed to Entertainment	North East	Mansell, F Parkinson
136	5/2/2003	Pitched roof conversion, 1-15 Pankhurst Place Clay Cross	Private Housing changed to Public Housing	East Midlands	Admiral, Derwent Valley, Milward, Wildgoose
141	3/3/2003	Refurbishment and extensions to St Catherine's Cottages	Private Housing changed to Public Housing	East Midlands	Bodill, E Taylor, Simons/Wrights

		Newark Nottinghamshire			
155	11/7/2003	Mount Pleasant Greenford, External remedial work (Phase 2)	Private Housing changed to Public Housing	London	Mansell, R Durnell
208	12/11/2004	Refurbishment, 10/12 Bowden Road Sunninghill	Private Housing changed to Public Housing	South East	Balfour Beatty / Mansell, Francis

II.1735. The reasons for each reclassification were as follows.

Infringement 9 – Police Fire & Rescue to Office

II.1736. In the Statement, the OFT classified this Infringement as falling within the product market for 'Police/Fire & Rescue'. In its response to the Statement, ARG stated that '*...this tender related to the conversion of a first floor flat for office use which was submitted to Nottinghamshire County Council and should be classified in the Office sector...*'.¹⁸⁸⁷ In this respect, the OFT notes that paragraph IV.996 of the Statement also stated that the tender related to the conversion of a flat for office use. The OFT therefore considers that Infringement 9 should be classified as falling within the product market for 'Office'.

Infringement 20 – Public Housing to Private Housing

II.1737. In the Statement, the OFT classified this Infringement as falling within the product market for 'Public Housing'. In its response to the Statement, Greswolde stated, '*As the Sir Josiah Mason Trust [the client organisation involved in this Infringement] is a private charity organisation funded by private donations, Greswolde submits that AI 20... should instead be categorised as 'private housing'*'.¹⁸⁸⁸ Having considered Greswolde's representations, the OFT considers that Infringement 20 should be classified as falling within the product market for 'Private Housing'.

Infringement 29 – Private Housing to Public Housing

II.1738. In the Statement, the OFT classified this Infringement as falling within the product market for 'Private Housing'. In its response to the Statement, E Taylor stated that the job involved '*...the refurbishment of council houses on behalf of Nottingham City Council. It was paid for out of a government modernisation grant (public sector money). These contracts were carried out under the supervision of Allan Joyce Architects (who were employed by Nottingham City Council to supervise the works)... In our view the AI should therefore be re-categorised as Public Sector Housing...*'.¹⁸⁸⁹

¹⁸⁸⁷ Written representations of ARG, 25 June 2008, paragraph 2.1.

¹⁸⁸⁸ Written representations of Greswolde, 27 June 2008, paragraph 3.6.

¹⁸⁸⁹ Written representations of E Taylor, 27 June 2008, paragraph 4.1.

II.1739. Having considered E Taylor's representations that the project was carried out on behalf of a public authority, the OFT considered that Infringement 29 should be classified as falling within the product market for 'Public Housing', in accordance with footnote 1731.

Infringements 78, 141 and 208 – Private Housing to Public Housing

II.1740. In the Statement, the OFT inadvertently classified these Infringements, all relating to work for Housing Associations, as falling within the product market for 'Private Housing'. However, in accordance with footnote 1731, the OFT considers that the relevant product market for these three Infringements should in fact be 'Public Housing'.

II.1741. In response to this Market Definition Supplementary Statement, Robert Woodhead claimed that *'The reclassification of the relevant product market for ... [Infringement 78] appears to be a market of convenience adopted by the OFT for the purpose of determining the level of fine to be imposed on Woodhead and does not analyse the competitive conditions that may or may not exist as between public and private sector housing in respect of the AI'*.¹⁸⁹⁰

II.1742. However, the OFT considers that the ONS definition, which is the basis upon which the OFT's 'Public Work' category is classified, is a reasonable objective basis upon which the OFT can proceed in relation to categorisation of this Infringement (i.e. housing association work as public work).

Infringements 136 and 155 – Private Housing to Public Housing

II.1743. In the Statement, the OFT classified these Infringements as falling within the product market for 'Private Housing'. As these two Infringements involved work undertaken on behalf of a public authority (respectively, North East Derbyshire Council and London Borough of Ealing Council), the OFT considered that they should be classified as falling within the product market for 'Public Housing', in accordance with footnote 1731.

Infringement 114 – Office to Police Fire & Rescue

II.1744. In the Statement, the OFT classified this Infringement as falling within the product market for 'Office'. In its response to the Original Statement, Bodill stated, *'The contract related to work at a police station and should therefore fall under the 'Police, Fire & Rescue' category'*.¹⁸⁹¹ In this respect, the OFT notes that paragraph IV.3636 of the Statement also stated that the tender related to the conversion and extension of a CCTV control room at Beeston Police Station. The OFT therefore considers that Infringement 114 should be classified as falling within the product market for 'Police/Fire and Rescue'.

Infringement 128 – Education to Entertainment (inc Leisure)

II.1745. In the Statement, the OFT classified this Infringement as falling within the product market for 'Education'. In its response to the Statement, F Parkinson stated, *'The project was to build a youth and community centre for Stockton on Tees Borough Council. The project comprised of the construction of a sports*

¹⁸⁹⁰ Letter from Robert Woodhead, 27 March 2009.

¹⁸⁹¹ Written representations of Bodill, 25 June 2008, paragraph 3.22.

hall and changing block extension to the existing youth and community centre and not to a school or any educational facility.... Accordingly, this falls within the Entertainment (inc Leisure) infringement sector'.¹⁸⁹²

II.1746. Paragraph IV.3996 of the Statement described this tender as being for a new sports hall extension at Robert Atkinson Youth & Community Centre. The OFT has also taken into account information published on the website of Stockton on Tees Borough Council, which describes the youth and community centre as offering '*a broad programme that includes health issues, crafts, cooking, holiday activities and visits, games and socialising*'.¹⁸⁹³ Whilst some of the activities offered by the centre could be characterised as educational, many involve leisure pursuits. The OFT therefore considers that Infringement 128 should be classified as falling within the product market for 'Entertainment (inc Leisure)'

Infringements 54 and 108 – East Midlands to West Midlands

II.1747. In the Statement, the OFT inadvertently classified these Infringements as falling within the geographic market for the 'West Midlands'. However, the OFT notes that Nottingham (where the construction work for these two Infringements was carried out) falls within the 'East Midlands' geographic market.

Unchanged classification – Infringement 204

II.1748. In addition, in the Market Definition Supplementary Statement the OFT adduced new evidence in relation to the relevant product market for Infringement 204. In the Statement, the OFT classified this Infringement as falling within the 'Office' product market. In its response to the Statement, Bodill submitted that '*This tender is incorrectly described as 'office units'. The tender was for the construction of four 'workspace units'...and should be classified in the product market, 'Other Industrial Buildings' rather than 'Office'*'.¹⁸⁹⁴

II.1749. The OFT subsequently made enquiries of the client, Nottingham City Council, as to the intended and current use of the constructed units. In light of this evidence, and for the reasons set out in the Statement, the OFT remains of the view that Infringement 204 falls within the 'Office' product market. As such, the first Market Definition Supplementary Statement did not affect Annex B of the Statement insofar as Infringement 204 was concerned.

Second Market Definition Supplementary Statement – 19 May 2009

II.1750. On 19 May 2009, the OFT issued the second Market Definition Supplementary Statement, amending the product market classification from 'Private Housing' to 'Public Housing' for the Infringements and Affected Parties set out in the table below. These Infringements all involved work for Local Authorities, which should be classified as 'Public Housing' in accordance with footnote 1731.

¹⁸⁹² Written representations of F Parkinson, 25 June 2008, paragraph 64.

¹⁸⁹³ OFT document reference SAC003.

¹⁸⁹⁴ Written representations of Bodill, 25 June 2008, paragraph 3.49.

Infringement Number	Date	Name	Affected Parties
8	14/3/2000	Four flats at Viking Way Kiveton Park	J J & A R Jackson, Strata
43	17/1/2001	Prebendal Estate Phase 3 52 housing refurbishments Aylesbury	J J McGinley, Mansell
80	1/11/2001	Upgrade of four bungalows Doncaster Road Costhorpe Nottinghamshire	Bodill, J J & A R Jackson
97	7/2/2002	Refurbishment 92 dwellings Mandeville Road Housing Estate Aylesbury	J J McGinley, Mansell
129	25/11/2002	Rebuilding of eight Newland properties Bilborough Nottingham	Bodill, William Woodsend
176	28/1/2004	Group repair scheme Phase 29 2 to 8 Bronte Street and 7 Beeches Road Lawkholme Keighley	G & J Seddon, Richardson Projects
220	29/3/2005	External structural refurbishment works 13-42 Claremont Close London	Durkan Limited, Mansell
240	2/2/2006	Redevelopment and refurbishment of 45-46 South Molton Street London	Balfour Beatty, Concentra

Other representations on reclassification made in response to the Statement

II.1751. In response to the Statement, a number of Parties made representations in relation to the OFT's market classification of certain other Infringements. Having considered these representations the OFT has concluded that a reclassification is not justified, for the reasons set out in the following paragraphs.

Infringement 85 – Product Market

- II.1752. In response to the Statement, Bowmer & Kirkland stated that *'product markets in relation to all of the Alleged Infringements should be further sub-divided according to the nature and to the value of the project'*.¹⁸⁹⁵ Further, with specific reference to Infringement 85, Bowmer & Kirkland believed that the correct product market should be 'civil engineering' instead of 'Other Industrial Buildings'. In oral representations, Bowmer & Kirkland stated *'we describe it as civil engineering ... it's the laying of heavy duty foundations... to pits to facilitate large pieces of plant ... I think the industry would call that civil engineering... we certainly do and that's why our civil engineering division did the work.'*¹⁸⁹⁶
- II.1753. In relation to Bowmer & Kirkland's first point, the OFT has set out at paragraphs II.1695 to II.1697 above, why it does not consider that further segmentation of the product market can be supported.
- II.1754. In relation to Infringement 85, the OFT has taken into consideration the descriptions of this job given by the client, by Bowmer & Kirkland and by Herbert Baggaley (the other Party to this Infringement), and has concluded that this Infringement should not be reclassified as 'Infrastructure', as which civil engineering works would normally be classified.
- II.1755. The client described this job as the *'removal of existing and formation of a new press base and associated works inside the existing Press Hall building... (with) alterations of structural steelwork to allow the installation of the new press'*, and classified the project as *'industrial buildings'*, matching the OFT's market classification of this Infringement.¹⁸⁹⁷ The OFT considers that this was likely to be a complex job with elements of civil engineering. However, this does not of itself support a reclassification as 'Infrastructure'. Although infrastructure work does not fall within the scope of the OFT's investigation as it is carried out by specialist civil engineering firms¹⁸⁹⁸, this is not the same as excluding all work involving elements of civil engineering.
- II.1756. Furthermore, in its response to the Market Definition Questionnaire when asked to fill in the proportion of work that was RMI work for each category of work, Bowmer & Kirkland stated *'We have excluded the Private Housing, Public Housing and Infrastructure headings as no work is undertaken in these categories'*.¹⁸⁹⁹ Therefore, by Bowmer & Kirkland's own admission, it did not consider that it carried out Infrastructure work and the mere fact that this project might have involved elements of civil engineering and some specialist skills does not mean that it should be categorised as 'civil engineering' or 'Infrastructure'.
- II.1757. The OFT further notes that the client invited Herbert Baggaley to tender for this project, indicating that it was a project which could be carried out by a building contractor without specialist civil engineering skills. Herbert Baggaley did not identify the project as being civil engineering, instead stating that: '...

¹⁸⁹⁵ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 60.

¹⁸⁹⁶ Oral representations of Bowmer & Kirkland, 1 August 2008, page 13.

¹⁸⁹⁷ Information from client, OFT Document Reference 7613.

¹⁸⁹⁸ See paragraph II.1617.

¹⁸⁹⁹ Bowmer & Kirkland's market definition response to question 5 of questionnaire, OFT Document Reference 6941.

*Baggaleys' decision not to price this job with a view to winning the tender was due to the problems and risks involved in the job ...*¹⁹⁰⁰

II.1758. Therefore, for the reasons outlined above, the OFT does not consider that a reclassification of the market for this Infringement is warranted.

Infringement 96 – Product Market

II.1759. In the Statement, the OFT categorised this tender as falling within the market for 'Education' construction works in the 'East Midlands'. The tenders sought were for refurbishment, adaptations and internal and external repairs to the main and sundry buildings of Sir John Moore Primary School.

II.1760. In its response to the Statement, Linford submitted that the OFT had *'...erroneously classified the relevant product market for [this Infringement] as being "Education". The work on Sir John Moore School was done by the "Linford-Bridgeman" division because it was historic building work. Linford's competitors on such projects are not contractors who would specialise in school work, but those who specialised more in restoration.'* and the OFT appear to have classified [this Infringement] not on the basis of competitive factors such as supply and demand side substitutability, but on non-economic and inappropriate factors such as the purpose for which the building in question was being used by the client. Linford observes that this classification as "Education" is arbitrary and, in fact, there is no category listed in the [Statement] in to which it could be appropriately classified.¹⁹⁰¹

II.1761. The OFT does not accept Linford's submission that the relevant product market has been defined erroneously, nor does it accept that non-economic factors were used as the basis for relevant market definition or that treating this tender as being within the 'Education' market is at all arbitrary.

II.1762. For reasons given in paragraphs II.1646 to II.1663 above, there is no basis for defining the relevant product market according to types of work – i.e. for treating NB and RMI as being in different markets. The evidence seen by the OFT, in particular the responses to its Suppliers' Survey, indicates supply side substitutability between these types of work, and hence a single market for NB and RMI work. The OFT therefore does not consider the fact that this tender was for restoration work – hence RMI – affects the market into which it falls, or that the OFT has defined the market incorrectly.

II.1763. The OFT has set out at paragraphs II.1695 to II.1700 and II.1727 to II.1728 above, the reasons why it is appropriate in this case following a proper market definition exercise to define the relevant product markets on the basis of identifiable sectors of work, including education, rather than categories of work.

II.1764. Within the relevant product markets all construction works have been included, with the exception of PFI and PPP projects. The relevant product market contains NB and RMI segments and the restoration work category forms part of the latter segment.¹⁹⁰² The OFT did not consider it appropriate to segment the relevant market into NB and RMI for the reasons set out in paragraphs II.1647 to II.1655 above.

¹⁹⁰⁰ Written representations of Herbert Baggaley, 27 June 2008, paragraph 3.

¹⁹⁰¹ Written representations of Linford, 26 June 2008, paragraph 5.10 and 5.11.

¹⁹⁰² BERR, Construction Statistics Annual 2007, Appendix Two, Definition of the Construction Industry.

II.1765. For these reasons, the OFT does not consider that a reclassification of the market for this Infringement is warranted.

SECTION III – LEGAL BACKGROUND

A. Introduction

- III.1. This Part of the Decision sets out the legal framework against which the OFT has considered the evidence in this case.
- III.2. The legal provisions prohibiting agreements which prevent, restrict or distort competition are contained in the Chapter I prohibition of the Act and Article 81(1). Both provisions are relevant to this case, by reason of the Modernisation Regulation. The relevant parts of both provisions are therefore set out below, followed by a detailed examination of the key concepts contained within each, together with the law on the burden and standard of proof.

B. The Chapter I Prohibition

In General

- III.3. The Chapter I prohibition prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK¹⁹⁰³ and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part I of the Act.¹⁹⁰⁴ The Chapter I prohibition applies in particular to agreements, decisions or concerted practices which directly or indirectly fix selling prices or other trading conditions.¹⁹⁰⁵
- III.4. In order to find an infringement of the Chapter I prohibition, the OFT must establish the existence of an agreement, a decision or a concerted practice between undertakings which may affect trade within the UK and which had as its object or effect, the appreciable prevention, restriction or distortion of competition.

Consistency with EC Law

- III.5. Section 60(1) of the Act sets out the principle that, so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EC law in relation to competition within the EC. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of the Act) with a view to ensuring that there is no inconsistency between its decision and the principles laid down by the EC Treaty and the European Courts and any relevant decision of the European Courts. Under section 60(3) of the Act, the OFT must, in addition, have regard to any relevant decision or statement of the Commission.
- III.6. The provision in EC competition law that is equivalent to the Chapter I prohibition is Article 81 of the EC Treaty, on which the Chapter I prohibition is modelled. Accordingly, the case law of the European Courts interpreting Article

¹⁹⁰³ Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK, and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the UK, that part.

¹⁹⁰⁴ The Chapter I prohibition came into force on 1 March 2000.

¹⁹⁰⁵ Section 2(2)(a) of the Act.

81 is relevant when applying the Chapter I prohibition. This is independent of the relevance of this case law in the context of the OFT's separate duty to apply Article 81(1) in the present case, as to which see paragraphs III.7 to III.9 below.

C. Article 81 of the EC Treaty

- III.7. Following the coming into force of the Modernisation Regulation from 1 May 2004¹⁹⁰⁶, when the OFT applies national competition law to agreements and/or concerted practices between undertakings which may affect trade between Member States, it is required also to apply Article 81 of the EC Treaty, where it is applicable.¹⁹⁰⁷
- III.8. Since some of the infringing agreements and/or concerted practices particularised in this Decision were entered into or continued after 1 May 2004, the OFT considers that it is under an obligation to consider the applicability of Article 81 to the circumstances of this case.
- III.9. Whether Article 81(1) is *in fact* applicable to the circumstances of this case depends on whether the infringing agreements and/or concerted practices '*may affect trade between Member States*' within the terms of Article 81(1). The OFT sets out the principles relevant to the determination of this question at paragraphs III.191 to III.196 below, and sets out its conclusions at paragraphs V.15 to V.25 of the Legal Assessment section below. As discussed in those paragraphs, the OFT does not consider that any of the agreements and/or concerted practices described in this Decision fulfil this criterion; Article 81(1) is not therefore *in fact* applicable.¹⁹⁰⁸

D. Undertakings

Concept of an undertaking

- III.10. The word 'undertaking' is not defined in the Act or in the EC Treaty. It is a wide term that the ECJ has held to cover '*any entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*'.¹⁹⁰⁹ In the particular context of Article 81(1), undertakings have been described as '*economic units which consist of a unitary organization of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and contribute to the commission of an infringement of the kind referred to in that provision*'.¹⁹¹⁰
- III.11. An 'undertaking' therefore designates an economic unit rather than a legal entity, and may describe a unit which itself consists of several persons, natural or legal.¹⁹¹¹ In particular, where a parent has the ability to exercise decisive

¹⁹⁰⁶ OJ L1, 4 January 2003, page 1 and Article 45, Modernisation Regulation.

¹⁹⁰⁷ Article 3, Modernisation Regulation.

¹⁹⁰⁸ In any event, in the particular circumstances of the present case the OFT's proposed action, including the imposition of and level of penalties, would be no different whether or not Article 81 had been infringed in addition to the Chapter I prohibition.

¹⁹⁰⁹ OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraph 2.5, citing Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979 at paragraph 21, and Case T-319/99 *FENIN v Commission* [2003] ECR II-357 at paragraph 35.

¹⁹¹⁰ Case T-11/89 *Shell v Commission* [1992] ECR II-757, at paragraph 311.

¹⁹¹¹ Case 170/83 *Hydrotherm Gerätebau GmbH v Firma Compact del Dott. Ing. Mario Andreoli & C.Sas* [1984] ECR 2999, at paragraph 11.

influence over a subsidiary at the time of an infringement so as to deprive it of real autonomy in determining its conduct on the market, the two entities form part of the same undertaking for the purposes of Article 81(1) even though they have distinct legal personalities.¹⁹¹²

- III.12. In this regard, it is important to note that the effective enforcement of competition law depends on ensuring that all legal entities with responsibility for the commission of an infringement are susceptible to the relevant sanctions for that infringement. This includes (current and former) parent companies who, although not directly involved in the infringing acts, could have influenced the policies and conduct of their subsidiaries to prevent such infringements but failed to do so.

Wholly owned companies

- III.13. The exercise of decisive influence can be presumed where a subsidiary is wholly owned by its parent, whether directly or indirectly.¹⁹¹³ The presumption will be further supported where additional indicia of decisive influence exist, such as the use of the same commercial name or logo¹⁹¹⁴, a parent being active on the same or adjacent markets to its subsidiary¹⁹¹⁵, direct instructions being given by a parent to a subsidiary¹⁹¹⁶ or the two entities having shared directors.¹⁹¹⁷ The CFI has made it clear that it can generally be presumed that a wholly-owned subsidiary essentially follows the instructions given to it by its parent, without needing to check whether the parent company in fact exercised that power.¹⁹¹⁸
- III.14. Where the presumption of decisive influence arises, the OFT is entitled to find that the parent and subsidiary form the same undertaking, and to hold the parent company responsible for an infringement committed by its subsidiary, unless the parent company has proved that the subsidiary determines its conduct on the market autonomously.¹⁹¹⁹ Although not necessary in this Decision, the OFT has in any event identified other indicia of influence, such as directors in common between the parent and subsidiary.

¹⁹¹² Case 48/69 *ICI Ltd v Commission* [1972] ECR I-61, at paragraph 132; Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151, [1984] 3 CMLR 325, at paragraphs 47 to 53; Case T-102/95 *Viho Europe BV v Commission* [1995] ECR II-17, at paragraph 51, confirmed on appeal in Case C-73/95 P *Viho Europe BV v Commission* [1996] ECR I-5457, at paragraph 16. See also OFT Competition law guideline on *Enforcement* (OFT407, Edition 12/04), at paragraph 5.41.

¹⁹¹³ Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at paragraph 29; Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, at paragraph 136; and Case T-69/04 *Schunk*, judgment of 8 October 2008, at paragraphs 56 to 58. See also Case C-97/08P *Akzo Nobel NV v Commission*, 10 September 2009, at paragraphs 72 to 77.

¹⁹¹⁴ Case T-66/99 *Minoan Lines SA v Commission* [2003] ECR II-05515, at paragraphs 129 and 137, confirmed by the ECJ in Case C-121/04 P *Minoikes Grammes ANE (Minoan Lines SA) v Commission*.

¹⁹¹⁵ Opinion of Advocate-General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at paragraph 49.

¹⁹¹⁶ Case T-48/69 *ICI Ltd v Commission* [1972] ECR I-619, at paragraphs 132 to 133.

¹⁹¹⁷ *Sepia Logistics v OFT* [2007] CAT 13, at paragraphs 77 to 80.

¹⁹¹⁸ Joined Cases T-71, 74, 87 and 91/03, *Tokai Carbon Co. Ltd and others v Commission* [2005] ECR II-10, at paragraph 60.

¹⁹¹⁹ Case C-97/08P *Akzo Nobel NV v Commission*, 10 September 2009, at paragraphs 54 to 78. See also Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, at paragraph 136; Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at paragraph 29; Case T-69/04 *Schunk*, judgment of 8 October 2008, at paragraphs 56 to 58; Case T-12/03 *Itochu v Commission*, judgment of 30 April 2009, at paragraphs 49 to 53.

III.15. A few Parties submitted that a 100 per cent shareholding is not sufficient to give rise to a rebuttable presumption that a parent and its subsidiary are a single economic unit, but that something more is required.¹⁹²⁰ Whilst these Parties cited CFI case law in support of their representations¹⁹²¹, the CFI clearly states in *Akzo Nobel*¹⁹²² and *Schunk*¹⁹²³ that a 100 per cent shareholding is sufficient in itself to give rise to a rebuttable presumption that decisive influence is exercised by the parent company (see also the cases cited in footnote 1913).¹⁹²⁴ This has recently been confirmed by the ECJ in *Akzo Nobel*:¹⁹²⁵

'... the Court of First Instance did not commit any error of law in holding that where a parent company has a 100% shareholding in its subsidiary there is a rebuttable presumption that that parent company exercises a decisive influence over the conduct of its subsidiary.'

III.16. A few Parties submitted in response to the Statement that, in order to find that a parent and its wholly owned subsidiary form part of the same undertaking, the OFT must establish not only that the parent could have exercised decisive influence over its subsidiary, but also that it did *in fact* exert that influence.¹⁹²⁶ However, as noted above, the European courts have made clear that, where a subsidiary is wholly owned, there is a rebuttable presumption that the parent company *did* exert decisive influence over its subsidiary's conduct. In *Avebe v Commission*, the CFI noted that:

'In the case giving rise to the judgment in Stora Kopparbergs Bergslags v Commission... the Court of Justice recognised that when a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary's conduct' (emphasis added).¹⁹²⁷

III.17. In that situation, it is for the parent company to rebut that presumption by adducing evidence to establish that its subsidiary was sufficiently autonomous.¹⁹²⁸ As set out in Section II, some Parties have asserted that their parent company is a holding company only, or that the subsidiary has its own management board, or that the parent is not involved in the subsidiary's day to day management. The OFT does not consider that these assertions alone are

¹⁹²⁰ For example, written representations of McGinley Holdings, 27 June 2008, paragraph 7; Transcript of oral hearing with Durkan Holdings, 27 February 2009, at page 13; Written representations of Crest Nicholson, 27 June 2008, paragraphs 1.7 and 4.22 to 4.29.

¹⁹²¹ For example, Case T-109/02 *Bolloré v Commission* [2007] ECR II-947, at paragraph 132 (overturned on appeal to the ECJ, Case C-322/07 P, judgment of 3 September 2009, without further discussion of this point); Case T-325/01 *DaimlerChrysler v Commission* [2005] ECR II-3319, at paragraph 218. Crest Nicholson also cited three Commission decisions, dating from the period 2002 to 2004.

¹⁹²² Case T-112/05 *Akzo Nobel NV v European Commission*, [2007] ECR II-5049, at paragraphs 60 to 62.

¹⁹²³ Case T-69/04 *Schunk*, judgment of 8 October 2008, at paragraphs 56 to 58.

¹⁹²⁴ The OFT also considers that in more recent decisions, the Commission has also found a presumption that a parent company exercises decisive influence over its wholly owned subsidiary. See, for example, Commission Decision in Case COMP/F/38.899 Gas Insulated Switchgear, 24 January 2007, at paragraph 335.

¹⁹²⁵ Case C-97/08P *Akzo Nobel NV v Commission*, 10 September 2009, at paragraph 63.

¹⁹²⁶ For example, written representations of Bowmer & Kirkland, 4 July 2008, paragraph 16.

¹⁹²⁷ Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, at paragraph 136.

¹⁹²⁸ Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at paragraphs 23 and 27 to 29; Case T-112/05 *Akzo Nobel NV v European Commission*, judgment of 12 December 2007 at paragraphs 60 to 62; Case T-314/01 *Avebe v Commission* [2006] ECR II-0000, at paragraph 136; Case C-97/08P *Akzo Nobel NV v Commission*, ECJ Judgment of 10 September 2009, at paragraph 61.

sufficient to rebut the presumption that a parent and subsidiary are a single economic entity. In order to rebut the presumption, a parent must adduce evidence relating to the economic and legal organisational links between the two legal entities to demonstrate that the subsidiary operates autonomously on the market. This has recently been upheld and confirmed by the ECJ.¹⁹²⁹

'... the conduct of the subsidiary on the market cannot be the only factor which enables the liability of the parent company to be established, but is only one of the signs of the existence of an economic unit. ... [I]n order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list.'

- III.18. Several Parties submitted that common directorships cannot be relied on as an indicator of decisive influence if the directors are not implicated in the infringements.¹⁹³⁰ The OFT does not accept this argument. The CFI has stated that *'It is...not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking...that the Commission is able to address the decision imposing fines to the parent company of a group of companies'*.¹⁹³¹ As a result, *'...attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred.'*¹⁹³²

Majority-owned companies

- III.19. In circumstances where a subsidiary is majority-owned, rather than wholly-owned by its parent company, the principles applicable to presuming that the parent exercised decisive influence may nevertheless apply where there is a clear ability to exercise control. This follows naturally from the principles set out in paragraphs III.11 to III.18.
- III.20. In other words, where the level of shareholding, coupled with any other economic and legal organisational links, are such as to allow the parent to direct the conduct of its subsidiary, the OFT is entitled to presume, in the absence of evidence to the contrary, that the parent company did in fact exercise decisive influence over its subsidiary. Where the shareholding is close to 100 per cent, the need to identify other links will be less than where the parent owns a bare majority.
- III.21. Certain parties suggested that the OFT was not entitled to rely on a presumption of decisive influence in circumstances where the shareholding was

¹⁹²⁹ Case C-97/08P *Akzo Nobel NV v Commission*, 10 September 2009, at paragraphs 73 to 74.

¹⁹³⁰ For example, written representations of McGinley Holdings, 27 June 2008, paragraph 12; Written representations of Crest Nicholson, 27 June 2008, paragraphs 1.8 and 4.36 to 4.37; Written representations of Balfour Beatty plc, 27 June 2008, paragraphs 9.7 to 9.10.

¹⁹³¹ Case T-112/05 *Akzo Nobel NV v European Commission*, judgment of 12 December 2007 at paragraph 58, recently upheld by the ECJ in Case C-97/08P *Akzo Nobel NV v Commission*, 10 September 2009.

¹⁹³² Case T-112/05 *Akzo Nobel NV v European Commission*, judgment of 12 December 2007 at paragraph 80, recently upheld by the ECJ in Case C-97/08P *Akzo Nobel NV v Commission*, 10 September 2009. See also Case T-12/03 *Itochu v Commission*, judgment of 30 April 2009, at paragraph 58.

less than 100 per cent, seeking to rely on a number of cases in support of that view.¹⁹³³ The OFT notes that almost all of the case law does relate to wholly owned companies but does not accept that any of these cases preclude the application of the presumption where the shareholding is less than 100 per cent.¹⁹³⁴

- III.22. Similarly, the case law identifies a number of relevant economic and legal organisational links indicative of a parent company's ability to control its subsidiary. In Section II, the OFT has considered such indicia for each of the corporate groups where shareholdings are less than 100 per cent when concluding that the exercise of decisive influence can be presumed. However, the OFT does not accept that every one of the various indicia identified by the case law must be present in order for the presumption to apply¹⁹³⁵, and therefore where parties have identified the absence of a particular link, that does not undermine the application of the presumption.
- III.23. In line with the position for wholly-owned subsidiaries, where the presumption of decisive influence arises, the OFT is entitled to find that the parent and subsidiary form part of the same undertaking, and to hold the parent company responsible for an Infringement committed by its subsidiary, unless the parent company has rebutted that presumption by proving that the subsidiary determined its conduct on the market autonomously.
- III.24. Durkan Holdings submitted that it was insufficient for the OFT to demonstrate that a parent was able to exert decisive influence over its subsidiary but it must also check whether that influence was actually exerted.¹⁹³⁶ In making this submission, Durkan Holdings relied on the first and second sentences of paragraph 136 of the CFI's judgment in *Avebe*.¹⁹³⁷ However, the OFT notes that the CFI went on in the remainder of that paragraph to state that the *actual* exercise of decisive influence could be *presumed* in the case of 100 per cent shareholding (see paragraph III.16). The CFI then considered the facts of the particular case (the entity in question had two parents, each with 50 per cent shareholding and joint management power) in order to reach a *presumption* (analogous to that arising with 100 per cent shareholding) that the joint parent *actually* exerted decisive influence over the subsidiary. As the applicant had not adduced any evidence to rebut the presumption, the CFI concluded that the entity and its joint parents formed a single undertaking.¹⁹³⁸ The OFT considers that the CFI's judgment in *Avebe* provides further support for its conclusion that a *presumption* of the exercise of decisive influence is not confined to the

¹⁹³³ Written representations of Durkan Holdings, 6 February 2009, paragraph 44(a) and 27 June 2008, paragraph 33(a), citing: Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at paragraphs 28; Opinion of Advocate General Mischo in *Stora*, at paragraph 48; *Sepia Logistics Ltd (formerly Double Quick Supplyline Ltd) v Office of Fair Trading* [2007] CAT 13, at paragraphs 76 to 80; Case C-196/99 P *Aristrain v Commission* [2003] ECR I-11005, at paragraph 99. As set out in Section II, at the time of the relevant Infringements, Durkan Holdings had a 51 per cent shareholding in Durkan.

¹⁹³⁴ The OFT also notes in this regard that the European Commission has previously considered a 98 per cent shareholding to be sufficient in itself to give rise to a *presumption* of decisive influence. Commission decision in *MCAA*, OJ L353, 13 December 2006, page 12, at paragraph 258.

¹⁹³⁵ See for example, the written representations of Durkan Holdings, 6 February 2009, paragraph 44(b) and 27 June 2008, paragraph 33(b), asserting that any directors in common must cover, and have exercised, 'key operational functions' in both companies, citing paragraph 49 of the CFI's judgment in *Metsä-Serla*.

¹⁹³⁶ Written representations of Durkan Holdings, 6 February 2009, paragraph 44(c) and 27 June 2008, paragraph 33(c); Transcript of oral hearing with Durkan Holdings, 27 February 2009, at page 12.

¹⁹³⁷ Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, at paragraph 136.

¹⁹³⁸ Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, at paragraphs 137 to 141.

situation where a parent company holds 100 per cent of the shares in its subsidiary.

Succession

- III.25. Since the concepts of undertakings and legal personality are distinct, in attributing liability for breaches of Article 81(1) to an undertaking, *'when a violation is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the violation was committed, so that it can answer for it'* (emphasis added).¹⁹³⁹ The ECJ has confirmed that *'the concept of an undertaking covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed...When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement.'*¹⁹⁴⁰ It is therefore irrelevant if a legal entity responsible for an infringement has been sold or transferred to another entity since the violation was committed; provided the original legal entity still exists, liability remains with it and a new parent company will usually not be liable for infringements which pre-date its acquisition unless that new parent company forms part of the original undertaking responsible for the infringement.¹⁹⁴¹
- III.26. Where, however, the original legal entity no longer exists, it is necessary to consider whether there is functional and economic continuity ('undertaking identity') between the original entity and any new entity into which it may have merged.¹⁹⁴² This involves considering whether the physical and human assets which were responsible for the infringement have been acquired by another entity.¹⁹⁴³
- III.27. The ECJ has confirmed that events such as organisational changes should not enable liabilities for competition law breaches to be evaded:

*'...it must be noted that if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing reoccurrence by means of deterrent penalties...the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because...the successor has a different legal status and is operated differently from the entity that it succeeded.'*¹⁹⁴⁴

¹⁹³⁹ Case T-6/89 *Enichem Anic SpA v Commission* [1991] ECR II-1623, at paragraph 236.

¹⁹⁴⁰ Case C-280/06 *Autorita Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and Philip Morris*, judgment of 11 December 2007, at paragraphs 38 and 39.

¹⁹⁴¹ Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, at paragraphs 73-82.

¹⁹⁴² Commission decision in *PVC*, OJ L74, 17 March 1989, pages 1 to 20; Joined Cases C-40/73 and others *Suiker Unie v Commission* [1975] ECR 1663, at paragraphs 75 to 87.

¹⁹⁴³ See, for example, *Anic*, at paragraphs 237 to 239 and *C-297/98 P SCA v Commission*, at paragraphs 24 to 28.

¹⁹⁴⁴ Case C-280/06 *Autorita Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and Philip Morris*, judgment of 11 December 2007, at paragraphs 41 and 43.

Agency relationships

- III.28. Under EC law, an agent is a legal or natural person who is vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal) for the sale or purchase of goods or services by the principal. It is immaterial whether the agent acts for one or several principals.¹⁹⁴⁵
- III.29. An agency relationship arises at English common law where one party, the principal, consents that another party, the agent, should act on his behalf, and the agent consents to do so. An agent may be an employee of the principal, an independent contractor, a partner or any other person given authority to act on the principal's behalf. An agency relationship can be created by agreement (express or implied), by the ratification of the agent's acts by the principal or, in certain circumstances, by the operation of law. These principles are further outlined in the following paragraphs.
- III.30. No contractual document is required to create an express agency agreement; any means (including oral¹⁹⁴⁶) by which the principal expresses his consent for the agent to act on his behalf will suffice.¹⁹⁴⁷ Moreover, an agency agreement can be implied from the principal's acquiescence to, or recognition of, the acts of the agent. Likewise, the agent's consent to act on behalf of the principal can be implied from his actions.¹⁹⁴⁸ It may also be inferred that an agent will have such authority as is usual or customary, given the position he holds.¹⁹⁴⁹ In this respect, both parties' conduct should be interpreted objectively. An express or implied agency agreement will give the agent actual authority to represent his principal.
- III.31. As noted above, if a person purports to act on behalf of another, but without prior authority, subsequent ratification by the second person will retrospectively confer authority and will create an agency relationship in respect of the ratified act. Ratification can be implied from any act demonstrating an intention to adopt the relevant transaction, in certain circumstances even through silence.¹⁹⁵⁰
- III.32. A principal may also be bound by the acts of an agent where the principal has, by words or conduct, represented to a third party that the agent has authority to act on his behalf and the third party acts in reliance on that representation and alters his position as a result. In these circumstances, the agent is said to have 'ostensible' or 'apparent' authority to act on behalf of the principal.¹⁹⁵¹
- III.33. According to European case law, an agent can be regarded as part of the same undertaking as its principal:

¹⁹⁴⁵ See paragraphs 12 and 13 of the European Commission Guidelines on Vertical Restraints, OJ C291/4, 13 October 2000. See also Article 1(2) of Council Directive 86/653 on self employed commercial agents, implemented in national law by Regulation 2(1) of The Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053).

¹⁹⁴⁶ Save for some limited statutory exceptions, which are not relevant to the facts of this case.

¹⁹⁴⁷ *Briess v Woolley* [1954] A.C. 333.

¹⁹⁴⁸ *Branwhite v Worcester Works Finance Ltd.* [1969] 1 A.C. 552, 587; *Little v Spreadbury* [1910] 2 K.B. 658.

¹⁹⁴⁹ *Howard v Sheward* (1866) LR 2 CP 148.

¹⁹⁵⁰ *Wilson v Tuman* (1843) 6 M & G 236, 242; *Bank Meli Iran v Barclays Bank* [1951] 2 T.L.R. 1057, 1063.

¹⁹⁵¹ *Hely-Hutchison v Brayhead* [1968] 1 Q.B. 549, 583; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd.* [1964] 2 Q.B. 480, 503.

*'It is clear from case-law that, where an agent works for his principal, he can in principle be regarded as an auxiliary organ forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking.'*¹⁹⁵²

- III.34. A principal and agent will be regarded as forming part of the same undertaking where the agent does not assume financial and commercial risk, and does not determine its own conduct on the market independently.¹⁹⁵³ This will be the case, for example, where:
- (a) property in the goods sold does not vest in the agent, or the agent does not himself supply the contract services;
 - (b) the agent does not contribute to the costs relating to the supply of the goods or services;
 - (c) the agent is not obliged to invest in sales promotion;
 - (d) the agent does not maintain stocks of the contract goods at his own cost or risk;
 - (e) the agent does not create and/or operate an after-sales service, repair or warranty service (or operates one reimbursed by the principal);
 - (f) the agent does not make market-specific investments in equipment, premises or training of personnel;
 - (g) the agent does not undertake responsibility for product liability towards third parties;
 - (h) the agent does not take the risk of the customers' non-performance of the contract.¹⁹⁵⁴
- III.35. For the avoidance of doubt, the OFT considers that the identification of companies forming an undertaking is primarily a matter of EC law, but has nonetheless set out the relevant common law principles where they assist in the identification of an agent/principal relationship.
- III.36. Once it is established that a principal and agent form part of the same undertaking, the principal is unable to avoid liability for the actions of its agent by claiming it was unaware of the agent's actions, or did not authorise or approve those actions.¹⁹⁵⁵

¹⁹⁵² Case T56/99 *Marlines v Commission* [2003] ECR II-5225, at paragraph 60. See also Joined Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 539.

¹⁹⁵³ Case T-325/01 *DaimlerChrysler v Commission* [2005] ECR II-3319; Case C-217/05 *CEPSA* [2006] ECR I-11987. See also European Commission Guidelines on Vertical Restraints (2000), at paragraphs 13 to 16.

¹⁹⁵⁴ European Commission Guidelines on Vertical Restraints (2000), at paragraph 16. No material alterations to these principles are proposed in the European Commission Draft Guidelines on Vertical Restraints of 28 July 2009.

¹⁹⁵⁵ Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, at paragraph 139; Case T56/99 *Marlines v Commission* [2003] ECR II-5225, at paragraph 60.

E. Agreements or concerted practices between undertakings

III.37. Note that this Part E (Agreements or concerted practices) and Part F (Prevention, restriction and distortion of competition), set out the general legal principles in relation to those matters. The application of those principles to the types of Infringement particularised in this Decision is then set out in Parts G (Cover bidding) and H (Compensation payment arrangements)

Agreement 'and/or' concerted practice

III.38. Both the Chapter I prohibition and Article 81(1) apply to 'agreements' and/or 'concerted practices'.¹⁹⁵⁶

III.39. The ECJ has confirmed that it is not necessary for the purposes of finding an infringement, to characterise conduct exclusively as an agreement or as a concerted practice.¹⁹⁵⁷ The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two; on the contrary, they are intended:

'to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves'.¹⁹⁵⁸

III.40. The ECJ explained this in *Anic* as follows:

'The list in Article [81(1)] of the Treaty is intended to apply to all collusion between undertakings, whatever 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'.¹⁹⁵⁹

This reasoning has been expressly cited by the CAT in several cases.¹⁹⁶⁰

III.41. While there is a particular overlap between the concepts of agreements and concerted practices in the case of single complex infringements of long duration¹⁹⁶¹, the same principle will apply to discrete infringements of short duration. As the CAT has confirmed in its judgments in both the *JJB Sports/AllSports* and *Argos/Littlewoods* cases, both of which involved discrete infringements of comparatively short duration:

¹⁹⁵⁶ Section 2(1) of the Act and Article 81(1) of the EC Treaty.

¹⁹⁵⁷ Case T-7/89 *Hercules Chemicals NV v European Commission* [1991] ECR II-1711, at paragraph 264, substantially upheld on appeal in Case C-51/92P *Hercules Chemicals v Commission* [1999] ECR I-4235; Cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV (LVM) v Commission* [1999] ECR II 931, at paragraphs 695 to 698; Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 132.

¹⁹⁵⁸ Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 131; followed in Case T-9/99 *HFB Holding v Commission* [2002] ECR II-1487, at paragraph 190. See also *Argos Limited and Littlewoods Limited v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21(iii); *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(ii); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(ii).

¹⁹⁵⁹ Case C-49/92P *European Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 108.

¹⁹⁶⁰ *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17, at paragraphs 153 to 154 and *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, at paragraphs 148 to 149, both citing paragraphs 108 and 130 to 131 of the *Anic* judgment. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 201 and 206(ii); and *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(ii).

¹⁹⁶¹ See the decision of the European Commission in *Citric Acid* OJ L239, 6 September 2002, page 18, at paragraph 143 (not challenged on appeal: see Case T-59/02 *Archer Daniels Midland* [2006] 5 CMLR 28 and Case T-43/02 *Jungbunzlauer*, judgment of the Court of First Instance of 27 September 2006).

*'It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other'.*¹⁹⁶²

This position has since been upheld by the Court of Appeal.¹⁹⁶³

- III.42. It is not therefore necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

Agreements

- III.43. An agreement does not have to be a formal written agreement to be caught by the Chapter I prohibition. Nor does an agreement have to be legally binding, or contain any enforcement mechanisms.¹⁹⁶⁴ The Chapter I prohibition is intended to catch a wide range of agreements and concerted practices, including oral agreements¹⁹⁶⁵ and 'gentlemen's agreements'¹⁹⁶⁶, since anti-competitive agreements are, by their nature, rarely in written form.¹⁹⁶⁷

- III.44. The test is whether there has been:

*'a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the faithful expression of the parties' intention'.*¹⁹⁶⁸

The intention of the parties must be to conduct themselves on the market in a specific way.¹⁹⁶⁹ For example, an adherence to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action in the market.¹⁹⁷⁰

- III.45. The precise manner in which the parties' intention to behave on the market in accordance with the terms of the relevant agreement is expressed, is not therefore significant; an agreement may be express or it may be implied from

¹⁹⁶² *JJB Sports plc v OFT and AllSports Ltd v OFT* [2004] CAT 17, at paragraph 644; and *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 665.

¹⁹⁶³ *Argos Limited and Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21.

¹⁹⁶⁴ Commission decision in *Soda-ash/Solvay, CFK*, OJ L10, 15 January 2003, at paragraph 56;

Commission decision in *PVC*, OJ L239, 14 September 1994, at paragraph 30.

¹⁹⁶⁵ Case 28/77 *Tepea BV v Commission* [1978] ECR 1391.

¹⁹⁶⁶ Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661, at paragraphs 106 to 114.

¹⁹⁶⁷ See also the OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraph 2.7.

¹⁹⁶⁸ Case T-41/96 *Bayer AG v Commission* [2000] ECR II-3383, at paragraph 69, upheld on appeal in Cases C-2 and 3/01P *BAI and Commission v Bayer* [2004] ECR I-23. See also the judgment of the CAT in *JJB Sports plc v OFT and AllSports Ltd v OFT* [2004] CAT 17, at paragraphs 156 and 637; and *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, paragraphs 151 and 658; *Argos Limited & Littlewoods Limited v OFT and JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21(iv).

¹⁹⁶⁹ Case 41/69 *ACF Chemiefarma NV v Commission* [1970] ECR 661, at paragraph 112; Joined Cases 209/78 to 215/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, at paragraph 86; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256; Joined cases T-305/94 etc. *Limburgse Vinyl Maatschappij v Commission* [1999] ECR II 931, at paragraph 715; Case T-41/96 *Bayer v Commission* [2000] ECR II-3383, at paragraph 69. See also the judgment of the CAT in *JJB Sports plc v OFT and AllSports Ltd v OFT* [2004] CAT 17, at paragraphs 156 and 637; and *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraphs 151 and 658.

¹⁹⁷⁰ See, for example, Commission decision in *Polypropylene*, OJ L230, 18 August 1986, at paragraph 81.

the conduct of the parties.¹⁹⁷¹ It may also consist of either an isolated act or a series of acts or a course of conduct.¹⁹⁷²

- III.46. The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other parties does not mean that it is not party to the agreement (although these facts may be relevant to the level of penalty).¹⁹⁷³

Concerted Practices

Undertakings Concerting Together

- III.47. A concerted practice does not require an actual agreement (whether express or implied) to have been reached. Rather, as the ECJ held in *Dyestuffs*, a concerted practice is:

*'a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition'.*¹⁹⁷⁴

- III.48. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine its policy on the market independently. The ECJ explained this in its judgment in *Suiker Unie* in the following terms:

*'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 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'.*¹⁹⁷⁵

¹⁹⁷¹ See, for example, Commission decision in *Soda-ash/Solvay, CFK*, OJ L10, 15 January 2003, at paragraph 52.

¹⁹⁷² Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 81.

¹⁹⁷³ OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraph 2.8. See also, for example, Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 80; Cases T-25/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, at paragraphs 1389 and 2557; and Case T-28/99 *Sigma Technologie di Rivestimento Srl v Commission* [2002] ECR II-1845, at paragraph 40.

¹⁹⁷⁴ Case 48/69 *ICI Ltd v Commission* [1972] ECR 619 ('Dyestuffs'), at paragraph 64; followed in Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 26; Cases C-89/85 etc. *Alhström Osakeyhtiö v Commission* [1993] ECR I-1307 ('Woodpulp II'), at paragraph 63; Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 115; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 158; and Case T-9/99 *HFB Holding v Commission* [2002] ECR II-1487 at paragraph 211. See also *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17, at paragraph 151; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 146; *Argos and Littlewoods v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21(i); *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 196 and 206(iii); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 101 and 103(iii).

¹⁹⁷⁵ Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 173; followed in Case T-7/89 *Hercules Chemicals NV v Commission* [1991] ECR II-1711, at paragraph 258; Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 116 and Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 159. See also *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17, at paragraph 152; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 147; *Apex*

III.49. The requirement of independence was further explained as follows:

*'...although...[the]...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 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 in question, 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...'*¹⁹⁷⁶

III.50. A concerted practice may occur, in particular, where there are reciprocal contacts between undertakings which have the object or effect of removing or reducing uncertainty as to future conduct on the market.¹⁹⁷⁷ 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...'*¹⁹⁷⁸

and:

*'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.'*¹⁹⁷⁹

III.51. In order to prove concertation, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have expressly agreed a particular course of conduct on the market. It is sufficient that, by its statement of intention, the competitor should have eliminated or, at

Asphalt and Paving Co Limited v OFT [2005] CAT 4, at paragraphs 198 and 206(iv); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 102 and 103(iv).

¹⁹⁷⁶ Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 174; Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, at paragraph 121; followed in Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 117; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraphs 159 to 160; and Case T-9/99 *HFB Holding v Commission* [2002] ECR II-1487, at paragraph 212. See also *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17 ('Replica Kit'), at paragraph 152; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 147; *Argos and Littlewoods v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21(ii); *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 198 and 206(v); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 102 and 103(v).

¹⁹⁷⁷ Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 175. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(vi); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(vi).

¹⁹⁷⁸ Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraph 1849. See also *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17 ('Replica Kit'), at paragraph 158; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 154; *Argos and Littlewoods v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21(v); *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(vii); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(vii).

¹⁹⁷⁹ Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraph 1852. See also *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17 ('Replica Kit'), at paragraph 158; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 154; *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(viii); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(viii).

the very least, substantially reduced uncertainty as to the conduct on the market to be expected on his part.

- III.52. Moreover, the requirement of concertation may be satisfied by the unilateral disclosure of information by one party to another, where that information is 'at the very least' accepted by the recipient. Thus, in *Tate & Lyle* the CFI held that:

'...the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice'.¹⁹⁸⁰

- III.53. Similarly, the mere receipt of information concerning competitors may be sufficient to give rise to concertation. As noted by the CFI in *Tate and Lyle*:

'an undertaking, by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market. The Court considers that the conclusion also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors'.¹⁹⁸¹

- III.54. In *Aalborg Portland*, the ECJ stated that an undertaking which receives information relating to an anti-competitive arrangement without manifestly opposing it will be taken to have participated in a concerted practice unless that undertaking puts forward evidence to establish that it had indicated its opposition to the anti-competitive arrangement to its competitors:

'According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs'.¹⁹⁸²

- III.55. The rationale for this principle of law is that:

¹⁹⁸⁰ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035 at paragraph 54, upheld by the ECJ in Case C-359/01P *British Sugar plc v Commission* [2004] ECR I-4933, and cited in *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17 ('Replica Kit'), at paragraph 159; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 155; *Argos and Littlewoods v OFT* and *JJB Sports plc v OFT* [2006] EWCA Civ 1318, at paragraph 21(vi).

¹⁹⁸¹ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035 at paragraph 58, upheld by the ECJ in Case C-359/01P *British Sugar plc v Commission* [2004] ECR I-4933, citing Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 200; *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17, at paragraph 159; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 155.

¹⁹⁸² Cases C-204/00 P etc. *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 81, citing Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, at paragraph 155 and Case C-49/92 P *Commission v Anic* [1999] ECR I-4125, at paragraph 96.

'...a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery... That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement'.¹⁹⁸³

- III.56. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel¹⁹⁸⁴, unless it has publicly distanced itself from what was agreed in the meeting.¹⁹⁸⁵

Conduct on the Market

- III.57. According to the case law of the ECJ, the concept of a concerted practice requires, besides undertakings concerting together, conduct on the market pursuant to those collective practices, and a relationship of cause and effect between the two.¹⁹⁸⁶

- III.58. Where an undertaking participating in concerting arrangements remains active on the market, there is a presumption that it will take account of information exchanged with its competitors. In *Anic*, the ECJ held that:

'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 the market, particularly when they concert together on a regular basis over a long period, as was the case here'.¹⁹⁸⁷

This is because it is assumed that *'the recipient of the information in question cannot normally fail to take that information into account when formulating its policy on the market'.¹⁹⁸⁸*

- III.59. The ECJ has recently confirmed that this presumption applies even if the concerted action is the result of a single meeting between undertakings.¹⁹⁸⁹

¹⁹⁸³ Cases C-204/00 P etc. *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 84.

¹⁹⁸⁴ Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraph 1389.

¹⁹⁸⁵ Case T-141/89 *Tréfileurope Sales SARL v Commission* [1995] ECR II-791, at paragraph 85, citing Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 232; Case T-9/99 *HFB Holding v Commission* [2002] ECR II-1487, at paragraph 223; Cases C-204/00 P etc. *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 85, citing Case C-291/98 P *Sarrió v Commission* [2000] ECR I-9991, at paragraph 50.

¹⁹⁸⁶ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 118; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 161; and Case T-9/99 *HFB Holding v Commission* [2002] ECR II-1487, at paragraph 213. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(ix) followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(ix).

¹⁹⁸⁷ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 121; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 162; and Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(x); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(x).

¹⁹⁸⁸ *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 663.

¹⁹⁸⁹ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 29.

F. Prevention, restriction or distortion of competition

No need to prove anti-competitive effect where anti-competitive object established

- III.60. In the context of Article 81(1) EC, the ECJ has held that *'there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, restriction or distortion of competition'*.¹⁹⁹⁰ Equally, where the conduct in question is a concerted practice, the ECJ has held that although the concept presupposes conduct of the participating undertakings on the market, it does not necessarily imply that conduct should produce the concrete effect of restricting, preventing or distorting competition;¹⁹⁹¹ under Article 81(1), concerted practices are therefore prohibited regardless of their effect, when they have an anti-competitive object.¹⁹⁹²
- III.61. It follows that the OFT is not, when applying the Chapter I prohibition, 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.¹⁹⁹³
- III.62. Several Parties submitted that this approach is incorrect, on the basis of the CFI's judgment in *GlaxoSmithKline*.¹⁹⁹⁴ A number of different submissions were put forward on the basis of this judgment; namely:
- (a) the OFT must carry out a competitive analysis to determine whether the provision in question has an anti-competitive object or effect;¹⁹⁹⁵
 - (b) the OFT is required to consider the legal and economic context in which the undertakings operate¹⁹⁹⁶, which, it is said, the OFT has failed to do (contrary to its previous practice¹⁹⁹⁷);

¹⁹⁹⁰ Joined Cases 56/64 and 58/64 *Consten & Grundig v Commission* [1966] ECR 299 at page 342; 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, at paragraphs 14 to 15; Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 99; Cases T-25/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, at paragraphs 837, 1531 and 2589; Case T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, at paragraphs 72 to 74; Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, judgment of 20 November 2008, at paragraph 16; Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 29.

¹⁹⁹¹ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 124; Case C-199/92P *Hüls AG v Commission* [1999] ECR I-4287 at paragraphs 163 to 165 and Commission decision in *British Sugar*, OJ L76, 22 March 1999, page 1, at paragraph 95 substantially upheld on appeal in Cases T-202/98 *Tate and Lyle v Commission* [2001] ECR II-2035. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206 (xi); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(xi).

¹⁹⁹² Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraphs 122 to 123. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206 (xii); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(xii).

¹⁹⁹³ *Argos & Littlewoods v OFT* [2004] CAT 24, at paragraph 357.

¹⁹⁹⁴ Case T-168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, [2006] 5 CMLR 1589. This case is currently under appeal to the ECJ (Joined cases C-501/06 P etc.).

¹⁹⁹⁵ For example, written representations of Allenbuild, 4 July 2008, paragraph 4.7, citing *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, at paragraphs 120 to 121; and Bellamy & Child, Sixth edition, paragraph 2.078).

¹⁹⁹⁶ For example, written representations of Allenbuild, 4 July 2008, paragraph 4.10; Written representations of Ackroyd & Abbott Construction, 2 July 2008, paragraph 62.

¹⁹⁹⁷ For example, Written representations of Allenbuild, 4 July 2008, paragraphs 4.6 and 4.10.

- (c) an agreement may only be presumed to have an anti-competitive object if it may properly be presumed to deprive final consumers of the advantages of competition.¹⁹⁹⁸
- III.63. Caddick cited several European cases in support of its representation that, where it is not obvious that an agreement has the object of restricting competition, it is necessary to establish what anti-competitive effects would flow naturally from the agreement if implemented.¹⁹⁹⁹
- III.64. In response to these arguments, the OFT notes that the ECJ has recently made clear that, in order to find an ‘object’ infringement, an agreement or concerted practice need only be *capable* in an individual case, having regard to the legal and economic context, of preventing, restricting or distorting competition.²⁰⁰⁰ The OFT is therefore not required to conduct a competitive analysis to demonstrate an *actual* prevention, restriction or distortion of competition in any particular case.²⁰⁰¹ Moreover, an impact on consumer prices is not a pre-requisite to the finding of an ‘object’ infringement²⁰⁰², as the competition rules are *‘designed to protect not only the immediate interests of individual customers or consumers but also to protect the structure of the market and thus competition as such.’*²⁰⁰³
- III.65. Nor does the finding of anticompetitive object amount to a presumption of effects rebuttable by an analysis of actual effects.²⁰⁰⁴ In her Opinion in *T-Mobile Netherlands*, Advocate General Kokott explained this principle as follows:

*‘Ultimately...the prohibition on ‘infringements of competition by object’ resulting from Article 81(1) EC is comparable to the risk offences...known in criminal law: in most legal systems, a person who drives a vehicle... when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident. In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.’*²⁰⁰⁵

¹⁹⁹⁸ For example, written representations of Stainforth, 27 June 2008, paragraph 2.4(d); Written representations of Quarmby, 27 June 2008, paragraphs 3.1(d) and 3.4(a) (both Parties citing Case T to 168/01 *GlaxoSmithKline Services v Commission* [2006] ECR II-2969, at paragraphs 119 to 121.

¹⁹⁹⁹ Written representations of Caddick, 24 June 2008, paragraph 3.19, citing Case 27/87 *Erauw-Jacquery Sprl v La Hesbignonne Société Coopérative* [1988] ECR 1919, Case C-306/96 *Javico v Yves St Laurent* [1988] ECR I-1983, and Commission decision in *Sicasov* OJ [1999] L 4/27. Stainforth and Quarmby made similar representations (Written representations of Stainforth, 27 June 2008, paragraph 2.4(e); Written representations of Quarmby, 27 June 2008, paragraph 3.1(e)).

²⁰⁰⁰ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 31. See also the Opinion of AG Kokott in the same case, 19 February 2009, at paragraph 48.

²⁰⁰¹ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 43.

²⁰⁰² Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraphs 36 to 39. See also the Opinion of AG Kokott, 19 February 2009, at paragraphs 56 to 58, and the Opinion of AG Trstenjak in Case C-501/06 *GlaxoSmithKline Services v Commission*, 30 June 2009, at paragraphs 102 to 118.

²⁰⁰³ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 38.

²⁰⁰⁴ See paragraph III.60.

²⁰⁰⁵ Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands BV and Others*, 19 February 2009, at paragraph 47. See also the Opinion of Advocate General Trstenjak in Case C-501/06 *GlaxoSmithKline Services v Commission*, 30 June 2009, at paragraph 89.

- III.66. For the reasons given in paragraphs III.71 to III.157 below, the OFT considers that the agreements and/or concerted practices particularised in this Decision are capable of preventing, restricting or distorting of competition. In reaching that conclusion, the OFT has taken into account the legal and economic context in which the agreements and/or concerted practices were applied (see Sections II.C (Market Definition) and IV.B (Cover Pricing Background)).
- III.67. In light of the OFT's finding (at paragraphs V.8 to V.9 of the Legal Assessment section below) that the agreements and/or concerted practices described in this Decision had as their object the prevention, restriction or distortion of competition, the OFT sets out below details of the law on anti-competitive object, but not effect. Whilst a number of Parties submitted that the Infringements in which they were involved did not result in any anti-competitive effect, these representations are not considered further here (although they are taken into account, to the extent relevant to the seriousness of the Infringements, as part of the assessment of penalty in Section VI (Enforcement)).

The law on anti-competitive object

- III.68. The 'object' of an agreement and/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.²⁰⁰⁶
- III.69. Where the obvious consequence of an agreement or concerted practice is to prevent, restrict or distort competition, that will be its object for the purpose of the Chapter I prohibition.²⁰⁰⁷ This will be the case even if the agreement or concerted practice had other objectives.²⁰⁰⁸
- III.70. It is irrelevant whether the parties to the agreement and/or concerted practice have considered the anti-competitive nature of their conduct and appreciated that the object or effect of it might be anti-competitive. The only test is whether the object or effect of the conduct is *in fact* to prevent, restrict or distort competition.²⁰⁰⁹

Bid rigging

- III.71. Tendering procedures are designed to provide structured 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.²⁰¹⁰ As noted by the CAT, the importance of the independent preparation of bids is sometimes recognised in tender documentation by requiring tenderers to certify

²⁰⁰⁶ Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* [1984] ECR 1679, at paragraphs 25 to 26.

²⁰⁰⁷ Cases T-374/94 etc. *European Night Services v Commission* [1998] ECR II-3141, at paragraph 136, citing *Tréfilunior v Commission* [1995] ECR II-1063, at paragraph 109.

²⁰⁰⁸ Case 96/102 NV *IAZ v Commission* [1983] ECR 3369, at paragraphs 22 to 25.

²⁰⁰⁹ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 253.

²⁰¹⁰ OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraph 3.14, as cited by the CAT in *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 214(i) and reflected in its reasoning at paragraph 208; followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 13 and 104.

that they have not had any contact with each other in the preparation of their bids.²⁰¹¹

- III.72. Any tenders submitted as the result of collusion between prospective suppliers, which reduce the uncertainty of the outcome of the tender process, are likely to have an appreciable effect on competition. Indeed, the OFT considers that bid rigging agreements and/or concerted practices, by their very nature, restrict competition to an appreciable extent.²⁰¹² Both the Commission and the CFI have also accepted that collusive tendering has the object of restricting competition.²⁰¹³
- III.73. There are two key forms of tender processes: open and selective. Where the process is only open to selected bidders, whether on an invitational, list or other basis, rather than to all potential bidders, the loss of independence as a result of collusion with other bidders can have an even greater distortionary effect on the tendering process.²⁰¹⁴ This is because the undistorted level of competition is already limited by the restricted number of bidders.
- III.74. This Decision addresses two key forms of collusive tendering or bid rigging, which are considered more fully in parts G and H below:

- (a) **Cover pricing or cover bidding** occurs when a supplier/bidder (Bidder A) submits a price for a contract that is not intended to win the contract; rather, it is a price that has been decided upon in conjunction with another supplier/bidder (Bidder B) that wishes to win the contract.²⁰¹⁵ It therefore only gives an *impression* of competitive bidding, as the token bid submitted by Bidder A is higher than the bid of Bidder B who seeks to win the contract. Whether or not the decision by Bidder A not to submit a genuine competitive bid was taken in conjunction with Bidder B, the level of the uncompetitive bid submitted by Bidder A was set using commercially sensitive price information obtained from Bidder B.

Furthermore, a cover pricing arrangement may also include the payment by Bidder B to Bidder A of an agreed amount of money or other consideration to 'compensate' Bidder A for the fact that Bidder A has no prospect of winning the contract and/or to compensate for tendering costs already accrued by Bidder A (referred to in this Decision as a '**compensation payment**'); and

- (b) **Compensation payment arrangements (without cover bidding)** occur where two suppliers/bidders each prepare and submit their own bids,

²⁰¹¹ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 209; followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 104.

²⁰¹² OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraph 3.14.

²⁰¹³ See, for example, *European Sugar Cartel* OJ L140, 26 May 1973, page 17, upheld in Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663; *Building and Construction Industry in the Netherlands* OJ, L92, 7 April 1992, page 1; *Pre-Insulated Pipes Cartel* OJ, L24, 30 January 1999, page 1, upheld in Cases T-9/99 etc. *HFB Holding v Commission* [2002] ECR II-1487.

²⁰¹⁴ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 210 to 211; followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 104.

²⁰¹⁵ One Party submitted that, in giving a cover price, Bidder B does not necessarily wish to win the contract. Regardless of whether this assertion is factually correct, this is not critical to the OFT's Decision in this case. The understanding between Bidder A and Bidder B, that A will submit a bid at or above the level of the cover price given by B, will restrict competition whether or not B wishes to win the tender. The manner in which competition is restricted is illustrated by the factors described at paragraph III.99 below.

but agree that the winning party will pay the losing party an agreed sum of money, again often expressed by the parties as a payment to compensate for lost tendering costs and referred to in this Decision as a 'compensation payment'. Although, unlike cover bidding, both parties may still be hoping to win the tender, the level of bids is above the competitive level as a result of these arrangements. In some of these arrangements, the agreed level of compensation is expressly agreed to be added to the final tender bid(s).

- III.75. Although not relevant to the question of whether or not certain conduct does or does not infringe the Chapter I prohibition, a number of Parties made representations concerning the terminology used by the OFT to describe the conduct which is the subject of this Decision. In common with many other competition authorities, practitioners and other organisations, the OFT uses the terms 'bid rigging' and 'collusive tendering' interchangeably. This is demonstrated by the OFT's published guidance, which refers to '*collusive tendering (bid rigging)*' and, elsewhere '*bid rigging (collusive tendering)*'.²⁰¹⁶

Price fixing

- III.76. Price fixing may involve fixing either the price itself or the components of a price, and may also take the form of an agreement or concerted practice to restrict price competition. An agreement may therefore constitute a price fixing agreement or concerted practice where it restricts price competition even if it does not entirely eliminate it.²⁰¹⁷ Accordingly, any provision in an agreement and/or concerted practice between competitors which, directly or indirectly, in isolation or in combination with other factors under the control of the Parties, fixes the prices at which goods or services are sold, will amount to an infringement of the Chapter I prohibition.
- III.77. For the reasons set out in parts G and H below, the OFT considers that all of the cover pricing Infringements referred to in this Decision constitute forms of price fixing, and that the compensation payments described in this Decision may also do so.
- III.78. Several Parties disputed this conclusion in their responses to the Statement. Wright (Hull) highlighted the distinction in section 188(2) of the Enterprise Act 2002 between price fixing and bid rigging.²⁰¹⁸ The OFT accepts that not all instances of bid rigging will necessarily also involve price fixing, hence the distinction between bid rigging and price fixing in section 188(2) of the Enterprise Act 2002 - there may be arrangements which are caught by section 188(2)(f), but not by section 188(2)(a). However, the OFT does not accept the inference that price fixing and bid rigging arrangements must be viewed as mutually exclusive.
- III.79. Milward argued that bid rigging is a form of customer sharing, rather than price fixing, citing the European Commission decision in *Building and Construction in*

²⁰¹⁶ OFT Competition law guideline on *Agreements and Concerted practices* (OFT401, Edition 12/04), at paragraph 3.14 and *OFT's guidance as to the appropriate amount of a penalty* (OFT423, Edition 12/04), at footnote 8.

²⁰¹⁷ OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraphs 3.5 and 3.6.

²⁰¹⁸ Written representations of Wright (Hull), 27 June 2008, paragraph 34.

the Netherlands and leading textbooks in support of this argument.²⁰¹⁹ As noted above, the OFT does not view the various potential categories of anti-competitive behaviour caught by the Chapter I prohibition and/or Article 81(1) as being mutually exclusive. An agreement or concerted practice may, depending on the particular facts of the case in question, be categorised as one or more of price fixing, customer/market sharing, bid rigging, information exchange, etc.²⁰²⁰

- III.80. In relation to whether a penalty may be imposed on a small agreement, section 39(9) of the Act has a specific definition of 'price fixing agreement' for this purpose. The application of this section is considered further in paragraphs VI.31 to VI.37 below.

Exchange of competitively sensitive information

- III.81. The case law in relation to agreements and concerted practices cited at paragraphs III.38 to III.59 above includes a significant number of cases in which information, including pricing information, had been shared amongst competitors. The exchange of pricing information is particularly sensitive from a competition law perspective. Indeed, the mere disclosure of such information to competitors will almost certainly infringe the Chapter I prohibition where it is capable of influencing their future conduct on the market, as will its receipt (see paragraphs III.50 to III.55 above).
- III.82. The exchange of commercially sensitive pricing information between competitors is rarely acceptable. Such exchange eliminates uncertainty and replaces '*the risks of competition and the hazards of competitors' spontaneous reactions by co-operation*'.²⁰²¹ The Commission has explicitly stated that '*it is contrary to the provisions of Article [81(1)]...for a producer to communicate to his competitors the essential elements of his price policy*'.²⁰²²
- III.83. The CFI has previously held that the exchange of information between building contractors regarding the cost components of the contract, the characteristics of the tenders and the prices proposed by each contractor was anti-competitive:

'Where there is concertation by undertakings regarding the manner in which they intend responding to an invitation to tender, involving the exchange of information regarding, inter alia, the costs of the product concerned, its specific characteristics and a breakdown of the price tenders, having in particular the object and effect of revealing to its competitors the course of conduct which each contractor has decided to adopt or contemplates adopting on the market and being capable of leading to the fixing of certain conditions for the transaction, practical cooperation between contractors is deliberately

²⁰¹⁹ Written representations of Milward, 26 June 2008, paragraph 7.5, citing OJ [1992] L92/1, [1993] 5 CMLR 135, upheld on appeal Case T-29/92 *SPO v Commission* [1995] ECR II-289; *European Community Law of Competition*, Bellamy & Child, Sixth edition (2008) paragraph 5.083; *The EC Law of Competition*, Faull, J and Nikpay, A, Second edition (2007), paragraph 8.42.

²⁰²⁰ In *Elevators and Escalators* (COMP 38.823 Press Release of 21 February 2007), the Commission concluded that the undertakings involved had infringed Article 81 by way of bid rigging, price fixing, allocation of projects, market sharing and the exchange of information. This case also involved instances of cover bidding. (On appeal Cases T-145/07 etc. *OTIS and others v Commission*.) Likewise, in *Gas Insulated Switchgear* (COMP 38.899, Press Release of 24 January 2007), the Commission found that the undertakings involved had infringed Article 81 by way of market sharing, allocation of projects, market sharing, bid rigging and exchange of information. (On appeal Cases T-145/07 etc. *Siemens v Commission*.)

²⁰²¹ Cases 48/69 etc *ICI v Commission* [1972] ECR 619, at paragraph 119.

²⁰²² Commission Decision 74/292/EEC *IFTRA Glass Containers*, OJ 1974 L160/1 at paragraph 43.

substituted for the risks of competition and an infringement of Article [81(1)] of the Treaty is thereby committed'.²⁰²³

III.84. The OFT considers that the exchange of such information has the object and/or effect of revealing to competitors the course of conduct which each contractor decides to adopt on the market. Practical cooperation between competitors is thereby deliberately substituted for the risks of competition, and such information exchange therefore infringes the Chapter I prohibition.²⁰²⁴

III.85. Admiral disputed whether sharing commercially sensitive information between competitors is wrong. In describing the practice of cover bidding, Admiral stated:

*'There is certainly communication, between, normally two bidders. There is certainly the exchange of commercially sensitive information. There is certainly a use put to that commercially sensitive information. Of course there is nothing wrong with sharing commercially sensitive information. It is intellectual property which can either be withheld from or shared with others. What is done with it is entirely the choice of the owner of it.'*²⁰²⁵

III.86. This is a complete misstatement of the law relating to anti-competitive conduct. As the ECJ noted in *Asnef-Equifax v Ausbanc*:

*'According to the case-law on agreements on the exchange of information, such agreements are incompatible with the rules on competition if they reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted (John Deere v Commission, paragraph 90, and Case C-194/99 P Thyssen Stahl v Commission [2003] ECR I-10821, paragraph 81).'*²⁰²⁶

III.87. Quarmby and Stainforth submitted that, as they were not involved in hardcore cartel activity, any exchange of information which took place would therefore need to be analysed by reference to its effects before an infringement could be established.²⁰²⁷

III.88. The OFT considers that all of the Infringements particularised in this Decision involve bid rigging and also restrict price competition. Accordingly, it is not necessary to consider whether these agreements or concerted practices had an anti-competitive effect.

G. Cover bidding

III.89. As noted above, cover bidding occurs when a supplier/bidder (Bidder A) submits a price for a contract that is not intended to win the contract, rather it is a price that is the same as, or based on, a price given to it by another supplier/bidder

²⁰²³ Case T-29/92 *SPO v Commission* [1995] ECR II-289, at paragraph 2.

²⁰²⁴ Case 40/73 *Suiker Unie v Commission* [1975] ECR 1663 at paragraphs 173 and 174. Also *SPO v Commission* (ibid.).

²⁰²⁵ Written representations of Admiral, 26 June 2008, paragraph 16. Admiral did not dispute, however, that its cover bidding amounted to bid rigging (Letter to the OFT from Admiral's legal representatives, Irwin Mitchell, dated 15 January 2009).

²⁰²⁶ Case C-238/05 *Asnef-Equifax v Ausbanc* [2006] ECR I-11125, at paragraph 51.

²⁰²⁷ Written representations of Quarmby, 27 June 2008, paragraphs 3.23 to 3.28; Written representations of Stainforth, 27 June 2008, paragraphs 2.24 to 2.27.

(Bidder B) that wishes to win the contract, and is higher than Bidder B's own intended bid.

III.90. It is clear that in communicating with one another to establish the price at which Bidder A will bid and the fact that Bidder B will be bidding below that price, the parties to a cover bidding arrangement knowingly distort the normal tendering process in which each bid would be independently formulated to ensure competition (see paragraphs III.71 to III.72 above). Collusion of this sort between bidders fundamentally undermines the specific competitive mechanism that has been put in place by the client.

III.91. It is also clear that by communicating in this way, the parties to a cover bidding arrangement '*knowingly substitute practical co-operation between them for the risks of competition*'. Bidder A is avoiding the risk of winning a contract he does not want, without the risks and disadvantages that he may face if he chose not to submit a bid or unilaterally submitted a high bid in the hope it was unsuccessful. Bidder B is reducing (or in some cases eliminating) the risk that he will not win the contract by ensuring that a competitor's bid is higher than his own.

Cover bidding as a form of concerted practice

III.92. The principles for identifying a concerted practice, described at paragraphs III.47 to III.59 above, were applied by the CAT in the context of cover bidding in *Apex*.²⁰²⁸

III.93. The CAT held that where (1) the tenderer receiving cover had had contact with the tenderer giving cover, and (2) the tenderer giving cover then gave cover by sending the tenderer receiving cover figures for a cover bid, this constituted concertation.²⁰²⁹ The CAT highlighted that these facts:

- (a) showed that the conduct was not unilateral;
- (b) infringed against the principle that each undertaking must determine independently the policy it intends to adopt on the market; and
- (c) constituted direct contact between participants which had as its object or effect:
 - i. the disclosure by one participant to another of the course of conduct which the former was to adopt or was contemplating adopting in the tendering process; and
 - ii. influencing a participant's conduct on the market.²⁰³⁰

III.94. This conduct was expressly held to contravene the principle against direct or indirect contact, set out at paragraph III.49.²⁰³¹ It was also held to constitute a prohibited reciprocal contact in that the disclosure by the party receiving cover

²⁰²⁸ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4.

²⁰²⁹ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 217 to 220, 227 to 229 and 240 to 242; see also *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 107.

²⁰³⁰ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 219, 229 and 242; see also *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 107.

²⁰³¹ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 220, 229 and 242; see also *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 107.

of its future intentions on the market was accepted by the party giving cover.²⁰³² As a result, the parties substituted practical cooperation for the risks of competition which substantially eliminated the uncertainty they each faced as to the conduct of the other in the tender process.²⁰³³

- III.95. In *Apex*, the CAT also applied the concept of conduct on the market, following the principles set out in *Anic*²⁰³⁴ (see paragraph III.58 above).²⁰³⁵ There, the tenderer giving cover was presumed to have taken account of the information that the tenderer receiving cover was not intending to submit a competitive bid when determining its own conduct in the tendering process, while the tenderer receiving cover was similarly presumed to have taken account of the figures it received for a cover bid when determining its conduct in the tendering process.
- III.96. The CAT explicitly noted that it was not necessary for the tenderer receiving cover to actually place a cover bid with the information received in order for the conduct of the undertakings in question to constitute a concerted practice.²⁰³⁶

The anti-competitive object of cover bidding

- III.97. The OFT considers that cover bidding has as its obvious consequence the prevention, restriction or distortion of competition, for the reasons set out at paragraphs III.90 and III.91 above, and described further below. Accordingly, in order to establish an infringement of the Chapter I prohibition in these circumstances, it is not necessary for the OFT to demonstrate that it also had this effect.
- III.98. The practice of cover bidding has previously been accepted by the CAT as having an anti-competitive object. In *Apex*²⁰³⁷ the CAT concluded that the parties' conduct in giving, or in receiving and considering, a cover price had as its object the prevention, restriction or distortion of competition.²⁰³⁸
- III.99. Having rejected *Apex*'s argument that the object of its conduct was to remain on its customers' tender lists²⁰³⁹, the CAT went on to conclude that the submission of a cover bid has an anti-competitive object or effect in that:
- (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'.²⁰⁴⁰*

²⁰³² See *Suiker Unie* at paragraph 175 and *Cimenteries* at paragraph 1849 – described at paragraphs III.49 and III.50 above.

²⁰³³ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 223, 232 and 245; see also *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 107.

²⁰³⁴ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 121.

²⁰³⁵ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 221, 230 and 243.

²⁰³⁶ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 224, 233 and 236.

²⁰³⁷ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4.

²⁰³⁸ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 223 to 224. See also paragraphs 233, 235 and 246 of the CAT's judgment.

²⁰³⁹ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 248 to 250.

- III.100. The OFT considers that each of these consequences arise in every instance of cover pricing found to be an Infringement in this Decision. Not only do these four consequences indicate that the object of the arrangements was anti-competitive, but also that the arrangements were, at a minimum, capable²⁰⁴¹ of anti-competitive effects. The restriction, prevention and/or distortion of competition which results from these four factors is in itself the anti-competitive object or effect of the cover bidding arrangement; it is not the case that an anti-competitive object or effect only arises where there is a direct inflation of the price paid by the customer or a complete elimination of competition from the tender process.
- III.101. Several Parties questioned the CAT's conclusion²⁰⁴², or stated that these factors do not arise in the context of their particular Infringements.²⁰⁴³ First, these Parties argued that, instead of submitting a cover bid, they could have unilaterally submitted an inflated bid or declined to bid, which would also have reduced the number of competitive bids (see sub-paragraph (a) above), but without breaching competition law.²⁰⁴⁴ However, cover bidding infringes the Act because it arises as a result of collusion between competitors. The fact that the same result may arguably arise as a result of wholly unilateral action cannot absolve the Parties of liability, nor does it lead to the conclusion that a cover bid is a 'genuine' or 'competitive' bid.²⁰⁴⁵ A competitive bid is one which reflects the bidder's own perception of the potential risks and rewards involved in the project and in the wider marketplace. Whilst a bidder might unilaterally submit a high bid in the hope of not winning a tender, in doing so it will take into account the risk that the bid could be so low as to win the job, or so high as to damage its credibility. Where a bidder submits a cover price, however, this risk is curtailed as the price has simply been obtained from a competitor. In this way, a bidder submitting a cover price deliberately substitutes practical cooperation for the risks of the competitive process²⁰⁴⁶ and the bid cannot, therefore, be regarded as 'genuine' or 'competitive'.
- III.102. In relation to (b) and (c) of paragraph III.99, several Parties submitted that their customers would have been extremely unlikely to seek a replacement bid, or that this would have been unfeasible.²⁰⁴⁷ Whilst recognising that the customer may not seek a replacement bid in every instance in which a tender is declined or withdrawn, the OFT does not agree that the likelihood of a customer inviting

²⁰⁴⁰ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 251. See also *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 14 to 15.

²⁰⁴¹ See paragraph III.64 above.

²⁰⁴² For example, written representations of Robert Woodhead, 2 July 2008, paragraph 2.13.

²⁰⁴³ For example, written representations of R Durtnell, 27 June 2008, paragraph 160; Written representations of Haymills, 27 June 2008, Annex 3, paragraph 4. See also Written representations of Quarmby, 27 June 2008, Annex 1, paragraph 22.

²⁰⁴⁴ Written representations of Haymills, 27 June 2008, Annex 3, paragraph 4(a); Written representations of R Durtnell, 27 June 2008, paragraph 160(a); Written representations of Quarmby, 27 June 2008, Annex 1, paragraph 22(a).

²⁰⁴⁵ Written representations of Robert Woodhead, 2 July 2008, paragraph 2.13.4; Written representations of Allenbuild, 4 July 2008, paragraphs 4.11 to 4.19.

²⁰⁴⁶ *Case C-209/07 Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, judgment of 20 November 2008, at paragraph 34.

²⁰⁴⁷ Written representations of R Durtnell, 27 June 2008, paragraphs 160(b) and (c); Written representations of Haymills, 27 June 2008, Annex 3, paragraphs 4(b) and (c). Alternatively, one Party argued that as the cover bid is 'competitive', there is no need for the tenderer to seek alternative bids (Written representations of Robert Woodhead, 2 July 2008, paragraphs 2.13.2 – 2.13.3).

a replacement bid is '*extremely low*'.²⁰⁴⁸ It is notable that within this Decision, there are several examples of tenders where clients did seek a replacement bidder after an invited tenderer declined to bid, such as Infringements 164 and 207, and in certain cases, such as Infringement 164, the replacement bidder tendered a bid which eventually won. Moreover, regardless of the *likelihood* of replacements being sought, the submission of a cover bid in any event deprives the customer of the *opportunity* of seeking a replacement bid.

III.103. With respect to (d) of paragraph III.99, the Parties put forward two main arguments. First, it was argued that future tenders are unlikely to be impaired as the Infringements are individual and discrete, as opposed to previous cover bidding cases where the contact between competitors was more regular and long term, and often involved all tenderers making payments and rotating bids.²⁰⁴⁹ The OFT does not consider this characterisation of its previous findings to be accurate. In particular, in *West Midlands Flat Roofing*²⁰⁵⁰ (which gave rise to the CAT's decision in *Apex*), the OFT concluded that there was a series of individual agreements or concerted practices, which had the object of fixing prices, each of which was treated as a discrete infringement. *Apex* itself was involved in two instances of cover bidding, each with different counter-parties, and involving none of the factors put forward to suggest that this aspect of the CAT's analysis should not apply to the present case.

III.104. The Parties also contended that any impairment of future tenders would be a separate infringement and should therefore not be taken into account by the OFT in this Decision.²⁰⁵¹ This argument rests on a misinterpretation of the CAT's remark in *Apex*, which refers to harm to future tenders caused not by collusion in relation to those future tenders (which would indeed be a separate infringement), but to lasting harm or potential harm caused by the collusion on the current infringement, as shown by the CAT's comments on duration of the infringement:

*'[I]n 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.'*²⁰⁵²

III.105. Such impact may arise in the following ways:

- (a) having submitted a bid with the intention of staying on the tenderer's lists for future tenders, new entrants who might otherwise have been invited to compete may not be able to gain entry to those lists for future tenders;
- (b) future tendering processes are more susceptible to cover bidding because the competitors who have successfully stayed on the tender lists are aware of one another's willingness to engage in cover bidding, thus reducing the risks involved for one firm to approach another to suggest such conduct;

²⁰⁴⁸ Written representations of Haymills, 27 June 2008, Annex 3, paragraph 4(b).

²⁰⁴⁹ Written representations of R Durnell, 27 June 2008, paragraph 160(d).

²⁰⁵⁰ OFT Decision CA98/01/2004, Case CP/0001-02 *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*, 16 March 2004, at paragraphs 374 to 375.

²⁰⁵¹ Written representations of Haymills, 27 June 2008, Annex 3, paragraph 4(d).

²⁰⁵² *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 278.

- (c) tenderers' perceptions as to what constitutes a competitive price will be distorted by seeing inflated cover bids, which may affect their assessment when deciding whether to accept future tendered bids.

III.106. It is notable that many Parties justified their decisions to submit cover bids on the basis that they wished to remain on a client's tender list for future work. This highlights those Parties' perceptions that replacement bidders would otherwise be sought for future work, to the detriment of the Party in question and to the benefit of potential competitors, and that the purpose of cover bidding was to prevent that change in the competitive environment from occurring.

III.107. A large number of Parties submitted in their responses to the Statement that the instances of cover bidding in which they were involved did not have the obvious consequence of preventing, restricting or distorting competition and, consequently, did not have an anti-competitive object.²⁰⁵³ Reasons advanced in support of this argument include the following:

- (a) in the absence of cover bidding, the company taking a cover price would unilaterally submit an inflated bid, or no bid at all, so the cover bidding made no difference to the outcome of the tender;²⁰⁵⁴
- (b) other 'genuine' bidders participated in the tender, so the practice of cover bidding did not deprive the customer of a competitive outcome;²⁰⁵⁵
- (c) the bid submitted by the company giving a cover price was unaffected, as (i) it was only asked for a cover price after it had calculated (alternatively, after it had submitted) its own bid; and/or (ii) although it had a degree of certainty about one competitor's bidding intentions, it did not have any certainty with respect to other potential bidders, such that it would still be constrained by competition in calculating its bid.²⁰⁵⁶

III.108. The OFT considers these to be variants based on the same premise; namely that cover bidding made no difference to the outcome of the tender process. In the OFT's view, these arguments are aimed at analysing the *effects* of the cover bidding arrangement by reference to a counterfactual scenario. As the CAT noted in *Argos and Littlewoods*, '*If an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability.*'²⁰⁵⁷ Moreover, none of the submissions listed in the preceding paragraph undermine the reasoning of the CAT identified in paragraph III.99 above. The representations listed in sub-paragraphs (a) and (b) above are similar to those advanced by the appellant in *Apex*²⁰⁵⁸, and were not accepted by the

²⁰⁵³ Alternatively, cover bidding does not reveal, in itself, an alteration of competition (for example, written representations of Ackroyd & Abbott, 2 July 2008, paragraph 63 to 64).

²⁰⁵⁴ For example, written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 22 to 27; Written representations of Stainforth, 27 June 2008, paragraphs 2.14 to 2.16; Written representations of Quarmby, 27 June 2008, paragraphs 3.13 to 3.15.

²⁰⁵⁵ For example, written representations of R Durnell, 27 June 2008, paragraph 160(a).

²⁰⁵⁶ For example, written representations of A H Willis, 27 June 2008, paragraph 39; Written representations of Pearce, 14 July 2008, paragraph 2.4; Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 18.

²⁰⁵⁷ *Argos & Littlewoods v OFT* [2004] CAT 24, at paragraph 708.

²⁰⁵⁸ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 150 to 152.

CAT. However, the OFT has addressed these arguments, to the extent relevant, in considering the seriousness of the Infringements in Section VI (Enforcement).

- III.109. Quarmby sought to rebut the OFT's conclusion that cover pricing has as its object the restriction of competition by adducing in evidence an economics report which concluded that the Party's conduct could not be presumed to have any economic effect.²⁰⁵⁹ Several other Parties submitted that it cannot be assumed that cover bidding is likely to produce negative effects on the market and lead to a reduction in consumer welfare such as to raise a presumption that, by its very nature, it would restrict competition.²⁰⁶⁰
- III.110. As noted in paragraph III.65, however, a finding of anticompetitive object does not amount to a presumption of effects rebuttable by an analysis of actual effects. Moreover, it is not necessary to find an actual reduction in consumer welfare in each case where an 'object' infringement is found.²⁰⁶¹ The OFT nevertheless considers that cover bidding is at a minimum capable of leading to a reduction of consumer welfare as it suppresses the competitive process which would otherwise exist (either if the party taking a cover price submitted a properly estimated bid, or if it withdrew from the tender process and enabled the customer to seek a replacement bid). It also deceives the customer into believing that tender prices have been independently determined, when they have not, thereby giving him a distorted view of the market.
- III.111. Several Parties submitted that cover pricing is motivated by a desire not to be dropped from customer tender lists and/or not to upset or delay the tender process.²⁰⁶² Wright (Hull) submitted that it had no intention of fixing or attempting to fix prices.²⁰⁶³ However, the motivation of an undertaking in submitting a cover bid, whether rational – such as seeking to remain on a selective tender list – or not, is irrelevant. The object of an agreement and/or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it.²⁰⁶⁴ A motive of needing to supply a price in order to continue to receive tender enquiries was explicitly considered and rejected by the CAT in *Price*.²⁰⁶⁵
- III.112. Other Parties submitted that customers would have been aware of the practice of cover bidding and can be assumed to have taken this into account in designing their tender process²⁰⁶⁶ Again, the OFT rejects this submission as customers cannot be assumed to have knowledge of cover bidding in relation to a specific tender when the intention of a Party engaging in this practice was to appear to submit a 'genuine' bid. In particular, a customer would have no

²⁰⁵⁹ Written representations of Quarmby, 27 June 2008, paragraph 3.2. The economics expert's report adduced in evidence purports to assess the effect of the conduct against a counterfactual scenario (Written representations of Quarmby, 27 June 2008, Annex 1, paragraphs 15 to 24).

²⁰⁶⁰ For example, written representations of Milward, 26 June 2008, paragraph 7.6.

²⁰⁶¹ See paragraphs III.60 to III.66.

²⁰⁶² For example, written representations of Stainforth, 27 June 2008, paragraph 2.12; Written representations of Milward, 26 June 2008, paragraph 7.7.

²⁰⁶³ Written representations of Wright (Hull), 27 June 2008, paragraph 34.

²⁰⁶⁴ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 250.

²⁰⁶⁵ See paragraphs III.68-69 and, in relation to cover pricing, *Richard W Price (Roofing Contractors) Limited v OFT* [2005] CAT 5, at paragraph 54.

²⁰⁶⁶ See, for example, written representations of Allenbuild, 4 July 2008, paragraph 4.16; Written representations of Quarmby, 27 June 2008, paragraph 3.12. Similarly, McGinley Holdings stated that the OFT had failed to ask customers whether they were aware of cover pricing, and whether this was a factor in determining how many bidders they would invite to tender (Written representations of McGinley Holdings, 27 June 2008, paragraph 23).

means of identifying if any or all of the bids it received were from tenderers engaged in cover pricing. Moreover, an infringement of the Act cannot be rendered lawful simply because the client could have taken greater precautions to prevent the unlawful arrangements from occurring or taken greater steps to minimise the effects of the unlawful arrangements.

- III.113. As a result, the OFT does not consider the above arguments undermine its conclusion that the cover bidding Infringements did have an anti-competitive object.

Tenders where no contractor is ultimately appointed

- III.114. In a few Infringements, the customer conducted a tender process but either did not appoint a contractor, or it appointed a contractor but ultimately did not proceed with the tendered job. The OFT does not consider, however, that this detracts from its analysis of the relevant Infringements. In particular, the Parties in these circumstances entered into an agreement and/or concerted practice with the object of preventing, restricting or distorting competition and also acted in pursuance of that arrangement. As such, the Infringement took place at a time before it was known that the contract would not proceed. As the OFT is not required to analyse the effects of the arrangement (see paragraphs III.60 to III.67 above), the fact that the tender process was subsequently abandoned is immaterial to the finding of an infringement. The OFT also notes that the customer in *Price*²⁰⁶⁷ ultimately did not appoint a contractor, but this did not preclude the finding of an 'object' infringement.

Cover bidding as a form of bid rigging

- III.115. Some Parties suggested that cover bidding is not as serious as bid rigging as it does not entail bid rotation, bid allocation or payments between bidders, each of which are characteristics of hardcore collusive tendering.²⁰⁶⁸ The OFT does not accept that bid rigging necessarily involves any or all of bid rotation, bid allocation or payments between bidders. Bid rigging can take a myriad of forms, including cover bidding.
- III.116. One Party submitted that cover bidding does not constitute bid rigging, as the cover pricing arrangement does not involve all bidders in the tender process.²⁰⁶⁹ Again, any suggestion that bid rigging must necessarily involve all potential bidders in a tender process is not supported by case law. By the same analogy, an agreement or concerted practice whereby competitors directly fix the sale price of a particular product would have to involve every single supplier of that particular product before it could constitute price fixing under Chapter I / Article 81(1). In the OFT's view, this reasoning is clearly unsustainable.

Whether cover bidding is a less serious form of bid rigging

- III.117. Several Parties accepted that their conduct amounted to bid rigging, and an object infringement of the Act, but considered that the practical effects were at the lowest end of the scale of seriousness for bid rigging infringements. As the

²⁰⁶⁷ *Richard W Price (Roofing Contractors) Limited v OFT* [2005] CAT 5, at paragraph 45(l).

²⁰⁶⁸ See, for example, written representations of Stainforth, 27 June 2008, paragraphs 2.8 to 2.9; Written representations of Allenbuild, 4 July 2008, paragraph 4.18.

²⁰⁶⁹ Written representations of A H Willis, 27 June 2008, paragraph 33. Alternatively, the company giving the cover price was still constrained by competition due to the presence of other 'genuine' bidders.

OFT considers that the Infringements have as their object the prevention, restriction or distortion of competition, it is not required to consider the effects of the conduct in order to establish a breach of the Chapter I prohibition. The seriousness of the Infringements is, however, reflected in the starting point adopted at Step 1 of the penalty calculation and these representations are considered, to the extent relevant, in Section VI (Enforcement).

III.118. Several Parties submitted that as they were not making supra-competitive profits, their conduct could not be considered to be 'hardcore'.²⁰⁷⁰ The OFT does not consider the level of a Party's profits to be a decisive factor in establishing its involvement in an Infringement. Moreover, as the OFT considers that the agreements and/or concerted practices particularised in this Decision had the object of restricting, preventing or distorting competition, there is no need to consider their effects (see paragraph III.60, above) and therefore neither the Party nor the OFT is in a position to know what the Parties' levels of profits might have been absent the Infringements.

Cover bidding as a form of price fixing

III.119. In cover bidding arrangements price competition is restricted in two ways. First, the party receiving cover submits a price determined directly or indirectly by the party giving cover. Secondly, the party giving cover determines its price in the knowledge that the party receiving cover will be submitting a high bid not intended to win the tender.

III.120. A number of Parties submitted that cover pricing (alternatively, the particular instance of cover pricing in which they engaged) does not constitute price fixing. A number of arguments were advanced in support of this conclusion.

III.121. Wright (Hull) submitted that the conduct it engaged in did not constitute price fixing '*in the sense in which the ordinary person would understand those words*'.²⁰⁷¹ The OFT notes that the Chapter I prohibition operates on the basis of a statutory interpretation informed by case law.

III.122. Bramall/Frank Haslam submitted that it was not involved in any centralised system where the ability of the various competitors to set their prices freely was limited, and its conduct was therefore less serious.²⁰⁷² The OFT rejects any suggestion that price fixing necessarily involves a centralised system with regular exchanges of detailed price information. As noted above, the CAT concluded in *JJB Sports/AllSports* and *Argos/Littlewoods*²⁰⁷³ that the appellants had engaged in price fixing, although both cases involved discrete infringements of comparatively short duration.

III.123. A few Parties submitted that cover pricing cannot be regarded as price fixing, as other 'genuine' bidders will be involved in the tender so the company giving a cover price will still have to compete to win.²⁰⁷⁴ The suggestion that a price

²⁰⁷⁰ For example, written representations of R Durtnell, 27 June 2008, paragraph 161; Written representations of Clegg, 27 June 2008, paragraph 103.

²⁰⁷¹ Written representations of Wright (Hull), 27 June 2008, paragraph 34.

²⁰⁷² Written representations of Bramall and Frank Haslam Milan, 27 June 2008 (as amended on 30 March 2009), paragraphs 2.10 to 2.11 and 2.20 to 2.23, citing T-29/92 *SPO v Commission* [1995] ECR II-289.

²⁰⁷³ *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17; *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24.

²⁰⁷⁴ Written representations of R Durtnell, 27 June 2008, paragraph 64; Written representations of Milward, 26 June 2008, paragraph 7.7.

fixing arrangement must involve all potential suppliers of the product or service in question is spurious (see also paragraph III.116). Similarly, R Durnnell submitted that, where a cover pricing arrangement has little effect on price competition, then it should not be considered price fixing.²⁰⁷⁵ The OFT refers to paragraph III.76, and reiterates that an agreement that restricts price competition even if does not eliminate it will nonetheless constitute a price-fixing agreement. Moreover, the price that is 'fixed' need not be the price that ultimately wins the tender (or is intended to win the tender). Accordingly, the understanding between the giver and receiver of the cover price that the receiver will submit a price at or above the level discussed will amount to price fixing regardless of whether the tender process involves other bidders unconnected with the cover pricing arrangement.

- III.124. Propensity and Bowmer & Kirkland stated that, as cover prices are exchanged at the end of the tender process, a bidder giving cover would have already determined its own price, which would therefore not be impacted by the knowledge that the company taking cover was not intending to win.²⁰⁷⁶ The OFT notes that a cover price will typically be requested some time in advance of the tender submission date, even if the actual cover price is not given until just before the tender deadline.²⁰⁷⁷ A bidder giving a cover price is, therefore, likely to know that its competitor is not intending to win the tender at the time it determines its own price, even if the cover price is not actually given until after that time. In any event, even if the scenario put forward by these Parties were factually correct in relation to any particular Infringement, price competition would still be restricted as the bidder receiving cover would submit a price determined directly or indirectly by the party giving cover.

Cover bidding and the exchange of commercially sensitive information

- III.125. The giving and receiving of cover bids as part of a tendering process is one example of the anti-competitive exchange of pricing information. Similarly, the disclosure of an intended tender bid, or any elements comprising the first round or provisional price tendered during the tender process prior to final bids, similarly constitute unlawful exchanges of pricing information in breach of the Chapter I prohibition.
- III.126. A H Willis disputed this conclusion, arguing that the disclosure of information about whether a party intends to compete for a tender is unimportant, particularly given that tenders generally involve multiple parties. As a result, A H Willis submitted that the information exchanged does not constitute a serious infringement of the Chapter I prohibition.²⁰⁷⁸ This argument ignores the fact that, in addition to the disclosure of one party's intention not to compete for a tender, pricing information will also be communicated between competitors, with the intention that one party will bid at or above this price, and the other below that price. In any event, the OFT considers that the disclosure to a competitor of whether or not a party intends to compete for a tender is also capable of anti-competitive object or effect (whether or not pricing information is also exchanged) as it substantially reduces the uncertainty faced by that competitor on the market.

²⁰⁷⁵ Written representations of R Durnnell, 27 June 2008, paragraph 63.

²⁰⁷⁶ Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 5.23; Written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 18 and 26.

²⁰⁷⁷ See paragraph IV.73 of the Conduct of the Parties section.

²⁰⁷⁸ Written representations of A H Willis, 27 June 2008, paragraph 34.

Cover bidding involving compensation payments

- III.127. As noted above, some cover bidding arrangements include the payment by the party giving cover to the party receiving cover of an agreed amount of money (a compensation payment). A compensation payment is often expressed by the parties concerned as a payment to compensate for lost tender costs, although, in some instances, it is also referred to as payment to 'back off' or 'stand down'.
- III.128. The OFT considers that the principles as to why cover bidding has an anti-competitive object and is capable of anti-competitive effects (as described in paragraph III.99 above) apply whether or not, in addition to the provision of a cover bid, a compensation payment is also agreed.
- III.129. It is wholly irrelevant that a compensation payment made in conjunction with a cover bid may be expressed as being to cover the recipient party's tender costs. The object of the agreement remains the same as for any other cover bid arrangement, namely an agreement not to compete against each other. As such, it is irrelevant that the Parties may claim that their intention was to use compensation payments as '*an insurance policy against expensive tendering costs*'.²⁰⁷⁹ The object of an agreement and/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.²⁰⁸⁰
- III.130. Cover bidding infringements in which participants offer (or request) inducements (such as compensation payments) to (or from) other cartel participants are more serious than infringements where no such inducement is offered. Such an agreement further distorts the tender process: the supplier providing the cover and who will make the compensation payment is at the least incentivised to recover the cost of that payment by further inflating his tender price in addition to any inflation due to reduced competition from the provision of a cover price.
- III.131. Moreover, the OFT considers that it is clear that the Parties were fully aware that an agreement to make a compensation payment was not legitimate, as in all instances compensation payments were processed between the relevant Parties by means of false invoices. The relevant Parties were therefore careful to take steps to cover up the fact that they had entered into such an arrangement.
- III.132. Bowmer & Kirkland stated that, in order to constitute an infringement of the Chapter I prohibition, the offer of a compensation payment must be conditional on the recipient of the offer (Bidder A) withdrawing or submitting an uncompetitive tender. If A was not intending to compete in the first place, the situation must be analysed by reference to the competition which would have existed in the absence of the offer of payment. Bowmer & Kirkland therefore submitted that, if Bidder A was not intending to compete in the first place,

²⁰⁷⁹ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.72.

²⁰⁸⁰ Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rhein zinc GmbH v Commission* [1984] ECR 1679, at paragraphs 25 to 26.

there would have been merely an *attempt* to prevent restrict or distort competition, which is not actionable under the Act.²⁰⁸¹

III.133. The OFT considers this argument to be without merit, as it is aimed at analysing the *effects* of the arrangement by reference to a counterfactual scenario, rather than being an objective analysis of its aims. As the CAT noted in *Argos and Littlewoods*, '*If an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability.*'²⁰⁸² The OFT's analysis of the aims and consequences of cover bids accompanied by compensation payments is applicable whether or not the party offered a compensation payment was intending to compete prior to receiving that offer.

III.134. This submission also fails to take account of the fact that, by entering into the arrangement and accepting the offer of payment, Bidder A has indicated to Bidder B its intended course of conduct on the market and accepted from Bidder B similar information.

III.135. The OFT considers that an agreement to make a compensation payment in conjunction with cover bidding has as its obvious consequence the prevention, restriction or distortion of competition, for the reasons set out in paragraphs III.99 and III.130. Accordingly, in order to establish an infringement of the Chapter I prohibition in these circumstances, it is not necessary for the OFT to demonstrate that it also had this effect.²⁰⁸³

H. Compensation payment arrangements

III.136. A compensation payment agreement or concerted practice (not involving cover pricing) occurs where two suppliers each prepare and submit their own bids but agree that the winning party will pay the losing party an agreed sum of money, again often expressed by the parties as a payment to compensate for tendering costs. Unlike cover bidding involving a compensation payment, the identity of the winning party will not be known to the two suppliers at the time of entering into the compensation arrangement.

III.137. In its response to the Statement, Wildgoose objected to the use of the term 'compensation payment', stating '*...it is clear that this is a phrase of the OFT's own coining and does not reflect everyday usage within the industry.*'²⁰⁸⁴ In the OFT's view, the particular terminology used to describe these payments (and the origin of that terminology) is unimportant. The conduct of the participants, and the legal analysis of that conduct, remains the same regardless of whether the term 'compensation payment' or some other descriptive term is used. Wildgoose accepted this in principle, but objected specifically to the use of the term 'compensation payment' both in the context of cover bids, and as a standalone infringement.²⁰⁸⁵ The OFT accepts that there are differences

²⁰⁸¹ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 30.

²⁰⁸² *Argos & Littlewoods v OFT* [2004] CAT 24, at paragraph 708.

²⁰⁸³ Whilst the OFT received representations that cover bidding in conjunction with a compensation payment has only limited (or no) anti-competitive effects, as the OFT has concluded that the conduct was anti-competitive by object, it does not consider these representations further here. To the extent that any of these arguments are relevant to the seriousness of the Infringements, they will be taken into account in Section VI (Enforcement).

²⁰⁸⁴ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.42.

²⁰⁸⁵ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.44.

between compensation payments made in these two different situations and has, therefore, analysed them separately at paragraphs III.127 to III.132 and III.138 to III.157, respectively (albeit, there will be aspects of the OFT's analysis which apply equally to both scenarios).

Compensation payment arrangements as a form of agreement and/or concerted practice

III.138. As noted at paragraphs III.47 to III.59 above, a concerted practice may occur, in particular, where there are reciprocal contacts between undertakings which have the object or effect of removing or reducing uncertainty as to future conduct on the market.²⁰⁸⁶ Where an undertaking remains active on the market, there is a presumption that it will take account of information exchanged with its competitors.²⁰⁸⁷

III.139. Compensation payment arrangements generally take the form of agreements, but at a minimum involve a form of concertation such as to amount to a concerted practice, in that such an arrangement:

- (a) involves reciprocal contacts, followed by the making of a payment which is not unilateral conduct;
- (b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market; and
- (c) constitutes direct contact between participants in a tender process which has as its object or effect:
 - i. the disclosure by each participant to the other of the course of conduct that it intends to adopt or is contemplating adopting in the tendering process; and/or
 - ii. the influencing of each other's conduct on the market, in particular through the obligation to pay or the opportunity to receive a compensation payment.

III.140. In arrangements to make compensation payments, the Parties disclose their intention to make a payment conditional on winning the tender. In some cases, the Parties also disclose details about the level of their bids and/or it is expressly agreed that one or more Party(ies) will include the amount of the agreed compensation payment in their tender bids. Whether or not there is such an express agreement, discussion of and agreement on the level of compensation, and the obligation to pay or the prospect of receiving the payment, can be presumed to influence the Parties' conduct in the tender process, as it influences the level of risk (of wasted costs) assumed by each party when making a bid and may also influence the formulation of a final bid price as described further below. The object of the contact between the Parties

²⁰⁸⁶ Cases 40/73 etc. *Suiker Unie v Commission* [1975] ECR 1663, at paragraph 175. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(vi); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(vi).

²⁰⁸⁷ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 121; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 162; and Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(x); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(x).

is therefore to create conditions of competition which do not correspond to the normal conditions of the market (see paragraph III.49).

- III.141. Wildgoose submitted that, in the absence of cover pricing or agreement to add the amount of the payment to the tender price, (i) an arrangement to make a compensation payment has no influence on the participants' conduct on the market, and the OFT is not entitled to rely on a presumption to this effect²⁰⁸⁸, and (ii) the parties reveal nothing about their respective intentions on the market.²⁰⁸⁹
- III.142. Even in the absence of a cover payment or agreement to add the amount of the payment to their tender price, the Parties will reveal their intention to make a payment to the other, conditional on winning the tender. As noted above, where an undertaking participating in concerting arrangements remains active on the market, the OFT is entitled to presume that it will take account of information exchanged with its competitors.²⁰⁹⁰ It should also be recalled that the reasoning at paragraph III.139 is relevant to the establishment of a concerted practice. Where two Parties have entered into an agreement to make a compensation payment, the same test does not apply.

Anti-competitive object of compensation payments (without cover pricing)

- III.143. The OFT considers that an agreement by one bidder to pay to another an agreed level of compensation, if the former wins the tender, has as its obvious consequence the prevention, restriction or distortion of competition as the parties *'knowingly substitute practical co-operation between them for the risks of competition'* in that
- (a) it is clear that in communicating with one another to establish whether each has a genuine intention to bid with a view to winning, and if so, whether they would each be prepared to compensate the losing bidder if they won the tender, the parties to a compensation payment arrangement knowingly distort the normal tendering process in which each bid would be independently formulated to ensure competition;
 - (b) the arrangement is capable of reducing the parties' incentives to compete for the relevant tender, as the risks of wasting tender costs as a result of losing a competitive tender are substituted by the certainty of a payment to cover all or part of those costs;
 - (c) in some, but not all, cases, the parties to such an arrangement also communicated either the intended levels of their bids or the levels of a first-stage bid that would normally remain confidential as between rival bidders; and

²⁰⁸⁸ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 4.23 to 4.31. As noted above, Wildgoose accepted that its conduct amounted to an infringement of the Chapter I prohibition and, by implication therefore, that it was a party to an anti-competitive agreement or concerted practice.

²⁰⁸⁹ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.33.

²⁰⁹⁰ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 121; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 162; and Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(x); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(x).

- (d) in some, but not all, cases, the parties to such an arrangement added the amount of the compensation payment to their tender price, directly inflating the price payable by the customer.

III.144. It is wholly irrelevant that an agreed compensation payment may be expressed as being to cover the losing party's tender costs. It is a normal feature of a competitive bidding process that there will be losing bidders as well as a winning supplier, and the losing party would usually bear its tender costs. At the very least, by agreeing to make a compensation payment, the Parties negate the risks of competition by recouping the costs of an unsuccessful tender submission from a competitor. By communicating in this way, the Parties also knowingly distort the normal tendering process in which each bid would be independently formulated (see paragraphs III.71 to III.72 above), as they cannot fail to take into account the obligation to pay, or the prospect of receiving payment, when participating in the tender process (even in the absence of an express agreement to add the amount of the payment to their bid prices).

III.145. Durkan disputed the OFT's conclusion that a losing bidder would normally expect to bear its tender costs. It submitted that, in respect of a two-stage tender process, it '*was one of the unwritten rules of engagement in the industry*' that provision would be made for the client to reimburse second stage tender costs if the negotiations, by that stage with a single firm, proceeded to contract but subsequently failed. As a result, Durkan argued that the compensation payment was intended to recoup costs which 'in the ordinary course', would have been paid by the client.²⁰⁹¹ Even if this scenario is factually correct (which the OFT does not necessarily accept), achieving a level of remuneration or cost recovery, which the Parties consider to be 'in the ordinary course', will not legitimise concertation between competitors. Each firm must independently determine its conduct on the market, including deciding whether or not to accept the risks of participating in tender processes where costs are not recoverable from the customer.

Agreement to add the amount of compensation to bid prices

III.146. The OFT considers that an agreement between competitors to pay an agreed level of compensation conditional upon winning a tender, and to add this amount to their respective bid prices, constitutes illegal price fixing, the object of which is to restrict competition. The concept of price fixing includes fixing a component of the price, such as a surcharge. The CFI has explicitly held that '*the prohibition of agreements and concerted practices which directly or indirectly fix prices also extends to agreements relating to the fixing of a part of the final price*'.²⁰⁹²

III.147. The CFI has also stated that:

²⁰⁹¹ Written representations of Durkan, 27 June 2008, paragraphs 90 to 91.

²⁰⁹² See the judgment of the CFI in Cases T-45/98 etc *Krupp Thyssen* [2001] ECR II-3757, paragraph 157 (not challenged on appeal: see Case C-65/02 P *ThyssenKrupp* [2005] ECR I-6773); also the decision of the European Commission in COMP IV/34.503 *Ferry Operators – Currency Surcharges* OJ 1997 L 26/23, paragraphs 55 to 58. This is also expressly stated at paragraph 3.5 of the OFT's Guideline 401 – *Agreements and concerted practices*.

*'competition between contractors regarding their calculation costs is restricted by the system of reimbursements for calculation costs and the client is thus deprived of the benefits of such competition'.*²⁰⁹³

and:

*'The joint fixing of the price increases which all the undertakings participating in a tendering procedure will include in their price tenders, and which will be received by the successful undertaking...making it possible to ensure that the contract awardee bears...the calculation costs incurred by all the participants in the tendering procedure, is caught by the prohibitions laid down in [Article 81(1)(a)] of the Treaty. First, it constitutes fixing part of the price and, secondly, it restricts competition between undertakings as regards their calculation costs and, lastly, it leads to a general increase in prices'.*²⁰⁹⁴

III.148. Several Parties submitted that, where a compensation payment was added to a tender price in a particular instance, this was a minimal sum which would have had little impact on the customer.²⁰⁹⁵ Firstly, the OFT does not necessarily accept this assertion as being factually correct in the context of each relevant Infringement. For example, Wildgoose argued that a compensation payment of £7,000, which it admits adding to the tender price, was minor in the context of the value of the contract.²⁰⁹⁶ In the OFT's view, a £7,000 additional charge to the customer is unlikely to be minor. In any event, such arguments about the actual level of increased price are irrelevant when assessing the object of an agreement.²⁰⁹⁷

No express agreement to add the amount of compensation to bid prices

III.149. Herbert Baggaley admitted that an agreement to pay compensation between itself and another bidder was an infringement of the Act, but stated that there was no evidence that the parties either agreed to add the amount of the compensation payment to their tender price, that they did in fact do so, or that the tender price was above the competitive level.²⁰⁹⁸

III.150. The OFT considers that price competition is suppressed by an agreement to make a compensation payment, even in the absence of an express agreement to add the amount of the payment to the tender price. Payments from one competitor to another without consideration in the form of goods or services are not normal commercial practice. By entering into an agreement to make a compensation payment to a competitor, the inevitable consequence is that a tenderer either (a) inflates its tender bid by the amount of the compensation payment such that it can make the payment to its competitor, without reducing its own profit margin, at the expense of the customer; and/or (b) chooses to accept a lower profit margin, but rather than adopting a normal commercial

²⁰⁹³ Case T-29/92 *SPO v Commission* [1995] ECR II-289, at paragraph 152.

²⁰⁹⁴ *Ibid.* at paragraph 3.

²⁰⁹⁵ For example, written representations of Herbert Baggaley, 27 June 2008, paragraph 33; Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.86.

²⁰⁹⁶ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.86.

²⁰⁹⁷ See paragraphs III.60 to III.66 above. Whilst the OFT has received representations that an arrangement to make a compensation payment has only limited (or no) anti-competitive effects, the OFT does not consider these arguments further in this Section, as it has concluded that the conduct was anti-competitive by object. To the extent that any of these representations are relevant to the seriousness of the Infringements, they will be taken into account in Section VI (Enforcement).

²⁰⁹⁸ Written representations of Herbert Baggaley, 27 June 2008, paragraph 33.

strategy of thereby lowering its bid in order to be more competitive (which would benefit the customer), it instead pays a sum to a competitor, for which there is no legitimate commercial rationale. Thus, whether or not the level of payment was expressly agreed to be added to the tender price(s) submitted, the payment is made at the expense of a potentially lower tender price, resulting in pricing above the competitive level. Such an agreement therefore has the obvious consequence, and thus the object, of restricting or distorting competition and is capable of an effect on price.

- III.151. Moreover, since an arrangement to make a compensation payment has as its object an obvious restriction or distortion of competition, it is not necessary for the OFT to prove that either party added all or part of the level of agreed compensation payment to its final bid price. Where an agreement has as its object a restriction or distortion of competition, it is immaterial whether it also has an anti-competitive effect. In any event, in all cases that are the subject of this Decision, the agreed level of compensation was paid following award of the relevant tenders.
- III.152. In the circumstances, and noting that compensation payment arrangements constitute a form of bid rigging and involve the exchange of commercially sensitive information (see further below), it is not necessary for the OFT to determine whether the conduct also amounts to a form of price fixing where there is no express agreement for one or more Parties to add the amount of compensation to tender prices.
- III.153. Durkan stated that, despite entering into a compensation payment arrangement, its tender price was not above the competitive level (by reference to the prices submitted by another independent bidder).²⁰⁹⁹ However, this does not detract from the conclusion reached by the OFT as to the anti-competitive object of the arrangements. In making a compensation payment, the tenderer gives the benefit of the reduction in its profit margin to a competitor, rather than to the customer and thus distorts competition. Even if a tender price reflects favourably when compared to another competitor's price, it could have been even lower if the customer had benefited from the tenderer's reduced profit margin, rather than that reduced margin instead arising from a payment made to a competitor. As noted above, it is sufficient for a finding of infringement that an agreement or concerted practice restricts or distorts price competition, even if it does not entirely eliminate it.²¹⁰⁰
- III.154. Wildgoose admitted that, in a number of instances where it made compensation payments, it absorbed this cost in reduced margins. However, it went on to state that '*These margins would not have been available to customers*'.²¹⁰¹ As noted above, if the Party was willing to accept a reduced margin on the particular tender, but chose to apply the reduced margin for the benefit of a competitor but not for a customer, then in so doing, competition on that tender was distorted.
- III.155. Bid rigging infringements in which participants offer (or request) inducements (such as compensation payments) to (or from) other cartel participants are more serious than infringements where no such inducement is offered. Whether or

²⁰⁹⁹ Written representations of Durkan, 27 June 2008, paragraph 89.

²¹⁰⁰ OFT Competition law guideline on *Agreements and Concerted practices* (OFT401, Edition 12/04), at paragraph 3.6.

²¹⁰¹ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.86.

not there is express agreement to inflate the tender bids to include the agreed compensation sum, a supplier who may be obliged to make the compensation payment is at the least incentivised to recover the cost of that payment by further inflating his tender price in addition. Moreover, the OFT considers that it is clear that the Parties were fully aware that an agreement to make a compensation payment was not legitimate, as in all instances compensation payments were processed between the relevant Parties by means of false invoices. The relevant Parties were therefore careful to take steps to cover up the fact that they had entered into such an arrangement.

Compensation payments and the exchange of commercially sensitive information

- III.156. When communicating with one another regarding a compensation payment, the Parties disclosed, and received, information regarding their respective bidding intentions. In some compensation payment Infringements, the Parties went so far as to exchange details of their tender prices. The OFT considers that this reduced or removed the degree of uncertainty each Party faced, with the result that competition between them was restricted (see paragraphs III.81 to III.88).
- III.157. Even where the Parties did not exchange details of their tender prices, the exchange of information regarding the level of compensation to be paid also has an influence on the pricing of the contracts in question, for the reasons given in paragraphs III.146 to III.154 (whether or not the Parties expressly agreed to include the level of compensation payments in their bids).²¹⁰²

I. Parties' representations on the applicability of previous CAT judgments

- III.158. As noted above, several Parties attempted to distinguish the previous CAT cases involving cover bidding²¹⁰³, and in particular *Apex*, from the Infringements. The arguments employed differed somewhat between Parties, but can be summarised as follows:
- (a) *Apex*, *Makers* and *Price* involve 'aggravated' cover bidding, which have an anti-competitive object, as opposed to instances of 'simple' cover bidding, which do not have an anti-competitive object, and must therefore be analysed by reference to their effects; or
 - (b) in *Apex*, cover prices were given by the eventual winner of the tender to other companies, which should be distinguished from the situation where a cover price is given by a company that is not the eventual winner.

- III.159. Two Parties analysed the sets of tenders involved in *Apex*²¹⁰⁴, as follows:

'(i) In relation to the FHH Contracts, the OFT found that Apex (Bidder B) asked Briggs (Bidder A) to take a cover and Briggs agreed to do so. While Apex

²¹⁰² One Party asserted that the OFT's argument set out in paragraph III.70 of the Statement was unconvincing, and submitted that this paragraph therefore fell short of demonstrating an infringement (Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.97). Wildgoose accepted, however, that its conduct could be deemed to have the object of restricting competition, so the OFT does not consider this submission any further.

²¹⁰³ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4; *Makers UK Limited v OFT* [2007] CAT 11; *Richard W Price (Roofing Contractors) Limited v OFT* [2005] CAT 5.

²¹⁰⁴ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4.

disputed this version of events, this is not an example of simple cover pricing but would fall more readily into the hardcore collusive tendering category. The CAT also considered an alternative version of events as suggested by Apex (which is more akin to simple cover pricing) which is arguably obiter. The case is also complicated by the fact that the Apex estimator was a former employee of Briggs.'

*'(ii) In relation to the Dudley Contracts, the OFT found that Howard Evans (Bidder B) contacted Apex (and apparently other potential bidders) (Bidder A) to inform them that they were compiling a list of bidders. This is again not a case of simple cover pricing, suggestive more of hardcore collusive tendering which conclusion is supported by the fact that two other bidders took covers off Howard Evans.'*²¹⁰⁵

- III.160. The Parties therefore draw a distinction between what they term 'simple' and 'aggravated' cover bidding based on the identity of the party initiating the contact (this being the only difference between the OFT's and Apex's version of events with respect to the FHH contracts in that case).
- III.161. The OFT does not accept this distinction between 'simple' and 'aggravated' cover bidding. In its judgment, the CAT considered both Apex's and the OFT's version of events in relation to the FHH Contracts and concluded that, on either set of facts, the elements of a concerted practice had been made out, and, crucially, that the conduct of Apex and Briggs had an anti-competitive *object*. In relation to the scenario where Briggs contacted Apex to request a cover price (which the Parties suggest is more akin to 'simple' cover bidding), the CAT concluded that: *'In our judgment the conduct of Apex and Briggs in Apex providing, and Briggs receiving and considering, a price for this purpose has at its object the prevention, restriction and distortion of competition.'*²¹⁰⁶
- III.162. Furthermore, in the OFT's view, the fact that the Apex estimator was a former employee of Briggs was not a determining factor in the CAT's conclusion that Apex's and Briggs' conduct had an anti-competitive object.
- III.163. In relation to the Dudley contracts, the CAT concluded that *'...the requirement of concertation is met by Apex contacting Howard Evans and Howard Evans sending Apex a fax with figures to submit.'*²¹⁰⁷ Whilst the CAT noted in its summary of the facts that Howard Evans had previously been in contact with Apex, the OFT does not consider this was material to the CAT's finding of a concertation and, therefore, to the infringement. The OFT therefore rejects the argument that Apex can be distinguished on this basis.
- III.164. Pearce submitted in its response to the Statement that the OFT is not entitled to conclude that all forms of cover bidding constitute a 'per se' infringement of the Act. Pearce highlighted that the CAT in *Apex*²¹⁰⁸ stated that a cover price 'in

²¹⁰⁵ Written representations of Stainforth, 27 June 2008, paragraphs 2.22; Written representations of Quarmby, 27 June 2008, paragraphs 3.17 to 3.18. The wording of the Parties' submissions was identical in respect of the quoted paragraphs. Wildgoose similarly argued that there was a dispute of fact in both *Apex* and *Makers* such that, on one version of the facts, the agreement or concerted practice was more akin to a market sharing cartel than 'normal' cover bidding (Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 4.18 to 4.19).

²¹⁰⁶ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 224. See also paragraph 233 where the CAT reaches the same conclusion following a discussion of the OFT's version of events.

²¹⁰⁷ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 242.

²¹⁰⁸ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 251.

these circumstances' had an anti-competitive object or effect, and not cover bidding generally.²¹⁰⁹ The OFT notes that the essential elements of cover bidding arrangements assessed by the CAT (see paragraphs III.93 and III.99) were also present for each of the cover bidding infringements described in this Decision. In each of the various instances of cover bidding assessed by the CAT, it found that the conduct constituted an infringement without the need to carry out any analysis of the effects of the conduct in question.

- III.165. Other Parties attempted to distinguish *Apex* on the basis that cover prices in that case were given by the eventual winner of the tender to other companies, thereby removing a potential competitor from the tender process. The argument advanced is that, where a cover price is given by a company that is *not* the eventual winner, then there is no appreciable distortion of competition and the company giving the cover price has gained no benefit.²¹¹⁰
- III.166. The OFT considers this essentially to constitute a consideration of the effects of the arrangement, whereas the OFT has concluded that the Infringements covered by this Decision have an anti-competitive object. In any event, the CAT made clear in *Apex* that '*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 practice of cover bidding will deceive the tenderee into thinking the bid is genuine, regardless of whether or not the company giving the cover price is the eventual winner. In analysing whether cover bidding has as its object the distortion or restriction of competition, the OFT therefore considers the identity of the eventual winner of the tender to be immaterial. See also paragraph III.114, concluding that even where there is *no* eventual winner, cover bidding on that tender process nonetheless constitutes an infringement.
- III.167. Several Parties also suggest that the other two CAT cases involving cover bidding can also be distinguished as 'aggravated' cases on the following bases:²¹¹¹
- (a) *Price*²¹¹² superficially appears to be a case of 'simple' cover bidding, but *Price's* argument that it was motivated by a desire to stay on the tender lists was undermined by the fact that it had not traded in the area for approximately 18 months, which clearly suggests that there was another motivation for taking a cover price inconsistent with a 'simple' cover bidding scenario;
 - (b) *Makers*²¹¹³ was not a straightforward cover bidding allegation, but had more to do with the alleged sub-contracting arrangement between *Makers* (Bidder A) and *Asphaltic* (Bidder B) where *Makers* knew that *Asphaltic* was bidding on the main contract against it, and *Asphaltic* provided *Makers* with a price for the entire project, which is not consistent with a simple cover bidding scenario.

²¹⁰⁹ Written representations of *Pearce*, 14 July 2008, paragraph 2.1 to 2.2.

²¹¹⁰ Written representations of *McGinley Holdings*, 27 June 2008, paragraphs 17 to 18.

²¹¹¹ For example, written representations of *Stainforth*, 27 June 2008, paragraph 2.22; written representations of *Quarmby*, 27 June 2008, paragraphs 3.17 to 3.19.

²¹¹² *Richard W Price (Roofing Contractors) Limited v OFT* [2005] CAT 5.

²¹¹³ *Makers UK Limited v OFT* [2007] CAT 11.

- III.168. The OFT considers these attempts to distinguish *Price* and *Makers* to be without merit.
- III.169. In particular, some Parties submitted that *Price* would have been a 'simple' cover bidding case (which, it is contended, does not constitute an 'object' infringement) *except* that the appellant's stated motivation to stay on the tender lists was questionable by reference to the facts. However, in line with its previous decision in *Apex*, the CAT clearly stated that *Price*'s motivation for engaging in cover bidding was irrelevant when deciding whether there was a restriction of competition. When assessing the facts that amounted to a concerted practice contrary to the Chapter I prohibition, the CAT specifically excluded reference to the perceived need to stay on tender lists.²¹¹⁴ Having assessed the facts as amounting to an infringement, the CAT then reiterated that '*The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence is to prevent, restrict or distort competition*' (*emphasis added*).²¹¹⁵ As the CAT clearly viewed the subjective intention of *Price* as irrelevant in assessing its conduct, the OFT does not accept these Parties' attempts to distinguish *Price*.
- III.170. The OFT also does not accept that *Makers* can be distinguished as a case involving 'aggravated' cover pricing on the basis that it involved a sub-contracting relationship. The appellant asserted that a sub-contracting relationship was in existence as an alternative plausible explanation of the evidence. This was, however, rejected by the CAT²¹¹⁶, which instead concluded that *Makers* had obtained a cover price from one of its competitors (either from Rock or Asphaltic) and that, in either scenario, this amounted to an infringement.²¹¹⁷ The OFT does not accept therefore that *Makers* can be distinguished as an 'aggravated' case of cover pricing.
- III.171. On this basis, the OFT does not accept that any factual differences between the present case and *Apex*, *Price* or *Makers* would result in the principles set out in Parts E to G being inapplicable.

J. Appreciable restriction of competition

- III.172. An agreement and/or concerted practice will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition in the UK. However, it will fall outside the Chapter I prohibition if its impact on competition is not appreciable. As the ECJ held in *Völk v Vervaecke* in relation to the corresponding provision of the EC Treaty:

'An agreement falls outside the prohibition in Article [81(1)] where it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question'.²¹¹⁸

- III.173. The OFT takes the view that an agreement and/or concerted practice will generally not restrict competition to an appreciable extent if the aggregate market share of the parties to the agreement or concerted practice does not exceed 10 per cent of the relevant market affected by the agreement, where it

²¹¹⁴ *Richard W Price (Roofing Contractors) Limited v OFT* [2005] CAT 5, at paragraphs 46 to 47.

²¹¹⁵ *Richard W Price (Roofing Contractors) Limited v OFT* [2005] CAT 5, at paragraph 54.

²¹¹⁶ *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 80.

²¹¹⁷ *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 93.

²¹¹⁸ Case 5/69 *Völk v Vervaecke* [1969] ECR 295, at paragraphs 5/7.

is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned).²¹¹⁹

- III.174. However, there will be circumstances where this is not the case. In particular, this approach will not apply to any agreement and/or concerted practice which directly or indirectly fixes prices, shares markets and/or rigs bids. The OFT will generally regard such agreements and/or concerted practices as being capable of restricting competition to an appreciable extent even where the parties' combined market share falls below the 10 per cent threshold.²¹²⁰ ,
- III.175. Moreover, the OFT considers that agreements and concerted practices to fix prices, share markets or rig bids will *by their very nature* restrict competition to an appreciable extent.²¹²¹
- III.176. The agreements and/or concerted practices described in this Decision involve price fixing and/or bid rigging. The OFT accordingly concludes that those agreements and/or concerted practices had the object of preventing, restricting and/or distorting competition to an appreciable extent, whether or not the Parties' combined market share in the relevant market fell below 10 per cent.
- III.177. One Party submitted, in its response to the Statement, that the OFT had failed to satisfy the burden and standard of proof to establish that the particular agreements and/or concerted practices in which it participated were capable of restricting competition to an appreciable extent.²¹²² These representations are addressed in Section IV, in the context of each Infringement. Another Party argued that cover pricing could not have an appreciable effect on competition where the party taking a cover had already decided that it would bid in a manner designed not to win the contract, the communication of a cover price may have occurred at a late stage in the tender process, and there were other 'genuine' bidders participating in the tender.²¹²³
- III.178. Another Party accepted that agreements and/or concerted practices which rig bids are *capable* of having an appreciable effect on competition, but disputed that the instances of cover pricing in which it was involved did, *in fact*, have as their object an appreciable restriction of competition.²¹²⁴ As stated in paragraph III.175, the OFT considers that bid rigging agreements and/or concerted practices by their very nature restrict competition to an appreciable extent. The OFT has not received any representations which lead it to conclude that cover bidding (or indeed, the particular instances of cover bidding in which this Party was involved) differ from other forms of bid rigging and price fixing in this respect.
- III.179. Such representations also ignore the basis on which cover bidding is found to be anti-competitive, which does not depend on the elimination of competition

²¹¹⁹ From 1 May 2004, the OFT has regard to the EC thresholds on appreciability in determining whether there is an appreciable restriction of competition. The Commission's Notice on Agreements of Minor Importance (OJ C368, 22 December 2001, page 13) and the OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04) at paragraphs 2.16 to 2.19.

²¹²⁰ OFT Competition Law Guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraphs 2.17 to 2.18.

²¹²¹ OFT Competition Law Guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraphs 3.4, 3.10 and 3.14.

²¹²² Written representations of GMI, 26 June 2008, paragraphs 19 to 23.

²¹²³ Written representations of A H Willis, 27 June 2008, paragraph 39.

²¹²⁴ Written representations of McGinley Holdings, 27 June 2008, paragraphs 19 to 22.

from the tender process or an actual direct impact on the price submitted by the giver of the cover price. As previously noted (see paragraph III.99), the following ways in which cover bidding may prevent, restrict or distort competition were identified by the CAT:

- '(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'.²¹²⁵*

III.180. With every instance of cover bidding set out in this Decision having these consequences, the competitive process is clearly affected to an appreciable extent whether or not other genuine bidders remain and whether or not the party submitting the cover might otherwise have declined to bid for the tender. Similarly the timing of the communication of the cover bid from one party to another is irrelevant.

III.181. Furthermore, and as noted above, a selective bidding process is designed to engender competition between a small number of tenderers. An essential feature of this system is that bids are prepared entirely independently. The loss of independence as a result of collusion with other bidders in a selective bidding process can therefore have an even greater distortionary effect on the tendering process, than in an open bidding process (see paragraphs III.71 to III.73 above). It is within this context that the appreciability of any restriction of competition should be considered. In the context of a selective tender process, the OFT considers that market shares do not provide a reliable indicator of the actual or potential impact of the Parties' conduct.

III.182. As such, the OFT remains of the view that the agreements and/or concerted practices particularised in this Decision had the object of preventing, restricting and/or distorting competition to an appreciable extent.

K. Effect on trade

III.183. It is necessary for the purposes of the Chapter I prohibition that the agreement and/or concerted practice may affect trade 'within the United Kingdom'. Likewise, it is necessary for the purposes of Article 81(1) that the agreement and/or concerted practice may affect trade 'between Member States'. In this section, the OFT addresses the legal principles underlying these requirements in turn.

Effect on trade within the United Kingdom

III.184. By virtue of section 2(1)(a) of the Act, the Chapter I prohibition applies only to agreements or concerted practices which:

'may affect trade within the United Kingdom'.

²¹²⁵ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 251. See also *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 14 to 15.

- III.185. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate.²¹²⁶
- III.186. One Party suggested in its response to the Statement that this provision of the Act is in conflict with Article 81(1), where there is a requirement that the relevant part be a '*substantial part*'. This Party submitted that the conflict between national and EC law should be interpreted in its favour, and the limited geographical coverage of its contracting works means that there was no effect upon a '*substantial part*' of the UK.²¹²⁷
- III.187. The OFT rejects the suggestion that there is any such conflict between Article 81 and section 2 of the Act. Article 81 applies where an arrangement '*may affect trade between Member States*' (see paragraphs III.191 to III.196 below).²¹²⁸ The two separate requirements as to whether the practice must affect '*trade between Member States*' or '*trade within the United Kingdom*' are clearly intended to ensure that Article 81 and section 2 of the Act have different geographic scopes. It would therefore be nonsensical to require the same degree of geographic coverage to find an infringement of the Chapter I prohibition as for Article 81. When applying Article 81 and section 2 of the Act to an agreement operating in only a part of the UK, any divergence in treatment is due to the inherent differences in the territorial scope of each provision, and does not signal a conflict between domestic and European law.
- III.188. It should also be noted that, to infringe the Chapter I prohibition, an agreement and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade.
- III.189. One Party submitted that, to the extent that there was an effect on trade within the UK as a result of the Infringements in which it participated, any such effect would be minimal.²¹²⁹ However, the CAT has confirmed that the test does not import a requirement that the effect on trade should be appreciable.²¹³⁰ Around 20 Parties submitted representations referring to *P&S Amusements*²¹³¹, in which the CAT's interpretation of the law on this point was questioned by the Chancellor of the High Court.²¹³² Whilst noting the comments made in that case, the OFT will continue to have regard to the CAT's interpretation, unless this is overturned by the Court of Appeal.
- III.190. Finally, agreements and concerted practices to fix prices, share markets or rig bids appreciably restrict competition by their very nature, and so are inherently

²¹²⁶ Section 2(7) of the Act.

²¹²⁷ Written representations of K J Bryan, 24 June 2008, page 2.

²¹²⁸ The Commission has stated that, in determining whether an agreement which covers only part of a Member State can satisfy this requirement, '*some guidance may be derived from the case law concerning the concept in Article 82 of a substantial part of the common market*'. The OFT does not consider this can be read as importing a *requirement* that an agreement *must* cover a substantial part of a Member State before it can fall within Article 81, although where an agreement only covers part of a Member State the likely outcome in practice is that it will not affect trade between Member States – see paragraph III.195 below.

²¹²⁹ Written representations of McGinley Holdings, 27 June 2008, paragraph 24.

²¹³⁰ *Aberdeen Journals Ltd v Director General of Fair Trading* [2003] CAT 11, at paragraphs 459 to 460.

²¹³¹ *P&S Amusements v Valley House Leisure* 2006 [EWHC] 1510 Ch, at 22.

²¹³² See, for example, written representations of F Parkinson, 25 June 2008, at paragraph 48; Written representations of G & J Seddon, 27 June 2008, at paragraph 48; Written representations of Richardson Projects, 27 June 2008, at paragraph 46.

capable of affecting trade.²¹³³ Moreover, for the specific reasons listed at paragraph III.179 above, and in particular the fact that other contractors are deprived of the opportunity to bid, the OFT considers that cover bidding practices are capable of an appreciable effect on trade.

Effect on trade between Member States

III.191. Pursuant to Article 3(1) of Regulation 1/2003, which entered into force on 1 May 2004, where a National Competition Authority, such as the OFT, applies national competition law to agreements, decisions of associations of undertakings or concerted practices within the meaning of Article 81 of the EC Treaty that may have an effect on trade between EU Member States within the meaning of the provision, then it must also apply Article 81 to such agreements, decisions or concerted practices. Thus, Article 81 will apply in parallel to national competition law. Since a number of the Infringements took place after 1 May 2004, the OFT considers that it has a duty to consider whether trade between Member States may have been appreciably affected, in order to determine whether Article 81 is applicable as well as the Chapter I prohibition.

III.192. The concept of ‘trade between Member States’ implies that there must be an impact, actual or potential, on cross-border activity involving at least two Member States, whether all or part of them.²¹³⁴ In this context, the concept of ‘trade’ has a wide scope, and includes trade in services as well as goods.²¹³⁵

III.193. In order that trade ‘may’ be affected by an agreement or concerted practice, the ECJ has held that:

*‘it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States’.*²¹³⁶

III.194. Finally, the agreement or concerted practice must affect trade between Member States to an appreciable extent.²¹³⁷ This is a jurisdictional requirement demarcating the boundary between EC competition law and national competition law.²¹³⁸ Appreciability can be assessed by reference to the market position and importance of the undertakings concerned, and will be absent where the effect on the market is insignificant because of their weak position

²¹³³ OFT Competition law guideline on *Agreements and Concerted Practices* (OFT401, Edition 12/04), at paragraphs 2.25, 3.4, 3.10 and 3.14.

²¹³⁴ European Commission’s *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, paragraph 21.

²¹³⁵ Case 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021, at paragraph 18; see also the European Commission’s *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraph 19.

²¹³⁶ First stated in Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, at page 249; see further, for example, Case 209/78 *Van Landewyck v Commission* [1980] ECR 3125, at paragraph 170; Case 126/80 *Salonia v Poidamani* [1981] ECR 1563, at paragraph 12; Case 42/84 *Remia v Commission* [1985] ECR 2545, at paragraph 22; and the European Commission’s *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraph 24.

²¹³⁷ See, for example, Case 22/71 *Béguelin* [1971] ECR 949, at paragraph 16.

²¹³⁸ Case 22/78 *Hugin v Commission* [1979] ECR 1869, at paragraph 17; see also *Aberdeen Journals Ltd v Director General of Fair Trading* [2003] CAT 11, at paragraphs 459 to 460.

on the market.²¹³⁹ For example, the Commission has indicated that agreements between small and medium-sized undertakings, the activities of which are normally local, or at most regional in nature, are unlikely to have an appreciable effect on trade between Member States.²¹⁴⁰

III.195. Horizontal cartels covering the whole of a Member State are normally capable of affecting trade between Member States. The Community Courts have held in a number of cases that agreements extending over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis by hindering the economic penetration which the EC Treaty is designed to bring about. The capacity of such agreements to partition the internal market follows from the fact that the undertakings participating in cartels in only one Member State normally need to take action to exclude competitors from other Member States.²¹⁴¹ In contrast, agreements that cover only part of a Member State are not likely appreciably to affect trade between Member States, unless they have the effect of hindering competitors from other Member States from gaining access to part of the Member State, which constitutes a substantial part of the common market.²¹⁴² Agreements that are local in nature are in themselves unlikely to have this effect.²¹⁴³

III.196. The OFT sets out in paragraphs V.15 to V.25 of the Legal Assessment section below, its reasons for considering that the Infringements set out in this Decision are not, individually or in aggregate, capable of appreciably affecting trade between Member States. The OFT considers as a result that it is not obliged to apply Article 81 to the Infringements.

L. Burden and standard of proof

Burden of proof

III.197. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp* that:

'95. As regards the burden of proof, the Director²¹⁴⁴ accepts that it is incumbent upon him to establish the infringement, and that the persuasive

²¹³⁹ See case 5/69 *Völk v Vervaecke* [1969] ECR 295, paragraph 5/7; Case 99/79 *Lancôme v ETOS* [1980] ECR 2511, at paragraph 24; Case T-77/92 *Parker Pen Ltd v Commission* [1994] ECR II-549, at paragraph 40; see also European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraph 44.

²¹⁴⁰ European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraph 50, citing European Commission's *Notice on Agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty*, OJ C368, 22 December 2001, page 13, paragraph 3.

²¹⁴¹ European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraphs 78 to 79. See also Case 215/96 *Carlo Bagnasco v BPN* [1999] ECR I-135, at paragraphs 51 to 53; Commission decision *Dutch Banks* OJ L271, 21 October 1999, page 28, at paragraph 61, citing Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, at paragraph 29 and Case T-29/92 *SPO v Commission* [1995] ECR II-289, at paragraph 229.

²¹⁴² European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraphs 89 and 92.

²¹⁴³ European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraph 91.

²¹⁴⁴ References to the 'Director' are to the Director General of Fair Trading. As from 1 April 2003, the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the Office of Fair Trading.

burden of proof remains on him throughout. However, that does not necessarily prevent the operation of certain evidential presumptions...

100. *In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged'.²¹⁴⁵*

Standard of proof

III.198. As regards the standard of proof, the CAT has held, also in *Napp*, that:

'...formally speaking the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. 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'.²¹⁴⁶

III.199. The CAT has since provided further elucidation on this passage in *JJB Sports plc and AllSports Limited v Office of Fair Trading*, stating:

'...the reference by the Tribunal to "strong and compelling" evidence at [109] of Napp should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled'.²¹⁴⁷

III.200. In other words, the standard of proof is no higher than the balance of probabilities but, in deciding whether this is met, regard should be to any surrounding circumstances which might increase, or decrease, the probability that an infringement of the Act occurred.²¹⁴⁸ In this case, the OFT takes full account of the fact that infringements of the Act are serious matters attracting severe financial penalties, but also notes that, by many of the Parties' own admissions, cover pricing was a widespread practice in the construction industry at the time when the Infringements took place. The OFT considers that both matters are relevant considerations when assessing the evidence to determine whether facts amounting to cover pricing have been established on the balance of probabilities.

²¹⁴⁵ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, at paragraphs 95 and 100. The CAT confirmed this approach in the recent *Replica Kit* judgment *JJB Sports Plc and AllSports Ltd v OFT* [2004] CAT 17, at paragraph 164; as upheld in *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 60. See also *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 158.

²¹⁴⁶ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, at paragraph 109.

²¹⁴⁷ *JJB Sports Plc and AllSports Ltd v OFT* [2004] CAT 17, at paragraph 204; as upheld in *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 60. See also *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24, at paragraphs 164 to 165.

²¹⁴⁸ This has been confirmed in recent decisions of the House of Lords, in other contexts but of general application, confirming that there is only one civil standard of proof, see *Re D (Northern Ireland)* [2008] 1 WLR 1499 at paragraph 28.

Evidential presumptions and inferences

- III.201. The OFT must adduce precise and consistent evidence to give grounds for a firm conviction that the infringement took place.²¹⁴⁹ One Party submitted that it is only when a particular document meets these criteria that the OFT can draw inferences from that document.²¹⁵⁰ However, the CFI has previously made clear that not every item of evidence has to satisfy those criteria in relation to every aspect of the infringement. Rather, it is sufficient if the body of evidence, viewed as a whole, meets those criteria.²¹⁵¹
- III.202. Indeed, it is clear that neither the burden nor the standard of proof preclude the OFT, where appropriate, from relying on evidential presumptions. As the ECJ has held, the evidence must be assessed as a whole.²¹⁵² Equally, the CAT has noted that:

'[This] approach does not in our view preclude the Director, in discharging the burden of proof, from relying in certain circumstances, on inferences or presumptions that would, in the absence of any countervailing indications, normally follow from a given set of facts, for example...that an undertaking's presence at a meeting with manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged'.²¹⁵³

Evidence required to establish a concerted practice

- III.203. Specific guidance was given in relation to establishing concertation in price-fixing cases under the Chapter I prohibition in *Replica Kit*, where the CAT noted:

'206. As regards price-fixing cases under the Chapter I prohibition, the Tribunal pointed out in Claymore Dairies²¹⁵⁴ that cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see Claymore Dairies at [3] to [10]...²¹⁵⁵ As the Court of Justice said in Cases 204/OOP etc. Aalborg Portland v Commission, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:

²¹⁴⁹ Joined Cases C 89/85 etc. *A Ahlström Osakeyhtiö v Commission* [1993] ECR I-1307, at paragraph 127; Joined Cases T-185/96 etc. *Riviera Auto Service v Commission* [1999] ECR II-93, paragraph 47; Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, at paragraph 43; Joined Cases T-44/02 OP etc. *Dresdner Bank v Commission* [2006] ECR II-0000, at paragraph 62.

²¹⁵⁰ Written representations of Crest Nicholson, 27 June 2008, at paragraph 5.17.

²¹⁵¹ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij v Commission ('PVC II')* [1999] ECR II 931, at paragraphs 768 to 778, confirmed on the relevant point by the ECJ, on appeal, in Joined Cases C-238/99 P etc. *Limburgse Vinyl Maatschappij v Commission*, at paragraphs 513 to 523. See also Joined Cases T-44/02 OP etc. *Dresdner Bank v Commission* [2006] ECR II-0000, at paragraph 63.

²¹⁵² Case 48/69 *ICI Ltd v Commission* [1972] ECR 619 ('Dyestuffs'), at paragraph 68; Joined Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraph 3708; Joined Cases T-305/94 etc *Limburgse Vinyl Maatschappij NV and others v Commission* [1999] ECR II-931, at paragraphs 768 to 778, and in particular paragraph 777, confirmed by the ECJ in Joined Cases C-238/99 P etc *Limburgse Vinyl Maatschappij NV and others v Commission* [2002] ECR I-8375, at paragraphs 513 to 523.

²¹⁵³ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, at paragraph 110.

²¹⁵⁴ *Claymore Dairies v OFT* [2003] CAT 18.

²¹⁵⁵ See also, for example, Joined Cases T-25/95 etc *Cimenteries v Commission* [2000] ECR-II 491, at paragraph 1838.

'55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well-known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct 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'.²¹⁵⁶

- III.204. This approach has subsequently been applied by the CAT in the specific context of cover bidding.²¹⁵⁷
- III.205. Several Parties submitted that the OFT has failed to adduce evidence of direct contact or an exchange of information between themselves and another Party, contrasting this with *Apex*²¹⁵⁸, where the OFT adduced direct contemporaneous evidence of faxes exchanged between the parties.²¹⁵⁹
- III.206. First, as demonstrated by the cases cited above (see paragraphs III.203 to III.203), both the ECJ and the CAT have noted that the very nature of a cartel may result in a lack of documentary evidence and, as such, the OFT may have to rely on inferences and circumstantial evidence to prove an infringement.
- III.207. Secondly, whilst a concerted practice may occur where there is reciprocal contact between competitors (see paragraph III.50 above), the OFT is not required to provide contemporaneous documentary evidence of this contact. The CFI noted in *Dresdner Bank* that: *'As anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted.'*²¹⁶⁰ The CAT has also confirmed that the OFT is not required to adduce documentary evidence in order to prove an infringement: *'in our view, there is no rule of law that, in order to establish a Chapter I infringement, the OFT has to rely on written or documentary evidence.'*²¹⁶¹

²¹⁵⁶ *JJB Sports Plc and AllSports Ltd v OFT* [2004] CAT 17, at paragraph 206. See also Case T-44/02 *Dresdner Bank and others v Commission* (2006) ECR II-3567, at paragraph 58.

²¹⁵⁷ *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 47.

²¹⁵⁸ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 205.

²¹⁵⁹ For example, written representations of Pearce, 14 July 2008, at paragraphs 3.1 to 3.6; Written representations of Linford, 26 June 2008, at paragraphs 6.4 to 6.5; Written representations of Crest Nicholson, 27 June 2008, at paragraphs 5.9 to 5.16.

²¹⁶⁰ Joined Cases T-44/02 OP etc. *Dresdner Bank v Commission* [2006] ECR II-0000, at paragraph 64.

²¹⁶¹ *Claymore Dairies v OFT* [2003] CAT 18, at paragraph 8.

- III.208. Finally, the nature of the evidence available to the OFT will obviously differ from one case to the next. The OFT does not accept the proposition that, because a certain type of evidence was adduced in the decision appealed in *Apex*, this obliges the OFT to produce equivalent evidence in all subsequent cases involving a similar type of infringement.
- III.209. One Party referred to *Scottish Flat Roofing (I)*²¹⁶² and *Scottish Flat Roofing (II)*²¹⁶³, in which the OFT had concluded that there was insufficient evidence to prove that certain entities had committed an infringement. This Party suggested that the OFT should apply the same principles in the present case, in respect of the evidence adduced in relation to that Party.²¹⁶⁴
- III.210. When reaching each decision, the OFT assesses the evidence relating to a potential infringement as a whole²¹⁶⁵, taking into account any relevant surrounding circumstances. As the CAT has noted, in issuing an infringement decision the OFT will weigh up the evidence before it, and is entitled to place such weight on witness evidence as it thinks fit.²¹⁶⁶ The assessment of evidence will necessarily be fact-specific and case-specific. Consequently, the OFT does not consider that parallels can usefully be drawn between the action it has taken in one case and the action it should take in another separate case, which is based on different facts and evidence, other than to note that the OFT has applied the same burden and standard of proof in this Decision as in those past cases.

Documentary evidence and conduct on the market

- III.211. Guidance has also been given in relation to establishing conduct on the market. Where undertakings seek to adduce proof to rebut a presumption of such conduct, this is a high burden to discharge, especially where the proof of the concerted practice is based upon documentary evidence.²¹⁶⁷ In *PVC II*, the CFI held that where the Commission's decision was based upon documentary evidence:

'the burden is on the applicants not merely to submit an alleged alternative explanation for the facts found by the Commission but to challenge the existence of those facts established on the basis of the documents produced by the Commission'.²¹⁶⁸

- III.212. One Party asserted that this principle does not apply to it, because the evidence adduced by the OFT does not amount to 'documentary evidence' and,

²¹⁶² OFT Decision CA98/01/2005, Case CE/1925-02 *Collusive tendering for mastic asphalt flat-roofing contracts in Scotland*, 15 March 2005, at paragraph 265.

²¹⁶³ OFT Decision CA98/04/2005, Case CE/3344-03 *Collusive tendering for felt and single ply roofing contracts in Western-Central Scotland*, 8 July 2005, at paragraph 182.

²¹⁶⁴ Written representations of Linford, 26 June 2008, at paragraphs 6.19 to 6.20.

²¹⁶⁵ Case 48/69 *ICI Ltd v Commission* [1972] ECR 619, at paragraph 68; Joined Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraph 3708; Joined Cases T-305/94 etc *Limburgse Vinyl Maatschappij NV and others v Commission* [1999] ECR II-931, at paragraphs 768 to 778, and in particular paragraph 777, confirmed by the ECJ in Joined Cases C-238/99 P etc *Limburgse Vinyl Maatschappij NV and others v Commission* [2002] ECR I-8375, at paragraphs 513 to 523.

²¹⁶⁶ *Claymore Dairies v OFT* [2003] CAT 18, at paragraphs 11 to 12.

²¹⁶⁷ See, for example, *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraphs 222, 231 and 244, where no such evidence was adduced by the appellant.

²¹⁶⁸ Joined cases T-305/94 etc. *Limburgse Vinyl Maatschappij v Commission ('PVC II')* [1999] ECR II 931, at paragraph 728. See also Cases C-204/00 P etc. *Aalborg Portland A/S v Commission* [2004] ECR I-123, at paragraph 132.

consequently, it is sufficient for it to put forward a plausible explanation of the facts as an alternative to the one adopted by the OFT.²¹⁶⁹ This Party referred to *Coats Holdings*²¹⁷⁰, where the CFI considered whether the evidence before it amounted to documentary evidence, but concluded that the evidence in question was ambiguous:

*'Since the evidence calls for interpretation, the Commission's argument is not convincing. According to the Commission, as there is documentary evidence, it is not sufficient for the applicants to provide a plausible explanation. However, that evidence is 'documentary evidence' only if the Commission's rather than the applicants' explanation is accepted. It follows that, in the present case, there is no documentary evidence within the meaning of the case law. As far as the inter-conditional obligations are concerned, the applicants are thus free to put forward a 'plausible explanation' of the facts as an alternative to the one adopted by the Commission.'*²¹⁷¹

III.213. Section IV below particularises the evidence adduced by the OFT in respect of each Infringement and addresses the Parties' submissions about the interpretation and strength of this evidence. However, as a general point, the OFT does not consider the documentary evidence adduced in this Decision to be akin to that in *Coats Holdings*.²¹⁷² Certain documents adduced in evidence in this case, such as tender registers, incorporate coding within the document in order to record where a cover price was taken or given. Witness evidence may be used to explain the coding system and the way in which the document was prepared and used. However, this does not equate to a situation where there may be alternative plausible explanations of a neutral document, as was the case in *Coats Holdings*. Consequently, it is insufficient for the Parties merely to put forward an alternative explanation for the documents found by the OFT, but they must also challenge the existence of the facts established by the documentary evidence as explained by witnesses (see the test set out in *PVC II* at paragraph III.211 above).

²¹⁶⁹ Written representations of Linford, 26 June 2008, at paragraphs 6.11 to 6.18.

²¹⁷⁰ Case T-36/05 *Coats Holdings and J & P Coats v Commission* [2007] ECR-II 110.

²¹⁷¹ Case T-36/05 *Coats Holdings and J & P Coats v Commission* [2007] ECR-II 110, at paragraph 74.

²¹⁷² Case T-36/05 *Coats Holdings and J & P Coats v Commission* [2007] ECR-II 110.

Witness evidence

- III.214. One Party submitted that the OFT is not entitled to rely on the uncorroborated evidence of a competitor in order to reach an infringement decision.²¹⁷³ This Party cites the CFI's judgment in *Bolloré v Commission*²¹⁷⁴, which stated that '*an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.*'²¹⁷⁵
- III.215. The OFT refutes the suggestion that this should be interpreted so broadly as to mean it is not entitled to place reliance on the witness evidence of a competitor (or its employees); rather, in each case, the OFT considers all the evidence in the round, having particular regard to the extent of the corroboration but also taking into account the credibility of the witness in question and his motivation for giving evidence.
- III.216. Indeed, the CFI has noted that where a witness is considered to be reliable, the degree of corroboration required is less, in terms of precision and depth, than would be the case if the witness were not credible.²¹⁷⁶ In this respect, the CFI has stated:

*'...where a person who has been asked to comment on documents... admits that he committed an infringement and thus admitted the existence of facts going beyond those whose existence could be directly inferred from the documents in question, that fact implies, a priori, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth.'*²¹⁷⁷

- III.217. The OFT therefore considers that it is entitled to rely on the evidence of a credible witness, particularly where that evidence is supported by surrounding circumstances. Indeed, in this Decision, the witness evidence for each Infringement is 'supported' by other evidence/indicia and is therefore not uncorroborated.

Conclusion

- III.218. In using the term '*strong and compelling*' to describe its evidence in the Conduct of the Parties section below, the OFT has followed the principles described in this section. The OFT considers that the evidence set out below is sufficient to satisfy the civil standard of proof and hence to overcome the presumption of innocence, to which the Parties are entitled.²¹⁷⁸ As noted above,

²¹⁷³ Written representations of E G Carter, 3 July 2008, paragraph 12 and 22 and footnote 1; Oral representations of E G Carter (transcript), 15 July 2008, at pages 6 to 9. Similarly, GMI and CJ Ellmore submitted that the OFT should exercise caution in relying on evidence provided by other Parties (Written representations of GMI, 26 June 2008, paragraphs 10.2 to 10.3; Written representations of C J Ellmore, 26 June 2008, paragraph 114).

²¹⁷⁴ Case T-109/02 *Bolloré v Commission* [2007] ECR II-947, at paragraph 167, overturned on appeal to the ECJ, Case C-322/07 P, judgment of 3 September 2009, without further discussion of this point.

²¹⁷⁵ See also Cases T-67/00 etc. *JFE Engineering v Commission* [2004] ECR II-2501, at paragraph 219; Case T-337/94 *Enso-Gutzeit v Commission* [1998] ECR II-1571, at paragraph 91.

²¹⁷⁶ Cases T-67/00 etc. *JFE Engineering v Commission* [2004] ECR II-2501, at paragraph 220.

²¹⁷⁷ Cases T-67/00 etc. *JFE Engineering v Commission* [2004] ECR II-2501, at paragraph 212.

²¹⁷⁸ See, for example, Case T-44/02 etc *Dresdner Bank and others v Commission*, judgment of 27 September 2006, at paragraph 61. *JJB and AllSports v OFT*, at paragraphs 200 to 204; *Burgess v OFT*

submissions by a Party which are particular to a piece of evidence or an Infringement are addressed in Section IV below.

M. Matters pre-dating 1 March 2000

III.219. The Act came into force on 1 March 2000. The OFT has considered two issues in respect of matters pre-dating its entry into force, namely agreements which cannot conclusively be shown to have been made after 1 March 2000, and evidence which pre-dates 1 March 2000.

Agreements which might have been concluded before 1 March 2000

III.220. The OFT accepts that in respect of a limited number of the infringements that were alleged in its Statement it cannot be established conclusively that the restrictive agreement was made after 1 March 2000.

III.221. Certain of these infringements are nonetheless pursued. The OFT considers it likely, on the balance of probabilities, that the agreements to provide/accept a cover price in these instances were made after 1 March 2000. However, to the extent that they may have been made before 1 March 2000 the OFT considers that the Chapter I prohibition does still apply to them.

III.222. To establish that the Chapter I prohibition does not apply to an agreement made before 1 March 2000, but continuing after that date, it must be shown *inter alia* that that agreement would not have been void under Section 35(1)(a) Restrictive Trade Practices Act 1976 ('the RTPA') immediately before 1 March 2000.²¹⁷⁹ In effect, if an agreement was considered anti-competitive and thus illegal under the regime which preceded the Act it cannot escape the operation of competition law simply because the Act came into force - rather, its illegality is to be dealt with by way of Chapter I instead.

III.223. The OFT considers that all of the Infringements involving cover pricing which are being pursued would (if they were concluded before 1 March 2000) have been void under the RTPA as:

- (a) The construction or carrying out of buildings, structures and other works by contractors is a supply of goods for the purposes of the RTPA;²¹⁸⁰
- (b) An agreement to provide/accept a cover price for construction work is a 'restriction' under the RTPA. Under such an agreement, one bidder agrees not to offer to supply goods at a price above the level of the cover price, while the other agrees not to offer to supply goods at a price below the level of the cover price. It thus entails restrictions being accepted by both parties, in respect of the prices to be quoted and charged to the procuring party;²¹⁸¹

[2005] CAT 25, at paragraphs 115 to 116; as cited in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 46.

²¹⁷⁹ Paragraph 19 of Schedule 13 to the Act. The Chapter I prohibition is dis-applied only to the extent that an agreement made before 1 March 2000 is within the scope of the provisions for a transitional period.

²¹⁸⁰ Section 43(3) RTPA

²¹⁸¹ Section 6(1)(a) RTPA The OFT also notes that in the case *In re Electrical Installations Agreement* [1970], 1 WLR 1391 at 1394, decided under Restrictive Trade Practices Act 1956, the Registrar of Restrictive Trading Agreements listed as a restriction: 'Cover prices given or received. Not to offer to supply

- (c) An agreement to provide/accept a cover price for construction work was therefore registrable;²¹⁸²
- (d) Such an agreement would not benefit from the exemption for certain 'non-notifiable' agreements. For reasons given in paragraphs III.119 to III.124 of this Decision the OFT considers agreements to provide/accept a cover price to be price fixing agreements, and these are outside the scope of the 'non-notifiable' exemptions;²¹⁸³
- (e) None of the agreements in question were registered with the OFT, as they were required to be. They were all, therefore, void.²¹⁸⁴

III.224. The OFT is therefore satisfied that even if the agreements in question were made before 1 March 2000 the Chapter I prohibition would still apply to them. It is therefore not necessary to establish conclusively that these agreements were made after 1 March 2000.

Evidence which pre-dates 1 March 2000

III.225. As noted above, the Act came into force on 1 March 2000 and any infringement would operate from no earlier than that date. However, the OFT takes the view that evidence relating to facts which arose before that date may be important for the understanding of the facts and matters at issue on and after 1 March 2000.

III.226. In this regard, the OFT notes the statement of the CAT in *Napp*:

*'It goes without saying that there can be no infringement of the Chapter I and Chapter II prohibitions on any date earlier than 1 March 2000...Nonetheless, in a case such as the present it is impossible to understand the situation as it was during the period of alleged infringement...without also understanding how that situation arose as a result of facts arising before 1 March 2000. In our view it is relevant to take facts arising before 1 March 2000 into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on or after that date.'*²¹⁸⁵

III.227. The OFT has, therefore, taken into consideration such evidence where it is available and relevant.

III.228. One Party questioned in its response to the Statement whether facts in existence before 1 March 2000 had been taken into account in assessing mitigating factors for the purpose of penalty calculations.²¹⁸⁶ The OFT confirms that where relevant evidence put forward by Parties in support of mitigating

goods in response to an invitation to tender at a price below that given to him by another person invited to tender for the supply of such goods or at a price above that which he has given to another such person in either case without first notifying that other'.

Although the Restrictive Practices Court did not rule upon the Registrar's analysis (the contractors having accepted that their agreement was a registrable restriction), the OFT considers this confirmation of its view that an agreement to provide/accept a cover price is a restriction under the RTPA.

²¹⁸² Section 1(1)(a) RTPA.

²¹⁸³ Section 27A(1)(c) RTPA. Had the agreements been 'non-notifiable' they would enjoy a transitional period in which the Chapter I prohibition would not apply: Schedule 13 Paragraphs 20(3) and 25(1)(a) of the Act.

²¹⁸⁴ Section 35(1)(a) RTPA

²¹⁸⁵ *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, at paragraph 217.

²¹⁸⁶ Written representations of McGinley Holdings, 27 June 2008, paragraph 25.

factors pre-dates 1 March 2000, the OFT would take that evidence into account. Mitigating factors are addressed in Section VI (Enforcement) below.

SECTION IV – THE CONDUCT OF THE PARTIES

A. Structure of this section

IV.1. This section is formed of three parts, each of which should be read in conjunction with the others:

(i) Section B: General comments on cover pricing and other bid rigging activities in the construction industry in England

This section sets out certain common themes that have emerged in the course of the OFT's investigation, concerning the way in which construction companies conducted the practice of cover pricing and other bid rigging activities during the period under investigation. The widespread and endemic practice of cover pricing in the construction industry was carried out in a relatively standard way, and the comments in this section should be read as applying to all Parties and all of the Infringements that are described in the following sections, except where otherwise stated in the descriptions of the Infringements.

(ii) Section C: A description of the general cover pricing and other bid rigging activities of each of the 37 companies that originally applied for leniency (now forming 33 Parties since some of these companies are treated together as part of one undertaking)

In order to avoid extensive repetition, the OFT sets out in this section the way in which each of the leniency Parties engaged in cover pricing and other bid rigging activities, including a brief explanation of the documents from each such Party evidencing the provision or receipt of cover prices. As many of the leniency Parties were party to more than three Infringements, the OFT sets out in this section much of the information that is common to all of the Infringements in which these companies participated. The activities of the leniency Parties are described in ***alphabetical order***.

(iii) Section D: A description of each of the Infringements

This section sets out the specific evidence in respect of each Infringement, and the inferences and conclusions drawn by the OFT from that evidence. The Infringements are described in ***chronological order***.

IV.2. Thus for each Infringement, reference should be made not only to the particular part of section D setting out details of that Infringement, but also to the relevant part(s) of section C detailing the cover pricing activities of any leniency Party(ies) involved in that Infringement, and in addition to the general comments on cover pricing and other bid rigging activities in section B.

IV.3. The OFT has therefore included, in Annex A towards the end of this Decision, a ***Navigation Table***, which details the paragraphs in which the case against each Party may be found in relation to each relevant Infringement. Each Party is found by the OFT to be a party to a number of Infringements, in most cases three but in some cases two or one, and in the case of leniency Parties, often more than three. In the Navigation Table, the Parties are listed in alphabetical order and against each Party are listed the Infringements in which the OFT has found that Party engaged in bid rigging activities, together with references to the relevant paragraphs in section D describing that Infringement and the

relevant paragraphs in section C describing the cover pricing activities of the leniency Party(ies) involved in that Infringement, where applicable.

- IV.4. The Navigation Table also sets out in respect of each Infringement,
- a. for a leniency Party, whether: (i) it will receive either full 100 per cent immunity for that Infringement (because it is a But For Infringement for that Party); or (ii) alternatively its allocated leniency percentage deduction from the penalty for that Infringement (because it is a Not But For Infringement for that Party)²¹⁸⁷; or (iii) it will receive no penalty for that Infringement (because the Infringement is not amongst the most recent three Not But For Infringements for the Party); and
 - b. for a non-lenieny Party, whether it will receive a 25 per cent deduction from the penalty for that Infringement (because it accepted the OFT's Fast Track Offer in respect of that Infringement) or alternatively will not be entitled to any deduction from penalty for that Infringement (because it did not accept the OFT's Fast Track Offer in respect of that Infringement).

B. General comments on cover pricing and other bid rigging activities in the construction industry in England

Cover pricing in the construction industry in England

- IV.5. This Decision is concerned with bid rigging activities that took place in relation to tendered works in the construction industry in England between the coming into force of the Competition Act on 1 March 2000, and December 2006.
- IV.6. When a purchaser wishes to purchase construction services, it typically invites a number of (what it believes to be) suitably qualified contractors to submit tender bids detailing the price at which they could undertake the work specified, in order to have competition for the individual contract between those contractors and obtain a competitive price. Any co-ordination or co-operation between competitors invited to tender in relation to the manner in which they intend to respond to the tender including individual tender prices which has the object or effect of preventing, restricting or distorting this competition (i.e. collusive tendering or bid rigging activities) is likely to amount to a serious infringement of the Chapter I prohibition.
- IV.7. The majority of the bid rigging activities discovered during the course of this investigation by the OFT involved cover pricing. Cover pricing occurs when a potential bidder obtains a price from a competitor in the tender process which is not designed to win the contract but is intended to give the appearance of competition. The CAT has fully endorsed the OFT's decision in its investigations into the roofing industry that cover pricing is anti-competitive and contravenes the Chapter I prohibition.²¹⁸⁸
- IV.8. In addition the OFT found a number of instances of compensation payments agreed and exchanged between bidders, discussed in general terms in paragraphs IV.147 to IV.155 below.

²¹⁸⁷ Each leniency Party's individual penalty calculation (to be found in Section VI (Enforcement) below) also sets out the relevant Infringements for which penalties are being calculated.

²¹⁸⁸ See, for example, *Apex Asphalt and Paving Co Limited v Office of Fair Trading*, 24 February 2005, www.catribunal.org.uk/documents/Jdg1032Apex240205.pdf.

IV.9. As noted above, the OFT describes in separate general sections for each of the leniency Parties, at paragraphs IV.158 to IV.751 below, how each of them would approach the giving and receiving of cover prices, and how such activities would be recorded. Certain common themes emerge, however, between all of the Parties in this investigation, and these are described in this section. It would be impractical to include all of the many comments on these general themes received by the OFT in leniency applications, in interviews with witnesses from leniency Parties, in responses to the OFT's Fast Track Offer, and in responses to the Statement. The OFT has therefore included in this section only a representative selection of comments received from these sources.

The widespread nature of cover pricing in the construction industry in England

IV.10. As stated in paragraphs II.1447, II.1449 and II.1460 of the OFT's Investigation section above, the OFT has obtained considerable evidence of the widespread and longstanding nature of cover pricing, also referred to as '*taking help*' or '*giving assistance*' by its participants²¹⁸⁹, in the construction industry in England, amongst companies of all sizes. First, many of the leniency Parties testified to the endemic nature of the practice both in their leniency applications and through the testimony of their employees in interview; second, several non-leniency Parties made reference to it in their responses to the OFT's Fast Track Offer; and third, many Parties made representations to this effect in their responses to the Statement.

IV.11. In relation to the leniency Parties, for example, Loach stated '*cover pricing in this area ... is a long standing practice which has been so prevalent and so well known within the industry to both buyers and potential purchasers alike that it has not occurred in the past to those involved that it might in any way be improper*'.²¹⁹⁰

IV.12. Clegg stated '*Cover pricing is a universally accepted practice within the construction industry and has been so for as far back as most people can remember ... cover pricing is so common as to be regarded as endemic within the construction industry, and has been practiced by all companies regardless of their size*'.²¹⁹¹

IV.13. Herbert Baggaley stated '*The practice of cover pricing within the general contracting industry is decades long. It has been known to individual estimators and directors within the industry as long as they have worked within it. In the course of their dealings with other estimators, the Estimating Department of HBC has not had occasion to explain the practice to another estimator. It is therefore considered to be endemic within the industry and that it would be unlikely for there to be more than a handful (if any at all) of Contractors who did not participate during the use of it*'.²¹⁹²

IV.14. Thomas Vale stated '*The practice of cover pricing is widespread in the construction industry and has been for many years. It has been described by estimating personnel within Thomas Vale and by organisations including the*

²¹⁸⁹ See for example, paragraph IV.126 below.

²¹⁹⁰ Cover Activities report, OFT Document Reference 4017, page 1.

²¹⁹¹ Leniency application, OFT Document Reference 4459, pages 4 and 6.

²¹⁹² Leniency application, OFT Document Reference 3899, pages 11 and 12.

National Federation of Builders and other trade bodies as “endemic”, “custom and practice” and “commonplace”.²¹⁹³

- IV.15. In interview, Robert Walker, a Director of Mansell, stated in response to the question *‘you were aware that, that Mansell had up to ... the time when you were talking then, had been involved in cover pricing?’*, *‘Well, not specifically but it was just such an industry-wide practice that it would have been amazing if the business hadn’t have been. I think it was, it was more ... the exception would have been that a company’s not doing it’*.²¹⁹⁴
- IV.16. A number of non-leniency Parties also, of their own volition, testified to the widespread and endemic nature of cover pricing in England in their responses to the OFT’s Fast Track Offer. For example, four companies, Interclass²¹⁹⁵, Richardson Projects²¹⁹⁶, Speller-Metcalf²¹⁹⁷ and Wygar²¹⁹⁸, all described cover pricing as a *‘universally common practice’* in relation to tendered works. Thomas Long described it as *‘normal trading practice within the industry for many years’*.²¹⁹⁹ E Manton stated *‘The company accepts it was unwise to get involved in cover pricing but it was such a common and widespread activity for so many years, that no one in the construction industry viewed it as an illegal practice’*.²²⁰⁰ Finally, J J & A R Jackson stated *‘We did not applied (sic) for leniency, as we believe that giving and receiving covers was widely established in the industry. We expected your investigation would highlight an accepted practice, used by thousands of contractors as well as sub contractors such as steel erectors, plumbers, electricians etc’*.²²⁰¹
- IV.17. As stated above, in their responses to the Statement, many Parties agreed that the practice of cover pricing was endemic, *‘in the sense of being a standard and accepted practice since time immemorial’*.²²⁰² Many companies made claims to the OFT that *‘...the practice was widely understood and accepted, even being taught on courses for industry personnel’*.²²⁰³ F Parkinson stated that *‘...cover pricing was a practice accepted to such an extent that it formed part of their (staff’s) education in the fundamental custom and practice of the construction industry’*.²²⁰⁴
- IV.18. R Durnell stated that the practice of cover pricing involved as many as 186,107 companies²²⁰⁵, and *‘therefore the problem has been not one of a deliberate flouting of the law but of a total failure on the part of the*

²¹⁹³ Leniency application, OFT Document Reference 4519, page 9.

²¹⁹⁴ Interview transcript, OFT Document Reference 11483, page 9. The *‘time when you were talking’* referred to was the time of the coming into force of the Act.

²¹⁹⁵ Letter from Interclass, OFT Document Reference 10417, page 2.

²¹⁹⁶ Letter from Richardson Projects, OFT Document Reference 10789, page 2.

²¹⁹⁷ Letter from Speller-Metcalf, OFT Document Reference 10843, page 2.

²¹⁹⁸ Letter from Wygar, OFT Document Reference 10938, page 2.

²¹⁹⁹ Letter from Thomas Long, OFT Document Reference 10884.

²²⁰⁰ Letter from E Manton, OFT Document Reference 10996, page 3.

²²⁰¹ Letter from J J & A R Jackson, OFT Document Reference 10443, page 1.

²²⁰² For example written representations of Clegg, 27 June 2008, paragraph 52; written representations of F Parkinson, 25 June 2008, paragraph 52; and written representations of Irwins, 27 June 2008, paragraph 56.

²²⁰³ Written representations of Clegg, 27 June 2008, paragraph 53. Also, for example written representations of F Parkinson, 25 June 2008, paragraph 53; and written representations of Irwins, 27 June 2008, paragraph 56.

²²⁰⁴ Written representations of F Parkinson, 25 June 2008, paragraph 53.

²²⁰⁵ Written representations of R Durnell, 25 June 2008, paragraph 82.

government, the various advisory and educating bodies, the trade associations and trade press and magazines to effectively communicate that the practice of cover pricing as carried out in the construction industry was considered to be in breach of the law'.²²⁰⁶ R Durnnell further stated that '...the OFT did not need to investigate to discover cover pricing... the whole industry knew of it'.²²⁰⁷

Publications and training regarding cover pricing

IV.19. The extent to which the practice was regarded as both legitimate and widespread in the construction industry is further demonstrated by a text book on the bidding process (*Construction Planning, Programming and Control* by Brian Cooke and Peter Williams, Blackwell Publishing 2004) that contained the following advice to bidders:

'Degree of competition

- *How many contractors have been invited to tender?*
- *Which contractors are on the tender list?*
- *Obtain details of competitors by making contact with material suppliers or specialist subcontractors listed in the contract documents*
- *Do we want the work or should we take a cover price (i.e. an arrangement whereby one contractor is given a price by another contractor which is then submitted as a tender offer. The price will be sufficiently realistic to look like a bona fide tender but high enough so as not to win the contract)?'.²²⁰⁸*

IV.20. In response to the Statement, many Parties stated that the textbook to which the OFT referred above was not the only one to have 'taught cover pricing'. Parties stated that in *Construction Contracts: Law and Management*²²⁰⁹ by Murdoch and Hughes, a textbook described in its introduction as 'the UK's leading textbook on the law governing construction contracts', reference was made to contractors submitting a 'cover bid', in the following terms: '*if the job is not wanted the contractor will submit an inflated tender, called a cover bid*'.

IV.21. However, the OFT notes that *Construction Contracts: Law and Management* does not suggest that an inflated tender should be arrived at as a result of collusion with competitors. There is no prohibition in competition law against a company unilaterally deciding to submit an inflated bid and calculating and submitting that inflated bid without any form of collusion with its competitors. The OFT defines cover pricing in paragraph IV.7 above as '*when a potential bidder obtains a price from a competitor in the tender process which is not designed to win the contract but is intended to give the appearance of competition*' (emphasis added).

IV.22. On this point, several Parties accepted that unilaterally submitting a cover bid

²²⁰⁶ Written representations of R Durnnell, 27 June 2008, paragraph 82.

²²⁰⁷ Written representations of R Durnnell, 27 June 2008, paragraph 83.

²²⁰⁸ *Construction Planning, Programming and Control* by Brian Cooke and Peter Williams, Blackwell Publishing 2004, page 196. The OFT wrote to the publishers on 17 March 2006 and suggested that this text be amended, given that cover pricing is a breach of the Act, OFT Document Reference 5950. On 20 March 2006 the publishers confirmed that the text would be amended at the next reprint, OFT Document Reference 5951.

²²⁰⁹ 3rd edition (2000) published by Taylor and Francis.

would not infringe the Chapter I prohibition, but argued that *'anyone working in the construction industry and taking a course using Murdoch and Hughes as their textbook would know that it would be necessary to obtain realistic tender figures in order to submit a cover bid as instructed, as is clear from Cooke and Williams' more recent textbook referred to by the OFT'*.²²¹⁰

- IV.23. Another example provided by R Durtnell was the 'Honeywood File' by H B Creswell²²¹¹, which made reference to obtaining a cover price *'from another builder who is making a bona fide offer'* if the builder was too busy to prepare a competitive tender.²²¹² In addition, in response to the Statement, Parties gave further examples of instances that they believed provided evidence that cover pricing was 'taught' as a 'legitimate activity'.²²¹³ In relation to this, as outlined above, the OFT accepts that this practice was regarded as both legitimate and widespread in the industry.
- IV.24. A number of Parties made representations relating to mitigation of penalties, in light of the foregoing and these are addressed in Section VI (Enforcement) below. Several Parties represented that although they did not seek to argue that cover pricing was not an infringement of the Act, nevertheless they considered that its illegality was *'...not known to the construction industry at large, and moreover that the leading textbooks used in teaching those in the industry specifically instructed personnel undergoing courses on how to engage in cover pricing. This is believed to be a unique circumstance in any of the OFT's investigations, and is thus powerful mitigation when it comes to penalty calculations'*.²²¹⁴ GMI stated that *'... even an acknowledged textbook on the bidding process includes cover pricing as an accepted matter to be considered by potential tenderers ... this must lessen the seriousness of such a cover pricing exercise and this should be reflected in a lessening of any proposed penalty.'*²²¹⁵
- IV.25. Some Parties claimed that the practice of cover pricing was probably also known to, and accepted by, the clients themselves.²²¹⁶ One of those Parties went further, suggesting that it was aware that in certain circumstances, clients have colluded in the process of cover pricing to satisfy their procurement regime (i.e. to meet requirements to receive a certain number of bids) by asking other contractors to submit bids that were higher than the already negotiated figure with a preferred contractor. In relation to the latter, the OFT notes that it has not been provided with any evidence of this having taken place in relation to the Infringements. Moreover, such arrangements may not amount to cover pricing as defined in this Decision (i.e. a form of collusion between

²²¹⁰ For example written representations of Clegg, 27 June 2008, paragraph 56.

²²¹¹ Written representations of R Durtnell, 27 June 2008, paragraph 76 – "Honeywood File" first published 1929 after serialisation in Architects Journal – last reprinted 1980.

²²¹² As referred to in written representations of R Durtnell, 27 June 2008, paragraph 77.

²²¹³ For example written representations of F Parkinson, 25 June 2008, paragraph 56; written representations of Francis, 2 July 2008, paragraph 64; written representations of G F Tomlinson, 23 June 2008, paragraph 63; written representations of R Durtnell, 27 June 2008, paragraphs 76 to 77 and 80; written representations of Richardson Projects, 27 June 2008, paragraph 51; written representations of W R Bloodworth, 27 June 2008, paragraph 51; and written representations of Bodill, 26 June 2008, paragraph 2.13.

²²¹⁴ For example written representations of Clegg, 27 June 2008, paragraph 57; written representations of Bodill, 26 June 2008, paragraph 2.14; and written representations of F Parkinson, 25 June 2008, paragraph 57.

²²¹⁵ Written representations of GMI, 26 June 2008, paragraph 82.

²²¹⁶ For example written representations of McGinley Holdings, 27 June 2008, paragraph 25; and written representations of Francis, 2 July 2008, paragraph 60.

competitors), albeit that they may give rise to restrictions or distortions of competition and may therefore amount to infringements of the Chapter I prohibition.

- IV.26. In relation to the more general assertion that some or all clients were aware of the practice of cover pricing in general, the OFT notes that a fundamental feature of a cover price is giving the illusion of a competitive tender. Thus, to the extent that any client was aware of the practice of cover pricing in general, that did not imply awareness that any specific tender was the subject of cover pricing, so no client was in a position to prevent the restriction or distortion of competition arising from the cover bidding.
- IV.27. The OFT is of the view that Parties engaging in discussions with competitors about the pricing of contracts and submitting false tenders must at the very least have realised that this involved a distortion of the competitive process thereby restricting or distorting competition. In each cover pricing Infringement, one Party provided the other(s) with prices which they could use to ensure that they did not win the contract and which, although bogus, would appear to the client to be genuine. To the extent that any of the Parties may not have appreciated that this involved a distortion of competition, the OFT considers that the Parties were, at the very least, negligent in failing to realise this.
- IV.28. Moreover, it is apparent from the representations of certain Parties that they understood cover pricing to be anti-competitive and had instructed staff not to engage in this conduct. For example, Lindum stated that it had *'...explained the effects of the Competition Act when it came into force and there was **no doubt on the part of the estimators that cover pricing breached the competition rules'*** (emphasis added).²²¹⁷ If certain Parties were in no doubt that cover pricing was anti-competitive, then the OFT considers that other Parties must have been at least negligent in their failure also to recognise this. Neither the widespread nature of the practice, nor the fact that it may have been recommended to estimators or bidders by others in the industry, in any way legitimises a practice which amounts to an infringement of the Act for the reasons set out above in the Legal Background section (Section III) and at paragraphs IV.45 onwards below.
- IV.29. Notwithstanding this, the OFT has taken into account the Parties' representations on this issue when determining the level of penalty to be imposed in this case as discussed in Section VI (Enforcement) below.

Reasons given for cover pricing

- IV.30. The reason given by most of the leniency Parties for the practice of cover pricing is that it enabled them to remain on the tender lists of those involved in arranging contracts for the provision of building services. In response to the Statement, many other Parties also cited this motive.
- IV.31. In relation to leniency Parties, Loach explained that *'It is known that a company that does not respond to an invitation to tender will be regarded as being disinterested in the work or, alternatively, too busy to undertake the work with the result that their name will be removed from future tender lists. Thus, it has been perceived that a company that wishes to remain on the lists but who does not wish, for whatever reason, to undertake the specific contract needs to*

²²¹⁷ Written representations of Lindum, 27 June 2008, paragraph 62.

respond but submit a price which it knows will not be acceptable. The completion of a tender and the calculation of a price involves many hours of work and, therefore, constitutes a considerable cost to the company ... in respect of those contracts which the company does not seek to attain but where it is necessary to tender solely to remain on the tender lists, that cost and the expenditure of time has been avoided by obtaining a cover price from a competitor company who is known to be submitting a tender'.²²¹⁸

IV.32. Thomas Vale stated that *'It is a feature of both the private and the public sector tendering process that if a company fails to return a tender, it will be placed at the bottom of the client's tender list and may ultimately be removed from such list'.²²¹⁹*

IV.33. Irwins listed the various factors which led to cover prices being taken as:

- 'a) The limited resources of the estimating function.*
- b) Unsolicited enquiries with inadequate/poor information.*
- c) Additional post tender work on previous tenders.*
- d) The limited information available with current enquiries.*
- e) The short tender period with inflexible deadlines.*
- f) Inability to obtain material or sub-contract quotations.*
- g) The realisation that after initial work, inspection of the site and documentation, that the company would not be in a position to offer a competitive price.*
- h) Orders received during the tender period resulting in inability to carry out the project efficiently if awarded'.²²²⁰*

IV.34. Sol stated that tenders could be received at unexpected times or at times where it had insufficient capacity to carry out the work. It said that *'The choices available to the Company in these instances were: to return the tender and risk alienating the client with the consequence that we may be removed from tender lists for their future work; to submit a tender based purely on ... our experience of similar projects (but as no two projects are identical this would involve a substantial addition for risk which would produce a high price and potentially damage the Company's reputation by appearing uncompetitive); the final alternative being to obtain a cover price from one of the other companies tendering. Choosing to obtain a cover price had the benefit of a tender being submitted, with a price that was generally competitive, and would lessen the likelihood of upsetting the client, which would happen if the tender was returned'.²²²¹*

IV.35. However, when the scores of witnesses from the leniency Parties were asked by the OFT in interview whether they could recall any particular instance of a

²²¹⁸ Cover Activities report, OFT Document Reference 4017, pages 1 and 2.

²²¹⁹ Leniency application, OFT Document Reference 4519, pages 9 and 10.

²²²⁰ Leniency application, OFT Document Reference A0714, page 6.

²²²¹ Leniency application, OFT Document Reference 4357, page 2.

client removing them from a tender list as a result of their not tendering for a particular contract, almost without exception they were unable to do so.

- IV.36. This was borne out by the responses to the OFT's surveys carried out in connection with market definition before issue of the Statement. The OFT sent out the Market Definition questionnaire to more than 350 clients. Question 5 of the questionnaire requested these clients to rank criteria used *'for drawing up a list of building contractors who are to be asked to tender for a project'*. 106 clients responded that their first criterion was the ability of the bidder to *'demonstrate that it has already done similar type of work'*. 55 clients ranked *'good reputation in industry'* as the primary criterion. 33 clients required that the company *'has passed the external accreditation processes'* in the first place. 56 clients considered competitive pricing to be the most important criterion. Only eight clients considered the *'local firm'* to be the most important criterion. 26 clients considered other factors as prevalent. Significantly, only two out of the 350 clients contacted by the OFT said that they recognised *'availability'* and *'availability to tender and carry out works at required time'* as the most important criteria.
- IV.37. However, in response to the Statement, many Parties echoed the comments of the leniency Parties cited above and stressed that the reason they engaged in cover pricing activity was a genuine fear of removal from tender lists.²²²² For example:
- *'the risk of being removed from a tender list in the event of ... refusing an invitation to tender was a real one'*.²²²³
 - *'...the primary motivation of the cover pricing in the admitted infringements was to allocate scarce estimating resources to other work opportunities or to avoid taking on work where Baggaley and Jenkins might have capacity constraints in properly performing the contract without thereby incurring the risk (as a result of not submitting a tender or of submitting an artificially high one) of damaging client relations or not being invited to tender in the future'*.²²²⁴
 - *'in order to cope with such a heavy workload, estimators have to carefully schedule tenders ...if the tender has to be withdrawn after acceptance there is a real possibility of being struck off the client tender list permanently'*.²²²⁵
 - *'there are a variety of reasons why a cover may be taken, essentially to get Hall "out of a hole" and not to "lose face" in the eyes of the client'*.
- IV.38. However, this last Party also stated that when it was not concerned about being on a client tender list or where a tender was received from a new client that it would rather not work with at the time, it would normally return the tender.²²²⁶ Several other Parties stated that it had been their policy for years to return tenders when they did not wish to bid, and that they had done so on

²²²² For example written representations of Thomas Long, 26 June 2008, paragraph 2.7.

²²²³ Written representations of Bodill, 26 June 2008, paragraph 2.8

²²²⁴ Written representations of Baggaley and Jenkins, 27 June 2008, paragraph 10.

²²²⁵ Written representations of Hall, 25 June 2008, paragraph 56.

²²²⁶ Written representations of Hall, 25 June 2008, paragraph 60.

many occasions.²²²⁷ In particular, one Party stated that whilst it recognised delisting concerns and a company could be placed under significant pressure from a client to make a bid for a contract, it sought to reduce that risk by returning tenders early if they were not appropriate, and building relationships with its clients and educating them as to its skill sets and abilities.²²²⁸ This Party submitted that even where a company was unable or unwilling to return a tender unpriced, it had a variety of legitimate means of arriving at a realistic price for a contract without committing a significant level of resource, such as utilising sub-contracting quotes, pricing manuals, freelance estimators and pre-tender advisors or clients' pre-tender estimates.²²²⁹

- IV.39. Some Parties were able to provide examples of where they believed they had been 'struck off the tender list' or 'relegated to the bottom of the rotation process' when they did not return a tender.²²³⁰ In relation to the latter, the OFT notes that moving to the bottom of a tender list may be a natural consequence of a rotation process, whether a tenderer declines to quote or provides a bid, and that such instances do not therefore provide clear support for the Parties' arguments in mitigation. Some Parties also provided evidence of correspondence that indicated that tendering history would be a factor when assessing tender lists.²²³¹
- IV.40. However, the majority of Parties claimed that it was difficult to provide such evidence because it is only infrequently communicated to parties, particularly in a written form.²²³² For example, one Party stated that the fact that Parties were unable to recall particular instances of a client removing them from a tender list as a result of not submitting a tender showed that *'...the risk was not illusory... it may not objectively have been so great as tenderers imagined, but subjectively, the risk was plainly real'*.²²³³
- IV.41. Some Parties stated that it was unlikely that a client would communicate to them that the reason they had not been asked to tender again was because they returned a bid.²²³⁴ A few Parties stated that *'It is extremely unlikely that a contractor would know the reason why he is not being invited to tender for a particular job. Even if the contractor was aware that he had not been invited to tender the client or his professional advisers would be most unlikely to give as a reason the failure to respond to an earlier tender'*.²²³⁵
- IV.42. It has also been represented that the OFT interviewing leniency Parties in relation to this question may have provided a skewed result as leniency Parties may not be able to recall not tendering in the first place, and therefore not be

²²²⁷For example written representations of Haymills Group, 27 June 2008, paragraph 10; written representations of GMI Construction, 26 June 2008, Annex 11; and written representations of R G Carter, 27 June 2008, paragraph 2.20.

²²²⁸ Written representations of Apollo, 27 June 2008, paragraph 6.7.

²²²⁹ Written representations of Apollo, 27 June 2008, paragraph 6.10.

²²³⁰ For example witness statement of Christopher Shaw Griffin of P Casey, 27 June 2008, paragraph 9; oral representations of Robert Woodhead, 2 July 2008, page 3; written representations of Dukeries, 27 June 2008, page 6; and written representations of Loach, 26 June 2008, paragraph 21.

²²³¹ For example written representations of Herbert Baggaley, 27 June 2008, paragraph 27.

²²³² For example written representations of Sol, 2 June 2008, page 5; and written representations of McGinley Holdings, 27 June 2008, paragraph 26.

²²³³ Written representations of McGinley Holdings, 27 June 2008, paragraph 26.1.

²²³⁴ For example written representations of Wiggett, 25 June 2008, paragraph 2.10.

²²³⁵ For example written representations of Wiggett, 25 June 2008, paragraph 2.10 and written representations of Thomas Long, 26 June 2008, paragraph 2.9.

able to provide examples of being removed from tender lists.²²³⁶ In this respect, the OFT does not consider that the leniency Parties should be in a different position from any other Party in this case.

- IV.43. One Party stated that *'the reasons witnesses can not recall any particular instance of a client removing them from a tender list as a result of their not tendering for a particular contract was because in most cases at that time they avoided the scenario by submitting a cover price'*.²²³⁷ Other Parties made similar representations²²³⁸ and/or suggested that a direct question was not asked in relation to this issue²²³⁹, with one Party stating that it did not specifically have this question put to it in interview and that it could recall a few occasions where this might have occurred.²²⁴⁰
- IV.44. The OFT has been given few examples of Parties actually being removed from tender lists as a result of declining to bid. Nevertheless, the OFT does accept that there was a relatively widespread perception amongst the Parties that they could be removed from a tender list if they declined to bid for a tender and that there may be instances where this has occurred. While the OFT has taken this into account when determining the starting point for penalty calculations (as discussed in paragraph VI.108 below), the OFT does not accept that it provides any sort of defence for illegal activity.
- IV.45. As discussed above in the Legal Background section, in paragraph III.111, the CAT has confirmed that the motivation of an undertaking in submitting a cover-bid, whether rational – such as seeking to remain on a selective tender list – or not, is irrelevant.
- IV.46. Thus, in essence, an undertaking's motive for cover pricing is irrelevant. It is no defence to an allegation of cover pricing for an undertaking to say that the cover bid was only put in so as to remain on the client's contractor list.²²⁴¹
- IV.47. Some companies told the OFT that they engaged in cover pricing partly because of the expense of calculating genuine figures for every tender they received – for example, see paragraph IV.31 above. Hugh McElhill, Senior Estimator at Balfour Beatty stated, *'Estimating is an expensive process [sic] so if we're given the job to price then, then it's to get the job'*.²²⁴² Nicholas Greene, Director of John Cawley stated, *'And physically it costs a lot of money to price. We physically could not afford to price every job that came in. Because there's a financial element in every – pricing a job takes up man hours'*.²²⁴³
- IV.48. This was reiterated in several Parties' representations to the OFT in response to the Statement.²²⁴⁴ For example, one Party stated in oral representations that

²²³⁶ Written representations of McGinley Holdings, 27 June 2008, paragraph 26.2.

²²³⁷ Written representations of R Durnell, 27 June 2008, paragraph 88.

²²³⁸ For example written representations of Baggaley and Jenkins, 27 June 2008, paragraph 12; written representations of Bodill, 26 June 2008, paragraph 2.10; and written representations of Lotus, 26 June 2008, paragraph 6.18.1.

²²³⁹ Written representations of Thomas Long, 26 June 2008, paragraph 2.9.

²²⁴⁰ Written representations of Henry Boot, 27 June 2008, paragraph 5.4.

²²⁴¹ *Richard W Price (Roofing Contractors) Ltd v OFT* [2005] CAT 5, at paragraph 54, citing *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, paragraphs 250 to 253.

²²⁴² Interview transcript, OFT Document Reference 11141, page 3.

²²⁴³ Interview transcript, OFT Document Reference 11297, pages 8 and 9.

²²⁴⁴ For example oral representations of Interclass, 27 June 2008, page 10; and written representations of Thomas Long, 26 June 2008, paragraph 2.3.

'because of our limited resources we were not able to deal with a tender in any other way other than submitting a cover price'. Another Party stated that the 'trend for public authorities in recent years to invite tenders for all contracts both large and small have increased the pressure on contractors' estimating resources...the taking of a cover price has developed as a mechanism for dealing with those cases where a contractor is unable or unwilling to prepare a tender offer but does not wish to reject the invitation to tender'.²²⁴⁵

- IV.49. As stated previously an undertaking's motivation in seeking and/or providing a cover bid, whether rational or not, is not a defence to a breach of Chapter I or Article 81. Moreover, as discussed by the Commission in its decision on the Building and construction industry in the Netherlands,

'... in theory, there are two ways of recovering calculation costs: either the client remunerates the price tender separately; or the building and construction firm includes the costs in its general business costs. The first possibility cannot be applied in principle in so far as, in civil law, the invitation to submit a tender and the submission of a tender do not give rise to any contractual payment obligations. The second possibility is thus the appropriate and generally applied method throughout the Community of recovering calculation costs, in the same way as promotion costs and the costs of marketing products form part of the general expenses of an undertaking'.²²⁴⁶

- IV.50. There is no prohibition on the unilateral inflation of a bid, whether to include the cost of calculating the tender or for other reasons. However, collusion with competitors during a tender process is prohibited since it artificially distorts the competitive process.

Potential effects of cover pricing

- IV.51. The OFT is not, when applying the Chapter I prohibition, 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.²²⁴⁷ In the present case, the OFT is not making any findings that any of the Infringements had the effect of restricting or distorting competition. As set out in paragraphs III.93 to III.113 of the Legal section above, cover pricing has its object a restriction of competition. The OFT needs only to show that the practice was capable of preventing, restricting or distorting competition.²²⁴⁸ However, a number of Parties have made representations that the Infringements to which they were party had no effect on the tender process in question. The OFT sets out below its view that, in relation to some of the Infringements, it is clear that the provision of a cover price had an effect on the particular tender process and that all of the instances of cover pricing were, at the very least, capable of restricting or distorting competition.

- IV.52. The submission of cover prices gives the illusion that there are more companies competing for a tender than is in fact the case. By substituting the certainty of

²²⁴⁵ Written representations of Thomas Long, 26 June 2008, paragraph 2.6.

²²⁴⁶ Commission Decision 92/204/EEC, IV/31.572 and 32.571 – *Building and construction industry in the Netherlands*, 5 February 1992, paragraph 74.

²²⁴⁷ *Argos & Littlewoods v OFT* [2004] CAT 24, at paragraph 357. See also legal section, paragraphs III.60 to III.65.

²²⁴⁸ Case C-8/08 *T-Mobile Netherlands BV and others v NMa*, judgment of 4 June 2009, at paragraph 31. See also the Opinion of AG Kokott in the same case, 19 February 2009, at paragraph 48.

co-operation for the risks of competition, the companies involved in cover pricing and other bid rigging activities knew that competition for any particular tender was reduced and those companies interested in winning the work may have therefore been able to submit higher bids than would otherwise have been the case.

- IV.53. In the Statement, the OFT noted that companies often insisted that where they exchanged a cover price with only one competitor, this did not distort the competitive process since it still left a number of companies submitting competitive tenders. For example, Les Pursey, estimator for Balfour Beatty stated *'in normal circumstance, six people pricing, if one person takes a cover they've still, still got to beat the other four'*.²²⁴⁹
- IV.54. However, the OFT notes that in a number of tenders, one company gave cover prices to three (or more) other tenderers. If four companies were tendering in these circumstances, then the client would not receive any genuinely competitive tender bids, despite having received four apparently independent bids. In other tenders only the companies engaging in cover pricing put in any form of tender bid, while all the other companies declined to bid. Again, in these circumstances the client will have received no competitive bids. As stated above, the practice of cover pricing was widespread and endemic in the construction industry and the OFT had initial evidence of cover pricing taking place in many more instances than feature in this Decision. Consequently, it is highly likely that clients were receiving no genuinely competitive bids in many more instances than those of which the OFT is aware, and the OFT considers that the widespread nature of the practice must have caused harm.
- IV.55. In response to the Statement, many Parties stated that the OFT has not proven the effect of cover pricing and that knowing that the competition was reduced had no effect on whether a genuine bid was submitted.²²⁵⁰ Parties stated that they did not accept that it was the case that clients were receiving no genuinely competitive bids. These Parties said that in cases where they were concerned, when they gave a cover price, they submitted a genuinely competitive bid, and when they took a cover price, they had no way of knowing which other bids were competitive.²²⁵¹ A number of Parties said that in relation to their specific Infringements, the competitive process was not distorted.²²⁵² One Party claimed that the practice of cover pricing was considered harmless and that it was not intended to have any effects on the ultimate price paid by the customer.²²⁵³ Some Parties stated that only the Party giving the cover would know that competition had been reduced by one.²²⁵⁴
- IV.56. Another Party noted that the OFT had not identified any instance in which the company inflated its bid above the competitive level as a result of requests for cover prices. It stated that in the majority of cases, *'cover pricing requests from even a number of competitors would not provide a company with certainty that it was the only company seeking to win the contract, since it would be necessary to know the full list of tender parties (not normally information distributed freely by clients in advance for obvious reasons) in order to be*

²²⁴⁹ Interview transcript, OFT Document Reference 11139, page 5.

²²⁵⁰ For example written representations of Linford, 26 June 2008, paragraph 9.28.19.

²²⁵¹ For example written representations of Clegg, 27 June 2008, paragraph 58.

²²⁵² For example written representations of McGinley Holdings, 27 June 2008, paragraph 26.4.

²²⁵³ Written representations of Baggaley and Jenkins, 27 June 2008, paragraph 12.

²²⁵⁴ For example, written representations of R Durnell, 27 June 2008, paragraph 91.

confident that every company that had been invited to tender was either not doing so or was not seeking to win'.²²⁵⁵ The OFT discusses below the various ways by which the parties to a tender may become aware of other parties on a tender list (for example, through discussions with subcontractors and trade associations).²²⁵⁶

- IV.57. Several other Parties stated that the decision to submit a cover price was *'made independently by each contractor and cover pricing was just an effective way of carrying out that decision... cover pricing does not therefore alter the fact that inflated bids would be put in by those companies that had already decided to do so'*.²²⁵⁷ However, it is obvious that if a party has decided independently to submit an inflated bid, it should do so without collusion with its competitors. Cover bidding infringes the Act because it arises as a result of collusion between competitors. The fact that the same result may arguably arise as a result of wholly unilateral action cannot absolve the Parties of liability, nor does it lead to the conclusion that a bid submitted after collusion with competitors, is a 'genuine' or 'competitive' bid.²²⁵⁸
- IV.58. Several Parties also submitted that it would be impossible in practice to submit a highly inflated bid as the client's professional quantity surveyor would have a clear budget price in mind and to inflate the figure by as much as 10 per cent is unrealistic, as reflected in their profit figures.²²⁵⁹ Another Party stated that most clients are well advised on tenders by teams of professionals and any attempt by a contractor to inflate a tender price would have been likely to be unsuccessful.²²⁶⁰ However, it is clear from the tender figures set out in many of the Infringements in this Decision that it was perfectly feasible for a company to submit a bid that was more than 10 per cent in excess of some of its competitors, without apparently arousing any suspicion on the part of the client. Indeed, some of the cover bids were calculated at amounts of 10 to 15 per cent or more above the giver's tender bid.²²⁶¹
- IV.59. More generally in relation to the above representations, the OFT notes that there were some instances where Parties provided cover prices to all of the other Parties that submitted tenders.²²⁶² Further, even where this was not the case, it is clearly conceivable that a company, equipped with the knowledge that a competitor was receiving a cover, could have chosen to artificially inflate its own tender price or at least bid less keenly than might otherwise have been the case.²²⁶³ At the same time, the company submitting the cover price was in no position to know whether the remaining bidders were submitting genuine bids or not, that is, as is the situation with a number of the Infringements in this Decision, there could have been no bids that were not tainted by either the giving or taking of a cover price.

²²⁵⁵ Written representations of Herbert Baggaley, 27 June 2008, paragraph 25.

²²⁵⁶ See paragraphs IV.80 to IV.95 below.

²²⁵⁷ Written representations of Herbert Baggaley, 27 June 2008, paragraph 23; and written representations of AH Willis, 27 June 2008, paragraph 41.

²²⁵⁸ Refer to Legal section, III.95.

²²⁵⁹ For example written representations of Hall, 25 June 2008, paragraph 70.

²²⁶⁰ Written representations of Baggaley and Jenkins, 27 June 2008, paragraphs 21 and 27.

²²⁶¹ See paragraph IV.104 below.

²²⁶² For example Infringements 66, 168 and 204.

²²⁶³ For example IV.113 below.

- IV.60. Moreover, it is important to note that a restriction or distortion of competition is not limited to a direct inflation of the winning tender price. Harm to the competitive process, with a consequent reduction in the likelihood that the best possible price has been obtained, can arise in other, less direct ways.
- IV.61. Distortion of competition by engaging in bid rigging has been confirmed by the CAT to be a contravention of the Chapter I prohibition because *'(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'*.²²⁶⁴
- IV.62. Even where, for example, two out of six bidders have been found by the OFT to have engaged in cover pricing, distortion of competition occurs or may occur in the following ways.
- IV.63. First, the client is deliberately deceived into thinking that it has received a certain number of genuine bids when in fact only a proportion of them are genuine and unaffected by unlawful contact with other parties.
- IV.64. Secondly, the client is deprived of obtaining an alternative bid from another contractor who genuinely wants to win the work. That other bidder might be more efficient than any of the bidders currently in the race and able to submit a lower bid. The client may also have some form of requirement to obtain a certain number of genuine bids in order to satisfy carefully agreed procurement rules that are designed to guarantee effective competition, and will unknowingly have been thwarted in his attempt to satisfy that requirement.
- IV.65. Thirdly, a potentially more efficient bidder that wants the job is deprived of the opportunity to win the work. This represents a form of barrier to entry that prevents new entrants from being added to the list of tenderers.
- IV.66. These second and third reasons can be linked directly to many Parties' stated reasons for engaging in cover bidding, that is, to stay on tender lists for future work. By doing so, the effect would be to stagnate tender lists, preventing other contractors, whether new entrants or existing competitors, from being given the chance to tender on future work (as well as the chance to bid on the tender in question). In this way, it can clearly be seen that the practice of cover bidding was capable of restricting or distorting competition for future tenders, and moreover, that such distortion may have been a primary motive of many Parties.
- IV.67. The OFT also observes that it did not have sufficient resources to visit every construction company in England or indeed in the regions that are the subject of the tenders in this Decision, and given the historically endemic nature of cover pricing it is very possible that other bidders were providing cover prices to each other, further reducing the number of genuinely competitive bids.

²²⁶⁴ Apex Asphalt and Paving Co Limited v OFT [2005] CAT 4, at paragraph 251. See also Makers UK Limited v OFT [2007] CAT 11, at paragraphs 14 to 15.

- IV.68. The OFT is therefore of the view that cover pricing invariably has the potential to at least distort competition although as noted above, the OFT is not making any findings in this Decision as to the effect of any of the Infringements.

How cover pricing was carried out

Contact was almost exclusively by telephone

- IV.69. Unlike with many of the OFT's previous investigations into cover pricing in the roofing industry²²⁶⁵, the OFT has uncovered very little evidence of written communications such as faxes being exchanged between competitors in the construction industry in order to facilitate cover pricing. In this investigation the evidence has been overwhelmingly that most contacts between competitors took place by telephone. In response to the Statement, many Parties confirmed that the conduct was routinely carried out over the phone.²²⁶⁶
- IV.70. For example, Henry Boot stated that '*Exchanges pertaining to cover pricing were almost invariably done by way of a quick telephone call*'.²²⁶⁷ Stephen Bradbury, Managing Director of Jack Lunn, confirmed that with regard to the exchange of covers, '*I'm not aware of it happening in any other way than by telephone*'.²²⁶⁸
- IV.71. The occasional examples in this Decision of exchange of information between competitors by e-mail or fax generally followed on from a telephone call, usually where a client had requested a detailed breakdown of tender figures from the lowest two or three bidders in the tendering process.

Contact in each tender was reciprocal

- IV.72. Other than in respect of two Infringements, the OFT has uncovered no evidence that any companies giving cover prices in respect of particular tenders made the initial contact and/or actively sought to ensure that all of the other tenderers were provided with cover prices.²²⁶⁹ Such activities are usually associated with more organised bid rotation or market sharing schemes and the OFT has no evidence that this occurred in this case. One Party stated in response to the Statement that this is evidence for the fact that the motivation in taking cover was not to assist the giver of the cover, but to allocate scarce estimating resources without damaging client relationships or being struck off tender lists.²²⁷⁰
- IV.73. Instead, most of the instances of cover pricing described in this Decision arose out of a ***reciprocal contact***, where the company wanting a cover price made the initial contact by telephoning a company that it knew to be bidding for the tender, and asking it for a cover price. Similarly, agreements to pay

²²⁶⁵ See www.offt.gov.uk/shared_offt/ca98_public_register/decisions/westmidlandsroofing.pdf, www.offt.gov.uk/shared_offt/ca98_public_register/decisions/ner.pdf, www.offt.gov.uk/shared_offt/ca98_public_register/decisions/scot.pdf, www.offt.gov.uk/shared_offt/ca98_public_register/decisions/scotroof.pdf, and www.offt.gov.uk/shared_offt/ca98_public_register/decisions/flatroof.pdf.

²²⁶⁶ For example written representations of Clegg, 27 June 2008, paragraph 52 and written representations of F Parkinson, 25 June 2008, page 13.

²²⁶⁷ Leniency application, OFT Document Reference B1584, page 6.

²²⁶⁸ Interview transcript, OFT Document Reference 11289, page 10.

²²⁶⁹ See Infringements 75 and 158.

²²⁷⁰ Written representations of Baggaley and Jenkins, 27 June 2008, paragraph 14.

compensation arose out of a telephone call from one company to another bidder. In many instances of cover pricing, a second call was then made close to the tender deadline, usually but not exclusively by the provider of the cover price, during which the cover price was given. There is no evidence that any cover price or compensation payment was given unilaterally. In all cases, the provision of a cover price and/or a compensation payment followed an initial request for a cover price and/or a mutual arrangement to pay compensation.

- IV.74. For example, in its leniency application Bluestone stated, *'There is no evidence whatsoever of Bluestone initiating the giving of a cover price to a competitor'*.²²⁷¹
- IV.75. Christopher Stubbs, Company Director and employee of Adam Eastwood, explained *'We would get a telephone call probably I don't know a week before the tender was due in ["can you give us a cover (?") and if we were giving a cover out we would wait until the 11th hour so that all they had to do was fill in their slip and get it away and vice versa. If we were expecting a cover it more often than not came in on the morning of the tender. We just used to put the figure on the sheet put it in the envelope and away we went'*.²²⁷²
- IV.76. Similarly, Richard Milner, Managing Director of Harlow & Milner, was asked in interview whether a cover price would be arranged some days in advance of the tender closing date. He replied, *'... if you've sort of made the decision the week before, or you may know who's pricing it, in that case it might be, 'can you help us out' and it'll be... 'yea we'll let you know on the day', we'd very rarely get a price days before, if we were taking a cover from somebody else it would always be on the day that the tender went in, you'd never have a load of notice because generally speaking, estimators being of the type that they are, you know, the nature of the beast if you like, it always takes to the wire'*.²²⁷³
- IV.77. Matthew Pickering, Senior Estimator for Phoenix, confirmed that if he wanted a cover price, *'you would probably try and ring up a few days before the tender date just to make sure that they can give you a cover price...if they'd say, yes they can help you, you would wait for a phone call, probably ring them a day before the tender's due back'*.²²⁷⁴
- IV.78. On other, less common occasions, particularly where the first call was made close to the tender deadline, the cover price was communicated back immediately to the person making the request during the first (and only, in these circumstances) telephone call.
- IV.79. For example, Ivan Peter Nelson, an Estimating Director of Irwins, explained *'You'd probably get to about two or three days before and realise that you were just not going to get a figure together and then probably on the night before or sometimes on the day, sometimes even after they're due to go in, I'd ring around and get a figure that I knew was going to be, reasonably all right over the top ... It worked well because it meant that I could always have another second look at each enquiry and be more choosy ... and it was a way, really,*

²²⁷¹ Leniency application, OFT Document Reference B1833, page 15.

²²⁷² Interview transcript, OFT Document Reference 11094 pages 3 to 4.

²²⁷³ Interview transcript, OFT Document Reference 12731, page 9.

²²⁷⁴ Interview transcript, OFT Document Reference 11327, page 5.

of, dealing with a, a tender, at the last minute and not upsetting, the clients and the architects and quantity surveyors'.²²⁷⁵

Obtaining details of bidding competitors who could provide a cover price

Subcontractors

- IV.80. Companies requesting cover prices would find out who else was tendering for a contract, and therefore companies from whom they might obtain cover prices, by a variety of means. Often they would find out from subcontractors whom they would ask to bid for a part of the work, such as the roofing or the electrical works. Sometimes the subcontractors would tell them without being asked that they were also being asked by a specified other company to bid for the same work.
- IV.81. For example, Malcolm Welsby, an estimator for Henry Boot, stated *'You sometimes get the competition without even trying. Sub-contractors, suppliers will ring up and say, "I'm preparing a quotation for roofing, I know that you're tendering, can I send you my quotation", and you say, "Yeah fine, by the way who else are you quoting?", it comes out very easy ...'.²²⁷⁶*
- IV.82. Julian Kaweck, Estimating Surveyor, Estimating Director and later Managing Director at Strata, stated that estimators would find out who was pricing the tender *'From subcontractors suppliers ringing around. You always got to find out the competition, everybody does'.²²⁷⁷*
- IV.83. Arthur Fox, Estimating Director at Wrights (Lincoln) until April 2003, explained that he would not actively try and find out who his competitors were on a particular contract, *'... we'd just find out as a matter of course. Suppliers will tell us, or subcontractors will...that's just part of a normal conversation with subcontractors and suppliers, and it, it happens all the time'.²²⁷⁸*
- IV.84. On other occasions the subcontractor would be asked for the names of other companies bidding for the main contract, and these names would be provided.
- IV.85. For example, Stephen Bradbury, Managing Director of Jack Lunn, confirmed that if requested then subcontractors would pass on competitor information, *'... we might ask a subcontractor, are you pricing it for anyone else? And they'll say yes, we're pricing it for two or three, we're pricing it for so and so...'.²²⁷⁹*
- IV.86. Similarly, Steve Rhodes, a Bid Manager for Totty (Propensity), said that *'when you start talking to ... any of the key subcontractors ... when you're chasing your quotations or even when you're having a dialogue about whether they'd like to price the job ... it's a general question "Who else have you had enquiries from?'''.²²⁸⁰*

²²⁷⁵ Interview transcript, OFT Document Reference 11253, page 5.

²²⁷⁶ Interview transcript, OFT Document Reference 11210, pages 4 and 5.

²²⁷⁷ Interview transcript, OFT Document Reference 13156, page 13.

²²⁷⁸ Interview transcript, OFT Document Reference 13131, page 4.

²²⁷⁹ Interview transcript, OFT Document Reference 11289 page 8.

²²⁸⁰ Interview transcript, OFT Document Reference 11351, page 8.

Competitors

- IV.87. On occasions companies would simply phone competitors who they thought might be bidding for the tender, and ask them whether they were bidding and if so whether a cover price could be provided.
- IV.88. For example, Martyn Etheridge, an estimator for Balfour Beatty stated *'There are some contractors who, I mean, obviously all in the telephone book, so you'd ring them up and ask for, say, the chief estimator and he'd say, yeah, yeah we're pricing it'*.²²⁸¹
- IV.89. Peter Goodbun, Estimating Manager at Mansell stated *'We would ring up one of our competitors to enquire as to whether they are pricing the job. We ... then inform them that we were unable to and would they give us a figure that we could go in on, which would obviously be in excess of theirs'*.²²⁸²

The Builders Conference

- IV.90. Certain organisations provided information more generally to construction companies. The Builders Conference collected information on a regular basis and provided it to construction companies. By this means this organisation helped to facilitate the exchange of cover prices between construction companies, although the OFT has no evidence that this was its intention. Christopher Stubbs, Company Director at Adam Eastwood, explained how he would find out who Adam Eastwood's competitors were from the Builders Conference, *'... they would ring round, are you pricing this work [?], yes ...they would have details of who else was tendering and you would say, yes I am pricing this work and they would say you are up against x, y and z'*.²²⁸³
- IV.91. Richard Blount, Director of J H Hallam stated *'... the Building Conference quite often will phone us up and say are you tendering and we will say yes and they will tell us who else is tendering'*.²²⁸⁴
- IV.92. Cliff Davey, Chief Estimator for Balfour Beatty stated *'if we were called by a Conference to ask if we were on a particular tender list, then we would declare that we were'*.²²⁸⁵

Glennigans

- IV.93. Another organisation, Glennigans, carried out a similar function. Jonathan Kirby, Commercial Director for Totty (Propensity), explained how Totty would find out the identity of other bidders for a tender, *'There were two routes, one you would [use] quite often, you know, during the tender process sub-contractors would just actually tell you ... And then there was also an outfit who actually found out. I don't know what they did but you could ring this outfit [Glennigans] and they told you who was on the tender lists'*.²²⁸⁶
- IV.94. Roger Hayes, former Chief Estimator for Herbert Baggeley stated *'There are agencies [which assist in finding out who the competition is on a particular*

²²⁸¹ Interview transcript, OFT Document Reference 11138, page 12.

²²⁸² Interview transcript, OFT Document Reference 11507, page 7.

²²⁸³ Interview transcript, OFT Document Reference 11094, page 3.

²²⁸⁴ Interview transcript, OFT Document Reference 12757, page 6.

²²⁸⁵ Interview transcript, OFT Document Reference 11144, page 10.

²²⁸⁶ Interview transcript, OFT Document Reference 11352, page 7.

tender] and I'm trying to think of their names now ... people like that, Glennigans'.²²⁸⁷

Trade Associations

- IV.95. Sometimes trade associations would provide bidder information in addition to their other activities. In the Nottingham area, the OFT uncovered evidence of two particular trade associations that facilitated the exchange of information and thereby the exchange of cover prices, the Nottingham Builders' Guild and the North Nottinghamshire Contractors' Guild. The work of these organisations is described at paragraphs IV.128 to IV.146 below. Allan Gregory, Managing Director of ARG, explained, *'the guild ... John Wooley, the secretary, used to phone around everyone on a weekly basis to gather intelligence. So if you needed assistance on a particular job, whether it was at the beginning ... whether you'd got halfway through the tender ... I've had to phone John Wooley, get a name, get a cover price, get on the bike, and get out and get the tender in'*.²²⁸⁸

Giving a cover price by informing a competitor of the company's own bid

- IV.96. When providing a cover price to a competitor, the providing company would on occasions inform the company receiving the cover price of the amount it intended to bid, and the receiving company would then submit a tender a small percentage in excess of the provider's bid price. For example, see Infringement 180 below. A number of Parties noted in their responses to the Statement that this was not the case in relation to any of the cover prices they gave or received.²²⁸⁹

Giving a cover price by telling a competitor what it should bid

- IV.97. More often, the providing company would calculate a figure somewhat in excess of its bid and inform the receiver of that cover price, and that was generally the tender bid that would be submitted by the receiver of the cover price. For example, with regard to providing a cover, Steve Rhodes, Bid Manager Public Division of Totty, said, *'a phone call halfway through the process, can you help us out. And typically I'd say yes without asking anybody. And then obviously we'd ring somebody up and dictate to them what figure they should put....'*²²⁹⁰
- IV.98. Robert Lowe, Regional Chief Estimator for Mansell stated *'I would look at my figure that I've arrived at, or if I hadn't arrived at it, the latest level I'd got to with it if we hadn't actually finalised it, and I would add a percentage onto that to suggest a figure that would not win'*.²²⁹¹

Calculating a cover price

- IV.99. Companies would calculate the cover price so that it was sufficiently above their own figure for the receiver of the cover price not to end up accidentally winning the contract, but not so far above that it looked ridiculously high and

²²⁸⁷ Interview transcript, OFT Document Reference 13391, pages 4 and 5.

²²⁸⁸ Interview transcript, OFT Document Reference 11113, page 7.

²²⁸⁹ For example written representations of Henry Boot, 27 June 2008, paragraph 5.6.

²²⁹⁰ Interview transcript, OFT Document Reference 11351, page 12.

²²⁹¹ Interview transcript, OFT Document Reference 11505, page 10.

either might have, in their view, led to the receiver of the cover price being rejected for future tenders due to being uncompetitive, or might have led to suspicion on the part of the client that organised the tender.

- IV.100. Many of the leniency Parties commented on this process in these terms. For example, Christopher Stubbs, Company Director at Adam Eastwood, explained '*... I tried not to give it as an actual 5% or 6% we would look at the contract and you know we would give them a reasonable percentage above what ours was so that it didn't harm them in any way... you didn't use to put 50% on because that would then look a ridiculous figure ...*'.²²⁹²
- IV.101. David Goodhead, an estimator at Davlyn, explained '*... I always ended up trying to think in terms of putting, say ... something in the region of, four, five per cent ... away from where we were ... not to put them miles away ... which to me slightly embarrasses them ... I suppose it's a case of do unto others as ... you would expect [them to do to you]*'.²²⁹³
- IV.102. In its leniency application, Wildgoose stated that '*Companies would generally endeavour to provide the requesting contractor with a competitive figure as, if the figure was too high, it would make the party requesting the cover look ridiculous in the eyes of the client and that contractor would be reluctant to provide assistance in the future. Therefore, contractors would tend to provide a figure as close to their own figure as they felt comfortable with, usually around 4-5% above*'.²²⁹⁴
- IV.103. On occasions companies receiving cover prices would go to great lengths to ensure that clients' suspicions were not aroused. For example, Clive Simpson, senior quantity surveyor at Thomas Fish, said that '*if we were taking a cover on a job, nothing was done unless, unless there was a feeling that a site visit was necessary, in which case, a site visit would be undertaken, so that the client, you cover your tracks so that the client wouldn't think, oh, there's only ever been two people come to visit the site, how could the other two possibly have priced it, so you went through the motions, but that was as far as it went*'.²²⁹⁵
- IV.104. Although the majority of the examples given above and in this part of the Decision involved differences in price of around 5 per cent, these examples are by no means exclusive and the OFT did not intend them to be so in the Statement. It is abundantly clear from the Infringements set out in this Decision that cover prices given to competitors were regularly calculated at amounts of 10 to 15 per cent or more above the giver's tender bid.²²⁹⁶ Thus, it cannot be accepted that tender prices more than 5 per cent above a competitor's submitted bid are inconsistent with, or incapable of, being cover prices. The arguments of certain Parties on this issue are addressed further in relation to specific Infringements below.

Companies caught out and asked to submit additional details

- IV.105. Occasionally the receiver of a cover price was caught out by the cover price being slightly too low or by there being too few bidders in the tendering

²²⁹² Interview transcript, OFT Document Reference 11094, page 4.

²²⁹³ Interview transcript, OFT Document Reference 11179, page 13.

²²⁹⁴ Leniency application, OFT Document Reference 0435, pages 1 and 2.

²²⁹⁵ Interview transcript, OFT Document Reference 13313, page 5.

²²⁹⁶ For example, Infringements 17, 91 and 176.

process, so that their tender ended up being second and the client asked them to submit additional details, for example a breakdown of their tender. It was the practice of many clients to invite tenders from around six companies, and then to ask the two companies submitting the lowest bids to provide a detailed breakdown of their figures, so that the client could ensure that the bid was realistically planned.

IV.106. In such circumstances the receiver of the cover price would have no detailed background information to give to the client and would have to go to the provider of the cover price and ask it for additional figures that could then be communicated to the client.

IV.107. For example, Arthur Paul Taylor ('APT'), a senior estimator at Wildgoose, stated *'... the idea is to keep the other contractor as close to your figure as you would feel comfortable with, usually around 4-5% above. We would not want it to be too close as it may mean that he is asked for further information by the client which we would then be obliged to supply'*.²²⁹⁷

IV.108. A number of tenders in this Decision feature the recipient of the cover price having been caught out in this way. These are often also the tenders that provide the infrequent examples of written communication between the Parties, since it proved necessary in these instances for detailed breakdown figures to be faxed or e-mailed from one company to the other and the normal telephone contact was unsuitable for these purposes.

IV.109. For example, in the tender for an apartment development at Speculation Street, dated 25 February 2004, Infringement 182 below, Steven Bradbury, Managing Director at Jack Lunn, stated *'the client has ... seen Jack Lunn's is the lowest figure and Lindum's in number two. Now at that stage he doesn't understand ... exactly how those prices are made up. And it may well be that Jack Lunn have missed something off, so as that their price ends up the lowest ... So in effect, he's not confident that both contractors are comparing apples with apples ... So ... what is normal then ... is that the client will contact the bottom two contractors and ask them for the contracts sum analysis, which gives all the break-down of how they've arrived at that price. ... So what's actually happened is, Lindum have contacted Jack Lunn and said to Jack Lunn, we've got a problem now because the client has asked us to give him a contract sum analysis and because we took a cover off you, we haven't got one. Can you help us out? ... And Lindum still want to appear to the client as if they've put a bona fide bid in'*.²²⁹⁸

Adding a further amount to the cover price

IV.110. Generally companies would submit the cover price that had been given to them by a competitor, as the figure for their tender bid. Alan Loveday, Commercial Manager at Propensity, said *'...it's an unwritten rule that if somebody gives you a cover price that's the minimum price that you put in. And generally speaking we always stick with that price so that when a tender result is issued to everyone once the contract's awarded, which is common practice by the client,*

²²⁹⁷ Witness statement, OFT Document Reference 14264, page 5.

²²⁹⁸ Interview transcript, OFT Document Reference 11290, page 5.

then you can see that people have actually maintained the position that you gave them'.²²⁹⁹

IV.111. Sometimes, however, the receiver of a cover price would not use the precise figure given to them, perhaps adding on a little more to ensure that they did not win the contract or be caught out in the manner described in paragraph IV.105 above, or amending a round figure to a less rounded figure so that it looked more realistic. For example, Ivan Peter Nelson, an Estimating Director of Irwins, explained that the tender submitted by Irwins was not necessarily the figure supplied by a competitor for a cover price, *'perhaps I'd add a little bit more or... You wouldn't knock any off but you'd add a bit more on perhaps*'.²³⁰⁰

IV.112. Wildgoose stated in its leniency application that *'Some contractors would provide an exact cover figure to enter on the tender form and others might indicate that Wildgoose should price around a particular figure*'.²³⁰¹

Refusal to give a cover price

IV.113. In the Statement, the OFT noted that there were very few circumstances in which a request for a cover price would be refused. Duncan Ironmonger, Senior Estimator and subsequently Chief Estimator at Strata until October 2004, explained, *'You ring up the competition, are you pricing it. No matter who, you weren't bothered who, just as long as you didn't win the work, that's all that mattered. So, you'd ring up, we don't want it, can you give us a cover. Most of them would just say yes, obviously, because they know they're reducing their competition*'.²³⁰²

IV.114. Steven Bradbury, Managing Director at Jack Lunn, stated *'there are some companies you wouldn't trust... the whole basis of cover, both giving and taking, depends on an element of trust and if you don't particularly trust a company you won't get involved with them*'.²³⁰³

IV.115. In response to the Statement, a number of Parties stated that they were prepared to decline to tender and had even introduced policies on refusing to engage in cover pricing.²³⁰⁴ The OFT welcomes such measures that will help to ensure that cover pricing is eradicated from the construction industry for the future.

An unwritten reciprocal arrangement

IV.116. It was clear that the construction companies that engaged in cover pricing generally saw it as a reciprocal arrangement, in which each abided by the longstanding custom to provide assistance in response to a request for a cover price from a competitor. One Party claimed this was the sole reason for engaging in cover pricing in relation to two of its Infringements.²³⁰⁵

²²⁹⁹ Interview transcript, OFT Document Reference 11349, page 12.

²³⁰⁰ Interview transcript, OFT Document Reference 11253, page 19.

²³⁰¹ Leniency application, OFT Document Reference 0435, page 1.

²³⁰² Interview transcript, OFT Document Reference 13138, page 16.

²³⁰³ Interview transcript, OFT Document Reference 11289, page 12.

²³⁰⁴ For example, written representations of GMI Construction, 26 June 2008, Annex 11; written representations of Henry Boot, 27 June 2008, paragraph 5.7; and written representations of Haymills Group, 27 June 2008, paragraph 10.

²³⁰⁵ Written representations of R Durnell, 27 June 2008, paragraph 96.

IV.117. For example, Andrew Eato, Contracts Director for ARG, while describing in interview the process of arriving at a figure to give a competitor, stated ‘... you just ... go in give them something slightly higher than your own figure ... you would hope that they would do similar for you’.²³⁰⁶ Allan Gregory, Managing Director of ARG also explained that he would have added, ‘three, four, five, six, seven percent, just to make it – make it look as if he’s done the work. And obviously, the unwritten law is that then, in the future, he would reciprocate for our situation’.²³⁰⁷ In its leniency application, Richard Bodill, Managing Director of Bodill talked about the practice of cover pricing in terms of it being a ‘system’ which ‘operated ... to overcome the consequences of sending back tender enquiries’.²³⁰⁸

IV.118. Similarly, Wildgoose stated in its leniency application that ‘Whilst it is accepted that a company giving a cover price to another would pitch that price such that its own tender would not be undercut, the object of the exercise (at least so far as Wildgoose understood it) was not to determine the outcome of the tender process as a whole but rather to offer assistance to another company unable to find the resources to price a given job accurately - in the knowledge that such assistance could be reciprocated at a future date’.²³⁰⁹

Completion of non-collusion statements

IV.119. The OFT notes that it is not uncommon for a client organising a tender procedure to require the firms invited to tender to complete a detailed non-collusion statement expressly confirming that the tender submitted is a competitive offer and that there have been no undue contacts with any competing company in connection with the tender offer (for example, 21 October 2003 – Ashgate Hospice²³¹⁰, 11 June 2004 – Malton, Norton and District Hospital²³¹¹ and 25 July 2005 – 71 – 75 Wright Street, Hull²³¹²). For the avoidance of doubt, the OFT is of the view that it is not necessary to show that a party completed such a non-collusion statement for the OFT to find that a party infringed the Chapter I prohibition intentionally (or indeed negligently). This issue is discussed further in the Enforcement section, at paragraph VI.41 below.

Cover bidding scenarios involving more than two undertakings

IV.120. In some of the tenders, one bidder gave cover to more than one other potential bidder, or two bidders gave cover to two or more other potential bidders. In such scenarios, certain bidders may have only been aware of the involvement of one other bidder, whereas others would have been aware of the multiple cover bid arrangements.

IV.121. For the purposes of this Decision, the OFT has presented the evidence for such scenarios within a single ‘Infringement’ section, within which the OFT describes its analysis of whether there was more than one agreement or concerted practice.

²³⁰⁶ Interview transcript, OFT Document Reference 11101, page 6.

²³⁰⁷ Interview transcript, OFT Document Reference 11113, page 11.

²³⁰⁸ Witness statement, OFT Document Reference 0864, page 6.

²³⁰⁹ Leniency application, OFT Document Reference 0347, page 3.

²³¹⁰ Leniency application, OFT Document Reference 6406.

²³¹¹ Example of non-collusion statement, OFT Document Reference A0136, page 5.

²³¹² Example of non-collusion statement, OFT Document Reference A0154, page 4.

Availability of contemporaneous documentary evidence

- IV.122. As described above, the OFT has uncovered very little evidence of written communications between competitors in the construction industry in order to facilitate cover pricing. In this investigation the evidence has been that contact between competitors took place by telephone and often a day before, or on the day, that a tender return was due.
- IV.123. Furthermore, many companies would not make any record of the contact or of the fact that a cover price was submitted and, in many cases, the relevant tender file would be destroyed since it no longer needed to be kept, either during the tendering process because the company knew it would not win the contract, or after the tendering process once the company had received confirmation that it had lost the contract.
- IV.124. For example, Loach explained that *'The obtaining or provision of a cover price did not usually result in the creation of any documentation. The essence of the scheme was to save the time otherwise spent on the creation of documentation. A cover price would be secured orally and the tender price would be submitted but because the tender would not result in a contract, then no paperwork would be created or retained'*.²³¹³
- IV.125. Derwent Valley stated *'As far as documentary evidence is concerned, the nature of cover pricing is such that generally there will be no such evidence. It takes place by way of telephone conversations. Also, whether or not cover pricing has taken place, where a tender is unsuccessful, the volume of paperwork and resulting storage implications are such that documents are generally destroyed within 9 to 12 months'*.²³¹⁴
- IV.126. Herbert Baggaley stated *'the use of covers was so endemic within the industry as an accepted standard practice ... HBC's Estimating Department has confirmed that it's (sic) members could not recall an instance where, prior to the OFT's current investigation, discussions regarding giving or receiving covers had met with any surprise or need of explanation by any third party. The actual words 'cover pricing' were rarely used, if at all. The practice was so routine that phrases used would be "taking help" or "giving assistance". The practice was considered so routine that no further consideration had been given prior to this investigation in (sic) compiling statistics or keeping specific records ... No need was felt to maintain any records of covers'*.²³¹⁵
- IV.127. The OFT has therefore had to proceed on the basis of limited contemporaneous documentary evidence for this investigation. Notwithstanding this, for most tenders included in this Decision there is at least one contemporaneous document evidencing bid rigging activities, often comprising one of the colluding companies' tender registers or forms of tender in which they recorded the giving and/or taking of cover prices, and in addition this is supported by a transcript of an interview with an employee or ex-employee of one of the leniency Parties. The OFT is therefore satisfied that the evidence set out in this Decision is sufficient to meet the required standard of proof described in the Legal section above.

²³¹³ Leniency application, OFT Document Reference 4017, page 3.

²³¹⁴ Leniency application, OFT Document Reference 3939, page 2.

²³¹⁵ Leniency application, OFT Document Reference 3899, page 5.

Trade associations and other information exchanges

- IV.128. As discussed in paragraph IV.95 above, certain organisations provided information more generally to construction companies. In the Nottingham area, the OFT uncovered evidence of two particular trade associations, the Nottingham Builders' Guild ('NBG') and the North Nottinghamshire Contractors' Guild ('NNCG') (together the 'Guilds'), that facilitated the exchange of information and thereby the exchange of cover prices. They collected information on a regular basis and provided it to their members. The Guilds ceased their activities as a direct result of the OFT's investigation. In response to the Statement, one Party noted that none of these organisations ever gave warning that cover pricing was unlawful and therefore they themselves had no awareness that cover pricing was illegal. This does not constitute an excuse for cover pricing – see paragraph IV.27 above.
- IV.129. The OFT has considerable evidence that the exchange of cover prices was facilitated by the activities of these organisations. It is clear from the evidence described below that a number of the Parties used the Guilds as a forum for exchanging information about tenders, which enabled them to identify potential providers of cover prices. However, given that the OFT has uncovered a significant amount of evidence of cover pricing from the Parties directly, and given the exceptional size of this case and the limited resources of the OFT, the OFT considered that, in this particular case, it was not appropriate to address the Statement to the Guilds. Consequently, it is not necessary for the OFT to determine whether the Guilds have infringed the Chapter I prohibition.
- IV.130. Notwithstanding that the Guilds were not addressees of the Statement, their activities are nonetheless described in detail below, as they were an important mechanism for the provision of cover pricing in the Nottingham area.

Activities of the Guilds

- IV.131. The rules and objects²³¹⁶ of the Guilds were, amongst others, '*d) to assist in the maintenance of fair and equitable conditions of tendering and to secure the mutual support and co-operation of members in a fair and equitable level of prices*' and '*k) to promote the exchange of information between the members with respect to (i) the existence of invitations to tender for particular contracts and conditions thereof, (ii) the name of persons making tenders for such contracts at any time, but not the amounts of such tenders*'. In addition, members were required to report any invitations to tender worth over £1000 to the Secretary, John Wholey. John Wholey was the Secretary of both Guilds.
- IV.132. When interviewed, John Wholey confirmed that the main purpose of the Guilds was to provide '*a contract information service*' and that there was no difference between the two Guilds, apart from the geographical difference.²³¹⁷ He confirmed that he contacted contractors on a weekly basis and that they would advise him of the tenders that they had been invited to bid for ('the tender reporting system').²³¹⁸ In turn, he would '*advise them of the reports that we received*'. The information provided was for the members' intelligence and '*what they did with the information was entirely up to them*'.²³¹⁹ However, he

²³¹⁶ Rules of the Guild, OFT Document Reference 4837.

²³¹⁷ Interview transcript, OFT Document Reference 13489, page 4.

²³¹⁸ Interview transcript, OFT Document Reference 13489, page 24.

²³¹⁹ Interview transcript, OFT Document Reference 13489, page 31.

agreed that the Guilds facilitated cover pricing *'because they [the contractors] knew the names of the other contractors who were tendering'*.²³²⁰ Moreover, he confirmed that members could indicate to him that they needed help with a tender and he would provide them with the list of other tenderers.²³²¹ In his view, the object *'was to provide the information and then the builders would use it for whatever purposes they wished to use it for. It might have been cover pricing, it might have been to assess...what kind of opposition they were up to in terms of the price of the product'*.²³²² In response to the Statement, one Party confirmed that finding out the identity of the competition on a job was utilised not only for cover pricing, but also for market intelligence to assess the attractiveness of a job in terms of how many competitors were bidding and the likelihood of winning the contract.²³²³

Members' perspective of the Guilds

- IV.133. It would appear that the majority of the members regarded the Guilds as a forum for social gatherings. For example, in respect of the NNCG, Allan Gregory of ARG stated that the advantage of membership was *'first and foremost, very much on a social theme'*.²³²⁴
- IV.134. Sol provided the following statement about the NBG: *'...it is our understanding that the Guild's main function was the organization of social activities. These included a bi-monthly luncheon, a Christmas luncheon and an evening AGM dinner...As a major local construction company we felt we should show some support and our Managing Director very occasionally attended the social events'*.²³²⁵
- IV.135. W R Bloodworth stated the following in respect of the NBG: *'Activities of the Guild have become increasingly limited and focussed around the annual meeting, drinks and dinner. Mr Bloodworth and his father...confirm that they have no recollection of any discussion of cover pricing nor wider bid-rigging nor compensation payments. The event is very much a "social" occasion and their experience has been that members are most reluctant to discuss the details of their business/current contracts work levels etc'*.²³²⁶
- IV.136. Andrew Arbon Davis of Loach said that the purpose of the tender reporting system was *'just purely to record the level of activity in the area...I think the idea then was that he [John Wholey] would amalgamate all the information from all the builders and probably then report at the AGMs that members of the Guild [NBG] had tendered for X million pounds worth of work and secured Y million pounds worth of work. So purely a record of the activity local in the industry'*.²³²⁷
- IV.137. Notwithstanding the social function of the Guilds, it is clear that members of the NBG utilised the NBG as a forum for exchange of information about tenders. For example, in the minutes of the Annual General Meeting ('AGM') of 15

²³²⁰ Interview transcript, OFT Document Reference 13489, page 33.

²³²¹ Interview transcript, OFT Document Reference 13489, page 43.

²³²² Interview transcript, OFT Document Reference 13489, page 34.

²³²³ Written representations of Propensity, 27 June 2008, paragraph 6.12.

²³²⁴ Interview transcript, OFT Document Reference 11100, page 17.

²³²⁵ Leniency application, OFT Document Reference 4363, page 2.

²³²⁶ Leniency application, OFT Document Reference 3907, page 4.

²³²⁷ Interview transcript, OFT Document Reference 11312, page 16.

November 2000, Richard Bodill (then Chairman of the NBG) refers to *'the activities of the Guild which centred on the need for members to regularly and consistently report tender enquiries. There remained a constant need to preserve the confidentiality and integrity of the Guild even within their own organisations and even more so when dealing with individuals or organisations who were not members'*.²³²⁸

IV.138. Richard Bodill reported in the minutes of the NBG AGM of 14 November 2001 that *'the main activities of the Guild remained constant with the reporting of tender enquiries and social activities when members were able to discuss the industry'*.²³²⁹

IV.139. Similarly, in respect of the NNCG, the following was recorded in the minutes of the AGM of 19 November 2003: *'The Chairman said the Secretary had maintained contact with a number of non-member organisations in order to ensure as much information as possible was available on local tender enquiries. The Chairman said the Guild's principal service continued to be the reporting of tender enquiries and he hoped all members had found the information provided has been useful and helpful. He hoped members would continue to maintain confidentiality in their dealings with the information provided and thereby maintaining the integrity of the Guild at all times'*.²³³⁰

IV.140. The parties interviewed have confirmed that they knew that if they wanted any information about tenders, the person to contact was John Wholey. For example, Juris Rozentals, Chief Estimator at Bodill, confirmed that it was possible to contact John Wholey in order to find out information about tenders: *'...We also sometimes, if it's reported to the Guild, we may find out information from them, you know if we're struggling to find out who's pricing a job...'*.²³³¹

Facilitation of cover pricing

IV.141. It is clear that a number of companies used the tender reporting system to obtain cover prices. Andrew Bodill, an estimator at Bodill confirmed that the company would only contact the NBG *'if we wanted to receive a cover price'* and that *'the initial purpose was for the intelligence; just to try and find who were pricing about'*.²³³²

IV.142. Richard Greene of John Cawley confirmed that he would contact John Wholey in order to find out which competitors might be tendering for a particular contract, and that the purpose of doing this would be to find out who he could approach to obtain a cover price.²³³³ Nick Greene of John Cawley stated that one of the reasons for the tender reporting system was to facilitate cover pricing.²³³⁴

IV.143. Simon Blackburn, Managing Director of Clegg, said that although he had no involvement with the NBG, he was aware of John Wholey and the NBG and that as far back as the 1980s and 1990s *'there was a time you could ring John*

²³²⁸ AGM minutes, OFT Document Reference 4857, page 2.

²³²⁹ AGM minutes for 14 November 2001, OFT Document Reference 4853, page 2.

²³³⁰ AGM minutes for 19 November 2003, OFT Document Reference 4803, page 2.

²³³¹ Interview transcript, OFT Document Reference 6337, page 3.

²³³² Interview transcript, OFT Document Reference 6339, pages 16 and 17.

²³³³ Interview transcript, OFT Document Reference 11298, page 18.

²³³⁴ Interview transcript, OFT Document Reference 11297, page 69.

Wholey, ask who was on the list and he would generally know who was on the list and would tell you who you could get a cover from'. In addition, 'John Wholey used to ring round and ask you if you were pricing a scheme and you'd say yes, I'm pricing it'.²³³⁵

- IV.144. Martin Ledingham, an estimator at Frudd, said that John Wholey's reporting system helped in terms of obtaining cover pricing.²³³⁶ Frudd's leniency application, and in particular the report by the Managing Director David Frudd, set out that the purpose of the NCG was *'to provide bona fide Nottingham building contractors with a contact to register the tenders where they can request or register the need for help. Help would be the requirement to be able to ask whoever else is quoting for the works to give a cover figure which was always expected to be higher so the work would not be won'.²³³⁷*
- IV.145. Similarly, in respect of the NCG, Andrew Eato, the Contracts Director of ARG, confirmed that he was aware of the tender reporting system operated by John Wholey and that *'the purpose of it obviously prior to the investigation was you got the information who was tendering and if you couldn't price it or was left with the problem and you needed assistance you could get names and contacts to go and get some help to enable you to get a tender in'. He also stated that John Wholey 'provided a tool' for cover pricing.²³³⁸*
- IV.146. Richard Ian Baggaley, Managing Director at Herbert Baggaley, confirmed that the tender reporting system operated by the NCG was useful because *'if you needed to seek a cover you would know who to approach for a cover...it would give you access to the names of bidders....It was a source of information if you needed to take a cover'.²³³⁹*

Compensation payments

IV.147. In addition to cover pricing, the OFT found six instances of compensation payments, set out in the table below. Given the lower degree of commonality between the circumstances of these six Infringements, this section describes certain features of the compensation payments, but not to the same level of detail as for cover pricing. Accordingly, these Infringements are described in detail in the relevant paragraphs of the Infringements section below.

Infringements			Parties
Number	Date	Name	
85	3 December 2001	Alterations To the Press Hall Derby Daily Telegraph	Herbert Baggaley Bowmer & Kirkland
89	11 December 2001	Meadow House Mansfield	Thomas Fish Herbert Baggaley Mansell
98	20 February 2002	Conversion of Davers Steel Building	Herbert Baggaley Wildgoose
104	22 April 2002	Alterations To Café & Conservatory Extension Burton College, Burton on Trent	Mansell Wildgoose

²³³⁵ Interview transcript, OFT Document Reference 13278, pages 17 and 18.

²³³⁶ Interview transcript, OFT Document Reference 6351, page 10.

²³³⁷ Leniency application, OFT Document Reference 3990, page 4.

²³³⁸ Interview transcript, OFT Document Reference 11101, pages 12 and 14.

²³³⁹ Interview transcript, OFT Document Reference 6317, page 12.

135	27 January 2003	17/18 Dover Street, W1	Mansell Durkan
146	12 May 2003	Construction Of Four Storey Lift Tower Burton College, Burton on Trent	Herbert Baggaley Wildgoose

IV.148. The evidence confirms that in some cases, payments were made in exchange for the submission of a cover price i.e. the company providing the cover price also agreed to pay the company receiving cover an agreed sum of money if the former won the tender. In other cases, where either it is unclear from the evidence whether cover pricing was involved or the evidence shows clearly that no cover pricing was involved and each Party prepared its own bid, the companies agreed that the successful tenderer would pay the losing tenderer an agreed sum of money. Such payment was ostensibly made to compensate the loser for the costs of preparing its tender.

IV.149. The OFT considers that the Infringements in this Decision in which the participants offered (or requested) inducements (such as compensation payments) to (or from) the other cartel participants, are more serious than those Infringements where no such inducement was offered. In such cases, customers may face additional loss as a result of the collusive tendering, as tender bids are likely to be further inflated to include the sums paid by way of inducement, rather than the successful contractor absorbing those sums by way of a reduced profit margin. Indeed, in some instances, inflation of one or more of the tender bids to include the agreed level of payment was explicitly recognised by one or more of the participants.

How compensation payments were made

IV.150. Compensation payments were usually agreed at the same time as an agreement on cover pricing. Where no cover price was involved, compensation payments were mutually agreed between the relevant Parties, usually over the telephone. For example, in respect of a compensation payment made by Mansell to Durkan relating to 17/18 Dover Street, London, Durkan contacted Mansell in order to discuss a compensation payment. Clive Perceval of Mansell made the following statement: *'We went through the [tender] process and we were then told that they were going to proceed with two contractors...But we still wished to go ahead with the job...and then I was contacted by Durkans who were in a similar position and, they suggested to us that because of this, one or other party was going to incur costs that we couldn't recover because we weren't going to secure the job...they [Durkan] put forward the proposal that those costs were reimbursed through the other contractor...I spoke to Steve Waite [Divisional Managing Director at the time] about it, and subsequently we agreed that's what we'd do'*.²³⁴⁰

IV.151. In all instances of compensation payments, false invoices were submitted to the undertaking that had agreed to make the payment. For example, in respect of the compensation payment made by Mansell to Durkan described above, Durkan submitted an invoice to Mansell for 'Fit Out Works' on a project at '83 to 87 Southwark Street, London SE1' for £60,000 plus VAT. Colin Gilbert of Mansell told the OFT that this project was another contract and that *'it had nothing to do with Durkan...I was asked to put the payment through on that project'*. He confirmed that the payment of £60,000 plus VAT to Durkan had

²³⁴⁰ Interview transcript, OFT Document Reference 11515, page 7.

nothing to do with 83 to 87 Southwark Street and that Durkan did no work for Mansell on that project.²³⁴¹

IV.152. Similarly, Herbert Baggaley stated in its leniency application that it had *'uncovered payments made or received for which there was no accompanying paper trail or internal stock or service records. Upon further investigation, a Schedule of Payments and Invoices was extracted which could constitute payments made in respect of covers given or received...'*²³⁴²

IV.153. In respect of a compensation payment made by Wildgoose to Herbert Baggaley, Wildgoose stated that it *'received an invoice from Herbert Baggaley Limited ('Baggaleys')...which refers to "Davvers Building, Sheffield – Joinery Works"...In this case the Accounts Department would not have found any order from Wildgoose as in actual fact the invoice did not relate to joinery works as stated'*.²³⁴³

The compensation payments influenced the tender bids that were submitted

IV.154. The OFT's investigation has confirmed that in most cases, compensation payments had an impact on the final tender bid submitted by the party making the compensation payment. In some cases, the relevant Parties expressly agreed that they would increase their tender prices by the amount of the agreed compensation payment. In other cases, the agreement to pay compensation influenced or at least potentially influenced the final tender price submitted.

IV.155. For example, in respect of a compensation payment made by Wildgoose to Herbert Baggaley relating to a contract for the construction of Four Storey Lift Tower, Burton College, Wildgoose agreed to pay Herbert Baggaley the sum of £7,000 in order to compensate it for its estimating costs. Herbert Baggaley accordingly raised a false invoice for *'Supply only of Joinery'* for a total value of £6,912 plus VAT. Wildgoose confirmed that this was a false invoice. Wildgoose included in its tender bid the amount agreed between the Parties of £7,000. Bryan Bennett, Estimating Director at Wildgoose, stated the following to the OFT: *'...I believe that initially both companies were to price the project and the loser would be paid £5,000 to cover the cost of the estimate...After the tender adjudication meeting, I rang Baggaleys...they asked if we had included the sum of money to cover their tender costs and I recall £7,000 was mentioned. I confirmed we had but that £7,000 was more than my recollection. They explained that the increase was due to the nature and size of the project. Therefore, I subsequently added £2,000 to the tender allowances. We subsequently won the project which was reduced in size. The £7,000 appears on the revised tender finance statement as "other payments". Subsequently, we received an invoice dated 23 October 2003 from Baggaleys in the sum of £6,912.00 plus VAT ostensibly for the supply of joinery'*.²³⁴⁴

Navigation table

IV.156. The Navigation Table in Annex A, towards the end of this Decision, details the paragraphs in which the case against each Party may be found in the sections below. Each Party is found by the OFT to be a party to a number of

²³⁴¹ Interview transcript, OFT Document Reference 11514, page 8.

²³⁴² Leniency application, OFT Document Reference 3899, page 8.

²³⁴³ Witness statement, OFT Document Reference 14270, pages 3 and 4.

²³⁴⁴ Witness statement, OFT Document Reference 14263, page 14.

Infringements, in most cases three but in some cases one or two and in the case of leniency Parties often more than three. In the Navigation Table, the Parties are listed in alphabetical order and against each Party are listed the Infringements in which the OFT has found that Party engaged in bid rigging activities, together with references to the relevant paragraphs in section D describing that Infringement and the relevant paragraphs in section C describing the cover pricing activities of the leniency Party(ies) involved in that Infringement, where applicable.

IV.157. The Navigation Table also sets out in respect of each Infringement,

- b. for a leniency Party, whether: (i) it will receive either full 100 per cent immunity for that Infringement (because it is a But For Infringement for that Party); or (ii) alternatively its allocated leniency percentage deduction from the penalty for that Infringement (because it is a Not But For Infringement for that Party)²³⁴⁵; or (iii) it will receive no penalty for that Infringement (because the Infringement is not amongst the most recent three Not But For Infringements for the Party); and
- c. for a non-lenieny Party, whether it will receive a 25 per cent deduction from the penalty for that Infringement (because it accepted the OFT's Fast Track Offer in respect of that Infringement) or alternatively will not be entitled to any deduction from penalty for that Infringement (because it did not accept the OFT's Fast Track Offer in respect of that Infringement).

C. Leniency Parties' Approach to Cover Pricing and other Bid Rigging Activities

IV.158. In order to avoid extensive repetition, the OFT sets out in this section the way in which each of the leniency Parties engaged in cover pricing and other bid rigging activities, including a brief explanation of the documents from each such Party evidencing the provision or receipt of cover prices. As many of the leniency Parties were party to more than three Infringements, the OFT sets out in this section much of the information that is common to all of the Infringements in which these companies participated. The activities of the leniency Parties are described in *alphabetical order*.

Adam Eastwood

IV.159. As part of its leniency application, Adam Eastwood provided a brief explanation of its participation in cover pricing. Adam Eastwood explained that *'The only circumstances in which Eastwoods have been involved in practice of issuing or receiving "covers" involve cases where Eastwoods or a third party wished to remain on tender lists. Eastwoods general practice, when they do not wish to tender for a contract is to advise the employer or his agent that they do not wish to tender giving the particular reason. Notwithstanding this general practice, some "covers" have been issued or received'*.²³⁴⁶ On those contracts for which Adam Eastwood decided to obtain a cover price, it explained that the practice of cover pricing *'...has only been employed as a convenience to other*

²³⁴⁵ Each leniency Party's individual penalty calculation (to be found in Section VI (Enforcement) below) also sets out the relevant Infringements for which penalties are being calculated.

²³⁴⁶ Leniency application letter, OFT Document Reference 3949, page 1.

construction firms, or Eastwoods, in circumstances where one or other wished to avoid the inconvenience or embarrassment of not putting in a tender.²³⁴⁷

IV.160. Adrian Tranter ('AT')²³⁴⁸, who joined Adam Eastwood in 1980 and at the time of his interview was Managing Director, explained that the estimating within the Major Works department was carried out by both himself and Christopher Stubbs ('CS')²³⁴⁹, Company Director and employee of Adam Eastwood since 1987. AT stated '*... at one time it was mainly all me but that has turned since I became MD and Chris has become more involved. Chris does the day-to-day inputting of the rates and subcontractors and the like...I'm with him at his side and we're discussing how we do this, how we do that, how long's it going to take to do this. We're quite an integrated team. There's only two of us, so we don't sort of hide away from each other*'.²³⁵⁰ AT confirmed that the decision whether to tender for a contract in the Major Works department was a joint decision between himself and CS but '*at the end of the day...he will respect my decision. If the job was too big then I would have to make the call at the end of the day. But as often as not we always agree*'.²³⁵¹

IV.161. CS explained how he would find out who Adam Eastwood's competitors were from the Builders Conference, '*...they would ring round, are you pricing this work [?] yes ...they would have details of who else was tendering and you would say, yes I am pricing this work and they would say you are up against x, y and z*'.²³⁵² AT explained that Adam Eastwood would tend to get to know who its competition was through, '*maybe a supplier or subcontractor...or a specialist*'.²³⁵³

IV.162. CS explained how the exchange of covers worked in practice, '*We would get a telephone call probably I don't know a week before the tender was due in, can you give us a cover [?] and if we were giving a cover out we would wait until the 11th hour so that all they had to do was fill in their slip and get it away and vice versa. If we were expecting a cover it more often than not came in on the morning of the tender. We just used to put the figure on the sheet, put it in the envelope and away we went*'.²³⁵⁴ CS confirmed that the exchange of covers only ever took place over the telephone.²³⁵⁵ CS was asked how he would arrive at a cover figure to give another competitor, and replied '*...I tried not to give it as an actual 5% or 6% we would look at the contract and you know we would give them a reasonable percentage above what ours was so that it didn't harm them in any way...you didn't use to put 50% on because that would then look a ridiculous figure*'.²³⁵⁶ AT confirmed that a cover price would need to be sufficiently low to give the client an appearance of competition.²³⁵⁷

IV.163. Adam Eastwood stated in its leniency application, '*As far as Eastwoods are concerned they have given more "covers" than those received...they were*

²³⁴⁷ Leniency application letter, OFT Document Reference 3949, page 2 and 3.

²³⁴⁸ Interview transcript, OFT Document Reference 11095, pages 1 and 2.

²³⁴⁹ Interview transcript, OFT Document Reference 11094, page 2.

²³⁵⁰ Interview transcript, OFT Document Reference 11095, page 2.

²³⁵¹ Interview transcript, OFT Document Reference 11095, page 2.

²³⁵² Interview transcript, OFT Document Reference 11094, page 3.

²³⁵³ Interview transcript, OFT Document Reference 11095, page 3.

²³⁵⁴ Interview transcript, OFT Document Reference 11094, pages 3 and 4.

²³⁵⁵ Interview transcript, OFT Document Reference 11094, page 4.

²³⁵⁶ Interview transcript, OFT Document Reference 11094, page 4.

²³⁵⁷ Interview transcript, OFT Document Reference 11095, page 5.

given/received because the requesting party said they did not want the contract and asked for help. Covers were nearly always given on the last or penultimate day before the Tender Date'.²³⁵⁸ CS confirmed that only he and AT were involved in the giving and receiving of cover prices in the Major Works section of Adam Eastwood.²³⁵⁹

IV.164. In addition, there was also a Minor Works department at Adam Eastwood that dealt predominantly with modernisation works. Tender preparations and estimating in the Minor Works department were dealt with by Paul Dodds ('PD').²³⁶⁰ PD assisted with compiling the 'list of covers' included as part of Adam Eastwood's leniency application before he left Adam Eastwood's employment in late 2006.²³⁶¹

IV.165. Adam Eastwood's leniency application stated that, *'There is no system within Eastwoods for recording when "covers" are issued*'.²³⁶² CS said *'other than scraps of paper that you [the OFT] have come across [during the search of Adam Eastwood's premises] the covers were never recorded*'.²³⁶³

Admiral

IV.166. As part of its leniency application, Admiral provided a handwritten list of cover pricing activity, both covers given and taken, since January 2000.²³⁶⁴ This list was prepared by Andrew Clarkson ('AC'), Estimating Director. The following Admiral employees were interviewed by the OFT: Keith Roebuck ('KR'), Chairman; Stephen Savage ('SS'), Managing Director; and AC.

Cover pricing – general

IV.167. Admiral staff confirmed in interview that it participated in both the giving and taking of cover prices. In its response to the Statement, Admiral noted that the *'procedures for taking and receiving cover prices [were] written into the company process manuals*'.²³⁶⁵ AC confirmed that the primary responsibility for giving and taking cover prices fell to him, *'That was basically down to me, although Stephen [Savage] and Keith [Roebuck] obviously knew about it, because it was...because it went on, so it was part and parcel of, of running the company*'.²³⁶⁶

IV.168. AC explained that on receipt of a tender, *'once the job gets into our system where I'm going to price it, it's given a number, the date it was received, the title of the job and the date it's due in*'.²³⁶⁷ These details were entered in the tender register maintained by AC.²³⁶⁸ AC further explained that, *'the job is either processed through myself, who does all the estimating, or in certain instances,*

²³⁵⁸ Letter to OFT, OFT Document Reference 3951, page 1.

²³⁵⁹ Interview transcript, OFT Document Reference 11094, page 5.

²³⁶⁰ Interview transcript, OFT Document Reference 11095, page 2.

²³⁶¹ Interview transcript, OFT Document Reference 11095, page 5 and 6.

²³⁶² Leniency application letter, OFT Document Reference 3949, page 1.

²³⁶³ Interview transcript, OFT Document Reference 11094, page 3.

²³⁶⁴ Tender appendix, OFT Document Reference 5189.

²³⁶⁵ Written representations of Admiral, 26 June 2008, paragraph 8.

²³⁶⁶ Interview transcript, OFT Document Reference 13299, page 11.

²³⁶⁷ Interview transcript, OFT Document Reference 13299, page 2.

²³⁶⁸ Tender enquiry List, OFT Document Reference 4258.

we've kept the documents and, taken a cover price, if necessary, if we've decided we weren't pricing it, for, for some reason, or we couldn't price it'.²³⁶⁹ The decision on whether a particular job was attractive was, according to KR, a *'three-fold decision'* between him, SS and AC.²³⁷⁰ At the end of the process a tender settlement meeting was held to finalise the tender which was attended by AC, KR and SS.

Admiral taking cover prices

IV.169. AC explained how Admiral would find out who the competition was on a job, *'I'd ring subcontractors, or material suppliers up, and say, have you had an enquiry for such and such a job? If they say yes, I say, can you tell me who you're pricing it for...then I would ring them up and say, I need some help on this job, because I can't price it, for whatever reason. Can you help me out with a figure?'*²³⁷¹

IV.170. Admiral confirmed that two contacts would take place with a competitor, by telephone, in respect of taking a cover price. One, when Admiral asked for help and then, secondly, on the day of the tender submission or the day before the tender submission, there would be a further contact to obtain the cover price.²³⁷² AC confirmed in interview in respect of taking a cover, that Admiral would phone the competitor around two days before the tender deadline, to register the fact that Admiral needed a cover, and then closer to the tender deadline, Admiral would actually receive the cover price.²³⁷³

Admiral giving cover prices

IV.171. Admiral confirmed that two contacts would also take place, by telephone, with a competitor in respect of giving a cover price. First, the competitor would ask Admiral for help and then secondly, on the day of the tender submission or the day before the tender submission, there would be a further contact to give the cover price.²³⁷⁴ AC confirmed in respect of providing a cover price to a competitor, *'You could say, I'll give you a ring when I've got the figure, or if I don't ring you tomorrow, give me a ring up at close of plays and I'll see if I've got something'*.²³⁷⁵

IV.172. In terms of arriving at a cover price to give to a competitor, AC said that, *'a lot depends on the value of the overall scheme... but normally you would just add... I don't know, probably 4%, or 5% on to...what I knew my figure was going to be'*.²³⁷⁶

Contemporaneous documents – tender documentation

IV.173. The main contemporaneous document produced at Admiral was the tender register maintained by AC. Admiral did not produce an internal information summary sheet, or similar such document during its tender process. As part of

²³⁶⁹ Interview transcript, OFT Document Reference 13299, page 2.

²³⁷⁰ Interview transcript, OFT Document Reference 13297, page 7.

²³⁷¹ Interview transcript, OFT Document Reference 13299, page 6.

²³⁷² Interview transcript, OFT Document Reference 13299, pages 6 and 7.

²³⁷³ Interview transcript, OFT Document Reference 13299, page 6.

²³⁷⁴ Interview transcript, OFT Document Reference 13299, pages 6 and 7.

²³⁷⁵ Interview transcript, OFT Document Reference 13299, page 7.

²³⁷⁶ Interview transcript, OFT Document Reference 13299, page 7.

its leniency application, Admiral produced documentation in relation to a number of tenders. This consisted of the relevant client 'Form of Tender' documentation and a few handwritten notes written by AC. This evidence is discussed by the OFT in relation to each relevant specific tender.

ARG

- IV.174. As part of its leniency application, ARG made available current employees and provided contact details for ex-employees to be interviewed. These were Allan Gregory ('AG'), Managing Director of ARG, Andrew Eato ('AE'), Contracts Director, and Darren Adkin ('DA'), an estimator surveyor employed by ARG from December 2002 to March 2004. During these voluntary interviews the individuals were asked to give an explanation of ARG's involvement in cover pricing.
- IV.175. AG explained during interview that on receipt of a tender an estimate schedule or chase control sheet was completed.²³⁷⁷ The tender was initially sent to AG and he passed it to the estimating office for the details to be entered on the estimate schedule.²³⁷⁸
- IV.176. AG and AE would make the decision regarding whether ARG was to tender for a contract.²³⁷⁹ AG and AE took a number of factors into account when deciding whether to tender for a particular contract, AG explained that they would have to consider, *'have we got a gang of men coming free in six weeks' time when this is due to start...also you can do the site survey and think...it's a nightmare of a job...there's no access...we've had feedback on this architect, we've had feedback on this client, and they're baddies. They don't pay...'*²³⁸⁰ On contracts AG and AE deemed unattractive they confirmed that ARG would obtain a cover price from a competitor.²³⁸¹

ARG taking cover prices

- IV.177. AG said that other than himself, and in his absence AE, the estimator involved in pricing the tender would be involved in the exchange of cover prices.²³⁸² ARG would find out who was pricing the tender from the architects, named contractors and suppliers and also *'the guild'*²³⁸³...*John Wooley, the secretary, used to phone around everyone on a weekly basis to gather intelligence. So if you needed assistance on a particular job, whether it was at the beginning...whether you'd got halfway through the tender...I've had to phone John Wooley, get a name, get a cover price, get on the bike, and get out and get the tender in'*²³⁸⁴ AG also went on to explain that there were organisations they could approach to find out who was on a tender list, *'there's also Glennagan's which is a national produced schedule. There's ABI, which is*

²³⁷⁷ Interview transcript, OFT Document Reference 11113, page 7.

²³⁷⁸ Interview transcript, OFT Document Reference 11113, page 7.

²³⁷⁹ Interview transcript, OFT Document Reference 11113, page 4.

²³⁸⁰ Interview transcript, OFT Document Reference 11113, page 4.

²³⁸¹ Interview transcript, OFT Document Reference 11113, page 5.

²³⁸² Interview transcript, OFT Document Reference 11113, page 13.

²³⁸³ Nottingham Builders Guild and North Nottinghamshire Contractors Guild were trade associations for Nottinghamshire builders used to report tenders and gather market intelligence.

²³⁸⁴ Interview transcript, OFT Document Reference 11113, page 7.

nationally available information. And there was another one called the Builders' Conference'.²³⁸⁵

IV.178. On tenders where ARG was taking a cover price, DA explained, *'I can remember taking covers on small works, spoke to Chris Stendle at Greenwoods...'.²³⁸⁶* However, DA stated that if a cover price was sought for a larger contract, *'I'd be given a price from Alan'.²³⁸⁷* AG explained that ARG would contact a competitor and say, *'We're not interested in this. Would you give us a cover price? It was the done thing'.²³⁸⁸* AG confirmed that if ARG required a cover price he would contact one of ARG's competitors by telephone.²³⁸⁹

IV.179. The OFT asked how the exchange of cover prices was recorded within ARG. AG replied *'Well as your colleagues saw from our schedule, there were certain items on the schedule that would say, 'Cover required'. That means a cover price required...mainly on the estimate schedule'.²³⁹⁰* AG continued to explain, *'Or in the right-hand column it might say, you know, 'Joe Bloggs, Sam Smith'.²³⁹¹* However AG confirmed that this information might have been entered post-tender.²³⁹² AE stated that contact between estimators regarding the exchange of cover prices might have been recorded on pieces of paper, *'Well they might make the odd notes on the scrap paper but there wasn't formally records kept of that sort of information...if you were taking a telephone call you sometimes make notes, different people seek information in different ways. It's not something that we insist on being written down so we have got proof – they might just write it straight on to the tender form'.²³⁹³*

ARG giving cover prices

IV.180. DA explained that if anyone approached him for a cover price, *'I had to refer it to Alan and Alan would make that decision...I would never make a decision to give another company...No I couldn't do that'.²³⁹⁴* DA stated, *'If someone rang me, I'd take a contact and speak to Alan'.²³⁹⁵* DA confirmed that according to his recollection, if a cover price was to be given to a competitor AG would arrange to give the cover price, *'...he's doing someone a favour, he wants to be doing the talking'.²³⁹⁶*

IV.181. AE described in interview the process of arriving at a figure to give a competitor, *'...it depended on the size of the job and the value of it but you would just – there is no set formula no set percentages you just...go in and give them something slightly higher than your own figure...you don't want to make your colleagues look daft...it has got to be somewhere near because you would hope that they would do similar for you. Because if all of a sudden there was a*

²³⁸⁵ Interview transcript, OFT Document Reference 11113, page 7.

²³⁸⁶ Interview transcript, OFT Document Reference 13125, page 5.

²³⁸⁷ Interview transcript, OFT Document Reference 13125, page 3.

²³⁸⁸ Interview transcript, OFT Document Reference 11113, page 5.

²³⁸⁹ Interview transcript, OFT Document Reference 11113, page 10.

²³⁹⁰ Interview transcript, OFT Document Reference 11113, page 10.

²³⁹¹ Interview transcript, OFT Document Reference 11113, page 10.

²³⁹² Interview transcript, OFT Document Reference 11113, page 10.

²³⁹³ Interview transcript, OFT Document Reference 11101, page 5.

²³⁹⁴ Interview transcript, OFT Document Reference 13125, page 5.

²³⁹⁵ Interview transcript, OFT Document Reference 13125, page 5.

²³⁹⁶ Interview transcript, OFT Document Reference 13125, page 6.

massive gap in the tender prices then it's obvious that something's not [right] or they clearly...didn't want the job...and that's no good to you neither you know you got to look as if you are keen and interested even if on that occasion you weren't'.²³⁹⁷ AG also explained that he would have added, 'three, four, five, six, seven percent, just to make it – make it look as if he's done the work. And obviously, the unwritten law is that then, in the future, he would reciprocate for our situation'.²³⁹⁸

Arthur M Griffiths

IV.182. The following Arthur M Griffiths employees were interviewed as part of its leniency application: Maurice Walsh ('MW'), Managing Director and Gary Wildsmith ('GW'), Commercial Director.

IV.183. In its leniency application Arthur M Griffiths admitted to one tender on which it took a cover price from Thomas Vale, as a '*desperate act of temporary insanity*' on the part of GW.²³⁹⁹ Since March 2000 the following Arthur M Griffiths employees were involved in estimating: Alan Griffiths ('AG'), company chairman (deceased January 2007), MW and GW. Bob Round who retired in 2004 was also involved in estimating, but only for very minor jobs.²⁴⁰⁰

Tendering procedure

IV.184. Prior to the leniency application by Arthur M Griffiths in June 2006, all tenders received went first to AG, who then would allocate it to either himself, MW or GW to prepare an estimate. MW and GW said that AG expected them to estimate all tenders properly and he never instructed them to seek cover prices.²⁴⁰¹ For the tenders for which MW or GW prepared estimates, a tender adjudication meeting would take place between AG and either MW or GW respectively. All the tender papers were then left with AG for final consideration. AG would then decide on the final tender figure, which he gave to either MW or GW, for them to fill in the official Form of Tender and arrange dispatch to the client.²⁴⁰²

IV.185. GW confirmed that AG would sometimes be interested in who else was bidding for a tender. He said '*Alan used to say, okay, who are we up against?*'²⁴⁰³ MW explained that they would find out who the competition was on a tender by two methods. Firstly, through industry intelligence bodies, such as the ABI and secondly, by contacting sub contractors, who would be named on a job for works such as mechanical or electrical.²⁴⁰⁴ GW said '*I can think of [a] time where Alan has, as I said...could you check and see if so and so is on this particular tender list? And I'd ring a colleague under the firm and say...to find out...who was on the list. But that's as far as it went, so...you think though, maybe, you know, perhaps, you know, there was something going on there*'.²⁴⁰⁵

²³⁹⁷ Interview transcript, OFT Document Reference 11101, page 6.

²³⁹⁸ Interview transcript, OFT Document Reference 11113, page 11.

²³⁹⁹ Letter from Arthur M Griffiths re: tender info, OFT Document Reference 5938, page 2.

²⁴⁰⁰ Interview transcript, OFT Document Reference 13291, pages 3 and 4.

²⁴⁰¹ Interview transcripts, OFT Document 13291, page 5 and OFT Document Reference 13292, page 3.

²⁴⁰² Tendering Procedure – AM Griffiths 1996 to date, OFT Document Reference 6409, page 1.

²⁴⁰³ Interview transcript, OFT Document Reference 13292, page 6.

²⁴⁰⁴ Interview transcript, OFT Document Reference 13291, page 8.

²⁴⁰⁵ Interview transcript, OFT Document Reference 13292, page 11.

Arthur M Griffiths taking cover prices

IV.186. GW confirmed that he asked for a cover price on one job (Tipton & Coseley Building Society, tender deadline 26 May 2006)²⁴⁰⁶, but that aside from this one instance he had no direct knowledge of cover pricing within Arthur M Griffiths.²⁴⁰⁷ He confirmed that he never discussed cover pricing with AG.²⁴⁰⁸ MW also said that, *'I never knew it went on here, Alan Griffiths dealt with the tenders when they came in, now whether he gave or took a cover, I can hand on heart honestly say, he never discussed it with me...he would have responsibility for everything basically, but he never, he wasn't the kind of man to discuss that kind of thing with me or anybody else'*.²⁴⁰⁹

Arthur M Griffiths giving cover prices

IV.187. MW explained that if he received a request for help from a competitor he would say, *'speak to Alan Griffiths, I would transfer the call down to him'*²⁴¹⁰ and that *'I don't know whether he would give a cover...He might well have told them to get stuffed, I don't know, on the other hand he might not have done'*.²⁴¹¹ GW said that *'...we have received phone calls from various people over the years...it was quite strictly understood that if any of those requests came in they were just fielded and passed on to Alan...to decide on, obviously who was asking for help...he'd always say, put them through to me, and that's what happened'*.²⁴¹² GW also said that he had *'no idea'* what AG did with the requests for help he received.²⁴¹³

Contemporaneous documents – tender documentation

IV.188. No contemporaneous documentation indicating cover pricing was produced under the leniency application made by Arthur M Griffiths. Prior to June 2006 Arthur M Griffiths did not record incoming tenders on a register, list or any other similar document. MW said, *'Alan Griffiths would make a note in a diary of when the tender date was due in and then bring the tender up for us, for us to do basically'*.²⁴¹⁴

Balfour Beatty

IV.189. As part of its leniency application, Balfour Beatty's legal representatives advised that *'Balfour Beatty entered the UK construction industry through BBCL [Balfour Beatty Construction Ltd or 'BBCL']...BBCL provides national building services,*

²⁴⁰⁶ Letter from Arthur M Griffiths re: tender info, OFT Document Reference 5938, pages 1 and 2.

²⁴⁰⁷ Interview transcript, OFT Document Reference 13292, pages 7 and 8. In response to the Statement, Arthur M Griffiths stated that prior to the departure of AG in mid 2006, *'the other three directors had very restricted access to information relating to the running of the company and tendering procedures'*, written representations, 19 May 2008. However, the OFT notes that the evidence outlined below in relation to Infringement 244 demonstrates clearly that GW was involved in at least this Infringement.

²⁴⁰⁸ Interview transcript, OFT Document Reference 13292, page 10.

²⁴⁰⁹ Interview transcript, OFT Document Reference 13291, page 11.

²⁴¹⁰ Interview transcript, OFT Document Reference 13291, page 18.

²⁴¹¹ Interview transcript, OFT Document Reference 13291, page 27.

²⁴¹² Interview transcript, OFT Document Reference 13292, page 11.

²⁴¹³ Interview transcript, OFT Document Reference 13292, page 11.

²⁴¹⁴ Interview transcript, OFT Document Reference 13291, page 3.

from a number of offices spread throughout the UK'.²⁴¹⁵ They stated that Balfour Beatty Refurbishment Ltd ('BBRL') 'is managed by Balfour Beatty Construction Scottish & Southern Ltd'.²⁴¹⁶

- IV.190. As part of its leniency application, Balfour Beatty made available current employees and contacted ex-employees to be interviewed. During these voluntary interviews the following individuals gave an explanation of BBCL's and BBRL's involvement in cover pricing: Peter Clist ('PC'), a Director and General Manager²⁴¹⁷ of BBCL, Martyn Etheridge ('ME'), a senior estimator at BBCL, Kenneth Winter ('KW'), who was a Managing Director of BBCL in the period from 1 August 2002²⁴¹⁸ until retiring at the end of 2005, Cliff Davey ('CD'), a Pre-Contract Manager at BBRL, and Hugh McElhill ('HM'), a senior estimator at BBRL.
- IV.191. In interview PC, when asked whether he would be involved in deciding whether a tender should be taken forward, stated *'that would depend on the size of the project...I look after anything from something, well, 200 million down to quite small projects. So the smaller projects it would be the responsibility of the technical services manager or the manager working for me'*.²⁴¹⁹ In interview ME also stated *'mainly the, the directors and the senior management, would decide, how competitive they wanted to go in on it'*.²⁴²⁰
- IV.192. It is apparent from documents provided by Balfour Beatty and those persons interviewed that Balfour Beatty would on occasions have sought to find out who else was competing for a tender. Balfour Beatty's legal representatives stated that in respect of finding out the identity of the competition on a tender, *'information may come from the client, suppliers or sub-contractors'*²⁴²¹ and also *'although BBCL is not a member of the Builders' Conference...sometimes staff at BBCL have had contact with the Builders' Conference e.g. BBCL is sometimes contacted by the Builders' Conference and asked which tenders BBCL is currently pricing. BBCL will usually provide this information and will receive in exchange the names of the other tenderers on the tender list'*.²⁴²² Balfour Beatty's legal representatives stated that this would also apply to BBRL. In interview ME stated *'I mean, there's several ways. I mean, you usually do a site visit and the number of times I've done a site visit and you've actually seen the competitors there as well...sometimes the clients will tell you...who you're up against...'* and *'...you can ring up a sub-contractor and say, have you priced anybody else on it?'*.²⁴²³ In terms of recording the information in respect of competition ME stated *'usually at the bottom of the tender summary sheet, we sometimes have in the bottom there, 'competition if known''*.²⁴²⁴

²⁴¹⁵ Leniency application, OFT Document Reference B1602, page 8.

²⁴¹⁶ Leniency application, OFT Document Reference B1602, page 9. The OFT notes that Balfour Beatty Construction Scottish & Southern Ltd, a sister company of BBCL, was formed in 2006 and prior to this BBRL was managed by BBCL's Southern division.

²⁴¹⁷ Peter Clist has been in this post since January 2006, prior to this he has held various management posts within BBCL, having been with Balfour Beatty for 21 years.

²⁴¹⁸ Prior to this Kenneth Winter was a General Manager of BBCL from 1994 – 2002.

²⁴¹⁹ Interview transcript, OFT Document Reference 11137, page 3.

²⁴²⁰ Interview transcript, OFT Document Reference 11138, page 3.

²⁴²¹ Leniency application, OFT Document Reference B1602, page 15.

²⁴²² Leniency application, OFT Document Reference B1602, page 17.

²⁴²³ Interview transcript, OFT Document Reference 11138, page 7.

²⁴²⁴ Interview transcript, OFT Document Reference 11138, page 8.

IV.193. Many of those persons interviewed explained that the purpose of cover pricing was so that clients did not remove them from future tender lists. ME stated *'...you don't want to upset the client, because next time they'll turn round and say, well, you didn't price that one, why should I give you any more work?'*²⁴²⁵

IV.194. Most of those persons interviewed in respect of Balfour Beatty advised that the exchange of cover prices was made via the telephone and not any other medium. PC stated *'Simply a phone call to a competitor if one was taking a cover'*.²⁴²⁶

BBCL giving cover prices

IV.195. In respect of the process of giving a cover price to a competitor ME stated *'...giving covers out, the people that approach me and say, can you give a cover and I would, I'd most probably say, yes, we most probably could help you out...and then I would discuss it with my, my directors. And they'll say, yeah fine'*.²⁴²⁷ When asked who he would discuss this with, ME stated *'Well, it'd most probably be my line manager and my director, which would be Peter Clist and John Samuels...'*.²⁴²⁸ In interview PC, when asked if he would be aware that another contractor had phoned for a cover price, stated *'Yes, Yes'* and *'I would think so on larger jobs, may not on smaller jobs. I would have liked to have thought I was aware on all size jobs but I can't guarantee that'*.²⁴²⁹ PC further stated he was likely to be aware of giving a cover price when the tender value was over a certain level *'...I suppose over two and a half million if I was...it's difficult to say an exact level but larger projects'*.²⁴³⁰ In respect of who made the decision to give or take a cover price, PC stated *'it would depend on size but...it probably would be the estimator'*.²⁴³¹

IV.196. When asked how a cover price, to give to a competitor, would be calculated ME stated *'...you're looking at, you know, a minimum of...4% or 5%'* and *'you'd most probably just run it past your, your director saying, you know, I've got to get a cover out, I'm thinking of giving him 5% or...a 100K on this...it's no hard and fast rules at all'*.²⁴³² ME confirmed that when he was giving a cover price he would calculate the price to give, stating *'I do all the numbers, yeah'*.²⁴³³ In respect of his involvement in calculating the cover price to give to a competitor PC stated *'...in some case[s] I would [be involved]...I think it would depend on the size of project'*.²⁴³⁴

IV.197. When asked how the giving and taking of a cover price would be recorded, ME stated *'it would be, most probably on a scrap of paper and put in the file...'*.²⁴³⁵ Further to this PC stated *'...some of the guys would write the, the information down, some wouldn't, there was no agreed way to do it'*.²⁴³⁶

²⁴²⁵ Interview transcript, OFT Document Reference 11138, page 5.

²⁴²⁶ Interview transcript, OFT Document Reference 11137, page 5.

²⁴²⁷ Interview transcript, OFT Document Reference 11138, page 13.

²⁴²⁸ Interview transcript, OFT Document Reference 11138, page 14.

²⁴²⁹ Interview transcript, OFT Document Reference 11137, page 7.

²⁴³⁰ Interview transcript, OFT Document Reference 11137, page 9.

²⁴³¹ Interview transcript, OFT Document Reference 11137, page 8.

²⁴³² Interview transcript, OFT Document Reference 11138, page 13.

²⁴³³ Interview transcript, OFT Document Reference 11138, page 18.

²⁴³⁴ Interview transcript, OFT Document Reference 11137, page 8.

²⁴³⁵ Interview transcript, OFT Document Reference 11138, page 12.

²⁴³⁶ Interview transcript, OFT Document Reference 11137, page 7.

IV.198. In interview KW, when asked if he had been aware of cover pricing taking place at BBCL, stated '*...I can only recollect one or two occasions when someone said to me...we've given a cover to someone. It was mentioned at a meeting, we've given a cover, I think*'.²⁴³⁷ In respect of whose decision it would have been to give or take a cover price, KW stated '*I think it always lies at the bottom rather than top*'.²⁴³⁸

BBRL taking cover prices

IV.199. In interview CD stated that the decision whether to price a tender '*... would lie ultimately...I guess, with the general manager, who's Gerry Pape in this instance...would have been Peter [Clist], who was previously [in that post]*'.²⁴³⁹ HM stated '*...I'd have a look at the documentation and report back to Cliff and say, yes, this is a nice job, no, it's not a very good job. Then, you know, we said right we're tendering the job' and 'I'd report back on my view but...I wouldn't have any part in the decision making process*'.²⁴⁴⁰ When asked if the competition was recorded anywhere, CD stated '*It will be noted down in...some instances...if it's of interest. We used to have a sheet called a bid risk, register or a sheet, I think, where there was a box for the competition to be listed if that was...known*'.²⁴⁴¹

IV.200. In respect of the process of taking a cover price from a competitor CD stated '*if I didn't know who was on the list initially, then I'd either ask the estimator that I'd assigned it to if it was one that we'd sort of started and couldn't finish. I'd make the phone call to...find out who the competition were, if we didn't know, look at the list and...select what I would think would be the most sensible person that's putting it together, and then contact them and ask them if they could help us. If they could, then we'd agree a time that I'd call or he'd call me when he'd got the figure ready and then he'd give me the figure and then we'd put...the bid in*'. CD stated that '*generally you would ask for chief estimator...a traditional title...for someone like me*'.²⁴⁴²

IV.201. When asked when in the tender period a request would be made for a cover price HM stated '*Normally within the last day or two prior to the tender going in' and 'I mean ... you're not advertising to the market place that you're taking a cover*'.²⁴⁴³ In terms of who made the decision to take a cover price from a competitor HM stated '*...it would be from Cliff's level and above*'.²⁴⁴⁴ CD stated '*I'm not sure ... there would be an ultimate decision. If...I was approached, somebody needed help, I would sort it out but people were generally informed if that was the case. So superiors knew...*'.²⁴⁴⁵ CD further explained that the tender adjudication meeting would not be held if a cover price had been taken.²⁴⁴⁶

²⁴³⁷ Interview transcript, OFT Document Reference 11140, page 6.

²⁴³⁸ Interview transcript, OFT Document Reference 11140, page 8.

²⁴³⁹ Interview transcript, OFT Document Reference 11144, page 3.

²⁴⁴⁰ Interview transcript, OFT Document Reference 11141, page 2.

²⁴⁴¹ Interview transcript, OFT Document Reference 11144, page 5.

²⁴⁴² Interview transcript, OFT Document Reference 11144, page 7.

²⁴⁴³ Interview transcript, OFT Document Reference 11141, page 8.

²⁴⁴⁴ Interview transcript, OFT Document Reference 11141, page 8.

²⁴⁴⁵ Interview transcript, OFT Document Reference 11144, page 8.

²⁴⁴⁶ Interview transcript, OFT Document Reference 11144, page 9.

- IV.202. When asked how the taking of a cover price would be recorded, CD stated *'They're not really recorded as such. It's...been seen as...an informal thing so you might find the casual bits of paper with things jotted down but it's not sort of something that's formally recorded'*.²⁴⁴⁷ HM stated *'I never kept any details of it'*.²⁴⁴⁸
- IV.203. In terms of the cover price provided by a competitor HM stated *'you'll find out the figure, report back what the figures that was given was and you might accept that figure or you might increase it [when submitting the tender to the client]'*.²⁴⁴⁹

Bluestone

- IV.204. In its leniency application²⁴⁵⁰, Bluestone, through its legal representatives, explained that between 1994 and 1998, under its parent company Morgan Sindall, it acquired 100 per cent controlling interest of seven regional construction limited companies, namely Snape, Robert R Roberts, Wheatley, Sindall, Hinkins & Frewin, Barnes & Elliott and Stansell. Each subsidiary company was run as a separate entity with its own board of directors and, according to Bluestone, its own discrete geographical area. On 9 November 2001, Bluestone was created; subsuming the seven companies into a single trading entity and from 2002 Bluestone created a national business with a uniform set of policies, procedures and operating systems. In December 2004, Bluestone made a further acquisition of the assets of three offices formally owned by the Benson Group, specifically those in Reigate, Hatfield and Fareham.²⁴⁵¹
- IV.205. Bluestone conducted an internal enquiry following the OFT's inspections under section 28 at its offices in Milton Keynes, Leeds and Nottingham. Bluestone identified *'multiple instances...of cover pricing across all areas of the Bluestone business'*²⁴⁵², and provided tables of *'definite'* and *'possible'* instances of cover pricing. These tables were amended in a further letter to the OFT dated 18 July 2006.²⁴⁵³
- IV.206. Covers recorded within Table A were confirmed as *'definite'* instances. Bluestone stated *'The information was provided by employees directly involved with, or with first hand knowledge of, the cover. Where possible, details regarding the third party involved have been included...and any documentary evidence received during the interview process has been referenced'*.²⁴⁵⁴
- IV.207. Table A lists a schedule of [...] covers given or received, identifying the Bluestone area, details of the tender, personnel involved, the other party to bid rigging (where known), details of any supporting documentary evidence and comments.²⁴⁵⁵

²⁴⁴⁷ Interview transcript, OFT Document Reference 11144, page 8.

²⁴⁴⁸ Interview transcript, OFT Document Reference 11141, page 9.

²⁴⁴⁹ Interview transcript, OFT Document Reference 11141, pages 8 and 9.

²⁴⁵⁰ Leniency application, OFT Document Reference B1833.

²⁴⁵¹ Leniency application, OFT Document Reference B1833, page 1 and 2.

²⁴⁵² Leniency application, OFT Document Reference B1833, page 9.

²⁴⁵³ Letter to the OFT, OFT Document Reference B2050.

²⁴⁵⁴ Leniency application, OFT Document Reference B1833, page 9.

²⁴⁵⁵ Table, OFT Document Reference B2052.

IV.208. Covers recorded within Table B were identified as *'possible'* instances of cover pricing for the following reasons:

- *'Documentary Evidence – a code such as (C) is included on the tender register and in the office concerned that code generally indicates that a cover has been taken;*
- *Ambiguous Code – i.e. in some offices "ZED" or "Z'ed" or "B Tender" is used interchangeably to denote tenders where a cover was sought and those tenders where a unilateral over-inflated price was submitted;*
- *Vagueness – i.e. vague recollection by staff of insufficient time to prepare tender/undesirable tender; or*
- *No tender build-up documentation – suggesting that a cover may have been sought'.²⁴⁵⁶*

IV.209. Table B lists a schedule of [...] [C] *'possible instances of cover pricing'*²⁴⁵⁷ and identifies details of the Bluestone area, tender, personnel involved, supporting documentary evidence and comments.

IV.210. Bluestone personnel provided explanations of their involvement in cover pricing. In particular, the OFT conducted interviews with Geoff Hixon, who worked as a senior estimator at Bluestone's Reigate office; estimating staff and directors from Bluestone's Leeds office, namely Mike Hesp ('MH'), David Smith ('DS'), and David Williamson ('DW'); and Commercial Director Martin Pitt ('MP') who was based in Milton Keynes. In addition, several other Bluestone current and former employees were interviewed by the OFT from other regional offices, including Geoff Hixon ('GH'), who used to work as a senior estimator at Bluestone's Reigate office.

Cover pricing - general

IV.211. As part of its leniency application, Bluestone provided a general explanation of its participation in cover pricing, from information obtained from face to face interviews and questionnaire responses with its own staff. Bluestone stated that *'cover pricing appears to have been endemic in the sector'*²⁴⁵⁸ and *'As a general rule, any exchange [of a cover price] would only be by telephone and not in writing. Extremely rarely where, as part of the bid process, further explanatory details have to be provided to the employer, there may have been some communication in writing'*.²⁴⁵⁹

IV.212. Bluestone concluded that *'it is clear from the evidence...that Bluestone has...been involved in cover pricing. i.e. has submitted tender prices which it had not prepared, which were not supported by any calculation and which were supplied by or influenced by a third party also participating in the tender process. It is also clear that, albeit on a minority basis, Bluestone has given cover prices to others'*.²⁴⁶⁰

²⁴⁵⁶ Leniency application, OFT Document Reference B1833, page 9.

²⁴⁵⁷ Table, OFT Document Reference B2053.

²⁴⁵⁸ Leniency application, OFT Document Reference B1833, page 14.

²⁴⁵⁹ Leniency application, OFT Document Reference B1833, page 15.

²⁴⁶⁰ Leniency application, OFT Document Reference B1833, page 18.

IV.213. Based at Bluestone's Leeds office, MH worked as Chief Estimator until approximately 2004, before becoming Pre-Construction Director. In interview, MH explained that Bluestone at Leeds was formerly known under the names of Roberts and then Snape Roberts before assuming the Bluestone title in 2002. MH had direct responsibility for decisions on tenders until 2004 and was still involved in tender settlements after that date. MH said that whilst he was Chief Estimator, he would usually make the decision to take a cover price, referring decisions to the managing director Graham Ellis *'only on the bigger stuff...on the smaller stuff...he wasn't bothered'*.²⁴⁶¹

IV.214. MH explained cover pricing as follows: *'It was a method of helping you out of a situation...and when...you were asked to give a cover to somebody else, well, that was to our advantage, but...all it did was knock one off a list of names, so [...]*

[...] [C], were we colluding to win or manipulate work, no, not in the strictest sense of the word'.²⁴⁶²

IV.215. Commercial Director MP was also interviewed by the OFT about his knowledge of cover pricing at Bluestone and he described the practice in the past as being *'the norm'* within the industry.²⁴⁶³ He said that there was little awareness of competition issues within Bluestone until he became aware of the OFT's investigation into the roofing industry. An email sent to him in April 2005 from the parent company Morgan Sindall about competition law, remained unread *'to my regret'*.²⁴⁶⁴

IV.216. Pre-Construction Manager DW, based at Bluestone's Leeds office, was also interviewed about cover pricing and agreed that the practice was widespread within the construction industry.²⁴⁶⁵ DW said that it was normally conducted by telephone and *'usually there was no record'*. DW confirmed that by writing something down there would have been evidence of collusion. DW confirmed that on occasions, he would have been directly involved in cover pricing, by contacting a competitor's Chief Estimator.²⁴⁶⁵

Bluestone taking cover prices

IV.217. With regard to taking a cover price, Bluestone explained the process as follows: *'Once the decision has been taken internally to 'take a cover', an initial phone call is made to a competitor to see if they would be prepared to assist...The driver in Bluestone's case has predominantly been to 'lose' the bid, but to be seen to be participating sufficiently to maintain an association with the Employer's forward workstream. Therefore, it seeks a competitor which is likely to be a serious bidder but not necessarily the winning bidder...Information regarding competitor involvement in the bid appears to have been freely gained through either the Builders' Conference organisation or from the engagement with the sub-contracting community...Occasionally personal contacts with past colleagues offer an insight into the level of interest in a particular project'*.²⁴⁶⁶

²⁴⁶¹ Interview transcript, OFT Document Reference 12680, pages 6 and 7.

²⁴⁶² Interview transcript, OFT Document Reference 12680, page 16.

²⁴⁶³ Interview transcript, OFT Document Reference 12679, page 7.

²⁴⁶⁴ Interview transcript, OFT Document Reference 12679, page 9.

²⁴⁶⁵ Interview transcript, OFT Document Reference 12674, pages 5 to 7.

²⁴⁶⁶ Leniency application, OFT Document Reference B1833, page 15.

- IV.218. Bluestone added *'Where an informal agreement to provide or receive a cover price has been reached, a follow-up telephone conversation just before the tender return deadline is the usual vehicle for communicating the cover price. In virtually all cases the competitor will merely provide the price to be used in the bid and not details of the price that it is intending to submit. On occasions, where the bid requires more than the mere submission of a price, certain supporting details (for example, specifications etc) are also exchanged. It is then a matter for Bluestone to decide whether to use the price provided or to modify it, inevitably by increasing it, prior to submission'*.²⁴⁶⁷
- IV.219. MH described the process of taking a cover price as follows: *'...you would ring up, speak to a competitor, and ask if they were tendering this job competitively, yes, they were, so you would ask for a cover price and he would ring you with a figure, suggesting that you went in on...if it was a trusted source...you may use that figure. If it was a particular job that you really really didn't want...you may actually add a little bit more to the figure you were given, just to be on the safe side, because what you wouldn't want is to come second, because sometimes you'd find that they'd interview the first two people, so you find yourself going to a meeting about a job you know bugger all about...but you didn't equally, given the choice, you didn't want to be number six on a list of six, because that would create the wrong impression as well, so it was difficult'*.²⁴⁶⁸
- IV.220. MH had a *'little black book'* of contacts which he used for the purpose of obtaining cover prices. This telephone book was taken during the OFT's search of the Leeds office.²⁴⁶⁹ MH said *'if I could, I would ring up quite early, because you didn't want to be left holding the baby at the end of it, in which case you've suddenly quickly got to price the job'*. He added that the other company would give the cover price *'on the day the tenders went in...so it would be last minute'*.²⁴⁷⁰
- IV.221. MH also explained some of the forms created at the Leeds office, which recorded tenders. A tender registration form was created by him, an example of which was provided as part of Bluestone's leniency application and referred to in interview.²⁴⁷¹ MH said that this form was *'the notification at the beginning of the tender process'* and, referring to the letter 'Z' on the second page of the form, he said that it meant that Bluestone was *'not interested...that in itself does not necessarily mean that the job was not priced, it's a damn good indication, yes, but not necessarily, it just meant, we weren't going to go for it, it wasn't an attractive job'*.²⁴⁷²
- IV.222. MH also maintained an electronic spreadsheet of tenders, an extract of which was found during the OFT's inspection under section 28.²⁴⁷³ Referring to the column marked 'WIN/LOSE'; MH explained the entry of the letters 'Z' as follows: *'Essentially, it was a classification to say that we were not interested in the job and I would guess, nine times out of ten, it was highly likely that that*

²⁴⁶⁷ Leniency application, OFT Document Reference B1833, page 15.

²⁴⁶⁸ Interview transcript, OFT Document Reference 12680, pages 11 and 12.

²⁴⁶⁹ Telephone contacts book, OFT Document Reference B0306.

²⁴⁷⁰ Interview transcript, OFT Document Reference 12680, page 15.

²⁴⁷¹ Tender registration form, OFT Document Reference B2250.

²⁴⁷² Interview transcript, OFT Document Reference 12681, pages 2 and 3.

²⁴⁷³ Tender spreadsheet, OFT Document Reference B0300.

was a cover'.²⁴⁷⁴ An earlier version of the spreadsheet of tenders was provided under leniency by Bluestone.²⁴⁷⁵ MH confirmed that the letter 'B' was also used to indicate that a cover price was sought by Bluestone and that the spreadsheet was updated once a month by him. He said in respect of the codes on the form, *'I think...it really...just phraseology at different times, we knew that you didn't want to be writing the word cover*'.²⁴⁷⁶

IV.223. In interview, DW agreed that the letter 'Z' or letters 'ZED', on internal documentation at Bluestone Leeds office, were used to indicate that a cover price had been taken from a competitor.²⁴⁷⁷ MP said that the letter 'Z' stood for *'zero interest*'.²⁴⁷⁸

IV.224. Also based at Bluestone's Leeds office, senior estimator DS agreed that the letters 'Z' or 'B' were used to indicate a cover price and he confirmed that he had a contact list of construction companies, which was used in part to contact other companies for cover prices.²⁴⁷⁹ This contact list was found during the OFT's inspection at Bluestone's Leeds office.²⁴⁸⁰

IV.225. GH was a senior estimator employed at Bluestone's Reigate office from July 2005 to December 2006. In interview, he said that tenders were allocated to him by the estimating manager and decisions as to whether Bluestone would competitively tender were made at director level. If a decision was made to seek a cover, a competitor would be approached by telephone and a cover price obtained. He said the cover price *'was designed to be above their figure obviously, but not horrendously...so they could make it look as though we were competitive*'.²⁴⁸¹ GH said that he sometimes recorded covers in his personal notebook.

Bluestone - giving cover prices

IV.226. In relation to giving a cover to a competitor, Bluestone explained that *'the process for Bluestone providing a cover price to a competitor, on approach, is the mirror image of that described...for receiving a cover price. There is no evidence whatsoever of Bluestone initiating the giving of a cover price to a competitor*'.²⁴⁸²

IV.227. In interview, MH said *'If...someone rang us and asked for a cover, would we give one out, well yes we would, because it was sort of tit for tat. Did we know at that time it was increasing our odds of winning the job, well, yes, come on we're not daft, of course we did...all it did was knock one off a likely list of five or six tenderers, so your odds went from one in six to one in four or, one in five*'.²⁴⁸³

²⁴⁷⁴ Interview transcript, OFT Document Reference 12681, page 5.

²⁴⁷⁵ Tender spreadsheet, OFT Document Reference B2177.

²⁴⁷⁶ Interview transcript, OFT Document Reference 12681, page 6.

²⁴⁷⁷ Interview transcript, OFT Document Reference 12674, pages 7 and 8.

²⁴⁷⁸ Interview transcript, OFT Document Reference 12679, page 18.

²⁴⁷⁹ Interview transcript, OFT Document Reference 12673, pages 10 and 11.

²⁴⁸⁰ Contact list, OFT Document Reference B0340.

²⁴⁸¹ Interview transcript, OFT Document Reference 13100, page 7.

²⁴⁸² Leniency application, OFT Document Reference B1833, page 15.

²⁴⁸³ Interview transcript, OFT Document Reference 12680, page 11.

IV.228. DS said that covers given might be recorded on Tender Finalisation Sheets, which were only created if Bluestone was genuinely tendering for the work. DS said that he recorded the name of the opposition on the right hand corner of this document with the letter 'C' by the company name if Bluestone had given a cover price. He added, *'certainly the way I would have done it was to list the names down. If any of those companies rang up asking for a cover, I would write a C against it, which indicated it was a prompt or reminder that...they had been in touch'*.²⁴⁸⁴ He also said that he was less involved in the giving and receiving of covers after DW replaced MH as Pre-Construction Manager/Chief Estimator in 2004.²⁴⁸⁵

Bodill

IV.229. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. The following Bodill employees expanded upon this explanation during interview: Managing Director Richard Bodill ('RB'), estimators Juris Rozentals ('JR') and Andrew Bodill ('AB') and estimating support David Wraithe ('DW').

IV.230. A tender sheet was completed for each contract for which Bodill was invited to tender.²⁴⁸⁶ DW explained that, *'In 99% of the cases'*, he would prepare the tender sheet.²⁴⁸⁷ On the few occasions when DW did not prepare the tender sheet it would be completed by either JR or AB. When preparing the tender sheet DW would write on the tender sheet the date of the tender submission, a calendar countdown to indicate the number of days that Bodill had to price the job, the name of the job, architect and quantity surveyor. Each tender sheet was given an in house File Number and a Job Number which was obtained from the Nottingham Builders' Guild ('NBG') (see paragraphs IV.128 to IV.146 above). Each tender that Bodill wanted to win was then allocated to either JR or AB (or, occasionally to RB).

IV.231. Bodill stated that the tender sheet included a section headed 'Tenderers' which provided space to insert the names of other companies tendering for the contract.²⁴⁸⁸ Initially, DW would enter the names of any competitors he knew were going for the job in this section against the numbers 1 to 6. As the job progressed DW along with AB and JR would also fill in names of other tenderers when this information was forthcoming. DW said that *'a lot of it is my writing but, the other two would put on as well if they received information'*.²⁴⁸⁹ These names were inserted when intelligence was obtained by staff in the estimating department, during the tender process. Bodill stated that this intelligence was obtained by telephone when asking sub-contractors and suppliers if they wished to price the tender, or when chasing quotations prior to completion of the estimate.²⁴⁹⁰ RB stated that Bodill may also have found out about other companies tendering for particular tenders through organisations such as the Builders Confederation and agencies such as Glennigans and

²⁴⁸⁴ Interview transcript, OFT Document Reference 12673, page 14.

²⁴⁸⁵ Interview transcript, OFT Document Reference 12673, page 15.

²⁴⁸⁶ Interview transcript, OFT Document Reference 11154, page 6.

²⁴⁸⁷ Interview transcript, OFT Document Reference 11154, page 2.

²⁴⁸⁸ Explanatory note, OFT Document Reference 0861, page 1.

²⁴⁸⁹ Interview transcript, OFT Document Reference 11154, page 3.

²⁴⁹⁰ Explanatory note, OFT Document Reference 0861, page 1.

ABI.²⁴⁹¹ RB also stated that information on other companies invited to tender for particular tenders was obtained as a result of Bodill's membership of the NBG.²⁴⁹²

Bodill giving cover prices

IV.232. In statements provided to the OFT as part of its leniency application and confirmed in the subsequent interviews with the OFT, all of Bodill's employees involved in the preparation of tenders confirmed the procedures followed for all tenders. RB explained how the process would work for tenders that Bodill wanted to win, as follows:²⁴⁹³

'Real Tenders

- *Enquiry arrives*
- *Tender sheet prepared. [...]*
- *Quantity Surveyor or any Consultants appointed as required*
- *Document read and marked up for procurement of materials and sub-contractors*
- *Enquiries set [sic] out for general materials*
- *Enquiries sent out for work packages*
- *Intelligence sought to identify other tenderers [...]*
- *Quotations checked and entered into tender estimate*
- *Tender estimate calculated*
- *Tender figure settled at Tender (Adjudication) Meeting*
- *Cover price given to other contractors who request it*
- *Tender submitted'*

IV.233. In tenders where Bodill was giving a cover price, Bodill stated that the ringed letter 'C' against another company who was tendering and the words 'from us' indicated that Bodill was giving that company a cover price. The figure Bodill gave that company as a cover price was usually written on the tender sheet beside their name.²⁴⁹⁴ The numbers '1', '2' and '3' indicated the order in which Bodill was approached by the other companies for a cover price and the first to approach would get the lowest price and so on.²⁴⁹⁵ If a competitor wanted Bodill to provide a cover price the phone call would be directed to the estimator dealing with that job and AB explained that, '*so it's put through to me, I'd say, yes, Okay, we'll contact you nearer...nearer the date*'.²⁴⁹⁶ JR explained that at the tender adjudication meeting, '*we settle the tender, and then we would fill in the tender sum analysis*'²⁴⁹⁷, and that between the tender adjudication meeting and submission of tender, '*we would put in any figures that, we would give in as help*'.²⁴⁹⁸ AB confirmed that at the tender adjudication meeting it was decided what price Bodill was going in at and he confirmed that the cover prices would be annotated on the tender sheet between the tender adjudication meeting and the actual submission of the tender.²⁴⁹⁹

²⁴⁹¹ Statement, OFT Document Reference 0864, page 8.

²⁴⁹² Statement, OFT Document Reference 0864, pages 8 and 9.

²⁴⁹³ Statement, OFT Document Reference 0864, page 5.

²⁴⁹⁴ Explanatory note, OFT Document Reference 0861, pages 1 and 2.

²⁴⁹⁵ Explanatory note, OFT Document Reference 0861, page 2.

²⁴⁹⁶ Interview transcript, OFT Document Reference 11153, page 4.

²⁴⁹⁷ Interview transcript. OFT Document Reference 11152, page 3.

²⁴⁹⁸ Interview transcript, OFT Document Reference 11152, page 4.

²⁴⁹⁹ Interview transcript, OFT Document Reference 11153, page 6.

IV.234. AB further explained that DW would normally have made the phone calls to a competitor to provide the cover price, *'purely because the estimator normally hand delivers the tender...so David would be in the office and we'd say, can you just ring this through to so and so'*.²⁵⁰⁰ DW confirmed that the relevant estimator would tell him the cover price to give following the tender adjudication meeting and that generally the estimators would annotate the cover price on the tender sheet.²⁵⁰¹ DW further stated that there would almost always be two contacts with the competitor asking for the cover price. DW also stated that the first contact would be when the competitor asked for help, and then secondly on the day of the tender submission or the day before the tender submission there would be the contact to give the competitor the cover price.²⁵⁰²

Bodill taking cover prices

IV.235. On receipt of a tender RB would discuss with the relevant estimator if Bodill were going to price the job. The ultimate decision on whether to take a cover on a tender would be RB's. RB explained how the process would work for tenders that Bodill did not want to win.²⁵⁰³

'Token Tenders ("Cover Pricing")

- *Enquiry arrives*
- *Tender sheet prepared. [...]*
- *Intelligence sought to identify other tenderers*
- *A Chosen tendered [sic tenderer] approached for help*
- *Cover price given to us just before tender submission due*
- *Tender submitted incorporating cover price'*

IV.236. Where Bodill was taking a cover, a ringed letter 'C' was generally written on the original tender form, shortly after receipt of the tender, instead of allocating the job to an estimator and a '*' would be annotated against the company that was providing the cover.²⁵⁰⁴ DW explained that *'where it says "estimator" I put "C" because that means we decided to take help on it, so it was never given to an estimator to look at'*.²⁵⁰⁵ DW said that he would then find out who was tendering for the job, make an initial contact to ask for help from them (i.e. a cover price) and then make a subsequent contact, probably on the morning of the tender submission to obtain the cover price.²⁵⁰⁶

Original and copy tender sheets

IV.237. After a tender was submitted the original tender sheets were then passed to RB who kept them in his office. AB explained that the tender sheet did not form part of the tender file and that once the tender was submitted the sheets were passed to RB. It was these original tender sheets that were provided to the OFT as part of Bodill's leniency application. JR and AB explained that they kept copies of the tender sheets but that the originals were kept by RB. AB always made copies of the original sheets for his tenders, while JR always made copies

²⁵⁰⁰ Interview transcript, OFT Document Reference 11153, page 4.

²⁵⁰¹ Interview transcripts, OFT Document 6338, page 5 and 11154, pages 3 and 4.

²⁵⁰² Interview transcript, OFT Document Reference 6338, page 5.

²⁵⁰³ Statement, OFT Document 0864, page 6.

²⁵⁰⁴ Explanatory note, OFT Document Reference 0861, page 1.

²⁵⁰⁵ Interview transcript, OFT Document Reference 6338, page 9.

²⁵⁰⁶ Interview transcript, OFT Document Reference 6338, page 9.

for both his and AB's tenders. The reason given for making the copies was that they were subsequently annotated with information following the tender submission, which was for market intelligence purposes. DW did not make any copies of any tender sheet.

- IV.238. The OFT clarified with Bodill staff in interview the status of these copy tender sheets. JR, who left Bodill on 13 December 2005, did not retain his copy tender sheets. AB confirmed that about nine or ten months after JR left Bodill, they had a clear out of his old files and these copy tender sheets were disposed of at this time.²⁵⁰⁷
- IV.239. Bodill has confirmed that all information in relation to cover pricing would be annotated on the tender sheet before the tender was submitted and that therefore this information will be identical on both AB's copy and RB's original copy (since this information was added before any copying of sheets took place). The originals of the tender sheets kept in RB's possession therefore contained only pre-tender information, other than where the OFT has indicated differently in relation to a specific tender. AB explained that he made photocopies of the tender sheets for his jobs which he priced up, so that both he and RB would have a copy. AB's own copies of tender sheets were made available to the OFT for inspection on 26 April 2007. Where market intelligence was obtained by AB after the tender submission this information would be annotated on AB's copy and also on RB's original copy (see below). Where such notes have been made following tender submission, this has been indicated by the OFT in relation to the specific tender.
- IV.240. JR confirmed that, *'until the tender goes in, then I photocopy it, so all the, all the sheets that you've received from Richard, those are all Richard's copies, so there would be, everything that was made pre tender, would be on those sheets'*.²⁵⁰⁸ JR further confirmed, *'as a matter of course, every job, that was tendered, I would take a photocopy of it, give the original to Richard, leave it in a file, and then as information post tender comes through, then I would make notes on it for intelligence purposes...sometimes I would photocopy it again, and give it to Richard so he was aware of what was happening. Sometimes, it would just be by word of mouth and he might make an odd note on the tender sheet himself'*.²⁵⁰⁹
- IV.241. AB explained that after the tender was submitted he would try to find out fairly quickly, sometimes the same afternoon as a 12:00 noon deadline, from the client if Bodill's tender was looking favourable. Occasionally, if such information was forthcoming this information would be written on the original tender sheet before it was passed to RB. Where such information was added to the original this has been indicated by the OFT in relation to the specific tender. Mostly, however, such market intelligence would be obtained a few days later and this information would then be added by AB both to his copy of the tender sheet and to RB's original copy.²⁵¹⁰ AB confirmed that he kept the original tender sheets in his office and that when AB obtained market intelligence information post-tender, as well as annotating his own copy AB would also annotate the

²⁵⁰⁷ Interview transcript, OFT Document Reference 11153, page 2.

²⁵⁰⁸ Interview transcript, OFT Document Reference 11152, page 14.

²⁵⁰⁹ Interview transcript, OFT Document Reference 11152, pages 13 and 14.

²⁵¹⁰ Interview transcript, OFT Document Reference 11153, page 7.

original held in RB's office.²⁵¹¹ Again, where such information has been added to both documents this has been indicated by the OFT in relation to the specific tender.

IV.242. In response to the Statement, Bodill argued that it was JR that engaged in the cover pricing conduct and that *'...Neither Richard Bodill nor any other Director was involved in the giving or taking of cover prices in relation to tenders which were always based on informal contacts between contractors at estimator level... [JR] did report to Richard Bodill as managing director but only periodically reporting on business levels not in relation to individual tenders or to advise on whether or not to take a cover price'*.²⁵¹² However, RB's witness statement²⁵¹³ clearly demonstrates that he knew that cover pricing was occurring within Bodill. RB explained the process for giving and taking cover prices. Even if RB delegated the authority to give or take covers on individual tenders, the practice of cover pricing within Bodill was carried out with his general consent and therefore warrants an uplift for director involvement on all Infringements, as described in Section VI (Enforcement) and Annex C below.

Bramall

IV.243. As part of its leniency application, Bramall provided a general explanation of its participation in cover pricing.²⁵¹⁴ This was supplemented by interviews with the following witnesses: Neil Baxter ('NB'), Managing Director, Bramall Yorkshire, Paul Alderson ('PA'), Estimating Manager, Bramall Yorkshire, Dave Prescott ('DP'), Managing Director, Bramall North West, and John Pagett ('JP'), Bid Manager, Bramall North West.

IV.244. Bramall had two divisions, each with its respective area, client base and management and staff. These were Bramall Construction North West ('BC NW') and Bramall Construction Yorkshire ('BC Yorkshire'). Unless specifically indicated to the contrary, the comments below apply to both parts of the business.

IV.245. Bramall asserted in its leniency application that there was awareness of the Act from its implementation from March 2000 and that attempts were made to stop or reduce instances of seeking and giving cover prices from and to its competitors. DP said during interview, that most tenders arrived unannounced because Bramall was on an approved tender list with various clients.²⁵¹⁵

BC NW taking cover prices

IV.246. JP said *'Basically the tender comes in, it either goes to marketing or comes direct to us at estimating, in any event it always ends up in estimating, we allocate it a number, log it basically, who the client is, what type of tender it is, the return date, create a file for the job, acknowledge the tender and then it*

²⁵¹¹ Interview transcript, OFT Document Reference 11153, page 6.

²⁵¹² Written representations of Bodill, 25 June 2008, page 25.

²⁵¹³ Statement, OFT Document 0864, page 6.

²⁵¹⁴ Leniency application, OFT Document Reference B1410, page 2.

²⁵¹⁵ Interview transcript, OFT Document Reference 11167, page 2.

goes through its normal process of breaking down for enquiries. It's allocated to an estimator and the estimator follows it through for pricing at that point'.²⁵¹⁶

- IV.247. DP said that upon receipt of a tender, he and the other estimators would take a view on the attractiveness or otherwise of the tender. The decision to return the tender unquoted or to seek a cover price was made by the Managing Director.²⁵¹⁷
- IV.248. DP said, *'It would've come to me...Or the MD at the time'.²⁵¹⁸* He said *'...a cover price gives you a reasonable chance of putting in a competitive figure without coming last, coming last consistently in a tender could arrive at you being struck off a tender list so, I think this is all about maintaining relations and maintaining your position on a tender list'.²⁵¹⁹*
- IV.249. DP said that when Bramall was looking for a cover price he would *'...discuss and agree with the bid manager, give him authority to take a cover and then the estimator would ring, well...he would ring the person, he'd endeavour to establish as we did who was...who were the bidding companies and then either based on relationships i.e. trust, someone who we could trust to ring, we knew, or looking at the list and thinking they'll be the most competitive of the people bidding, I think this is really down their street that type of work, you would try them'.²⁵²⁰*
- IV.250. Intelligence on who else was submitting bids on a particular tender would be obtained over the telephone when speaking to suppliers and sometimes by clients sending emails distributing information or by attending bidders conferences²⁵²¹ or from the Building Bureau that actively circulated the names of tendering parties.²⁵²² The names of competitors were entered in the tender log book and on the tender adjudication front sheet.
- IV.251. DP continued, *'You'd ring them [the competitors] up and say, you know, we're struggling with this, can I have some help. So it'd be done over the phone...and normally the day...normally the morning of the tender submission you'd get the call from the giving company with a figure to go in at'.²⁵²³*
- IV.252. DP was asked when Bramall would initiate the contact with a competitor for a cover price. He replied, *'I think it would've been 2 or 3 days before'.²⁵²⁴*
- IV.253. When asked how a cover price would be recorded, DP said, *'The tender figure would be written in the book. You may sometimes come across a 'c' written against a number, I think there's also been asterisk and dots used over...years, different estimators have brought their tools of the trade I suppose their way of doing things that meant that it's varied'.²⁵²⁵*

²⁵¹⁶ Interview transcript, OFT Document Reference 11168, page 3.

²⁵¹⁷ Interview transcript, OFT Document Reference 11167, page 3.

²⁵¹⁸ Interview transcript, OFT Document Reference 11167, page 10.

²⁵¹⁹ Interview transcript, OFT Document Reference 11167, page 6.

²⁵²⁰ Interview transcript, OFT Document Reference 11167, page 6.

²⁵²¹ Interview transcript, OFT Document Reference 11167, page 7.

²⁵²² Interview transcript, OFT Document Reference 11167, page 4.

²⁵²³ Interview transcript, OFT Document Reference 11167, page 6.

²⁵²⁴ Interview transcript, OFT Document Reference 11167, page 7.

²⁵²⁵ Interview transcript, OFT Document Reference 11167, page 7.

IV.254. DP was asked if he would have recorded if someone else had taken a cover price in the tender log book. He said, '*...sometimes we picked up intelligence that someone was taking a cover from someone else as well and there might be some note cover from [the company providing the cover price] against a bidder's name so we might have recorded the intelligence that, despite the fact that we were taking one, we knew someone else were taking one.*'²⁵²⁶

IV.255. When asked when there would be contact with a competitor JP said, '*The only time would be if you were gonna take a cover, basically.*'²⁵²⁷

IV.256. DP was asked who knew that cover pricing went on. He replied, '*The estimating department, the board...and I would say, on ad hoc occasions the surveyor, senior surveyor would tender the odd scheme so they would be aware of it so we're limited to probably 2 or 3 people, 2 or 3 senior surveyors, the estimating department, board.*'²⁵²⁸

BC NW giving cover prices

IV.257. DP said he would not be approached directly to give a cover price; that approach would be made to the Estimating Department. JP confirmed that the giving of a cover price would have to be agreed by the Managing Director or the Commercial Director.²⁵²⁹

IV.258. DP was asked how BC NW recorded the giving of a cover price to a competitor. He said, '*...I think sometimes a 'c' has appeared on a tender adjudication front sheet with their figure written in but...it weren't sort of a sacrosanct process because...I think...there were a genuine desire...to record as little as possible...*'²⁵³⁰

IV.259. In its response to the Statement, Bramall asserted in respect of DP's answer to the above question (see IV.258) '*[t]his Quote should not be relied upon by the OFT because it is factually incorrect and is refuted by further testimony from both John Pagett ("Pagett") and later in [Dave] Prescott's own testimony.*'²⁵³¹

IV.260. The OFT does not accept Bramall's assertions. The quote in paragraph IV.258 is accurate and complete and is not contradicted by anything in the witness evidence of DP or JP. The OFT accepts that DP and other Bramall witnesses do describe ways in which cover pricing was recorded, but this does not undermine DP's perception of the desire to record as little as possible.

IV.261. DP was asked how he calculated a cover price to give to a competitor; he replied, '*Yea, well I think that...it's industry custom and practice...people would use the words give me a tight cover which means, in my opinion, it's between 3 and 5%...as opposed to...give me a cover that's...doesn't involve me in having extensive dialogue with the client which could be up to 10%. So I would say the price range is 3 to 10%.*'²⁵³²

²⁵²⁶ Interview transcript, OFT Document Reference 11167, page 8.

²⁵²⁷ Interview transcript, OFT Document Reference 11168, page 7.

²⁵²⁸ Interview transcript, OFT Document Reference 11167, pages 8 and 9.

²⁵²⁹ Interview transcript, OFT Document Reference 11168, page 11.

²⁵³⁰ Interview transcript, OFT Document Reference 11167, pages 7 and 8.

²⁵³¹ Written representations of Bramall, 27 June 2008, paragraph 7.2.

²⁵³² Interview transcript, OFT Document Reference 11167, pages 8.

BC Yorkshire taking cover prices

- IV.262. Incoming tenders were logged in a Tender Log Book and referred for level of interest to the Managing Director or in his absence one of the other directors.²⁵³³ PA said, *'...generally the enquiry would come in everything gets logged it's given its own reference number and then...you go through a process of...sending out enquiries, getting your quotations in...then...resourcing it up comparing the quotations that come back in coming to a sort of final point...and then sitting down with the board and adjudicating that and then the submission'*.²⁵³⁴
- IV.263. NB explained what he understood by cover pricing: *'...where estimators used to basically help each other out because it was impossible to price every scheme that sometimes you may get five tenders in, all in one day, all going back in the same day and when we have gone through periods where we try to price all the schemes what happens is that we do five bad tenders and what we have learnt is that if we didn't focus on putting in the right tender we could have - if we put five tenders in it could have two effects one could be that we made a right mess of it and that we had landed schemes which were going to be worse and non-profitable who were going to be significant loss makers so we tended to focus our energies on ones which were schemes that we felt were attractive that we could do a good job on'*. When asked why companies engaged in cover pricing NB replied, *'...to protect the business from winning loss making work...'*.²⁵³⁵
- IV.264. PA explained why Bramall sought cover prices. *'Our reason was, we just physically couldn't have priced all the work that came through the door, so most of the time there was only me and David [Smallman, estimator] and we would essentially, in a year we could have like 100 enquiries which would mean you'd be looking at doing a job a week if you had still...a job in itself roughly that could take you a month so basically you just physically couldn't do it'*.²⁵³⁶
- IV.265. NB was asked who would decide if a job was attractive or otherwise and he replied, *'invariably it would be me. If I wasn't around it could have been one of the other directors...the contracts director, surveying director they would be the two that will more likely be involved'*.²⁵³⁷
- IV.266. PA was asked what would happen once a job was deemed not to be attractive. He replied that *'We would have looked for assistance in the same way'*.²⁵³⁸ He clarified the term *'assistance'* as meaning a cover price.
- IV.267. PA was asked how he would get a cover price from a competitor. He said, *'...once we'd established who was on the list, it would just be a quick phone call to a competitor and say are you on this scheme, and if it's like "yeah" then it's like, "can you help us out?", "alright", "we'll give you call" and that's it'*.²⁵³⁹

²⁵³³ Leniency application, OFT Document Reference B1410, page 10.

²⁵³⁴ Interview transcript, OFT Document Reference 11170, page 3.

²⁵³⁵ Interview transcript, OFT Document Reference 11169, page 6.

²⁵³⁶ Interview transcript, OFT Document Reference 11170, page 6.

²⁵³⁷ Interview transcript, OFT Document Reference 11169, page 3.

²⁵³⁸ Interview transcript, OFT Document Reference 11170, page 5.

²⁵³⁹ Interview transcript, OFT Document Reference 11170, page 6.

- IV.268. NB also explained how the exchange of covers operated: *'...one estimator would ring another estimator and at some point during the tendering process and asked for along the lines of can you give us some help on this tender and close to the date the other contractor would ring up and give us it may be a figure or it might have been in the region of...'*²⁵⁴⁰
- IV.269. When asked if the contact with competitors was exclusively by phone rather than fax or email NB replied, *'To the best of my knowledge neither of those [fax or email] are used or were used'*.²⁵⁴¹
- IV.270. PA was also asked if fax or email was ever used to obtain a cover price and he said, *'No...email didn't really exist at that time'*.²⁵⁴² He added that contact would always be from estimator to estimator and said *'...we had a contact database of companies and knew who their contacts were, or you just asked for somebody within the estimating department at a senior level'*.²⁵⁴³
- IV.271. PA was asked how the taking of a cover price was recorded. He replied, *'...the estimating management system [EMS, a computer recording system], and we have a tender log book as well...we've had various means of recording it, [as well as a period of] not really recording it. It has varied'*.²⁵⁴⁴

BC Yorkshire giving cover prices

- IV.272. NB was asked when there would be contact with competitors. He said, *'If it was one where...they were looking for a cover then that would be where there would be contact'*.²⁵⁴⁵
- IV.273. PA was asked if the same notation for recording the taking of a cover price by Bramall Yorkshire applied to the undertaking giving a cover price to a competitor. He replied, *'We've adopted a policy from the 2000 which we haven't, have been strict with but we weren't providing covers to other companies anyway'*.²⁵⁴⁶

Clegg

- IV.274. As part of its leniency application, Clegg made available current employees to be interviewed. During these voluntary interviews the individuals were asked to give an explanation of Clegg's involvement in cover pricing.
- IV.275. Leslie Hunt ('LH') started working for Clegg in around 1997 as Senior Estimator when it was previously based in Ilkeston. At that time LH was the only senior estimator at Clegg so had knowledge of most tenders entering the office. David Clarke ('DC') joined Clegg in 2002 and was subsequently appointed as Estimating Manager, and LH then took on more of a marketing role once tenders had been passed to him. LH explained during interview that post 2000 the tender process was that on receipt of a tender some would go to Peter

²⁵⁴⁰ Interview transcript, OFT Document Reference 11169, page 7.

²⁵⁴¹ Interview transcript, OFT Document Reference 11169, page 7.

²⁵⁴² Interview transcript, OFT Document Reference 11170, page 6.

²⁵⁴³ Interview transcript, OFT Document Reference 11170, page 7.

²⁵⁴⁴ Interview transcript, OFT Document Reference 11170, pages 7 and 8.

²⁵⁴⁵ Interview transcript, OFT Document Reference 11169, pages 5 and 6.

²⁵⁴⁶ Interview transcript, OFT Document Reference 11170, page 8.

Warren ('PW') the Business Development Manager, and said that *'the enquiring documents sometimes come in to him. Occasionally we will receive tender documents through quantity surveying or cost consultants...and they make contact by phone and say documents are ready for collection'*.²⁵⁴⁷ In cases such as this if the client was based locally they would go to them to collect the invitation to tender documents. More recently any tender received in the office would be sent to PW and a tender notification form created whereby *'it's booked in and basic description of the job. It will then be passed on to Simon [Simon Blackburn ('SB')] for him to decide whether we price it or not and the decision is now price it or send it back'*.²⁵⁴⁸ The form was a basic summary of the tender details and LH commented *'the particular estimator who's dealing with it would fill it in'*²⁵⁴⁹ but sometimes it would even be completed by administration staff. The decisions on whether to price a tender were made at management level, however LH commented that prior to DC joining Clegg the tender documents would have been passed down to him.²⁵⁵⁰

IV.276. DC joined Clegg as a senior estimator in 2002 and then went on to take over the administration side of the business and discussing workloads with management in the position of Estimating Manager. DC also said that new tenders would normally go to PW and commented *'From the tender coming in, and we would produce a tender notification, and that tender notification would state the basic principles of...the description of the work, the contract, the start and finish times of it anticipated in the tender document, and distribute that to the directors and the construction manager who would be looking at the project ultimately'*.²⁵⁵¹ When asked who would actually complete this information DC said *'Either Les or myself...Whoever the estimator is'*.²⁵⁵² In regard to who decided whether to price a tender DC said *'it will be discussed by the directors, with regard to our current workload and if we were able to tender'*.²⁵⁵³

IV.277. SB joined Clegg in 2002 as Construction Director and became Managing Director from January 2004. SB described the standard form to be filled in when a tender was initially received and confirmed this was typically done by PW with the *'very briefest details of the project'*.²⁵⁵⁴ SB said that at that stage *'It comes to my desk, and at that point, I either decide we are pricing it, decide we are going to discuss it, or decide we are going to send it back'*. This form would be signed by him, then passed on to the estimators. SB commented that *'the estimators fill the form in and complete it and say what we are doing'*.²⁵⁵⁵ SB went on to say *'We will have settlement meetings; we will have various other processes in that. They tend to not be recorded so much because the estimators then have a process where they have a front sheet for every project'*. SB outlined how this document would give a more detailed description of the tender which would be passed to the board and any contracts manager allocated to the tender. The form, titled *'Tender Details & Summary'*, completed by the estimator dealing with the tender, would contain details of the project, client, key dates and *'Other Tenderers'* as well as reference to which Clegg

²⁵⁴⁷ Interview transcript, OFT Document Reference 13277, page 4.

²⁵⁴⁸ Interview transcript, OFT Document Reference 13277, page 5.

²⁵⁴⁹ Interview transcript, OFT Document Reference 13277 page 6.

²⁵⁵⁰ Interview transcript, OFT Document Reference 13277 page 5.

²⁵⁵¹ Interview transcript, OFT Document Reference 13276, page 3.

²⁵⁵² Interview transcript, OFT Document Reference 13276, page 3.

²⁵⁵³ Interview transcript, OFT Document Reference 13276, page 2.

²⁵⁵⁴ Interview transcript, OFT Document Reference 13278, page 3.

²⁵⁵⁵ Interview transcript, OFT Document Reference 13278, page 3.

employees had attended a tender meeting to discuss it.²⁵⁵⁶ As part of its leniency application Clegg provided a number of examples of completed versions of this form.²⁵⁵⁷

Clegg taking cover prices

IV.278. Clegg provided to the OFT a report into its activities concerning the giving and receiving of cover prices. This report listed the reasons for Clegg taking cover prices as:²⁵⁵⁸

- desire not to offend or lose goodwill with clients or consultants sending enquiries;
- limited estimating resource usually influenced by untimely/unsolicited enquiries;
- insufficient technical capacity to deliver a project if a bid was to be successful; and
- time/cost to prepare tenders.

IV.279. LH as an estimator would be informed by a director if Clegg wished to take a cover price on a tender, and would be instructed to obtain that cover price. He commented on the various reasons why Clegg would seek a cover price for a tender. He said *'I would think the majority of occasions, it's a time and labour availability issue, it just isn't convenient'*.²⁵⁵⁹ LH went on to explain how the time issue could arise from slippages in tender documents being issued by the client, incorrect details being given to Clegg about a tender before the final details were released, or general issues of Clegg already having a full workload. Explaining why Clegg did not just send back tenders that it was unable to or did not wish to bid for, LH said that *'in days gone by, it wasn't such a problem to send documents back, as far as I know, because it didn't really upset clients as much as it would these days'*. LH referred to the type of construction work undertaken and went on to say that *'There's been a big swing over the period of years to design and build...now that is a major change in the way you tender. The costs involved are much larger, the timescales are much longer...and the commitment from a contractor to tender is much more crucial because of the costs involved and associated with it'*. LH said, *'it's more difficult to send those back because a client and his representative may only come out to 3 maybe 4 contractors on the D&B tender'*.²⁵⁶⁰

IV.280. LH said that the decision to seek a cover price would be taken during meetings of the directors who would then communicate that decision to him, usually by telephone call. Currently this would come from SB and historically would have also come from PW and other directors such as John King ('JK'), the Production Director.²⁵⁶¹ Asked how Clegg would know who to approach for a cover price, LH said that it would find out which of its competitors were bidding for a tender by talking to any sub-contractors or suppliers named on the tender. He said that Clegg could *'ring these people up with the, in effect, the pretence of pricing the job and saying ... would you provide us with a copy quotation...would save you the hassle of sending the full enquiry or you could say just fax them a request*

²⁵⁵⁶ Interview transcript, OFT Document Reference 13278, page 3.

²⁵⁵⁷ Tender Summary sheets, OFT Document References 4470, 4475, 4478, 4479, 4481, 4485 and 4488.

²⁵⁵⁸ Leniency Report Background Information, OFT Document Reference 4459, pages 4 and 5.

²⁵⁵⁹ Interview transcript, OFT Document Reference 13277, page 7.

²⁵⁶⁰ Interview transcript, OFT Document Reference 13277, page 7.

²⁵⁶¹ Interview transcript, OFT Document Reference 13277, page 9.

*for a quotation...oh by the way have you had this enquiry from anyone else’.*²⁵⁶²
LH also kept a list of his equivalent level contacts at Clegg’s competitors and would use this to contact a competitor for a cover price.

IV.281. DC said that information might also be obtained from the Builders’ Conference or Glennigans.²⁵⁶³

IV.282. DC described the reasons for Clegg taking a cover price as follows: *‘a price that we submit to the client at the 11th hour, because we somehow failed to be able to complete a tender properly...that it’s too late to return, or...rather than offend a client, which we’ve had the problem with, if, if you do return documents...if [it] doesn’t fall in with resources, we’ve had the problem of how do we tell them? And not be excluded from anything else they ever do again?’.*²⁵⁶⁴

IV.283. DC confirmed that he was made aware of the desire to obtain a cover price in the same manner described by LH, saying *‘the directors will say, we need a cover for this one’.*²⁵⁶⁵ DC agreed that the cover prices submitted to the client were meant to be low enough to ensure that Clegg appeared to be competitive, but not sufficiently low to win the contract. If Clegg took a cover price on a tender it was not always recorded; however, DC was asked what the letter ‘C’ on documents next to references to *‘opposition’* meant and replied *‘Most of the time it would indicate C for cover’.*²⁵⁶⁶ LH confirmed in interview that on occasions a ‘C’ would also be written when Clegg found out that a company was taking a cover price from someone else.²⁵⁶⁷

IV.284. On tenders where Clegg was taking a cover price, SB said this was *‘a defensive mechanism for maintaining relationships with clients’.* If Clegg did not have the resources available to price a tender or carry out the actual work tendered for at that time then SB said Clegg *‘would take a decision if it’s a client we probably want to work for in the future, if we say not to him now then there would be an issue’.*²⁵⁶⁸ SB went on to say *‘if you don’t bid a scheme, then the chances are you won’t get another opportunity with that client’.*²⁵⁶⁹

IV.285. SB added *‘[Cover pricing] is something we have always done...we have often signed anti-collusion notice with tenders. It does say on our tender forms that we haven’t exchanged the information with other people, and clearly we have, so it’s not right, is it?...[Cover pricing] is just something that is done in the industry and we continue to do it. It’s as simple as that’.*²⁵⁷⁰

IV.286. SB said that once he made the decision to take a cover price on a tender he would communicate this verbally in person to the estimator or telephone them and ask them to arrange it.²⁵⁷¹ SB also confirmed how cover prices were recorded by saying that *‘the most common one would be a C in brackets at the*

²⁵⁶² Interview transcript, OFT Document Reference 13277, page 14.

²⁵⁶³ Interview transcript, OFT Document Reference 13276, page 4.

²⁵⁶⁴ Interview transcript, OFT Document Reference 13276, page 3.

²⁵⁶⁵ Interview transcript, OFT Document Reference 13276, page 4.

²⁵⁶⁶ Interview transcript, OFT Document Reference 13276, page 8.

²⁵⁶⁷ Interview transcript, OFT Document Reference 13277 page 15.

²⁵⁶⁸ Interview transcript, OFT Document Reference 13278, page 4.

²⁵⁶⁹ Interview transcript, OFT Document Reference 13278, page 5.

²⁵⁷⁰ Interview transcript, OFT Document Reference 13278, page 6.

²⁵⁷¹ Interview transcript, OFT Document Reference 13278, page 5.

side of the name of whoever we had got it from. We put asterisk at the side of some, and some you just write cover at the side of it'.²⁵⁷²

Clegg giving cover prices

- IV.287. On tenders where Clegg was giving a cover price, LH explained *'in the times when I was on my own they [the competitors] would generally ring me, because you're talking about my level of seniority and again, essentially the opposition competition would ask their senior estimator or estimator who is dealing with the job, organise a cover, try to find out who's on the tender list and they will ring whoever they choose to approach*'.²⁵⁷³ LH went on to say that *'I would receive a phone call from [competitors]...can you help us out on this tender, I would say yeah fine, and they'd say, when will you be able to help us out with the actual figures...saying the tender's due on the first of the month so that they don't get left in limbo*'.²⁵⁷⁴
- IV.288. LH described how this approach for a cover price would be recorded, saying that *'Occasionally I'd make a scribbled note on a letter or something like that...not always, maybe just log it in to memory and pass that information on. Certainly pass the information on, I would never, it never was something I would keep to myself, you would tell the directors that you'd been approached by such and such a company*'.²⁵⁷⁵ LH explained that the giving and receiving of cover prices was such a common practice that he didn't give it a second thought, and when questioned as to whether at any point he thought that perhaps Clegg should not be doing this, LH replied *'I knew at some point that this was an illegal practice as such but it was so prevalent*'.²⁵⁷⁶
- IV.289. DC described the giving of cover prices in similar terms. He said that, *'If they [a competitor] requested a cover price, they would ring up and say, are you pricing this tender? Because we would like some assistance, which generally means we would like a cover price because they've got a similar situation that we would have if we were in that same boat. So if they're contacting us, they just ring up and say, are you pricing it? Can you give us some help? From the point of view of a cover price...'*²⁵⁷⁷ With regard to recording of cover prices given, DC said *'If it was a cover to, you, you would sometimes, not always, but generally have it on, if you got the list of competition, and you would put at the side of it that it, it was a cover. Or you may have found out that someone else has given a cover to someone else, within that list of tenders*'.²⁵⁷⁸
- IV.290. SB described the approach from a competitor for a cover price as being the same as if Clegg was seeking a cover price from a competitor. He said, *'Their estimator would ring our estimator. It's a very small industry, and most, you know, Les [LH] has worked for a number of companies in the past, as have Dave [DC], so they all know each other. They have usually worked together, so you will find that whichever one of the estimators knows either Les or Dave, they will give them a bell and ask them*'. SB said that he would very rarely be

²⁵⁷² Interview transcript, OFT Document Reference 13278, page 4.

²⁵⁷³ Interview transcript, OFT Document Reference 13277, page 9.

²⁵⁷⁴ Interview transcript, OFT Document Reference 13277, pages 10 and 11.

²⁵⁷⁵ Interview transcript, OFT Document Reference 13277, page 10.

²⁵⁷⁶ Interview transcript, OFT Document Reference 13277, page 11.

²⁵⁷⁷ Interview transcript, OFT Document Reference 13276, page 4.

²⁵⁷⁸ Interview transcript, OFT Document Reference 13276, pages 7 and 8.

contacted directly by a competitor seeking a cover price, however it had happened on some occasions.²⁵⁷⁹

Cover pricing activity at Clegg

IV.291. As part of its leniency application, Clegg also provided to the OFT three schedules of information relating to tenders involving cover pricing:

- *'Schedule A²⁵⁸⁰ Definites – projects where cover pricing has taken place and evidence is available together with estimator's corroboration of evidence.*
- *Schedule B²⁵⁸¹ Possibles – projects where some vague evidence exists that covers have taken place but no corroborative evidence from Estimators. These could be post tender market intelligence where cover pricing by others may have been discovered or projects with no evidence but estimator recalls possibility of cover pricing activity.*
- *Schedule C²⁵⁸² Others – projects with no evidence or estimator recollection but lack of archive records indicate could be cover price activity'.²⁵⁸³*

List of companies with whom Clegg exchanged information

IV.292. Clegg also provided to the OFT, a list of companies with whom it had exchanged information in regard to the giving and taking of cover prices. This list included the following names:²⁵⁸⁴

- [...] [C] [List of x Participant Companies]

²⁵⁷⁹ Interview transcript, OFT Document Reference 13278, pages 5 and 6.

²⁵⁸⁰ Schedule, OFT Document Reference 4461.

²⁵⁸¹ Schedule, OFT document Reference 4462.

²⁵⁸² Schedule, OFT Document Reference 4463.

²⁵⁸³ Cover Price Activity report, OFT Document Reference, 4460, page 2.

²⁵⁸⁴ Executive Summary, OFT Document Reference 4458.

Davlyn

IV.293. As part of its leniency application, Davlyn made available current employees to be interviewed. During these voluntary interviews the individuals were asked to give an explanation of Davlyn's involvement in cover pricing.

IV.294. David Gaskin ('DG1') started working for Davlyn initially as a quantity surveyor before progressing to Director and Co-Owner. DG1 explained during interview that the tender process post 2000 was that on receipt of a tender '*...It'll get logged in, given an, an E number, and then...our estimator...Dave Goodhead...He'll price the job. We then have a, a little tender meeting, normally with Dave Goodhead, myself and Marilyn Charles, just to agree...what price we're going to put in when the tender's put together*'.²⁵⁸⁵ DG1 also stated that prior to his retirement, Dave Charles would also have been involved in the decision concerning whether to tender for a contract.²⁵⁸⁶ DG1 explained that he and Marilyn Charles ('MC'), Co-Owner, made a decision to stop engaging in the practice of cover pricing '*...a year or so before...you [the OFT] came here, we made a conscious decision to stop giving...taking covers or giving cover prices out*'.²⁵⁸⁷ DG1 and MC made that decision based on, '*...we heard that the OFT were...well,...were frowning on the practice...so I suppose the rumours going round, and before then,...we didn't really see it as a...it had just, in the industry, had become a common practice*'.²⁵⁸⁸

Davlyn taking cover prices

IV.295. David Goodhead ('DG2'), an estimator at Davlyn employed since 1994, explained that on contracts Davlyn had decided not to tender Davlyn would, on occasions, obtain a cover price. DG2 stated '*I suppose ultimately we ended up in a situation where...what are we going to do with this and I, I suppose we would bump into the issue of trying to seek a cover on the project*'.²⁵⁸⁹

IV.296. DG2 said he would find out who was pricing the tender, '*...sometimes in passing...via suppliers or subcontractors, people would say, oh yeah, we've heard that from such and such, and I'd just probably write it down out of...it's just market information*'.²⁵⁹⁰ DG2 also went on to explain that he would not actively try and find out who Davlyn's competition were, '*...I wouldn't go around...if it came out in conversation via a subcontractor or supplier...I'd just note it down. Generally speaking, you just put it on the, on the prelim sheet and what have you so that...if...people did want to know, we'll say, well, yeah, we X, Y and Z are, We're up against X, Y and Z*'.²⁵⁹¹

IV.297. On tenders where Davlyn was taking a cover price DG1 explained '*...if we couldn't get a price in, or didn't want to put a bid in, or wanted to put a bid in, but weren't bothered about winning the job, and just wanted to, put a price in, [DG2 would] ring another contractor who you suspect might be pricing it. Maybe you could find that out through one of the sub contractors, and ring them up and say, are you pricing this...we haven't got time to do it all up, can*

²⁵⁸⁵ Interview Transcript, OFT Document Reference 11177, page 4.

²⁵⁸⁶ Interview Transcript, OFT Document Reference 11177, page 6.

²⁵⁸⁷ Interview Transcript, OFT Document Reference 11177, page 6.

²⁵⁸⁸ Interview Transcript, OFT Document Reference 11177, page 6.

²⁵⁸⁹ Interview Transcript, OFT Document Reference 11179, page 5.

²⁵⁹⁰ Interview Transcript, OFT Document Reference 11179, page 6.

²⁵⁹¹ Interview Transcript, OFT Document Reference 11179, page 6.

you help us out with it?...and they'd give you a figure that...would make sure you wouldn't win it. And actually not look too bad, because you don't want to lose it, but look stupid, but you don't want to win the job'.²⁵⁹² DG2 explained that the exchange of cover prices was mainly carried out by telephone.²⁵⁹³ DG2 stated that the exchange of cover prices, 'would obviously have to be within probably a day or two of when the tender was due. I'd normally wait until possibly they were in a position to give me a figure. Possibly the only time I would probably get in contact with them again was if, really we were getting somewhat close to the tender day and/or time'.²⁵⁹⁴

IV.298. DG1 explained how covers taken were recorded, *'I suppose in the file that we would have had, Dave would have recorded...that we'd...covered it, put it in at this price. And we'd probably have...a copy of our tender form as well, with any notes on it. So we would have recorded it yeah'.²⁵⁹⁵ DG1 confirmed that if a cover was taken on a particular tender the information in the tender file would be disposed of shortly after the tender return date, 'probably just ditched the file, because of it's of no use for us to archive'.²⁵⁹⁶*

IV.299. DG2 explained that everyone within Davlyn knew cover pricing was in existence, *'...by virtue of the fact there's only ten or eleven of us up there, really...everybody knew that...that we'd had to cover that particular job'.²⁵⁹⁷*

Davlyn giving cover prices

IV.300. On tenders where Davlyn was giving a cover price DG2 explained how he would arrive at a figure to give to a competitor as follows, *'...I always ended up trying to think in terms of putting, say...something in the region of, four, five percent...away from where we were...not to put them miles away...which to me...slightly embarrasses them...I suppose it's a case of do unto others as...you would expect'.²⁵⁹⁸*

IV.301. DG2 explained how he would record giving a cover price. *'I suppose in days gone by...within the contract file...it was sometimes scribbled in the, in the actual contract or the tender file. It might just be a scrap of paper or something...like that'.²⁵⁹⁹ The giving of a cover price was not formally recorded.²⁶⁰⁰*

IV.302. In its response to the Statement, Davlyn confirmed that *'[p]rior to the investigation by the OFT we were not aware within Davlyn that general cover pricing was an infringement of the Competition Act. When we became aware of the investigation in 2005 we made a decision to not engage in obtaining or giving cover prices. Such activity had therefore stopped before the visit to our offices in January 2005. We have not engaged in cover pricing since this time and we have a firm policy not to engage in this practice in the future'.²⁶⁰¹*

²⁵⁹² Interview Transcript, OFT Document Reference 11177, page 11.

²⁵⁹³ Interview Transcript, OFT Document Reference 11179, page 10.

²⁵⁹⁴ Interview Transcript, OFT Document Reference 11179, pages 11 and 12.

²⁵⁹⁵ Interview Transcript, OFT Document Reference 11177, page 11.

²⁵⁹⁶ Interview Transcript, OFT Document Reference 11177, page 12.

²⁵⁹⁷ Interview Transcript, OFT Document Reference 11179, page 14.

²⁵⁹⁸ Interview Transcript, OFT Document Reference 11179, page 13.

²⁵⁹⁹ Interview Transcript, OFT Document Reference 11179, page 12.

²⁶⁰⁰ Interview Transcript, OFT Document Reference 11179, page 12.

²⁶⁰¹ Written representations of Davlyn, 25 June 2008, paragraph 1.

Derwent Valley

- IV.303. As part of its leniency application, Derwent Valley made available current directors to be interviewed and provided contact details for an ex-employee. During these voluntary interviews the individuals were asked to give an explanation of Derwent Valley's involvement in cover pricing.
- IV.304. David Stone ('DS'), former Managing Director of Derwent Valley from circa 2000 and then Director oversaw a lot of the work carried out. DS described how the tender process began, explaining how Derwent Valley received invitations to tender for jobs. He said *'sometimes you'd get a phone call asking, would you like to tender, and we'd say yay or nay, other times, they'd just arrive on your desk and the process then was...they'd give you a date of return, probably three, two, three, four weeks, depending on the size of the job, and you had to get it returned...it's giving time for your subcontractors to price and...you'd, could be, days putting them together, if it's a decent sized one, and, you'd got a date to return these and you have to...get them in on that date'*.²⁶⁰²
- IV.305. DS said that tenders posted to Derwent Valley would either be addressed to Derwent Valley, to him or to Pat Tunncliffe ('PT'), Derwent Valley's former senior estimator. He described the decision making process on whether to bid for a tender, saying that *'Pat would...dish them out, and I'd help, where, where I could, on the tendering side'*. When asked who would actually make the decision DS replied, *'Pat would certainly, he, he was the senior estimator at that time, and if he...was fully committed to, other works, he, he'd make the decision to say, return it...He'd probably say to me, can we manage this or can't we manage it, and I'd say, well I certainly can't manage it, can you manage it, and, well, the decision would be left with him to see if he wanted to...tender'*.²⁶⁰³
- IV.306. In relation to what documents were generated as part of the tendering process DS described how a document would be generated to show the pricing and he would write out the enquiries and give them to a secretary to type out. DS referred to what happened with such documents, saying that *'it was all put away in a file, once that tender's been submitted, if we don't hear anything on that tender, you can guarantee within two or three months, it's binned'*. DS also said the details were recorded in a tender register book²⁶⁰⁴, and when asked who maintained this he replied *'Well this was run by Pat Tunncliffe...He ran that on his own, he kept the record of tenders'*.²⁶⁰⁵ Beyond the tender register Derwent Valley did not keep any significant volume of documents relating to the tendering process. When queried as to the lack of documentary material, DS commented *'Well you know, as soon as you've submitted your tender, you know within a week whether you've won the job or not, so, if I probably tendered one job a week, it isn't, the record is really in your mind'*.²⁶⁰⁶

²⁶⁰² Interview transcript, OFT Document Reference 13478, page 2.

²⁶⁰³ Interview transcript, OFT Document Reference 13478, page 3.

²⁶⁰⁴ Document index book, OFT Document Reference 1912.

²⁶⁰⁵ Interview transcript, OFT Document Reference 13478, page 4.

²⁶⁰⁶ Interview transcript, OFT Document Reference 13478, page 5.

IV.307. Andrew Stone ('AS'), Managing Director of Derwent Valley, said that previously he *'wasn't really involved in the estimating at all, it was either David or Pat so tenders that did come in, the ones that I saw were the ones that I was to price which would only be small jobs, price it on your own, if you get it wrong you get it wrong, it's not the end of the world. So I was given the smaller ones as a trial thing'*.²⁶⁰⁷ AS said that contracts he was made aware of would come to him from DS and as far as making decisions on whether or not to bid for a tender AS said *'The ones that I was passed on would have been ones for me to give a go at and try and, and try and win'*.²⁶⁰⁸

IV.308. PT joined Derwent Valley in 1998 as a contractor and moved on to perform the role of quantity surveyor and eventually estimator. He left Derwent Valley in 2003. PT said of his time at Derwent Valley that DS, a surveyor called Harold Grindy ('HG'), and he dealt with tenders. DS dealt with hospital related work, typically from the Derbyshire Health Authorities, HG with Nottingham University related work and PT said he dealt with *'any other job that came in tended to come my way'*. Describing how Derwent Valley would first be approached to bid on a tender, PT said *'it would start with a phone call from the client or the QS or the architect, you know, we've got this job going out to tender would you like to have a go at it?'*.²⁶⁰⁹ PT said they would telephone either DS or him and the tender documents would then be either posted or collected from the client. When a tender first came in PT said he would sit down with DS or a previous Managing Director by the name of Phillip Taylor and say *'are we going to tender for this job or are we not?'*. PT said sometimes Derwent Valley would not want to tender so would send it back, however PT commented *'it was difficult to send it back when you'd already accepted over the phone that you would have a go at it but they didn't always tell you everything about the job and sometimes there was stuff on it that you didn't like the look of and you thought, well, it'd be better if I'd said no'*.²⁶¹⁰

IV.309. PT was asked about the decision making process and whether he would have a final say on whether or not Derwent Valley would bid for a tender. PT responded, *'I possibly had some influence on it, you know, I would say, I don't think this is worth going for, and whether they listened to me that was up to them'*.²⁶¹¹ PT was asked what documents were generated as part of this process, such as meeting notes, forms of tender reports and so on. PT said *'Derwent Valley wasn't like that'*. PT explained that he kept a tender record book and how he used it. He said that *'if you were tendering against contractors that you bid against before and it was a particular area or a particular type of work, you can look back and think, well, I got hammered last time, there's virtually no point me going for it. If they're going to go for it again there's no point in me going for it'*.²⁶¹²

Derwent Valley taking cover prices

IV.310. Derwent Valley provided to the OFT a report into its activities concerning the giving and receiving of cover prices. This report contains background information on Derwent Valley's involvement with such practices and

²⁶⁰⁷ Interview transcript, OFT Document Reference 13477, page 2.

²⁶⁰⁸ Interview transcript, OFT Document Reference 13477, page 3.

²⁶⁰⁹ Interview transcript, OFT Document Reference 14237, page 3.

²⁶¹⁰ Interview transcript, OFT Document Reference 14237, page 3.

²⁶¹¹ Interview transcript, OFT Document Reference 14237, pages 3 and 4.

²⁶¹² Interview transcript, OFT Document Reference 14237, page 4.

corroborates the reasons for taking a cover price on a tender as explained during the interviews. In regard to cover pricing, the report states that, *'Cover pricing was entered to fulfill the expectations/pressures of the tendering process i.e. unless a tender was submitted the company would risk not being asked to tender for future work. The pricing process is a lengthy one and the company entered these arrangements when the estimator was absent on holiday or due to illness, or where the company was unable to cope with the number of tenders required to be priced within a given time'*.²⁶¹³

IV.311. DS gave the reasons for taking a cover price on a tender as being *'Timing, either busy, holidays, there could be a number of reasons, there could be the time for when they wanted them returned'*.²⁶¹⁴ When asked who would actually decide to contact a competitor to obtain a cover price DS said *'Pat would be the major person at that time, because he was, he was senior estimator in that sense of it'*.²⁶¹⁵ DS went on to say he would not always be told if a cover price had been taken, he said *'some he [PT] would do, but not all of them, because he knew how busy, if the company was busy, we don't want them'*.²⁶¹⁶ For those tenders which PT discussed with DS, DS said *'Pat would come and say, what do we do with this, do we take a cover or return it'*.²⁶¹⁷ DS was also asked how Derwent Valley would record that it had taken a cover price on a tender and referred to the entries of the letter 'C' by competitors' names in the tender record book.²⁶¹⁸

IV.312. AS gave the reasons for Derwent Valley seeking a cover price, saying *'on the very few occasions we've actually asked for a cover, it's normally been down to either workload at the time, estimators on holiday. When you've only got either one or two estimators and if all of your clients decide to send you, you're just, the workloads just far too, far too great'*.²⁶¹⁹ AS said he would make the decision to take a cover price if it was a tender he personally had been dealing with, but there was no formal system in place to communicate to others in Derwent Valley that a cover price had been taken on a tender.²⁶²⁰

IV.313. PT described possible reasons for wanting to take a cover price: *'It could be that another job had come in that was more interesting'*.²⁶²¹ *'It may be you'd said yes to two jobs, they both came in at the same time, you looked at them and thought well I'd rather have this than that, I'll take a cover on the other one. It may be that, you'd said yes, you were interested in it but then a job that you'd been waiting for actually got started and then you didn't have the staff to do the next one'*.²⁶²² PT said that Derwent Valley sought a cover price for a tender rather than just sending it back to the client as *'if you sent it back you tended to upset the client and then they think well, you've not priced it for me this time...I'll not give you another chance'*.²⁶²³ PT said that *'The easy way out*

²⁶¹³ Leniency application, OFT Document Reference 3938, page 1.

²⁶¹⁴ Interview transcript, OFT Document Reference 13478, page 5.

²⁶¹⁵ Interview transcript, OFT Document Reference 13478, page 5.

²⁶¹⁶ Interview transcript, OFT Document Reference 13478, pages 5 and 6.

²⁶¹⁷ Interview transcript, OFT Document Reference 13478, page 7.

²⁶¹⁸ Interview transcript, OFT Document Reference 13478, page 6.

²⁶¹⁹ Interview transcript, OFT Document Reference 13477, page 4.

²⁶²⁰ Interview transcript, OFT Document Reference 13477, page 4.

²⁶²¹ Interview transcript, OFT Document Reference 14237, page 4.

²⁶²² Interview transcript, OFT Document Reference 14237, page 4.

²⁶²³ Interview transcript, OFT Document Reference 14237, page 5.

was to take a cover price off another contractor which put you out of the running'.²⁶²⁴

- IV.314. PT described the decision making process in respect of Derwent Valley deciding to take a cover price on a tender. He said *'I would discuss it with the directors and, but ultimately it would be their decision*'.²⁶²⁵ He went on to say *'if it had been agreed that we would take a cover on a job I would try and find one of the other contractors ... and get a cover off him*'.²⁶²⁶
- IV.315. PT was then asked how he would determine which companies to approach to obtain a cover price. He said *'in some cases it was very difficult to find who was tendering, you know, if you wanted to take a cover, you could pick up the phone, you could make one call and find someone who was tendering for it. In other cases you could have spent a morning on the phone and still find nobody that was tendering for it ... Sometimes the client would tell you, sometimes it was in the trade press, other times you just had to pick up the phone and hope. You would think, right, that is the client, that is the area of the work, there are two or three contractors in that area that work for that client, hopefully one of them's got the enquiry*'.²⁶²⁷ PT also said that some clients would tell him who was bidding for a tender. When asked why a client would do this, PT responded *'some clients are more open than others*'.²⁶²⁸
- IV.316. Milward suggested in its response to the Statement that PT's difficulty in obtaining names of other tenderers suggested that it was unlikely that the names of other tenderers in Derwent Valley's tender record book were recorded contemporaneously.²⁶²⁹ The OFT notes in response that PT did not say he was unable to obtain details of competitors; rather, he stated that sometimes he found it difficult to obtain these details, while at other times it was relatively easy.
- IV.317. PT was asked how Derwent Valley recorded where it had taken a cover price on a tender. PT said *'I would make a note in my diary that the tender was due in, where it was, what time and that we were tendering. And I would probably list the contractors that were tendering for it when I found them, the same as I would put in the book [the Derwent Valley Tender Record book], but it was really just a note of the day that the tender was due in*'.²⁶³⁰ PT referred to the Tender Record book, confirmed that it was his book and contained his handwriting, and said that if he was taking a cover or knew that someone else at Derwent Valley was taking a cover *'I would put a little C in brackets against [a tender entry]*'.²⁶³¹

Derwent Valley giving cover prices

- IV.318. On tenders where Derwent Valley was giving a cover price, DS was asked how a competitor would know that Derwent Valley was bidding for that tender. DS explained *'I suggest they'd find out with the enquiries that go out, when you're*

²⁶²⁴ Interview transcript, OFT Document Reference 14237, page 4.

²⁶²⁵ Interview transcript, OFT Document Reference 14237, page 5.

²⁶²⁶ Interview transcript, OFT Document Reference 14237, page 6.

²⁶²⁷ Interview transcript, OFT Document Reference 14237, page 6.

²⁶²⁸ Interview transcript, OFT Document Reference 14237, pages 6 and 7.

²⁶²⁹ Written representations of Milward, 26 June 2008, paragraph 4.7.

²⁶³⁰ Interview transcript, OFT Document Reference 14237, page 7.

²⁶³¹ Interview transcript, OFT Document Reference 14237, page 8.

*doing a job, they'd probably speak to someone they know at a merchant and then they'd find out you're in for it...if we wanted...materials for a job, we'd send an enquiry in for the materials, and they'd probably find out that way'.*²⁶³²

When asked how Derwent Valley recorded the giving of a cover price, DS referred to the Tender Record book and said he assumed that this was indicated by use of the letter 'C' but that the book was run by PT and PT *'found these companies out at different times to find out who his opposition was as well'.*²⁶³³ DS confirmed that no other records were kept concerning the giving of cover prices and admitted he was also possibly involved in giving cover prices but could not specifically recall them.²⁶³⁴

IV.319. AS described the process of giving a cover price as being *'where somebody, another firm has asked for a cover from yourself that they aren't able to give a price for whatever reasons...and you'd give them a price, slightly higher than yourself so that they know they aren't going to be successful in getting the job'.*²⁶³⁵ AS said he would only have known about a cover price being given to a competitor if the tender was one that was handed to him to deal with. AS confirmed that there would have been occasions where he received a call or made a call to a competitor to communicate a figure for a cover price.²⁶³⁶

IV.320. PT was asked about Derwent Valley giving cover prices to competitors. He said *'Oh, if somebody phoned up and said, can I have a cover, I would say yes automatically. One less competitor'.* PT went on to say he would not have spoken to management about the decision to give a cover price and would have communicated the cover price to a competitor via telephone. PT explained, *'The chances are a contractor would ring you up and say, are you tendering for this job? I'd say yes. Can you help us out? I'd say yes and then when I have my figure I would ring up and give him a figure. And obviously that would be higher than mine'.*²⁶³⁷ The cover price given by PT was recorded in the Tender Record book in the same manner as a cover being received, by means of entering a letter 'C' in brackets by the tender details.²⁶³⁸

IV.321. In its response to the Statement, Milward suggested that Derwent Valley's recording of cover prices was inconsistent. It noted that there had been one project, for Derby City Hospital, where Derwent Valley had recorded giving a cover price to Milward, but Milward had won the tender.²⁶³⁹ It further suggested that the recording of a letter 'C' in the Tender Record book could have meant *'main competitor'* rather than *'cover price'.*²⁶⁴⁰ Milward suggested that this might be more likely because the word *'Cover'* had been used elsewhere in the Tender Record book, suggesting to Milward that 'C' could not be used as an alternative.²⁶⁴¹ Milward noted that DS had only *'assumed'* that 'C' denoted a cover price.²⁶⁴²

²⁶³² Interview transcript, OFT Document Reference 13478, page 6.

²⁶³³ Interview transcript, OFT Document Reference 13478, page 6.

²⁶³⁴ Interview transcript, OFT Document Reference 13478, page 7.

²⁶³⁵ Interview transcript, OFT Document Reference 13477, page 4.

²⁶³⁶ Interview transcript, OFT Document Reference 13477, page 6.

²⁶³⁷ Interview transcript, OFT Document Reference, 14237, page 5.

²⁶³⁸ Interview transcript, OFT Document Reference 14237, page 8.

²⁶³⁹ Written representations of Milward, 26 June 2008, paragraph 4.2.

²⁶⁴⁰ Written representations of Milward, 26 June 2008, paragraph 4.6.

²⁶⁴¹ Written representations of Milward, 26 June 2008, paragraph 4.4.

²⁶⁴² Written representations of Milward, 26 June 2008, paragraph 4.5.

IV.322. Milward's alternative suggestions are not supported by the evidence set out in this Decision. Although DS was not as definite as PT about the meaning of the letter 'C' in the Tender Record book, this is unsurprising given that by DS's own admission PT '*ran that on his own, he kept the record of tenders*'.²⁶⁴³ It is also clearly incorrect to suggest that Derwent Valley might not have used more than one method of recording cover prices – in common with many other companies, it used not only the word '*Cover*' but also the letter '*C*' on different occasions. PT was very clear in his evidence about the meaning of the letter '*C*' in the Tender Record book in relation to several different tenders, as demonstrated above and in the individual Infringements below. The OFT cannot comment on the Derby City Hospital tender since it is not proceeding in respect of that tender, but considers that the credibility of other entries on Derwent Valley's records is not undermined where, as in the Infringements in this Decision, those entries are supported by contemporaneous documents and/or witness evidence.

Cover pricing activity at Derwent Valley

IV.323. As part of its leniency application, Derwent Valley provided to the OFT two schedules of information relating to tenders involving cover pricing:

- DVC 1 List of Covers Given²⁶⁴⁴
- DVC 2 List of Covers Taken²⁶⁴⁵

Derwent Valley list of contractors exchanging cover prices

IV.324. Derwent Valley also provided to the OFT, a list of competitors with whom it had exchanged information in regard to the giving and taking of cover prices, along with the company addresses and contact individuals where known. This list includes the following company names:²⁶⁴⁶

- [...] [C] [List of x Participant Companies]

²⁶⁴³ Interview transcript, OFT Document Reference 13478, page 4.

²⁶⁴⁴ List of covers given, OFT Document Reference 3940.

²⁶⁴⁵ List of covers taken, OFT Document Reference 3941.

²⁶⁴⁶ List of Contractors taking cover prices, OFT Document Reference 3942.

[...] [C]

IV.325. In its response to the Statement, Derwent Valley confirmed that it was '*...not seeking to deny participation in cartel activity (namely bid rigging) or that its conduct infringed the prohibition in Section 2 of the Competition Act...*'²⁶⁴⁷

Frank Haslam Milan

IV.326. Frank Haslam Milan was not visited by the OFT using its powers under the Act, although a sister company, Bramall was visited under section 28 on 23 February 2006. As part of its leniency application, Frank Haslam Milan provided three lists of cover pricing activity.²⁶⁴⁸ These lists were of (1) possible cover prices taken or given, (2) [...] [C] instances where Frank Haslam Milan definitely took cover, and (3) [...] [C] instances where Frank Haslam Milan definitely gave cover. These lists were prepared by Stephen Francis ('SF'), who was Procurement Manager at the time of the leniency application but has since left Frank Haslam Milan, and the former Managing Director, Mark Davis ('MD'), who left Frank Haslam Milan in April 2003. The following Frank Haslam Milan employees were interviewed by the OFT: David Mellor ('DM'), Managing Director, SF, David Ward, ex-Managing Director, Allen Hickling, Managing Director, Steve Maltby, estimator, Terry Bateman, Managing Director, Paul Donhue, estimator and Steve Wilkinson, estimator.

Cover pricing – general

IV.327. Frank Haslam Milan has only admitted that one of its three separate business units, Frank Haslam Milan's North East Division, definitely engaged in the taking and giving of cover prices. The two relevant interviewees who worked in the North East Division were DM and SF, while the other interviewees worked in other geographical areas of the company. In its leniency application it is explained that on the introduction of the Act, each of the three parts of the business, '*sought to ensure that [they did not engage] in any cartel activity and with respect to cover pricing that reliance on this practice ceases or at least reduces. However, pressure from clients to submit realistically priced bids, a need to remain on the approved tenderers list and limited resources meant that one business unit (FHM NE) did, on an ad hoc basis, revert back to some cover pricing*'.²⁶⁴⁹

IV.328. The primary Frank Haslam Milan staff who were aware of the practice of cover pricing were SF, DM and MD.²⁶⁵⁰ Frank Haslam Milan staff confirmed in interview that it participated in both the giving and taking of cover prices. SF

²⁶⁴⁷ Letter from Derwent Valley, 26 January 2009, page 1.

²⁶⁴⁸ Activity lists, OFT Document References B1457, B1458 and B1459.

²⁶⁴⁹ Leniency application, OFT Document Reference B1445, page 2.

²⁶⁵⁰ Interview transcript, OFT Document Reference 12855, page 11.

confirmed that he would not have given a cover of his own initiative and that he would have to discuss it with DM and previously MD.²⁶⁵¹ DM confirmed that SF would derive and communicate a cover figure to a competitor, but that he would do this after checking with him.²⁶⁵²

IV.329. SF explained that on receipt of a tender, *'all the details of the particular tender enquiry were logged [electronically], we had a business process monitor...there was also the...Competitive Tender Information...System...'*²⁶⁵³ and SF further explained that, *'generally myself as senior estimator or estimating manager, used to do a tender appraisal, again that was to basically get the feel for the job, point out any inherent risks in it, and also give us...a bid strategy basically to run through, whether we were classing as a key tender or if it was you know bit of an also ran'*.²⁶⁵⁴ DM confirmed that *'my role would be, with the estimating department, to do a full tender appraisal of that scheme, we did that within two days'*²⁶⁵⁵ and *'...from the tender appraisal we would then hold a couple of tender meetings to run through – one, which was producing our prelims to do the job, because obviously its built up of suppliers, sub contractors, and then another meeting to have the final bid that we put together'*.²⁶⁵⁶

Frank Haslam Milan taking cover prices

IV.330. SF explained how Frank Haslam Milan would find out who the competition was on a job: *'during the tender adjudication I would, I would, obviously as you're sort of ringing round chasing your prices from sub-contractors and suppliers, I would always try and find out who was pricing the job'*.²⁶⁵⁷

IV.331. SF confirmed that, *'if a cover price was ever requested, it was just done verbally over the telephone'*.²⁶⁵⁸ DM said that, *'... if we got a lot of estimates come in and we couldn't quite cope with resources or the job didn't suit ... the odd one we possibly might, take some assistance but very few and far between, to be honest'*.²⁶⁵⁹

Frank Haslam Milan giving cover prices

IV.332. SF explained that, *'if a company on a tender list is looking for assistance when they neither have the capacity or willingness to submit what is gonna be a competitive bid 'cause they're, for one particular reason, don't want to win the job or...can't do the job if they won it, but maybe want to stay on that particular client's tender list...would just seek assistance'*.²⁶⁶⁰

IV.333. In terms of arriving at a cover price to give to a competitor, SF said that, *'it was just whatever price we were putting in, you know, there would be a certain amount of money added on top of that...if people were wanting to take*

²⁶⁵¹ Interview transcript, OFT Document Reference 12857, page 13.

²⁶⁵² Interview transcript, OFT Document Reference 12855, page 11.

²⁶⁵³ Interview transcript, OFT Document Reference 12857, page 2.

²⁶⁵⁴ Interview transcript, OFT Document Reference 12857, page 2.

²⁶⁵⁵ Interview transcript, OFT Document Reference 12855, page 3.

²⁶⁵⁶ Interview transcript, OFT Document Reference 12855, page 3.

²⁶⁵⁷ Interview transcript, OFT Document Reference 12857, page 12.

²⁶⁵⁸ Interview transcript, OFT Document Reference 12857, page 4.

²⁶⁵⁹ Interview transcript, OFT Document Reference 12855, page 4.

²⁶⁶⁰ Interview transcript, OFT Document Reference 12857, page 7.

a cover price, they would want to come as close to the first position as they could possibly could without obviously winning it'.²⁶⁶¹

Contemporaneous documents – tender documentation

IV.334. Frank Haslam Milan provided documents for all the tenders on which it admitted taking and giving cover. These documents included tender summary sheets, client letters and estimators' notes. Where there are no contemporaneous documents for a specific tender, the evidence relies on the personal recollections of SF, DM and MD. The evidence provided is discussed by the OFT in relation to each relevant specific tender.

Frudd

IV.335. As part of its leniency application, Frudd provided a spreadsheet *'confirming...the giving and receiving of cover prices from and to the company'* between 2000 and 2004.²⁶⁶² It was explained in a letter to the OFT from Frudd's legal representatives that the information on the spreadsheet had been compiled from *'information from records that have been completed by...personnel who have since left the company. It is therefore only fair to say that some of the assumptions we have made may not be totally accurate...That said, it is possible that Frudd did give and receive cover prices in the relevant period'.²⁶⁶³*

IV.336. The spreadsheet²⁶⁶⁴ compiled by director Jenna Frudd and estimator Paul Platts, lists a total of [...] [C] tenders for which Frudd received a cover price and a further [...] [C] tenders for which Frudd gave cover. The information on the spreadsheet appears to have been almost exclusively compiled from documents found by the OFT during an inspection under section 28 in June 2005. This includes a tender register listing tenders received by Frudd during the period from 2000 to 2004.²⁶⁶⁵

IV.337. The following personnel gave an account of their knowledge and involvement in cover pricing at Frudd: Managing Director David Frudd ('DF'), Director Jenna Frudd ('JF'); and estimators Martin Ledingham ('ML'), Michael Robins ('MR') and Paul Platts ('PP').

Cover pricing – general

IV.338. Directors and staff agreed that Frudd had participated in cover pricing during the period from 2000 until at least November 2004, when a 'no cover policy' was enforced. DF stated in a letter to the OFT *'we regret that we have been involved in providing and receiving cover quotations, which seemed the easiest way to keep up with the pressure of providing quotations for our various clients even when sometimes we didn't really want the work'.²⁶⁶⁶* In this letter, DF explained the role of the Nottingham Builders' Guild (a trade association of which Frudd was a member, discussed in more detail at paragraphs IV.128 to

²⁶⁶¹ Interview transcript, OFT Document Reference 12857, page 7.

²⁶⁶² Leniency application letter, OFT Document Reference 3984, page 1.

²⁶⁶³ Leniency representations letter, OFT Document Reference 3989, page 2.

²⁶⁶⁴ Table of cover prices received and given, OFT Document Reference 3985.

²⁶⁶⁵ Tender registers, OFT Document References 2017, 2018 and 2019.

²⁶⁶⁶ Leniency information letter, OFT Document Reference 3990, page 3.

IV.146 above) in connection with cover pricing. He stated that the Guild *'Provides bona fide Nottingham building contractors with a contact to register the tenders where they can request or register the need for help. Help would be the requirement to be able to ask whoever else is quoting for the works to give a cover figure which was always expected to be higher so the work would not be won'*.²⁶⁶⁷

IV.339. In interview DF provided an explanation for the need for cover pricing as follows: *'If we don't particularly want a job, we haven't the resource to spend the time...If we didn't like the look of it, or we didn't want to do it, we would ask for a cover'*.²⁶⁶⁸ He said that the practice was introduced to him by Chief Estimator MR who worked for Frudd until 2004. DF said that he didn't get involved personally in cover pricing but knew it took place until a decision was made in about November 2004 to stop the practice.

IV.340. DF explained *'I think all the local press and the local – you know, the building trade magazine...we suddenly thought...never thought it was illegal to do it, we just sort of thought it was...everybody was doing it, we just thought, "Well, we'd better stop it, then, if it's that bad"...I think it was a gradual process. We weren't altogether as we decided that. I can't remember whether it was – somebody stuck...an OFT thing on the wall. Somebody opened a magazine and copied it and sent it round the office. And then eventually we all sort of thought, "Well, just a minute, we shouldn't be doing this," you know...That's how it seemed to happen to me. I don't think we ever sort of focused exactly on that and had a meeting about it. It just sort of gradually came to us'*.²⁶⁶⁹

IV.341. Fellow director JF was also well aware that cover pricing took place at Frudd and sometimes attended tender adjudication meetings where Frudd's need for a cover price was discussed.²⁶⁷⁰ JF confirmed that cover pricing stopped once Frudd started to be aware of OFT activity in the area.²⁶⁷¹

IV.342. Estimator PP said that contracts meetings were held every fortnight and it was a *'team decision'* as to whether Frudd was interested in pricing an enquiry, but *'David [Frudd] has the final say'*.²⁶⁷² PP said that the competition on a tender would be recorded on both the manual tender register and the 'Enquiries Received' spreadsheet. PP also confirmed that most covers (*'nine times out of ten'*) were dealt with by MR.²⁶⁷³ PP confirmed that a company decision was made to discontinue the practice of cover pricing after articles started to appear in the press and building journals.²⁶⁷⁴ PP stated that this decision to cease cover prices coincided with MR's departure from Frudd.²⁶⁷⁵

IV.343. ML joined Frudd as an estimator in 2003, reporting to MR before becoming senior estimator/surveyor on MR's departure from Frudd in about November 2004. In interview, ML explained that tenders were recorded on a manual tender register. In addition, Frudd maintained a spreadsheet entitled *'Enquiries*

²⁶⁶⁷ Leniency information letter, OFT Document Reference 3990, page 3.

²⁶⁶⁸ Interview transcript, OFT Document Reference 6352, page 4.

²⁶⁶⁹ Interview transcript, OFT Document Reference 6352 page 4 and 5.

²⁶⁷⁰ Interview transcript, OFT Document Reference 13104, pages 4 and 5.

²⁶⁷¹ Interview transcript, OFT Document Reference 13104, page 6.

²⁶⁷² Interview transcript, OFT Document Reference 6350, page 5.

²⁶⁷³ Interview transcript, OFT Document Reference 6350, pages 12, 13 and 47.

²⁶⁷⁴ Interview transcript, OFT Document Reference 6350, page 18.

²⁶⁷⁵ Interview transcript, OFT Document Reference 6350, page 48.

Received', summarising current tenders, recorded on a shared computer drive. ML admitted that he was involved in cover pricing, especially after MR left the company until a decision was made by Frudd not to continue with the practice.²⁶⁷⁶ ML admitted that covers could be recorded by estimators at Frudd on the tender register or on the tender enquiry spreadsheets by use of the letter 'C'.²⁶⁷⁷

IV.344. Former Chief Estimator MR was also interviewed about his participation in cover pricing at Frudd until his departure in late 2004. MR explained the tender process as follows: *'enquiries would come into the office, usually by post...the tenders would then be...given a reference number and put into a folder and, then they would be listed...And that was then given to the directors and, a decision was made as to whether or not we would price those projects'*.²⁶⁷⁸ He said the decision whether or not to price a project was made during joint discussions between him and directors DF, JF and Andrew Smith. He said *'I don't think any of us really wanted to give or take covers, it wasn't something that, I don't think anybody was proud of doing, it was really under the pressures of trying to, carry out the job basically'*.²⁶⁷⁹

IV.345. MR admitted that that the letter 'C' was used on the tender register to indicate a cover given or received by Frudd. PP also explained that the annotation of the letter 'C' by the name of a company on the tender register would indicate either a cover was received by Frudd from that company or vice versa.

Frudd taking cover prices

IV.346. In interview, ML explained the process of taking a cover price as follows: *'you had a...company's name who were pricing it, say, and you just phoned them up. They'd give you a figure. You'd put the figure on the tender form'*. ML explained that he knew who to contact for a cover price from the information provided from John Wholey of the Nottingham Builders' Guild.²⁶⁸⁰ John Wholey made weekly telephone calls to Frudd to discuss tender invitations and ML said *'he'd tell you who else was pricing them'*.²⁶⁸¹ ML confirmed that the reporting system, operated by John Wholey, helped Frudd to obtain cover prices.²⁶⁸² The list of competitors described in paragraph IV.351 below, includes the following entry; *'When all else fails...John Wholley...[...][C]'*.²⁶⁸³

IV.347. MR admitted that he gave and received cover prices but said that covers would only be sought if authorised or instructed by directors during regular tender meetings.²⁶⁸⁴ MR confirmed that he used the list entitled *'Mic's Likely Lads'*²⁶⁸⁵ as a means of contacting a competitor for a cover price and that covers were recorded by the use of the letter 'C' on Frudd's tender register.

²⁶⁷⁶ Interview transcript, OFT Document Reference 6351, pages 3, 5 and 6.

²⁶⁷⁷ Interview transcript, OFT Document Reference 6351, pages 10 and 11.

²⁶⁷⁸ Interview transcript, OFT Document Reference 13115, page 3.

²⁶⁷⁹ Interview transcript, OFT Document Reference 13115, page 12.

²⁶⁸⁰ Interview transcript, OFT Document Reference 6351, page 7.

²⁶⁸¹ Interview transcript, OFT Document Reference 6351, pages 7 and 8.

²⁶⁸² Interview transcript, OFT Document Reference 6351, pages 8 and 9.

²⁶⁸³ List, OFT Document Reference 4013.

²⁶⁸⁴ Interview transcript, OFT Document Reference 13115, pages 7 and 8.

²⁶⁸⁵ List, OFT Document Reference 4013.

IV.348. Estimator PP explained that the purpose of obtaining a cover price was as follows: *'You want to look competitive, although we've not priced the job'*.²⁶⁸⁶ PP said a cover price was recorded as follows: *'we'd write it in the book...there'd be a 'C' at the side of the book...to say that it had been a cover...on the 'Enquiries Received' sheet, we'd put a 'C' as well, if that was the decision'*.²⁶⁸⁷

Frudd giving cover prices

IV.349. In interview, ML said that when giving cover prices to competitors, *'you generally put a percentage on your figure ... Just enough that it'd keep them far enough away, out of the picture'*.²⁶⁸⁸ MR and PP both admitted that the letter 'C' on the tender register could indicate a cover price given to a competitor.

IV.350. PP said he referred requests for cover prices to MR or, in his absence, senior estimator Andrew Holland. PP said *'We'd get a phone call in, I'd take the phone call...And then I'd go and say to Mic, 'So-and-so wants a cover on this price...he would then organise it. And he would put...a percentage mark-up on our tender...And give it to them...Give the appearance of a competitive price, yeah'*.²⁶⁸⁹ PP said that by giving cover prices *'I suppose it makes your chances of getting the job a bit better'*.²⁶⁹⁰

List of competitors

IV.351. As part of its leniency application, Frudd also provided a document entitled *'THE COMPETITION MIC'S LIKELY LADS'*, which is a list of building contractors with contact names and telephone numbers.²⁶⁹¹ Frudd explained that this document belonged to MR. This list includes the following names:

- [...] [C] [List of x Participant Companies]

²⁶⁸⁶ Interview transcript, OFT Document Reference 6350, page 14.

²⁶⁸⁷ Interview transcript, OFT Document Reference 6350, pages 20 and 21.

²⁶⁸⁸ Interview transcript, OFT Document Reference 6351, page 11.

²⁶⁸⁹ Interview transcript, OFT Document Reference 6350, pages 14 and 15.

²⁶⁹⁰ Interview transcript, OFT Document Reference 6350, page 28.

²⁶⁹¹ Contact list, OFT Document Reference 4013.

[...] [C]

Harlow & Milner

- IV.352. As part of its leniency application, Harlow & Milner provided a general explanation of its participation in cover pricing. Statements were provided to the OFT by Richard Milner ('RM'), Managing Director of Harlow & Milner, Chris Smithson ('CS'), Chief Estimator and Graham Pearce ('GP'), former Chief Estimator.
- IV.353. On receipt of a request to tender from a client, a member of the estimating staff would fill out an Enquiry Record, entering the details of the client, a brief description of the job and various other pieces of information. In a final box at the bottom of the front page, 'Estimators Comments', Harlow & Milner would on occasions insert the names of competitors.

Harlow & Milner taking cover prices

- IV.354. RM would have the final say as to whether or not a tender was to be properly priced or a cover price was to be sought. He stated in answer to whether or not he took part in preparing a tender, *'Not in the actual preparation of the tender no. My involvement came at the back end when it was the management decision as to how competitively we went in on the tender depending on the workload etc as we talked about, the desirability of the projects'*.²⁶⁹² He added that if the work was deemed unattractive, *'...we would either...if we had the capacity to price it, we would price it and then we would deal with it at the management decision at the end, we would put a higher price in. On occasions we have rung, we've investigated who else has been pricing that project and, so as not to affect our commercial position with customers...If you send the tender back then you're actually striking yourself off, or potentially striking yourself off for future works so we take a view well do we price it and price it high or do we take a cover, in that we would find out who was pricing it and we'd ring one of those contractors up instead. The terminology that was often used was "can you help us out"...'*.²⁶⁹³
- IV.355. RM explained his understanding of cover pricing as follows: *'It's when they don't, somebody doesn't want the work but doesn't want to send the tender back, they obtain a price from another organisation which is above a level*

²⁶⁹² Interview transcript, OFT Document Reference 12731, page 4.

²⁶⁹³ Interview transcript, OFT Document Reference 12731, page 4.

where they would be asked to execute the works but below a level where it would be obvious that they haven't tried...'.²⁶⁹⁴

IV.356. When taking a cover price, RM stated, *'... we would get a price which was not too high so that it looked as though we hadn't tried but high enough so that we didn't actually win the work'.²⁶⁹⁵* RM, CS and GP said that when taking a cover price intelligence was often obtained on the companies competing for the tender by telephone when asking sub-contractors and suppliers if they wished to price the tender, or when chasing quotations prior to completion of the estimate. Harlow & Milner kept a list of 'Useful Building Contacts and Competitor Details'.²⁶⁹⁶

IV.357. RM continued, *'either Graham or Chris who are the estimators who would know their opposite number, estimators at other organisations, as I understand it they would ring, ask...can you help us out with this one...'.²⁶⁹⁷* GP was asked in interview if faxes or emails were ever used in exchanging cover prices with competitors. He replied, *'Well we never did...emails is something which – I am probably a little bit of a dinosaur...I did use them but not a massive amount. Faxes is very slow you see the trouble is you might struggle to find out who's pricing so ringing is quick so you ring up and usually as I say because of tenders like 12 o'clock and it has got to be then you haven't time to worry so you ring up'.²⁶⁹⁸*

IV.358. RM was asked if a cover price would be arranged some days in advance of the tender closing date. He replied, *'It might be left to the wire. It might be one of those where you haven't found anybody to get a cover price from and you might, you know, have a final ring round the day before...because you'd rather put a cover price in than send the tender documents back so...if you haven't found anybody and it got to the 11th hour...it might be...at that point...if you've sort of made the decision the week before, or you may know who's pricing it, in that case it might be, 'can you help us out' and it'll be...“yea we'll let you know on the day”, we'd very rarely get a price days before, if we were taking a cover from somebody else it would always be on the day that the tender went in, you'd never have a load of notice because generally speaking, estimators being of the type that they are, you know, the nature of the beast if you like, it always takes to the wire'.²⁶⁹⁹*

IV.359. GP stated that many details were recorded on scraps of paper which were subsequently discarded or lost if a cover price was used as a tender.²⁷⁰⁰ CS said, *'It's generally just written down on a piece of scrap paper, who the contractor is and the name of the estimator or the guy that we're getting the price from and usually the price you'd write on a scrap of paper as well'. He added, 'I would think its usually just put in the file for reference'.²⁷⁰¹*

²⁶⁹⁴ Interview transcript, OFT Document Reference 12731, page 7.

²⁶⁹⁵ Interview transcript, OFT Document Reference 12731, page 5.

²⁶⁹⁶ Contact list and competitor list, OFT Document Reference A0568 and A0569.

²⁶⁹⁷ Interview transcript, OFT Document Reference 12731, page 8.

²⁶⁹⁸ Interview transcript, OFT Document Reference 12732, page 9.

²⁶⁹⁹ Interview transcript, OFT Document Reference 12731, page 9.

²⁷⁰⁰ Interview transcript, OFT Document Reference 12732, page 21.

²⁷⁰¹ Interview transcript, OFT Document Reference 12733, page 7.

Harlow & Milner giving cover prices

- IV.360. CS said in interview that when providing a cover price to a competitor *'We have a prelim sheet [Enquiry Record], which we'll write on the front any contractors who we know are pricing it. But mainly we'd...written it on a piece of scrap paper'*.²⁷⁰²
- IV.361. RM and CS stated that a telephone number or a '©' next to an undertaking's name in the Estimators Comments Box on the Tender Enquiry, indicated that a cover was given to that undertaking.²⁷⁰³ GP said that, for him, there was no fixed method used for recording the giving of cover prices, and that as well as a telephone number and/or '©' next to an undertaking, the word 'cover' or the cover price itself was sometimes used.²⁷⁰⁴
- IV.362. When asked how Harlow & Milner arrived at a cover price CS said, *'Effectively, it's the price that we've decided that our price will be plus a percentage. Somewhere between 5 and 15% you'd add on and then round it possibly round it to, up or down'*.²⁷⁰⁵

Henry Boot

- IV.363. As part of its leniency application, Henry Boot made available current employees and contacted ex-employees to be interviewed. During these voluntary interviews the following individuals provided explanations of Henry Boot's involvement in cover pricing: John Dawson ('JD'), who was a Chief Estimator at Henry Boot in the period from March 2000 until retiring at the end of 2002, Ian Bayston ('IB'), a Chief Estimator²⁷⁰⁶ at Henry Boot, Malcolm Welsby ('MW'), an estimator at Henry Boot, Duncan Abrahams ('DA'), an estimator at Henry Boot, and Michael Mosley ('MM'), Managing Director²⁷⁰⁷ of Henry Boot.
- IV.364. In interview JD stated the decision on whether a job was attractive was made by *'the regional manager, we would...provide him the facts, he looks at those facts, and he would decide'*.²⁷⁰⁸ In interview IB also stated the attractiveness of a tender would be *'...probably discussed with the regional manager, [and] the chief estimator'*.²⁷⁰⁹
- IV.365. It is apparent from Henry Boot's tender adjudication sheets ('Sheet 28s') that Henry Boot would on occasions have sought to find out who else was competing for a tender. Henry Boot's legal representatives stated that in order to find this out, *'There were various methods by which such information would*

²⁷⁰² Interview transcript, OFT Document Reference 12733, page 7.

²⁷⁰³ Interview transcripts, OFT Document Reference 12731, pages 9 and OFT Document Reference 12733, page 8.

²⁷⁰⁴ Interview transcript, OFT Document Reference 12732, page 12.

²⁷⁰⁵ Interview transcript, OFT Document Reference 12733, page 7.

²⁷⁰⁶ Ian Bayston has been an estimator at Henry Boot since 1975 and became Chief Estimator in June 2004.

²⁷⁰⁷ Michael Mosley is a named director of Henry Boot and became MD of Henry Boot in April 2005, prior to that he was regional director at Henry Boot.

²⁷⁰⁸ Interview transcript, OFT Document Reference 11211, page 4.

²⁷⁰⁹ Interview transcript, OFT Document Reference 11212, page 3.

be obtained: through the Builders' Conference or ABI Building Data, sub-contractors and sometimes from the client themselves'.²⁷¹⁰ In interview MW also stated 'You sometimes get the competition without even trying. Sub-contractors, suppliers will ring up and say, "I'm preparing a quotation for roofing, I know that you're tendering, can I send you my quotation" and you say, "Yeah fine, by the way who else are you quoting?", it comes out very easy ... Even some local authorities. I had one only recently where they told you who you were up against'.²⁷¹¹ In terms of recording this information in respect of competition JD stated 'at the [tender] submission meeting, we [would] record the minutes on ... a sheet 28 and at the top of the first sheet 28 we would record the competition on there'.²⁷¹²

IV.366. In its response to the Statement, Henry Boot stated that *'information regarding who the competition was on a potential contract was not sought or obtained for the purposes of cover pricing'.²⁷¹³ However, as detailed in paragraph IV.369 below, where this information was not sought for the purpose of cover pricing it was still on occasions used for that purpose, by Henry Boot's own admission. Furthermore, as also detailed in paragraph IV.369, IB stated that where the information had not already been obtained Henry Boot would indeed contact a supplier specifically for the purpose of obtaining the name of a competitor in order to obtain a cover price.*

IV.367. Many of those persons interviewed explained that the purpose of cover pricing was so that clients did not remove them from future tender lists. JD stated *'if you return tender documents then what you tend to find is that the client or the client's representatives...take a rather dim view of it and you probably don't get on a tender list again, certainly for a long long time, and that basically is the reason for...taking a cover'.²⁷¹⁴*

IV.368. Most of those persons interviewed in respect of Henry Boot advised that the exchange of cover prices was carried out via the telephone and not any other medium. As part of its leniency application, Henry Boot's legal representatives stated that *'Exchanges pertaining to cover pricing were almost invariably done by way of a quick telephone call'.²⁷¹⁵*

Henry Boot taking cover prices

IV.369. In respect of the process of taking a cover price from a competitor, JD confirmed that the regional manager would have had the ultimate decision as to whether to take a cover.²⁷¹⁶ IB stated *'generally the only way round it if we hadn't got the resources available would be to take a cover. You generally found out who your opposition were beforehand anyway or during [the tender preparation period]. If not, you could make a phone call to perhaps a named supplier in the document, the client's document, and you'd find the list who he's priced and then you would approach another, another contractor and ask if they could help you out, I mean everybody knew if you said "Can you ... help*

²⁷¹⁰ Leniency application, OFT Document Reference B1584, pages 2 and 3.

²⁷¹¹ Interview transcript, OFT Document Reference 11210, pages 4 and 5.

²⁷¹² Interview transcript, OFT Document Reference 11211, page 7.

²⁷¹³ Written representations of Henry Boot, 27 June 2008, paragraph 5.9.

²⁷¹⁴ Interview transcript, OFT Document Reference 11211, page 5.

²⁷¹⁵ Leniency application, OFT Document Reference B1584, page 6.

²⁷¹⁶ Interview transcript, OFT Document Reference 11211, page 4.

us, give us some assistance." They knew what it meant...'.²⁷¹⁷ IB also stated '...we used to have a book...with all names, names all contractors' names and telephone numbers...'.²⁷¹⁸

IV.370. When asked when contact would take place in respect of taking a cover price, IB stated *'Well it could be anytime during the tender period. Just to ask them if...they were pricing it, if they could help us out and they'll say, they used to say "Yeah, we'll give you a ring", generally...the day before. Sometimes it would be the 11th hour because depending on when they got the tender finished'.²⁷¹⁹*

IV.371. When asked how taking a cover price would have been recorded, IB stated *'at that time it used to, the chief estimator used to put the figure in...our tender register'.²⁷²⁰ JD stated '...if we were taking a cover then [in] that situation you don't have a submission meeting so there's no minutes of it so all [of] it would be in the tender register itself...'.²⁷²¹ JD explained how he would record the taking of a cover price in the tender register, however as this method of recording is not relevant to the Infringements detailed below the OFT does not intend to describe this process further.*

Henry Boot giving cover prices

IV.372. In respect of the process of giving a cover price to a competitor MW stated *'it just simply worked by, you'd get a phone call, "Can you help me out?" and if the people you were working for said "Yes, do it", then you simply told them, "Yeah we'll fix you up", and you just simply...need to get your price correct first. Once you've decided on your bottom line price then you would, with agreement, put a percentage on it to make sure that the price you were offering to somebody else would safeguard their interests and that the last thing you want to do is arrive at a figure, give them a price and then find out that we've then had another look at it and thought, not really interested in this, our price goes up and they finish up being the lowest...'.²⁷²² In terms of who made the decision at Henry Boot to give a cover price to a competitor JD stated *'the call [from a competitor] would invariably come to myself...and it would be my decision as to whether I said "Yes we're able to help you" or whether we're not'. When asked if he would discuss this with anyone else, JD stated '...I would certainly inform the regional manager...'.²⁷²³**

IV.373. In interview, MM stated that he had been aware of cover pricing taking place at Henry Boot and stated *'I've been involved in [coming to] the price we would give to someone who'd asked for help'.²⁷²⁴ When asked how a cover price, to give to a competitor, would be calculated MW stated *'The basic calculation is simply how much do you want to add to your price, to put them away from it,**

²⁷¹⁷ Interview transcript, OFT Document Reference 11212, page 10.

²⁷¹⁸ Interview transcript, OFT Document Reference 11212, page 12.

²⁷¹⁹ Interview transcript, OFT Document Reference 11212, page 12.

²⁷²⁰ Interview transcript, OFT Document Reference 11212, page 12.

²⁷²¹ Interview transcript, OFT Document Reference 11211, page 9.

²⁷²² Interview transcript, OFT Document Reference 11210, page 8.

²⁷²³ Interview transcript, OFT Document Reference 11211, page 4.

²⁷²⁴ Interview transcript, OFT Document Reference 11215, page 7.

but not make 'em look silly really'.²⁷²⁵ JD stated '...it was above Henry Boot's figure and maybe globally shall we say, 5% plus or minus'.²⁷²⁶

IV.374. In interview DA, when asked how the giving of a cover price would be recorded, stated *'If you're giving one [a cover price]...we used to write it down on the sheet 28 which is the tender adjudication sheet'.²⁷²⁷ JD stated 'If it was on the sheet 28 and I was the one that was recording the minutes of the...[tender] submission meeting...I would probably put a "k" in a circle at the side of the list of competition if I knew that somebody was taking a cover...'.²⁷²⁸ MW stated 'I would [record] who I've given a cover to with the price, so that I know what I've actually done' and that this would be put 'in the tender file'.²⁷²⁹*

Herbert Baggaley

IV.375. As part of its leniency application, Herbert Baggaley through its legal representatives, Actons, provided a typed schedule of all tenders received by Herbert Baggaley between 1 January 2000 and 27 June 2005.²⁷³⁰ During the section 28 visit to Herbert Baggaley's premises on 14 June 2005, the OFT obtained similar typed versions of this schedule for the years 2003²⁷³¹ and 2004.²⁷³² The OFT also obtained during the section 28 visits a number of handwritten Tendering Schedules some of which had been marked with the words *'Cover Price'*²⁷³³ and *'CP'*.²⁷³⁴ Also provided as part of its leniency application was a list of contractors with contact details, with whom Herbert Baggaley had been involved in the practice of taking and giving cover prices.²⁷³⁵

IV.376. The following Herbert Baggaley employees were interviewed by the OFT: Howard Baggaley ('HB'), Executive Chairman, Richard Baggaley ('RB'), Managing Director, Roger Hayes ('RH') Chief Estimator until October 2002 when he left Herbert Baggaley, and Anton Newell ('AN') who became Chief Estimator in October 2002 and prior to that worked as an estimator.

Compensation payments

IV.377. As part of its leniency application, Herbert Baggaley's legal representatives informed the OFT that Herbert Baggaley had been involved in arrangements where the winning contractor, on a particular tender, would reimburse the unsuccessful contractor a certain sum of money. The details of these arrangements are set out in the relevant Infringement sections – see table following paragraph IV.147 above.

²⁷²⁵ Interview transcript, OFT Document Reference 11210, page 9.

²⁷²⁶ Interview transcript, OFT Document Reference 11211, page 10.

²⁷²⁷ Interview transcript, OFT Document Reference 11214, page 7.

²⁷²⁸ Interview transcript, OFT Document Reference 11211 page 9.

²⁷²⁹ Interview transcript, OFT Document Reference 11210, page 8.

²⁷³⁰ List of tenders, OFT Document Reference 3901.

²⁷³¹ Tenders schedule, OFT Document Reference 1656.

²⁷³² Tenders schedule, OFT Document Reference 1655.

²⁷³³ Tendering schedule, OFT Document Reference 1654, page 1.

²⁷³⁴ Tendering schedule, OFT Document Reference 1614, page 1.

²⁷³⁵ List of third party contractors, OFT Document Reference 3902.

Cover pricing – general

- IV.378. Herbert Baggaley staff confirmed in interview that it participated in both the giving and taking of cover prices. HB said that when Herbert Baggaley received a tender, it arranged, *'...an interest meeting. So every inquiry that is received by the company is considered by that – meeting, something I established, I think in the late 90s, when it – it really had evolved that the chief estimator appeared to be taking the decision as to which jobs suited us and those that didn't'*.²⁷³⁶
- IV.379. In respect of the typed schedule of all tenders received by Herbert Baggaley between 1 January 2000 and 27 June 2005, Herbert Baggaley explained what the categorisation 'A', 'B', 'C' and 'R' stood for. *'Those tenders which were classed as "A" were the very real focus of HBC [Herbert Baggaley]. They were the work which HBC wanted and needed to obtain and maintain. Those marked "B" were useful jobs which would be gladly received but pursuing them was not to be undertaken at the expense of the very high interest. This left Tenders which were of little or no interest to HBC. They were labelled "C". It is a coincidence that "C" stood for these low interest Tenders when in fact many of them were involved in cover pricing. The OFT will note though that being labelled under "C" does not automatically mean that every one of these low interest jobs involved covers. Therefore the number of "C" tenders listed under Document 1 [3901] may not tally precisely with the number of covers received or provided by HBC'*.²⁷³⁷ In respect of whether category 'C' tenders coincided with covers, AN in interview said *'Not 100% but on the whole it probably did, yes'*.²⁷³⁸ 'R' was entered when the tender documents were returned to the client.

Herbert Baggaley taking cover prices

- IV.380. HB explained that the *'definitive'* decision on whether to take or give a cover would be made at the *'interest meetings'* and in practice that the Chief Estimator might make a preliminary decision, *'...having reviewed the inquiry against the – the estimating workload and, indeed, the current won-work status, as to whether the inquiry was of high or low interest'*.²⁷³⁹ HB confirmed that he was fully aware that cover pricing was going on.²⁷⁴⁰
- IV.381. Both RH and AN who were employed as Chief Estimators at Herbert Baggaley for the period under investigation confirmed that the tender procedure was as described in paragraph IV.379 above. RH said *'On receipt of a tender...it would be my job to analyse [the] content of the job, the risks, benefits, and then initially report back to the directors as to whether it was a project that fitted in with our business plan and the resources that we had available'*.²⁷⁴¹ RH said that the primary reason why cover pricing took place was *'We were always concerned about upsetting a client by returning his invitation'*.²⁷⁴²

²⁷³⁶ Interview transcript, OFT Document Reference 6370, page 2.

²⁷³⁷ Leniency application, OFT Document Reference 3899, page 4.

²⁷³⁸ Interview transcript, OFT Document Reference 6372, page 9.

²⁷³⁹ Interview transcript, OFT Document Reference 6370, page 3.

²⁷⁴⁰ Interview transcript, OFT Document Reference 6370, page 5.

²⁷⁴¹ Interview transcript, OFT Document Reference 13391, page 2.

²⁷⁴² Interview transcript, OFT Document Reference 13391, page 3.

- IV.382. AN confirmed that the decision to take a cover, *'would be discussed at the interest meeting, and that decision taken at that meeting then'*.²⁷⁴³ AN also confirmed that once a decision had been made to take a cover, the estimator would make the necessary arrangements.²⁷⁴⁴
- IV.383. RH explained how Herbert Baggaley would find out who the competition was on a job: *'There are agencies and, I'm trying to think of their names now, they've gone, ABI, people like that, Glennigans...And a client would normally in a project have specified sub-contractors and suppliers who would give you information with regards to who they've received enquiries from'*.²⁷⁴⁵
- IV.384. Herbert Baggaley explained that *'The purpose of the cover priced bid was to show realism. Therefore, the covers had to be realistic. The most expedient way of ensuring this was, given the fact that a receiving party had not been privy to the detail behind any figure, was to use another Estimator with a sound reputation for estimating. Therefore over time, certain contacts would be approached by HBC's Chief Estimator more often than others'*.²⁷⁴⁶ AN confirmed this approach, *'we would chose the one who we either knew best from previous dealings, or the one we maybe thought was going to give us the most competitive cover, because the objective was to look as competitive as possible, and that was part of the reason for taking the cover'*.²⁷⁴⁷
- IV.385. AN confirmed that two contacts would take place, by telephone, with a competitor in respect of taking a cover price: *'...if we decided two weeks into the job let's take a cover on this one, within the next week we would probably make a phone call and then [the] arrangement would be ring back the day before it's due it when their price is completed'*.²⁷⁴⁸

Herbert Baggaley giving cover prices

- IV.386. Herbert Baggaley explained the process when a company contacted it for a cover price. *'That company might then contact HBC, invariably by telephone, and ask if they can "take help" on this particular tender. On being contacted by another contractor, an HBC Estimator would agree and arrange for the other contractor, to call HBC again some twelve to twenty four hours before the tender was due to be lodged, by which time HBC would have completed its tender review. When the follow up call was received the estimator would give a figure to the other contractor which would be above HBC's figure'*.²⁷⁴⁹
- IV.387. AN confirmed that if a company requested that Herbert Baggaley provide it with a cover price, the other company would have the expectation that it would receive a price from Herbert Baggaley that appeared competitive but was designed not to win the contract.²⁷⁵⁰
- IV.388. In terms of arriving at a cover price to give to a competitor, AN said *'It would have been, depending, two, three, four percent, depending on the type of*

²⁷⁴³ Interview transcript, OFT Document Reference 6372, page 5.

²⁷⁴⁴ Interview transcript, OFT Document Reference 6372, page 6.

²⁷⁴⁵ Interview transcript, OFT Document Reference 13391, pages 4 and 5.

²⁷⁴⁶ Leniency application, OFT Document Reference 3899, page 6.

²⁷⁴⁷ Interview transcript, OFT Document Reference 6372, page 6.

²⁷⁴⁸ Interview transcript, OFT Document Reference 6372, page 8.

²⁷⁴⁹ Interim report, OFT Document Reference 3894, page 4 and 5.

²⁷⁵⁰ Interview transcript, OFT Document Reference 6372, page 12.

scheme, straightforward jobs you could have, bill of quantities you would probably be a little bit tighter because there was less problem available in terms of when you had your bill requested assuming that there was no problems, they would accept it. Design and Build projects where interpretation comes into it more, you'll probably be a little bit on the higher side towards four percent so that they are a little bit further away but still not silly'.²⁷⁵¹

Contemporaneous documents

- IV.389. Herbert Baggaley's leniency application provided additional contemporaneous documents to those obtained by the OFT on the section 28 visit. The main document was the complete list of all tenders received between 1 January 2000 and 27 June 2005. Further additional contemporaneous documents, client tender letters and internal estimate sheets were provided on 20 April 2007.²⁷⁵² All documentary evidence is discussed by the OFT in relation to each relevant specific tender.
- IV.390. AN explained in respect of the handwritten Tendering Schedule referred to in paragraph IV.375 above that, *'Predominantly, it's Roger's [handwriting] but there are some of mine in there...'*²⁷⁵³ and that if there was *'cover price'* written in the final column, then there was almost certainly cover pricing taking place in respect of that tender.²⁷⁵⁴

Hobson & Porter

- IV.391. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing.²⁷⁵⁵ The following Hobson & Porter employees expanded upon this explanation during interview: David Watson ('DW'), Managing Director, Russell Horner ('RH'), Major Works Estimating Director, Ian Gibbins ('IG'), Minor Works Director and Michael Haywood ('MH') an estimator in Major Works. The distinction between Major and Minor works was that Major Works dealt with contracts from approximately [...] upwards²⁷⁵⁶ while Minor Works dealt with contracts from [...] up to maximum of approximately [...].²⁷⁵⁷
- IV.392. In its leniency application Hobson & Porter provided lists of cover pricing activity for both Major²⁷⁵⁸ and Minor Works.²⁷⁵⁹ DW explained how these lists were compiled, *'we scanned through our documentation that we had and we tested the knowledge of our people and estimators used their memory and came up with the list'*.²⁷⁶⁰

²⁷⁵¹ Interview transcript, OFT Document Reference 6372, page 12.

²⁷⁵² Letter, OFT Document Reference 6393.

²⁷⁵³ Interview transcript, OFT Document Reference 6372, page 10.

²⁷⁵⁴ Interview transcript, OFT Document Reference 6372, pages 10 and 11.

²⁷⁵⁵ Background information, OFT Document Reference A1344.

²⁷⁵⁶ Interview transcript, OFT Document Reference 11229, page 3.

²⁷⁵⁷ Interview transcript, OFT Document Reference 11231, page 3.

²⁷⁵⁸ Activity schedule, OFT Document Reference A1347.

²⁷⁵⁹ Activity schedule front page, OFT Document Reference A1349.

²⁷⁶⁰ Interview transcript, OFT Document Reference 11230, page 5.

Cover pricing – general

- IV.393. Hobson & Porter confirmed that it participated in both the giving and taking of cover prices for both Major and Minor Works.²⁷⁶¹ In Major Works, shortly after the receipt of a tender DW and RH would discuss in a meeting whether to tender for the work. DW said that it would be his ultimate responsibility as Managing Director to decide if Hobson & Porter wanted to win the work.²⁷⁶² DW explained that, *'it solves a problem for us by way of not wanting to upset the clients and still being retained on their tender lists'*.²⁷⁶³ For Minor Works it would be IG's decision as to whether Hobson & Porter wanted to win the work or to return the tender with a cover price.²⁷⁶⁴
- IV.394. For both Major and Minor Works tenders, Hobson & Porter confirmed that two contacts would take place with a competitor in respect of giving and taking a cover price. Firstly, when the competitor or Hobson & Porter asked for help, and then secondly, on the day of the tender submission or the day before the tender submission, there would be a further contact to either give or obtain the cover price.²⁷⁶⁵ DW confirmed that it would generally be the estimators who would make such contact.²⁷⁶⁶
- IV.395. DW also explained how Hobson & Porter would find out who the competition was on a job: *'Generally that would be via the supplier chain by the sub-contractors and suppliers there might be a little bit of specialist deal on the job that you know there is only going to be supplied by one or two types of people you know suppliers for instance - may be approach those and say have you had any enquiries for this sort of deal on this job and if so who from generally it is the supplier chain'*.²⁷⁶⁷

Contemporaneous documents – tender documentation

- IV.396. For Major Works a 'Tender Information' sheet was produced once Hobson & Porter had decided to price the job.²⁷⁶⁸ On these sheets is a section where the known competition for the tender was inserted and where annotations were made in relation to cover pricing. These individual sheets are discussed by the OFT in relation to each relevant specific tender.
- IV.397. For Minor Works a 'Minor Works Tender Summary' Sheet was produced which also contained a section where the known competition for the tender was inserted and where annotations were made in relation to cover pricing. These individual sheets are also discussed by the OFT in relation to each relevant specific tender.
- IV.398. IG explained that his department operated this document recording system in accordance with British Standard 5750, which meant that details of tenders received were required to be completed on the Minor Works summary

²⁷⁶¹ Background information, OFT Document Reference A1344, pages 1 and 2.

²⁷⁶² Interview transcript, OFT Document Reference 11230, page 3.

²⁷⁶³ Interview transcript, OFT Document Reference 11230, page 6.

²⁷⁶⁴ Interview transcript, OFT Document Reference 11231, pages 4 and 5.

²⁷⁶⁵ Interview transcript, OFT Document Reference 11229, page 6.

²⁷⁶⁶ Interview transcript, OFT Document Reference 11230, page 7.

²⁷⁶⁷ Interview transcript, OFT Document Reference 11230, pages 4 and 5.

²⁷⁶⁸ Interview transcript, OFT Document Reference 11229, page 5.

sheets.²⁷⁶⁹ However the operation of this recording system was irregular. IG explained that he tended not to fill in the forms on receipt of a tender, though his colleagues did and that the recording system was phased out in 2005.

Hobson & Porter – Major Works giving cover prices

IV.399. RH explained that, *'The only reason we would really contact a competitor close to the return date would be if they have already contacted us to ask us for a cover we may ring then you know if we agreed to give them a cover we would call them back with a figure that they could use in place of pricing the job'*.²⁷⁷⁰

IV.400. Hobson & Porter confirmed that if a cover price was provided then this would be recorded on the tender sheet as well. RH said that *'you write C in the column'*.²⁷⁷¹ The 'C', which could be either handwritten or typed, would be written on the tender sheet next to the company that was receiving the cover price. DW further confirmed, *'Normally the C would denote that we gave or took a cover ourselves'*.²⁷⁷² MH said that the 'C' might indicate that Hobson & Porter had given a cover, but that it might alternatively indicate that he *'may have been party to knowing that another competitor was taking a cover from somewhere else'*.²⁷⁷³

Hobson & Porter – Major Works taking cover prices

IV.401. RH explained that if Hobson & Porter was taking a cover price there would not be the same documentation as when giving cover, but RH would put documentation for tenders where cover was taken in a separate file.²⁷⁷⁴

IV.402. If Hobson & Porter was taking a cover price RH explained how it would find out who to get the cover price from, *'If it's somebody that we were taking covers from before obviously we knew the people if it was a new if we had to approach somebody that we didn't know we would ring them up and I would just ask for the estimator'*.²⁷⁷⁵

Hobson & Porter – Minor Works giving cover prices

IV.403. IG explained that that there would be contact with competitors close to the tender return date for two reasons – to give or take a cover. In the case of giving a cover if a competitor had contacted Hobson & Porter and asked for a cover, IG explained that this would be, *'usually 3,4,5% above you so that they could provide the client with a tender that didn't look silly'*.²⁷⁷⁶

IV.404. In contrast to Major Works, the Minor Works Tender Summary Sheet did not have such a universal use of 'C', to indicate a cover price. Sometimes a 'C' would be written, or 'cover', sometimes not at all and mention of cover would be found on another document, such as a handwritten note on a client letter. The OFT discusses these records in relation to each relevant specific tender.

²⁷⁶⁹ Interview transcript, OFT Document Reference 11231, pages 5 and 6.

²⁷⁷⁰ Interview transcript, OFT Document Reference 11229, page 6.

²⁷⁷¹ Interview transcript, OFT Document Reference 11229, page 10.

²⁷⁷² Interview transcript, OFT Document Reference 11230, page 12.

²⁷⁷³ Interview transcript, OFT Document Reference 11232, page 10.

²⁷⁷⁴ Interview transcript, OFT Document Reference 11229, page 10.

²⁷⁷⁵ Interview transcript, OFT Document Reference 11229, page 8.

²⁷⁷⁶ Interview transcript, OFT Document Reference 11231, page 7.

Hobson & Porter – Minor Works taking cover prices

- IV.405. IG confirmed that another reason to contact a competitor close to the tender return date would be if Hobson & Porter required a cover price. If Hobson & Porter was taking a cover IG explained how he would know who to contact. *'You would over the years obviously you would know who the estimators are if you don't if it is a cold call that you are told that they are tendering you would then ring and ask for the estimator and ask the question are you tendering for this job'*.²⁷⁷⁷
- IV.406. IG said that generally he would not record details of cover pricing on the tender summary sheets, but may instead have made a note on another document. IG explained that sometimes *'verbally declined'*, would be written on a tender summary sheet. This was a way to get around the BS 5750 requirement where there were no tender details available to complete on the sheets, and means that Hobson & Porter took a cover.²⁷⁷⁸
- IV.407. In its response to the Statement, Hobson & Porter stated *'[i]t is not disputed that Hobson & Porter participated in cover pricing during the relevant period set out in the Statement'*.²⁷⁷⁹

Irwins

- IV.408. As part of its leniency application, Irwins provided a general explanation of its participation in cover pricing. Irwins explained that *'it receives far more enquiries than can be priced...[and as a result] It has in the past been regarded as necessary (and as a last resort) to take cover prices on particular contracts'*.²⁷⁸⁰ Irwins stated that *'the reason in taking cover prices is to avoid offending clients/potential clients/consultants and to protect the company being removed from future tender lists'*.²⁷⁸¹
- IV.409. Ivan Peter Nelson ('IPN'), an Estimating Director at Irwins for the 11 years prior to interview by the OFT, explained that he was responsible for deciding whether a job was attractive, *'And so you're then into a position where you either price it, send it back or, up to whenever you lot [the OFT] came along, took a cover'*.²⁷⁸² IPN made his decisions based on *'Well, the location initially, if it was...where we could do it, the size of the job, the client and the type of work, really...if it just looked attractive, if it fit within sort of jobs that I knew we could...we'd probably be more competitive on'*.²⁷⁸³ On those contracts IPN deemed unattractive he explained *'if...it wasn't somebody that would get really upset if you sent it back up, I would return it...Where I've said, yes, we'll have it, I would think that I would have a go at pricing. If...the enquiry came in and I'd be working along on it and I decided...we're not going to be competitive on here...some time during the two to three week tender period I'd wack it in as a*

²⁷⁷⁷ Interview transcript, OFT Document Reference 11231, page 9.

²⁷⁷⁸ Interview transcript, OFT Document Reference 11231, page 13.

²⁷⁷⁹ Written representations of Hobson & Porter, 27 June 2008, paragraph 59.

²⁷⁸⁰ Leniency report, OFT Document Reference A0714, page 6.

²⁷⁸¹ Leniency report, OFT Document Reference A0714, page 6.

²⁷⁸² Interview transcript, OFT Document Reference 11253, page 5.

²⁷⁸³ Interview transcript, OFT Document Reference 11253, page 9.

bad job and say well...forget it'.²⁷⁸⁴ IPN confirmed that in these situations he may have decided to seek a cover price.²⁷⁸⁵

IV.410. IPN maintained an internal Tender Register in which were recorded details of all tenders received by Irwins.²⁷⁸⁶ IPN explained that he would complete the Tender Register on receipt of a tender invitation, and would keep it updated as the tender process progressed. Each tender was allocated an internal number and all the details of the tender were recorded including date received, awarding body, tender deadline, type of contract, amount tendered and other relevant information including the names of competitors on the tender where known.²⁷⁸⁷

IV.411. IPN explained how he would find out who else was pricing the tender, *'The sub-contractors know and the material suppliers and you tend to get to know, without even asking. If...I'm desperately wanting to know like the day before, then I would ring, ring a sub-contractor and ask them*'.²⁷⁸⁸ IPN would note in the final column of the Tender Register the identities of the competitors as and when they were discovered.²⁷⁸⁹

IV.412. IPN said during interview *'I've very rarely given any cover pricing because I'm always, because of the fact that I'm just a one-man estimating team... I would think 90 % of the time it's just me that's been needing the help*'.²⁷⁹⁰

IV.413. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for *'Covers Taken'* and *'Cover Given'*, which detail projects/contracts identified by the company during the course of an internal investigation conducted by IPN into potential cover prices. Irwins stated that *'the schedule is as accurate and complete as company and other records individual recollections permit...whilst it is confident that the information provided is comprehensive, it remains possible that there may be inadvertent errors or omissions due to the absence of detailed records during the review period*'.²⁷⁹¹ Irwins further clarified that *the '...schedule is compiled from the limited information found on tender summaries, notes on margins and old papers together with individuals' memories (not always reliable)*'.²⁷⁹²

IV.414. Irwins also provided the OFT with copies of a number of contemporaneous tender returns/forms of tender relating to individual tenders.

Irwins taking cover prices

IV.415. On tenders where Irwins was seeking a cover IPN explained *'You'd probably get to about two or three days before and realise that you were just not going to get a figure together and then probably on the night before or sometimes on the day, sometimes even after they're due to go in, I'd ring around and get a figure that I knew was going to be, reasonably all right over the top...It worked well because it meant that I could always have another second look at each enquiry*

²⁷⁸⁴ Interview transcript, OFT Document Reference 11253, pages 9 and 10.

²⁷⁸⁵ Interview transcript, OFT Document Reference 11253, page 10.

²⁷⁸⁶ See for example OFT Document Reference A0339.

²⁷⁸⁷ Interview transcript, OFT Document Reference 11253, pages 6 and 7.

²⁷⁸⁸ Interview transcript, OFT Document Reference 11253, page12.

²⁷⁸⁹ Interview transcript, OFT Document Reference 11253, page12.

²⁷⁹⁰ Interview transcript, OFT Document Reference 11253, page16.

²⁷⁹¹ Leniency report, OFT Document Reference A0714, page 7.

²⁷⁹² Leniency report, OFT Document Reference A0714, page 7.

and be more choosy...and it was a way, really, of, dealing with a, a tender, at the last minute and not upsetting, the clients and the architects and quantity surveyors'.²⁷⁹³ IPN was asked who else within Irwins was actively involved in cover pricing to which he replied 'I think everybody in the industry knows it's going on but with, they wouldn't know which, I was taking covers on which I weren't cos we didn't particularly talk about it...But generally it's all, it was left for me, Im [sic] the culprit'.²⁷⁹⁴

IV.416. In either the fourth or fifth column of the Tender Register, the percentage mark-up was recorded. These columns were also commonly used by IPN to record a 'C'.²⁷⁹⁵ IPN confirmed that the presence of a 'C' in the percentage mark-up column on the Tender Register would indicate that Irwins obtained a cover price in relation to that tender.²⁷⁹⁶ IPN would also record the figure Irwins submitted on the Tender Register in the sixth column. However, this was not necessarily the figure supplied by a competitor for a cover price, *'perhaps I'd add a little bit more or...you wouldn't knock any off but you'd add a bit more on perhaps'.²⁷⁹⁷*

IV.417. The final column on the Tender Register would record *'...notes really...if I find out various people that happen to be in for the tender...'.²⁷⁹⁸* Occasionally Irwins would record the taking of a cover price by means of an '*' or the word 'Cover' in the final column of the Tender Register.²⁷⁹⁹ On other occasions Irwins would record the telephone number of the provider of a cover price in the final column of the Tender Register.²⁸⁰⁰ The OFT discusses instances of these records in relation to the relevant specific tenders in the next section.

IV.418. Irwins also provided to the OFT two lists of contracts where cover prices were given and taken.²⁸⁰¹ These lists included the following companies:

- [...] [C] [List of x Participant Companies]

²⁷⁹³ Interview transcript, OFT Document Reference 11253, page 5.

²⁷⁹⁴ Interview transcript, OFT Document Reference 11254, pages 1 and 2.

²⁷⁹⁵ Interview transcript, OFT Document Reference 11253, page 7.

²⁷⁹⁶ Interview transcript, OFT Document Reference 11253, page 7.

²⁷⁹⁷ Interview transcript, OFT Document Reference 11253, page 19.

²⁷⁹⁸ Interview transcript, OFT Document Reference 11253, page 8.

²⁷⁹⁹ Interview transcript, OFT Document Reference 11254, page 16.

²⁸⁰⁰ Interview transcript, OFT Document Reference 11255, page 22.

²⁸⁰¹ Schedules of covers given, OFT Document References A0717 and A0718.

IV.419. Irwins stated in its response to the Statement that *'[i]t is not disputed that Irwins and Jack Lunn participated in cover pricing during the relevant period...'*²⁸⁰² It further stated, *'Irwins and Jack Lunn do not submit that cover pricing did not infringe the Act'*.²⁸⁰³

J H Hallam

IV.420. As part of its leniency application, J H Hallam made available current employees to be interviewed. These were Spencer Robinson ('SR'), senior estimator, Richard Blount ('RB'), Chief Surveyor, William Packer ('WP'), Chief Estimator and Steve Gill ('SG'), estimator at J H Hallam. During these voluntary interviews the individuals were asked to give an explanation of J H Hallam's involvement in cover pricing.

J H Hallam taking cover prices

IV.421. During interview, WP explained the criteria J H Hallam used to decide whether to tender for a contract. WP stated *'...the fact is if we have already accepted a tender and then for some reason at that stage...we couldn't deal with it either because somebody was ill or...the workload suddenly increased then it was possible that we would go and get a cover price'*.²⁸⁰⁴ RB stated the decision whether to tender for a contract was made by *'It's me generally speaking if I am hovering like that and I am not quite sure whether its something we want to go for or not I normally chew it over with John... [John Hallam, Managing Director]'*.²⁸⁰⁵ RB explained *'we try to tender for everything that came through the door but there were occasions when we were caught out when you know for lots of reasons...it's not unusual for us to be ringing round the day before the tender's due in chasing sub-contract tenders so we can finish our tender and frequently like the morning the tender is going in and we haven't got a mechanical price or an electrical price you know fundamental to our bid and in those circumstances you are almost left with no alternative...but to perhaps take some help from another contractor in other words cover. It's normally desperation because we can't finish our tender...'*.²⁸⁰⁶

IV.422. RB explained who was aware of cover pricing within J H Hallam, *'Well it's certainly from the board down because I gave a monthly board report...if we had taken a cover it would be noted on the tender report and what I tended to do was if we had taken a cover I would just put a small c in the results column'*.²⁸⁰⁷ RB stated that *'There are five members of the board who are Richard Hallam [Chairman], John Hallam [Managing Director], Chris Hallam [Personnel Director], Rob Hefford [Financial Director] and myself [Commercial Director]'*.²⁸⁰⁸ These *'monthly board reports'* are titled *'R & B board Meetings'* and list the name of the contract, and record a small 'c' if cover had been taken

²⁸⁰² Written representations of Irwins, 27 June 2008, page 15.

²⁸⁰³ Written representations of Irwins, 27 June 2008, page 16.

²⁸⁰⁴ Interview transcript, OFT Document Reference 12756, page 4.

²⁸⁰⁵ Interview transcript, OFT Document Reference 12757, page 4.

²⁸⁰⁶ Interview transcript, OFT Document Reference 12757, page 5.

²⁸⁰⁷ Interview transcript, OFT Document Reference 12757, page 10.

²⁸⁰⁸ Interview transcript, OFT Document Reference 12757, page 10.

for that contract. However RB stated that he did not usually record the identity of companies from whom J H Hallam had taken a cover price.²⁸⁰⁹

IV.423. SR explained how he would find out the identity of J H Hallam's competitors for a contract. SR stated *'subcontractors, Builders Conference. The majority of time, I mean if you're sending enquiries out, to subcontractors...they'd often phone you up and say..."I've had it in from a couple of other contractors, do you want to know the names", and they'll just give you the names'*.²⁸¹⁰ J H Hallam's leniency application also stated that *'The company has also been contacted by Barbow ABI and Builders Conference for information regarding tenders received and being priced. They often send out complimentary information identifying who is pricing which job'*.²⁸¹¹

IV.424. SR explained how the receiving of a cover price worked in practice. SR stated *'...you could do it the day you got the tender in...but reality is you were either too busy or you just put it to one side...you've just got something on your calendar just to flag it up a few days before. I mean we've got like a list of all the tenders what are going in and it's got the dates highlighted...you look on there and think, right, tender goes in a week today, I'd better start...I'd better phone around...in a couple of days time and try and sort the price out'*.²⁸¹² SG stated *'we rarely get a figure before the morning of the estimate'*.²⁸¹³

J H Hallam giving cover prices

IV.425. RB explained how the giving of a cover worked in practice, *'generally speaking it was the same as us when we were looking for a cover one of desperation towards the latter stages of the tender process in other words they have ran out of time and can't finish it off. That was the norm occasionally we would get a phone call early on in the process when the grid on the desk don't really want to send it back and therefore want some comfort that they can get some support from us but that was less common it was more the desperate phone call the day before the tender is due in'*. RB continued *'...so normally we would end up giving a cover either the day before or more commonly on the morning that the tender is going in'*.²⁸¹⁴

IV.426. RB was asked whether he recorded the giving of a cover price to a competitor. RB stated *'There wasn't and I have to say I would of and I have frowned on the fact that there was any notes at all I would have just preferred to have just kept it a verbal thing and as I say personally I have given covers out I have never been specific I have never told them what our figure was going to be I have always said that you need to pitch your bid over this, left it fairly loose'*.²⁸¹⁵

IV.427. SR however did occasionally record contact with a competitor, *'...I'd probably just scribble it on the front of the tender document or whatever I was working [on] I'd probably just scribble it on that, unless they said, "can you give me a call?" and then I'd take his name and number. But nine times out of ten if someone was taking a cover of you they'd phone you back because it's their*

²⁸⁰⁹ Interview transcript, OFT Document Reference 12757, page 10.

²⁸¹⁰ Interview transcript, OFT Document Reference 12754, page 5.

²⁸¹¹ Leniency application report, OFT Document reference 4969, page 7.

²⁸¹² Interview transcript, OFT Document Reference 12754, page 7.

²⁸¹³ Interview transcript, OFT Document Reference 12755, page 7.

²⁸¹⁴ Interview transcript, OFT Document Reference 12757, page 8.

²⁸¹⁵ Interview transcript, OFT Document Reference 12757, page 8.

sort of responsibility to get the tender back'.²⁸¹⁶ WP stated 'We record it on forms... We put the company's names down that we had given the covers to'.²⁸¹⁷

IV.428. RB confirmed that he would generally have been aware if one of the estimators within J H Hallam was giving a cover price to a competitor but would leave the calculation of the cover price to them, *'I'd normally leave it to the estimator'.²⁸¹⁸* SR stated *'we'd finalise the tender so we'd know...what figure we're going in at before we can help another contactor out...because in honesty you didn't want to make their price look stupid, so it'd only be a percent...you'd probably put, lets shove four percent on or two percent or three percent...because obviously you didn't want to make their price look ridiculous because the client'll think, "Oh his price is miles out, we're never going to ask him again." Because obviously if we needed the same help hopefully...they'd do the same with us, you know...so you didn't make their price look silly. You'd only put a few percent on'.²⁸¹⁹*

IV.429. J H Hallam also provided to the OFT in its leniency application a list of companies with whom J H Hallam had *'exchanged pricing information'* during the period from March 2000 to July 2005. The list contained the following entries:²⁸²⁰

- [...] [C] [List of x Participant Companies]

IV.430. J H Hallam stated in its oral response to the Statement *'...we acknowledge that we've done wrong, that we're prepared to pay a fine'.²⁸²¹*

Jack Lunn

IV.431. As part of its leniency application, Jack Lunn provided a general explanation of its participation in cover pricing. Jack Lunn explained that *'it receives far more enquiries than can be priced...'* and as a result *'it has in the past been regarded as necessary (and as a last resort) to take cover-prices on particular contracts'.²⁸²²* Jack Lunn stated that *'The primary reason in doing so is not to offend clients and consultants and to protect the company from being removed from future tender lists'.²⁸²³*

²⁸¹⁶ Interview transcript, OFT Document Reference 12754, pages 6 and 7.

²⁸¹⁷ Interview transcript, OFT Document Reference 12756, page 7.

²⁸¹⁸ Interview transcript, OFT Document Reference 12757, page 9.

²⁸¹⁹ Interview transcript, OFT Document Reference 12754 page 7.

²⁸²⁰ Leniency application report, OFT Document Reference 4969, page 3.

²⁸²¹ Oral representations (transcript) of J H Hallam, 31 July 2008, page 15.

²⁸²² Leniency application report, OFT Document Reference A0673, page 7.

²⁸²³ Leniency application report, OFT Document Reference A0673, page 7.

- IV.432. Stephen Bradbury ('SB'), Managing Director of Jack Lunn since 2004²⁸²⁴, explained that the ultimate decision on deciding whether a job was attractive rested with him, *'It may well be that I make a decision very early on. On the other hand, in the majority of tenders, I don't get to see them when they come through the door, they go straight to the estimating. The ultimate decision since I joined the company would be myself'*.²⁸²⁵ Jack Lunn's leniency application corroborated this, stating *'the estimator(s) inform the Managing/Estimating Director who may decide at this time, based on both the information provided by the estimator and any further relevant factors of which he is aware, to cover the tender'*.²⁸²⁶
- IV.433. SB made his decisions based on various factors: *'...it may well be that our estimating department is just overloaded...It may well be that despite being led to believe it's a simple job, when we get the documents it's an extremely difficult job...it may well be that we feel that it's not a fair tender...another reason may be that the client is using the tender process as simply a feasibility study...'*²⁸²⁷ On those contracts SB deemed unattractive he explained *'There would be a variety of things we would do. We would look at the client. If it's a client we did a lot of work for we would be very loathe to send that tender back for risk of upsetting them for future work ... or, we may well choose to talk to one or two other contractors and see if they're keen for the job and more so would they be prepared to tell us, or give us a cover...'*²⁸²⁸ Jack Lunn's leniency application states *'If a decision to cover the tender is taken at this stage, the estimator will generally not carry out any further work on the tender other than to find out which other contractors are pricing/tendering the scheme. When this happens no paperwork or computer records is/are produced, as no further work is undertaken'*.²⁸²⁹
- IV.434. SB was asked who else within Jack Lunn was actively involved in cover pricing or knew that cover pricing was going on, to which he replied *'I would say three people, myself and the two estimators...Keith Poskitt and Tony Metcalf. But I'd qualify that slightly in that...everybody in the industry knows that covers are taken and it would be naïve to think that the directors, all the directors in Jack Lunn didn't know...'*²⁸³⁰

Jack Lunn taking cover prices

- IV.435. SB explained how he would find out who Jack Lunn's competitors were, *'clients are quite happy to tell you and we use industry journals, we use what we call ABI, we also use builders conference'*.²⁸³¹ SB also confirmed that subcontractors would pass on competitor information, *'...and we might ask a subcontractor, are you pricing it for anyone else? And they'll say yes, we're pricing it for two or three, we're pricing it for so and so'*.²⁸³² SB was asked if he would record who the competition was, and replied *'not particularly. I don't... This is usually done at estimating stage and I only get to know at the*

²⁸²⁴ Interview transcript, OFT Document Reference 11289, pages 1 and 2.

²⁸²⁵ Interview transcript, OFT Document Reference 11289, page 5.

²⁸²⁶ Leniency application report, OFT Document Reference A0673, page 9.

²⁸²⁷ Interview transcript, OFT Document Reference 11289, pages 5 and 6.

²⁸²⁸ Interview transcript, OFT Document Reference 11289, page 7.

²⁸²⁹ Leniency application report, OFT Document Reference A0673, page 9.

²⁸³⁰ Interview transcript, OFT Document Reference 11289, page 13.

²⁸³¹ Interview transcript, OFT Document Reference 11289, page 8.

²⁸³² Interview transcript, OFT Document Reference 11289, page 8.

review stage'.²⁸³³ Antony Metcalf ('AM'), estimator at Jack Lunn since 2000²⁸³⁴, was also asked if he would record who the competition was, and replied *'In some cases it's recorded on our tender submission, we have a note on there, competition, so we'd make a note for management'*.²⁸³⁵

IV.436. SB confirmed that the exchange of covers *'usually operates at estimator level and it's, I'm not aware of it happening in any other way than by telephone'*.²⁸³⁶

SB also confirmed that the exchange of cover prices would need his authority, *'it would certainly need me, they would certainly make me aware of it'*.²⁸³⁷

IV.437. Jack Lunn stated in its leniency application, *'when a decision to take a cover is taken, the tender summary sheet is not produced (there being no need) and the hard copy "form of tender" is completed using the figure provided by another contractor. For the reasons explained earlier this paperwork is then disposed of due to it not being of any practical use and in order to avoid practical storage difficulties'*.²⁸³⁸

Jack Lunn giving cover prices

IV.438. Jack Lunn stated in its leniency application, *'In practice where a cover is given, one contractor, usually through the estimating department/estimators, will contact another by telephone and enquire if he is prepared to offer a cover price. In most cases at JLC, the final agreement is through a Director even though the actual discussion may be between estimators or Directors(s). This contact is invariably by telephone'*.²⁸³⁹ SB was asked whether there was any particular formula used when giving cover prices to a competitor. SB replied *'There's no hard and fast formula for our company ...'*.²⁸⁴⁰

IV.439. Both AM and Keith Poskitt, (an estimator for Jack Lunn Construction since 1988)²⁸⁴¹ explained that the giving of covers was not formally recorded on any of Jack Lunn's internal documents. AM said *'Not formally; again, it would be recorded on a piece of paper, it would be in the file somewhere'*.²⁸⁴²

IV.440. Jack Lunn stated in its response to the Statement that *'[i]t is not disputed that...Jack Lunn participated in cover pricing during the relevant period...'*.²⁸⁴³ It further stated, *'...Jack Lunn do not submit that cover pricing did not infringe the Act'*.²⁸⁴⁴

²⁸³³ Interview transcript, OFT Document Reference 11289, page 9.

²⁸³⁴ Interview transcript, OFT Document Reference 11292, pages 1 and 2.

²⁸³⁵ Interview transcript, OFT Document Reference 11292, page 5.

²⁸³⁶ Interview transcript, OFT Document Reference 11289, page 10.

²⁸³⁷ Interview transcript, OFT Document Reference 11289, page 11.

²⁸³⁸ Leniency application report, OFT Document Reference A0673, page 9.

²⁸³⁹ Leniency application report, OFT Document Reference A0673, page 9.

²⁸⁴⁰ Interview transcript, OFT Document Reference 11289, page 12.

²⁸⁴¹ Interview transcript, OFT Document Reference 11293, page 2.

²⁸⁴² Interview transcript, OFT Document Reference 11292, page 8.

²⁸⁴³ Written representations of Jack Lunn, 27 June 2008, page 15.

²⁸⁴⁴ Written representations of Jack Lunn, 27 June 2008, page 16.

John Cawley

- IV.441. As part of its leniency application, John Cawley stated that it had participated in cover pricing for many years but kept no documentary evidence of covers given and received. John Cawley estimated that during the period 2000 to 2004, a *'maximum of [...] [C] covers have been given/received. This out of a total of [...] [C] prices given out'*.²⁸⁴⁵
- IV.442. John Cawley could only recall [...] [C] projects in 2004 where covers had been taken but the other party to bid rigging for these tenders was not identified. No contemporaneous documents were provided to substantiate this statement.
- IV.443. Director Nicholas Greene ('NG') and his father and co-director Richard Greene ('RG') were interviewed by the OFT.

Cover pricing - general

- IV.444. In interview NG said that, as a family business, tenders were prepared by himself and RG only. Once a tender was received, a decision would be made to price it or *'you'd get a cover'*.²⁸⁴⁶ NG explained that cover pricing is where *'someone's priced the job themselves and they gave you something higher than theirs. You physically know you're not going to get the job...and you've submitted a reasonable tender to the client'*.²⁸⁴⁷ NG added that cover pricing was something *'you dipped your toe in it now and again'*.²⁸⁴⁸
- IV.445. NG explained that the exchange of cover prices would take place by telephone between estimators and that only he and his father were involved in the practice at John Cawley.²⁸⁴⁹ A tender register was retained but no record was made of covers received or given.²⁸⁵⁰ RG said in interview that he would have noted covers taken and received by scribbling the details on a piece of paper, which would soon be thrown away.²⁸⁵¹
- IV.446. RG confirmed that he had been involved in cover pricing for a long time and explained that when a tender arrived at John Cawley, the options were as follows: *'I could either send it back and upset them, or stab a price at it, or in those days you got a cover'*.²⁸⁵² On occasions, he also provided cover prices to competitors.

John Cawley taking cover prices

- IV.447. In a prepared statement to the OFT, RG stated that cover prices were taken by John Cawley for various reasons, including pressure of work, a failure of sub-contractors to submit a price in time, other orders that *'filled our work capacity'* and the enquiry being of *'little interest'*.²⁸⁵³

²⁸⁴⁵ Statement, OFT Document Reference 0867, page 1.

²⁸⁴⁶ Interview transcript, OFT Document Reference 11297, page 7.

²⁸⁴⁷ Interview transcript, OFT Document Reference 11297, page 13.

²⁸⁴⁸ Interview transcript, OFT Document Reference 11297, page 14.

²⁸⁴⁹ Interview transcript, OFT Document Reference 11297, pages 18 and 21.

²⁸⁵⁰ Interview transcript, OFT Document Reference 11297, page 19.

²⁸⁵¹ Interview transcript, OFT Document Reference 11304, page 4.

²⁸⁵² Interview transcript, OFT Document Reference 11298, page 3.

²⁸⁵³ Draft witness statement, OFT Document Reference 0866.

IV.448. NG also confirmed that it was easy to find out who else had been invited to tender, through information gleaned from sub-contractors or through membership of the Nottingham Builder's Guild, which exchanged information about current tenders. Once a competitor had been identified, NG explained that contact would be made by telephone to an estimator *"Have you got this job?" ... "I've been looking for cover". That's it. Arrange to phone again or closer to the time, and that's it'*.²⁸⁵⁴

IV.449. NG confirmed that apart from entering the cover price on the tender sheet, no other record would be kept and *'then within – couple of weeks we'd chuck the documents away or something, and that was it'*.²⁸⁵⁵ NG also explained that when a competitor provided a cover price *'what you want to do as well, you don't want to make it too close that you're asked to do a bill of quantities...because then you're making it more work...what you want to do, you want to come fourth'*.²⁸⁵⁶

John Cawley giving cover prices

IV.450. If a competitor had contacted John Cawley for a cover price, NG explained the way a figure would be arrived at was as follows: *'say you were going in at £53,000, you'd go in at 57. You make it five, six, seven per cent more...You'd just make up a figure'*.²⁸⁵⁷ Again, no records would be kept by him of covers given out. NG said that John Cawley took more covers than it gave out *'because it's not our market any more...and being a small firm we couldn't cope with a lot of these big jobs'*.²⁸⁵⁸

Contemporaneous documents

IV.451. Apart from a tender register, John Cawley stated that no contemporaneous documents were kept by John Cawley. Records of covers taken and given were not retained.

List of companies with whom John Cawley 'have/may have been in communication'

IV.452. John Cawley provided names and telephone numbers of nine companies with whom *'we have/may have been in communication'*.²⁸⁵⁹ This list is as follows:

- [...] [C] [List of x Participant Companies]

²⁸⁵⁴ Interview transcript, OFT Document Reference 11297, page 18.

²⁸⁵⁵ Interview transcript, OFT Document Reference 11297, page 19.

²⁸⁵⁶ Interview transcript, OFT Document Reference 11297, page 20.

²⁸⁵⁷ Interview transcript, OFT Document Reference 11297, pages 19 and 20.

²⁸⁵⁸ Interview transcript, OFT Document Reference 11297, page 19.

²⁸⁵⁹ Statement, OFT Document Reference 0867.

Loach

- IV.453. As part of its leniency application, Loach's legal representatives, Richard Nelson Solicitors (Nelsons), provided a general explanation of its participation in cover pricing.²⁸⁶⁰ The following Loach employees present and past, expanded upon this explanation during interview: Richard Franczak ('RF'), Managing Director and part owner, Andrew Arbon-Davis ('AA'), Chief Estimator and Director, John Rowe ('JR'), Small Works Estimator, and Ken Tyler ('KT'), ex- Marketing Director and part owner until his retirement in 2003.
- IV.454. In its leniency application Loach confirmed that it participated in the giving and receiving of cover prices for tenders dealt with by both its Major Works division and its Small Works division.
- IV.455. Initially the ultimate decision to give or take cover was KT's, and more latterly AA. JR did not have the authority to give or take covers without referral to the appropriate director. When asked to confirm if his was the final decision, KT said, *'Generally, in conjunction with the estimators, and sometimes fellow directors'*. When asked if that was by way of a formal meeting he said, *'Impromptu discussion as well'*.²⁸⁶¹
- IV.456. AA confirmed that *'The decision to take a cover would have been...the marketing director at the time...up to 2003...After 2003 it would have been my decision as a director'*.²⁸⁶²
- IV.457. In order to monitor the performance of the company, records were kept of all the contracts for which Loach tendered. AA explained that the records relating to Major Works were initially maintained by KT, but were discontinued by his successor and not reinstated until 2004/2005. The record of Small Works was maintained throughout by JR, initially under the supervision of KT and more recently by AA.
- IV.458. Loach produced a *'List of Contracts'*²⁸⁶³ in which those tenders involving cover prices were highlighted in pink and in some instances where appropriate, highlighted in blue, a reference to the contractor believed by Loach to be either giving or taking a cover. The list includes both Major and Small Works tenders.

Loach taking cover prices

- IV.459. In order to find out details of who else was competing for a tender, AA said that *'Quite often what would happen is you would get a phone call from subcontractors saying "We're pricing this job for another contractor, can we send you a copy of our quote?" And we'd say, "Yeah, okay, who are you pricing it for?" and they'd tell you who it is and that's how you'd acquire the names that were on the list...'*.²⁸⁶⁴ AA added that they would also occasionally obtain names of competitors from ABI and Glennigans, and *'Builders Conference is another one. You'd get a phone call from, say, the Builders Conference, and they would say, "Have you got such and such a job in to tender?" "Yes/No" If it was a yes, "Oh we've also had it in from X, Y and Z"*.

²⁸⁶⁰ Cover activities report, OFT Document References 4017.

²⁸⁶¹ Interview transcript, OFT Document Reference 11322, Page 2.

²⁸⁶² Interview transcript, OFT Document Reference 11312, page 7.

²⁸⁶³ List of contracts, OFT Document Reference 4026.

²⁸⁶⁴ Interview transcript, OFT Document Reference 11312, page 8.

So that was another way'.²⁸⁶⁵ JR also confirmed that names of competitors would generally be obtained through subcontractors.²⁸⁶⁶

IV.460. KT said *'I would phone a contractor that we knew to be on the list and ask him if he was pricing the job, and if so, could he give us a cover?'*.²⁸⁶⁷ AA confirmed that contact was *'purely telephone. If we were taking a cover we would ring up one of the builders that we would have found out were on the list and would have asked them for help'*.²⁸⁶⁸

IV.461. Loach stated that its record of all contracts for which it tendered *'included [details of] contracts where a cover price had been provided [by a competitor] or submitted [by Loach]'*.²⁸⁶⁹ Loach explained, *'Contracts where a cover is involved sometimes have the word "cover" written against the contract details in the column headed "Note" which tends to record the outcome of the tender. It appears that where the word "cover" appears in the note column, this is an indication that the company has taken, and probably submitted, a cover price [from a competitor]. This is supported by the fact that, generally speaking, there is no budget or margin figure inserted'*.²⁸⁷⁰

IV.462. The *'List of Contracts'*, which was made up of loose pages covering anything from a period of several months to a maximum of a year, was found to contain duplicate entries, which had been altered in certain particulars. An example of this can be seen in the two documents containing the tender for the New Assembly Hall, Seely Church Primary School – 13 June 2001.²⁸⁷¹ The first spreadsheet²⁸⁷² has an entry for the tender with no figures shown under the headings *'Margin'* or *'%'* and with the word *'cover'* under the heading *'Note'*. The second spreadsheet²⁸⁷³ for the school tender contains *'margin'* and *'%'* figures, but no entry under the heading *'Note'*.

IV.463. AA was asked to explain why there were two separate tender spreadsheets containing the different information, one recording a cover price and one with no reference to cover pricing. AA explained that when, prior to the OFT's visit, he had seen the reports that JR had been compiling with the entries *'cover'* and *'©'* recorded, personally he did not think it was the right thing to do, and he instructed JR to remove the references. He said, *'I just didn't think we should be putting "cover" on a list. And then, as obviously the sort of panic set in when we heard about raids elsewhere I asked John to remove any "Cs" that he'd put on the forms. So that's what he did ... the first instruction was to remove the covers purely because I didn't think we should be putting covers on there. The second instruction was to remove the reference to "Cs" down the side as a sort of, if you like, a panic reaction to the investigation that we heard was going on'*.²⁸⁷⁴

²⁸⁶⁵ Interview transcript, OFT Document Reference 11312, page 8.

²⁸⁶⁶ Interview transcript, OFT Document Reference 11313, page 8.

²⁸⁶⁷ Interview transcript, OFT Document Reference 11322, page 5.

²⁸⁶⁸ Interview transcript, OFT Document Reference 11312, page 9.

²⁸⁶⁹ Report, OFT Document Reference 4017, page 3.

²⁸⁷⁰ Report, OFT Document Reference 4017, page 4.

²⁸⁷¹ List of contracts, OFT Document Reference 4026, pages 19 and 41.

²⁸⁷² List of contracts, OFT Document Reference 4026, page 19.

²⁸⁷³ List of contracts, OFT Document Reference 4026, page 41.

²⁸⁷⁴ Interview transcript, OFT Document Reference 11312, page 5.

- IV.464. JR confirmed that he was asked by AA to stop recording references to covers, 'C's etc because *'he told us you [the OFT] were due to visit us and that it would really be inappropriate if, you know, it became known that we did that practice'*.²⁸⁷⁵ JR confirmed that, acting on AA's instructions, he removed any references to cover pricing and produced a selection of new tender spreadsheets.
- IV.465. AA was asked if there was any available documentation in respect of particular tenders where Loach had taken a cover and he said. *'No ... there's no reason to keep it'*.²⁸⁷⁶ Loach confirmed in its leniency application that *'The obtaining or provision of a cover price did not usually result in the creation of any documentation. The essence of the scheme was to save the time otherwise spent on the creation of documentation'*.²⁸⁷⁷ It continued, *'Contracts where a cover is involved sometimes have the word "cover" written against the contract details in the column headed "Note" which tends to record the outcome of the tender. It appears that where the word "cover" appears in the note column, this is an indication that the company has taken, and probably submitted, a cover price. This is supported by the fact that, generally speaking, there is no budget or margin figure inserted'*.²⁸⁷⁸
- IV.466. It was further explained that *'In the column headed "Opposition", the entry of a "(c)" against the name of a competitor indicates that a cover was taken from or received by that particular company. It indicates that [Loach] believes, or discovers subsequently, that the competitor has taken a cover price. It cannot, however, be inferred [from] the fact the word "cover" appears in the note column and that a "(c)" appears against the name of a competitor that Loach took the cover from that competitor. It may well be that the source of the cover was not recorded and that, subsequently, it was discovered that a competitor had taken a cover price also'*.²⁸⁷⁹

Loach giving cover prices

- IV.467. AA stated with regard to the giving of cover prices, *'if somebody phoned up to us they would usually phone up the individual estimator that was pricing it and that individual estimator would say, "Yes, okay, we'll help you out"...it was sort of, if you like, a common place occurrence, and...if you did get the call from somebody asking for assistance, which is usually the way they'd put it, then yes the individual would say "Yes, okay we'll help you out with that"'*.²⁸⁸⁰
- IV.468. AA confirmed that contact was *'purely telephone...if they wanted a cover from us, they would ring us up and ask if we were pricing it and if we could help them out. So it was done by the phone'*.²⁸⁸¹ As noted above in paragraph IV.466, the giving of a cover price was generally recorded in the tender register: *'In the column headed "Opposition", the entry of a "(c)" against the name of a competitor indicates that a cover was taken from or received by that*

²⁸⁷⁵ Interview transcript, OFT Document Reference 11313, page 5.

²⁸⁷⁶ Interview transcript, OFT Document Reference 11312, page 8.

²⁸⁷⁷ Leniency application letter, OFT Document Reference 4017, page 3.

²⁸⁷⁸ Leniency application letter, OFT Document Reference 4017, page 4.

²⁸⁷⁹ Leniency application letter, OFT Document Reference 4017, page 4.

²⁸⁸⁰ Interview transcript, OFT Document Reference 11312, page 7.

²⁸⁸¹ Interview transcript, OFT Document Reference 11312, page 9.

*particular company. It indicates that [Loach] believes, or discovers subsequently, that the competitor has taken a cover price’.*²⁸⁸²

IV.469. Loach also provided to the OFT a list of companies which it believed had been involved in cover pricing activity on tenders in respect of which Loach submitted a tender.²⁸⁸³ This list included the following companies:

- [...] [C] [List of x Participant Companies]

Mansell

IV.470. As part of its leniency application, Mansell’s legal representatives advised that Mansell has 14 regional business units in England.²⁸⁸⁴ They stated that *‘The extent to which a cover price was recorded appears to have varied considerably between the regional business units’.*²⁸⁸⁵ However, there are certain common factors between all of the business units, which the OFT discusses first in this section. The OFT then discusses in more detail the practice of giving and taking of cover prices for each relevant regional business unit in separate sections below.

IV.471. Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.²⁸⁸⁶ They stated that *‘The contact with the other party would normally be effected by an estimator...although the decision to take a cover would normally be made by either the Business Unit Managing Director or the Chief Estimator’.*²⁸⁸⁷ They also stated that *‘Where it is decided to seek a cover price, the MCSL [Mansell] estimator may discover the identity of competing bidders through contact with sub-contractors or may check...sources such as the Builders Conference...to ascertain the identity of other bidders from whom a cover may be taken. If an identified competitor is already known to the estimator and would be considered likely to provide a credible cover price, then this may dictate the choice of provider’.*²⁸⁸⁸

²⁸⁸² Leniency application letter, OFT Document Reference 4017, page 4.

²⁸⁸³ List of companies, OFT Document Reference 4028.

²⁸⁸⁴ Leniency application, OFT Document Reference B0734, page 9.

²⁸⁸⁵ Leniency application, OFT Document Reference B0734, page 16.

²⁸⁸⁶ Leniency application, OFT Document Reference B0734, page 19.

²⁸⁸⁷ Leniency application, OFT Document Reference B0734, page 19.

²⁸⁸⁸ Leniency application, OFT Document Reference B0734, pages 19 and 20.

IV.472. Many of those persons interviewed explained that the purpose of cover pricing was so that clients did not remove them from future tender lists. For example Barry Russ ('BR'), a managing estimator, stated that *'at times, rather than upset them [the client] by not putting a bid in...we on occasions would have...taken a cover, rather than send it back'*.²⁸⁸⁹

IV.473. Many of those persons interviewed in respect of Mansell advised that the exchange of cover prices was carried out via the telephone and not any other medium. For example BR stated *'it was always done by phone, basically, the actual process...was always a phone call'*.²⁸⁹⁰

IV.474. Mansell's legal representatives also stated that *'Typically, the simple existence of a cover received has been recorded on a database for all tenders'*²⁸⁹¹ and that *'In the databases with variation between regional offices, it is possible to ascertain a likely cover price situation from, amongst other things:*

- *the use of a simple "C" in the records or from a price marked next to a competitor's name; or*
- *from the fact that the tender price recorded does not correspond to the usual format of a quoted price; or*
- *the use of Code 3 (North East and North West); or*
- *the use of a precise tender figure (Western); or*
- *historically the use of Code 13 from the AS400 Database; or*
- *a grade "C" in the Database for the North East'*

For covers given, this may be apparent from a separate Tender Record Document, which may record a "C" against the name of the company receiving the cover'.²⁸⁹²

IV.475. Mansell's legal representatives also provided to the OFT a list of all competitors whom Mansell knows or believes have provided it with cover prices²⁸⁹³, which includes:

- [...] [C] [List of x Participant Companies]

²⁸⁸⁹ Interview transcript, OFT Document Reference 11516, page 7.

²⁸⁹⁰ Interview transcript, OFT Document Reference 11516, page 12.

²⁸⁹¹ Leniency application, OFT Document Reference B0734, page 16.

²⁸⁹² Leniency application, OFT Document Reference B0734, page 18.

²⁸⁹³ Leniency application, OFT Document Reference B0734, pages 29 to 33.

[...] [C]

IV.476. Mansell's legal representatives stated that *'The Executive Board members mistakenly believed that cover pricing had ceased within MCSL. At levels below (starting with Business Unit Managing Director) there appears to have been extensive awareness of the practice'*.²⁸⁹⁴ In interview Robert Walker ('RW'), Group Commercial Director of Mansell and member of the Executive Board²⁸⁹⁵, stated, when asked about Mansell's involvement in cover pricing around the time of the coming into force of the Competition Act, that *'...it would have been amazing if the business hadn't have been...'* and he further stated in relation to cover pricing after that time that *'...there are odd occasions during the process where it became obvious that there were still the odd things going through...'*.²⁸⁹⁶

Compensation payments

IV.477. As part of its leniency application, Mansell's legal representatives informed the OFT that Mansell had been involved in arrangements where the winning contractor, on a particular tender, would reimburse the unsuccessful contractor a certain sum of money. The details of these arrangements are set out in the relevant Infringement sections – see table following paragraph IV.147 above.

²⁸⁹⁴ Leniency application, OFT Document Reference B0734, page 24.

²⁸⁹⁵ Divisional structure diagram, OFT Document Reference B2858, page 1.

²⁸⁹⁶ Interview transcript, OFT Document Reference 11518, page 9.

North East Region ('NER')

- IV.478. The NER consisted of two offices in Gateshead. In interview Omer Asir ('OA'), a managing estimator²⁸⁹⁷ in the NER, stated *'the decision would be made by Bill... [Aitchison, the Managing Director in the NER]'*²⁸⁹⁸ as to whether a tender was attractive and that Mansell would price it. When asked how he would find details of the competition OA stated *'you would have a number of named suppliers and sub contractors and you'd generally get that information from them'* and *'you also used to get some information from the Builders' Conference...'*²⁸⁹⁹
- IV.479. In respect of the process of the exchange of cover prices, Mansell's legal representatives advised that *'Typically covers have been taken or given by Mr Asir. Approval for a cover price had to be obtained from Mr Aitchison...'*²⁹⁰⁰ In interview OA, when asked whether it was Bill Aitchison who had the final decision to give or take a cover price, stated *'Yes...Obviously his decision was influenced by...the pressure on the department which he would seek advice [on] from me.'*²⁹⁰¹ OA stated *'if you were told that you needed to take assistance on a project, the names were sourced through, named subcontractors, named suppliers, and then a phone call would be made and generally you would find that was fairly late on in the tender process, i.e. within...maybe's a week to a few days before the tender was due in.'*²⁹⁰²
- IV.480. As part of its leniency application, Mansell's legal representatives provided the North East tender log²⁹⁰³ and advised *'where a cover was taken by the business unit, this is shown by the letter 'c' next to the tender details in a list of all tenders kept by Omer Asir.'*²⁹⁰⁴ OA, when asked what the 'C's on the tender log indicated, stated *'they indicate covers that were taken.'*²⁹⁰⁵

Thames Valley Region ('TVR')

- IV.481. The TVR consisted of one office in Slough. In interview BR, a managing estimator in the TVR, stated that *'...it would tend to be the business unit managers and also the MD...'*²⁹⁰⁶ who decided whether a tender was attractive and that Mansell would price it. BR explained that details of the competition were available from Builders' Conference and also from the type of work, *'certain types of work tend to have certain types of contractor specialists.'*²⁹⁰⁷ BR further stated that *'in other cases, it can be through the grapevine, effectively word of mouth. "Oh, did you know that so and so is tendering for that one?". Sometimes you can find out that way.'*²⁹⁰⁸

²⁸⁹⁷ Omer Asir was a Senior Estimator in the NER from 2000 – 2006 and then became managing estimator. Interview transcript, OFT Document Reference 11509, page 2.

²⁸⁹⁸ Interview transcript, OFT Document Reference 11509, page 3.

²⁸⁹⁹ Interview transcript, OFT Document Reference 11509, page 4.

²⁹⁰⁰ Summary of findings, OFT Document Reference B0925, page 2.

²⁹⁰¹ Interview transcript, OFT Document Reference 11509, page 10.

²⁹⁰² Interview transcript, OFT Document Reference 11509, page 9.

²⁹⁰³ Tender register, OFT Document Reference B0926.

²⁹⁰⁴ Summary of findings, OFT Document Reference B0925, page 2.

²⁹⁰⁵ Interview transcript, OFT Document Reference 11509, page 6.

²⁹⁰⁶ Interview transcript, OFT Document Reference 11516, page 5.

²⁹⁰⁷ Interview transcript, OFT Document Reference 11516, page 7.

²⁹⁰⁸ Interview transcript, OFT Document Reference 11516, page 8.

TVR taking cover prices

- IV.482. In respect of the process of the exchange of cover prices BR stated the decision to take a cover price was made by *'...either the MD or...the business...manager...'*²⁹⁰⁹ and was made *'...within a few days of...the tender receipt...'*²⁹¹⁰ BR explained *'it would mainly come from a call, either from myself, or if I was busy I'd get...someone else to ring up and see who they could find. And then I would speak to them and...arrange the process.'*²⁹¹¹ If a cover price was being taken BR advised that he was always aware of this.²⁹¹²
- IV.483. There would then generally be a second contact just before the deadline for tender return. BR stated *'...once you'd made an approach and...contractor X said, "yes I'll...give you a cover, I'll give you a ring at such and such a time, the day before or on the day"...'.*²⁹¹³
- IV.484. As part of its leniency application, Mansell's legal representatives provided BR's workload reports for major projects²⁹¹⁴ and special projects headed 'Tender Results Analysis'²⁹¹⁵, also referred to by Mansell as the annual workload sheets. In interview BR stated *'I tended to keep...the annual workload sheets...'*²⁹¹⁶ and that *'...where we actually tendered a job, I would record in the bid column our bid...'* and *'in most cases where we took a cover, I would tend to put it in the net column, so that it was written short, effectively...'*²⁹¹⁷ BR explained that *'there's a remarks column, which basically gives such information as whether a contract was awarded, whether it was lost and if, if we'd taken a cover at that point...who we'd taken the cover from...'*²⁹¹⁸ BR stated *'we used to record who we had, [taken cover from] partly for my own purpose, so I could keep a record of what, who I had got...one from and I would put that down on the results sheet...'*²⁹¹⁹
- IV.485. BR used brackets to show a cover price had been taken and stated that *'my way of parentheses was of saying that was the company that helped us out, effectively.'*²⁹²⁰ When asked when he would complete the workload reports BR stated *'probably after the...tender had gone in'* and BR went on to explain *'if I knew in advance, and it was a week or two earlier that we were going to be getting some help from such and such, I may well have put their name in, just to say...this is the company that say they're going to help us.'*²⁹²¹ In terms of completing the workload reports BR explained how he would complete the columns headed 'Our Bid': *'I tended to not put it in the first bid column, because...although it effectively was a bid it was a cover bid...so I didn't tend to put it in there.'*²⁹²² When asked whether gaps in the margin and percentage

²⁹⁰⁹ Interview transcript, OFT Document Reference 11516, page 19.

²⁹¹⁰ Interview transcript, OFT Document Reference 11516, page 13.

²⁹¹¹ Interview transcript, OFT Document Reference 11516, page 12.

²⁹¹² Interview transcript, OFT Document Reference 11516, page 21.

²⁹¹³ Interview transcript, OFT Document Reference 11516, page 10.

²⁹¹⁴ At one time known as 'Prime Projects'.

²⁹¹⁵ Spreadsheet, OFT Document Reference B3539, page 4.

²⁹¹⁶ Interview transcript, OFT Document Reference 11516, page 8.

²⁹¹⁷ Interview transcript, OFT Document Reference 11516, page 9.

²⁹¹⁸ Interview transcript, OFT Document Reference 11516, page 9.

²⁹¹⁹ Interview transcript, OFT Document Reference 11516, page 14.

²⁹²⁰ Interview transcript, OFT Document Reference 11516, page 14.

²⁹²¹ Interview transcript, OFT Document Reference 11516, page 20.

²⁹²² Interview transcript, OFT Document Reference 11516, page 20.

columns were another indication of a cover price BR stated *'that's right...that would be another indication'*.²⁹²³

TVR giving cover prices

IV.486. In respect of the process of giving a cover price to a competitor BR stated *'...I'd just take the name of who, who we need to contact, and their phone number...and then just write that down somewhere and ring them back nearer the time. It would probably be the day before the tender went in, but quite often it would be the morning that the bid was in at 12'*.²⁹²⁴ BR, when asked when management would be made aware of the request for a cover price, advised that they might not be aware until the tender adjudication. BR stated *'during the week you might bump into them [the management] and say, oh, by the way, so and so has just rung...for a cover and they'd say oh, alright, okay, fine. But other than that...we'd just say...such and such has approached us for a, a bid and...we've agreed and...leave it at that, really'*.²⁹²⁵

IV.487. In terms of arriving at a figure to give to a competitor BR stated *'it would tend to be left to myself...I'd sit with the estimators and we'd just have a quick look at the bid... It depends on the build-up of the bid...but in most cases we...would put a certain percentage on top and just make sure that they were sitting away from us'*.²⁹²⁶

IV.488. BR, when asked how he would record giving a cover price to a competitor, stated *' [I] Didn't tend to put the figure down on the workload sheets...in most cases I would have just written the bid figure on the tender summary sheet, because that's effectively what I would have in front of me when they rang up'*. BR continued *'Or when I rang them, to say...I think you better go in no lower than, which is what we tended to do, no lower than such and such. And then they could add on whatever they wanted to'*.²⁹²⁷

Eastern Region

IV.489. The Eastern Region consisted of three offices in Nottingham, Derby and Leeds. In interview Kenneth Lockwood ('KL'), who was a Chief Estimator²⁹²⁸ in the Nottingham office, stated that the decision whether to price a tender *'was decided on the Monday morning meeting'*.²⁹²⁹ KL went on to explain *'...myself and the marketing...manager, we basically ran the Monday morning meeting. And...if the MD was on holiday...that would maybe be where [the] commercial manager or director above our MD would come in...'*.²⁹³⁰

Eastern Region taking cover prices

IV.490. In interview Paul Winson ('PW'), a senior estimator²⁹³¹ in the Nottingham office, when asked how he would find details of the competition, stated *'Generally we*

²⁹²³ Interview transcript, OFT Document Reference 11516, page 21.

²⁹²⁴ Interview transcript, OFT Document Reference 11516, pages 14 and 15.

²⁹²⁵ Interview transcript, OFT Document Reference 11516, page 15.

²⁹²⁶ Interview transcript, OFT Document Reference 11516, page 15.

²⁹²⁷ Interview transcript, OFT Document Reference 11516, page 14.

²⁹²⁸ Kenneth Lockwood left Mansell in November 2004.

²⁹²⁹ Interview transcript, OFT Document Reference 11511, page 4.

²⁹³⁰ Interview transcript, OFT Document Reference 11511, page 5.

²⁹³¹ Paul Winson joined Mansell, as a Senior Estimator, in November 2003.

would find it out from sub contractors'.²⁹³² When asked if the competition was recorded anywhere else PW stated 'we'd got it on the Lotus Notes database, there's...[a] section for competition, and...if you found out that company A was pricing and just put it in the records'.²⁹³³

IV.491. In respect of the process of taking a cover price from a competitor KL stated '*...I could pick the phone up...certainly in Nottingham and speak to opposite numbers there and say we're not going to process this job, we're going to go for a cover on it. I would certainly look at who I was taking a cover from because...I always wanted to be in the lowest three, because clients, if you weren't in the lowest three the next job that came out the client wouldn't invite you*'.²⁹³⁴ KL explained he would decide which competitor to take a cover price from and stated '*...I wouldn't expect my senior to do that either, so I would make the phone call and I would receive it. Maybe if I wasn't going to be in I would say, well, when you ring the figure through can you ask for such and such a person...we cleared it through the MD and then I would sign it as chief estimator*'.²⁹³⁵ In terms of his involvement in taking cover prices PW explained '*...I'm not at that level who would make the contact*'²⁹³⁶ but that there may have been circumstances where the Chief Estimator would ask him to deal with it.²⁹³⁷

IV.492. When asked when in the tender period a request would be made for a cover price KL stated '*I wouldn't approach right at the beginning, I'd wait till Builder's Conference came back with the list of who was tendering...it's not something you'd just band around and say I'd like a cover price please...I thought it was something that was to be kept, obviously kept a low profile*'.²⁹³⁸ He added '*I've never ever said to someone...in the open space...we're taking covers. I just find that hard to believe people do that...you could probably say well I should I have done that but I didn't ... it's something I didn't ever refer to...*'.²⁹³⁹ In terms of who made the decision in the Nottingham office to take a cover price from a competitor KL stated '*it was the MDs decision...we'd decide it on a Monday morning not to go for something*'.²⁹⁴⁰

IV.493. In interview KL, when asked how the taking of a cover price would be recorded, stated '*...if we'd taken a cover I mean it was marked on, on my list of who were not pricing something, and that would be recorded...that job would keep...appear[ing] ...on that Monday morning list, but it would appear as a point two*' and KL confirmed that point two would signify a cover.²⁹⁴¹

IV.494. In terms of the cover price provided by a competitor KL stated '*If we were given a cover figure to go in at then we, we use that figure, we didn't change it...*'.²⁹⁴²

²⁹³² Interview transcript, OFT Document Reference 11508, page 4.

²⁹³³ Interview transcript, OFT Document Reference 11508, page 4.

²⁹³⁴ Interview transcript, OFT Document Reference 11511, page 13.

²⁹³⁵ Interview transcript, OFT Document Reference 11511, page 14.

²⁹³⁶ Interview transcript, OFT Document Reference 11508, page 6.

²⁹³⁷ Interview transcript, OFT Document Reference 11508, page 7.

²⁹³⁸ Interview transcript, OFT Document Reference 11511, page 13.

²⁹³⁹ Interview transcript, OFT Document Reference 11511, page 8.

²⁹⁴⁰ Interview transcript, OFT Document Reference 11511, page 13.

²⁹⁴¹ Interview transcript, OFT Document Reference 11511, pages 13 and 14.

²⁹⁴² Interview transcript, OFT Document Reference 11511, page 18.

Eastern Region giving cover prices

- IV.495. In respect of Mansell's process if a competitor requested a cover price PW stated *'Then you just...put them through to the chief estimator' and 'They'd make a decision on how to deal with it'*.²⁹⁴³ KL confirmed that it would be his decision as to whether to give a cover price, stating *'Yeah, again it would be reported...on the Monday morning meeting I would show how many were tendering for it so there's a column that we had which [would] show how many people are really tendering for it. I mean if we ended up with five people asking us for a cover and there were six tendering, then that would be, you know, your best of both worlds wouldn't it'*.²⁹⁴⁴
- IV.496. In terms of arriving at a figure to give to a competitor PW explained that it would be the decision of the Chief Estimator, stating *'he'd be involved in the adjudication anyway, so he'd...have an understanding as to how competitive you...were being'*.²⁹⁴⁵ PW explained that he might contact a competitor with the cover price, stating *'well, yes, if you'd been asked to, yes'*.²⁹⁴⁶ KL stated *'...I would expect to give a cover out that was realistic to the value of the job, I suppose really it depends on who it is...I'd probably put them...anywhere between, you know, three and five percent away from you, sometimes you might want to have somebody very close to you, sometimes you might want them further away because...there was a lot of scope in the document, if you'd got an idle quantity surveyor who'd done very little on it then you'd have opportunity to capitalise on the document. So you wouldn't want somebody too close to you because your price would move up a little bit in negotiation'*.²⁹⁴⁷

London Region

- IV.497. The London region operated from Mansell's City Road office. Mansell's legal advisers stated that this *'is the base for 3 separate and autonomous business units: (i) Major Works... (ii) Specialised Works...and (iii) Special Projects'*.²⁹⁴⁸ In interview Peter Goodbun ('PG'), who was the Estimating Manager of the City Road office²⁹⁴⁹, stated that when deciding whether to price a tender *'I work through the documentation, to make sure it fits the...criteria of work that we're looking for...Then I will talk to the...managing director...and then we will make the decision from there as to whether we proceed or not'*.²⁹⁵⁰

London Region taking cover prices

- IV.498. In interview PG, when asked how he would find details of the competition, stated *'all the jobs are reported to Builders' Conference'* and confirmed that Mansell would report to the Builders' Conference that it was tendering and would check to see which other contractors had reported they were tendering.²⁹⁵¹

²⁹⁴³ Interview transcript, OFT Document Reference 11508, page 7.

²⁹⁴⁴ Interview transcript, OFT Document Reference 11511, pages 14 and 15.

²⁹⁴⁵ Interview transcript, OFT Document Reference 11508, page 7.

²⁹⁴⁶ Interview transcript, OFT Document Reference 11508, page 7.

²⁹⁴⁷ Interview transcript, OFT Document Reference 11511, page 15.

²⁹⁴⁸ City Road Office summary, OFT Document Reference B0867, page 1.

²⁹⁴⁹ Peter Goodbun has worked at Mansell for 35 years, becoming Estimating Manager in 1985.

²⁹⁵⁰ Interview transcript, OFT Document Reference 11507, page 3.

²⁹⁵¹ Interview transcript, OFT Document Reference 11507, page 5.

- IV.499. In respect of the process of taking a cover price from a competitor Mansell's legal representatives stated *'The estimating team would either telephone around other contractors if they were known to be bidding for the same tender or would refer to the information held by the Builders' Conference. Choice of whom would be approached would largely depend on personal contacts or knowledge of the company in question'*.²⁹⁵² PG stated *'we would ring up one of our competitors, to enquire as to whether they are pricing the job...we [would] then inform them that we were unable to [price the job] and would they give us a figure that we could go in on, which would obviously be in excess of theirs'*.²⁹⁵³
- IV.500. When asked when in the tender period a request would be made for a cover price PG stated it would be *'very, very close to the submission [date]'* and explained *'we would invariably be seen to be active. We'd do a site visit and probably raise a few queries, so as to give the appearance that we were active when we weren't necessarily active. And invariably ring up...probably in the last 48 hours of the tender period...or even later, to whoever we've decided to, receive that figure [from]'*.²⁹⁵⁴ Mansell's legal representatives stated *'The decision to take a cover may be made at the outset...or later in the process if it is found that the contract is not as attractive as first thought or there are capacity constraints or other issues'*.²⁹⁵⁵
- IV.501. In terms of who made the decision in the City Road office to take a cover price from a competitor, Mansell's legal representatives stated *'Whilst responsibility for making contact with competitors to obtain a cover price is given to the estimating team, the decision whether or not to seek a cover price would usually involve Peter Goodbun, the estimating manager, as well as the relevant managing director'*.²⁹⁵⁶ In interview PG stated *'I may recommend it [that a cover price be taken] ...but the decision of whether to proceed or not proceed ultimately...relied on the bidding director'*.²⁹⁵⁷
- IV.502. In interview PG, when asked if the taking of a cover price would be recorded, stated *'No'*.²⁹⁵⁸ In terms of the actual cover price provided by a competitor PG stated *'I mean invariably that wasn't even recorded on the computer either'*.²⁹⁵⁹

Mowlem²⁹⁶⁰

- IV.503. As part of its leniency application, Carillion's legal representatives provided summaries of the process of cover pricing, on a regional basis, in the form of statements made by current employees. Also as part of its leniency application, Carillion made available current employees and contacted ex-employees to be interviewed. During these voluntary interviews the individuals were asked to give an explanation of Mowlem's involvement in cover pricing.

²⁹⁵² City Road Office summary, OFT Document Reference B0867, page 4.

²⁹⁵³ Interview transcript, OFT Document Reference 11507, page 7.

²⁹⁵⁴ Interview transcript, OFT Document Reference 11507, page 8.

²⁹⁵⁵ City Road Office summary, OFT Document Reference B0867, page 4.

²⁹⁵⁶ City Road Office summary, OFT Document Reference B0867, page 4.

²⁹⁵⁷ Interview transcript, OFT Document Reference 11507, page 9.

²⁹⁵⁸ Interview transcript, OFT Document Reference 11507, page 8.

²⁹⁵⁹ Interview transcript, OFT Document Reference 11507, page 9.

²⁹⁶⁰ Mowlem plc was acquired by Carillion plc in 2006, see paragraph II.288 of the Factual Background section above.

- IV.504. The OFT discusses the practice of giving and taking of cover prices for each related region in separate sections below.
- IV.505. Many of those persons interviewed explained that the purpose of cover pricing was so that clients did not remove them from future tender lists. Many of those persons interviewed in respect of Mowlem also advised that the exchange of cover prices was carried out via the telephone and not by any other medium.

East Region – Gateshead office

- IV.506. The East Region consisted of three offices in Nottingham, Leeds and Gateshead. In interview, Ian Parsons ('IP'), a senior estimator at Carillion in the Gateshead office, when asked whose decision it would be as to whether the Gateshead office priced a tender, stated *'the final say would come down to, Martin [Nunn], the...[divisional] director'*.²⁹⁶¹ When asked how he would find details of the competition IP stated *'a lot of the times the subcontractors let us know...who's on the list'*.²⁹⁶² In terms of recording the information in respect of competition IP stated *'if we find out who's tendering, we'll put the competition names in there [the tender register]'*²⁹⁶³ and when asked if the competition was recorded anywhere else IP stated *'Yeah, the front sheet of the...prelim book. It's actually the second sheet, the front sheet states the tender details. We would fill that in day one when it comes through the door...The second form is a tender settlement form which we take in at the end of the tender process...and we have a column in, in the left hand side of that form which says 'Competition'...And if we if we find out, we list them, if we don't, we don't bother'*.²⁹⁶⁴
- IV.507. When asked about the reasons for cover pricing IP stated *'the reasons for cover pricing is time, if...you're running out of time and you just physically can't get a tender in...and you don't want to upset the client'*.²⁹⁶⁵ As part of its leniency application, Emmanuel Marion Nunn²⁹⁶⁶, Divisional Director for the East Region, stated *'There would frequently be occasions when a supplier [contractor] would know it would not be in a position to execute a contract if it won the tender because of other commitments. Alternatively, its estimating team might simply not have time to prepare the tender because of other work. The supplier would be conscious...that not putting in a tender might alienate a regular customer and lead to the supplier being dropped off future tender lists. It was as a result of these factors that suppliers regularly asked for a so-called "cover price"'*.²⁹⁶⁷
- IV.508. In respect of the process of giving a cover price to a competitor IP stated *'you would receive a telephone call from a...company that possibly wanted a cover and they would ask to speak to the estimator dealing with the tender...more often enough we'd check with the...senior managing estimator or whoever just to make sure things were okay and...you would arrange to ring him [the other*

²⁹⁶¹ Interview transcript, OFT Document Reference 12745, page 3.

²⁹⁶² Interview transcript, OFT Document Reference 12745, page 5.

²⁹⁶³ Interview transcript, OFT Document Reference 12745, page 6.

²⁹⁶⁴ Interview transcript, OFT Document Reference 12745, page 7.

²⁹⁶⁵ Interview transcript, OFT Document Reference 12745, pages 7 and 8.

²⁹⁶⁶ Witness statement, OFT Document Reference B1770, page 1. Known as Martin Nunn, became Divisional Director in April 2005, prior to this was Regional Director for the North East Region.

²⁹⁶⁷ Witness statement, OFT Document Reference B1770, page 1.

contractor] *back when you had a price*'.²⁹⁶⁸ When asked when in the tender period a request would be made for a cover price IP stated '*...it tended to be...towards the end. I mean, some people left it until the night before*'.²⁹⁶⁹ In terms of who made the decision in the Gateshead office to give a cover price to a competitor IP stated '*I would check everything with Alan [Morton]²⁹⁷⁰ to make sure because he's the manager of the department*'.²⁹⁷¹

IV.509. When asked how a cover price, to give to a competitor, would be calculated IP stated '*we'll just add a percentage on...we wouldn't round it up...we'd just probably add 5% and take a few, you know, hundredths of a percent off...*'.²⁹⁷²

IV.510. When asked how the giving of a cover price would be recorded, IP stated '*...we would just put a little 'C' against the person that was [taking a cover price]...so we would have the list of the competition, if we had the list, we would just put a 'C' on that form...*'.²⁹⁷³ The form IP was referring to is the second page of a document provided as part of Carillion's leniency application, headed 'Tender details and summary'.²⁹⁷⁴

East Region – Nottingham office

IV.511. In interview, Karl Chatburn ('KC'), an Estimating Manager²⁹⁷⁵ at Mowlem in the Nottingham office, when asked whose decision it would be as to whether the Nottingham office priced a tender, stated '*It would be a decision, really, between all these senior managers, so, it would be myself, the commercial manager, probably a contracts manager, and the divisional director*'.²⁹⁷⁶ When asked how he would find details of the competition KC stated '*Basically that's through, when you send out sub contract enquiries, material enquiries. A lot of the...main contractors will go to...the same sub contractors, and you get relationships with these sub contractors, and you...can just talk to them*'.²⁹⁷⁷ When asked if the information in respect of competition was recorded, KC stated '*...I would probably record that in my sort of notes book that you'd...keep*'.²⁹⁷⁸

IV.512. In respect of the process of the exchange of cover prices KC stated the decision to take a cover price was made by '*The regional director ... They ... would come to me and basically say...I don't want to take this tender any further*'.²⁹⁷⁹ When asked about the process of taking a cover price, KC stated '*You...would basically phone up the company that you would think to be the most, who would be the most competitive, if you wanted to come close. Speak to their estimating department, and ask...them for help*'. In terms of the timing of a request for a cover price, KC stated '*it all depends when you take the decision to take a cover...if you take it right at the start of the tender*

²⁹⁶⁸ Interview transcript, OFT Document Reference 12745, page 8.

²⁹⁶⁹ Interview transcript, OFT Document Reference 12745, page 9.

²⁹⁷⁰ Alan Morton is the Managing Estimator in the Gateshead office.

²⁹⁷¹ Interview transcript, OFT Document Reference 12745, pages 8 and 9.

²⁹⁷² Interview transcript, OFT Document Reference 12745, page 9.

²⁹⁷³ Interview transcript, OFT Document Reference 12745, page 9.

²⁹⁷⁴ Example of document headed 'Tender Details and Summary', OFT Document Reference B1749.

²⁹⁷⁵ Karl Chatburn was Estimating Manager from July 2003 to October 2006.

²⁹⁷⁶ Interview transcript, OFT Document Reference 12744, page 2.

²⁹⁷⁷ Interview transcript, OFT Document Reference 12744, page 4.

²⁹⁷⁸ Interview transcript, OFT Document Reference 12744, page 5.

²⁹⁷⁹ Interview transcript, OFT Document Reference 12744, page 7.

period...then you might...make it earlier on in the...tender process. But there might be circumstances where you...do originally intend to price the job, and then get towards the end of the tender period, and...there's a realisation within the senior management that actually we don't need that job, so it...might be a late decision'.²⁹⁸⁰ KC explained that there was not a standard way of recording when a cover price had been taken.²⁹⁸¹

South East Region – West Malling office

IV.513. In interview, Trevor Puttick ('TP'), a Chief Estimator²⁹⁸² at Mowlem in the West Malling office, when asked whose decision it would be as to whether the West Malling office priced a tender, stated *'every week there was a meeting called...the contracts managers meeting, and [at] that we would go through the tender list, and, myself, the director and sometimes the contracts manager would decide which jobs would be the ones we would sooner go for'.²⁹⁸³ When asked how he would find details of the competition TP stated *'...there's organisations, the Builder's Conference for example, were constantly on the phone to you saying oh, are you in for such and such a job?...We were a member of the Builder's Conference as Mowlem's...I would regularly get through in the post lists of jobs with the contractors on them and then the chief estimator's name and contact numbers'.²⁹⁸⁴ In interview, Stephen Diamond ('SD'), a senior estimator²⁹⁸⁵ at Mowlem in the West Malling office, stated *'...the simplest way was the client used to tell you who you are up against...then when you were doing the price, you'd find out from, people that you were going to for prices, maybe named suppliers or subcontractors, would just tell you who else they're...quoting'.²⁹⁸⁶ When asked if the information in respect of competition was recorded, TP stated *'...when we did the tender review pack...it had a little slot there competition if known, I think it said. So you would write it down when you did your tender review pack'.²⁹⁸⁷****

IV.514. When asked about the process of giving a cover price, SD stated *'...the day before it goes in, you get a call its one of your competitors...[and] for a variety of reasons from estimators gone sick to they can't finish the job for whatever reason...They want...you to help them out, and generally you say yeah, okay, and then you just, gave them a figure that was a bit more than your figure'.²⁹⁸⁸ TP explained that he would usually receive such calls and stated *'Sometimes it went to the director, sometimes it would have gone to Steve or somebody else, but as my name was the contact on the Builder's Conference, largely it came to me'.²⁹⁸⁹ When asked when in the tender period a request would be made for a cover price, SD stated *'...they would ring you up the day before it's due in. It would be very late in the process'.²⁹⁹⁰ In terms of who made the decision in the West Malling office to give a cover price to a competitor, TP stated *'I principle****

²⁹⁸⁰ Interview transcript, OFT Document Reference 12744, page 7.

²⁹⁸¹ Interview transcript, OFT Document Reference 12744, page 8.

²⁹⁸² Trevor Puttick joined Mowlem in March 1997 and left in November 2003.

²⁹⁸³ Interview transcript, OFT Document Reference 12749, page 4.

²⁹⁸⁴ Interview transcript, OFT Document Reference 12749, page 5.

²⁹⁸⁵ Stephen Diamond worked at Mowlem for 10 years, leaving in approximately 2004.

²⁹⁸⁶ Interview transcript, OFT Document Reference 12743, page 4.

²⁹⁸⁷ Interview transcript, OFT Document Reference 12749, page 5.

²⁹⁸⁸ Interview transcript, OFT Document Reference 12743, page 7.

²⁹⁸⁹ Interview transcript, OFT Document Reference 12749, page 11.

²⁹⁹⁰ Interview transcript, OFT Document Reference 12743, page 5.

[sic] would, subject to sign off or agreement from the director in charge at the time'.²⁹⁹¹

IV.515. When asked how a cover price to give to a competitor would be calculated, TP stated *'we'd have the tender review meeting of our own, tender sum, and then at the end of that there would be a discussion around the table with the relevant director...the estimator, myself and...the contracts manager, if he was there, of what level of a figure to give, and that was often noted on the tender review form as well'*.²⁹⁹² SD stated *'when we had our firm price, then we'd ring them and say, I'd add a bit on and then say if you went over this price, you'd be, it would be okay, it would be enough, [you] wouldn't be in the frame for the job'*.²⁹⁹³ When asked whether the giving of a cover price would be recorded, SD stated *'I wouldn't, no'*.²⁹⁹⁴

IV.516. In its response to the Statement, Carillion stated that *'Mowlem does not contest that certain employees (and/or former employees) participated in each of the three Relevant ... Infringements nor does it contest its liability under the Chapter 1 prohibition...'*.²⁹⁹⁵

P Waller

IV.517. As part of its leniency application, P Waller provided a general explanation of its participation in cover pricing.²⁹⁹⁶ Two of the directors of P Waller expanded upon this explanation during interview: Philip Waller ('PW'), Managing Director, and Hilary Jane Waller ('JW'), Director and Company Secretary. P Waller specialised in general contracting for commercially based clients, health authorities, local authorities, universities and architects, and has completed projects to the value of [...]C], whilst being capable of taking contracts up to [...]C]. P Waller was rarely involved in domestic work.

IV.518. In its leniency application P Waller confirmed that it participated in both the giving and taking of cover prices: *'We have no defence that we were involved in giving and accepting cover prices on some tenders. This never advanced beyond giving/accepting assistance on projects that were not required for various reasons, or because deadlines could not be achieved'*.²⁹⁹⁷ PW said that as Managing Director it was his ultimate responsibility to decide if P Waller wanted to win the work or not, unless there were any unusual circumstances when the decision would be discussed. *'Mostly it's myself, but yes if there are doubtful areas then the surveyors and the contracts manager are brought into the discussion'*.²⁹⁹⁸ PW added that he made the decision on whether to give or take a cover price.²⁹⁹⁹

²⁹⁹¹ Interview transcript, OFT Document Reference 12749, page 11.

²⁹⁹² Interview transcript, OFT Document Reference 12749, page 11.

²⁹⁹³ Interview transcript, OFT Document Reference 12743, page 8.

²⁹⁹⁴ Interview transcript, OFT Document Reference 12743, page 8.

²⁹⁹⁵ Written representations of Carillion, 27 June 2008, paragraph 1.4.

²⁹⁹⁶ Leniency application letter, OFT Document Reference 4034.

²⁹⁹⁷ Leniency application letter, OFT Document Reference 4034, page 1.

²⁹⁹⁸ Interview transcript, OFT Document Reference 6367, page 3.

²⁹⁹⁹ Interview transcript, OFT Document Reference 6367, page 8.

IV.519. P Waller provided with its leniency application lists of tenders in which it had been actively involved in cover pricing.³⁰⁰⁰ This information was based upon the recollections of PW and JW. P Waller subsequently produced an additional list of tenders in which it had taken cover prices.³⁰⁰¹

P Waller taking cover prices

IV.520. PW confirmed that he carried out all the estimating duties for P Waller, but if the decision was that P Waller did not want or could not accommodate a tender then a cover would be sought. The tracing of other contractors on the tender list would be dealt with by JW. *'Yes, if I've decided that we're going to take a cover I would leave the admin of it to Jane'*.³⁰⁰² JW confirmed that *'He [PW] would ask me to get a cover, yes'*.³⁰⁰³ PW said that they would ask *'various merchants'* who else was quoting.³⁰⁰⁴

IV.521. JW would make telephone contact with companies likely to be on the tender list until she discovered a company which confirmed that it was submitting a tender price and which was willing to give P Waller a cover. PW said *'she would ring them up, get the contact for the price'*.³⁰⁰⁵

IV.522. There are few documentary records kept of those tenders involving the receipt of a cover or of those tenders P Waller genuinely priced, but lost. PW said that *'if we took a cover we had no interest in the contract it would be kept for a month maybe, but then we would literally destroy the documents'*.³⁰⁰⁶ The OFT is therefore reliant upon the contents of desk diaries maintained by PW and JW and a small number of *'Tender Book Note Sheets'*³⁰⁰⁷ kept by JW.

IV.523. JW's diaries contain regular references in note form to the fact that P Waller was seeking a cover for a specific tender. The entry would refer to the name of the tender, the company supplying the cover, and in some cases a contact name and telephone number e.g. *'Ring Jeff at Hill Bros re cover for Robert Mellor School 10 am [...] [C]'*.³⁰⁰⁸ The entry was shown either on the day the tender was due to be submitted or the day preceding it.

IV.524. JW confirmed that it was her habit to place a tick alongside any entry in her diaries when the appropriate action had been taken or it had been completed/accomplished.³⁰⁰⁹

IV.525. The *'Tender Book Note Sheets'*³⁰¹⁰ were used by JW when securing a cover price. They consist of loose A4 sheets of paper ruled into columns with the names of contractors and telephone numbers listed down the left hand side of the page. The rest of the page is divided into five columns each headed with a tender name. As each contractor was contacted by JW, a cross would be

³⁰⁰⁰ Spreadsheet and schedule, OFT Document Reference 4035 and 4036.

³⁰⁰¹ List of tenders, OFT Document Reference 4507.

³⁰⁰² Interview transcript, OFT Document Reference 6367, page 13.

³⁰⁰³ Interview transcript, OFT Document Reference 6366, page 3.

³⁰⁰⁴ Interview transcript, OFT Document Reference 6367, page 4.

³⁰⁰⁵ Interview transcript, OFT Document Reference 6367, page 13.

³⁰⁰⁶ Interview transcript, OFT Document Reference 13285, page 3.

³⁰⁰⁷ Tender sheets, OFT Document Reference 3610.

³⁰⁰⁸ Diary, OFT Document Reference 3622, page 111.

³⁰⁰⁹ Interview transcript, OFT Document Reference 6366, page 4.

³⁰¹⁰ Tender sheets, OFT Document Reference 3610.

inserted opposite their name until one was found who was willing to supply a cover, then either a tick or a name would be inserted opposite the company.

P Waller giving cover prices

IV.526. In addition to the list of covers received referred to in paragraph IV.519 above, P Waller provided a list of covers that it had provided to other contractors³⁰¹¹, naming the tender, tender date, contact and company and an indication as to whether P Waller won or lost the tender. This list included the following companies:

- [...] [C] [List of x Participant Companies]

Phoenix

IV.527. As part of its leniency application, Phoenix provided a general explanation of its participation in cover pricing.³⁰¹² The following Phoenix employees expanded upon this explanation during interview: Michael Williamson ('MW'), Managing Director of Phoenix, and Matthew Pickering ('MP'), senior estimator since January 2005. Roger Grace ('RG') was the previous senior estimator up to January 2005 and for another year or so worked on a part time basis at Phoenix. Due to ill health RG was unable to attend an interview. However, MW had close involvement in the tendering process at Phoenix, and was able to explain the process and the significance of the contemporaneous documentary evidence.

IV.528. In its leniency application Phoenix provided a list of cover pricing activity.³⁰¹³ MW said that, *'we got that information just by going through all the tenders and if there was anything written on any of the tenders we got it off that'*.³⁰¹⁴ The list only covered the period May 2004 to August 2005 as Phoenix explained that it did not keep tender paperwork longer than about two years.

IV.529. Phoenix stated in its response to the Statement that *'...Phoenix has accepted that it engaged in cover pricing in breach of the Chapter 1 prohibition'*.³⁰¹⁵

Cover pricing – general

IV.530. In its leniency application Phoenix confirmed that it participated in both the providing and receiving of cover prices, mainly for the reason of wanting to be retained on client lists.³⁰¹⁶ MW explained that on receipt of a tender the estimator would formulate the estimate which would be discussed at a tender adjudication meeting shortly before the tender was submitted. MW explained

³⁰¹¹ List of tenders, OFT Document Reference 4508.

³⁰¹² Leniency letter, OFT Document Reference 4415.

³⁰¹³ Schedule, OFT Document Reference 4416.

³⁰¹⁴ Interview transcript, OFT Document Reference 11328, page 8.

³⁰¹⁵ Written representations of Phoenix, 27 June 2008, paragraph 91.

³⁰¹⁶ Letter, OFT Document Reference 4415, page 1.

that, *'at the end of the day the margins were sort of agreed by me you know I would have the final say'*.³⁰¹⁷

IV.531. MW explained that the only contact with a competitor close to the tender deadline would be for the purposes of cover pricing. MW confirmed that two contacts would take place with a competitor in respect of providing and taking a cover price. One, when the competitor or Phoenix asked for help and then, secondly, on the day of the tender submission or the day before the tender submission, there would be a further contact to either give or obtain the cover price. MW explained that, *'they would ring us ...right towards the 11th hour and give us a price'*.³⁰¹⁸ MW also confirmed that it would generally be the estimators who would make such contact and that the contact would be by telephone.

Phoenix taking cover prices

IV.532. MW said if Phoenix had decided to take a cover that in order to find out where to obtain a cover price, *'We would probably try and ring one of the suppliers who was named to see if they'd had enquiries from anybody else...'*.³⁰¹⁹

IV.533. MP confirmed if he wanted a cover price, *'you would probably try and ring up a few days before the tender date just to make sure that they can give you a cover price...if they'd say, yes they can help you, you would wait for a phone call, probably ring them a day before the tender's due back'*.³⁰²⁰

Phoenix giving cover prices

IV.534. For providing a cover MP said, *'they're ringing me up a few days before the tender's due in and they'll see if I'm prepared to give them a cover price and then either I'll ring them with the information or they'll ring me last minute'*.³⁰²¹

IV.535. MW explained that when Phoenix was giving a cover price he would work out the value of the cover price by adding, *'a small percentage, you just put a figure, what you feel is comfortable...'*. MW agreed that it would be worked out on a job by job basis.³⁰²²

Contemporaneous documents – tender documentation

IV.536. Phoenix explained that where there had been contact with other companies in respect of cover pricing these contacts would be handwritten on the relevant tender documentation. Documents provided with the leniency application gave examples of such annotations. For receiving a cover, annotations would indicate the name, phone number and company of the person who was providing the cover together with the cover price.³⁰²³ For providing a cover handwritten annotations again would give the name, company and telephone number of who was receiving the cover price.³⁰²⁴ In addition where MW had priced a job, a

³⁰¹⁷ Interview transcript, OFT Document Reference 11328, page 5.

³⁰¹⁸ Interview transcript, OFT Document Reference 11328, page 9.

³⁰¹⁹ Interview transcript, OFT Document Reference 11328, page 7.

³⁰²⁰ Interview transcript, OFT Document Reference 11327, page 5.

³⁰²¹ Interview transcript, OFT Document Reference 11327, page 6.

³⁰²² Interview transcript, OFT Document Reference 11328, page 13.

³⁰²³ Tender invitation, OFT Document Reference 4425.

³⁰²⁴ Tender return, OFT Document Reference 4129.

tender summary sheet was produced and if a cover price(s) was given this would be typed on the tender summary sheet.³⁰²⁵

Propensity

IV.537. The Propensity leniency application was made on behalf of its subsidiaries Totty, Totty Building, Jackson which until December 2005 was the parent company of Jackson BS, and Dean & Bowes

IV.538. The following individuals from Propensity were interviewed:

Totty

Jonathan Kirby ('JK') Commercial Director;
Martin Miller ('MM'), Bid Manager, Commercial Division;
John Gittins ('JG'), Managing Director Public Division; and
Steve Rhodes ('SR'), Bid Manager Public Division.

Totty Building

Philip Ryder ('PR'), Managing Director; and
Alan Loveday ('AL'), Commercial Manager.

Jackson

Bernard Clarke ('BC'), Managing Director;
John Rhodes ('JR'), Pre Contracts Manager;
Stuart Talbot ('ST'), Pre Contracts Manager;
Colin Jackson ('CJ'), Senior Estimator;
Philip Cooper ('PC'), Senior Estimator; and
John Harvey ('JH'), Senior Estimator.

IV.539. Propensity confirmed in its leniency application that it had taken a decision at a Board of Directors' meeting held on 25 April 2006, not to continue to partake in cover pricing.³⁰²⁶ Furthermore it stated that a compliance policy was being drafted and that all appropriate staff had been advised that it was contrary to company policy to either give or take cover prices.

IV.540. In its response to the Statement, Propensity confirmed that it accepted '*...liability for giving or receiving cover prices in relation to all [its Infringements outlined in the Statement]*'.³⁰²⁷

Totty

IV.541. Totty underwent a structural reorganisation in April 2005. Prior to the reorganisation tenders for both the public and private sector would be processed within the one Estimating section for Totty. After the reorganisation Totty was split into two Estimating sections, one which dealt with the contracts for the public sector and the other which dealt with the private sector or commercial sector. The tenders subject of this investigation occurred both before and after the reorganisation. The organisational set up at the time of each tender is explained in paragraphs II.1051 to II.1095 of the Parties section above.

³⁰²⁵ Tender return, OFT Document Reference 4134.

³⁰²⁶ Minutes, OFT Document Reference A1265.

³⁰²⁷ Written representations of Propensity, 27 June 2008, paragraph 1.4.

IV.542. The reorganisation within Totty made no change in terms of the internal documents that were created when pricing up a tender.³⁰²⁸ On receipt of a tender, a tender appraisal form was completed which recorded details such as the return date, client name and description of works. The main contemporaneous document completed within Totty during the tender process was the Tender Final Summary sheet. MM explained that if a tender was the subject of cover pricing, this would be written on the Tender Final Summary sheet.³⁰²⁹ JK explained that the Tender Final Summary sheet was completed by the relevant estimator and brought to the tender settlement meeting. The tender settlement meeting took place prior to the submission of the tender and any information added to this form in relation to cover pricing would be added before the tender deadline.³⁰³⁰

IV.543. The staff involved in the preparation of a tender submission would have been a Bid Manager, who was responsible for a team which included the estimator working on that tender. The Bid Manager system had been in place since approximately 2003 and prior to this there was a more traditional estimator led role of preparing the tender.

IV.544. Knowledge within Totty of cover pricing was widespread. SR confirmed *'any estimator who processed the job really and obviously, everybody above him, director wise, would be aware of it at some stage up until the bid day...from board level down'*.³⁰³¹ JK also confirmed that, *'then logically the divisional MD [Managing Director], well, probably everybody who attended a tender settlement [meeting]...you've got your divisional MD, commercial director, construction director, estimator, planner, design and build. And probably the senior the QS [Quantity Surveyor], who's going to be looking after the job. So in terms of who has knowledge of cover pricing was going on I would say it wasn't a secret, if you like. You didn't advertise it, you didn't need to. But it wasn't sort of kept under cover or under wraps, so pretty well everybody'*.³⁰³²

Totty taking cover prices

IV.545. JK explained how Totty would find who the competition was on a job, *'There were two routes, one quite often, you know, during the tender process subcontractors would just actually tell you...And then there was also an outfit who actually found out. I don't know what they did but you could ring this [Glennigans] outfit and they told you who was on the tender lists'*.³⁰³³ In addition SR said that, *'occasionally when you go to an interview to go on a tender list, you'll see other bidders there...After that it's when you start talking to any of the key subcontractors...So when you're, when you're chasing your quotations or even when you're having a dialogue about whether they'd like to price the job... it's a general question "Who else have you had enquiries from?'"*.³⁰³⁴

IV.546. SR said that when seeking a cover, *'you'd make the first phone call to make sure somebody would help you out...And then...the day before you'd ring them*

³⁰²⁸ Interview transcript, OFT Document Reference 11352, page 9.

³⁰²⁹ Interview transcript, OFT Document Reference 11354, page 8.

³⁰³⁰ Interview transcript, OFT Document Reference 11352, page 16.

³⁰³¹ Interview transcript, OFT Document Reference 11351, page 13.

³⁰³² Interview transcript, OFT Document Reference 11352, page 13.

³⁰³³ Interview transcript, OFT Document Reference 11352, page 7.

³⁰³⁴ Interview transcript, OFT Document Reference 11351, page 8.

or they'd ring you with that price they wanted you to put on your form of tender'.³⁰³⁵

Totty giving cover prices

IV.547. For providing a cover SR explained that there was *'a phone call halfway through the process, can you help us out. Typically I'd say yes without asking anybody...And then obviously we'd ring somebody up and dictate to them what figure they should put...'*³⁰³⁶

IV.548. JK explained if Totty had been asked to provide a cover that, *'There would be three of us that would discuss it. There would be the estimator because he's got to give it. There would be myself because I'm the sort of line manager and there would be our divisional managing director. So the three of us would agree at sort of, we'd sort of – you've obviously got to have certainty of what your price is because you haven't got your price together and you go and give a price you then find out that the cover you've given is less than yours, well you just drop somebody else in it. So the decision was sort of collective in a way but we'd say, yes, make it about...so it must have been a joint decision'*.³⁰³⁷

IV.549. JK further explained how the cover figure was calculated, *'it was arrived at literally by leaving it as late as you could because you'd got to get your own price and then you'd add 10% or something onto it. You didn't tell them what your price was but if you knew your price was £5 million you'd say, well, tell them to go in at somewhere around £5.5 million'*.³⁰³⁸ MM said that the figure, *'It tended to be somewhere between 5 and 7½% higher than our figure'*.³⁰³⁹

Totty Building

IV.550. Totty Building generally dealt with smaller tenders up to a value of [.....][C] while the holding company, Totty, dealt with tenders starting from [.....][C] upwards.

IV.551. Totty Building, independently of the rest of Propensity, stopped cover pricing in November 2005. AL said that, *'we have done for the last 18 months, and we'd already instigated this before the OFT visited us'* and *'It was made on my recommendation to Phillip Ryder and his co-director Gareth More, to say, look, it's wrong that we suck in more enquiries that we can actually price. In the longer term if we don't bid competitively we'll ultimately start to receive less enquiries because, you know, you're seen to be not as successful, not as competitive as you would be if you were able to reduce the number of enquiries that's coming in but give them 100% attention. And they supported me in that'*.³⁰⁴⁰ This was confirmed by PR who said that, *'...I don't think this is really in the best interests of the client, the industry, ourselves...not only that, it's actually illegal'*.³⁰⁴¹

³⁰³⁵ Interview transcript, OFT Document Reference 11351, page 11.

³⁰³⁶ Interview transcript, OFT Document Reference 11351, page 12.

³⁰³⁷ Interview transcript, OFT Document Reference 11352, pages 12 and 13.

³⁰³⁸ Interview transcript, OFT Document Reference 11352, page 12.

³⁰³⁹ Interview transcript, OFT Document Reference 11354, page 9.

³⁰⁴⁰ Interview transcript, OFT Document Reference 11349, pages 8 and 9.

³⁰⁴¹ Interview transcript, OFT Document Reference 11353, page 6.

IV.552. On receipt of a tender, as explained in respect of Totty, a tender appraisal form was completed which recorded details such as the return date, client name and description of works. Also as with Totty, the main contemporaneous document completed during the tender process was the Tender Final Summary Sheet. As an example, in respect of one particular tender³⁰⁴², AL confirmed that he as the estimator would enter 'C's against competitors in the Competition section of the Tender Final Summary Sheet.³⁰⁴³

Totty Building taking cover prices

IV.553. Both AL and PR confirmed the actual exchange of cover prices took place at estimator level and that this would be with the knowledge of PR, 'he'd [AL] come to me and say "I'm not going to be able to submit a bid. I think in this instance I'm going to ask...obtain a cover"'.³⁰⁴⁴ AL explained how Totty Building would find who the competition was, 'You get it from the supply chain, sub-contractors, named suppliers in the tender documents. There's an organisation called Builder's Conference that we get the information from'.³⁰⁴⁵

Totty Building giving cover prices

IV.554. AL explained how the exchange of cover prices took place, 'by personal contact on telephone between one estimator and another. Just to say look, are you pricing this job? Yes, we are. Well, we can't finish our tender, can you help us?'.³⁰⁴⁶ AL further explained how the cover figure was calculated, 'Generally I would say somewhere between 0% and 5%, but generally round about 5% above ours'.³⁰⁴⁷

Jackson

IV.555. In December 2005 Jackson underwent a reorganisation and estimating was split into two companies. However, all the Infringements relating to Jackson pre-date this reorganisation, and the process discussed below relates only to the period prior to December 2005.

IV.556. JR explained that he managed a team of estimators and when an estimator was allocated a tender, JR would write the estimator's initials in the tender register. JR confirmed that it would normally be himself, rather than the relevant estimator assigned to a tender, who would make the telephone call to a competitor to either take or provide a cover.

IV.557. In addition, on receipt of a tender, a tender summary sheet was prepared. The basic details of the job, i.e. value, submission date etc, would be completed on the sheet by JR and the job allocated to an estimator.

IV.558. JR confirmed that most of the senior staff and estimators at Jackson were aware of cover pricing. BC confirmed that he was aware that JR was engaged in giving and taking covers and recording the information in the tender book.³⁰⁴⁸

³⁰⁴² Tender final summary, OFT Document Reference A2285.

³⁰⁴³ Interview transcript, OFT Document Reference 11349, page 12.

³⁰⁴⁴ Interview transcript, OFT Document Reference 11353, page 9.

³⁰⁴⁵ Interview transcript, OFT Document Reference 11349, page 6.

³⁰⁴⁶ Interview transcript, OFT Document Reference 11349, page 7.

³⁰⁴⁷ Interview transcript, OFT Document Reference 11349, page 8.

³⁰⁴⁸ Interview transcript, OFT Document Reference 11344, pages 7 and 8.

Jackson taking cover prices

IV.559. The main contemporaneous document completed within Jackson, provided under leniency, was a handwritten tender book maintained by JR, the pre contracts manager for Jackson until he left the company on 13 April 2006. The tender book covers all of Jackson's business until December 2005 prior to the reorganisation. The tender book records details of where a cover price was taken.³⁰⁴⁹

IV.560. JR explained how he recorded details in his tender book. *'As I say probably shortly after the bids were returned. It may have been the next day, it may have been the next week or it may have been when I had to fill in one of these other [board] reports'³⁰⁵⁰ and 'I'd complete the...initial details, for example, the estimate number...the date the tender was received, that information had been recorded early on in the tender process but the details of the actual price that was submitted...if it was a cover, who it was received from, that would have been...written in at some point after the bid was actually submitted'.³⁰⁵¹*

IV.561. JR explained the annotations in relation to cover pricing made in the tender book, *'the cover price would probably have been written in...when I produced a report. I'd produce reports for the board either weekly or monthly or whenever and when I was bringing the information up to date that was probably the most likely time I would have recorded the information'.³⁰⁵²*

IV.562. JR explained how Jackson would find out who the competition was: *'there's a practice known as the Builders Conference and, we would talk to them on a regular basis about projects that come in and they would circulate details and a few weeks later some details about who else was on the tender list would come back' and 'If we were particularly keen to know the only other way would be to ring other contractors and ask them if there was, they were tendering for that particular project'.³⁰⁵³*

IV.563. JR confirmed that the communication of the cover price was by telephone, *'I would make contact with them and speak to someone in authority, ask them if they would provide a price on a particular project involved...they may respond immediately or they may come back to me and then the next contact would be when the price was given'.³⁰⁵⁴*

Jackson giving cover prices

IV.564. Where Jackson gave a cover price, this was not recorded in the tender book maintained by JR.³⁰⁵⁵

IV.565. In respect of Jackson providing a cover JR confirmed that *'If, another company had asked Jackson's for a price, that would have been discussed at,*

³⁰⁴⁹ Leniency report, OFT Document Reference A0872, page 35.

³⁰⁵⁰ Interview transcript, OFT Document Reference 11347, pages 10 and 11.

³⁰⁵¹ Interview transcript, OFT Document Reference 11347, page 11.

³⁰⁵² Interview transcript, OFT Document Reference 11347, page 10.

³⁰⁵³ Interview transcript, OFT Document Reference 11347, page 5.

³⁰⁵⁴ Interview transcript, OFT Document Reference 11347, page 9.

³⁰⁵⁵ Leniency report, OFT Document Reference A0872, page 35.

*adjudication and that information would have been known to the director sitting in on the adjudication meeting’.*³⁰⁵⁶

IV.566. JR further explained how the cover figure was calculated, *‘it would normally [be] about 5% above the price that we were putting in ourselves unless, directed to the contrary’.*³⁰⁵⁷

Simons/Wrights

IV.567. As part of its leniency application, Simons’ legal representatives stated that *‘...the evidence of infringement of Chapter I of the Competition Act has been uncovered in relation to the minor building works part of the construction business, in Wrights and in the local offices of SCL [Simons]’*³⁰⁵⁸ However, they stated *‘the business culture of Wrights, which was acquired by SCL in 1998, differed from that of the Group as a whole’.*³⁰⁵⁹ The OFT discusses in more detail the practice of giving and taking of cover prices for both Wrights and local offices of Simons in separate sections below.

IV.568. The legal representatives provided a general overview of Wrights’ part in the process of cover pricing. They stated that *‘Wrights was engaged over a sustained period (beginning prior to the entry into force on 1 March 2000 of the Chapter I prohibition and continuing until, we believe, around April 2003, when the estimating director Arthur Fox left the business) in the seeking and giving of cover prices on various contracts’.*³⁰⁶⁰ They also stated, *‘So far as Simons Group has been able to ascertain, this practice was not actively encouraged by those responsible for the operational management of Wrights. Nonetheless, it is clear that it went on in the knowledge of senior personnel, including Colin Sargeant [‘CS’] who was, for a time, Managing Director of Wrights’.*³⁰⁶¹

IV.569. In relation to minor building works at Simons, the legal representatives stated, *‘The practice of seeking and giving cover prices also went on in relation to minor building works within a number of the Local Works operations. In particular, it appears that such activity was being undertaken in Lincoln, Nottingham and York. It seems likely that this activity also continued until around mid-2003’.*³⁰⁶² They continued, *‘This practice appears to have been condoned (in the period up to March 2000 at least) by those responsible for operational management of Local Works, including Roger Hall who was then Director of the Local Works operations’.*³⁰⁶³

IV.570. The legal representatives stated, *‘The practice of cover pricing appears historically to have been prevalent within the industry and, according to Roger Hall, helping out a competitor by providing a cover price where that competitor did not have a desire (or the capacity) to undertake a project seems to have*

³⁰⁵⁶ Interview transcript, OFT Document Reference 11347, page 9.

³⁰⁵⁷ Interview transcript, OFT Document Reference 11347, page 9.

³⁰⁵⁸ Leniency report, OFT Document Reference B3580, page 6.

³⁰⁵⁹ Leniency report, OFT Document Reference B3580, page 5.

³⁰⁶⁰ Leniency report, OFT Document Reference B3580, page 9.

³⁰⁶¹ Leniency report, OFT Document Reference B3580, page 10.

³⁰⁶² Leniency report, OFT Document Reference B3580, page 10.

³⁰⁶³ Leniency report, OFT Document Reference B3580, page 10.

been accepted commercial custom and practice, at least for certain types of work and client'.³⁰⁶⁴

IV.571. They further explained, *'Putting in tenders based on a cover price, on projects which a contractor did not wish to win, enabled a rapport to be maintained with the client, whereas "returning" tenders (i.e. sending them back to the clients without pricing them) ran the risk that the company would be dropped from the list of contractors invited to bid in future*'.³⁰⁶⁵

IV.572. Simons has not generally provided contemporaneous documentary evidence of covers having been sought. The legal representatives stated, *'This is due principally to the fact that, under the tendering procedures policy within SCL's quality manual, tenders which have been submitted but where SCL has not succeeded in winning the contract are to be kept for a period of 12 months only, and then destroyed. Where covers were taken then the tender would have been lost in the normal course of events and, therefore, the file destroyed in line with the document retention policy*'.³⁰⁶⁶

Wrights

IV.573. In respect of the process of cover pricing at Wrights, the legal representatives stated, *'...whilst Arthur Fox was Estimating Director...[employed by Wrights from 1996 to April 2003] the practice of taking cover prices was prevalent, allowing Fox to manage the number of tenders that were being processed*'.³⁰⁶⁷ In addition they stated *'The firms from whom covers would typically be sought or to whom they would have been given include Lindums Construction Company Limited...and RG Carters Limited*'.³⁰⁶⁸

IV.574. During a voluntary interview on 26 April 2007, Arthur Fox ('AF') described the tender process at Wrights. AF explained that tenders arriving at the office, *'...used to go to the managing director, in the first place, who would then probably bring them into me...and we would have a tender meeting at least once a week. Normally on a Monday morning...so we would decide which jobs we were pricing and which jobs we were not pricing*'³⁰⁶⁹, based on *'...the type of job, the value of the job, bearing in mind our current workload, future workload...there was...lots of variables in there*'.³⁰⁷⁰ AF confirmed to the legal representatives, *'that taking covers was normal to allow him to manage the very high numbers of tenders that were being processed. All estimators within local competitor firms were well known to each other and a contractor would normally expect to receive assistance from a competitor if it was asked for*'.³⁰⁷¹

IV.575. On receipt of a tender AF would enter the contract details on a *'management estimating report*'. AF explained that the purpose of these reports was *'just a report to the rest of the board on, on what was going on in the...estimating department. Enquiries received in the period, not only on major contracts, but*

³⁰⁶⁴ Leniency report, OFT Document Reference B3580, page 10.

³⁰⁶⁵ Leniency report, OFT Document Reference B3580, pages 10 and 11.

³⁰⁶⁶ Leniency report, OFT Document Reference B3580, page 11.

³⁰⁶⁷ Leniency report, OFT Document Reference B3580, page 12.

³⁰⁶⁸ Leniency report, OFT Document Reference B3580, page 12.

³⁰⁶⁹ Interview transcript, OFT Document Reference 13131, page 2.

³⁰⁷⁰ Interview transcript, OFT Document Reference 13131, pages 2 and 3.

³⁰⁷¹ Leniency report, OFT Document Reference B3580, page 12.

smaller work stuff as well'.³⁰⁷² AF explained that the contracts would be categorised into levels of interest.³⁰⁷³ AF stated category '*...one would certainly be...tenders which were of our particular interest*'.³⁰⁷⁴ CS stated category two was used for jobs that Wrights was '*kind of interested in*'.³⁰⁷⁵ Finally Category 3 or 'others' was used when the tender was to be returned to the client, a square foot price submitted or a cover price taken.³⁰⁷⁶

IV.576. CS confirmed that originally Category 3 contracts were referred to as covers, '*...I can remember challenging Andy Rowe, that, you know, covers wasn't a word that we wanted to see written on a piece of paper*'.³⁰⁷⁷ He also stated '*you've seen the documentation where the piece of paper said covers on it...we did get to the stage where I said, we just can't have that on a piece of paper...we can't openly record the fact that the way we're going to deal with these tenders we don't want...is to get involved in this practice. Now, that certainly is a conversation I recall having with Arthur...you can't record something, in that way*'. CS was asked whether it was a case of not recording cover prices, or of changing company practice. CS sighed and replied, '*Well I can't...it, it's more not recording it than changing practice*'.³⁰⁷⁸

IV.577. AF explained that he would not actively try and find out who his competitors were on a particular contract, '*...we'd just find out as a matter of course. Suppliers will tell us, or subcontractors will...That's just part of a normal conversation with subcontractors and suppliers, and it, it happens all the time*'.³⁰⁷⁹ AF continued, '*...and we'd also get it from marketing companies...like the ABI...'*'.³⁰⁸⁰

IV.578. During interview, CS explained that once a decision had been taken not to price a tender '*Arthur would get on to the phones to arrange some kind of cover activity*'.³⁰⁸¹

IV.579. Brian Ockert ('BO'), Technical Support Manager for SCL and previously an estimator at Wrights, confirmed that '*Wright's were involved in giving cover prices as well as seeking them. He recalls he received occasional calls from competitors requesting "help" with a price. He understood help in this context to mean a cover price. He would usually speak to Arthur Fox who would then contact the competitor, although on a couple of occasions he contacted the competitor himself with a price that had already been calculated by Fox*'.³⁰⁸²

IV.580. AF confirmed that if he had been approached by a competitor for a cover price he would bring it to the attention of either CS, Managing Director from September 1998 to April 2002, or Andy Rowe ('AR'), Managing Director from April 2002 to April 2003, at the tender adjudication meeting.³⁰⁸³ AF confirmed

³⁰⁷² Interview transcript, OFT Document Reference 13131, page 21.

³⁰⁷³ Interview transcript, OFT Document Reference 13131, page 22.

³⁰⁷⁴ Interview transcript, OFT Document Reference 13131, page 23.

³⁰⁷⁵ Interview transcript, OFT Document Reference 12816, page 9.

³⁰⁷⁶ Interview transcript, OFT Document Reference 13131, page 25.

³⁰⁷⁷ Interview transcript, OFT Document Reference 12816 page 10.

³⁰⁷⁸ Interview transcript, OFT Document Reference 12816 page 6.

³⁰⁷⁹ Interview transcript, OFT Document Reference 13131, page 4.

³⁰⁸⁰ Interview transcript, OFT Document Reference 13131, page 4.

³⁰⁸¹ Interview transcript, OFT Document Reference 12816, page 4.

³⁰⁸² Leniency report, OFT Document Reference B3580, page 13.

³⁰⁸³ Interview transcript, OFT Document Reference 13131, pages 7 and 8.

that the giving of a cover price to a competitor could have been carried out by AF, CS or AR, *'I suppose any of us might have done that, you know, it depends who was available'*.³⁰⁸⁴

Simons – Minor Building Works

IV.581. In respect of the process of cover pricing at Simons, the legal representatives stated, *'The Local Works operations were under the responsibility of Roger Hall who was on the board of SCL at that time. Hall has admitted that he knew cover pricing was going on in Wrights and in the Local Works operations of SCL in Lincoln, Nottingham and York and that on occasions he would instruct estimators to take covers...'*³⁰⁸⁵ Roger Hall ('RH') started working for Simon's in 1968 as a surveyor and eventually worked his way through the business to become Chief Operating Officer in 2005.

IV.582. During an interview on 15 March 2007 RH was asked if he was involved in the decision to price a tender. RH replied *'...certainly in the Lincoln patch I would have quite an influence...'*³⁰⁸⁶ RH confirmed that in relation to the other Simons offices the decision to tender for a contract would be made locally, however, *'The bigger it got the more likely it was to get to me or to the division surveyor'*.³⁰⁸⁷

Lincoln

IV.583. In respect of the process of the exchange of cover prices in Lincoln, *'Roger Hall recalled using Bill Dickinson as a sub-contracted estimator between 2000-2001 when the Lincoln and Boston offices were too busy'*.³⁰⁸⁸ The legal representatives stated *'Around once or twice a year, Hall recalls that he would receive a call from Bill Dickinson saying that he was too busy to price the tenders. Hall recalls that he would try to persuade him to do the work or if all else failed to "get some help". By this he meant that he should take a cover price'*.³⁰⁸⁹

IV.584. The legal representatives stated, *'Hall's evidence has been confirmed by a number of other employees at the Lincoln office at that time'*.³⁰⁹⁰ In addition they stated, *'...within Lincoln, other key competitors from whom covers would have been sought/to whom covers would have been given include...Lindums...'*.³⁰⁹¹

IV.585. Barry Molsom ('BM'), Contract Manager, recalled that *'...calls were received from competitors requesting cover prices in relation to tenders for minor building works which the Local Works operations had properly priced, and covers were given. Molsom explained that, although he may have taken calls, he did not provide prices himself but would seek guidance from the Divisional Directors and Surveyor. He would contact Roger Hall or Steve Foster. Not all calls from competitors came through to him as most would ask to speak to an*

³⁰⁸⁴ Interview transcript, OFT Document Reference 13131, page 8.

³⁰⁸⁵ Leniency report, OFT Document Reference B3580, page 16.

³⁰⁸⁶ Interview transcript, OFT Document Reference 12777, page 3.

³⁰⁸⁷ Interview transcript, OFT Document Reference 12777, page 3.

³⁰⁸⁸ Leniency report, OFT Document Reference B3580, page 16.

³⁰⁸⁹ Leniency report, OFT Document Reference B3580, page 16.

³⁰⁹⁰ Leniency report, OFT Document Reference B3580, page 17.

³⁰⁹¹ Leniency report, OFT Document Reference B3580, page 18.

Estimator rather than a Contract Manager'.³⁰⁹² BM stated that he had 'no recollection of ringing competitors to request a cover price but believes that Bill Dickinson may have been given instructions to do so by the management who at the time would have been Roger Hall and Steve Foster where he was too busy to properly price the work'.³⁰⁹³

Nottingham

IV.586. In respect of the tender preparation process in the Nottingham office, Martin Ledingham ('ML'), an estimator for Simons from 1999 until June 2003, explained that the decision as to whether to tender for a contract was made by, 'usually a joint decision between manager and myself'.³⁰⁹⁴ ML confirmed that if a decision was made not to tender for a contract the tender would either be sent back or Simons would take a cover price.³⁰⁹⁵

IV.587. The legal representatives stated 'There were essentially three ways of identifying the contractors to contact for a cover price: Discussion with sub-contractors; speaking to John Woolley [sic], who was involved in the Builders Guild; and through information received from the Builders Conference'.³⁰⁹⁶

IV.588. They also stated 'Ledingham identified a number of companies and individuals to whom he would turn for cover prices and explained the process he would go through. The same companies asked for covers from SCL. These were as follow: Mike Robbins of Frudd Construction (Nottingham); Tom Scothen [sic] of Woodsends (Nottingham); Richard Bodill of Bodill's (Nottingham); Tomlinsons (Derby); Fish Construction (Nottingham). Ledingham explained that he would ask for a specific person or the estimator and the person at the other company would simply provide a figure. This figure would already have been inflated by the company providing it (i.e. it was the figure that SCL could include in a tender as a cover price)'.³⁰⁹⁷

IV.589. ML explained how the exchange of covers worked in practice: 'You'd phone a particular company up and say, you know, we don't want to price this job can you give us some help?'.³⁰⁹⁸ ML explained that he would know who to contact, 'via the list of names you'd get from John Woolly [sic]. Or from subcontractors or whoever...If you got a job you'd perhaps leave it for a day, a week, whatever, you'd make a decision and then you'd seek help'.³⁰⁹⁹

York

IV.590. The legal representatives spoke to four individuals who were at that time employed in the Local Works operation in York, in addition to Roger Hall. They reported 'These individuals confirm that where the York Local Works operation was invited to tender for work which it ultimately did not want... "assistance" would be sought on occasions from competitors in the form of cover prices'.³¹⁰⁰

³⁰⁹² Leniency report, OFT Document Reference B3580, pages 17 and 18.

³⁰⁹³ Leniency report, OFT Document Reference B3580, page 18.

³⁰⁹⁴ Interview transcript, OFT Document Reference 12775, page 2.

³⁰⁹⁵ Interview transcript, OFT Document Reference 12775, page 2.

³⁰⁹⁶ Leniency report, OFT Document Reference B3580, page 19.

³⁰⁹⁷ Leniency report, OFT Document Reference B3580, page 19.

³⁰⁹⁸ Interview transcript, OFT Document Reference 12775, page 3.

³⁰⁹⁹ Interview transcript, OFT Document Reference 12775, page 3.

³¹⁰⁰ Leniency report, OFT Document Reference B3580, page 21.

During interview Phil Bowers ('PB') Regional Manager of the York Office explained that *'...it would depend on the client again. But, if it was a client we were working with and we wanted to stay involved with...we'd probably take a cover price'*.³¹⁰¹

IV.591. The legal representatives explained, *'Assistance would normally be sought from one of six "preferred" firms. These were identified by Stephen Kenneally [Contracts Manager] as follows: ...Hobson and Porter'*.³¹⁰² They also stated *'The decision to seek a cover price was normally a joint decision involving Kenneally, Bowers and possibly (depending on project value or risk) Hall'*.³¹⁰³

IV.592. They also stated, *'In relation to [.....] [C] jobs, Bowers explained that his recollection is that 90% of calls from competitors for covers would have come to him. Other calls would have gone to Ray Holgate, Steve Duncan or Stephen Watson and other general surveyors employed at the time'*.³¹⁰⁴ Eversheds added, *'The "preferred" firms would contact the York Local Works office from time to time for a cover price. Covers were given to these firms with similar frequency to that with which they were taken'*.³¹⁰⁵ PB confirmed that the exchange of cover prices was always carried out by telephone.³¹⁰⁶

Sol

IV.593. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing.³¹⁰⁷ This was supplemented by interviews with the following employees: Adrian Whiteside ('AW'), Managing Director, Andrew Turner ('AT'), Senior Estimator, and John Cummings ('JC'), Chief Estimator.

IV.594. Sol was a relatively small company, run by a board of three directors. Sol employed estimators who were responsible for preparing tenders in relation to invitations to tender received by Sol. Once a tender had been prepared by an estimator all tenders were reviewed by either the managing director, another director or a divisional director before submission to the client. As a result of this practice, the Board of Directors and senior management was able to keep up to date with all tenders with which the company was involved.

IV.595. Sol asserted that the process of procuring tenders was usually very protracted and frequently involved detailed contact with the client's professional advisers and the client over an extended period of time. This made planning the estimating workload and construction workload on site very difficult and frequently impossible. Additionally tender enquiries could be received without prior knowledge.³¹⁰⁸

³¹⁰¹ Interview transcript, OFT Document Reference 12776, page 2.

³¹⁰² Leniency report, OFT Document Reference B3580, page 21.

³¹⁰³ Leniency report, OFT Document Reference B3580, page 21.

³¹⁰⁴ Leniency report, OFT Document Reference B3580, page 22.

³¹⁰⁵ Leniency report, OFT Document Reference B3580, page 22.

³¹⁰⁶ Interview transcript, OFT Document Reference 12776, page 3.

³¹⁰⁷ Report, OFT Document Reference 4356.

³¹⁰⁸ Report, OFT Document Reference 4357.

IV.596. In his interview with the OFT, AT described the process of handling an invitation to tender received from the client, that Sol wanted to win:³¹⁰⁹

- A tender came into the office;
- The estimator checked that all the documentation was there;
- He reported to the construction or the tendering team with the basic information about the work;
- Then he proceeded to work out the cost for the construction;
- The contracts manager provided a preliminary cost to add on;
- Then at a tender settlement meeting the estimating team discussed the job and decided on a profit;
- That provided a tender figure that Sol submitted to the client and;
- Details of competition were obtained on the telephone while talking to suppliers and sub-contractors.

IV.597. Sol employees expanded upon this explanation during interview, as follows.

IV.598. JC told the OFT that he was responsible for all tendering procedures, with AT only having any direct responsibility during JC's absences for holidays or sickness.³¹¹⁰

IV.599. JC continued, *'we have a marketing team who try and keep me informed of what job's on the horizon. When the jobs actually arrive in the office, I will peruse all the documents, get a feel for the job depending on size, we'll have what we call a launch meeting where we...sort of launch the job to other people that's involved with it – contracts managers, other, other management, then set about the nitty-gritty of the tender, sending out the sub contracting enquiries, sending out material enquiries, waiting for them to come back and then start putting the tender together; pricing sections that we do, what we call builders' work, you know, that Sol do, that Sol rather than subcontract, get that up and running, then get the subcontractors' quotes in, analyse all those, include those in the bid as appropriate. Then put it all together, get all the figures together, ready for a tender meeting. We would go through the job and sort of adjudicate it and put little bits of profit margins on and stuff like that'*.³¹¹¹

IV.600. JC said that AW would have the final say in consultation with himself and the other managers as to whether or not the tender was attractive.³¹¹² He added that once a month he (JC) would prepare an Estimating Board Report for the benefit of the three managing directors. This was to keep them up to date for the monthly board meeting. It would include 'C' markings for cover prices where appropriate. When asked if the Board were all aware of the practice of cover pricing, JC replied, *'Oh, absolutely, yeah'*.³¹¹³

Sol taking cover prices

IV.601. Sol said that when the estimating workload was fully taken up, the receipt of an unexpected tender enquiry or an expected one that arrived late, could leave the undertaking in a position where it did not have the capacity or time to

³¹⁰⁹ Interview transcript, OFT Document Reference 6382.

³¹¹⁰ Interview transcript, OFT Document Reference 11368, page 22.

³¹¹¹ Interview transcript, OFT Document Reference 11368, page 2.

³¹¹² Interview transcript, OFT Document Reference 11368, page 3.

³¹¹³ Interview transcript, OFT Document Reference 11369, page 1.

dedicate to a tender, even one from a sought after or existing client. Other factors were staff holidays and sickness and the late arrival of sub-contractors' quotations.³¹¹⁴

IV.602. Stated options for the company in the event of a shortage of capacity or time were:

- to return the tender and risk alienating the client and being removed from tender lists;
- to submit a tender based on a previous, similar tender with the added risk that entailed, appearing uncompetitive with a loss of company credibility as a result; or
- to obtain a cover price.³¹¹⁵

IV.603. The advantage of the cover price was that it allowed the company to submit a competitive tender without upsetting a client. It was regarded as an industry 'norm' and until 2004 Sol was unaware that it was anti-competitive and illegal.³¹¹⁶

IV.604. Management at Sol, AW, would make the final decision as to whether or not a tender was attractive to Sol. If it was not, for whatever reason, a cover price would be sought from one of Sol's competitors. AW said in interview with the OFT, *'...and it would be my final decision whether we proceeded or not actually'*.³¹¹⁷ When asked what factors were taken into account when seeking a cover price from a competitor, AW said, *'Well really the level of work on the site actually. Obviously whether we've got – whether we've just won jobs, whether we're starting a number of jobs together, whether we've got site staff available to run them, whether we've got staff in the office to manage them...there's a whole team that's required to run and manage that project. And if they're very busy doing other things then the job is going to suffer, so you've got to take a decision whether, you know, you'll let the client know the other job's suffering basically. So, yeah, that's sort of the final decision'*.³¹¹⁸ When asked further if he made the decision alone to obtain a cover price from a competitor, AW said, *'No I'd say after consultation with the various people who provide those services within the organisation. But obviously as MD at the end of the day you've got to make that decision'*.³¹¹⁹

IV.605. JC, in his interview with the OFT, said that not wishing to upset a client by not submitting a tender figure was the fundamental reason for taking a cover price.

³¹²⁰

IV.606. JC said that if the tender was deemed *'... not attractive...we'd look who the client was and if it was a client that we'd done a lot of work for...and didn't want to upset, we may then get involved and try to sort...a cover price out...if it was a client who's a complete one-off, say, a developer who'd just come into town, probably wasn't serious anyway and perhaps he's looking for a*

³¹¹⁴ Statement, OFT Document Reference 4357, page 2.

³¹¹⁵ Statement, OFT Document Reference 4357, page 2.

³¹¹⁶ Statement, OFT Document Reference 4357, page 2.

³¹¹⁷ Interview transcript, OFT Document Reference 6381, page 4.

³¹¹⁸ Interview transcript, OFT Document Reference 6381, pages 4 and 5.

³¹¹⁹ Interview transcript, OFT Document Reference 6381, page 5.

³¹²⁰ Interview transcript, OFT Document Reference 11368, page 3.

budget...we'd probably send it back with a sort of a lamish excuse, I suppose'.³¹²¹

- IV.607. Details of other undertakings were obtained by Sol from sub-contractors and suppliers and the Builders' Conference.³¹²²
- IV.608. AW said that the exchange of cover prices was '*... normally done by telephone, and our Chief Estimator [JC] would normally deal with that aspect of it...*'.³¹²³
- IV.609. When asked when he would contact a competitor for a cover price, JC confirmed that there would be an initial contact days or weeks before the tender deadline to arrange the cover price³¹²⁴ and that subsequently '*you couldn't get a cover price until they'd finished it, obviously...So, you'd be right up...It could be on the morning the tender was due in [that a cover price would be given by the competitor]*'.³¹²⁵
- IV.610. When asked how he would record the taking of a cover price, JC replied, '*Well, you've seen it in my book, obviously. With a C*'.³¹²⁶ AW said '*John normally put a little 'c' in his book, actually, which I think you've probably seen because you've seen that documentation*' [the Tender Register]. He continued, '*Yeah, that's it and it's quite clear there that there's a 'c' against it actually. I mean it wasn't particularly hidden. It was a part of everyday life actually*'.³¹²⁷
- IV.611. AT said that the letter 'C' next to a competitor's name on the Tender Summary sheet showed that a cover price had been obtained or given.³¹²⁸
- IV.612. When asked how Sol arrived at a cover price JC said, '*I just get a figure. I mean, the guy finishes up his tender, like me giving covers the same, and he'll just add on a percentage to put us well clear of the field and I'd take his, whatever figure he gave me, I'd take as read*'.³¹²⁹

Sol giving cover prices

- IV.613. JC in interview stated that when giving a cover price to a competitor, the competitor would ring up and ask for a cover price. A 'C' would be put next to the competitor's name in the Competitors Box in the Tender Register and '*from Sol*' written next to it.³¹³⁰
- IV.614. JC added that when giving out a cover price he would add a percentage to his own figure. '*I'd just give him a figure. That's what you want to go in at*'.³¹³¹ When asked what percentage figure he used, JC said, '*5 to 10 per cent I work on, obviously not making it an exact five or an exact six and stuff*'.³¹³² When

³¹²¹ Interview transcript, OFT Document Reference 11368, page 3.

³¹²² www.buildersconference.co.uk.

³¹²³ Interview transcript, OFT Document Reference 6381, page 13.

³¹²⁴ Interview transcript, OFT Document Reference 11368 page 7.

³¹²⁵ Interview transcript, OFT Document Reference 11368, page 5.

³¹²⁶ Interview transcript, OFT Document Reference 11368, page 5.

³¹²⁷ Interview transcript, OFT Document Reference 6381, pages 13 and 14.

³¹²⁸ Interview transcript, OFT Document Reference 11367, page 5.

³¹²⁹ Interview transcript, OFT Document Reference 11368, page 6.

³¹³⁰ Interview transcript, OFT Document Reference 11368, page 9.

³¹³¹ Interview transcript, OFT Document Reference 11368, page 7.

³¹³² Interview transcript, OFT Document Reference 11368, page 6.

asked how he would record giving a cover to a competitor JC replied, *'With the same thing [in his tender register]. Yeah, the same'*.³¹³³

IV.615. AT said that the letter 'C' next to a competitor's name on the Tender Summary sheet showed that a cover price had been obtained or given.³¹³⁴

Companies with whom Sol engaged in cover pricing

IV.616. Sol provided the OFT with a list of the companies with whom it engaged in cover pricing. The list included the following companies:³¹³⁵

- [...] [C] [List of x Participant Companies]

Strata

IV.617. As part of its leniency application, Strata made available current employees and provided contact details for ex-employees to be interviewed. During these voluntary interviews the individuals were asked to give an explanation of Strata's involvement in cover pricing.

IV.618. Julian Kawecki ('JK'), started working for Strata in 1976 as Estimating Surveyor progressing to Estimating Director and finally Managing Director until leaving Strata's employment in August 2005. JK explained during interview that the tender process post 2000 was that on receipt of a tender *'It would be booked in, logged in, given a number, we would decide whether to price it or not'*.³¹³⁶ The decision as to whether to price the project would then be made by *'the Managing Director, Estimating Director, Contracts Manager, Contracts Director'*.³¹³⁷ JK went on to explain *'The Contract's Director was John McCready, the Commercial Director was Steve Marshall and the Planning Director was Norman Hudson. The Managing Director was Doug Page before I*

³¹³³ Interview transcript, OFT Document Reference 11368, page 5.

³¹³⁴ Interview transcript, OFT Document Reference 11367, page 5.

³¹³⁵ Contact list, OFT Document Reference 4361.

³¹³⁶ Interview transcript, OFT Document Reference 13156, page 4.

³¹³⁷ Interview transcript, OFT Document Reference 13156, page 4.

took over from Doug³¹³⁸ The decision whether to price a job was made at a weekly meeting and one of the estimators would be tasked with obtaining a cover for tenders on which the management had decided Strata would not be submitting a competitive tender.

IV.619. Paul Throssell ('PT'), an estimator at Strata employed since 1980 explained that a document referred to by Strata as the Estimating Tracking document (and previously called by Strata the 'Contracts in Hand sheet')³¹³⁹, *'tracks the work that we have coming in, Jane Bell an administration assistant produces this once it's come in and we have futures meetings, that's the heads of department and the directors... and then they track it through'. ... 'How it works is that, Paul Taylor gets involved, he's the marketing manager, ... the bid manager, the marketing manager, the directors, also put their bits of information as it comes in, and Jane types all the information into this document, that they produce for the futures meeting, and they go through the various different pieces of information that have come in, for the different jobs. I get a copy of this, but I don't have any involvement in actually producing it ...*³¹⁴⁰

Strata taking cover prices

IV.620. JK and one of the estimators would go through the Estimating Tracking document and JK would allocate the estimators work, including the task of obtaining a cover price for a tender. PT confirmed in interview that it was *'Usually me'*³¹⁴¹ who was tasked with obtaining a cover price. A document found on the OFT's visit under section 28 on 6 July 2005 set out the estimators' job roles, within which cover pricing is mentioned: *'covers, to/from where appropriate'*.³¹⁴²

IV.621. PT explained that *'On what we would now call the tracking document, on the contracts in hand sheet that I mentioned earlier, where we listed down the jobs and when the jobs were due in, there'd be a C, if we were going to cover it, there'd be a C on that sheet against the job'*.³¹⁴³ PT confirmed in interview that the presence of a 'C' in the estimator column on the tracking document would indicate that Strata obtained a cover price in relation to that tender.³¹⁴⁴

IV.622. JK said the estimators would find out who was pricing the tender, *'From subcontractors suppliers ringing around. You always got to find out the competition, everybody does'*.³¹⁴⁵ JK also went on to explain that there were organisations they could approach to find out who was on a tender list. In reference to the Builders Conference JK said.... *'Yeah. People would ring in and say they are on the list they would tell you who was on the list'*.³¹⁴⁶ JK also went on to state that Glennigans and Contract Journal also published tender lists.³¹⁴⁷

³¹³⁸ Interview transcript, OFT Document Reference 13156, page 5.

³¹³⁹ Estimating Tracking Document, OFT Document Reference 3184.

³¹⁴⁰ Interview transcript, OFT Document Reference 11382, page 9.

³¹⁴¹ Interview transcript, OFT Document Reference 11380, page 5.

³¹⁴² Notes for Discussion, OFT Document Reference 3211.

³¹⁴³ Interview transcript, OFT Document Reference 11380, page 10.

³¹⁴⁴ Interview transcript, OFT Document Reference 11380, pages 9 and 10.

³¹⁴⁵ Interview transcript, OFT Document Reference 13156, page 13.

³¹⁴⁶ Interview transcript, OFT Document Reference 13156, page 15.

³¹⁴⁷ Interview transcript, OFT Document Reference 13156, page 16.

- IV.623. On tenders where Strata was taking a cover price PT explained *'If we were taking a cover, then we would ring them once we found out who was pricing it, we would ring them and ask them first if they were pricing it, and then if they could help us out, because we were struggling either with the amount of work we'd got in already, or meeting a tender date, that was the reason we did it' ... 'And then the day before the tender was due in, we'd ring them up and say, if they hadn't already contacted us, we'd ring them and say, you said you were going to give us a cover, can you tell me when we can have this price, so it was still, the tender was still delivered as a genuine tender, so it was still hand delivered'*.³¹⁴⁸
- IV.624. Duncan Ironmonger ('DI'), employed as senior estimator in 1999 and subsequently Chief Estimator before he left Strata's employment in October 2004, was also involved in cover pricing. On the OFT's visit under section 28 on 6 July 2005 a document entitled *'Strata Chief Estimator Roll'* was found. Item two on that list says *'Meet with Julian to decide what we are pricing, covering or returning'*.³¹⁴⁹ DI explained how cover pricing worked in practice, *'You ring up the competition, are you pricing it. No matter who, you weren't bothered who, just as long as you didn't win the work, that's all that mattered. So, you'd ring up, we don't want it, can you give us a cover. Most of them would just say yes, obviously, because they know they're reducing ... their competition.'*³¹⁵⁰
- IV.625. DI also went on to explain that the receiving of a cover would almost always be pre-arranged. *'Usually, if we could, we'd find out in plenty of time because we had our fingers burnt ... there are times when you cant actually find out who else is pricing it' ... 'So unless you give yourself plenty of time, you can finish up quite embarrassed when it gets towards tender submission dates'*.³¹⁵¹ On the majority of occasions a cover would be pre-arranged and the actual exchange of covers would be carried out at the last moment before the tender was due in.³¹⁵²
- IV.626. Once a cover price had been received PT explained, *'... I took a copy of the tender form, and I wrote in pencil on the top corner of the tender form who I'd taken a cover from, um, if I got the guy's name, I'd put his name on as well, and then we'd put a copy of the tender form into a ring binder ... '*³¹⁵³ An example of the ring binder PT refers to entitled *'Covers from Jan 2000 to Dec 2001'* was found on the OFT's visit under section 28 on 6 July 2005.³¹⁵⁴ PT went on to say *'Every estimator had access to it Yeah [sic], it was just left to the individual, which was generally me or Duncan, ... and it was just left to us, we just updated it as and when we sorted a cover price out'*.³¹⁵⁵
- IV.627. DI confirmed this version of events in interview and also made clear that a copy of the tender form was taken once it was completed and the comments were

³¹⁴⁸ Interview transcript, OFT Document Reference 11380, page 7.

³¹⁴⁹ Handwritten note, OFT Document Reference 3214.

³¹⁵⁰ Interview transcript, OFT Document Reference 13138, page 16.

³¹⁵¹ Interview transcript, OFT Document Reference 13138, page 16.

³¹⁵² Interview transcript, OFT Document Reference 13138, page 17.

³¹⁵³ Interview transcript, OFT Document Reference 11380, page 9.

³¹⁵⁴ File, OFT Document Reference 3279.

³¹⁵⁵ Interview transcript, OFT Document Reference 11380, page 10.

written by the estimators on the copy document prior to that document being inserted into the 'covers' file.³¹⁵⁶

IV.628. The OFT only found one of the 'covers' files during its visit on 6 July 2005. On 6 March 2006 the OFT received a telephone call from [.....] [C] of Herbert Smith LLP, acting on behalf of Strata. [...] [C] stated that *'several weeks before the OFT visited Strata in July 2005 a former employee of Strata's ... phoned an estimator in Strata to tell him that the OFT were conducting investigations and to be careful about leaving ... evidence around'*.³¹⁵⁷ Consequently *'an administrative assistant ... decided to take the 2002-2004 covers file home and destroy it'*.³¹⁵⁸ [...] [C] confirmed that there was no covers file for 2005.³¹⁵⁹

Strata giving cover prices

IV.629. On tenders where Strata was giving a cover price PT explained *'They would ring me up, ... and they'd say, ... we've got this job in, we can't manage to price it, we can't do it in time, we understand you're pricing it, can you help us out? I'd say yes, no problem, the tender's due in, such and such a date, ... we've got a tender adjudication meeting the day before, or two days before, generally the day before, once we'd had the adjudication meeting, and finalised our figure, then I would sort out what price I was going to give them and give them a ring. If I didn't ring them before they rang me, and that's how it worked'*.³¹⁶⁰

IV.630. PT went on to explain how Strata would arrive at a figure to give a competitor *'... considering who it was, and where they were, and where they'd been in relation to us on a previous tender, not going back through records or anything like that, just from results letters, ... we'd put in 5% or 6% up, something like that, and then I would put five in my calculation and then point, press a few buttons randomly, percent, comes up a figure addition, add that on to our figure and give them their figure'*.³¹⁶¹

IV.631. In addition DI stated *'you'd always try and put them far enough away so that they didn't finish second. So, we tended to work on percentages. Don't put them 10% away but we can put them 5% away and there's usually someone in between you'*.³¹⁶² DI continued, *'If you knew that there was only you and one other pricing, then you might go up 10% anyway. ... you weighed up, out, what the competition was on ... the particular job.'* *'... because obviously people who were taking covers did not want to be top of the list'*.³¹⁶³ However, DI explained *'... it's possible that on the, at the tender meeting we would come to a figure and I dish out a cover price and then the following morning I might get a cheaper mechanical pricing and we reduce our price. ... they obviously couldn't because they'll have already posted or agreed to send it off. So, that would finish up they'd be 10% out rather than 5% out, you know'*.³¹⁶⁴

³¹⁵⁶ Interview transcript, OFT Document Reference 13138, page 19.

³¹⁵⁷ File note, OFT Document Reference 5909.

³¹⁵⁸ File note, OFT Document Reference 5909.

³¹⁵⁹ File note, OFT Document Reference 5909.

³¹⁶⁰ Interview transcript, OFT Document Reference 11380, page 11.

³¹⁶¹ Interview transcript, OFT Document Reference 11380, page 11.

³¹⁶² Interview transcript, OFT Document Reference 13138, page 20.

³¹⁶³ Interview transcript, OFT Document Reference 13138, page 20.

³¹⁶⁴ Interview transcript, OFT Document Reference 13138, pages 20 and 21.

IV.632. PT explained how Strata kept a record of covers given. PT confirmed that the letter 'C' on the contract information sheet or BOB sheet, written alongside a competitor's name and a figure, shows that Strata gave that company a cover price.³¹⁶⁵ The figure recorded also shows the figure given by Strata as a cover figure.³¹⁶⁶ PT stated *'... there's a letter C in brackets ... that indicates that we're giving ... a cover ...'*³¹⁶⁷ PT confirmed that it would indicate Strata had given a cover price if *'...there's a figure on our sheet, and there's a percentage, so that's obviously a figure that we've given, because we'd have no knowledge, if they'd taken cover from somebody else, we wouldn't have the figure ... because there's a figure and a percentage, that's why, that shows that we've given a cover'*.³¹⁶⁸

IV.633. DI also explained that he would record covers given on the contract analysis or BOB sheet, *'the names on, on the front, we may have written on there the amount of cover that we'd given to the competition. I can't think of any other way that we recorded it'*.³¹⁶⁹

List of companies with whom Strata engaged in cover pricing

IV.634. Strata also provided to the OFT a list of companies *'... which the estimator would have used when making contact with other contractors regarding the giving and receiving of cover prices'*.³¹⁷⁰ The list included the following companies:³¹⁷¹

- [...] [C] [List of x Participant Companies]

³¹⁶⁵ Interview transcript, OFT Document Reference 11381, page 5.

³¹⁶⁶ Interview transcript, OFT Document Reference 11381, page 5.

³¹⁶⁷ Interview transcript, OFT Document Reference 11381, page 3.

³¹⁶⁸ Interview transcript, OFT Document Reference 11381, page 3

³¹⁶⁹ Interview transcript, OFT Document Reference 13138, page 19

³¹⁷⁰ Letter, OFT Document Reference 4052, page 4

³¹⁷¹ Contact list, OFT Document Reference 4064.

[...] [C]

T & C Williams

IV.635. As part of its leniency application, T & C Williams provided a general explanation of its participation in cover pricing. T & C Williams explained that *'The company has on occasion been involved in "cover bidding" in respect of contracts for which it was tendering, either by "giving a cover" to a competitor (i.e. giving some indication of the price that it intended to put forward in its tender) or by "receiving a cover" from a competitor (i.e. obtaining some indication of the price that its competitor intended to put forward). To the best of the knowledge of the Company's current officers and employees, this is the full extent of its contact with competitors during the course of the tendering process'*.³¹⁷²

T & C Williams taking cover prices

IV.636. John Hardy ('JH'), an estimator at T & C Williams explained during interview that *'the enquiries would end up on my desk then I'd have a chat with Brian [Brian Barker ('BB'), Managing Director] and say what we doing with this certain job...or he'll come in to me and say I've seen such and such come in, get rid of it, I don't want it. It's not for us that or whatever. Occasionally...we would send a job back if it was an architect we didn't know or a QS that we didn't know...if it was someone that we worked for regularly and we wanted to*

³¹⁷² Corporate Statement, OFT Document Reference A0358, page 1.

keep on working for them that's when we would have...if we'd decided that we weren't going to price it at that stage that's when we'd just hang on to it and then at a later date before the tender would go in, we would see who was pricing it so that we could put a price in but not actually waste any time pricing it'.³¹⁷³ BB confirmed that 'generally speaking, I would make the decision as to whether and how keen we were on the work...John would carry out from there'.³¹⁷⁴

IV.637. T & C Williams explained how it would find out who else was tendering for the contract. *'Very rarely is the Company informed when in receipt of a tender of which other building contractors are on the same tender list. In a few cases, however, the Company has in the past been involved in contacts with other builders tendering for the same contract. Tenderers are sometimes able to ascertain one another's identities either by informed guess work or, where an invitation to tender specifies a given sub-contractor or supplier, by obtaining information from that party. In the few cases in question, the Company...has itself initiated contacted [sic] with other builder in order to find out in broad terms the price which that builder intends to quote (i.e. to take a cover)'.³¹⁷⁵*

IV.638. T & C Williams explained that *'The [Tender] register records details of contracts for which the Company was invited to tender between January 2000 and March 2006. However, the register provides only an approximate record of the Company's tendering activities'.³¹⁷⁶ It continued 'Each row relates to a given contract and records details of the project, when the enquiry was received, when the tender was to be returned and so on. The final columns are reserved for "comments". In the case of some [...] [C] contracts of the 484 listed in the Register, the comments column contains a "C"...the Company has established that the inclusion of a "C" in the comments column of the Tender Register indicates that a cover was taken in respect of the contracts thus identified'.³¹⁷⁷*

IV.639. BB confirmed that the exchange of cover prices was discussed at management meetings: *'there could be instances there where you would be discussing a particular job and you might have said then...we didn't go very hard for that one ... or indeed may have even said well we took a cover on that one'.³¹⁷⁸ At these meetings would have been 'senior staff...that's the directors and all the senior staff in the office'.³¹⁷⁹*

IV.640. On tenders where T & C Williams was taking a cover price JH explained *'either myself or the buyer [Steve Potter], usually me, would see if we could find out who was pricing it, so we'd ring a...named electrician...and say...who else you pricing it for and then they'd give us 2 or 3 names ... and then I would ring one of those and say 'are you pricing it' and if he'd say yes then I'd say well we don't want to, can you help us'.³¹⁸⁰ JH confirmed that when referring to 'help' he meant provide a figure for a cover price.³¹⁸¹*

³¹⁷³ Interview transcript, OFT Document Reference 12763, page 4.

³¹⁷⁴ Interview transcript, OFT Document Reference 12762, page 4.

³¹⁷⁵ Corporate Statement, OFT Document Reference A0358, page 3.

³¹⁷⁶ Corporate Statement, OFT Document Reference A0358, page 4.

³¹⁷⁷ Corporate Statement, OFT Document Reference A0358, pages 4 and 5.

³¹⁷⁸ Interview transcript, OFT Document Reference 12762, page 11.

³¹⁷⁹ Interview transcript, OFT Document Reference 12762, page 11.

³¹⁸⁰ Interview transcript, OFT Document Reference 12763, page 6.

³¹⁸¹ Interview transcript, OFT Document Reference 12763, page 6.

IV.641. JH stated that he would contact another competitor by telephone *'probably 2 or 3 days before the tender was going in, it wouldn't be early because you'd be busy doing other jobs so they'd just get left on the side...it would be...relatively close to the tender date I would say'*.³¹⁸² As for the actual exchange of cover prices, *'Quite often it would only be the morning that the tender was due in'*.³¹⁸³

IV.642. JH confirmed that he would sometimes record the contact with competitors. JH stated *'You'd make a note sometimes on a piece of paper...if it was one where say I was going to get a cover then I'd maybe put a note on that such and such will give us a cover...that's as far as it went'*.³¹⁸⁴ JH confirmed that if a 'C' was written in the tender book, *'it would be that we had taken a cover, if it was in the book'*.³¹⁸⁵ T & C Williams stated in a *'Supplemental Corporate Statement'*, that *'no records are kept in relation to contracts not obtained; and that the recollections of those involved inevitably fade given the high volume of contracts processed, the manner in which covers are obtained on the basis of a brief telephone conversation, and the fact that covers have frequently been taken in relation to enquiries outside the Company's normal working area, from firms with which the Company is not familiar'*.³¹⁸⁶

T & C Williams giving cover prices

IV.643. T & C Williams explained, *'In the few cases in question, the Company has...been contacted by another builder in respect of a given invitation to tender and has been asked to indicate in broad terms the price it intends to quote (i.e. to give a cover)'*.³¹⁸⁷

IV.644. On tenders where T & C Williams was giving a cover price, JH explained that a typical conversation would go as follows, *'...you get a phone call, - it's such and such from such and such, are you pricing a particular job? - yes - can you give me some help on it, I'm not gonna get it done in time, or I'm too busy I can't price that one'*.³¹⁸⁸

IV.645. BB stated that when providing a figure to a competitor for a cover price there was *'No...laid down formula...you would use anything bar a fixed percentage because of course, it wouldn't take an Einstein to work out that one was 5% more than another one...would it?'*.³¹⁸⁹

IV.646. T & C Williams explained that *'There was no equivalent code for indicating contracts in respect of which a cover was given. The Company has no written record of the giving of covers, which will usually involve only a single telephone call from another building firm'*.³¹⁹⁰

³¹⁸² Interview transcript, OFT Document Reference 12763, page 11.

³¹⁸³ Interview transcript, OFT Document Reference 12763, page 11.

³¹⁸⁴ Interview transcript, OFT Document Reference 12763, page 11.

³¹⁸⁵ Interview transcript, OFT Document Reference 12763, page 10.

³¹⁸⁶ Supplemental corporate statement, OFT Document Reference A0865, page 20.

³¹⁸⁷ Corporate Statement, OFT Document Reference A0358, page 3.

³¹⁸⁸ Interview transcript, OFT Document Reference 12763, page 11.

³¹⁸⁹ Interview transcript, OFT Document Reference 12762, page 9.

³¹⁹⁰ Corporate Statement, OFT Document Reference A0358, page 5.

IV.647. JH confirmed that he would sometimes record the contact with competitors. JH stated *'You'd make a note sometimes on a piece of paper...that somebody rang wanting help...but that's as far as it went'*.³¹⁹¹

IV.648. T & C Williams also provided to the OFT a schedule *'listing the companies and (where known) the individuals within those companies with which the Company has had contact since January 2000 regarding cover pricing'*. The list contained the following companies:³¹⁹²

- [...] [C] [List of x Participant Companies]

IV.649. In its response to the Statement, T & C Williams stated it *'...does not dispute the factual basis for the allegations...'*³¹⁹³ in respect of its Infringements.

Thomas Fish

IV.650. As part of its leniency application, Thomas Fish made available current directors and employees to be interviewed and also arranged availability for ex-employees to be interviewed. During these voluntary interviews the individuals were asked to give an explanation of Thomas Fish's involvement in cover pricing.

IV.651. Peter Woodhouse ('PW'), Director of Thomas Fish, formerly Managing Director from circa 2000, was responsible in that former role for the day-to-day activities of Thomas Fish. PW explained that the construction work carried out by Thomas Fish was split into two categories; major works and general works. Major works required a full construction team comprised of a contracts manager, site manager, surveyor and so on, whereas the general works were usually up to the value of about [...] [C] and were usually dealt with by one person who would prepare the estimate then manage the project.³¹⁹⁴

IV.652. PW was involved in the decision making process for how tenders were dealt with. He said *'On general works, I would...pass it in to the general works for them to do the tendering...And because the tenders generally were relatively low value, then they were left to their own devices, if you like...I used to oversee the work of general works, and used to guide them in terms of the sort of work they ought to put in for...And the values of projects, just to make sure that they weren't trying to carry out too much work at any time'*.³¹⁹⁵ PW described how major works operated in a similar manner where tender documents would be passed to the estimator. He also commented that there would be a tender settlement meeting at the end of the estimating process, in which the attendees would look at issues such as risk and margin.³¹⁹⁶

IV.653. PW said that general works tenders would have been passed to Mark Thomas ('MT'), Peter Stone ('PS') and John Slade ('JS'). In respect of major works it was primarily Martin Lane ('ML'). PW said that he was part of the decision to tender along with contracts managers *'And, really, the estimator in terms of the*

³¹⁹¹ Interview transcript, OFT Document Reference 12763, page 11.

³¹⁹² Annex 3, OFT Document Reference A0868.

³¹⁹³ Written representations of T & C Williams, 27 June 2008, paragraph 4.

³¹⁹⁴ Interview transcript, OFT Document Reference 6355, page 3.

³¹⁹⁵ Interview transcript, OFT Document Reference 6355, page 4.

³¹⁹⁶ Interview transcript, OFT Document Reference 6355, page 4.

work that he had got'.³¹⁹⁷ In regard to how he made the decision whether or not to bid for a tender, PW said *'It's a fairly complex basis. I mean, obviously, initially it was the workload that we'd got on...And are we looking for another project? Very interested in who the client was and, well, obviously whether they'd got the ability to pay us at the end of the project*'.³¹⁹⁸ PW also commented that the professional team of quantity surveyors and the architects to be used influenced the decision whether or not to tender, along with the type of construction work involved as some types were more profitable than others.

IV.654. In relation to what documents were generated as part of the tendering process, PW described the tender meetings as *'ad hoc'* and said that no formal record would be taken of the rationale behind deciding whether to tender or not to tender for a contract. PW described the main document generated as being the *'front sheet'* which recorded all the details of the tender; however this was not used so much in the general works area. In regard to how Thomas Fish tracked pending tenders, PW said that *'on a weekly basis, a chart was drawn up showing the work that we got in to tender, showing the submission dates for the tender. Martin Lane on major contracts would have been involved with one of the secretarial staff in preparing that*'. PW explained that some documents would be kept, even if they had been shelved for being over the client's budget, as there was the possibility that a job might come out for re-tender at a later time.³¹⁹⁹

IV.655. PW was asked what would happen if they considered a tender not to be attractive to Thomas Fish. He responded that *'On occasions, we would decline to tender. ... And I suppose it's at that point we would consider taking a cover price or seeking a cover price*'.³²⁰⁰

IV.656. MT joined Thomas Fish circa 1999 as a surveyor/estimator working in the general works department with JS and PS, and was eventually promoted to general works manager. MT described his role in the tendering process, saying that *'I was given certain enquiries via one of my two colleagues, John Slade or Peter Stone...it was passed to me to estimate*'.³²⁰¹ MT described how he would put the tender together and send it to the client but did not participate in the decision making process of whether to bid for a tender or not.

IV.657. MT described what documents would be generated or used in the tendering process. The main document where the details would be recorded was the general works tender book.³²⁰² MT would make some entries in this book; however he said the majority of this was done by PS and JS. MT was asked what documents would be retained, and for older tenders he said that documents would be deleted or put into an old file, and *'when that got too big, it would be just chucked away*'.³²⁰³

IV.658. JS joined Thomas Fish circa 1999 and originally worked in the general works department, which he also referred to as *'small works*'.³²⁰⁴ Subsequently he

³¹⁹⁷ Interview transcript, OFT Document Reference 6355, page 5.

³¹⁹⁸ Interview transcript, OFT Document Reference 6355, page 5.

³¹⁹⁹ Interview transcript, OFT Document Reference 6355, pages 6 and 7.

³²⁰⁰ Interview transcript, OFT Document Reference 6355, page 10.

³²⁰¹ Interview transcript, OFT Document Reference 6354, page 5.

³²⁰² Extracts of estimates book, OFT Document Reference 3974.

³²⁰³ Interview transcript, OFT Document Reference 6354, page 12.

³²⁰⁴ Interview transcript, OFT Document Reference 6360, page 2.

moved to the role of contracts manager within the major contracts department of Thomas Fish and left the company in July 2005. JS described his role by saying that *'You would pretty much do everything, you'd send enquiries out and price them, get subcontract quotations and the like'*.³²⁰⁵ In regard to how decisions on whether to tender for a contract were made, JS said *'It was a pretty much joint thing...You could run out of time to price something and you decide you're not going to price it. You could also see that you've picked up other work in between time and you're not pricing it. Or alternatively you crack on and price on it'*.³²⁰⁶

IV.659. PS joined Thomas Fish prior to 2000 and was employed as part of the general management in the general works department until leaving the company in 2004. PS described his role as *'managing the department. Overseeing projects within the department. We all had our own roles to play so it was a team...it was varied, but basically the management side and the estimating and...not all of the estimating'*.³²⁰⁷

IV.660. PS said that tenders would probably first come in via PW or ML or the secretary and explained that the value of the tender also determined who would deal with it. PS said *'if it was [...] [C], the likelihood it may have drifted into ours [general works]'*. PS also said that if ML looked at a tender and decided it was not one to be dealt with by the major works department, it would be left on PS's desk and would be dealt with by general works.³²⁰⁸

IV.661. PS described factors affecting whether Thomas Fish bid for a tender as being *'the capacity of people in the office ... whether we like the job or not'*.³²⁰⁹ Asked what documents were produced, such as meeting notes and tender reports, PS said that *'Within our department we didn't really have any, we didn't have anything specific, there was nothing set down. We just made our own notes, if necessary or, you know, we built the tender up ourselves'*. PS did however comment that tenders *'were put in a book and given a number. You know, for reference'*.³²¹⁰

IV.662. Clive Simpson ('CS') was also interviewed concerning his time at Thomas Fish and involvement with tenders and cover pricing. CS said *'I joined Thomas Fish in 1989 as a quantity surveyor, promoted to a senior QS in 1998, and left the company in September 2006. So whilst primarily employed as a quantity surveyor, that role extended into estimating on an as and when basis, to meet the business requirements of Thomas Fish'*.³²¹¹ CS described his role further by saying *'as a senior quantity surveyor, I was primarily involved in the post contract running of jobs, but due to my experience in that, I was seconded into estimating as and when. We didn't employ a full time estimator'*.³²¹² CS explained that the surveying department, which at that time consisted of him and ML, would price the tenders and that he reported directly to ML, and PW above that.³²¹³

³²⁰⁵ Interview transcript, OFT Document Reference 6360, page 3.

³²⁰⁶ Interview transcript, OFT Document Reference 6360, page 3.

³²⁰⁷ Interview transcript, OFT Document Reference 13312, pages 2 and 3.

³²⁰⁸ Interview transcript, OFT Document Reference 13312, page 3.

³²⁰⁹ Interview transcript, OFT Document Reference 13312, page 4.

³²¹⁰ Interview transcript, OFT Document Reference 13312, page 4.

³²¹¹ Interview transcript, OFT Document Reference 13313, page 2.

³²¹² Interview transcript, OFT Document Reference 13313, page 3.

³²¹³ Interview transcript, OFT Document Reference 13313, page 3.

- IV.663. CS confirmed that *'no post arrived direct to an individual without it having gone across the director's desk first. So that would apply to tenders as well'*. CS said that *'once tenders had been received...they would be looked at in terms of value, to decide whether they were, a job to be dealt with by a major contracts division, or more by the small works, or general works... division'*. In the major works department, CS said everything went through ML because he was the sole estimator and surveying director. CS explained that *'Martin would generally price everything that we were interested in pricing, but if his workload was such, or there were two jobs in at once that we were keen in getting, then that's when I'd get dragged in to supplanting the resources'*.³²¹⁴
- IV.664. CS stated that he did not make the decision as to whether or not to submit a bid for a tender. He said in respect of major contracts, *'That wasn't a decision I took, that decision had been made higher up the line by Peter Woodhouse or Martin Lane'*.³²¹⁵
- IV.665. ML joined Thomas Fish in 1979 as a quantity surveyor and was subsequently promoted to Associate Director until he left Thomas Fish in 2006. ML said *'I was probably pricing most, 75%, 80% of major contracts works, or pricing, development work as well, and, doing the QS function on whatever I had to do at the time, as well'*.³²¹⁶ ML said that *'the tender would land on my desk, so sometime in the next day or so I'd talk to Peter [PW], just go across to his desk and say, you know, we've got this job from Nottingham University, it looks good, you know, are we going to price it. He'd say yes or, you know, if we didn't need the work or whatever and it was a bad job, we'd say well, get some help on that and that would be it. Because it was never called covers, it was called help'*.³²¹⁷
- IV.666. In relation to what documents were generated as part of the tender process, ML said *'if we were going to price a job, obviously we'd send out the whole job for pricing, as you would in a tender enquiry, subcontract enquiry...if we weren't going to price it, it would just lie on the desk, and wait for somebody either to phone up to see if we were on the list and did you want help, or, you know, you find out...if you couldn't find out who was on the list, there's always a way somehow you can find out via subcontractors. And so probably the last week before the job went in you'd phone around and try and find somebody pricing it. You'd always do a [site] visit though, whatever happened'*.³²¹⁸ ML further said that *'there was a tender report done every week, and then, because I was in charge of estimating, that tender report, when we used to have the management meeting...the last Wednesday of every month, that week's tender report would form the basis of my report to the management meeting...I'd just run through...Prior to this one, it's half a million quid, and then that one, we're getting some help from whoever, or looking for help on it'*.³²¹⁹
- IV.667. As part of its leniency application, Thomas Fish provided to the OFT a disclosure document of information relating to its involvement in cover pricing.

³²¹⁴ Interview transcript, OFT Document Reference 13313, page 4.

³²¹⁵ Interview transcript, OFT Document Reference 13313, page 5.

³²¹⁶ Interview transcript, OFT Document Reference 13315, page 3.

³²¹⁷ Interview transcript, OFT Document Reference 13315, page 4.

³²¹⁸ Interview transcript, OFT Document Reference 13315, page 4.

³²¹⁹ Interview transcript, OFT Document Reference 13315, pages 4 and 5.

This document states *'We have been involved on a fairly regular basis in giving and receiving cover prices as part of the tender process...On making contact and expressing a wish to receive a cover price or help, the company giving the cover would then undertake to provide a figure to the company making the request, for that company to submit as it's tender price. Obviously the figure given would be above the figure being submitted by the genuine tenderer, but in this process at no time would we be aware of their tender figure or anyone elses. Equally if we were providing the cover price we would only know our figure and the cover figure we had provided. Our main reason for carrying out this procedure was to avoid returning tender opportunities, as it is a fact that if we do this on a regular basis then we reduce our future tender opportunities from the clients affected. We have kept no comprehensive records of this activity but it took place in both our Major Contracts section of the company and in General Works and probably more so in General Works in recent years'*.³²²⁰

Thomas Fish taking cover prices

- IV.668. PW described how if a tender was not attractive and Thomas Fish was going to decline to tender, *'at that point we would consider taking a cover price or seeking a cover price'*.³²²¹ PW said *'we were very much aware that if we kept declining work when we were asked to work, particularly as far as local authorities were concerned, then we would just slip down their select list'*.³²²²
- IV.669. PW described the reasons for seeking a cover price and said it *'stems out of us having an enquiry for a project that we really are not interested in...So as not to disclose our lack of interest to the client, we seek a cover price on the basis that that price will be higher than the lowest tendered price. So we will then in theory be seen to have put in a bid, but in practice we know we are not going to win the project, because our tender will have been higher than the lowest tender'*.³²²³ PW further said he had talked to clients and *'that really annoyed them, that they'd gone to the trouble of putting you on a select list of six or eight contractors, and if you declined to provide a tender for whatever reason, they seemed to take that as a slight'*.³²²⁴
- IV.670. PW was asked how Thomas Fish would find out which competitors were bidding for a tender. He responded that *'The easiest way to find out is in the tender documentation there are usually specified certain items which can only be obtained from certain services, from certain sub-contractors, or items that are needed for work from certain suppliers...And therefore presumably, every contractor is going to contract those, contact those individuals to get a price...And so when we contacted those individuals, we would ask what contact they had from the contractors'*.³²²⁵ PW further noted that these competitor details would be recorded on the computer entry for the tender and also by ML on the front sheet of the tender documents.
- IV.671. MT described cover pricing as follows: *'If we had a project that came through the door for a regular client, and we were far too busy...then we would ask for*

³²²⁰ Disclosure documents, OFT Document Reference 3961, page 3.

³²²¹ Interview transcript, OFT Document Reference 6355, page 10.

³²²² Interview transcript, OFT Document Reference 6355, page 11.

³²²³ Interview transcript, OFT Document Reference 6355, page 13.

³²²⁴ Interview transcript, OFT Document Reference 6355, page 14.

³²²⁵ Interview transcript, OFT Document Reference 6355, page 12.

a price off somebody else that we thought was pricing it...and ask them just to give us a price just to put on the tender sheet and hand in, knowing that we didn't get it'.³²²⁶ MT said that his involvement in cover pricing was very limited but that to his knowledge the reason for seeking a cover price was 'mainly to keep the client...If you decide to turn round to the client and say, "No, I'm sorry, I'm not pricing that one"...and then they'll drop you off the tender list, and you'll not get any more inquiries from them'.³²²⁷ MT was asked if he knew of any occasion where Thomas Fish had been dropped by a client and replied 'I'm not aware of any'.³²²⁸

IV.672. JS was asked what would have happened if a tender was considered unattractive. He replied that *'If we felt we couldn't do the work we would try not to price it. If we knew early enough we'd send it back to the client...But I must admit we did try to avoid that because you've only got to do it once or twice and you'll be off the tender list'.³²²⁹ Asked if he could recall any times that Thomas Fish had been dropped from a tender list, JS replied 'I can't specifically, no'.³²³⁰ JS went on to describe the reasons for seeking a cover price by saying that, *'you can't always price everything all the time. You don't want to upset your clients who you work for regularly...So you would tend to try and get a figure from someone else to make sure a) you could get a price back, and b) not win the job'.³²³¹ JS further explained reasons for seeking a cover price by saying 'Generally it's you can't do the job for one or two reasons. It could be that it doesn't suit the workforce you've got so you can't really make a good job of it...It could be that you are overloaded with work. It could be that you've just run out of time to price it'.³²³²**

IV.673. PS explained the reasons for Thomas Fish seeking a cover price, saying that, *'Generally speaking it was always down to last minute, prices not coming in from your sub-contractors. You just couldn't get a price together some time, so it was to save sending it back, generally speaking...I suppose you was always afraid of not getting more enquiries from the people. It was almost a system that you could use to, to make sure that you kept enquiries. Because it wasn't always that you wanted to send them back. You sometimes...it was...it was just a necessity, you know, that the work had built up. You may have won some projects during that week and you didn't necessarily want that work. So it was a way of, just making it easier to work with'.³²³³*

IV.674. PS was asked who would have made the decision to take a cover price on a tender. He replied *'I guess the guy who is pricing it, so it could be myself, it could be a colleague, because you'd know at the point whether or not you could get the work done in the time that you could get the estimate together...occasionally you might decide that, because of the lack of information, you may decide early on that it was something that you wouldn't like as well, I mean it wasn't always last minute'.³²³⁴ PS recalled that he would have made decisions to take cover prices and when asked who that decision*

³²²⁶ Interview transcript, OFT Document Reference 6354, page 16.

³²²⁷ Interview transcript, OFT Document Reference 6354, page 17.

³²²⁸ Interview transcript, OFT Document Reference 6354, page 17.

³²²⁹ Interview transcript, OFT Document Reference 6360, page 7.

³²³⁰ Interview transcript, OFT Document Reference 6360, page 7.

³²³¹ Interview transcript, OFT Document Reference 6360, page 8.

³²³² Interview transcript, OFT Document Reference 6360, page 9.

³²³³ Interview transcript, OFT Document Reference 13312, pages 6 and 7.

³²³⁴ Interview transcript, OFT Document Reference 13312, page 7.

would have been communicated to within Thomas Fish he said that, *'we might have a meeting with Peter Woodhouse...But we didn't communicate that with anyone in particular. You know, there was no set regime for doing it, it was pretty much left up to yourself as to whether you could get the tender together or not'*.³²³⁵

IV.675. PS was asked how he would know who to contact to obtain a cover price for a tender and responded that *'Very much, more often than not the subcontracts are, you know, if you've got M&E, a lot of people will give you a list of M&E, go to these three, so they will always know who is on the tender list anyway...Mechanical and electrical contractors. They are generally the ones, more than anyone else, or a specialist, maybe refrigeration...'*.³²³⁶

IV.676. PS was further questioned on whether he considered the legal implications of seeking a cover price for a tender. He explained the activity, saying that, *'I think everyone knew, sort of, that, you know...you sort of knew that it was, well I didn't know it was illegal, but you knew it wasn't something that you broadcast...It had always been a bit secret society, I think...it was only when you get to a certain level that you...that you hear about it...obviously it was underhand a bit, but it was nothing [sighs]...you know, like being a lookout outside a supermarket while somebody was robbing, if you understand what I mean? It was, kind of, just, a...something that people didn't really talk about or make a fuss about'*.³²³⁷

IV.677. CS was asked what documents were generated as part of the tender process and he replied that *'if we were taking a cover on a job, nothing was done unless, unless there was a feeling that a site visit was necessary, in which case, a site visit would be undertaken, so that the client, you cover your tracks so that the client wouldn't think, oh, there's only ever been two people come to visit the site, how could the other two possibly have priced it, so you went through the motions, but that was as far as it went'*.³²³⁸

IV.678. CS gave an outline of the reasons why he believed Thomas Fish took cover prices. He said *'it could be either a job that we look at and say well, that's not appropriate, we can't accommodate it, we don't have the resources...Or we may look at it and think, well, maybe it's not a client particularly that we're going to want to work for or it's a tricky job'*.³²³⁹ CS continued to say that *'The biggest thing behind it is...there's a fear that even though you can't price this current job, you haven't got the resources, that if you turn it down and send it back, you'll be precluded from being invited to price any further jobs'*.³²⁴⁰ CS was asked if a client had ever told him that if Thomas Fish did not bid for a tender, it would not be invited to bid again and he replied *'I can't quote an example, no, but there's certainly a perception'*.³²⁴¹

IV.679. CS also described the process involved in obtaining a cover price, and his involvement, saying that *'once the decision had been taken, as I say, at senior level, as to whether that job was being bid for or not, the mechanism of*

³²³⁵ Interview transcript, OFT Document Reference 13312, pages 7 and 8.

³²³⁶ Interview transcript, OFT Document Reference 13312, page 9.

³²³⁷ Interview transcript, OFT Document Reference 13312, page 12.

³²³⁸ Interview transcript, OFT Document Reference 13313, page 5.

³²³⁹ Interview transcript, OFT Document Reference 13313, pages 6 and 7.

³²⁴⁰ Interview transcript, OFT Document Reference 13313, pages 7.

³²⁴¹ Interview transcript, OFT Document Reference 13313, page 7.

obtaining the cover price and everything else would fall on the estimating department, which would be in major contracts, first port of call would be generally Martin [ML]. My role in doing it was usually when Martin was on holiday'.³²⁴²

IV.680. In regard to how he would know which other companies were bidding for a tender and who to contact to obtain a cover price, CS said *'It would probably be someone you were familiar with, who you may have contacted in the past, or that you know an individual there...staff move around, and you then tend to know somebody at most of the other contractors...through the exchange of covers over the years, you build up a contact list of estimators, so you know who was estimator at that firm, so that would be first port of call. If it was a cold call, just ring and ask for the estimating department'.³²⁴³*

IV.681. CS was asked whether the cover price Thomas Fish obtained would be recorded anywhere and replied *'it wouldn't necessarily have been recorded. We would then fill in the tender form with the figure that we were supplied with, sign it as though it was a bona fide tender, and submit it'.³²⁴⁴*

IV.682. ML said *'help is, you know, it's a cover price, but it's the clandestine word for cover'.³²⁴⁵* ML was asked who made the decision to take a cover price for a tender and said *'well, it was part of my job'.³²⁴⁶*

Thomas Fish giving cover prices

IV.683. For tenders where Thomas Fish was giving a cover price, PW said *'I may have been contacted or made aware that a particular contractor wanted a cover price...But I would pass that information to the estimator, and leave them to it'.³²⁴⁷*

IV.684. CS was asked how a competitor would contact Thomas Fish to try and obtain a cover price. He said that *'most times the calls came through kind of cold and through the switchboard, somebody's been asking for the estimating department'.³²⁴⁸* He confirmed that Thomas Fish would *'never ring somebody asking them if they wanted to take a cover'.³²⁴⁹*

IV.685. ML had previously said he would make the decision to obtain a cover price and confirmed that he too would decide to give a cover price to a competitor if requested. He said *'If I was pricing the job and somebody phoned up and said can I get...can you give me some help on pricing so and so, and you say yeah. Can you give me some help? Yeah, sure, you know'.³²⁵⁰* ML continued, *'they'd phone up and say...can I speak to the estimator who is pricing that, and the receptionist had a copy of the tender report as well, so she knew what estimator was pricing which job'.³²⁵¹*

³²⁴² Interview transcript, OFT Document Reference 13313, page 7.

³²⁴³ Interview transcript, OFT Document Reference 13313, page 8.

³²⁴⁴ Interview transcript, OFT Document Reference 13313, page 8.

³²⁴⁵ Interview transcript, OFT Document Reference 13315, page 4.

³²⁴⁶ Interview transcript, OFT Document Reference 13315, page 5.

³²⁴⁷ Interview transcript, OFT Document Reference 6355, page 15.

³²⁴⁸ Interview transcript, OFT Document Reference 13313, page 9.

³²⁴⁹ Interview transcript, OFT Document Reference 13313, page 8.

³²⁵⁰ Interview transcript, OFT Document Reference 13315, page 5.

³²⁵¹ Interview transcript, OFT Document Reference 13315, page 5.

Compensation payments

IV.686. As part of its leniency application, Thomas Fish informed the OFT that it had been involved in arrangements where the winning contractor, on a particular tender, would reimburse the unsuccessful contractor or contractors a certain sum of money to offset their costs incurred in the preparation and submission of a bid for that tender. The details of these arrangements are set out in the description of the relevant particular Infringement, below.

Thomas Fish lists of competitors and contacts

IV.687. Thomas Fish also provided to the OFT, a list of competitors with individual contact names, telephone numbers and notes on their areas of activity. This list was originally kept by PS and on his departure from Thomas Fish it was passed on to MT.³²⁵² The list includes details of the following companies:

- [...] [C] [List of x Participant Companies]

IV.688. In addition to this, Thomas Fish also provided a document titled '*MARTIN LANES CONTACT LIST*' which contains further names of competitors,

³²⁵² Contact list, OFT Document Reference 3973.

individual contacts and telephone numbers.³²⁵³ This list includes details of the following companies:

- [...] [C] [List of x Participant Companies]

Thomas Vale

- IV.689. In its leniency application, Thomas Vale explained that its head office was in Stourport-on-Severn and that it employed staff in several regional offices and structured its operations into business divisions that addressed specific markets and client bases.³²⁵⁴ Operating divisions included Traditional, Building and Maintenance and Strategic Projects, all based at the head office; City & Interiors, based in Aston, Birmingham; and East Midlands, based outside Leicester (since relocated to Derbyshire).
- IV.690. Prior to the business being organised into separate divisions, the estimating function was based at the head office until 2000 under the management of Chief Estimator Chris Trickett ('CKT'). Thereafter, estimators worked for divisions under separate management and CKT become Commercial Manager with responsibility for the estimating function within Traditional division only.
- IV.691. Other personnel who provided explanations of their involvement in cover pricing worked in divisions as follows: estimators Ian Skyrms ('IS') and Robin Perks ('RP') worked for CKT in Traditional division; Simon Westwood ('SJW') worked for CKT as an estimator in Traditional, then moved to Strategic Projects division before becoming IT manager at the head office; and senior estimator Chris Duffy ('CD') also worked in Strategic Projects division.
- IV.692. Other estimating personnel with whom it was not possible to conduct interviews included the following: estimator Anthony (Tony) Allport ('AA') worked in Building and Maintenance division until emigrating to New Zealand in 2004 and Anthony (Tony) Bastable ('AJB') worked as an estimator in Strategic Projects division before leaving the company in 2005. Paul Kirk worked as an estimator in the East Midlands division until 2004.

Cover pricing – general and the use of the Tender Status spreadsheet

- IV.693. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing and following interviews with staff, it was apparent that indications of a cover price were recorded in several ways. Most significantly, a spreadsheet entitled 'TENDER STATUS 2000 to 2006'³²⁵⁵, hereafter referred to as the 'Tender Status spreadsheet', was maintained and updated at Thomas Vale's head office by CKT. This detailed all tenders received

³²⁵³ Contact list extracts, OFT Document Reference 3976.

³²⁵⁴ Leniency application, OFT Document Reference 4519, page 6.

³²⁵⁵ Tender Status spreadsheet, OFT Document Reference 4522.

at the head office by Thomas Vale for the period 2000-2006 for its separate divisions, i.e. Strategic Projects, Building and Maintenance and Traditional. The Tender Status spreadsheet also recorded tenders for the City & Interiors division until 2001 plus tenders for the East Midlands area until it became a separate division in 2002.

IV.694. CKT explained the creation of the Tender Status spreadsheet to the OFT in interview *'prior to 2000...I was responsible for the whole estimating function, so...I knew really what was going on in that whole discipline. Obviously when we were split down into divisions, to a certain extent that reduced my sort of knowledge of what was going on. And I got this set up so that all the estimators in all the divisions could actually...relate and talk to one another electronically, so somebody, somewhere in the building could, would know what was going on'*.³²⁵⁶

IV.695. CKT went on to explain that all tenders, apart from those for City & Interiors from 2001 and those for East Midlands from 2002, were booked through him and went onto the Tender Status spreadsheet.³²⁵⁷ This recorded a sequential tender number, description of the project and client, approximate value, designated estimator and category. In interview, staff from Thomas Vale explained that category A indicated a contract that Thomas Vale was keen on, whereas category C was a less desirable project for which assistance from another contractor was sometimes sought. CKT said that *'C in those days, was, obviously, as it says, inferred as being a cover'*.³²⁵⁸

IV.696. From January 2001, the use of category C tenders ceased and was replaced by category B although the meaning of the category remained the same in that it indicated a cover price. When asked about the decision to change from category C to B, CKT said *'I do vaguely remember that...I think that came from a discussion I perhaps had with Tony Hyde [managing director of Thomas Vale] and he thought that we didn't really need to have these three categories, particularly something that was indicating C, which was obvious to people perhaps what it meant. So we agreed at that point just to say, A for one we priced, and B for one that we probably didn't'*.³²⁵⁹ The use of category B to indicate a cover price is borne out by the key to categorisation on the spreadsheet maintained by the Strategic Projects division, i.e. *'Cat A – Priced CAT B – Cover'*.³²⁶⁰

IV.697. The Tender Status spreadsheet also recorded the tender return date, the amount of Thomas Vale's submitted bid, an indication of the result and a column entitled Tendering Contractors. Within this column, other contractors' names would often be recorded.

Thomas Vale taking cover prices

IV.698. With regard to taking a cover price, Thomas Vale stated *'As the purpose for taking a cover was to ensure that a contract would not be awarded, there was no need to either create or retain documentation'* (emphasis added by Thomas

³²⁵⁶ Interview transcript, OFT Document Reference 11418, page 9.

³²⁵⁷ Tender Status spreadsheet, OFT Document Reference 4522.

³²⁵⁸ Interview transcript, OFT Document Reference 11418, page 15.

³²⁵⁹ Interview transcript, OFT Document Reference 11419, page 11.

³²⁶⁰ Tender report, OFT Document Reference 4192.

Vale).³²⁶¹ It added *'in relation to taking a cover, the estimator may have categorised the tender as 'B' or 'C' on the Tender spreadsheet or Weekly Tender List and/or shown the competitor name in bold on the Tender spreadsheet'*.³²⁶²

IV.699. Thomas Vale explained that that *'the decision on whether to take a cover price would generally be made by the General Manager, Director in Charge or Bid Manager in conjunction with the Chief Estimator (or equivalent)'*.³²⁶³ In interview, CKT said that the decision not to competitively price a tender would always be referred to Thomas Vale's divisional directors who *'were always aware with the action and agreed with the action'* taken by estimators.³²⁶⁴

IV.700. Thomas Vale said that there was no standard process as to who would be called for a cover price. Once a firm had been identified as being on the tender list, either from estimators' knowledge and experience or from trade publications or alternatively sub-contractors specified in the tender documentation, it would depend on whether Thomas Vale estimating staff had a relationship with an estimator at that firm.³²⁶⁵ When it was determined that a cover price would be sought from a competitor, a senior member of the estimating staff (usually the Chief Estimator or Estimating Manager) would undertake to call an estimating contact at the other firm.³²⁶⁶

IV.701. In interview, CKT said that *'most of the time and obviously it's highlighted in the records...I dealt mainly with the covers myself'*³²⁶⁷ and that the decision to take assistance on a tender was made *'pretty early on'*.³²⁶⁸ He explained that he made initial contact with a competitor by telephone and then followed it up with another call just before the tender was due. When asked who he would contact, he said *'Well, obviously there were certain people within the network that you...obviously knew perhaps a little bit better than others. You may have worked with them, they may have worked with you, you may have had contact with them at other businesses somewhere or other, and you felt comfortable with these guys, you know, it was trust really...Generally, it was me who dealt with them, you know, because with respect you needed somebody who understood the other people as well, and the other personalities, so it was crucial that somebody who had reasonable experience was dealing with it'*.³²⁶⁹

IV.702. CKT said that he had a *'little black book'*³²⁷⁰ of contacts, so that when seeking a cover price *'the number and the contact person was readily available to me'*.³²⁷¹ As part of its leniency application, Thomas Vale provided CKT's list of contacts to the OFT.³²⁷² This contained an alphabetical list of contractors, contact names and telephone numbers.

³²⁶¹ Leniency application, OFT Document reference 4519, page 12.

³²⁶² Leniency application, OFT Document reference 4519, pages 12 and 13.

³²⁶³ Leniency application, OFT Document Reference 4519, page 9.

³²⁶⁴ Interview transcript, OFT Document Reference 13855, pages 14 and 15.

³²⁶⁵ Leniency application, OFT Document Reference 4519, page 11.

³²⁶⁶ Leniency application, OFT Document reference 4519, page 11.

³²⁶⁷ Interview transcript, OFT Document Reference 13855, page 4.

³²⁶⁸ Interview transcript, OFT Document Reference 11418, page 21.

³²⁶⁹ Interview transcript, OFT Document Reference 11418, pages 21 and 22.

³²⁷⁰ Interview transcript, OFT Document Reference 11418, pages 21.

³²⁷¹ Interview transcript, OFT Document Reference 13855, page 9.

³²⁷² Contact book, OFT Document Reference 11086.

- IV.703. CKT explained that when Thomas Vale was seeking a cover, usually on a Category B or C contract, the party that provided assistance would be highlighted in bold within the 'Tendering Contractors' column of the Tender Status spreadsheet.
- IV.704. CKT said *'the competitor who is in bold was an indication to me and obviously anyone else who had access to it, to whom we had actually gone to for a cover figure...and the reason, one of the reasons why it was in bold, obviously it was important to know who you had gone to, or talked to'*.³²⁷³ CKT stated that all the other estimators understood the system of putting in bold the name of a competitor who had provided cover *'because I'd asked them, in fairness, you know, please if you do anything like this please let me know'*.³²⁷⁴ He added *'because all the lads actually understood the reasons as to why we needed that sort of highlighted'*.³²⁷⁵
- IV.705. This Tender Status spreadsheet, which was accessible electronically to estimating staff at the head office, would be updated with the name of the competitor that had provided cover, either by CKT or by the designated estimator. If dealt with by CKT, the highlighting in bold of the competitor would have been entered as soon as he had arranged the cover price, *'and then obviously that told other people that it was already set up'*.³²⁷⁶ CKT explained that he usually dealt with the necessary telephone calls to obtain a cover price for his own division (Traditional) and he would update the spreadsheet himself. However, estimators in both Building and Maintenance and Special Projects divisions would have been fully aware of the system of recording covers on the Tender Status spreadsheet.³²⁷⁷ CKT said *'eighty per cent of the entries on there were actually inputted by myself...it may well be that on odd occasions other divisions, because they had access to this...they inputted the details themselves'*.³²⁷⁸ CKT went on to explain that if the tender had been allocated to an estimator in a different division, the designated estimator would normally have arranged the cover price themselves.³²⁷⁹
- IV.706. CKT further explained that being Thomas Vale's Chief Estimator for the overall estimating function until 2000, all tenders continued to come through him, even for other divisions. On occasions, the Tender Status spreadsheet showed CKT to be the designated estimator for a tender allocated to a separate division, e.g. Special Projects. CKT explained that this would indicate that he dealt with the cover price in place of the normal estimator, *'it may well be that Tony Allport or whoever at that time was perhaps going out or on holiday and I dealt with it for him'*.³²⁸⁰
- IV.707. On other occasions, CKT would not have known which estimator had been allocated to a tender in which case the estimator column would be left blank. This he said was purely a *'clerical oversight'*³²⁸¹ and if a competitor had been

³²⁷³ Interview transcript, OFT Document Reference 11418, page 17.

³²⁷⁴ Interview transcript, OFT Document Reference 11418, page 18.

³²⁷⁵ Interview transcript, OFT Document Reference 13855, page 5.

³²⁷⁶ Interview transcript, OFT Document Reference 13855, pages 6 and 7.

³²⁷⁷ Interview transcript, OFT Document Reference 11418, pages 17 and 18.

³²⁷⁸ Interview transcript, OFT Document Reference 13855, page 2.

³²⁷⁹ Interview transcript, OFT Document Reference 13855, pages 5 and 6.

³²⁸⁰ Interview transcript, OFT Document Reference 13855, page 5.

³²⁸¹ Interview transcript, OFT Document Reference 13855, page 3.

highlighted in bold, it would still indicate that the designated estimator would have dealt with the cover.

IV.708. Other estimating personnel were also interviewed about their knowledge of the Tender Status spreadsheet and how covers from other contractors were recorded internally at Thomas Vale. IS, who worked directly for CKT, was aware of the Tender Status spreadsheet, categorisation of tenders and the system of highlighting a competitor in bold to indicate covers. He said that although he had access to the spreadsheet, it would usually be up to CKT to update the report.³²⁸² IS added that CKT would know what to enter on the spreadsheet because *'it would be talked about after the tender, we'd talk about it before the tender went in...and it would be arranged either by Chris or myself...to get the cover price'*.³²⁸³ RP, who joined Thomas Vale in 2002 and also worked directly for CKT, was not aware of the Tender Status spreadsheet at the time but understood the categorisation of B or C tenders and that any information about covers would be passed to CKT.³²⁸⁴

IV.709. CD, who worked in Strategic Projects division, said that he was aware that CKT maintained the Tender Status spreadsheet and that if a competitor was named in bold; this indicated that assistance had been sought from that company. CD said that if he had been personally aware of the cover price received from a competitor, he would make the entry in the spreadsheet himself at the end of the tender process.³²⁸⁵

IV.710. SJW was also interviewed and said that he created the Tender Status spreadsheet on behalf of CKT and was aware of its contents. He said that either he or CKT could have made or received telephone calls relating to cover prices but the decision to take a cover price *'came from director level'*.³²⁸⁶ SJW said that either CKT or the designated estimator updated the Tender Status spreadsheet with the known competition and Thomas Vale's bid. In respect of updating the competitor who had provided a cover price in bold, SJW said *'that wasn't something that I did particularly, I don't think that was something that I did so perhaps that was Chris Trickett that...had done that'*.³²⁸⁷

Thomas Vale giving cover prices

IV.711. In relation to giving a cover to a competitor, Thomas Vale explained that when submitting a genuine tender price for a project that it was interested in winning, estimating personnel would create a Tender Summary Sheet, also known as EST6 sheet and/or prelim book sheet. This form included a section headed Competition and Thomas Vale stated that *'personnel may have made some note in this section to indicate that cover was provided. This could be by annotating the other party who asked for cover in bold, or use of a ringed letter "C", and/or a figure, telephone number and contact name'*.³²⁸⁸

³²⁸² Interview transcript, OFT Document Reference 11389, pages 3 and 4.

³²⁸³ Interview transcript, OFT Document Reference 11422, page 4.

³²⁸⁴ Interview transcript, OFT Document Reference 11387, pages 4 and 5.

³²⁸⁵ Interview transcript, OFT Document Reference 11384, pages 3 and 4.

³²⁸⁶ Interview transcript, OFT Document Reference 11396, page 3.

³²⁸⁷ Interview transcript, OFT Document Reference 11396, pages 5 and 6.

³²⁸⁸ Leniency application, OFT Document Reference 4519, page 12.

IV.712. In interview CKT explained *'under the competitors' names we should accumulate it on that form; we probably may well write the figure, and indicate it was a cover from us to them'*.³²⁸⁹

Other divisions at Head Office

IV.713. A similar spreadsheet to the Tender Status spreadsheet was retained in electronic format within the Strategic Projects division, entitled *'Strategic Projects Tender Report April 2002 – March 2005'*³²⁹⁰ containing largely identical information to that maintained by CKT; a sub-heading provides a key to categorisation of tenders as *'CAT A – Priced CAT B – Cover'*.

IV.714. This spreadsheet was maintained and updated by Russell Burley, the former Bid Manager for that division. Again, tendering contractors that provided covers were highlighted in bold. On one contract, a ringed letter 'c' was annotated next to another contractor, which, according to SJW, indicated a cover price from Thomas Vale to that contractor.³²⁹¹

IV.715. Nick Galliers, ex-manager of Building and Maintenance division also kept a separate handwritten tender list (which duplicated entries held by CKT in his tender status report). CKT said that it appeared that Nick Galliers indicated the use of a cover price by marking a shaded triangle in the corner of the column marked 'value', adjacent to Thomas Vale's tender figure.³²⁹²

Other Thomas Vale offices

IV.716. The same categorisation codes of A, B and C were used in tender lists created by City & Interiors and East Midlands division. Nigel Stone, estimating manager in Birmingham kept a separate handwritten tender register and would indicate a cover taken by use of the word 'COVER' in the estimator column. Other spreadsheets for this division would also record whether Thomas Vale intended to submit a cover price by use of typed or handwritten use of B or C in the category column. Nigel Stone, in interview explained that City & Interiors had their own classification of incoming work, *'We had a three-scale sort of tier, which was, which was, ABC and A being an A, a grade A job, as we know, which is one that we're extremely keen on, B not so keen but, you know, could be of interest to us and C being we weren't interested and we would, in most cases, take a cover'*.³²⁹³

IV.717. In its leniency application, Thomas Vale also provided contemporaneous handwritten notes of telephone communications, which indicated prices were sought from other contractors, showing the contact name of that contractor, telephone number and tender amount provided. The use of covers could, on occasions, also be clearly indicated in management reports or memos. For example, one tender report from a senior management managers' meeting has the following entry *'outside assistance being taken'*.³²⁹⁴

³²⁸⁹ Interview transcript, OFT Document Reference 11418, page 22.

³²⁹⁰ Tender report, OFT Document Reference 4192.

³²⁹¹ Interview transcript, OFT Document Reference 11396, page 6.

³²⁹² Interview transcript, OFT Document Reference 11420, page 9.

³²⁹³ Interview transcript, OFT Document Reference 11423, page 7.

³²⁹⁴ Meeting minutes, OFT Document Reference 4617, page 1.

W R Bloodworth

IV.718. As part of its leniency application, W R Bloodworth provided a list of [...] [C] cover prices, both covers given and taken, since March 2000³²⁹⁵ and a list of *'Contacts for Cover Prices'* in respect of competitor companies.³²⁹⁶ The following W R Bloodworth employees were interviewed by the OFT: Stuart Bloodworth ('SB'), Managing Director, and Michael Campbell ('MC'), estimator. The previous Managing Director, David Bloodworth ('DB'), retired in 2002.

Cover pricing - general

IV.719. W R Bloodworth staff confirmed in interview that it participated in both the giving and taking of cover prices. SB said that as W R Bloodworth was a small family firm, generally only MC and he would get involved in estimating.³²⁹⁷ MC explained that on receipt of a tender *'We'd have a look at it, see if it was a job that we thought we could do, see if it was a job we thought we could win and see how busy we were – if it was a job we needed, then decide if we're going to price it, and if we weren't going to price it to find out – well you pretty much knew – who was going to price and get some help from them. i.e. a cover price'*.³²⁹⁸

IV.720. The OFT obtained two tender registers from the premises of W R Bloodworth during the visit under section 28 on 28 June 2005. MC explained in relation to the first register³²⁹⁹, that he would annotate with *'A tick if we won the job and a cross if we didn't'*.³³⁰⁰ In relation to the second tender register³³⁰¹ where a number of letter 'C's have been added, MC explained that, *'where in the column in the last one I've put a tick or cross I've marked jobs up with a "C" this time where we've either given cover or cover taken to the best of my recollection'*.³³⁰² MC also confirmed that he made these annotations at the time the tender was current, apparently in an effort to ensure that his records were more accurate and to find out what proportion of jobs involved cover pricing.³³⁰³

W R Bloodworth taking cover prices

IV.721. SB explained how W R Bloodworth would find out who the competition was on a job, *'I mean [we] either heard from...sub-contractors or from ABI'*.³³⁰⁴ SB also explained that on occasion he would also contact John Wholey of the Nottingham Builders' Guild³³⁰⁵ to ask who else was tendering for a job and then use that information to contact a competitor to obtain a cover price.³³⁰⁶ MC also explained that he would contact a competitor: *'Ring them up and ask for Estimating or a guy that I knew worked there.'*³³⁰⁷

³²⁹⁵ Schedule of relevant contracts, OFT Document 3912.

³²⁹⁶ Schedule of contacts for cover prices, OFT Document 3915.

³²⁹⁷ Interview transcript, OFT Document Reference 6348, page 2.

³²⁹⁸ Interview transcript, OFT Document Reference 6347, page 2.

³²⁹⁹ Tender enquiries, OFT Document 1881.

³³⁰⁰ Interview transcript, OFT Document Reference 6347, page 6.

³³⁰¹ Tender enquiries, OFT Document 1882.

³³⁰² Interview transcript, OFT Document Reference 6347, pages 6 and 7.

³³⁰³ Interview transcript, OFT Document Reference 6347, page 7.

³³⁰⁴ Interview transcript, OFT Document Reference 6348, page 7.

³³⁰⁵ The Nottingham Builders' Guild was a trade association, discussed in more detail at paragraphs IV.128 to IV.146 above.

³³⁰⁶ Interview transcript, OFT Document Reference 6348, page 14.

³³⁰⁷ Interview transcript, OFT Document Reference 6347, page 4.

IV.722. SB of W R Bloodworth confirmed that two contacts would take place, by telephone, with a competitor in respect of taking a cover price. One, when W R Bloodworth asked for help and then, secondly, on the day of the tender submission or the day before the tender submission, there would be a further contact to obtain the cover price.³³⁰⁸

W R Bloodworth giving cover prices

IV.723. MC explained that W R Bloodworth would always provide a cover price if approached by a competitor, otherwise *'chances are then if I needed a cover of[f] anybody then I wouldn't be able to get it'*.³³⁰⁹ SB admitted that the purpose of a cover price was not to win the contract, but to give the client the appearance of competition.³³¹⁰

IV.724. In terms of arriving at a cover price to give to a competitor, MC said *'Well, I generally put 5% or 6% on...Because somebody would say to you, "Don't put me miles out because I won't get an enquiry anyway"'*.³³¹¹

Contemporaneous documents

IV.725. The leniency application provided no additional contemporaneous documents to those obtained on the section 28 visit. This documentary evidence is discussed by the OFT in relation to each relevant specific tender.

Wildgoose

IV.726. As part of its leniency application, Wildgoose provided a general explanation of its participation in cover pricing. Wildgoose explained that *'...the practice of giving cover bids in the construction industry at least as far as Wildgoose is concerned, arose from the inability of companies in the sector to submit properly priced tenders for every request received and their unwillingness to disappoint existing or potential customers by declining to submit a tender'*.³³¹² Wildgoose stated that *'Whilst it is accepted that a company giving a cover price to another would pitch that price such that its own tender would not be undercut, the object of the exercise (at least so far as Wildgoose understood it) was not to determine the outcome of the tender process as a whole but rather to offer assistance to another company unable to find the resources to price a given job accurately - in the knowledge that such assistance could be reciprocated at a future date'*.³³¹³

IV.727. In addition, Wildgoose also provided 'Draft Witness Statements' for various employees, including Bryan Bennett ('BB'), who started working for Wildgoose in 1995 as Senior Estimator before progressing to Estimating Director in 1999³³¹⁴, Graham Barber ('GB'), who joined Wildgoose in 1983 as a Project Manager before being appointed as Construction Director and finally Managing

³³⁰⁸ Interview transcript, OFT Document Reference 6348, page 8.

³³⁰⁹ Interview transcript, OFT Document Reference 6347, page 5.

³³¹⁰ Interview transcript, OFT Document Reference 6348, page 6.

³³¹¹ Interview transcript, OFT Document Reference 6347, page 5.

³³¹² Leniency application report, OFT Document Reference 0347, page 3.

³³¹³ Leniency application report, OFT Document Reference 0347, page 3.

³³¹⁴ Witness Statement, OFT Document Reference 14263, page 1.

Director in 1997³³¹⁵, Arthur Paul Taylor ('APT'), a senior estimator at Wildgoose since 1996, and Ian Braime ('IB'), a senior estimator at Wildgoose from 2003.

- IV.728. The 'Draft Witness Statements' of BB and GB were subsequently replaced by 'Witness Statements' and signed, by BB on 11 December 2007, and by GB on 8 December 2007 and contain the following statement, *'This statement was provided to the Office of Fair Trading on 15 December 2004. I believe that it was true to the best of my knowledge and belief at that time. This statement does not include those facts or information that I have subsequently recalled or which have otherwise come to light since that date'*.³³¹⁶ The 'Witness Statement' of APT was signed on 14 December 2007 and stated, *'This statement was provided to the Office of Fair Trading on 14 February 2005. I believe that it was true to the best of my knowledge, recollection and belief at that time. This statement does not include those facts or information that I have subsequently recalled or which have otherwise come to light since that date'*.³³¹⁷ The 'Witness Statement' of IB was signed on 10 December 2007 and contains the following statement, *'This statement was provided to the Office of Fair Trading on 14 February 2005. I believe it was true to the best of my knowledge, recollection and belief at that time'*.³³¹⁸
- IV.729. In the 'Witness Statement' prepared by BB, he explained the decision making process carried out when deciding to tender for a contract. *'When enquiries come in to Wildgoose they are logged in the Enquiry Register...by our estimating assistant, Nicola Hale...Then, a decision will be made as to whether we wish to "price" this particular work, i.e. submit a tender offer. The decision process is generally informal and is usually made initially between myself and the Managing Director, Graham Barber, or one or more of the other Directors'*.³³¹⁹ In the 'Witness Statement' prepared by GB, he confirmed *'The tender selection process is dealt with by the Directors and the staff preparing tenders are not involved in this decision making process, although the estimator will know that a cover is to be taken...We will convene an ad hoc meeting and then make a decision between the Directors as to whether we will price a job or not'*.³³²⁰
- IV.730. BB stated that *'A number of factors are taken into account when making the decision whether or not to tender for a particular project. These include: the type of work involved and its complexity; the procurement method...; the time scale...; the terms and conditions to be imposed by the client...the geographical location...; the particular client...; other professionals involved...; the likely competition...; and finally the resources within the company...'*.³³²¹ BB stated *'If we cannot submit a tender, we would agree to submit a cover bid to avoid upsetting the client by returning the enquiry'*.³³²² GB also confirmed that in the circumstances listed above, Wildgoose might have decided to obtain a cover price from a competitor.³³²³

³³¹⁵ Witness Statement, OFT Document Reference 14261, page 1.

³³¹⁶ Witness Statement, OFT Document Reference 14263, page 16.

³³¹⁷ Witness Statement, OFT Document Reference 14264, page 11.

³³¹⁸ Witness Statement, OFT Document Reference 14259, page 5.

³³¹⁹ Witness Statement, OFT Document Reference 14263, pages 1 and 2.

³³²⁰ Witness Statement, OFT Document Reference 14261, page 3.

³³²¹ Witness Statement, OFT Document Reference 14263, page 2.

³³²² Witness Statement, OFT Document Reference 14263, page 5.

³³²³ Witness Statement, OFT Document Reference 14261, page 3.

IV.731. GB sent a memorandum to BB on 28 July 2003 setting out the circumstances in which Wildgoose would consider giving or taking a cover price. This memo states;³³²⁴

'In order to avoid a repeat of recent difficulties I propose that we adopt the following policies as discussed:

- *If we seek assistance then we do not give assistance to others – to avoid “chain reactions”*
- *Final assistance should be dealt with at Director/Senior Estimator level and we should ensure that the price is comprehensive – i.e. includes M & E, Provisional Sums etc. – to avoid being lowest when assisted’.*

Wildgoose taking cover prices

IV.732. BB explained *'If we decide to take a cover, we will insert “C” (for “Cover”) or “HR” (meaning “Help Required”) against that particular enquiry in the Enquiry Register. “HR” reflects the fact that a cover will be obtained...unless the initial decision is reviewed and we agree to seek assistance from a freelance estimator or possibly another department within the company’.*³³²⁵ In justification for using the abbreviation 'HR', BB stated *'“HR”, if viewed by a client is considered to be a better reference than “C” which they may perceive as either (1) on a scale of A-C, of low interest to us or (2) a possible reference to a cover’.*³³²⁶

IV.733. APT explained *'Those files on which covers are to be taken are placed on a table in the Estimating Department in date order. Once the file gets closer to the tender submission date it is removed and whoever is least busy will make the call or alternatively Bryan Bennett will allocate it to someone to do. This procedure is known to all the Directors at Wildgoose’.*³³²⁷ IB and BB also confirmed that once it was decided that a cover would be taken, the documents would have been put to one side on a work bench in the office.³³²⁸ IB stated that *'Nearer the deadline, one of the estimators would be instructed to make a call to one of the other tenderers in order to take a cover. If a project was aborted halfway through (i.e. a decision was made to submit a cover after all), the estimator would make the call to another contractor or Bryan Bennett would allocate it to someone to make this call’.*³³²⁹

IV.734. BB explained how Wildgoose would find out who else was pricing the tender, *'There are various means available to find out who the other contractors are. Many of the projects on which Wildgoose receives enquiries are published in the trade press, such as the “Contracts Journal”. Glenigans or The Builders Conference will provide this information. In addition, you can call a material supplier or sub-contractor and ask them if they have quoted on a particular project and usually they will tell you who else they have quoted to for that work. At times, additional tender information or adjustments received from architects, engineers and quantity surveyors, have contained the names of all the tendering contractors. Also sub-contractors’ and suppliers’ quotations can*

³³²⁴ Memo, OFT Document Reference 0420, page 2.

³³²⁵ Witness Statement, OFT Document Reference 14263, page 6.

³³²⁶ Witness Statement, OFT Document Reference 14263, page 6.

³³²⁷ Witness Statement, OFT Document Reference 14264, page 5.

³³²⁸ Witness Statement, OFT Document Reference 14259, page 2.

³³²⁹ Witness Statement, OFT Document Reference 14259, page 2.

carry the names of other tenderers. On occasions, we have also received the initial tender enquiry posted to ourselves by the client, but with another contractor's name upon the enclosed tender invitation letter'.³³³⁰

IV.735. Wildgoose provided some additional information on the use of covers in the industry. Wildgoose stated *'Within Wildgoose, the tendency would have been for the estimator assigned to the task to ask another contractor company with whom he was familiar for assistance (i.e. a cover). This may be because clients can require further information such as costs analysis or a priced bill of quantities and it is easier to ask a contractor the estimator already knows for this assistance. For example, there are half a dozen companies in the Chesterfield area that Wildgoose would often tender against. Of these, we understand that [.....][C] all gave and received cover bids'.³³³¹ 'If Wildgoose required assistance on an enquiry, many competitors would be willing to provide it with a cover or if unable to help, would refer Wildgoose to someone else they knew to be pricing the job concerned. Some contractors would provide an exact cover figure to enter on the tender form and others might indicate that Wildgoose should price around a particular figure'.³³³²*

IV.736. Wildgoose also stated that *'Companies would generally endeavour to provide the requesting contractor with a competitive figure as, if the figure was too high, it would make the party requesting the cover look ridiculous in the eyes of the client and that contractor would be reluctant to provide assistance in the future. Therefore, contractors would tend to provide a figure as close to their own figure as they felt comfortable with, usually around 4-5% above'.³³³³*

IV.737. BB explained that *'for most covers all we are required to do is obtain the cover figure from one of the other contractors and fill in the tender form itself for submission'.³³³⁴*

Wildgoose giving cover prices

IV.738. BB explained that for tenders which Wildgoose was competitively pricing, a tender finance statement was completed. The tender finance statement provided a summary of all the on-site costs, prelims, materials, sub-contractor and labour costs and resulted in a net estimate.³³³⁵

IV.739. In respect of covers given to competitors, BB stated *'...we have also provided assistance to companies when they have called us and we have been pricing the work (i.e. giving a cover). If another company calls our reception, they would usually be referred to the person dealing with that particular tender or sometimes myself'.³³³⁶ BB continued, 'Companies unknown to myself and outside our direct geographic area will often ring for assistance, having obtained our name from the Yellow Pages or from other suppliers'.³³³⁷*

³³³⁰ Witness Statement, OFT Document Reference 14263, pages 7 and 8.

³³³¹ Leniency application 'Additional Information', OFT Document Reference 0435, page 1.

³³³² Leniency application 'Additional Information', OFT Document Reference 0435, page 1.

³³³³ Leniency application 'Additional Information', OFT Document Reference 0435, pages 1 and 2.

³³³⁴ Witness Statement, OFT Document Reference 14263, page 6.

³³³⁵ Witness Statement, OFT Document Reference 14263, page 4.

³³³⁶ Witness Statement, OFT Document Reference 14263, page 8.

³³³⁷ Witness Statement, OFT Document Reference 14263, page 8

IV.740. With regard to the actual figure given by Wildgoose as a cover price APT stated, *'When we provide covers, we would endeavour to provide the other contractor with a competitive figure as if it was too high it would make them look ridiculous in the eyes of the client; his figures would not look attractive and would create a feeling that that contractor did not want the job. Therefore, the idea is to keep the other contractor as close to your figure as you would feel comfortable with, usually around 4-5% above. We would not want it to be too close as it may mean that he is asked for further information by the client which we would then be obliged to supply'*.³³³⁸

IV.741. In relation to the recording of covers given to competitors BB stated, *'The tender finance statements will sometimes provide details of our competitors when found out during the tender process by the estimator. Also, if contact had been made by any other company seeking assistance, this may also be recorded. This may be indicated by a "C" being written next to the competitor's name (although the presence of a "C" does not necessarily mean Wildgoose had been asked for a cover or indeed given one as this information could have been added post tender ... However, this information is not always detailed on the tender finance statement by the estimator, he may have made a mental note or noted it on a separate piece of paper to explain to the attendees of the [tender adjudication] meeting'*.³³³⁹

List of Wildgoose's contacts

IV.742. Wildgoose also provided to the OFT an 'Alphabetical List of Contractors' found in a general phone book.³³⁴⁰ The list included the following companies:

- [...] [C] [List of x Participant Companies]

³³³⁸ Witness Statement, OFT Document Reference 14264, page 5

³³³⁹ Witness Statement, OFT Document Reference 14263, pages 4 and 5

³³⁴⁰ Directory, OFT Document Reference 01183.

[...] [C]

York House

IV.743. As part of its leniency application, York House made available current employees to be interviewed. These were Robert Andrew Bruce ('RAB') Managing Director of York House and Arthur Richardson ('AR'), Estimating Director for York House. During these voluntary interviews the individuals were asked to give an explanation of York House's involvement in cover pricing.

York House taking cover prices

IV.744. During interview, RAB explained the criteria York House used to decide whether to tender for a contract. RAB stated *'It could be a location, it could be size, it could be the type of work, it could be the client'*.³³⁴¹ AR explained that the decision to tender for a contract was a collective decision between, *'Basically myself as head of department and Andy as the Managing Director with the knowledge of the other directors...'*³³⁴² RAB confirmed that if York House decided not to tender for a particular contract, *'We'd probably decide that...depending on who was involved...so that we wouldn't upset anybody, we'd decide to take a cover'*.³³⁴³

IV.745. AR explained how he would find out the identity of York House's competitors for a contract. AR stated *'generally your sub-contractors price for everybody...and most of the time you would find out via that route who your competitors were'*.³³⁴⁴ RAB further explained *'we used to buy construction news and contracts journal used to publish lists of people who tender in there. Glenigans...ABI...you actually get a list of jobs which are in tender...and within there it would give you most of your competitors and then there used to be an organisation, it was called Builders Confederation...and they used to ring on a regular basis and say are you tendering for this job or that job and they'd tell you who was on the tender list and also sub-contractors would tell you'*.³³⁴⁵

IV.746. AR explained that, on receipt of a tender *'I used to have a program when the job come in I would mark it on the program and you could see from the bar chart as to what we've got in on the workload'*.³³⁴⁶ York House in its leniency application stated *'They [estimating programs] set out when a tender comes in and when it's due back. This process used to be done by hand. The program is updated (on average) on a weekly basis. It allows the company/estimators to*

³³⁴¹ Interview transcript, OFT Document Reference 11467, page 5.

³³⁴² Interview transcript, OFT Document Reference 11466, page 5.

³³⁴³ Interview transcript, OFT Document Reference 11467, page 6.

³³⁴⁴ Interview transcript, OFT Document Reference 11466, page 6.

³³⁴⁵ Interview transcript, OFT Document Reference 11467, page 7.

³³⁴⁶ Interview transcript, OFT Document Reference 11466, page 6.

keep an eye on when tenders are due back and lists all jobs currently in. When a job comes in it gets an estimate number and is inputted as a "program". It allows [AR] to allocate estimating resource and decide whether the company can or cannot price a tender'.³³⁴⁷

IV.747. RAB stated that he was aware of the practice of exchanging cover prices but in later years would not have been involved in the actual obtaining of a cover price, *'Arthur has probably done the cover...obtained the cover prices to be honest. But I will have obtained some cover prices before Arthur joined us [in February 2001]'.³³⁴⁸*

IV.748. AR explained how the receiving of a cover price worked in practice. *'If you decided at some point along the line that you needed a cover obviously you have got to find out via your subcontractors who is on the list and you would look at the list and you would pick...somebody who is pricing the job to win it so again you don't look as though you haven't priced it'.³³⁴⁹* AR stated that contact with a competitor was carried out by telephone, *'Generally telephones I have never had a person meeting with anybody to discuss a cover ever'.³³⁵⁰*

IV.749. AR explained that he would contact a competitor for a cover price maybe as *'a last minute decision and you may ring up a couple of days before the tender is due in ... but if you have a job that you have had in the office for a couple of weeks and you couldn't do anything with it because again you are too busy you generally make contact at the latter stages rather than in the early stages because you just don't want anybody knowing that you are not pricing the job'.³³⁵¹*

IV.750. AR continued *'Covers are usually given out at the last minute the very last minute I mean we are all in the same boat we have all got to get the tender in on the same date, the same time and invariably nobody has a price ready until a day or two before it goes in even on the last day'.³³⁵²*

IV.751. AR confirmed that the letters 'COV' written on the estimating programs indicate a cover price.³³⁵³

D. The Infringements

IV.752. This section sets out the specific evidence in respect of each Infringement, and the inferences and conclusions drawn by the OFT from that evidence. The Infringements are described in chronological order.

IV.753. For each Infringement, reference should be made not only to the particular part of this section setting out details of the Infringement, but also to the relevant part(s) of section C above detailing the cover pricing activities of any leniency Party(ies) involved in that Infringement, and in addition to the general

³³⁴⁷ Executive summary, OFT Document Reference A0633, page 9.

³³⁴⁸ Interview transcript, OFT Document Reference 11467, page 8.

³³⁴⁹ Interview transcript, OFT Document Reference 11466, page 9.

³³⁵⁰ Interview transcript, OFT Document Reference 11466, page 9.

³³⁵¹ Interview transcript, OFT Document Reference 11466, page 10.

³³⁵² Interview transcript, OFT Document Reference 11466, page 10.

³³⁵³ Interview transcript, OFT Document Reference 11466, page 10.

comments on cover pricing and other bid rigging activities in section B, which precedes both of these sections.

IV.754. The OFT has included, in Annex A towards the end of this Decision, a Navigation Table, which details the paragraphs in which the case against each Party may be found in relation to each relevant Infringement. In the Navigation Table, the Parties are listed in alphabetical order and against each Party is listed the Infringements in which the OFT has found that Party engaged in bid rigging activities, together with references to the relevant paragraphs in this section describing that Infringement and the relevant paragraphs in section C describing the cover pricing activities of the leniency Party(ies) involved in that Infringement, where applicable.

Alleged Infringement 1: Not included in the Decision

Alleged Infringement 2: Not included in the Decision

Alleged Infringement 3: Not included in the Decision

Alleged Infringement 4: Not included in the Decision

Alleged Infringement 5: Not included in the Decision

Infringement 6: Conversion of Offices to Flats, 2 Water Lane, Leeds – 3 March 2000

Client: Waller & Partners Ltd

Parties: Strata (formerly known as Weaver) and Quarmby

IV.755. On 1 February 2000, Waller & Partners Ltd, on behalf of their client CPL FURB Ltd, sought tenders for conversion and refurbishment of a small four-storey riverside warehouse, formerly converted to offices, into flats.³³⁵⁴ The following five companies were invited to tender: Quarmby, Brenville Construction, Weaver, Jack Lunn and SHL.³³⁵⁵ The deadline for receipt of tenders was 3 March 2000.³³⁵⁶

IV.756. Waller & Partners Ltd received the following tender returns:³³⁵⁷

³³⁵⁴ Information from client, OFT Document Reference 9914.

³³⁵⁵ Information from client, OFT Document Reference 9914.

³³⁵⁶ Information from client, OFT Document Reference 9914.

³³⁵⁷ Information from client, OFT Document Reference 9914.

Company	Time & Date tender received	Amount of tender	Awarded contract
Quarmby	12:00 noon on 3 March 2000	£789,000	
Brenville Construction	12:00 noon on 3 March 2000	£859,852	
Weaver [Strata]	12:00 noon on 3 March 2000	£848,512	
Jack Lunn	12:00 noon on 3 March 2000	£868,410	
SHL	N/A	Declined to tender 17 February 2000	

IV.757. Although Quarmby won the tender it was not awarded the contract as post tender the client scaled back the project and placed the contract with another contractor.³³⁵⁸

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Form of Tender

IV.758. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents, mostly copy Form of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³³⁵⁹

'FROM QUARMBY CONSTRUCTION'

IV.759. The Form of Tender was signed by Duncan Ironmonger ('DI'), an estimator at Strata.³³⁶⁰ The Form of Tender also stated that Strata's tender figure was £848,512.³³⁶¹

IV.760. In its response to the Statement, Quarmby noted '*...that the interview transcript of Duncan Ironmonger in fact identifies the file as being labelled "Strata Covers Jan 2000 - December 2001". [Quarmby] contends that this is an important discrepancy, particularly as the name "Strata" was not adopted until later than the alleged infringement.*'³³⁶² However the contemporaneous tender return form for this tender had the correct company name 'Weaver Construction' (Strata's company name at the time of the Infringement) and tender date '3 March 2000' recorded on it.³³⁶³ The file is clearly headed 'Covers Jan 2000 - December 2001' which is handwritten on a pre-printed Strata label. The fact that the documents were re-filed or the file relabelled when the company had been renamed does not undermine the plain meaning of documents kept within it.

³³⁵⁸ Tender Report, OFT Document Reference 9913, page 3.

³³⁵⁹ Form of Tender, OFT Document Reference 3504.

³³⁶⁰ Form of Tender, OFT Document Reference 3504.

³³⁶¹ Form of Tender, OFT Document Reference 3504.

³³⁶² Written representations of Quarmby, 27 June 2008, paragraph 2.11(b)(i)(B).

³³⁶³ Form of Tender, OFT Document Reference 3504.

Evidence from leniency applicant - Strata

IV.761. As part of its leniency application, Strata provided to the OFT a list of covers compiled by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:³³⁶⁴

Date	Project	Strata ref no
03/03/2000	Conversion of Offices to Flats, 2 Water Lane, Leeds for CPL Furb Ltd	T19/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXM/107	Quarmby Construction	Ilkley	

IV.762. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.763. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.764. Also during an interview with the OFT on 29 March 2007, conducted in connection with Strata's leniency application, DI provided further information regarding the tender for this contract. DI was shown the Form of Tender³³⁶⁵ for the conversion of offices to flats, 2 Water Lane, Leeds. DI stated '*... my initial involvement would be going to Julian...and saying, are we pricing it...no we'll take a cover and then I wouldn't do anything more on it until I found out who the competition was*'.³³⁶⁶ During the interview DI laughed, an employee of the OFT asked '*for the benefit of the tape, Mr Ironmonger, you, looked at the, that form of tender, and something caught your eye and you laughed. Could you just explain what you were laughing at please?*'.³³⁶⁷ DI replied '*Yeah. I'd written in the top right-hand corner who we'd received a cover from ... Quarmby Construction*'.³³⁶⁸ DI confirmed that he put the Form of Tender for a contract on which Strata had taken a cover into a file marked 'covers'.³³⁶⁹ DI also stated '*So, I take it from this I've dropped a few companies in the [unclear]*'.³³⁷⁰

IV.765. In its response to the Statement, Quarmby also suggested that the OFT '*... has failed to consider other reasonable explanations for such annotation (i.e. 'FROM*

³³⁶⁴ Schedule of Covers, OFT Document Reference 4054, page 1.

³³⁶⁵ Form of Tender, OFT Document Reference 3504.

³³⁶⁶ Interview transcript, OFT Document Reference 13138, page 32.

³³⁶⁷ Interview transcript, OFT Document Reference 13138, page 33.

³³⁶⁸ Interview transcript, OFT Document Reference 13138, page 33.

³³⁶⁹ Interview transcript, OFT Document Reference 13138, page 33.

³³⁷⁰ Interview transcript, OFT Document Reference 13138, page 33.

QUARMBY CONSTRUCTION') such as post-tender discussion. Duncan Ironmonger and Julian Kawecki admit generally to engaging in post-tender discussions on a routine basis in respect of bids that they had not won'.³³⁷¹ The OFT is satisfied that the explanation it has received for the annotation is correct. The document was kept in a file marked 'Covers...', which DI has confirmed to be the file in which Strata kept records of covers it had taken.³³⁷² Further, DI confirmed that 'We wouldn't do it on every one but I seem to recall on certain ones I'd write on the top who we'd got it [the cover] from'.³³⁷³ The OFT considers the explanation of DI, who along with Paul Throssell, was responsible for populating this file, for the annotations he has written to be sufficient for it to be satisfied that the annotations relate to the taking of covers, not to post-tender discussions. Further, the references made at interview by DI and Julian Kawecki to post-tender discussions were not made in connection with the annotations in question.³³⁷⁴

Evidence from other companies – Quarmby

IV.766. The OFT wrote to Quarmby on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that Quarmby had participated in bid rigging on this tender. The OFT rang the Managing Director of Quarmby on 6 June 2007 to inform him that due to Quarmby's lack of response to the OFT's letter dated 22 March 2007, the OFT were treating this as a rejection of the OFT's Fast Track Offer. The Managing Director confirmed this.³³⁷⁵

IV.767. The OFT subsequently wrote to Quarmby's ultimate parent company at the time of this Infringement, St James Securities, on 6 November 2007, asking it to comment on Quarmby's response to the OFT's Fast Track Offer, given that the OFT intended to hold St James Securities jointly and severally liable for any infringements committed by Quarmby in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, St James Securities stated that it did not intend to respond to the matters referred to in the OFT's letter.³³⁷⁶

IV.768. Following the issue of the Statement, St James Securities did not submit any written or oral representations in respect of this Infringement.

IV.769. In its response to the Statement, Quarmby noted that the allegations against it do not include the taking of cover prices, only the giving. This is stated to be '*important circumstantial evidence in support of OCC's contention that it has not and does not give cover prices...to merely give cover prices would be to confer on one's competitors a benefit without any advantage to oneself and consequently would be commercially inexplicable and irrational*'.³³⁷⁷

³³⁷¹ Written representations of Quarmby, 27 June 2008, paragraph 2.11(b)(i)(D).

³³⁷² Interview transcript, OFT Document Reference 13138, page 18.

³³⁷³ Interview transcript, OFT Document Reference 13138, page 19.

³³⁷⁴ Interview transcript, OFT Document Reference 13138, page 21; and interview transcript, OFT Document Reference 13156, page 18.

³³⁷⁵ Telephone note, OFT Document Reference 10771.

³³⁷⁶ Response from St James Securities, OFT Document Reference 14098.

³³⁷⁷ Written representations of Quarmby, 27 June 2008, paragraph 2.7.

IV.770. First, the OFT notes that only three Alleged Infringements were pursued against each non-leniency Party, out of a wider pool of evidence available to the OFT³³⁷⁸ and so the fact that the three allegations in the Statement regarding Quarmby related only to the giving of cover cannot be taken as meaningful evidence of Quarmby's pattern of behaviour. Second, the OFT does not accept that the giving of cover confers a benefit on competitors without any benefit to the firm in question. Indeed, DI explained that when Strata rang competitors to ask them to give cover *'Most of them would just say yes, obviously, because they know they're reducing... their competition'*.³³⁷⁹

IV.771. Moreover, the OFT notes that in addition to the evidence from Strata relating to it taking cover from Quarmby on this tender, the OFT also has strong and compelling evidence relating to Admiral taking cover from Quarmby (Infringement 214) and York House taking cover from Quarmby (Infringement 233). The OFT considers it highly improbable that all three of these companies would have mistakenly identified Quarmby as a participant in cover pricing if indeed Quarmby never gave cover prices.

IV.772. In its response to the Statement, Quarmby asserted that it neither gave nor took cover prices as a matter of its corporate policy, and provided witness evidence in support of this assertion.³³⁸⁰ The OFT notes in this regard the evidence of Roger Nelson, Quarmby's Commercial Director, who described becoming aware of the illegality of cover pricing in 2004, and went on to state:

'David Jones [Quarmby's Managing Director] and I agreed that even though we thought it highly unlikely cover price had occurred or was occurring at QCC (because it was not our practice to do so) we should take measures to reinforce the message that no-one within QCC was engaged in the practice of cover pricing or would be in future'.³³⁸¹

IV.773. The OFT takes from this evidence that despite Quarmby's stated policy of not engaging in cover pricing activities, the Commercial Director and Managing Director were not certain that staff were not engaging in cover pricing, but only thought that it was 'highly unlikely' and that this uncertainty justified taking further action to prevent Quarmby's engagement in cover bidding. The OFT therefore considers that any such policy held by Quarmby does not undermine the evidence presented in relation to the giving of cover by Quarmby in this instance.

IV.774. In its response to the Statement, Quarmby stated that its commercial director Roger Nelson recalled *'... that this tender was a design and build project as cited in [Quarmby's] tender book ... A design and build tender requires much more detailed information to be submitted to the tenderee as the tenderee essentially scores the tenderer's proposals for "best value" which usually incorporates factors other than price ... As a design and build tender does not consist of the contractor merely pricing a bill of quantities, but providing detailed information to the tenderee, it is unfeasible that a cover price was submitted by Strata for this tender'*.³³⁸²

³³⁷⁸ See paragraph II.1470 of Section II (The OFT's Investigation).

³³⁷⁹ Interview transcript, OFT Document Reference 13138, page 16, as set out in paragraph IV.624.

³³⁸⁰ Written representations of Quarmby, 27 June 2008, paragraph 2.8.

³³⁸¹ Witness statement of Roger Nelson, paragraph 24.

³³⁸² Written representations of Quarmby, 27 June 2008, paragraph 2.11(a)(iii); also witness statement of Roger Nelson, paragraphs 16 to 19.

IV.775. The OFT accepts that a company submitting a bid based on a cover price, where the procurement criteria is not only 'lowest price' but also 'most economically advantageous' or 'best value', runs a greater risk of winning the contract, and that if the bid were to consist merely of a price it would be likely to be non-compliant. However, in this instance the OFT does not consider this undermines its conclusion that Quarmby provided a cover price to Strata. First, Strata has admitted to having sought and obtained a cover price from Quarmby. Second, the bid submitted by Strata did contain the level of detail required to render the bid compliant (including a total tender price, a cost of removing lift for re-use sum, a contract period, an earliest start date and two other provisional sums)³³⁸³, notwithstanding that Strata, on its evidence, had taken a cover price. Third, in this tender price was ranked as the most important criteria if not the only one.³³⁸⁴ On balance, therefore, the OFT does not consider the nature of the project and the form of tender required to be evidence negating the possibility of Strata having tendered on the basis of a cover price.

IV.776. By way of alternative argument, Quarmby also stated in its response to the Statement that *'[t]he infringement is alleged to have occurred on the 3rd March 2000, the OFT has adduced no evidence that the cover price was given on the 3rd March 2000, save that this was the submission deadline for the tender. [Quarmby] contends that the OFT has not adduced "strong and compelling evidence" in respect of the date on which the alleged infringement is said to have occurred and, specifically, that the alleged infringement occurred after the Competition Act 1998 (the "Act") came into force on 1 March 2000'*.³³⁸⁵ Quarmby further stated *'[i]t would be the date of that arrangement [the cover pricing agreement/concerted practice arrangement] which would be the relevant date, for competition law purposes. The date of the tender itself would be irrelevant, save to the extent that it provides circumstantial evidence that if the cover price, was given at all (which is denied), it is likely to have been given before 1 March 2000, when the Competition Act 1998 came into effect...'*.³³⁸⁶

IV.777. The OFT does not accept Quarmby's assertion that the cover price is likely to have been given before 1 March 2000 since, as PT explained in interview, and as outlined in IV.623 above, Strata would generally tend to obtain cover prices *'the day before the tender was due in'*. The OFT is therefore satisfied that on the balance of probabilities the cover price was provided after 1 March 2000.

The OFT's analysis of the evidence and finding

IV.778. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.779. Strata and Quarmby each accepted an invitation to tender for this contract.

IV.780. Strata was unable to submit a tender by the return date and/or did not want to win this contract.

³³⁸³ Form of Tender, OFT Document Reference 3504.

³³⁸⁴ Tender Report, OFT Document Reference 9913, page 3.

³³⁸⁵ Written representations of Quarmby, 27 June 2008, paragraph 2.11(b)(ii).

³³⁸⁶ Written representations of Quarmby, 27 June 2008, paragraph 2.11(b)(ii).

IV.781. Quarmby completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Quarmby being the lowest received and that it won the contract.

IV.782. Strata's Form of Tender records '*From Quarmby Construction*', handwritten in the top right hand corner. Strata and DI confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata and DI confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and DI's admission and explanation of the contemporaneous evidence that Quarmby supplied Strata with a cover price for this tender.

IV.783. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by Quarmby, the pattern consistent with a cover price having been provided.

IV.784. In addition the OFT notes that Quarmby's tender figure is the only figure below Strata's tender figure, and the OFT is therefore satisfied that Strata could only have received a cover figure from Quarmby.

IV.785. The OFT therefore concludes that contact took place between Strata and Quarmby. The OFT also concludes that Quarmby supplied a figure to Strata for a cover bid.

IV.786. The OFT is satisfied that the facts set out in paragraphs IV.758 to IV.785 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³³⁸⁷ In particular:

- (a) the provision of a figure for a cover bid from Quarmby to Strata was not unilateral³³⁸⁸, and contravenes the principle against direct or indirect contact between competitors;³³⁸⁹
- (b) Strata can be presumed to have taken account of the information received from Quarmby (i.e. the cover price) when determining its own conduct in the tendering process;³³⁹⁰ and
- (c) Quarmby can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³³⁹¹

IV.787. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Quarmby and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the conversion of offices to flats, 2 Water Lane, Leeds, tender deadline 3 March 2000.

³³⁸⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³³⁸⁸ See paragraph IV.73 of the General comments on cover pricing section.

³³⁸⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³³⁹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³³⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.788. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.789. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 7: **Guiseley School, Fieldhead Road, Guiseley, Leeds – 8 March 2000**
Client: **Leeds City Council**
Parties: **Strata and C J Ellmore**

IV.790. On 19 January 2000, Leeds City Council sought tenders for a formation of new multi-functional hall at Guiseley School, Fieldhead Road, Guiseley, Leeds.³³⁹² The following five companies were invited to tender: Harlow & Milner, A Ryall & Son (Contractors) Ltd, C J Ellmore, Pullan Construction Ltd and Strata.³³⁹³ The deadline for receipt of tenders was 12:00 noon on 8 March 2000.³³⁹⁴

IV.791. Leeds City Council received the following tender returns.³³⁹⁵

Company	Time & Date tender received	Amount of tender	Awarded contract
Harlow & Milner	Before 12:00 noon on 8 March 2000	£232,942.00	
A Ryall & Son (Contractors) Ltd	Before 12:00 noon on 8 March 2000	£232,528.91	
C J Ellmore	Before 12:00 noon on 8 March 2000	£218,748.00	Yes
Pullan Construction Ltd	No Tender Returned	N/A	
Strata	Before 12:00 noon on 8 March 2000	£229,847.00	

IV.792. The tenders received were over budget and the work had to be re-tendered.³³⁹⁶

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Form of Tender

IV.793. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents, mostly copy Form

³³⁹² Information from client, OFT Document Reference 8497, page 1.

³³⁹³ Information from client, OFT Document Reference 8497, page 1.

³³⁹⁴ Information from client, OFT Document Reference 8497, page 1.

³³⁹⁵ Information from client, OFT Document Reference 8497, page 1.

³³⁹⁶ Information from client, OFT Document Reference 8497, page 1.

of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³³⁹⁷

'FROM ELLMORE CONSTRUCTION'

- IV.794. The Form of Tender was signed by Duncan Ironmonger ('DI'), an estimator at Strata, on 8 March 2000.³³⁹⁸ The Form of Tender also stated that Strata's figure was £229,847.00.³³⁹⁹
- IV.795. In its response to the Statement, C J Ellmore stated that there was a *'complete absence of many of the contemporaneous documents which the witnesses would have been expected to see'*.³⁴⁰⁰ Although various documents which might have been available had Strata been awarded the contract were not available to put to DI, as noted in paragraphs IV.122 to IV.127 above, it is common that unsuccessful tenderers do not have such documentary records. The OFT does not consider this undermines the strength of the Form of Tender evidence which was available.
- IV.796. In its response to the Statement, C J Ellmore referred to the destruction by an employee at Strata of the 2002 to 2004 file of Strata's collection of cover price documents and proceeded to assert in respect of this Infringement that *'...where there is a complete absence of many of the contemporaneous documents which the witnesses would have expected to see, the destruction of a very important exhibit undermines the reliability of the evidence provided by Strata'*.³⁴⁰¹ The OFT does not accept this assertion. The contemporaneous cover price file document is available, and the OFT considers this to be good evidence of Strata taking a cover price from C J Ellmore in respect of this tender. The destruction of documents relating to covers provided in 2002-2004 does not bear upon the credibility of the documents which remain available in respect of covers provided in 2000, and which the OFT recovered independently during a search of Strata's premises.

Evidence from leniency applicant – Strata

- IV.797. As part of its leniency application, Strata provided to the OFT a list of covers compiled by reference to its contract information sheets, the file *'Covers from Jan 2000 – Dec 2001'* and *'contracts in hand'* documents. The entry for this tender states as follows:³⁴⁰²

³³⁹⁷ Form of Tender, OFT Document Reference 3502, page 1.

³³⁹⁸ Form of Tender, OFT Document Reference 3502, page 4.

³³⁹⁹ Form of Tender, OFT Document Reference 3502, page 1.

³⁴⁰⁰ Written representations of C J Ellmore, 25 June 2008, paragraph 116.

³⁴⁰¹ Written representations of C J Ellmore, 25 June 2008, paragraph 116.

³⁴⁰² Schedule of Covers, OFT Reference 4054, page 1.

Date	Project	Strata ref no
08/03/2000	New Build Fieldhead Road School, Guiseley, Leeds for Leeds City Council	T25/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXN/107	CJ Ellmore & Co Ltd	Henshaw Lane, Yeadon, Leeds LS19 7RZ	

IV.798. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.799. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.800. Also during an interview with the OFT on 29 March 2007, conducted in connection with Strata's leniency application, DI provided further information regarding the tender for this contract. DI was shown the Form of Tender³⁴⁰³ for the works at Guiseley School, Fieldhead Road, Guiseley and asked how the document indicates the company from whom Strata received a cover figure. DI stated *'Ah, top right-hand corner, front of the form of tender, from Ellmore Construction is what I used to write on to say who we'd receive the cover from'*.³⁴⁰⁴ DI confirmed that he put the Form of Tender into a file marked *'covers'*.³⁴⁰⁵

Evidence from other companies – C J Ellmore

IV.801. The OFT wrote to C J Ellmore on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that C J Ellmore had participated in bid rigging on this tender. The OFT received an email from Keeble Hawson, representing C J Ellmore, on 4 May 2007 stating *'... we are not in a position to advise our client ... without disclosure'*.³⁴⁰⁶ The OFT noted C J Ellmore's rejection of the OFT's Fast Track Offer.

IV.802. C J Ellmore provided a witness statement from its Managing Director, Stephen Ellmore ('SE'), which stated that *'I am aware that Ellmores has been approached to give cover prices on occasions in the past and that cover pricing has gone on in some form within the industry. It is Ellmores' policy however not to give or receive cover prices or engage in any other anti-competitive behaviour. This policy was first put in writing in March 2005 but it has always been Ellmores' policy to comply with the law in all respects'*.³⁴⁰⁷ The witness

³⁴⁰³ Form of Tender, OFT Document Reference 3502.

³⁴⁰⁴ Interview transcript, OFT Document Reference 13138, page 36.

³⁴⁰⁵ Interview transcript, OFT Document Reference 13138, page 36.

³⁴⁰⁶ Email from Keeble Hawson, OFT Document Reference 10952, page 1.

³⁴⁰⁷ Witness statement of Stephen Ellmore, 26 June 2008, paragraph 10.

statement further stated that the estimator at C J Ellmore responsible for this tender was Andrew Ellmore, who left the firm in or around 2005.³⁴⁰⁸

IV.803. The OFT considers that this evidence of C J Ellmore's company policy regarding cover pricing, which was not in writing at the time of this tender, does not serve to establish that cover pricing did not take place in relation to this tender, in breach of that policy. Although SE was *'involved in estimating from 1987 to 2002'* it remains possible that other members of the estimating team, including Andrew Ellmore, may have given cover prices to competitors, including Strata, without the knowledge of SE.

IV.804. In its response to the Statement, C J Ellmore stated that its *'...case is that [the] evidence produced in respect of this infringement is not sufficiently strong or compelling'*.³⁴⁰⁹ The OFT does not accept C J Ellmore's assertion that it has not satisfied the requisite burden of proof in respect of this Infringement. The OFT notes, as outlined in III.98 to III.105 above, that in price-fixing cases a single item of evidence, or wholly circumstantial evidence may be sufficient to meet the required standard of proof. The OFT considers the contemporaneous documentary evidence and the explanatory witness evidence to be strong and compelling proof of this Infringement. The OFT also considers that the fact the tender was not awarded is irrelevant to the finding of an infringement for the reasons set out in paragraph III.14 of the Legal Background section.

IV.805. In its response to the Statement, C J Ellmore also stated that the *'... OFT infers, from the fact the tender submitted by Strata was higher, that this was consistent with a cover price having been provided. It is submitted that it would be equally consistent with ... Strata having received information from other sources about the amount of money that C J Ellmore was due to tender at.'*³⁴¹⁰ In its response to the Statement, C J Ellmore asked the OFT to consider the possibility that a contractor (A) bidding for a contract could have provided a subcontractor with its full bid price, perfectly legitimately, and for that subcontractor to inform another contractor (B) bidding for the same contract of the full bid price of contractor (A).³⁴¹¹ The OFT does not consider this theoretical alternative explanation provided by C J Ellmore to be at all plausible. There is no evidence that Strata obtained the cover price from other sources in the conduct of this Infringement, but there is evidence from DI that Strata obtained the cover price direct from C J Ellmore.

IV.806. In its response to the Statement, C J Ellmore further stated that the *'...OFT infers, from the fact that C J Ellmore's tender figure is the only figure below Strata's tender figure, that Strata could only have received the cover figure from C J Ellmore. It is submitted that this too is equally consistent with information having been supplied to Strata from other sources'*.³⁴¹² Again, the OFT does not consider this alternative explanation provided by C J Ellmore to be at all plausible for the same reasons.

IV.807. In its response to the Statement, C J Ellmore also asserted *'...[e]ven had there been an agreement or concerted practice, on the facts of [this Infringement],*

³⁴⁰⁸ Witness statement of Stephen Ellmore, 26 June 2008, paragraphs 11 to 12.

³⁴⁰⁹ Written representations of C J Ellmore, 25 June 2008, paragraph 27.

³⁴¹⁰ Written representations of C J Ellmore, 25 June 2008, paragraphs 28 and 29.

³⁴¹¹ Oral representations of C J Ellmore, 16 July 2008, page 5.

³⁴¹² Written representations of C J Ellmore, 25 June 2008, paragraphs 30 and 31.

*the Chapter prohibition [sic] would not have been breached.*³⁴¹³ The OFT does not accept C J Ellmore's assertion that its provision of a cover price to Strata did not breach competition law. The OFT's analysis as to why agreements or concerted practices to provide and/or receive cover prices infringe the Chapter I prohibition is set out in Section III (Legal Background).

The OFT's analysis of the evidence and finding

- IV.808. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.
- IV.809. Strata and C J Ellmore each accepted an invitation to tender for the contract for works at Guiseley School, Guiseley, Leeds.
- IV.810. Strata was unable to submit a tender by the return date and/or did not want to win this contract.
- IV.811. C J Ellmore completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by C J Ellmore being the lowest received and that it won the contract.
- IV.812. Strata's Form of Tender records '*FROM ELLMORE CONSTRUCTION*' handwritten in the top right hand corner. Strata and DI confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata and DI confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous documentary evidence from Strata, and Strata's admission of taking cover, and DI's explanation of the contemporaneous evidence that C J Ellmore supplied Strata with a cover price for this tender.
- IV.813. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by C J Ellmore, the pattern consistent with a cover price having been provided.
- IV.814. In addition the OFT notes that C J Ellmore's tender figure is the only figure below Strata's tender figure, and the OFT is therefore satisfied that Strata could only have received a cover figure from C J Ellmore.
- IV.815. The OFT therefore concludes that contact took place between Strata and C J Ellmore. The OFT also concludes that C J Ellmore supplied a figure to Strata for a cover bid.
- IV.816. The OFT is satisfied that the facts set out in paragraphs IV.793 to IV.815 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁴¹⁴ In particular:

³⁴¹³ Written representations of C J Ellmore, 25 June 2008, paragraph 35(d).

³⁴¹⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from C J Ellmore to Strata was not unilateral³⁴¹⁵, and contravenes the principle against direct or indirect contact between competitors;³⁴¹⁶
- (b) Strata can be presumed to have taken account of the information received from C J Ellmore (i.e. the cover price) when determining its own conduct in the tendering process;³⁴¹⁷ and
- (c) C J Ellmore can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁴¹⁸

IV.817. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between C J Ellmore and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for works at Guiseley School, Guiseley, Leeds, tender deadline 8 March 2000.

Immunity and leniency assessment

IV.818. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.819. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 8: Four Flats at Viking Way, Kiveton Park – 14 March 2000
Client: Rotherham Metropolitan Borough Council
Parties: Strata (formerly known as Weaver) and J J & A R Jackson

IV.820. On 11 February 2000, Rotherham Metropolitan Borough Council sought tenders for the construction of four flats at Viking Way, Kiveton Park, Rotherham.³⁴¹⁹ The following six companies were invited to tender: Weaver, Bramall, RMBC Building Works Department, J J & A R Jackson, George Hurst & Sons Ltd, William & Wood (Wath) Limited.³⁴²⁰ The deadline for receipt of tenders was 11:00 am on 14 March 2000.³⁴²¹

IV.821. Rotherham Metropolitan Borough Council received the following tender returns:³⁴²²

³⁴¹⁵ See paragraph IV.73 of the General comments on cover pricing section.

³⁴¹⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁴¹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴¹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴¹⁹ Information from client, OFT Document Reference 10650.

³⁴²⁰ Information from client, OFT Document Reference 10650.

³⁴²¹ Information from client, OFT Document Reference 10650.

³⁴²² Information from client, OFT Document Reference 10650.

Company	Time & Date tender received	Amount of tender	Awarded contract
Weaver [Strata]	Not Recorded	£175,563.00	
Bramall	Not Recorded	£216,519.00	
RMBC Building Works Dept	Not Recorded	£135,959.25	Yes
J J & A R Jackson	Not Recorded	£166,288.00	
George Hurst & Sons Ltd	Not Recorded	£167,980.00	
William & Wood (Wath) Ltd	Not Recorded	£197,682.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Form of Tender

IV.822. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents, mostly copy Form of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³⁴²³

'Cover from Jacksons'

IV.823. The Form of Tender was signed by John Slack, an ex-estimator at Strata³⁴²⁴ on 13 March 2000.³⁴²⁵ The Form of Tender also stated that Strata's figure was £175,563.³⁴²⁶

Evidence from leniency applicant - Strata

IV.824. As part of its leniency application, Strata provided to the OFT a list of covers compiled by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:³⁴²⁷

Date	Project	Strata ref no
13/03/2000	Four Flats at Viking Way, Kiveton Park for Rotherham Borough Council	T20/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXN/107	Jacksons	Worksop?	

IV.825. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

³⁴²³ Form of Tender, OFT Document Reference 3496.

³⁴²⁴ Interview transcript, OFT Document Reference 13138, page 39.

³⁴²⁵ Form of Tender, OFT Document Reference 3496.

³⁴²⁶ Form of Tender, OFT Document Reference 3496.

³⁴²⁷ Schedule of Covers, OFT Document Reference 4054, page 1.

Witness evidence from leniency applicant - Strata

IV.826. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.827. Also during an interview with the OFT on 29 March 2007, conducted in connection with Strata's leniency application, Duncan Ironmonger ('DI'), an estimator at Strata, provided further information regarding the tender for this contract. DI was shown the Form of Tender³⁴²⁸ for the construction of four flats at Viking Way, Kiveton Park and asked how the document shows the company from whom Strata received a cover figure. DI stated '*Ah, yet again by the name in the top right-hand corner. Cover from Jacksons's ...*'.³⁴²⁹ DI confirmed that John Slack was tasked to get a cover price for this contract, because the tender was 'too small' for Strata.³⁴³⁰ DI explained '*it'd be a new build and we weren't into building new houses or flats at that time, particularly of a four number*'.³⁴³¹

Evidence from other companies – J J & A R Jackson

IV.828. The OFT wrote to J J & A R Jackson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that J J & A R Jackson had participated in bid rigging on this tender. In response to this letter J J & A R Jackson admitted '*We provided a cover price to Weaver Building Ltd of Doncaster. We did not win the job*'.³⁴³²

IV.829. Following the issue of the Statement, J J & A R Jackson did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.830. From the evidence presented above, the OFT draws the following conclusions.

IV.831. Strata and J J & A R Jackson each accepted an invitation to tender for the contract for the construction of four flats at Viking Way, Kiveton Park.

IV.832. Strata was unable to submit a tender by the return date and/or did not want to win this contract.

IV.833. Strata's Form of Tender records '*Cover from Jacksons*', handwritten in the top right hand corner. Strata and DI confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata and DI confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and DI's admission and explanation of the contemporaneous evidence, and J J & A R

³⁴²⁸ Form of Tender, OFT Document Reference 3496.

³⁴²⁹ Interview transcript, OFT Document Reference 13138, page 39.

³⁴³⁰ Interview transcript, OFT Document Reference 13138, page 39.

³⁴³¹ Interview transcript, OFT Document Reference 13138, page 39.

³⁴³² Response from J J & A R Jackson, OFT Document Reference 10443, page 2.

Jackson's admission that they gave a cover price to Weaver, that J J & A R Jackson supplied Strata with a cover price for this tender.

IV.834. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by J J & A R Jackson, the pattern consistent with a cover price having been provided.

IV.835. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that J J & A R Jackson admitted that the party with whom it engaged in bid rigging was 'Weaver', without being shown the OFT's evidence that Strata was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.836. The OFT therefore concludes that contact took place between Strata and J J & A R Jackson. The OFT also concludes that J J & A R Jackson supplied a figure to Strata for a cover bid.

IV.837. The OFT is satisfied that the facts set out in paragraphs IV.822 to IV.836 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁴³³ In particular:

- (a) the provision of a figure for a cover bid from J J & A R Jackson to Strata was not unilateral³⁴³⁴, and contravenes the principle against direct or indirect contact between competitors;³⁴³⁵
- (b) Strata can be presumed to have taken account of the information received from J J & A R Jackson (i.e. the cover price) when determining its own conduct in the tendering process;³⁴³⁶ and
- (c) J J & A R Jackson can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁴³⁷

IV.838. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between J J & A R Jackson and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the construction of four flats at Viking Way, Kiveton Park, tender deadline 14 March 2000.

Immunity and leniency assessment

IV.839. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

³⁴³³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁴³⁴ See paragraph IV.73 of the General comments on cover pricing section.

³⁴³⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁴³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴³⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.840. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 9: Residential Training Centre, Ollerton – 11 April 2000
Client: Nottinghamshire County Council
Parties: ARG and J J & A R Jackson

IV.841. On 24 March 2000, Nottinghamshire County Council sought tenders for conversion of a first-floor flat for office use, Ollerton residential unit.³⁴³⁸ The following six companies were invited to tender: Carmalor, Robert Woodhead, J J & A R Jackson, Greenwood, ARG and N.C.C. Building Direct.³⁴³⁹ The tender deadline was 10:00 am on 11 April 2000.³⁴⁴⁰

IV.842. Nottinghamshire County Council received the following tender returns:³⁴⁴¹

Company	Time & Date Tender Received	Amount of tender	Awarded contract
Carmalor	By 10:00 am on an April 2000	£72,337.00	Yes
Robert Woodhead	By 10:00 am on an April 2000	£76,048.00	
J J & A R Jackson	By 10:00 am on an April 2000	£79,973.00	
Greenwood	By 10:00 am on an April 2000	£83,049.37	
ARG	By 10:00 am on an April 2000	£83,614.00	
N.C.C. Building Direct	No Tender Received	N/A	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant ARG – Estimate Schedule and Chase Control Sheet

IV.843. During the OFT’s search of ARG’s premises an Estimate Schedule and Chase Control sheet was found. This document contained the following entry in respect of this tender:³⁴⁴²

³⁴³⁸ Information from client, OFT Document Reference 13223.

³⁴³⁹ Information from client, OFT Document Reference 13223.

³⁴⁴⁰ Information from client, OFT Document Reference 13223.

³⁴⁴¹ Information from client, OFT Document Reference 13223.

³⁴⁴² Estimate Schedule and Chase Control sheet, OFT Document Reference 1588, page 7.

CLIENT	PROJECT	ESTIMATOR	EST. DATE	EST NO.	ESTIMATE VALUE
Trent Architecture & Design	Residential Training centre, Ollerton Internal alterations to 1 st floor to form office	ARG	11-04-00	4277	C. JACKSONS 83,614-00

REMARKS	WORK WON OR LOST
GREENWOODS J.J JACKSONS.	

Evidence from leniency applicant - ARG

IV.844. As part of its leniency application, ARG provided to the OFT 'a table listing the contracts since January 2000 where ARG has been involved in cover pricing, including the names of the companies involved, the individuals within those companies that ARG has been in contact with in respect of cover pricing, together with details of dates and any supporting documentary evidence which ARG is able to provide'.³⁴⁴³ The table contained the following entry for this contract:³⁴⁴⁴

Company	Member of NNCG, NBG or CAGE	Individual Contact	Contract	Cover Price Taken	Cover Price Given	Compensation Payments Involved	Date of Tender Enquiry Received by ARG
J.J & A.R Jackson Limited	CAGE	Cameron Gray	Residential Training Centre at Ollerton		Yes	No	No Record

Date of tender Return	Tender Price	Any documentary evidence to be provided
11.04.00	£83,614	Estimate File No. 4277 We have no archived estimates prior to 5000

IV.845. In its response to the Statement, ARG confirmed that it had '*...admitted cover pricing in relation to this tender but they are unable to recollect any details. They can only assume that they used a cover price due to a high level of work at the time and would therefore, have been unable to carry out the works had they been successful*'.³⁴⁴⁵

³⁴⁴³ Response from ARG, OFT Document Reference 3887, page 1.

³⁴⁴⁴ Schedule of Covers, OFT Document Reference 3888, page 3.

³⁴⁴⁵ Written representations of ARG, 25 June 2008, paragraph 2.3.

Witness evidence from leniency applicant – ARG

- IV.846. During interviews conducted in connection with its leniency application, ARG's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.174 to IV.181 above and is relied upon by the OFT in relation to this tender.
- IV.847. During a telephone interview conducted on 27 September 2007 with Jackie Gregory ('JG') of ARG, the OFT pointed out that the figure ARG submitted was higher than the figure submitted by J J & A R Jackson for this contract, as confirmed by the client and J J & A R Jackson. Therefore, the OFT could not understand how ARG could have given J J & A R Jackson a cover price lower than its own tender figure as stated in ARG's table. JG explained that ARG had made a genuine mistake when compiling its leniency schedule and had interpreted the entry, '*C. JACKSONS 83,614-00*' in the estimate value column on the estimate schedule to mean that ARG had given J J & A R Jackson a cover price. However, after consultation with Allan Gregory ('AG') Managing Director of ARG, JG confirmed that although neither AG nor JG had any specific recollection with regard to the exchanging of a cover price in relation to this tender, ARG did accept on the basis of the tender figures submitted that ARG did receive a cover price from J J & A R Jackson.³⁴⁴⁶

Evidence from other companies – J J & A R Jackson

- IV.848. The OFT wrote to J J & A R Jackson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that J J & A R Jackson had participated in bid rigging on this tender. In response to this letter J J & A R Jackson admitted '*We provided a cover price to ARG Mansfield Ltd of Mansfield. We did not win the job*'.³⁴⁴⁷
- IV.849. Following the issue of the Statement, JJ & AR Jackson did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

- IV.850. From the evidence presented above, the OFT draws the following conclusions.
- IV.851. ARG and J J & A R Jackson each accepted an invitation to tender for internal alterations to a residential training centre at Ollerton.
- IV.852. Both companies submitted a tender. ARG was unable to submit a competitive tender by the return date and/or did not want to win this contract.
- IV.853. An entry on the Estimate Schedule and Chase Control sheet found at ARG records '*C. JACKSONS 83,614-00*' in the estimate value column. JG on behalf of AG confirmed that the handwritten entry could mean that ARG either gave or received a cover price to/from J J & A R Jackson. However, on the basis that the tender figure submitted by ARG was higher than the tender submitted by J J & A R Jackson, as confirmed by the client, JG and AG accepted that ARG received a cover price from J J & A R Jackson.

³⁴⁴⁶ Telephone interview, OFT Document Reference 14364.

³⁴⁴⁷ Response from J J & A R Jackson, OFT Document Reference 10443, page 2.

- IV.854. J J & A R Jackson admitted that it gave a cover price to ARG, in response to the OFT's letter of 22 March 2007.
- IV.855. The OFT considers in the light of the contemporaneous evidence from ARG, JG's and AG's admissions and explanations of that contemporaneous evidence, and J J & A R Jackson's admission that it gave a cover price to ARG, that J J & A R Jackson supplied ARG with a cover price for this tender.
- IV.856. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that J J & A R Jackson admitted that the party with whom it engaged in bid rigging was ARG, without being shown the OFT's evidence that ARG was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.857. The OFT further notes that the tender submitted by ARG was higher than the tender submitted by J J & A R Jackson, the pattern consistent with a cover price having been provided.
- IV.858. The OFT therefore concludes that contact took place between ARG and J J & A R Jackson. The OFT also concludes that J J & A R Jackson supplied a figure to ARG for a cover bid.
- IV.859. The OFT is satisfied that the facts set out in paragraphs IV.843 to IV.858 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁴⁴⁸ In particular:
- (a) the provision of a figure for a cover bid from J J & A R Jackson to ARG was not unilateral³⁴⁴⁹, and contravenes the principle against direct or indirect contact between competitors;³⁴⁵⁰
 - (b) ARG can be presumed to have taken account of the information received from J J & A R Jackson (i.e. the cover price) when determining its own conduct in the tendering process;³⁴⁵¹ and
 - (c) J J & A R Jackson can be presumed to have taken account of the information it received from ARG (i.e. that ARG did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁴⁵²
- IV.860. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between ARG and J J & A R Jackson, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for internal alterations to a residential training centre at Ollerton, tender deadline 11 April 2000.

³⁴⁴⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁴⁴⁹ See paragraph IV.73 of the General comments on cover pricing section.

³⁴⁵⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁴⁵¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴⁵² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.861. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.862. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to ARG under section 28 on 28 June 2005. ARG will not therefore receive 100 per cent immunity in respect of this tender. However, ARG will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 10: Not included in the Decision

Alleged Infringement 11: Not included in the Decision

Alleged Infringement 12: Not included in the Decision

Alleged Infringement 13: Not included in the Decision

Infringement 14: Office Development at Lancaster Park, York – 12 June 2000
Client: F R Evans (Leeds) Ltd
Parties: Irwins and GMI

IV.863. F R Evans (Leeds) Ltd sought tenders for an office development at Lancaster Park, York. The following six companies were invited to tender: Guilford Construction, GMI, Stainforth, Irwins, Oldfield Watson and Kier Northern.³⁴⁵³ The deadline for receipt of tenders was 12:00 noon on 12 June 2000.

IV.864. F R Evans (Leeds) Ltd received the following tender returns.³⁴⁵⁴

Company	Time & Date tender received	Amount of tender	Awarded contract
Guilford Construction	Time unknown, 12 June 2000	£1,175,414.77	Yes
GMI	Time unknown, 12 June 2000	£1,218,927.00	
Stainforth	Time unknown, 12 June 2000	£1,219,912.69	
Irwins	Time unknown, 12 June 2000	£1,248,699.00	
Oldfield Watson	Time unknown, 12 June 2000	£1,253,234.00	
Kier Northern	Time unknown, 12 June 2000	£1,308,081.00	

³⁴⁵³ Information from client, OFT Document Reference 7878.

³⁴⁵⁴ Information from client, OFT Document Reference 7878.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register and Form of Tender

IV.865. During the OFT's search of Irwins' premises a Tender Register was found. The Tender Register contained the following entries in respect of this tender:³⁴⁵⁵

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered
0500053 24 May 640	Proposed Offices Development Lancaster Park York	F R Evans (Leeds) Ltd Richard Boothroyd Associates Kilmartin Plowman & Partners	B Q Cover	1248669

Date tender Due	Estimator	Competition
Fri 9 June	IPN	G.M.I

IV.866. Irwins also provided to the OFT its Form of Tender for this contract.³⁴⁵⁶ This Form of Tender states that it was for a proposed office development at Lancaster Park York for F.R. Evans (Leeds) Limited. In the top left hand corner is handwritten 'GMI.'.³⁴⁵⁷ The Form of Tender was signed on 12 June 2000 and the figure Irwins submitted was £1,248,669.00.³⁴⁵⁸

IV.867. In its response to the Statement, GMI suggested that the extract from Irwins' Tender Register set out above does not constitute adequate contemporaneous evidence in respect of this Infringement, citing a number of reasons.

IV.868. First, GMI suggested that Irwins did not have a consistent method by which it recorded the taking of cover prices.³⁴⁵⁹ The OFT considers that it is irrelevant if Irwins did not record all of the cover prices that it took, or all of the details (such as name of competitor) for cover prices that it took, providing that the entries that were made in its Tender Register accurately recorded the taking of a cover price, and GMI has not produced any evidence to suggest that this is not the case in respect of this Infringement.

IV.869. The OFT notes that in relation to a different, and arguably less explicit, entry in Irwin's Tender Register in respect of a tender for an office construction contract at Centurion Park in York on 22 March 2002³⁴⁶⁰, GMI confirmed that for the

³⁴⁵⁵ Tender Register, OFT Document Reference A0339, page 16.

³⁴⁵⁶ Form of Tender, OFT Document Reference A0838.

³⁴⁵⁷ Form of Tender, OFT Document Reference A0838.

³⁴⁵⁸ Form of Tender, OFT Document Reference A0838.

³⁴⁵⁹ Written representations of GMI, 24 June 2008, paragraphs 29 to 44.

³⁴⁶⁰ Tender Register, OFT Document Reference A0339, page 40. The OFT notes that this entry includes the annotation 'C' rather than 'Cover' under type of works, and listed GMI as well as three other firms under 'competition, but distinguished GMI by the use of brackets: '(GMI)'.

tender in question Irwins did submit a price provided to it by GMI.³⁴⁶¹ Moreover, the accuracy of entries in Irwin's Tender Register has also been confirmed by other Parties' admissions of cover pricing in relation to Infringements 62, 157 and 165.

IV.870. Secondly, while discussing this Infringement GMI made a number of suggestions regarding entries in the Tender Register that comprised either 'c' or a number of companies in the 'Competition' column.³⁴⁶² Neither of these situations applies here where there is an explicit reference to 'Cover' and only one firm, in this case GMI, named as competition.

IV.871. Thirdly, GMI suggested that Irwins might have amended the Tender Register after the commencement of the OFT's investigation as part of a strategy to cooperate with the OFT and implicate its competitors.³⁴⁶³ This suggestion is clearly without any foundation, given that the Tender Register was found by the OFT at Irwins' premises during its visit and before Irwins' application for leniency, as described in the Statement and at paragraph IV.865 above. The OFT took the copy of this document during its search of Irwins' premises and can confirm that it is a faithful facsimile of the original document, so the OFT also considers it irrelevant that GMI has been unable to obtain an original of the Tender Register from Irwins.³⁴⁶⁴

Evidence from leniency applicant – Irwins

IV.872. As part of its leniency application, Irwins' legal representatives provided a general explanation of its participation in cover pricing.³⁴⁶⁵ This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.873. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for 'Covers Taken' and 'Covers Given', which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson ('IPN'), Estimating Director at Irwins into potential cover prices. At number 19 of the 'Covers Taken' schedule is the following entry:³⁴⁶⁶

³⁴⁶¹ Written representations of GMI, 24 June 2008, paragraphs 59 to 60.

³⁴⁶² Written representations of GMI, 24 June 2008, paragraphs 38 to 40

³⁴⁶³ Written representations of GMI, 24 June 2008, paragraph 45.

³⁴⁶⁴ Written representations of GMI, 24 June 2008, paragraphs 46 to 49.

³⁴⁶⁵ Leniency application, OFT Document Reference A0714, page 6.

³⁴⁶⁶ Schedule of covers, OFT Document Reference A0718, page 3.

	Year	Tender Ref	Description	Client	Date	Value	Cover From
19		0500053	Office Development Lancaster Park York	F R Evans (Leeds) Ltd	09.06.00	1248696	GMI

Individual Contact	Notes
John Naylor	

IV.874. Irwins also provided to the OFT a schedule listing its competitors' contact details. The name of GMI appears on the list and '*John Naylor*' is named as the contact, with a telephone number of [...] [C].³⁴⁶⁷

IV.875. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

IV.876. GMI alleged that the two schedules provided by Irwins were liable to be inaccurate because they had been compiled after the commencement of the OFT's investigation and would have been affected by Irwins' desire to reduce its penalties by cooperating with the OFT.³⁴⁶⁸ The OFT does not consider that the mere fact that a document has been compiled by a leniency applicant cooperating with the OFT under the leniency programme calls into question the veracity of that document. While the OFT is not according the same evidential weight to Irwins' schedules provided under leniency as it is to contemporaneous documents and witness testimony, the OFT considers these documents provide evidence of Irwins' position as to its engagement in cover pricing on this tender, and as such constitutes evidence additional to the available contemporaneous records and witness evidence.

Witness evidence from leniency applicant Irwins

IV.877. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins' leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.878. Also during this interview, IPN was shown the '*Tender Register*'³⁴⁶⁹ and in particular the reference to the entry for proposed office development at Lancaster Park, York and was asked if he could recall anything about that contract. IPN replied '*Yeah. This, will be one that we have absolutely no chance whatever of getting it...*'.³⁴⁷⁰ The OFT asked why there was no chance of Irwins securing this contract, IPN replied '*I would say that GMI would get that, without even trying. They get 90% of Evans work*'.³⁴⁷¹ IPN confirmed that the presence of the handwritten word '*Cover*' in the fourth column on the tender

³⁴⁶⁷ Contact list, OFT Document Reference A0715, page 3.

³⁴⁶⁸ Written representations of GMI, 24 June 2008, paragraph 28.

³⁴⁶⁹ Tender Register, OFT Document Reference A0339, page 16.

³⁴⁷⁰ Interview transcript, OFT Document Reference 11254, page 22.

³⁴⁷¹ Interview transcript, OFT Document Reference 11254, page 22.

register shows that Irwins took a cover in relation to that contract, *'I'm getting a bit more explicit there ... pretty obvious...'*.³⁴⁷² IPN was then shown the Form of Tender for this contract, and asked about the significance of the reference to *'GMI'* handwritten in the top left hand corner.³⁴⁷³ IPN replied *'There you go, yeah'*.³⁴⁷⁴ IPN confirmed that this shows a cover price was received from GMI.³⁴⁷⁵

IV.879. In its response to the Statement, GMI suggested that IPN's evidence was undermined by some form of grudge against GMI and by doubts over his ability to remember events that happened several years previously.³⁴⁷⁶ The OFT considers that IPN's recollection in interview was clear. The interview with IPN is not the only piece of evidence upon which the OFT relies; on the contrary, the OFT relies on two pieces of contemporaneous evidence for this Infringement which are explained by IPN's witness evidence. IPN's interview was carried out with the agreement of his employers who were legally represented and any suggestion that either IPN or Irwins sought to obtain an advantage by fabricating evidence cannot be sustained and has not been supported by any contemporaneous evidence contradicting the OFT's case. On the contrary, similar evidence from IPN in relation to other Parties has been confirmed by their admissions of Infringements 62, 157 and 165.

IV.880. GMI also suggested that the unreliability of IPN's evidence was also shown by his suggestion that GMI obtained 90 per cent of Evans' work.³⁴⁷⁷ In order to contradict this suggestion, GMI provided evidence that between July 1999 and August 2002 it obtained only one project from Evans, although without any information as to the number of contracts which Evans put to tender during that period. However, the OFT first notes that this tender took place in June 2000, early in that three year period. At that time IPN may well have had a perception that GMI won a lot of work from Evans. Secondly, this perception would have been strengthened if GMI had won a lot of work from Evans in the preceding years – in this connection, the OFT notes that by GMI's own admission it has a *'strong and trusting relationship'* with Evans lasting for 24 years.³⁴⁷⁸ Thirdly, even if IPN was mistaken as to the amount of Evans' work obtained by GMI, such mistaken perception may nonetheless have led him to take a cover price and therefore even if GMI did less work for Evans in the preceding years the OFT does not consider that this undermines the reliability of IPN's evidence as a whole.

Evidence from other companies – GMI

IV.881. The OFT wrote to GMI on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that GMI had participated in bid rigging on this tender. The OFT received a call from [...] [C] of Addleshaw Goddard, who were then representing GMI, on 16 May 2007, confirming that GMI had rejected the OFT's Fast Track Offer.³⁴⁷⁹

³⁴⁷² Interview transcript, OFT Document Reference 11254, page 22.

³⁴⁷³ Form of Tender, OFT Document Reference A0838, page 1.

³⁴⁷⁴ Interview transcript, OFT Document Reference 11254, page 23.

³⁴⁷⁵ Interview transcript, OFT Document Reference 11254, page 23.

³⁴⁷⁶ Written representations of GMI, 24 June 2008, paragraphs 26 to 28.

³⁴⁷⁷ Written representations of GMI, 24 June 2008, paragraphs 50 to 51.

³⁴⁷⁸ Written representations of GMI, 24 June 2008, paragraph 51.2.

³⁴⁷⁹ File note of telephone conversation, OFT Document Reference 10355.

IV.882. In its response to the Statement, GMI claimed there was no reason for it to participate in cover pricing as it clearly had a policy of declining tenders where, for whatever reason, it felt unable to submit a tender, noting that an example of this can be found in the description of Infringement 211 where GMI was an invited bidder but declined to tender.³⁴⁸⁰ The OFT notes that the present Infringement relates to the provision of a cover price, not the acceptance of one, which is compatible with a policy of declining tenders. Though the OFT has found, in paragraph IV.73 above, that a common motive for providing cover prices was reciprocity, it notes that the undertaking concerned may have other motives, such as facilitating the reduction in competitive bids for a tender which it wishes to win. Therefore, any evidence of GMI declining tenders has no bearing on the finding that it gave a cover price to a competitor.

The OFT's analysis of the evidence and finding

IV.883. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.884. Irwins and GMI each accepted an invitation to tender for the contract for an office development at Lancaster Park, York. Irwins was unable to submit a tender by the return date and/or did not want to win this contract.

IV.885. GMI appears to have completed the estimating process for the tender for this contract and came second lowest in the tender process.

IV.886. Irwins' Tender Register recorded '*G.M.I.*' handwritten in the final column. Also '*GMI.*' was handwritten on the Form of Tender. No other competitors were written in respect of this tender either on Irwins' Tender Register or on its Form of Tender. IPN confirmed that he received a cover price from GMI.

IV.887. In addition '*cover*' was handwritten in the type of work/ percentage difference column on Irwins' Tender Register. IPN confirmed that '*cover*' handwritten in this column shows that Irwins sought a cover price in relation to this contract. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN's admission and explanation of the contemporaneous evidence, that GMI supplied Irwins with a cover price for this tender.

IV.888. The OFT notes that the tender submitted by Irwins was higher than the tender submitted by GMI, the pattern consistent with a cover price having been provided.

IV.889. The OFT therefore concludes that contact took place between Irwins and GMI. The OFT also concludes that GMI supplied a figure to Irwins for a cover bid.

IV.890. The OFT is satisfied that the facts set out in paragraphs IV.865 to IV.889 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁴⁸¹ In particular:

³⁴⁸⁰ Written representations of GMI, 24 June 2008, paragraphs 68 to 71.

³⁴⁸¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from GMI to Irwins was not unilateral³⁴⁸², and contravenes the principle against direct or indirect contact between competitors;³⁴⁸³
- (b) Irwins can be presumed to have taken account of the information received from GMI (i.e. the cover price) when determining its own conduct in the tendering process;³⁴⁸⁴ and
- (c) GMI can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁴⁸⁵

IV.891. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and GMI, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for an office development at Lancaster Park, York, tender deadline 12 June 2000.

Immunity and leniency assessment

IV.892. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.893. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this Infringement.

Alleged Infringement 15: Not included in the Decision

Alleged Infringement 16: Not included in the Decision

Infringement 17: Internal Redecoration of King Edward Court, Nottingham – 2 August 2000

Client: Crown Prosecution Service

Parties: Bodill and Thorndyke

IV.894. On 11 July 2000, the Crown Prosecution Service sought tenders for the internal redecoration of King Edward Court, Nottingham. The return date for the tender was 2 August 2000 and four companies were invited to tender: Thorndyke, Loach, Abbey Construction (Nottingham) Limited and Bodill.³⁴⁸⁶

³⁴⁸² See paragraph IV.73 of the General comments on cover pricing section.

³⁴⁸³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁴⁸⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴⁸⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴⁸⁶ Information from client, OFT Document Reference 7530.

IV.895. The Crown Prosecution Service received the following tender returns by 2 August 2000:³⁴⁸⁷

Company	Time and date tender received	Amount of tender	Awarded the tender
Thorndyke	09:00 1 August 2000	£12,367.00	Yes
Loach	Declined to tender		
Abbey Construction (Nottingham) Limited	09:00 2 August 2000	£29,185.90	
Bodill	09:00 1 August 2000	£14,161.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.896. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten:³⁴⁸⁸

- '
1. BODILL
 2. LOACH. "SENT BACK "
 3. *THORNDYKE. Mr. GOODE
- [...] [C] Tel [...] [C] Ringing US'

IV.897. The tender sheet states that Bodill's submitted price was £14,161 and has a © in the top right hand corner.³⁴⁸⁹

Evidence from leniency applicant Bodill

IV.898. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.899. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000 and explained that when a '*' is written against a contractor's name it means that it gave Bodill a cover price.³⁴⁹⁰ In respect of this tender, Bodill confirmed that it received a cover price from Thorndyke³⁴⁹¹ and that it submitted a token tender.³⁴⁹²

Witness evidence from leniency applicant Bodill

IV.900. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover

³⁴⁸⁷ Information from client, OFT Document Reference 7530.

³⁴⁸⁸ Leniency application, OFT Document Reference 0493.

³⁴⁸⁹ Leniency application, OFT Document Reference 0493.

³⁴⁹⁰ Explanatory Note of Tender Sheet, OFT Document Reference 0861, page 1.

³⁴⁹¹ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 1.

³⁴⁹² Tender Analysis, OFT Document Reference 0849, page 1.

pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Thorndyke

IV.901. The OFT wrote to Price Waterhouse Coopers LLP, the appointed liquidator for Thorndyke, on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Thorndyke had participated in bid rigging on this tender. The OFT received no response to that letter, and in a follow-up call Pricewaterhouse Coopers LLP confirmed that they understood that the OFT would treat the absence of a response as a rejection of its offer.³⁴⁹³

IV.902. Following the issue of the Statement, Thorndyke did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.903. From the evidence presented above, the OFT draws the following conclusions.

IV.904. Bodill and Thorndyke each accepted an invitation to tender for this contract.

IV.905. Bodill was unable to submit a tender by the return date and/or did not want to win this tender. It appears that Thorndyke completed the estimating process for this contract and that it submitted a tender with the hope of winning the work. This is shown by the facts that it submitted the lowest price and that it won the tender.

IV.906. In regard to Thorndyke, Bodill's tender sheet records '*0860 0780 807126 *THORNDYKE. Mr. GOODE Tel [.....] [C] Ringing US*'. Bodill has confirmed that this shows that it received a cover price from Thorndyke. The OFT considers that this also shows more specifically that Bodill was expecting a telephone call from Thorndyke before the date for submitting its tender, in order to obtain its cover price. Bodill recorded on the tender sheet the figure £14,161 as the tender figure and this was the exact figure that Bodill submitted.

IV.907. Bodill's tender sheet records the name of a Thorndyke estimator, '*Mr Goode*', and the telephone number '*[.....] [C]*'. Company information for Thorndyke shows that the telephone number '*[.....] [C]*' is Thorndyke's.³⁴⁹⁴

IV.908. Although Thorndyke has not admitted engaging in this bid rigging activity, the OFT considers that the contemporaneous evidence from Bodill together with Bodill's admission and explanation of that evidence, demonstrates that Thorndyke did in fact engage in bid rigging activity on this tender.

IV.909. The OFT notes in addition that Thorndyke's tender figure is the only figure below Bodill's tender figure, and the OFT is therefore satisfied that Bodill could only have received a cover figure from Thorndyke.

³⁴⁹³ File note of telephone conversation, OFT Document Reference 10889.

³⁴⁹⁴ FAME report, OFT Document Reference 12552, page 15.

- IV.910. The OFT also notes that the tender submitted by Bodill was higher than the tender submitted by Thorndyke, a pattern consistent with a cover price having been provided.
- IV.911. The OFT therefore concludes that contact took place between Thorndyke and Bodill. The OFT also concludes that Thorndyke supplied a figure to Bodill for a cover bid.
- IV.912. The OFT is satisfied that the facts set out in paragraphs IV.896 to IV.911 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁴⁹⁵ In particular:
- (a) the provision of a figure for a cover bid from Thorndyke to Bodill was not unilateral³⁴⁹⁶, and contravenes the principle against direct or indirect contact between competitors;³⁴⁹⁷
 - (b) Bodill can be presumed to have taken account of the information received from Thorndyke (i.e. the cover price) when determining its own conduct in the tendering process;³⁴⁹⁸ and
 - (c) Thorndyke can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁴⁹⁹
- IV.913. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and Thorndyke, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the internal redecoration of King Edward Court, Nottingham, tender deadline 2 August 2000.

Immunity and leniency assessment

- IV.914. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.915. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

³⁴⁹⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁴⁹⁶ See paragraph IV.73 of the General comments on cover pricing section.

³⁴⁹⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁴⁹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁴⁹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 18: Superstore, Retail Units and Petrol Filling Station, St Andrew's Retail Park, Small Heath, Birmingham – 11 August 2000
Client: William Morrison Supermarkets plc
Parties: Sol and Bowmer & Kirkland

IV.916. On 14 July 2000, William Morrison Supermarkets plc ('WMS') sought tenders for the construction of a superstore, retail units and petrol filling station at St Andrew's Retail Park, Small Heath, Birmingham. The following six companies were invited to tender: Sol, Carillion Building, Laing Ltd, Sir Robert McAlpine, Kier³⁵⁰⁰ and Bowmer & Kirkland. The closing date for return of tender was 11 August 2000 by 12:00 noon.³⁵⁰¹

IV.917. WMS received the following tender returns:³⁵⁰²

Company	Date Tender Received	Amount of Tender	Awarded Tender
Sol	11 August 2000	£8,545,179	Yes
Carillion Building	11 August 2000	£8,884,535	
Laing Ltd	11 August 2000	£8,887,495	
Sir Robert McAlpine	11 August 2000	£8,912,083	
Kier	11 August 2000	£8,940,644	
Bowmer & Kirkland	11 August 2000	£8,992,604	

Evidence of agreement and/or concerted practice

Contemporaneous evidence from leniency applicant Sol – Tender Register

IV.918. During the OFT visit to Sol's premises under section 27 on 18 January 2006 a copy of Sol's Tender Register was obtained.³⁵⁰³ This contained the following entry for this tender:³⁵⁰⁴

³⁵⁰⁰ The client information for this tender lists Kier Construction as tendering for this contract. In a letter to the OFT following the issue of the Statement, however, Kier informed the OFT that the company which submitted this tender was Kier Regional, i.e. Kier, not Kier Construction (letter from Kier, 28 April 2008, page 2).

³⁵⁰¹ Information from client, OFT Document Reference 10012.

³⁵⁰² Information from client, OFT Document Reference 10012.

³⁵⁰³ Tender Register, OFT Document Reference 4169.

³⁵⁰⁴ Tender Register, OFT Document Reference 4169, page 18.

<u>DATE DUE</u>	<u>JOB DESCRIPTION</u>	<u>CLIENT</u>	<u>ARCHITECT</u>	<u>QUANTITY SURVEYOR</u>
11 AUG '00	PROPOSED SUPERSTORE, RETAIL UNITS & PETROL FILLING STATION ST. ANDREWS RETAIL PARK, SMALL HEATH BIRMINGHAM	WM MORRISONS SUPERMARKETS PLC	WM GOWER P'SHIP	REX PROCTOR & PARTS

<u>TYPE</u>	<u>TENDER SUM</u>	<u>ESTIMATOR</u>	<u>COMPETITION</u>	<u>RESULT & COMMENTS</u>
B.Q.	32 WKS 8,748,953 (1.2% 100,000) 37 WKS 8,549,179 (.6% 50,000	JC	MOSS SOUTHERN CARILLION – WOLV S.R M'ALPINE – BIRM LAING – EASTERN (LUTON) B + K 'C' FROM SOL	(GLOUCESTER) RING ROGER WALKER/RICHARD BACON

Evidence from leniency applicant Sol

IV.919. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.920. In particular, Sol provided the OFT with an analysis of its tender sheets since March 2000. In respect of this tender Sol confirmed that it gave a cover price to Bowmer & Kirkland.

IV.921. It is response to the Statement, Sol confirmed '[a]s can be seen from the extract from Sol's tender register [in the Statement] Sol gave a cover price on this job to Bowmer & Kirkland. The cover was requested by Bowmer & Kirkland...'.³⁵⁰⁵

Witness evidence from leniency applicant Sol

IV.922. During interviews conducted in connection with its leniency application, Sol's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.923. When interviewed about this tender, John Cummings ('JC'), Chief Estimator at Sol³⁵⁰⁶, identified the writing in the Tender Register³⁵⁰⁷ as his. When asked if the

³⁵⁰⁵ Written representations of Sol, 27 June 2008, Annex 1, Detailed Explanation, paragraph 1.

³⁵⁰⁶ Interview transcript, OFT Document Reference 11368, page 9.

figure in the 'Tender Sum' column³⁵⁰⁸ was the figure Sol tendered he said, 'Yeah'.³⁵⁰⁹ He was asked if the entries in the 'Competition' column were in his handwriting and what the source of that information had been. He replied, 'That is my handwriting, yeah... again, you know, subcontractors, um, Builders' Conference occasionally, occasionally just looking at Contracts Journal. You know, you can look and see the list of tenders'.³⁵¹⁰ When asked to explain the entry 'B&K 'C' FROM SOL' in the 'COMPETITION' column he replied 'That's cover from Sol... we gave them a cover. We priced that and won the job, actually, as it was, that one. But B&K rang me up and we gave them cover, Roger Walker....'.³⁵¹¹ JC was asked who Roger Walker was. He said, 'He's a senior estimator at B&K'³⁵¹² and added, 'He probably rang me four weeks before....[the tender deadline]'.³⁵¹³ JC confirmed that in the alternative, the cover price may have been given to Richard Bacon at Bowmer & Kirkland.³⁵¹⁴

Evidence from other companies – Bowmer & Kirkland

IV.924. The OFT wrote to Bowmer & Kirkland on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty it might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Bowmer & Kirkland had participated in bid rigging on this tender. In response to this letter Bowmer & Kirkland did not admit that it had engaged in bid rigging on this particular tender.³⁵¹⁵

IV.925. Following the issue of the Statement, the OFT received a letter from Dickinson Dees LLP, representing Bowmer & Kirkland, which stated '*Our client is content to make an admission in relation to Alleged Infringement 18*'.³⁵¹⁶

IV.926. In its response to the Statement, Bowmer & Kirkland stated in respect of this Infringement '*...on the scant information provided to B&K on 22 March 2007, B&K was then unable to form a view. After examination of the [Statement] and the evidence supporting the allegation that B&K sought and obtained a cover price, the allegation appears to be credible ... The facts are now admitted*'.³⁵¹⁷

IV.927. In its oral representations on the Statement, Bowmer & Kirkland stated in respect of this Infringement '*..... one of our estimators decided to tender and, and, and took a cover on this particular job*'.³⁵¹⁸

The OFT's analysis of the evidence and finding

IV.928. From the evidence presented above, the OFT draws the following conclusions.

³⁵⁰⁷ Tender Register, OFT Document Reference 4169, page 18.

³⁵⁰⁸ Two figures appear in the Tender Sum Column. 32 wks [weeks] £8,748,953 and 37 wks [weeks], £8,549,179. Neither of these is the figure Sol submitted for this tender to the client. JC was not asked to explain this anomaly.

³⁵⁰⁹ Interview transcript, OFT Document Reference 11368, page 9.

³⁵¹⁰ Interview transcript, OFT Document Reference 11368, page 9.

³⁵¹¹ Interview transcript, OFT Document Reference 11368, pages 9 and 10.

³⁵¹² Interview transcript, OFT Document Reference 11368, page 10.

³⁵¹³ Interview transcript, OFT Document Reference 11368, page 11.

³⁵¹⁴ Interview transcript, OFT Document Reference 11368, page 11.

³⁵¹⁵ Schedule of Tenders, OFT Document Reference 10253, page 2.

³⁵¹⁶ Letter from Dickinson Dees LLP, 6 June 2008, page 2.

³⁵¹⁷ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 7.

³⁵¹⁸ Oral representations of Bowmer & Kirkland, 1 August 2008, page 7.

- IV.929. Sol and Bowmer & Kirkland each accepted an invitation to tender for this contract. It appears that Sol completed the estimating process for the tender for this contract. This is shown by the fact that Sol submitted the lowest bid and won the contract. Bowmer & Kirkland was unable to submit a tender by the return date and/or did not want to win this contract.
- IV.930. The Tender Register entry for this tender shows that Sol provided Roger Walker or Richard Bacon at Bowmer & Kirkland with a cover price, indicated by the entry 'B&K 'C' FROM SOL' in the 'COMPETITION' column and 'RING ROGER WALKER/RICHARD BACON' in the 'RESULTS & COMMENTS' column of the Tender Register. Sol confirmed that this meant that it gave a cover price to Bowmer & Kirkland for this tender. Specifically, the OFT considers that this entry shows that Sol had registered the fact that Bowmer & Kirkland wanted a cover price and had arranged to phone Bowmer & Kirkland nearer to the deadline for the tender with that cover price.
- IV.931. JC of Sol confirmed in interview that he provided Roger Walker, or in the alternative Richard Bacon, at Bowmer & Kirkland with a cover price for this tender. JC confirmed that Roger Walker was a 'senior estimator at B&K', whilst Herbert Baggaley provided a list of 'construction companies giving or receiving covers' which included the name of Richard Bacon at Bowmer & Kirkland.³⁵¹⁹
- IV.932. In connection with its application for leniency, Sol provided the OFT with a list of undertakings with whom it had exchanged cover prices. Among these was the name of Roger Walker at Bowmer & Kirkland.
- IV.933. The tender figure of £8,992,604 submitted by Bowmer & Kirkland is in keeping with a cover price being sufficiently higher than the winning bid to remain credible while also ensuring that the undertaking lost the tender.
- IV.934. The OFT notes that both Parties have now admitted their involvement in cover pricing in respect of this Infringement.
- IV.935. The OFT therefore concludes that contact took place between Sol and Bowmer & Kirkland. The OFT also concludes that Sol supplied a figure to Bowmer & Kirkland for a cover bid.
- IV.936. The OFT is satisfied that the facts set out in paragraphs IV.918 to IV.935 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁵²⁰ In particular:
- (a) the provision of a figure for a cover bid from Sol to Bowmer & Kirkland was not unilateral³⁵²¹, and contravenes the principle against direct or indirect contact between competitors;³⁵²²
 - (b) Bowmer & Kirkland can be presumed to have taken account of the information received from Sol (i.e. the cover price) when determining its own conduct in the tendering process;³⁵²³ and

³⁵¹⁹ Leniency application, OFT Document Reference 3902, page 2.

³⁵²⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁵²¹ See paragraph IV.73 of the General comments on cover pricing section.

³⁵²² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁵²³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Sol can be presumed to have taken account of the information it received from Bowmer & Kirkland (i.e. that Bowmer & Kirkland did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁵²⁴

IV.937. In its response to the Statement, Sol refuted the '*OFT assertion... that it took account of its knowledge that Bowmer & Kirkland were not submitting a competitive bid when determining its own conduct in the tender process*'.³⁵²⁵

IV.938. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption³⁵²⁶ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Sol has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Sol's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that Sol submits that this infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

IV.939. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Sol and Bowmer & Kirkland in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the superstore, retail units, petrol filling station at St Andrew's Retail Park, Small Heath, Birmingham, date of tender 11 August 2000.

Immunity and leniency assessment

IV.940. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.941. Sol did not inform the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities during the visit by the OFT under section 27 to Sol's premises on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, Sol will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 19: Not included in the Decision

³⁵²⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁵²⁵ Written representations of Sol, 27 June 2008, Annex 1, Detailed Explanation, paragraph 2.

³⁵²⁶ See paragraph III.938 of the Legal Background section.

Infringement 20: Mason House, Shirley – 18 August 2000
Client: The Sir Josiah Mason Trust
Parties: Thomas Vale and Greswolde

IV.942. On 25 July 2000, The Sir Josiah Mason Trust sought tenders for the construction of a new wing to Mason House, Shirley, Birmingham. The following seven companies were invited to tender: Greswolde, Thomas Vale, Baldwin Construction, Piper, Weaver plc, William Sapcote and Spicers.³⁵²⁷ The deadline for the receipt of tenders was 12:00 noon on 18 August 2000.

IV.943. The Sir Josiah Mason Trust received the following tender returns:³⁵²⁸

Company	Date tender received	Amount of tender	Awarded tender
Greswolde	18 August 2000	£548,660 (later revised to £523,660)	Yes
Thomas Vale	18 August 2000	£570,327	
Baldwin Construction	18 August 2000	£597,417	
Piper	18 August 2000	£606,777	
Weaver plc	18 August 2000	£616,978	
William Sapcote	18 August 2000	£622,340	
Spicers	Declined to submit	n/a	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.944. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:³⁵²⁹

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T4533	B	Sir Josiah Mason Trust	Extension to Mason House, Shirley	400,000	CKT	C	18/08/2000 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
570,327	-	Sapcote, Greswolde, Piper, Baldwin, Weaver,	

IV.945. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*³⁵³⁰ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

³⁵²⁷ Information from client, OFT Document Reference 13246.

³⁵²⁸ Information from client, OFT Document Reference 13246.

³⁵²⁹ Tender Status spreadsheet, OFT Document Reference 4522, page 7.

³⁵³⁰ Interview transcript, OFT Document Reference 11418, page 21.

Within this contact list, there is an entry for Greswolde plus names and telephone number.³⁵³¹

Evidence from leniency applicant Thomas Vale

IV.946. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.947. At Annex 14³⁵³² of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 60 of the schedule under Annex 14 and within the section for 2000 tenders is the following entry:³⁵³³

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T4533	18 August	Sir Josiah Mason Trust	Extension to Mason House, Shirley	Taken (Greswolde)	Yes (Tender Spreadsheet)

IV.948. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.949. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application.³⁵³⁴ The name '*Greswold*' appears on this list.

IV.950. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.951. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.952. CKT admitted that the initials '*CKT*', which appear in the estimator column for this tender, were his own and that the letter '*B*', which appears in the column marked '*DIV*', stands for Building Division (also known as Traditional), for which

³⁵³¹ Contact list, OFT Document Reference 11086, page 9.

³⁵³² Leniency application, OFT Document Reference 4568.

³⁵³³ Leniency application, OFT Document Reference 4568, page 60.

³⁵³⁴ Cover pricing activity: Key competitors, OFT Document Reference 4524.

CKT was the estimating manager.³⁵³⁵ In interview, CKT could not recall this tender but referring to the relevant entry in the Tender Status spreadsheet, he said *'I would have made that entry, it would have been booked in as our internal tender number T4533; the division would have been our building division as it was called in those days. The client, as you stated, is the Sir Josiah Mason Trust, it's an extension to Mason house in Shirley, West Midlands that is, there's an approximate value of £400,000, CKT is the estimator that's responsible for that tender, category C would indicate that at that time it was the category for a cover figure. The tender return date was 18/8/2000 at noon. Thomas Vale's submitted tender was £570,327 and the names of the contractors listed on the right hand side, Greswolde is in bold letters which indicates that a cover figure was obtained from Greswolde construction'*.³⁵³⁶ When asked who he would have contacted from Greswolde for cover prices, CKT referred to the entry in his contact book and stated *'almost certainly I would have spoken to somebody called Richard Ferris'*.³⁵³⁷

Evidence from other companies – Greswolde

IV.953. The OFT wrote to Greswolde on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greswolde had participated in bid rigging on this tender. In response Greswolde, through its legal representatives, admitted engaging *'in bid rigging activities on this tender with THOMAS VALE CONSTRUCTION'*.³⁵³⁸

IV.954. The OFT subsequently wrote to Greswolde's ultimate parent company at the time of this Infringement, Mantisson, on 5 November 2007, asking it to comment on Greswolde's response to the OFT's Fast Track Offer, given that the OFT intended to hold Mantisson jointly and severally liable for any infringements committed by Greswolde in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Mantisson did not make any comment.³⁵³⁹

IV.955. In their response to the Statement, Greswolde and Mantisson stated *'Greswolde is not...challenging the OFT's substantive allegations in relation to each of the Alleged Infringements and maintains its acceptance of the terms of the Fast Track Offer'*.³⁵⁴⁰

The OFT's analysis of the evidence and finding

IV.956. From the evidence presented above, the OFT draws the following conclusions.

IV.957. Thomas Vale and Greswolde each accepted an invitation to tender for an extension to Mason House, Shirley, Birmingham.

IV.958. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category C

³⁵³⁵ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

³⁵³⁶ Interview transcript, OFT Document Reference 13865, page 2.

³⁵³⁷ Interview transcript, OFT Document Reference 13865, page 11.

³⁵³⁸ Response from Greswolde, OFT Document Reference 10364, page 2.

³⁵³⁹ Response from Mantisson, OFT Document Reference 13986.

³⁵⁴⁰ Written representations of Greswolde and Mantisson, 27 June 2008, paragraph 2.5.

tender, which, as CKT stated in interview *'in those days, was, obviously, as it says, inferred as being a cover'*.³⁵⁴¹

- IV.959. Greswolde completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Greswolde being the lowest received and the fact that it won the contract.
- IV.960. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records five competitors who were also invited to tender for this contract, namely *'Sapcote, **Greswolde**, Piper, Baldwin'* [and] *'Weaver'*. Greswolde is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is recorded as £570,327, matching that recorded by the client.
- IV.961. The Sir Josiah Mason Trust also received a tendered amount of £548,660 from Greswolde. Greswolde's bid was the lowest received by the client with Thomas Vale's bid second lowest. This fits into the pattern consistent with a cover price having been provided from Greswolde to Thomas Vale. The OFT notes that Greswolde is the only company whose figure is below that of Thomas Vale and so Thomas Vale could only have received cover from Greswolde.
- IV.962. The OFT notes that although five competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Greswolde. This indicates that a conscious decision was made to differentiate Greswolde from the other four competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price and make contact with Greswolde at the time. It also indicates that CKT himself made contact with Greswolde.
- IV.963. Thomas Vale admitted that Greswolde was one of the *'key competitors'* with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price had been received from Greswolde. He also named Richard Ferris as someone he would *'almost certainly'* have contacted for a cover price. There is an entry for Richard Ferris in a contact book he used to telephone other contractors for the purpose of obtaining cover prices.
- IV.964. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Greswolde admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.965. The OFT therefore concludes that contact took place between Thomas Vale and Greswolde and that Greswolde supplied a figure to Thomas Vale in order that it could submit a bid to the client that was not intended to win the contract.

³⁵⁴¹ Interview transcript, OFT Document Reference 11418, page 15.

IV.966. The OFT is satisfied that the facts set out in paragraphs IV.944 to IV.965 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁵⁴² In particular:

- (a) the provision of a figure for a cover bid from Greswolde to Thomas Vale was not unilateral³⁵⁴³, and contravenes the principle against direct or indirect contact between competitors;³⁵⁴⁴
- (b) Thomas Vale can be presumed to have taken account of the information received from Greswolde (i.e. the cover price) when determining its own conduct in the tendering process;³⁵⁴⁵ and
- (c) Greswolde can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.³⁵⁴⁶

IV.967. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Greswolde in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for Mason House, Shirley, Birmingham, tender deadline 18 August 2000.

Immunity and leniency assessment

IV.968. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.969. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 21: Proposed St Vincent's Parish Centre at Crookes, Sheffield – 25 August 2000

Client: Diocese of Hallam

Parties: Strata (formerly known as Weaver) and Stainforth

IV.970. On 27 July 2000, the Diocese of Hallam sought tenders for works at St Vincent's Parish Centre at Crookes, Sheffield.³⁵⁴⁷ The following three companies were invited to tender: Stainforth, Weaver and Ackroyd & Abbott.³⁵⁴⁸ The deadline for receipt of tenders was 12:00 noon on 25 August 2000.³⁵⁴⁹

³⁵⁴² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁵⁴³ See paragraph IV.73 of the General comments on cover pricing section.

³⁵⁴⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁵⁴⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁵⁴⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁵⁴⁷ Information from client, OFT Document Reference 10125.

³⁵⁴⁸ Information from client, OFT Document Reference 10125.

³⁵⁴⁹ Information from client, OFT Document Reference 10125.

IV.971. The Diocese of Hallam received the following tender returns:³⁵⁵⁰

Company	Date tender received	Amount of tender	Awarded contract
Stainforth	25 August 2000	£516,767.69	Yes
Weaver [Strata]	25 August 2000	£539,220.00	
Ackroyd & Abbott	25 August 2000	£649,159.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata- Form of Tender

IV.972. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001', containing various documents mostly copy Form of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³⁵⁵¹

'FROM STAINFORTH'

IV.973. The Form of Tender was signed by Duncan Ironmonger ('DI'), an estimator at Strata, on 24 August 2000.³⁵⁵² The Form of Tender also stated that Strata's figure was £539,220.00.³⁵⁵³

Evidence from leniency applicant – Strata

IV.974. As part of its leniency application, Strata provided to the OFT a list of covers³⁵⁵⁴, compiled by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:³⁵⁵⁵

Date	Project	Strata ref no
24/08/2000	St Vincent's Parish Centre, Crookes, Sheffield	T105/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXN/107	Stainforth	Bradford	

IV.975. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

³⁵⁵⁰ Information from client, OFT Document Reference 10125.

³⁵⁵¹ Form of Tender, OFT Document Reference 3431.

³⁵⁵² Form of Tender, OFT Document Reference 3431.

³⁵⁵³ Form of Tender, OFT Document Reference 3431.

³⁵⁵⁴ Schedule of Covers, OFT Document Reference 4054.

³⁵⁵⁵ Schedule of Covers, OFT Document Reference 4054, page 3.

Witness evidence from leniency applicant - Strata

IV.976. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Stainforth

IV.977. The OFT wrote to Stainforth on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Stainforth had participated in bid rigging on this tender. In response to this letter the OFT received an email on 26 April 2007 from Stainforth's legal representatives, Gordons LLP stating '*we formally confirm that our Client will not be accepting your offer...*'.³⁵⁵⁶

IV.978. However, in its response to the Statement, Stainforth accepted '*...that it provided a cover price to Strata* [in respect of this Infringement].'³⁵⁵⁷

The OFT's analysis of the evidence and finding

IV.979. From the evidence presented above, the OFT draws the following conclusions.

IV.980. Strata and Stainforth each accepted an invitation to tender for the contract for works at St Vincent's Parish Centre, Crookes, Sheffield.

IV.981. Strata was unable to submit a tender by the return date and/or did not want to win this contract.

IV.982. Strata's Form of Tender records '*FROM STAINFORTH*', handwritten in the top right hand corner. Strata confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and Strata's admission and explanation of the contemporaneous evidence that Stainforth supplied Strata with a cover price for this tender.

IV.983. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by Stainforth, the pattern consistent with a cover price having been provided.

IV.984. In addition the OFT notes that Stainforth's tender figure is the only figure below Strata's tender figure, and the OFT is therefore satisfied that Strata could only have received a cover figure from Stainforth.

IV.985. The OFT notes that both Parties have now admitted their involvement in cover pricing in respect of this Infringement.

³⁵⁵⁶ Response from Stainforth, OFT Document Reference 10862.

³⁵⁵⁷ Written representations of Stainforth, 27 June 2008, paragraph 2.35(b).

IV.986. The OFT therefore concludes that contact took place between Strata and Stainforth. The OFT also concludes that Stainforth supplied a figure to Strata for a cover bid.

IV.987. The OFT is satisfied that the facts set out in paragraphs IV.972 to IV.986 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁵⁵⁸ In particular:

- (a) the provision of a figure for a cover bid from Stainforth to Strata was not unilateral³⁵⁵⁹, and contravenes the principle against direct or indirect contact between competitors;³⁵⁶⁰
- (b) Strata can be presumed to have taken account of the information received from Stainforth (i.e the cover price) when determining its own conduct in the tendering process;³⁵⁶¹ and
- (c) Stainforth can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁵⁶²

IV.988. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Stainforth and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the works at St Vincent's Parish Centre, Crookes, Sheffield, tender deadline 25 August 2000.

Immunity and leniency assessment

IV.989. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.990. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this infringement.

Infringement 22: Refurbishment 73 Wates Houses, Windsor – 7 September 2000
Client: Windsor & District Housing Association
Parties: Mansell and Connaught

³⁵⁵⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁵⁵⁹ See paragraph IV.73 of the General comments on cover pricing section.

³⁵⁶⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁵⁶¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁵⁶² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.991. In July 2000, Windsor & District Housing Association ('Windsor Housing'), part of the Radian group³⁵⁶³, sought tenders for refurbishment works, Wates House, Windsor.³⁵⁶⁴ The following five companies were invited to tender: Borrás Construction, Connaught, Formbridge Construction, Leadbitter Construction and Mansell. The date and time of tender return was 31 August 2000 at noon.³⁵⁶⁵

IV.992. Windsor Housing received the following tender returns:³⁵⁶⁶

Company	Date tender received	Amount of tender	Awarded contract
Connaught	Before deadline	£1,718,486.56	YES
Leadbitter Construction	Before deadline	£2,143,191.00	
Borrás Construction	Before deadline	£2,089,852.00	
Formbridge Construction	Before deadline	£2,235,096.79	
Mansell	Before deadline	£1,886,255.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheets

IV.993. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a Mansell managing estimator, workload reports. The 2000 workload report for major projects contained the following entry:³⁵⁶⁷

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
66262	Windsor – Refurb. 73 Wates Houses		1886255			

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS. %	
1718486	1886255	2235096	2nd		Cover from Connaught

Evidence from leniency applicant Mansell

IV.994. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.³⁵⁶⁸ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.995. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell received a cover

³⁵⁶³ Information from client, OFT Document Reference 10000.

³⁵⁶⁴ Information from client, OFT Document Reference 10001.

³⁵⁶⁵ Information from client, OFT Document Reference 10001. It is noted that the tender return date which the client has advised us of differs from that provided by Mansell.

³⁵⁶⁶ Information from client, OFT Document Reference 10001.

³⁵⁶⁷ Leniency application, OFT Document Reference B3538, page 1.

³⁵⁶⁸ Leniency application, OFT Document Reference B0734.

price from Connaught and that this cover price was taken due to *'insufficient tender period: resource'* at Mansell.³⁵⁶⁹

Witness evidence from leniency applicant Mansell

IV.996. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.997. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR explained that roofing contracts would have specialist contractors and stated *'looking at the name [Connaught] that we went to [for a cover price], they are a specialist contractor of that sort of work...'*³⁵⁷⁰ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.³⁵⁷¹

Evidence from other companies – Connaught plc

IV.998. The OFT wrote to Connaught plc on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Connaught had participated in bid rigging on this tender. In response to this letter Connaught plc stated that it was unable to accept the OFT's Fast Track Offer.³⁵⁷²

IV.999. In their response to the Statement, however, Connaught stated *'Connaught does not dispute the facts alleged against it'*³⁵⁷³ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.1000. From the evidence presented above, the OFT draws the following conclusions.

IV.1001. Mansell and Connaught each accepted an invitation to tender for this contract.

IV.1002. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Connaught completed the estimating process for this tender and that they submitted a bid with the hope of winning the work. This is shown by the price submitted by Connaught being the lowest received and that they won the contract.

IV.1003. Mansell's 2000 workload report records *'Cover from Connaught'*, in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of

³⁵⁶⁹ Leniency application, OFT Document Reference B1351, page 2.

³⁵⁷⁰ Interview transcript, OFT Document Reference 11516, pages 19 and 20.

³⁵⁷¹ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

³⁵⁷² Response from Connaught, OFT Document Reference 10975.

³⁵⁷³ Written representations of Connaught, 27 June 2008, paragraphs 1.4 and 3.1.

figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.1004. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Connaught, the pattern consistent with a cover price having been provided.

IV.1005. In addition the OFT notes that Connaught's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from Connaught.

IV.1006. Connaught has stated that it does not dispute the facts alleged against it, and confirmed that it *'has no material to set against the evidence obtained by the OFT'*.³⁵⁷⁴

IV.1007. The OFT therefore concludes that contact took place between Mansell and Connaught. The OFT also concludes that Connaught supplied a figure to Mansell for a cover bid.

IV.1008. The OFT is satisfied that the facts set out in paragraphs IV.993 to IV.1007 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁵⁷⁵ In particular:

- (a) the provision of a figure for a cover bid from Connaught to Mansell was not unilateral³⁵⁷⁶, and contravenes the principle against direct or indirect contact between competitors;³⁵⁷⁷
- (b) Mansell can be presumed to have taken account of the information received from Connaught (i.e. the cover price) when determining its own conduct in the tendering process;³⁵⁷⁸ and
- (c) Connaught can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁵⁷⁹

IV.1009. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Connaught in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment works, Wates Houses, tender deadline 7 September 2000.

Immunity and leniency assessment

IV.1010. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

³⁵⁷⁴ Written representations of Connaught, 27 June 2008, paragraph 3.1.

³⁵⁷⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁵⁷⁶ See paragraph IV.73 of the General comments on cover pricing section.

³⁵⁷⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁵⁷⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁵⁷⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.1011. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 23: **New Pavilion and Facilities, Pole Lane, Unsworth Cricket Club – 15 September 2000**
Client: **Unsworth Cricket and Tennis Club Ltd**
Parties: **Strata (formerly known as Weaver) and G & J Seddon**

IV.1012. On 16 August 2000, Unsworth Cricket and Tennis Club Ltd sought tenders for a new pavilion and facilities, Pole Lane, Unsworth Cricket Club.³⁵⁸⁰ The following seven companies were invited to tender: Tilbury Douglas (now known as Interserve), G & J Seddon, PLP Construction, Diamond Construction, Jackson, Jackson & Sons, Weaver (now known as Strata), Lawlor Construction.³⁵⁸¹ The deadline for receipt of tenders was 12:00 noon on 15 September 2000.³⁵⁸²

IV.1013. Unsworth Cricket and Tennis Club received the following tender returns:³⁵⁸³

Company	Date tender received	Amount of tender	Awarded contract
Tilbury Douglas	15 September 2000	£758,354	
G & J Seddon	15 September 2000	£691,198	Yes
PLP Construction	15 September 2000	£720,014	
Diamond Construction	15 September 2000	£799,839	
Jackson, Jackson & Sons	15 September 2000	£770,000	
Weaver [Strata]	15 September 2000	£715,330	
Lawlor Construction	15 September 2000	£792,269	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata- Form of Tender

IV.1014. During the OFT’s search of Strata’s premises a ring binder file marked ‘Covers from Jan 2000 to Dec 2001’ containing various document, mostly copy Form of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³⁵⁸⁴

‘FROM SEDDON’

IV.1015. The Form of Tender was signed by Duncan Ironmonger (‘DI’), an estimator at Strata, on 14 September 2000.³⁵⁸⁵ The Form of Tender also stated that Strata’s figure was £715,330.00.³⁵⁸⁶

³⁵⁸⁰ Information from client, OFT Document Reference 9894.

³⁵⁸¹ Information from client, OFT Document Reference 9894.

³⁵⁸² Information from client, OFT Document Reference 9894.

³⁵⁸³ Information from client, OFT Document Reference 9894.

³⁵⁸⁴ Form of Tender, OFT Document Reference 3425.

³⁵⁸⁵ Form of Tender, OFT Document Reference 3425.

³⁵⁸⁶ Form of Tender, OFT Document Reference 3425.

Evidence from leniency applicant - Strata

IV.1016. As part of its leniency application, Strata provided to the OFT a list of covers³⁵⁸⁷, compiled by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:³⁵⁸⁸

Date	Project	Strata ref no
14/09/2000	New Pavillion & Facilities Unsworth Cricket Club, Bury Lancs	T119/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXM/107	Seddon	Manchester/Stoke on Trent	

IV.1017. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.1018. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Seddon

IV.1019. The OFT wrote to Seddon on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Seddon had participated in bid rigging on this tender. In response to this letter, G & J Seddon responded, admitting '*We engaged in bid rigging activities on this tender with Weaver Construction Limited*'.³⁵⁸⁹ G & J Seddon added in its covering letter that it gave a cover price on this tender.³⁵⁹⁰

IV.1020. The OFT subsequently wrote again to G & J Seddon's ultimate parent company at the time of this Infringement, Seddon, on 5 November 2007, asking it to comment on G & J Seddon's response to the OFT's Fast Track Offer, given that the OFT intended to hold Seddon jointly and severally liable for any infringements committed by G & J Seddon in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Seddon said '*We confirm that Seddon Group Limited ("SGL") support and adopt G&J Seddon Limited ("G&JS") acceptance of the reduction of penalty offer and*

³⁵⁸⁷ Schedule of Covers, OFT Document Reference 4054.

³⁵⁸⁸ Schedule of Covers, OFT Document Reference 4054, page 3.

³⁵⁸⁹ Response from G & J Seddon, OFT Document Reference 10826, page 2.

³⁵⁹⁰ Response from Seddon, OFT Document Reference 10825.

that SGL does not intend to comment upon matters ... or to make any submissions on this case at the present time'.³⁵⁹¹

IV.1021. In its response to the Statement, G & J Seddon confirmed in respect of this Infringement that they '*... has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of Infringement*'.³⁵⁹²

The OFT's analysis of the evidence and finding

IV.1022. From the evidence presented above, the OFT draws the following conclusions.

IV.1023. Strata and G & J Seddon each accepted an invitation to tender for the contract for a new pavilion and facilities at Pole Lane, Unsworth Cricket Club.

IV.1024. Strata was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1025. G & J Seddon completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work. This is shown by the price submitted by G & J Seddon being the lowest received and that they won the contract.

IV.1026. Strata's Form of Tender records '*FROM SEDDON*', handwritten in the top right hand corner. Strata confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and Strata's admission and explanation of the contemporaneous evidence, and G & J Seddon's admission that it gave a cover price to Weaver, that G & J Seddon supplied Strata with a cover price for this tender.

IV.1027. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by G & J Seddon, the pattern consistent with a cover price having been provided.

IV.1028. In addition the OFT notes that G & J Seddon's tender figure is the only figure below Strata's tender figure, and the OFT is therefore satisfied that Strata could only have received a cover figure from G & J Seddon.

IV.1029. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that G & J Seddon admitted that the party with whom it engaged in bid rigging was '*Weaver*', without being shown the OFT's evidence that Strata was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.1030. The OFT therefore concludes that contact took place between Strata and G & J Seddon. The OFT also concludes that G & J Seddon supplied a figure to Strata for a cover bid.

³⁵⁹¹ Response from Seddon, OFT Document Reference 14027.

³⁵⁹² Written representations of G & J Seddon, 27 June 2008, paragraph 6.

IV.1031. The OFT is satisfied that the facts set out in paragraphs IV.1014 to IV.1030 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁵⁹³ In particular:

- (a) the provision of a figure for a cover bid from G & J Seddon to Strata was not unilateral³⁵⁹⁴, and contravenes the principle against direct or indirect contact between competitors;³⁵⁹⁵
- (b) Strata can be presumed to have taken account of the information received from G & J Seddon (i.e. the cover price) when determining its own conduct in the tendering process;³⁵⁹⁶ and
- (c) G & J Seddon can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁵⁹⁷

IV.1032. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between G & J Seddon and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for a new pavilion and facilities at Unsworth Cricket Club, Bury, tender deadline 15 September 2000.

Immunity and leniency assessment

IV.1033. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1034. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Alleged Infringement 24: Not included in the Decision

Alleged Infringement 25: Not included in the Decision

Alleged Infringement 26: Not included in the Decision

³⁵⁹³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁵⁹⁴ See paragraph IV.73 of the General comments on cover pricing section.

³⁵⁹⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁵⁹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁵⁹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 27: Proposed Police Station, Spennymoor – 16 October 2000
Client: Durham Police Authority
Parties: Mowlem and Interserve (formerly known as Tilbury Douglas)

IV.1035. On 11 September 2000, Durham Police Authority sought tenders for a new build, Spennymoor Police Station.³⁵⁹⁸ The following seven companies were invited to tender: Ballast, Tilbury Douglas, Kier, M J Gleeson, Miller Construction, Mowlem and Shepherd Construction. The date and time of tender return was 16 October 2000 at 4:00 pm.³⁵⁹⁹

IV.1036. Durham Police Authority received the following tender returns:³⁶⁰⁰

Company	Date & time tender received	Amount of tender	Awarded contract
Mowlem	16 October 2000 4:00 pm	£2,338,500	
Kier	16 October 2000 4:00 pm	£2,337,823	YES
Miller Construction	Declined to submit		
M J Gleeson	16 October 2000 4:00 pm	£2,605,708	
Ballast	16 October 2000 4:00 pm	£2,393,314	
Shepherd Construction	16 October 2000 4:00 pm	£2,484,551	
Tilbury Douglas [Interserve]	16 October 2000 4:00 pm	£2,503,240	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Carillion³⁶⁰¹ – Tender Settlement form

IV.1037. As part of its leniency application, Carillion’s legal representatives provided a Tender Details and Summary document for this tender. On the second page under the section headed ‘*Competition*’, the following entries have been made:³⁶⁰²

‘Competition

1.)Shepherd
2.)Ballast Wiltshire
3.)Gleeson
4.)Tilbury Douglas (C)
5.)Kier
6.)Mowlem

Evidence from leniency applicant Carillion

IV.1038. Carillion’s legal representatives also provided to the OFT a table headed ‘*Tenders where Cover given*’, which includes this tender. In respect of this tender the table states that a cover was given to ‘*Tilbury Douglas*’ (Interserve).³⁶⁰³

³⁵⁹⁸ Information from client, OFT Document Reference 7760.

³⁵⁹⁹ Information from client, OFT Document Reference 7760.

³⁶⁰⁰ Information from OFT Document Reference 7760.

³⁶⁰¹ Mowlem was acquired by Carillion on 23 February 2006.

³⁶⁰² Leniency application, OFT Document Reference B1749, page 2.

³⁶⁰³ Leniency application, OFT Document Reference B1746.

IV.1039. In its response to the Statement, Mowlem stated that it '*... does not contest that certain employees (and/or former employees) participated in each of the three Relevant Alleged Infringements nor does it contest its liability...*'.³⁶⁰⁴

Witness evidence from leniency applicant Carillion

IV.1040. During interviews conducted in connection with its leniency application, a Carillion employee from the Gateshead office provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.506 to IV.510 above and is relied upon by the OFT in relation to this tender.

IV.1041. During an interview with the OFT on 11 April 2007, Ian Parsons ('IP'), a senior estimator at Carillion, advised how he would record when Mowlem had given a cover as detailed in paragraphs IV.506 to IV.510 above. In relation to this tender, IP confirmed that he completed the Tender Details and Summary sheet and when asked what the '(C)' meant, stated '*That means we give Tilbury Douglas a cover in that instance*'.³⁶⁰⁵ When asked whether this was a contract Mowlem wanted to win IP stated '*yes, it was something we were looking to [win], I think we'd done one or two police stations in Northumberland. I think it was something we, we actually targeted to win*'.³⁶⁰⁶

Evidence from other companies – Interserve

IV.1042. The OFT wrote to Interserve on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Interserve had participated in bid rigging on this tender. In response to this letter Interserve made no admission in respect of this tender and stated '*Where no admission has been made, this is because either: Interserve believes no cover price was given or taken; or is due to a lack of available relevant information*'.³⁶⁰⁷ Interserve did advise that '*There was limited documentation but this may simply reflect the fact that in general documentation relating to tender opportunities that are not won is disposed of after a short period. It appears that we did tender for this job and that we did not win the tender*'.³⁶⁰⁸

IV.1043. In its response to the Statement, Interserve confirmed that it was not proposing to contest the OFT's decision on liability in respect of this Infringement. It also said that it was not proposing to challenge the evidence in relation to this Infringement³⁶⁰⁹ and it has not done so.

The OFT's analysis of the evidence and finding

IV.1044. From the evidence presented above, the OFT draws the following conclusions.

IV.1045. Mowlem and Interserve each accepted an invitation to tender for this contract.

³⁶⁰⁴ Written representations of Mowlem, 27 June 2008, paragraph 1.4.

³⁶⁰⁵ Interview transcript, OFT Document Reference 12745, page 12.

³⁶⁰⁶ Interview transcript, OFT Document Reference 12745, page 12.

³⁶⁰⁷ Response from Interserve, OFT Document Reference 10429, page 2.

³⁶⁰⁸ Response from Interserve, OFT Document Reference 10432, page 2.

³⁶⁰⁹ Oral representations of Interserve, 23 July 2008, page 3.

IV.1046. Both companies submitted a tender. Interserve was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Mowlem completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.

IV.1047. Mowlem's Tender Summary and Details sheet for this tender records '*Tilbury Douglas (C)*', under the heading '*Competition*'. Mowlem confirmed that this shows that it gave a cover price to the company noted.

IV.1048. The OFT further notes that the tender submitted by Interserve was higher than the tender submitted by Mowlem, the pattern consistent with a cover price having been provided.

IV.1049. The OFT therefore concludes that contact took place between Mowlem and Interserve. The OFT also concludes that Mowlem supplied a figure to Interserve for a cover bid.

IV.1050. The OFT is satisfied that the facts set out in paragraphs IV.1037 to IV.1049 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁶¹⁰ In particular:

- (a) the provision of a figure for a cover bid from Mowlem to Interserve was not unilateral³⁶¹¹, and contravenes the principle against direct or indirect contact between competitors;³⁶¹²
- (b) Interserve can be presumed to have taken account of the information received from Mowlem (i.e. the cover price) when determining its own conduct in the tendering process;³⁶¹³ and
- (c) Mowlem can be presumed to have taken account of the information it received from Interserve (i.e. that Interserve did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁶¹⁴

IV.1051. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mowlem and Interserve in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the proposed police station, Spennymoor, tender deadline 16 October 2000.

Immunity and leniency assessment

IV.1052. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

³⁶¹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁶¹¹ See paragraph IV.73 of the General comments on cover pricing section.

³⁶¹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁶¹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁶¹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.1053. Carillion informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mowlem will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 28: Not included in the Decision

Infringement 29: Refurbishment of a House, 143 Sneinton Dale, Sneinton, Nottingham – 8 November 2000
Client: Allan Joyce Architects
Parties: Greenwood and E Taylor (trading as Carmalor)

IV.1054. On 18 October 2000, Allan Joyce Architects sought tenders for the refurbishment of a house, 143 Sneinton Dale, Sneinton, Nottingham. The return date for the tender was 8 November 2000 and four companies were invited to tender: E Taylor (trading as Carmalor)³⁶¹⁵, Craig Wells, Greenwood and NCBW.³⁶¹⁶

IV.1055. Allan Joyce Architects received the following tender returns:³⁶¹⁷

Company	Date Tender Received	Amount of tender	Awarded contract
Carmalor [E Taylor]	8 November 2000	£23,789	Yes
Craig Wells	8 November 2000	£28,612	
Greenwood	8 November 2000	£24,866	
NCBW	Approx 13 November 2000	£20,582	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Greenwood – Tender/Enquiry List, Client Letter, Post-it note and Form of Tender

IV.1056. During the OFT's visit to Greenwood's premises under section 27 on 19 November 2004, a Tender/Enquiry List was obtained and the following entry relates to this tender:³⁶¹⁸

³⁶¹⁵ In its description and analysis of this Infringement, for consistency with the available documentary and witness evidence, the OFT has referred to 'Carmalor' but notes that this is a trading name for E Taylor, which is accordingly the responsible legal entity.

³⁶¹⁶ Information from client, OFT Document Reference 7031.

³⁶¹⁷ Information from client, OFT Document Reference 7031.

³⁶¹⁸ Tender/Enquiry List, OFT Document Reference 0034, page 40.

EST No	EST OR	CLIENT	CLT CAT	PROJECT REF
4090		ALLAN JOYCE		UMA, 143 SNEINTON DALE

DELIVERY			REVIEW			
DATE	TIME	AREA	SIGN	DATE	ESTIMATE VALUE	RST
05/11/00	NOON	NOTTM.			24866.00	

IV.1057. During the OFT's search of Greenwood's premises under section 28 on 15 June 2005, a number of tender documents with a post-it note attached were found. The post-it note attached to the tender documents for this tender contained the following handwritten note:³⁶¹⁹

*'143 SNEINTON DALE
COVER FROM
CARMALOUR
WAYNE
[...] [C]
24866.00'*

IV.1058. An invitation to tender for this contract was also found at Greenwood.³⁶²⁰ The following amount was handwritten on the front page of the invitation to tender:

*'£24866.00
_____'*

IV.1059. A completed Form of Tender for this contract was also found at Greenwood. The Form of Tender shows that Greenwood tendered £24866.00 for this contract.³⁶²¹

Witness Evidence from Greenwood

IV.1060. During an interview conducted on 12 October 2006, Chris Stendall ('CS'), an ex-estimator for Greenwood, commented in general terms on Greenwood's participation in bid rigging activities. He asked the OFT *'Why don't you ask me if we've taken a cover or given a cover ... of course I have done that and I believe that probably every other contractor in the country has probably done that on certain occasions'*.³⁶²² CS explained, *'... the only reason for doing that is to make sure you're tender ... a figure goes into the client and that you're kept in the loop for next time'*.³⁶²³

IV.1061. CS confirmed that the exchange of cover prices was always carried out by telephone.³⁶²⁴ At Greenwood the exchange of cover prices usually occurred *'towards the end, I suppose when I, you know they realise you couldn't do*

³⁶¹⁹ Handwritten post-it note, OFT Document Reference 2519.

³⁶²⁰ Invitation to tender, OFT Document Reference 2518.

³⁶²¹ Form of Tender, OFT Document Reference 2520.

³⁶²² Interview transcript, OFT Document Reference 6362, page 18.

³⁶²³ Interview transcript, OFT Document Reference 6362, Page 18.

³⁶²⁴ Interview transcript, OFT Document Reference 6362, pages 19 and 20.

something or they wanted help'.³⁶²⁵ CS stated that if he received a cover price he would record it '*... in a notebook and then, it would go onto the tender sheet*'.³⁶²⁶ During interview CS confirmed that when referring to a 'notebook' he actually was referring to a post-it note.³⁶²⁷

IV.1062. CS was interviewed for a second time on 28 February 2007 and was shown the tender documents and post-it note found during the OFT's search of Greenwood's premises in relation to this tender. CS confirmed that this tender was dealt with by Andrew Boam, an ex-estimator at Greenwood. On being shown by the OFT the handwritten notes on the post-it note CS said that the notes meant '*That somebody has rung Carmalor and that there is their number and that's the figure they have given us I would have thought*'.³⁶²⁸ CS confirmed that the cover price provided by Carmalor was then used as Greenwood's tender figure as shown on the Form of Tender.³⁶²⁹ During the interview conducted on 12 October 2006, CS confirmed that Andrew Boam was involved in the process of cover pricing at Greenwood.³⁶³⁰

Evidence from other companies – Greenwood

IV.1063. The OFT wrote to Greenwood on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greenwood had participated in bid rigging on this tender. A response was received from Begbies Traynor informing the OFT that '*... we have now ceased to act as administrators pursuant to the provisions of paragraph 84 of schedule B1 of the Insolvency Act 1986 which facilitates the ending of an administration order by dissolution of the company. ... As we have ceased to act as administrators of the company we are not in a position to enter into any agreement on its behalf*'.³⁶³¹ The OFT has not been able to establish any successor party to Greenwood with undertaking identity in respect of this tender. The OFT will not therefore be pursuing either Greenwood or any successor company to Greenwood in respect of this tender.

Evidence from other companies – E Taylor

IV.1064. The OFT wrote to E Taylor on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that E Taylor had participated in bid rigging on this tender. In response to this letter, E Taylor said that after consideration it felt unable to accept the OFT's Fast Track Offer.³⁶³²

IV.1065. During the OFT section 27 visit at E Taylor's premises on 19 January 2006, Mark Brown, the Managing Director of E Taylor, confirmed that Wayne Creed was employed as an estimator.³⁶³³

³⁶²⁵ Interview transcript, OFT Document Reference 6362, page 21.

³⁶²⁶ Interview transcript, OFT Document Reference 6362, page 21.

³⁶²⁷ Interview transcript, OFT Document Reference 6362, page 22.

³⁶²⁸ Interview transcript, OFT Document Reference 13423, page 7.

³⁶²⁹ Interview transcript, OFT Document Reference 13423, page 7.

³⁶³⁰ Interview transcript, OFT Document Reference 6362, page 27.

³⁶³¹ Response from Begbies Traynor, OFT Document Reference 10358.

³⁶³² Response from E Taylor, OFT Document Reference 11006.

³⁶³³ Filenote, OFT Document Reference 5826.

IV.1066. In its response to the Statement, E Taylor stated *'Having reviewed the relevant sections of the SO that relate to ourselves, and most particularly the 3rd party evidence referred to, we have a degree of empathy with the OFT as to why they have reached the conclusion that Carmalor were involved in cover pricing. Unfortunately, as a result of the death of [the former Managing Director]... and the departure of [former Estimating Director] Steve Fowkes... our ability to defend our position is significantly prejudiced by the fact that we have no access to contemporaneous documentary evidence. Nor can we offer any meaningful personal testimony from those allegedly involved in the practice, that would act as a legally adequate defence. Thus, we find ourselves in "no man's land" neither able to admit, nor adequately defend the allegations levelled at us'*.³⁶³⁴

IV.1067. However, E Taylor submitted a statement from Wayne Creed ('WC'), the only person named in the Statement still employed by E Taylor, with its response to the Statement. WC stated that *'I recall being asked to provide a price on this job...I have never heard of Andrew Boam... I do not recall ever having had a conversation with Mr. Boam either in person or by telephone. ... I have no recollection whatsoever of making any call to Greenwoods such that this post-it note might be a record of that call'*.³⁶³⁵

IV.1068. The OFT appreciates that a company would not often keep a record of giving a cover price, and in that instance recognises the need to assess the quality of evidence implicating the accused party. The OFT also recognises that where a cover price was given by a sole employee, other employees or directors of that company may not be aware whether or not such conduct took place.

IV.1069. The OFT notes the direct contradiction between this witness evidence and the contemporaneous evidence and overall explanation provided by CS. On balance, the OFT considers the latter to be more compelling. CS's evidence is consistent with the contents of the post-it note attached to the contemporaneous tender documents. Further, in relation to Infringements 118 and 133 in this Decision, the contents of similar post-it notes obtained from Greenwood indicating that cover prices have been provided/accepted have been confirmed to be correct by evidence from other Parties. The OFT also notes that although WC states that he does not recall making a call to Greenwoods, he does not actually state that he did not do so, or that it would have been in any way contrary to the prevailing practice within E Taylor at the time to have done so. In light of those factors, the OFT considers that the contemporaneous evidence and explanation of CS should be preferred to that of WC.

The OFT's analysis of the evidence and finding

IV.1070. From the evidence presented above, the OFT draws the following conclusions.

IV.1071. Greenwood and Carmalor each accepted an invitation to tender for this contract.

IV.1072. Greenwood was unable to submit a tender by the return date and/or did not want to win this tender. It appears that Carmalor completed the estimating

³⁶³⁴ Written representations of E Taylor, 27 June 2008, page 4.

³⁶³⁵ Written representations of E Taylor, 27 June 2008, witness statement of Wayne Creed, paragraph 5.

process for this contract and that it submitted a tender with the hope of winning the work. This is shown by the fact that it submitted the lowest price and that it won the tender.

IV.1073. A post-it note found at Greenwood records '*143 SNEINTON DALE COVER FROM CARMALOUR WAYNE* [.....] [C] 24866.00'. CS confirmed that the note records that Greenwood received a cover figure of £24,866 from Carmalor. The telephone number '[.....] [C]' is a number of E Taylor.³⁶³⁶ In addition E Taylor confirmed that Wayne Creed was employed as an estimator.

IV.1074. The OFT notes that the figure provided by Carmalor to Greenwood as its cover price, '*24866.00*', and recorded by Greenwood on the post-it note, was identical to the tender that Greenwood submitted for the work.

IV.1075. The OFT considers in the light of the contemporaneous evidence from Greenwood, and the admission and explanation by CS of that contemporaneous evidence, that Carmalor gave a cover price to Greenwood for this tender.

IV.1076. The OFT further notes that the tender submitted by Greenwood was higher than the tender submitted by Carmalor, a pattern consistent with a cover price having been provided.

IV.1077. The OFT therefore concludes that contact took place between Carmalor and Greenwood. The OFT also concludes that Carmalor supplied a figure to Greenwood for a cover bid.

IV.1078. The OFT is satisfied that the facts set out in paragraphs IV.1056 to IV.1077 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁶³⁷ In particular:

- (a) the provision of a figure for a cover bid from Carmalor to Greenwood was not unilateral³⁶³⁸, and contravenes the principle against direct or indirect contact between competitors;³⁶³⁹
- (b) Greenwood can be presumed to have taken account of the information received from Carmalor (i.e. the cover price) when determining its own conduct in the tendering process;³⁶⁴⁰
- (c) Carmalor can be presumed to have taken account of the information it received from Greenwood (i.e. that Greenwood did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁶⁴¹

IV.1079. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Carmalor and Greenwood, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment of a

³⁶³⁶ <http://www.trade-review.co.uk/Southwell-town.htm>, OFT Document Reference 14362.

³⁶³⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁶³⁸ See paragraph IV.73 of the General comments on cover pricing section.

³⁶³⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁶⁴⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁶⁴¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

house, 143 Sneinton Dale, Sneinton, Nottingham, tender deadline 8 November 2000.

Infringement 30: Environmental Improvements, Pearmain Drive, Nottingham – 24 November 2000
Client: Nottingham City Council
Parties: Bodill, Mansell, Thomas Vale and Thomas Long

IV.1080. On 26 October 2000, Nottingham City Council sought tenders for environmental improvements, Pearmain Drive, Nottingham.³⁶⁴² The following six companies were invited to tender: Allenbuild, Bodill, Mansell, Nottingham City Building Works, Thomas Long and Thomas Vale. The date and time of tender return was 24 November 2000 at 12:00 noon.³⁶⁴³

IV.1081. Nottingham City Council received the following tender returns:³⁶⁴⁴

Company	Date tender received	Amount of tender	Awarded contract
Bodill	Prior to expiry date and time	£457,730	
Thomas Long	Prior to expiry date and time	£482,900	
Mansell	Prior to expiry date and time	£496,411	
Nottingham City Building Works	Prior to expiry date and time	£412,419	YES
Thomas Vale	Prior to expiry date and time	£489,950	
Allenbuild	Prior to expiry date and time	£439,934	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1082. In Bodill’s tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed ‘Tenderers’, the following entries have been made, most of which are handwritten:³⁶⁴⁵

	1.	BODILL.	
	2.	T. LONG. © FROM	①
<u>£482900</u>	John Etc	han D. MANNING. US	
	3.	THOMAS VALE. © FROM	②
<u>£489950</u>		C. TRICKETT [...] [C] US	
	4.	ALLEN BUILD	
	5.	CITY BUILDING WORKS	
<u>£496411</u>	6.	MANSELL. ©	③

³⁶⁴² Information from client, OFT Document Reference 9111.

³⁶⁴³ Information from client, OFT Document Reference 9111.

³⁶⁴⁴ Information from client, OFT Document Reference 9111.

³⁶⁴⁵ Tender sheet, OFT Document Reference 0517.

Evidence from leniency applicant Bodill

IV.1083. As part of its leniency application, Bodill provided a general explanation of its participation in the process of cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1084. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.³⁶⁴⁶ In respect of this tender, Bodill confirmed that it gave cover prices to Thomas Long, Thomas Vale and Mansell.³⁶⁴⁷

IV.1085. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1086. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from leniency applicant Thomas Vale – tender status spreadsheet

IV.1087. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:³⁶⁴⁸

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £
T4637	B	City of Nottingham	Pearmain Drive Estate Improvements, Nottingham	

EST	CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
CKT	C	24/11/2000 Noon	489,950	-	Bodill, Thos Long,	

IV.1088. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Chris Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*³⁶⁴⁹ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Bodill plus names and a telephone number and an entry for Thomas Long with the name Dirk Manning.³⁶⁵⁰

Evidence from leniency applicant Thomas Vale

IV.1089. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of

³⁶⁴⁶ Tender Analysis – Tender Sheets, OFT Document Reference 0465.

³⁶⁴⁷ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

³⁶⁴⁸ Tender Status spreadsheet, OFT Document Reference 4522, page 10.

³⁶⁴⁹ Interview transcript, OFT Document Reference 11418, page 21.

³⁶⁵⁰ Contact list, OFT Document Reference 11086, pages 2 and 14.

the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.1090. At Annex 13³⁶⁵¹ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the East Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page nine of the schedule under Annex 13 and within the section for 2000 tenders is the following entry:³⁶⁵²

Tab.	Tender No.	Date	Client	Comments
35	T4637	24 November	City of Nottingham	Pearmain Drive Estate Improvements, Nottingham

Cover Given/Taken	Evidence
Taken (Bodill)	Yes (Tender Spreadsheet)

IV.1091. In its response to the Statement, Thomas Vale did not submit any representations specifically in respect of this Infringement, save as to the level of detriment to the final consumer. To the extent that Thomas Vale submitted that this infringement should not be treated as serious because no effects have been shown, this point is addressed in Step 1 of Section VI (Enforcement) below.

Witness evidence from leniency applicant Thomas Vale

IV.1092. During interviews conducted in connection with its leniency application, Thomas Vale’s employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.1093. CKT admitted that the initials ‘CKT’, which appear in the estimator column for this tender, were his own and that the letter ‘B’, which appears in the column marked ‘DIV’, stands for Building Division (also known as Traditional), for which CKT was the estimating manager.³⁶⁵³ In interview CKT explained that he had dealt with the tender and in respect of the entry in the Tender Status spreadsheet, stated ‘*The job, CKT myself, who dealt with it. C was the cover, a figure I’ve inputted there of £489,950*’ and ‘*it indicates that Bodill Construction gave me a cover on that job*’.³⁶⁵⁴ When shown the Bodill tender sheet, described above, CKT confirmed that the telephone number [...] [C] was the main switchboard number for Thomas Vale’s Stourport office.³⁶⁵⁵

³⁶⁵¹ Leniency application, OFT Document Reference 4532.

³⁶⁵² Leniency application, OFT Document Reference 4532, page 9.

³⁶⁵³ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

³⁶⁵⁴ Interview transcript, OFT Document Reference 11419, page 9.

³⁶⁵⁵ Interview transcript, OFT Document Reference 11419, page 9.

Evidence from leniency applicant Mansell

IV.1094. Following the issue of the Statement, Mansell did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Mansell

IV.1095. During interviews conducted in connection with its leniency application, an employee of Mansell and an ex-employee from the Nottingham office provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.1096. During an interview with the OFT on 18 April 2007, Kenneth Lockwood ('KL'), who was a Chief Estimator in the Nottingham office, was shown the Bodill tender sheet described above. In respect of this document KL stated '*I would suspect that that's who we'd gone to, Bodill, again a company I knew we would take cover, give a cover from*'.³⁶⁵⁶

Evidence from other companies – Thomas Long

IV.1097. The OFT wrote to Thomas Long on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Thomas Long had participated in bid rigging on this tender. In response to this letter Thomas Long admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved*'.³⁶⁵⁷

IV.1098. In its response to the Statement, Thomas Long '*...confirmed that it took a cover price in relation to this tender*'.³⁶⁵⁸ in respect of this Infringement.

IV.1099. In its response to the Statement, Thomas Long also stated that '*Thomas Long believes that the cover price would have been taken by the estimator Mark Phillips rather than Richard Manning who was a Director for Thomas Long at the time*'.³⁶⁵⁹ However, Thomas Long did not provide any supporting evidence of this, and indeed appeared to contradict itself elsewhere in its written representations when it stated that '*No Director of Thomas Long was involved in the Alleged Infringements other than Richard Manning who is a former Director in relation to AI. 30*'.³⁶⁶⁰ The OFT considers that the contemporaneous document from Bodill provides sufficiently strong and compelling evidence that Richard Manning at Thomas Long was involved in this Infringement, as it is a record of a request for a cover price from Thomas Long, and Bodill would have had no reason to insert Richard Manning's name unless he had either made the request or been designated as a recipient for a follow up return call. In either case he would have known about Thomas Long taking a cover price on this tender.

³⁶⁵⁶ Interview transcript, OFT Document Reference 11511, page 24.

³⁶⁵⁷ Response from Thomas Long, OFT Document Reference 10885, page 2.

³⁶⁵⁸ Written representations of Thomas Long, 26 June 2008, paragraph 3.2.

³⁶⁵⁹ Written representations of Thomas Long, 26 June 2008, paragraph 3.5.

³⁶⁶⁰ Written representations of Thomas Long, 26 June 2008, paragraph 5.

The OFT's analysis of the evidence and finding

IV.1100. From the evidence presented above, the OFT draws the following conclusions.

IV.1101. Bodill, Mansell, Thomas Vale and Thomas Long each accepted an invitation to tender for this contract.

IV.1102. All four companies submitted a tender. It appears that Bodill completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.

IV.1103. Mansell, Thomas Vale and Thomas Long were unable to submit a tender by the return date and/or did not want to win this contract.

IV.1104. In regard to Thomas Vale, Bodill's tender sheet records '*THOMAS VALE. C. TRICKETT* [.....] [C] © *US FROM*' and a figure '£489950'. Bodill confirmed that this shows that it gave a cover price to the company noted. The tender sheet also has the number '②' recorded against Thomas Vale to show that Thomas Vale was the second party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Thomas Vale's bid was indeed the second lowest of the bids above Bodill's figure.

IV.1105. In addition, the telephone number set out in Bodill's tender sheet, [.....] [C], is the main switchboard number for Thomas Vale's Stourport office and CKT is confirmed by Thomas Vale as being the person who dealt with this tender. Furthermore, the figure that Bodill recorded on the tender sheet against Thomas Vale was identical to the figure that Thomas Vale submitted for the tender.

IV.1106. In addition, Thomas Vale's Tender Status spreadsheet shows this tender as a Category C, and Thomas Vale has admitted that it received a cover price from Bodill on this tender. Of the two competitors listed on Thomas Vale's tender sheet, Bodill is highlighted in bold. This indicates that a conscious decision was made to differentiate Bodill from the other competitor.

IV.1107. In regard to Mansell, Bodill's tender sheet records '*MANSELL.* © ' and a figure '£496411'. Bodill confirmed that this shows that it gave a cover price to the company noted. The tender sheet also has the number '②' recorded against Mansell to show that Mansell was the third party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Mansell's bid was indeed the third lowest of the bids above Bodill's figure.

IV.1108. In addition, Mansell has admitted on the basis of this document that it is likely that it received a cover price from Bodill. Furthermore, the figure that Bodill recorded on the tender sheet against Mansell was identical to the figure that Mansell submitted for the tender.

IV.1109. In regard to Thomas Long, Bodill's tender sheet records '*T. LONG. D. MANNING. © FROM US*' and a figure '£482900'. Bodill confirmed that this shows that it gave a cover price to the company noted. The tender sheet also has the number '*①*' recorded against Thomas Long to show that Thomas Long was the first party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Thomas Long's bid was indeed the lowest of the bids above Bodill's figure.

IV.1110. In addition, the contacts list provided by Thomas Vale, which CKT confirmed was used to contact competitors when seeking a cover price, has an entry for Thomas Long with the name Dirk Manning. Thomas Long has confirmed that Richard Manning was a director of Thomas Long at the time of the Infringement. Furthermore, the figure that Bodill recorded on the tender sheet against Thomas Long was identical to the figure that Thomas Long submitted for the tender.

IV.1111. In addition, Thomas Long has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.1112. The OFT further notes that the tenders submitted by Mansell, Thomas Vale and Thomas Long were all higher than the tender submitted by Bodill, the pattern consistent with cover prices having been provided.

IV.1113. The OFT therefore concludes that contact took place between Bodill and Mansell, between Bodill and Thomas Vale, and between Bodill and Thomas Long. The OFT also concludes that Bodill supplied figures to each of Mansell, Thomas Vale and Thomas Long for cover bids.

IV.1114. The OFT is satisfied that the facts set out in paragraphs IV.1082 to IV.1113 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.³⁶⁶¹ In particular:

- (a) the provision of figures for cover bids from Bodill to each of Mansell, Thomas Vale and Thomas Long was not unilateral³⁶⁶², and contravenes the principle against direct or indirect contact between competitors;³⁶⁶³
- (b) Mansell, Thomas Vale and Thomas Long can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own conduct in the tendering process,³⁶⁶⁴ and
- (c) Bodill can be presumed to have taken account of the information it received from Mansell, Thomas Vale and Thomas Long (i.e. that none of them intended to submit competitive bids) when determining its conduct in the tendering process.³⁶⁶⁵

IV.1115. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place

³⁶⁶¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁶⁶² See paragraph IV.73 of the General comments on cover pricing section.

³⁶⁶³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁶⁶⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁶⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Bodill and Mansell, between Bodill and Thomas Vale, and between Bodill and Thomas Long in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for environmental improvements, Pearmain Drive, Nottingham tender deadline 24 November 2000.

Immunity and leniency assessment

IV.1116. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1117. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1118. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information provided by leniency party Bodill. Mansell will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Mansell in respect of this Infringement.

IV.1119. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information provided by leniency party Bodill. Thomas Vale will not therefore receive 100 per cent immunity in respect of this tender. However, Thomas Vale will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 31: New Church Blacker Road – 27 November 2000
Client: Staincross Methodist Church
Parties: Strata (formerly known as Weaver) and Holroyd

IV.1120. On 29 September 2000, Staincross Methodist Church sought tenders for a new build, Methodist Church Hall and Rooms.³⁶⁶⁶ The following seven companies were invited to tender: Saul Construction, George Booth & Sons, Torpoint, Wildgoose, Weaver, Roberts and Holroyd.³⁶⁶⁷ The deadline for receipt of tenders was 12:00 noon on 27 November 2000.³⁶⁶⁸

IV.1121. Staincross Methodist Church received the following tender returns:³⁶⁶⁹

³⁶⁶⁶ Information from client, OFT Document Reference 9584. The client is unsure but states the tenders were sent out 'on or about this date'.

³⁶⁶⁷ Information from client, OFT Document Reference 9584.

³⁶⁶⁸ Information from client, OFT Document Reference 9584.

³⁶⁶⁹ Information from client, OFT Document Reference 9584.

Company	Time & Date tender received	Amount of tender	Awarded contract
Saul Construction	12:00 noon on 27 November 2000	£873,392.85	
George Booth & Sons Ltd	12:00 noon on 27 November 2000	£685,315.00	Yes
Torpoint Ltd	12:00 noon on 27 November 2000	£750,000.00	
Wildgoose	12:00 noon on 27 November 2000	£686,944.00	
Weaver [Strata]	12:00 noon on 27 November 2000	£715,479.00	
Roberts Construction	12:00 noon on 27 November 2000	£728,768.00	
Holroyd	12:00 noon on 27 November 2000	£679,140.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Form of Tender

IV.1122. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents, mostly Form of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³⁶⁷⁰

'Holroyd. Andrew Waldren'

IV.1123. The Form of Tender also stated that Strata's figure was £715,479.³⁶⁷¹

Evidence from leniency applicant - Strata

IV.1124. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:³⁶⁷²

Date	Project	Strata ref no
27/11/2000	New Church, Mapplewell for Staincross Methodist Church	T154/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXM/107	Holroyd	Wetherby	

IV.1125. Also as part of Strata's leniency application, it provided the OFT with a schedule which the estimator would have used when making contact with other contractors regarding the giving and receiving of cover prices.³⁶⁷³ The schedule contains the entry '*Holroyd, Wetherby, [.....] [C], Andrew Waldren*'.³⁶⁷⁴ This confirms that Andrew Waldren of Holroyd was known to the estimators at Strata as someone to contact when seeking a cover price.

³⁶⁷⁰ Form of Tender, OFT Document Reference 3396.

³⁶⁷¹ Form of Tender, OFT Document Reference 3396.

³⁶⁷² Leniency application, OFT Document Reference 4054, page 4.

³⁶⁷³ Contact list, OFT Document Reference 4064.

³⁶⁷⁴ Contact list, OFT Document Reference 4064, page 5.

IV.1126. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.1127. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Holroyd

IV.1128. The OFT wrote to Holroyd on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Holroyd had participated in bid rigging on this tender. Holroyd did not respond to this letter and on 8 May 2007 the OFT informed the Managing Director of Holroyd that a failure to respond to the Fast Track letter denoted a rejection. The Managing Director of Holroyd confirmed that Holroyd had rejected the OFT's Fast Track Offer.³⁶⁷⁵

IV.1129. The OFT subsequently wrote to Holroyd's ultimate parent company at the time of this Infringement, Holderness, on 6 November 2007, asking it to comment on Holroyd's response to the OFT's Fast Track Offer, given that the OFT intended to hold Holderness jointly and severally liable for any infringements committed by Holroyd in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Holderness stated '*the company is unable to comment*'.³⁶⁷⁶

IV.1130. Following the issue of the Statement, Holroyd did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.1131. From the evidence presented above, the OFT draws the following conclusions.

IV.1132. Strata and Holroyd each accepted an invitation to tender for this contract.

IV.1133. Both companies submitted a tender. Strata was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1134. Strata's Form of Tender records '*Holroyd, Andrew Waldren*' handwritten in the top right hand corner. Strata confirmed that this indicates that it received a cover price from the company and more specifically the individual, if noted as in this case. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata confirmed contained documents and records of covers taken.

³⁶⁷⁵ File note of telephone conversation, OFT Document Reference 10412.

³⁶⁷⁶ Response from Holderness, OFT Document Reference 14227.

IV.1135. In addition the OFT notes that the tender submitted by Strata was higher than the tender submitted by Holroyd, the pattern consistent with a cover price having been provided.

IV.1136. The OFT therefore concludes that contact took place between Strata and Holroyd. The OFT also concludes that Holroyd and more specifically Andrew Waldren of Holroyd supplied a figure to Strata for a cover bid.

IV.1137. The OFT is satisfied that the facts set out in paragraphs IV.1122 to IV.1136 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁶⁷⁷ In particular:

- (a) the provision of a figure for a cover bid from Holroyd to Strata was not unilateral³⁶⁷⁸, and contravenes the principle against direct or indirect contact between competitors;³⁶⁷⁹
- (b) Strata can be presumed to have taken account of the information received from Holroyd (i.e the cover price) when determining its own conduct in the tendering process;³⁶⁸⁰ and
- (c) Holroyd can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁶⁸¹

IV.1138. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Holroyd and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the new church, Blacker Road, tender deadline 27 November 2000.

Immunity and leniency assessment

IV.1139. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1140. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this infringement.

³⁶⁷⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁶⁷⁸ See paragraph IV.73 of the General comments on cover pricing section.

³⁶⁷⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁶⁸⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁶⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 32: Alterations to Reception at King Edward Court, Nottingham – 27 November 2000
Client: Crown Prosecution Service
Parties: Bodill and Thorndyke

IV.1141. On 11 November 2000, the Crown Prosecution Service sought tenders for alterations to reception at King Edward Court, Nottingham. The return date for the tender was 27 November 2000 and four companies were invited to tender: Thorndyke, Bodill, Hill and Abbey Construction (Nottingham) Limited.³⁶⁸²

IV.1142. The Crown Prosecution Service received the following tender returns on 27 November 2000:³⁶⁸³

Company	Time and date tender received	Amount of tender	Awarded the tender
Thorndyke	11:21 am 27 November 2000	£14,970	
Bodill	11:35 am 27 November 2000	£16,059	Yes
Hill	No return		
Abbey Construction (Nottingham) Limited	Declined on 15 November 2000		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1143. In Bodill’s tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed ‘Tenderers’, the following entries have been made, all of which are handwritten:³⁶⁸⁴

- 1. BODILL
- * 2. THORNDYKE Mr. I THORNDYKE
Tel [...] [C]
- 3. HILLS’

IV.1144. The tender sheet states that Bodill’s submitted price was £16,059.00 and has a © in the top right hand corner.³⁶⁸⁵

IV.1145. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2000 which contains an entry for this tender on 27 November which reads ‘12.00 CPS RECEP. (C)’.³⁶⁸⁶ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, ‘It means we’re looking for some help, a cover, a cover price’.³⁶⁸⁷

³⁶⁸² Information from client, OFT Document Reference 14358.

³⁶⁸³ Information from client, OFT Document Reference 14358.

³⁶⁸⁴ Tender sheet, OFT Document Reference 0518.

³⁶⁸⁵ Tender sheet, OFT Document Reference 0518.

³⁶⁸⁶ 2000 Diary, OFT Document Reference 0105, page 22, obtained during visit to Bodill's premises under section 27 on 19 November 2004.

³⁶⁸⁷ Interview transcript, OFT Document Reference 6337, page 4.

Evidence from leniency applicant Bodill

IV.1146. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1147. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000 and explained that when a ‘*’ is written against a contractor's name it means that it gave Bodill a cover price.³⁶⁸⁸ In respect of this tender, Bodill confirmed that it received a cover price from Thorndyke³⁶⁸⁹, that it submitted a token tender and that it won this tender.³⁶⁹⁰

IV.1148. Bodill separately confirmed in respect of this tender, via its legal representatives, that it did carry out the job 2566, comprising the reception alterations at King Edward Court, Nottingham, following the submission of the cover price on 27 November 2000. The work was completed by April 2002.³⁶⁹¹

Witness evidence from leniency applicant Bodill

IV.1149. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Thorndyke

IV.1150. The OFT wrote to Pricewaterhouse Coopers LLP, the appointed liquidator for Thorndyke, on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Thorndyke had participated in bid rigging on this tender. The OFT received no response to that letter, and in a follow-up call Pricewaterhouse Coopers LLP confirmed that they understood that the OFT would treat the absence of a response as a rejection of its offer.³⁶⁹²

IV.1151. Following the issue of the Statement, Thorndyke did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.1152. From the evidence presented above, the OFT draws the following conclusions.

IV.1153. Bodill and Thorndyke each accepted an invitation to tender for this contract.

IV.1154. Bodill was unable to submit a tender by the return date and/or did not want to win this tender. It appears that Thorndyke completed the estimating process for this contract and that it submitted a tender with the hope of winning the work. This is shown by the fact that it submitted the lowest price.

³⁶⁸⁸ Explanatory Note of Tender Sheet, OFT Document Reference 0861, page 1.

³⁶⁸⁹ Tender Analysis - Tender Sheets, OFT Document Reference 0465, page 2.

³⁶⁹⁰ Tender Analysis, OFT Document Reference 0849, page 1.

³⁶⁹¹ File note, OFT Document Reference 14367a.

³⁶⁹² File note of telephone conversation, OFT Document Reference 10889.

IV.1155. The OFT notes that although Bodill on this occasion was actually awarded the work, it has admitted that it engaged in bid rigging activity on this tender by submitting a cover price.

IV.1156. In regard to Thorndyke, Bodill's tender sheet records **THORNDYKE Mr. / THORNDYKE Tel [.....] [C]*'. It also has a '©' in the top right hand corner. Bodill has confirmed that this shows that it received a cover price from Thorndyke. The OFT considers that this also shows more specifically that Bodill was expecting a telephone call from Thorndyke before the date for submitting its tender, in order to obtain its cover price. Bodill recorded on the tender sheet the figure £16,059.00 as the tender figure and this was the exact figure that Bodill submitted.

IV.1157. Bodill's tender sheet records the name of a Thorndyke estimator, *'Mr. / THORNDYKE'*, and the telephone number *'[.....] [C]*'. Company information for Thorndyke shows that the telephone number *[...] [C]* is Thorndyke's.³⁶⁹³

IV.1158. In addition, JR's diary entry for the tender return date contains a 'C' in brackets against the name of this tender. JR explained in interview that this type of entry meant that Bodill was looking for a cover price.

IV.1159. Although Thorndyke has not admitted engaging in this bid rigging activity, the OFT considers that the contemporaneous evidence from Bodill together with Bodill's admission and explanation of that evidence, demonstrates that Thorndyke did in fact engage in bid rigging activity on this tender.

IV.1160. The OFT notes in addition that Thorndyke's tender figure was the only figure below Bodill's tender figure, and the OFT is therefore satisfied that Bodill could only have received a cover figure from Thorndyke. The OFT also notes that the tender submitted by Bodill was higher than the tender submitted by Thorndyke, a pattern consistent with a cover price having been provided. The client only received two bids for this work, both of which were the subject of bid rigging.

IV.1161. The OFT therefore concludes that contact took place between Thorndyke and Bodill. The OFT also concludes that Thorndyke supplied a figure to Bodill for a cover bid.

IV.1162. The OFT is satisfied that the facts set out in paragraphs IV.1143 to IV.1161 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁶⁹⁴ In particular:

- (a) the provision of a figure for a cover bid from Thorndyke to Bodill was not unilateral³⁶⁹⁵, and contravenes the principle against direct or indirect contact between competitors;³⁶⁹⁶
- (b) Bodill can be presumed to have taken account of the information received from Thorndyke (i.e. the cover price) when determining its own conduct in the tendering process;³⁶⁹⁷ and

³⁶⁹³ FAME report, OFT Document Reference 12552, page 15.

³⁶⁹⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁶⁹⁵ See paragraph IV.73 of the General comments on cover pricing section.

³⁶⁹⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (c) Thorndyke can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁶⁹⁸

IV.1163. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and Thorndyke, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations to reception at King Edward Court, Nottingham, tender deadline 27 November 2000.

Immunity and leniency assessment

IV.1164. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1165. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Bodill in respect of this Infringement.

IV.1166. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.³⁶⁹⁹ The OFT first became aware of this tender as a result of the entry in a document obtained during a section 27 visit to Bodill on 19 November 2004³⁷⁰⁰, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made. Nevertheless, as stated in paragraph IV.1165 above, the OFT is not imposing any financial penalty on Bodill in respect of this Infringement.

Alleged Infringement 33: Not included in the Decision

Infringement 34: Civic Accommodation, County Hall, Nottingham – 5 December 2000
Client: Nottinghamshire County Council
Parties: Bodill, Loach, Beaufort, K J Bryan

IV.1167. In 10 November 2000, Nottinghamshire County Council ('Nottinghamshire CC') sought tenders for refurbishment work of civic accommodation at County Hall, Nottingham. The return deadline for the tender was 10:00 on Tuesday 5

³⁶⁹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁶⁹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁶⁹⁹ Written representations of Bodill, 26 June 2008, paragraph 3.5.

³⁷⁰⁰ 2000 Diary, OFT Document Reference 0105, as discussed in paragraph IV.1145 above.

December 2000 and six companies were invited to tender: Bodill, Beaufort, Loach, K J Bryan, William Woodsend and Robert Woodhead.³⁷⁰¹

IV.1168. Nottinghamshire CC received the following tender returns by 10:00 on 5 December 2000:³⁷⁰²

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
Robert Woodhead	5 December 2000	10:00	£271,678	
Loach	5 December 2000	10:00	£291,703	
Bodill	5 December 2000	10:00	£269,347	Yes
William Woodsend	5 December 2000	10:00	£276,600	
Beaufort	5 December 2000	10:00	£303,295	
K J Bryan	5 December 2000	10:00	£312,173	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Bodill – tender sheet

IV.1169. In Bodill's original tender sheet for the refurbishment of civic accommodation, County Hall, Nottingham, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following handwritten entries have been made:³⁷⁰³

- '
- 1. Bodill
 - £291703 2. Loach © from us 1
 - 3. Woodsend
 - £303284 4. Beaufort © from us 2
M Tomsett [...] [C]
 - £312173 5. KJ Bryan © from us 3
Will ring us Tues AM
 - 6. ? DLO'

IV.1170. The tender sheet for this tender states that Bodill's tender was £269,347.³⁷⁰⁴

Contemporaneous documentary evidence from Loach – tender spreadsheets

IV.1171. During the OFT's search of Loach's premises, two printed spreadsheets were found. The first spreadsheet³⁷⁰⁵ was headed 'Small Works Tenders' and contained the following entry:

³⁷⁰¹ Information from client, OFT Document Reference 9458.

³⁷⁰² Information from client, OFT Document Reference 9458.

³⁷⁰³ Leniency application, OFT Document Reference 0520.

³⁷⁰⁴ Leniency application, OFT Document Reference 0520.

³⁷⁰⁵ Small Works Tenders, OFT Document Reference 3725.

2000	Contract	Sum	Margin	%	Won	Note	Winner
05-Dec	Refurbishment of civic accommodation County Hall Notts	291,703				Cover	

Var %	Job No.	Opposition
		Bodill (C)/ Woodsend/ Beaufort

IV.1172. A second, similar but untitled, spreadsheet showed the same entries as those set out above, in the columns headed 'Contract', 'Sum', 'Note' and 'Opposition'.³⁷⁰⁶

Evidence from leniency applicant Bodill

IV.1173. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1174. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.³⁷⁰⁷ In respect of the tender for civic accommodation, County Hall, Nottingham, Bodill confirmed that it gave cover prices to Loach, Beaufort and K J Bryan.³⁷⁰⁸

IV.1175. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1176. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from leniency applicant Loach

IV.1177. As part of its leniency application, Loach's legal representatives provided a general explanation of its participation in cover pricing.³⁷⁰⁹ This evidence is set out in paragraphs IV.453 to IV.469 above and is relied upon by the OFT in relation to this tender.

IV.1178. In its response to the Statement, Loach stated '*Loach took a cover from Bodills on this tender due to a lack of estimating resources and the inability to return the tender for future marketing considerations*'³⁷¹⁰ in respect of this Infringement.

³⁷⁰⁶ Contract summary, OFT Document Reference 2993.

³⁷⁰⁷ Tender Analysis – Tender Sheets, OFT Document Reference 0465.

³⁷⁰⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

³⁷⁰⁹ Leniency application, OFT Document Reference 4017.

³⁷¹⁰ Written representations of Loach, 26 June 2008, page 19.

Witness evidence from leniency applicant Loach

IV.1179. During an interview conducted on 19 April 2007 in connection with its leniency application, Andrew Arbon-Davies ('AA'), Chief Estimator at Loach at the time of this tender, admitted that Loach took a cover price from Bodill for this tender. When shown the Bodill tender sheet he said, *'I am happy that that means that they've given us a cover. Yes'*.³⁷¹¹

Evidence from other companies – Beaufort

IV.1180. During the OFT's visit to Beaufort under section 28 on 29 June 2005, no information was found in relation to this tender. The OFT wrote to Beaufort on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty it might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that Beaufort had participated in bid rigging on this tender. In response to this letter, Beaufort admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party / parties involved'*.³⁷¹²

IV.1181. The OFT subsequently wrote to Beaufort's ultimate parent company at the time of this Infringement, Beaufort Holdings, on 5 November 2007, asking it to comment on Beaufort's response to the OFT's Fast Track Offer, given that the OFT intended to hold Beaufort Holdings jointly and severally liable for any infringements committed by Beaufort in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Beaufort Holdings' legal representatives Elliott Mather LLP said *'The company confirms that it shall not be making any comments on either its subsidiary, Beaufort Construction (S-IN-A) Limited's response to the reduced penalty offer, nor your proposed actions'*.³⁷¹³

IV.1182. In their response to the Statement, Beaufort and Beaufort Holdings confirmed their acceptance of the OFT's Fast Track Offer.³⁷¹⁴

Evidence from other companies – K J Bryan

IV.1183. During the OFT's visit to K J Bryan under section 27 on 19 January 2006, no information was produced in relation to this tender.

IV.1184. The OFT wrote to K J Bryan on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty it might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that K J Bryan had participated in bid rigging on this tender. In response to this letter, K J Bryan's legal representatives stated *'In view of the lack of physical records to refresh memories and the significant period of time that has passed since the events in question our client's officers and members of staff have difficulty in trying to recollect the circumstances concerning the contracts in question...our client does not feel it appropriate to accept the offer...'*.³⁷¹⁵ The OFT notes that

³⁷¹¹ Interview transcript, OFT Document Reference 11321, page 7.

³⁷¹² Response from Beaufort, OFT Document Reference 10245, page 2.

³⁷¹³ Response from Beaufort Holdings, OFT Document Reference 13915.

³⁷¹⁴ Written representations of Beaufort and Beaufort Holdings, 27 June 2008, page 1.

³⁷¹⁵ Response from K J Bryan, OFT Document Reference 10462, page 2.

K J Bryan's officers and staff were able to recollect, and respond in respect of, two of the five contracts covered by the OFT's Fast Track Offer.

IV.1185. In its response to the Statement, K J Bryan neither expressly admitted, nor contested its involvement in this Infringement, stating *'There was only a very small and limited number of infringements'*³⁷¹⁶ and *'KJB accepts that the Cover Scheme is illegal... KJB in mitigation submits that it when historically using the Scheme was not aware that it was illegal... and on finding out the scheme was illegal took immediate action to ensure it was not and has not been involved in use of the same again'*.³⁷¹⁷ The response further stated that *'Bodill's had already given cover figures to both Loach and Beaufort Construction before on Bodill's own evidence a cover was given to K J Bryan'*.³⁷¹⁸

The OFT's analysis of the evidence and finding

IV.1186. From the evidence presented above, the OFT draws the following conclusions.

IV.1187. Bodill, Loach, Beaufort and K J Bryan each accepted an invitation to tender for the tender for the refurbishment work of civic accommodation at County Hall, Nottingham.

IV.1188. Bodill completed the estimating process for the tender for this contract. Bodill wanted to win the tender for this contract and submitted a bid with hope of winning the work.

IV.1189. Loach, Beaufort and K J Bryan were unable to submit a tender by the return date and/or did not want to win this contract.

IV.1190. In respect of Loach, Bodill's tender sheet records *'© from us'* against Loach. Bodill has confirmed that this indicates that it gave the company in question a cover price. The tender sheet also has the number '1' recorded against Loach to indicate that Loach was the first party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers indicate the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. Furthermore, Bodill recorded on the tender sheet the figure £291,703 against Loach, a figure that was identical to the tender that Loach submitted for the work.

IV.1191. Loach's contemporaneous tender spreadsheets also record the word *'Cover'* and a *'©'* against Bodill. Although Loach has stated generally that this is evidence only that both Loach and Bodill were involved in cover pricing on this tender (i.e. not necessarily with each other), the OFT considers in the light of the contemporaneous evidence from Bodill and Bodill's admission and explanation of that contemporaneous evidence, that the tender spreadsheet from Loach provides corroborating evidence that Bodill supplied Loach with a cover price for this tender. When the specific evidence from Bodill in relation to this tender was put to AA of Loach in interview, he admitted that Loach took a cover from Bodill, as described in paragraph IV.1179 above.

³⁷¹⁶ Written representations of K J Bryan, 24 June 2008, page 4.

³⁷¹⁷ Written representations of K J Bryan, 24 June 2008, page 5.

³⁷¹⁸ Written representations of K J Bryan, 24 June 2008, page 4.

IV.1192. In respect of Beaufort, Bodill's tender sheet records '*© from us*' against Beaufort. Bodill has confirmed that this indicates that it gave the company in question a cover price. The tender sheet also has the number '2' recorded against Beaufort to indicate that Beaufort was the second party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers indicate the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. Furthermore, Bodill recorded on the tender sheet the figure £303,284 against Beaufort, a figure that was only £11 different from the tender that Beaufort submitted for the work. Bodill's tender sheet also records the name and telephone number of a Beaufort estimator, providing further evidence that contact was made between the two parties.

IV.1193. Finally, Beaufort admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 21 March 2007.

IV.1194. In respect of K J Bryan, Bodill's tender sheet records '*© from us*' against K J Bryan. Bodill has confirmed that this indicates that it gave the company in question a cover price. The tender sheet also has the number '3' recorded against K J Bryan to indicate that K J Bryan was the third party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers indicate the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. Furthermore, Bodill recorded on the tender sheet the figure £312,173 against K J Bryan, a figure that was identical to the tender that K J Bryan submitted for the work. Bodill's tender sheet also recorded that K J Bryan was due to telephone Bodill on Tuesday morning. The OFT takes this to mean the morning of Tuesday 5 December 2000, the date for return of tenders, and notes that this is consistent with the pattern of cover pricing (with transmission of figures frequently taking place at the last minute).

IV.1195. The OFT considers that the admission by the other parties of engaging in bid rigging activities for this tender, supports the OFT's interpretation of Bodill's tender sheet as indicating that KJ Bryan too was provided with a cover price.

IV.1196. The OFT notes that whilst K J Bryan has not admitted engaging in cover pricing in relation to this specific Infringement, it has accepted that it engaged in cover pricing more generally, and did not put forward any evidence that calls into question the OFT's analysis of the evidence in relation to this Infringement.

IV.1197. The OFT notes in addition that the tenders submitted by Loach, Beaufort and K J Bryan were all higher than the tender submitted by Bodill, a pattern consistent with cover prices having been provided by Bodill.

IV.1198. The OFT therefore concludes that contact took place between Loach and Bodill, between Beaufort and Bodill, and between K J Bryan and Bodill. The OFT also concludes that Bodill supplied figures to each of Loach, Beaufort and K J Bryan for cover bids

IV.1199. The OFT is satisfied that the facts set out in paragraphs IV.1169 to IV.1198 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁷¹⁹ In particular:

³⁷¹⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of figures for cover bids from Bodill to each of Loach, Beaufort and K J Bryan was not unilateral³⁷²⁰, and contravenes the principle against direct or indirect contact between competitors;³⁷²¹
- (b) Loach, Beaufort and K J Bryan can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process;³⁷²² and
- (c) Bodill can be presumed to have taken account of the information it received from Loach, Beaufort and K J Bryan (i.e. that none of them intended to submit competitive bids) when determining its conduct in the tendering process.³⁷²³

IV.1200. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Loach and Bodill, between Beaufort and Bodill, and between K J Bryan and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the refurbishment work of civic accommodation at County Hall, Nottingham, tender deadline 5 December 2000.

Immunity and leniency assessment

IV.1201. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1202. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1203. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information provided by Bodill. Loach will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Loach in respect of this infringement.

Infringement 35: Proposed Extension, Milford Sports Club – 8 December 2000
Client: Allen Todd Architecture
Parties: Strata (formerly known as Weaver) and Caddick

IV.1204. On 18 November 2000, Allen Todd Architecture sought tenders for a new build sports club, pavilion and changing facilities at Milford Sports Club, Kirkstall, Leeds.³⁷²⁴ The following seven companies were invited to tender:

³⁷²⁰ See paragraph IV.73 of the General comments on cover pricing section.

³⁷²¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁷²² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷²³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷²⁴ Information from client, OFT Document Reference 7036.

Termrim, Irwins, Weaver, C J Ellmore, P S Turner, Clayfield and Caddick.³⁷²⁵
 The deadline for receipt of tenders was 12:00 noon on 8 December 2000.³⁷²⁶

IV.1205. Allen Todd Architects received the following tender returns:³⁷²⁷

Company	Time & Date tender received	Amount of tender	Awarded contract
Termrim	12:00 noon on 8 December 2000	£1,023,540	
Irwins	12:00 noon on 8 December 2000	£889,969	
Weaver [Strata]	12:00 noon on 8 December 2000	£1,005,726	
C J Ellmore	12:00 noon on 8 December 2000	£896,840	Yes
P S Turner	12:00 noon on 8 December 2000	£910,818	
Clayfield	12:00 noon on 8 December 2000	£920,223	
Caddick	12:00 noon on 8 December 2000	£979,133	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Form of Tender

IV.1206. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents – mostly Form of Tenders and result letters – was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:³⁷²⁸

'Caddicks'

IV.1207. The Form of Tender also stated that Strata's figure was £1,005,726.³⁷²⁹

Evidence from leniency applicant Strata

IV.1208. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 to Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:³⁷³⁰

Date	Project	Strata ref no
08/12/2000	Extn at Milford Sports Club, Kirkstall, Leeds for the Speight Simpson Partnership	T174/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXN/107	Caddits	No Details	

³⁷²⁵ Information from client, OFT Document Reference 7036.

³⁷²⁶ Information from client, OFT Document Reference 7036.

³⁷²⁷ Information from client, OFT Document Reference 7036.

³⁷²⁸ Form of Tender, OFT Document Reference 3390.

³⁷²⁹ Form of Tender, OFT Document Reference 3390.

³⁷³⁰ Leniency application, OFT Document Reference 4054, page 4.

IV.1209. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.1210. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Caddick

IV.1211. The OFT wrote to Caddick on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Caddick had participated in bid rigging on this tender. In response to this letter Caddick admitted *'We engaged in bid rigging (cover pricing) activities with this tender but cannot recall details of the other party involved'*.³⁷³¹

IV.1212. The OFT subsequently wrote to Caddick's ultimate parent company at the time of this Infringement, Caddick Group, on 5 November 2007, asking it to comment on Caddick's response to the OFT's Fast Track Offer, given that the OFT intended to hold Caddick Group jointly and severally liable for any infringements committed by Caddick in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Caddick Group stated in a telephone call to the OFT on 6 December 2007 that it had no issues to raise.³⁷³²

IV.1213. In their response to the Statement, Caddick confirmed *'...that it provided a cover price [in respect of this tender] because it reacted to a request by Weaver (Strata)'*.³⁷³³

The OFT's analysis of the evidence and finding

IV.1214. From the evidence presented above, the OFT draws the following conclusions.

IV.1215. Strata and Caddick each accepted an invitation to tender for this contract.

IV.1216. Both companies submitted a tender. Strata was unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.1217. Strata's Form of Tender records *'Caddicks'*, handwritten in the top right hand corner. Strata confirmed that this indicates that it received a cover price from the company noted. This Form of Tender was also found in the file marked *'Covers from Jan 2000 to Dec 2001'*, which Strata confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and Strata's admission and explanation of the contemporaneous evidence that Caddick supplied Strata with a cover price for this tender.

³⁷³¹ Response from Caddick, OFT Document Reference 10964, page 2.

³⁷³² Response from Caddick Group, OFT Document Reference 13922.

³⁷³³ Written representations of Caddick, 24 June 2008, paragraph 6.4(a)(iii).

- IV.1218. In addition, Caddick has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.
- IV.1219. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by Caddick, the pattern consistent with a cover price having been provided.
- IV.1220. The OFT therefore concludes that contact took place between Strata and Caddick. The OFT also concludes that Caddick supplied a figure to Strata for a cover bid.
- IV.1221. The OFT is satisfied that the facts set out in paragraphs IV.1206 to IV.1220 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁷³⁴ In particular:
- (a) the provision of a figure for a cover bid from Caddick to Strata was not unilateral³⁷³⁵, and contravenes the principle against direct or indirect contact between competitors;³⁷³⁶
 - (b) Strata can be presumed to have taken account of the information received from Caddick (i.e the cover price) when determining its own conduct in the tendering process;³⁷³⁷ and
 - (c) Caddick can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁷³⁸
- IV.1222. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Caddick and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new build sports club, pavilion and changing facilities at Milford Sports Club, Kirkstall, Leeds, tender deadline 8 December 2000.

Immunity and leniency assessment

- IV.1223. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.1224. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this infringement.

³⁷³⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁷³⁵ See paragraph IV.73 of the General comments on cover pricing section.

³⁷³⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁷³⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷³⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 36: Summerhill Terrace, Birmingham – 8 December 2000
Client: Crosby Homes
Parties: BBCL³⁷³⁹ and Interserve (formerly known as Tilbury Douglas)

IV.1225. On 14 October 2000 Crosby Homes sought tenders for construction of an apartment block, Summerhill Terrace, Birmingham.³⁷⁴⁰ The following five companies were invited to tender: Balfour Beatty³⁷⁴¹, Benson, Tilbury Douglas, Kendrick and Willmott Dixon. The date of tender return was 8 December 2000 at noon.³⁷⁴²

IV.1226. Crosby Homes received the following tender returns:³⁷⁴³

Company	Date tender received	Amount of tender	Awarded contract
Balfour Beatty	8 December 2000	£7,793,329	
Kendrick	8 December 2000	£6,745,493	
Benson	8 December 2000	£5,903,654	YES
Willmott Dixon	8 December 2000	£7,434,105	
Tilbury Douglas [Interserve]	8 December 2000	£7,930,464	

IV.1227. Crosby Homes has advised that the work subject of the tender was not carried out as *'tenders were over budget'* but that *'a contract was subsequently negotiated for shell & core work with the lowest tenderer'*.³⁷⁴⁴

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Balfour Beatty – handwritten notes on Interserve letter

IV.1228. As part of its leniency application, Balfour Beatty's legal representatives provided a letter from Interserve to Stannah Lifts dated 30 October 2000, relating to this tender, on which are handwritten notes including: *'JOHN STOT ESTIMATOR T. DOUGLAS'* and *'ASKED FOR AN EXTENSION. NOT KEEN ON PROJECT'* and finally *'COVER £7,930,000'*.³⁷⁴⁵

Evidence from leniency applicant Balfour Beatty

IV.1229. Balfour Beatty's legal representatives also provided to the OFT a schedule setting out instances of cover pricing uncovered or suspected within BBCL,

³⁷³⁹ Information from client, OFT Document Reference 10045.

³⁷⁴⁰ Information from client, OFT Document Reference 7523.

³⁷⁴¹ The OFT notes that the client's response records 'Balfour Beatty' as tendering for this contract. Although it is possible that the company involved in this Infringement was BBRL, for convenience the OFT generally refers to BBCL throughout the description of this Infringement since this is how the participant company was described by Balfour Beatty in its leniency application. For the avoidance of doubt, therefore, where BBCL appears in the description of this Infringement and the OFT's consequent findings, this should be taken to mean BBRL if it was the participant company. In any event, BBCL and BBRL form part of the same undertaking, and the Party as defined in paragraphs II.133 to II.182 above would therefore be liable for their actions.

³⁷⁴² Information from client, OFT Document Reference 7523.

³⁷⁴³ Information from client, OFT Document Reference 7523.

³⁷⁴⁴ Information from client, OFT Document Reference 7523.

³⁷⁴⁵ Leniency application, OFT Document Reference B1617, page 1.

where covers were given. In respect of this tender the schedule contains the following entry:³⁷⁴⁶

Internal Ref/Job No	Project name/client	Project type	Submission Date	Tender Value	Firm to whom cover was given
3016 (MP*)	Summer Hill Terrace / Crosby Homes	Design & Build	8/12/00	7,793,329	Tilbury Douglas

Other Bidders of which BBCL was aware	Who won the contract (if known)?	Reasons for seeking cover price (if known)	What information was disclosed other than/in addition to inflated pricing data?
Kendrick Willmott Dixon Benson	Not known	BBCL believes that Tilbury Douglas asked for a time extension and was not keen on the project.	None

IV.1230. It appears that BBCL obtained the names of these other companies competing for this tender (*'Other Bidders...'* in the above schedule extract) in the course of discussions regarding a possible extension to the tender period (see handwritten notes³⁷⁴⁷ which appear to be a note of such conversations). However the OFT has no evidence to suggest that any of these other companies were involved in bid rigging on this tender.

Witness evidence from leniency applicant Balfour Beatty

IV.1231. During interviews conducted in connection with its leniency application, Balfour Beatty employees and ex-employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.189 to IV.203 above and is relied upon by the OFT in relation to this tender.

IV.1232. During an interview with the OFT on 30 March 2007, Martyn Etheridge ('ME'), a senior estimator at BBCL, advised what would happen when a competitor asked for a cover price from BBCL as detailed in paragraphs IV.195 to IV.198 above. ME advised that his role was *'to estimate and, and win building contracts for the south-east which includes Birmingham ... as well as the London office'*.³⁷⁴⁸ In respect of the letter from Interserve to Stannah Lifts, ME stated *'... it's an enquiry letter to Stannah³⁷⁴⁹ Lifts, asking them for a price for providing this for that project. I also sent Stannah Lifts an enquiry for that project for lifts. When I got their quote back ... also contained in there was ... Tilbury Douglas's enquiry letter'*.³⁷⁵⁰

IV.1233. In relation to the handwritten notes ME stated *'That's my handwriting. Looking at that, basically what it is, is that, John Stot obviously approached*

³⁷⁴⁶ Leniency application, OFT Document Reference B1604, page 2

³⁷⁴⁷ Handwritten notes, OFT Document Reference B1618.

³⁷⁴⁸ Interview transcript, OFT Document Reference 11138, page 2.

³⁷⁴⁹ The OFT notes that the transcript incorrectly refers to Stannah as Stanner.

³⁷⁵⁰ Interview transcript, OFT Document Reference 11138, pages 16 and 17.

me, and asked for an extension ... of time firstly, and he was not keen on the project, so I just wrote those two notes down. And then, we had problems with it, so I think we asked for an extension. I can't remember if we got an extension or not; I think we most probably did ... and then obviously later on he most probably came back to me and asked me if I could help him out with a price 'cos he wasn't keen on it. And that's the number I most probably gave him'.³⁷⁵¹

Evidence from other companies – Interserve

IV.1234. The OFT wrote to Interserve on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participating in bid rigging on this tender, in return for an admission that Interserve had participated in bid rigging on this tender. In response to this letter Interserve admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved. Although a cover was taken, the tender was properly priced and was for a sum in excess of the cover price'*.³⁷⁵²

IV.1235. In its response to the Statement, Interserve stated *'In accordance with the terms of the Fast Track Offer, Interserve Group is not proposing to withdraw this admission'*³⁷⁵³ in relation to this Infringement.

The OFT's analysis of the evidence and finding

IV.1236. From the evidence presented above, the OFT draws the following conclusions.

IV.1237. BBCL and Interserve each accepted an invitation to tender for this contract.

IV.1238. Both companies submitted a tender. Interserve was unable to submit a tender by the return date and/or did not want to win this contract. It appears that BBCL completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.

IV.1239. Handwritten notes on a letter provided by Balfour Beatty's legal representatives for this tender show *'JOHN STOT ESTIMATOR T. DOUGLAS', 'ASKED FOR AN EXTENSION. NOT KEEN ON PROJECT', and 'COVER £7,930,000'*. Balfour Beatty confirmed that this shows that it gave a cover price to the company noted of the amount shown. The OFT notes that Interserve's bid was very close to, and higher than, this figure.

IV.1240. In addition, Interserve has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007. Interserve stated that it submitted a tender for a sum in excess of the cover price, and this matches the information provided by Crosby Homes and Balfour Beatty. The cover price provided was £7,930,000, while the tender submitted was £7,930,464.

IV.1241. The OFT notes that the tender submitted by Interserve was higher than the tender submitted by BBCL, the pattern consistent with a cover price having been provided. The OFT further notes that Interserve's tender figure was the

³⁷⁵¹ Interview transcript, OFT Document Reference 11138, page 17.

³⁷⁵² Response from Interserve, OFT Document Reference 10432, page 3.

³⁷⁵³ Written representations of Interserve, 25 June 2008, paragraph 4.4.3.

only one above that of BBCL, and that BBCL could not therefore have provided cover to anyone other than Interserve, for this tender.

IV.1242. The OFT therefore concludes that contact took place between BBCL and Interserve. The OFT also concludes that BBCL supplied a figure to Interserve for a cover bid.

IV.1243. The OFT is satisfied that the facts set out in paragraphs IV.1228 to IV.1242 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁷⁵⁴ In particular:

- (a) the provision of a figure for a cover bid from BBCL to Interserve was not unilateral³⁷⁵⁵, and contravenes the principle against direct or indirect contact between competitors;³⁷⁵⁶
- (b) Interserve can be presumed to have taken account of the information received from BBCL (i.e. the cover price) when determining its own conduct in the tendering process;³⁷⁵⁷ and
- (c) BBCL can be presumed to have taken account of the information it received from Interserve (i.e. that Interserve did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁷⁵⁸

IV.1244. In its response to the Statement, Balfour Beatty stated '*The OFT has adduced no evidence that the giving of a cover was taken into account by Balfour Beatty and Mansell when pricing its tenders nor is there any evidence that the giving of a cover had any effect on these parties' pricing of the tender*'.³⁷⁵⁹ The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption³⁷⁶⁰ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Balfour Beatty has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Balfour Beatty's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that Balfour Beatty submitted that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement).

IV.1245. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between BBCL and Interserve in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Summerhill Terrace, Birmingham, tender deadline 8 December 2000.

³⁷⁵⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁷⁵⁵ See paragraph IV.73 of the General comments on cover pricing section.

³⁷⁵⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁷⁵⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷⁵⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷⁵⁹ Written representations of Balfour Beatty, 27 June 2008, paragraph 10.8.

³⁷⁶⁰ See paragraph III.58 of the Legal Background section.

Immunity and leniency assessment

IV.1246. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1247. Balfour Beatty informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Balfour Beatty will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 37: Extension to Vermuyden School Centenary Road, Goole – 13 December 2000
Client: East Riding of Yorkshire Council
Parties: Strata (formerly known as Weaver) and Lindum Group

IV.1248. On 16 November 2000, East Riding of Yorkshire Council sought tenders for a new science block, Vermuyden School, Goole.³⁷⁶¹ The following seven companies were invited to tender: Hobson & Porter, Weaver, Quibell & Sons (Hull) Ltd, Holroyd, Lindum Group, Robinson & Sawdon and Geo Houlton.³⁷⁶² The deadline for receipt of tenders was 12:00 noon on 13 December 2000.³⁷⁶³

IV.1249. East Riding of Yorkshire Council received the following tender returns:³⁷⁶⁴

Company	Time & Date tender received	Amount of tender	Awarded contract
Hobson & Porter	11:30 am on 13 December 2000	£704,466	Yes
Weaver [Strata]	11:40 am on 13 December 2000	£716,493	
Quibell & Sons (Hull) Ltd	11:50 am on 13 December 2000	£725,449	
Holroyd	10:28 am on 13 December 2000	£732,529	
Lindum Group	11:16 am on 13 December 2000	£743,323	
Robinson & Sawdon	11:11 am on 13 December 2000	£776,777	
Geo Houlton	11:23 am on 13 December 2000	£807,242	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Contract Information Sheet (BOB sheet)

IV.1250. During the OFT's search of Strata's premises a contract information sheet, or BOB sheet, was found.³⁷⁶⁵ The BOB sheet contained the following entries typed in the tender results box:³⁷⁶⁶

³⁷⁶¹ Information from client, OFT Document Reference 7820.

³⁷⁶² Information from client, OFT Document Reference 7820.

³⁷⁶³ Information from client, OFT Document Reference 7820.

³⁷⁶⁴ Information from client, OFT Document Reference 7820.

³⁷⁶⁵ BOB sheet, OFT Document Reference 3869.

³⁷⁶⁶ BOB sheet, OFT Document Reference 3869.

TENDER RESULTS		
% DIFF	CONTRACTOR	VALUE
	WEAVER	716493
	HOBSON & PORTER	
	QUIBELL	
	GEO. HOULTON	
6.2117997	LINDUM (C)	761000

Evidence from leniency applicant - Strata

IV.1251. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. This list contained the following entry:³⁷⁶⁷

Date	Project	Strata ref no
13/12/2000	Extn to Vermuyden School, Goole	T168/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
✓		Lindum	Lincoln	

IV.1252. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.1253. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Lindum Group

IV.1254. The OFT wrote to Lindum Group on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lindum Group had participated in bid rigging on this tender. In response to this letter Lindum Group admitted '*We engaged, cannot recall full details*'.³⁷⁶⁸

IV.1255. Lindum Group added in a separate annex '*A tender for Lindum Construction, which was neither requested, nor accepted. Our marketing lady, Zoe Johnson, had sent information to them about Lindum in general. We have never worked for East Riding Council, nor wished to, so it was, effectively, a marketing error. It is not our geography and we do not know the construction/supply etc market there. We had not been invited to tender, we just received the tender. The tender should have been quietly returned. However, I understand that we believe we took a cover, using Glenigans as a list for who was tendering. The*

³⁷⁶⁷ Leniency application, OFT Document Reference 4054, page 4.

³⁷⁶⁸ Response from Lindum Group, OFT Document Reference 10514, page 2.

job was too complicated to square foot in the time and especially so as was Christmas time, when very pressured on jobs. We cannot recall which company that gave the cover to us. We may recall more if we investigated further with Glenigans, which we have not done. YES, COVER RECEIVED, but cannot recall who from'.³⁷⁶⁹

IV.1256. In its response to the Statement, Lindum Group confirmed that it *'...does not contest the fact of the infringements [including this Infringement] ... [f]ollowing the OFT's inspections at the premises of the Lindum companies on 26 January 2006, Lindum Group conducted internal investigations into the alleged conduct and admitted to the OFT, so far as possible, infringements of the Chapter I prohibition...'.³⁷⁷⁰*

The OFT's analysis of the evidence and finding

IV.1257. From the evidence presented above, the OFT draws the following conclusions.

IV.1258. Strata and Lindum Group each accepted an invitation to tender for the contract for a new science block, Vermuyden School, Goole.

IV.1259. Both companies submitted a tender. Strata completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work.

IV.1260. Lindum Group did not have the time to complete the estimating process and it did not want to win the contract.

IV.1261. Strata's contract information sheet records *'6.2117997 LINDUM (C) 761000'* typed in the tender results box. Paul Throssell ('PT'), an estimator at Strata confirmed that a '(C)' written next to a competitor's name alongside a figure and a percentage difference shows that Strata gave a cover price to the company noted, as in this case. The OFT considers in the light of the contemporaneous evidence from Strata, PT's explanation of how covers given were recorded and Lindum Group's admission that it received a cover price, that Strata supplied Lindum Group with a cover price for this tender.

IV.1262. In addition the OFT notes that the tender submitted by Lindum Group was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided. The OFT does not consider it significant that the figure eventually submitted by Lindum Group, £743,323, differs from the amount shown against Lindum Group, £761,000, on Strata's BOB sheet. It is likely that Lindum Group was made aware by Strata of the amount Strata intended to bid, and that Lindum Group selected its own figure for a cover bid that differed from Strata's recommended amount but was still comfortably above Strata's bid.

IV.1263. The OFT therefore concludes that contact took place between Strata and Lindum Group. The OFT also concludes that Strata supplied a figure to Lindum Group for a cover bid.

³⁷⁶⁹ Response from Lindum Group, OFT Document Reference 10515, page 3.

³⁷⁷⁰ Written representations of Lindum Group, 27 June 2008, paragraph 3.

IV.1264. The OFT is satisfied that the facts set out in paragraphs IV.1250 to IV.1263 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁷⁷¹ In particular:

- (a) the provision of a figure for a cover bid from Strata to Lindum Group was not unilateral³⁷⁷², and contravenes the principle against direct or indirect contact between competitors;³⁷⁷³
- (b) Lindum Group can be presumed to have taken account of the information received from Strata (i.e the cover price) when determining its own conduct in the tendering process;³⁷⁷⁴ and
- (c) Strata can be presumed to have taken account of the information it received from Lindum Group (i.e. that Lindum Group did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁷⁷⁵

IV.1265. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Lindum Group and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the new science block, Vermuyden School, Goole, tender deadline 13 December 2000.

Immunity and leniency assessment

IV.1266. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1267. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 38: Fresh Start Phase 5, River Leen School, Bulwell, Nottingham – 15 December 2000

Client: Nottingham City Council

Parties: Bodill and K J Bryan

IV.1268. In November/December 2000, Nottingham City Council ('NCC') sought tenders for gymnasium, changing room and toilet refurbishment, and the construction of a new ramped area at the River Leen School, Hucknall Lane³⁷⁷⁶, together known as Phase 5. The following six companies were invited to tender: Allenbuild,

³⁷⁷¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁷⁷² See paragraph IV.73 of the General comments on cover pricing section.

³⁷⁷³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁷⁷⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷⁷⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁷⁷⁶ Information from client, OFT Document References 9113 and 9114.

Bodill, K J Bryan, Loach, Simons and Thomas Long.³⁷⁷⁷ The deadline for the receipt of tenders was 12:00 noon on Friday 15 December 2000.

IV.1269. NCC received the following tender returns:³⁷⁷⁸

Company	Date and time tender received	Amount of tender	Awarded contract
Allenbuild	Prior to 12:00 noon 15 December 2000	£282,833	Yes
Bodill	Prior to 12:00 noon 15 December 2000	£318,218	
K J Bryan	Prior to 12:00 noon 15 December 2000	£344,138	
Loach	Prior to 12:00 noon 15 December 2000	£302,354	
Simons	Prior to 12:00 noon 15 December 2000	£313,994	
Thomas Long	Prior to 12:00 noon 15 December 2000	£320,941	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1270. Bodill's original tender sheet³⁷⁷⁹ relating to River Leen School, Phase 5, provided to the OFT as part of its leniency application, has under the section headed '*Tenderers*', the following entries, all of which are handwritten with the exception of the name 'Bodill'.

'

1. BODILL
2. T LONG.
3. LOACH.
4. ~~S W DICKINSON~~ SIMONS.
5. K. J. BRYAN © FROM US'

£344138

IV.1271. The tender sheet states that Bodill's submitted figure was £318,218.

IV.1272. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*SIMONS*', '*£344138*', and '*© FROM US*' were made by him.³⁷⁸⁰ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1273. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1274. In particular, Bodill provided to the OFT a '*Tender Analysis Schedule of Covers taken & given [since] March 2000*'³⁷⁸¹, which records that Bodill gave out a cover price on this tender. Bodill also provided to the OFT a '*Tender Analysis -*

³⁷⁷⁷ Information from client, OFT Document References 9113 and 9114.

³⁷⁷⁸ Information from client, OFT Document References 9113 and 9114.

³⁷⁷⁹ Leniency application, OFT Document Reference 0521.

³⁷⁸⁰ Leniency application, OFT Document Reference 6426, pages 1 and 11.

³⁷⁸¹ Tender Analysis, OFT Document Reference 0849, page 1.

Tender Sheets March 2000 – November 2004.³⁷⁸² This document confirms that Bodill gave a cover price to K J Bryan in respect of this tender.

IV.1275. The *'Explanatory Note of Tender Sheet'*³⁷⁸³ provided by Bodill in its leniency application explains notations used on its tender sheets. The '©' and *'FROM US'* against a contractor's name show that Bodill supplied that contractor with a cover price. The figure/cover price given is written on the tender sheet against their name.³⁷⁸⁴

IV.1276. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1277. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

[...] [C]

IV.1278. [...] [C]³⁷⁸⁵ 3786

IV.1279. [...] [C]³⁷⁸⁷

[...] [C]

IV.1280. [...] [C]³⁷⁸⁸ 3789

³⁷⁸² Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

³⁷⁸³ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

³⁷⁸⁴ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

³⁷⁸⁵ [...] [C]

³⁷⁸⁶ [...] [C]

³⁷⁸⁷ [...] [C]

³⁷⁸⁸ [...] [C]

³⁷⁸⁹ [...] [C]

[...] [C]

[...] [C]

IV.1281. [...] [C]

[...] [C]

IV.1282. [...] [C]

IV.1283. [...] [C]³⁷⁹⁰

IV.1284. [...] [C]^{3791 3792 3793}

IV.1285. [...] [C]

Evidence from other companies – K J Bryan

IV.1286. The premises of K J Bryan were searched by officers of the OFT on 19 January 2006 and no documentation was found relative to this tender.

³⁷⁹⁰ [...] [C]

³⁷⁹¹ [...] [C]

³⁷⁹² [...] [C]

³⁷⁹³ [...] [C]

IV.1287. The OFT wrote to K J Bryan on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that K J Bryan had participated in bid rigging on this tender. In response to this letter, K J Bryan's legal representatives stated *'In view of the lack of physical records to refresh memories and the significant period of time that has passed since the events in question our client's officers and members of staff have difficulty in trying to recollect the circumstances concerning the contracts in question...our client does not feel it appropriate to accept the offer...'*.³⁷⁹⁴ The OFT notes that K J Bryan's officers and staff were able to recollect, and respond in respect of, two of the five contracts covered by the OFT's Fast Track Offer.

IV.1288. In its response to the Statement, K J Bryan neither expressly admitted, nor contested its involvement in this Infringement, stating *'There was only a very small and limited number of infringements'*³⁷⁹⁵ and *'KJB accepts that the Cover Scheme is illegal... KJB in mitigation submits that it when historically using the Scheme was not aware that it was illegal... and on finding out the scheme was illegal took immediate action to ensure it was not and has not been involved in use of the same again'*.³⁷⁹⁶ The response further stated that *'this is a case where Bodhill's [sic] supplied a tender to KJB – KJB were not the instigator or leader of use of the Cover Scheme and had not knowledge of what other covers have been given'*.³⁷⁹⁷

[...] [C]

IV.1289. [...] [C]

IV.1290. [...] [C]³⁷⁹⁸

IV.1291. [...] [C]³⁷⁹⁹

The OFT's analysis of the evidence and finding

IV.1292. From the evidence presented above, the OFT draws the following conclusions.

IV.1293. Bodill, [.....] [C] K J Bryan, and [.....] [C] each accepted an invitation to tender for this contract.

³⁷⁹⁴ Response from K J Bryan, OFT Document Reference 10462, page 2.

³⁷⁹⁵ Written representations of K J Bryan, 24 June 2008, page 4.

³⁷⁹⁶ Written representations of K J Bryan, 24 June 2008, page 5.

³⁷⁹⁷ Written representations of K J Bryan, 24 June 2008, page 4

³⁷⁹⁸ [...] [C]

³⁷⁹⁹ [...] [C]

- IV.1294. It appears that Bodill [.....] [C] completed the estimating process for this tender and submitted bids with the hope of winning the work.
- IV.1295. K J Bryan [.....] [C] were unable to submit a tender by the return date and/or did not want to win this tender.
- IV.1296. With regard to K J Bryan, Bodill's tender sheet³⁸⁰⁰ records under '*Tenderers*' and against K J Bryan '*£ 344138 (C) from us*'. Bodill has admitted to providing a cover price to K J Bryan for this tender. K J Bryan did submit a price of £344,138.00³⁸⁰¹, a figure identical to that recorded on Bodill's tender sheet. K J Bryan's bid was also higher than Bodill's, a pattern consistent with a cover price having been provided.
- IV.1297. The OFT considers in the light of the contemporaneous evidence and Bodill's admission and explanation of that evidence, that Bodill provided K J Bryan with a cover price for this tender. The OFT notes that whilst K J Bryan has not admitted engaging in cover pricing in relation to this specific Infringement, it has accepted that it engaged in cover pricing more generally, and did not put forward any evidence that calls into question the OFT's analysis of the evidence in relation to this Infringement.
- IV.1298. [...] [C]³⁸⁰²
- IV.1299. The OFT therefore concludes that contact took place between K J Bryan and Bodill and that Bodill supplied a figure to K J Bryan for a cover bid.
- IV.1300. The OFT is satisfied that the facts set out in paragraphs IV.1270 to IV.1299 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁸⁰³ In particular:
- (a) the provision of a figure for a cover bid from Bodill to K J Bryan was not unilateral³⁸⁰⁴, and contravenes the principle against direct or indirect contact between competitors;³⁸⁰⁵
 - (b) K J Bryan can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;³⁸⁰⁶ and
 - (c) Bodill can be presumed to have taken account of the information received from K J Bryan (i.e. that K J Bryan did not intend to submit a

³⁸⁰⁰ Leniency application, OFT Document Reference 0521.

³⁸⁰¹ Information from client, OFT Document Reference 9113.

³⁸⁰² [...] [C]

³⁸⁰³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁸⁰⁴ See paragraph IV.73 of the General comments on cover pricing section.

³⁸⁰⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁸⁰⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

competitive bid) when determining its own conduct in the tendering process.³⁸⁰⁷

IV.1301. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and K J Bryan, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Phase 5 at the River Leen School, Hucknall Lane, Bulwell, Nottingham, tender deadline 15 December 2000.

Immunity and leniency assessment

IV.1302. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1303. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 39: Saxton Gardens Phase 2 – 20 December 2000
Client: Leeds City Council
Parties: Henry Boot, Bullock, Mowlem and G & J Seddon

IV.1304. On 8 November 2000, Leeds City Council sought tenders for Saxton Gardens Phase 2, refurbishment works to 112 flats.³⁸⁰⁸ The following six companies were invited to tender: Bullock, Frank Haslam Milan, G & J Seddon, Henry Boot, Lovell and Mowlem, the date and time of tender return was 20 December 2000 at 12:00 noon.³⁸⁰⁹

IV.1305. Leeds City Council received the following tender returns:³⁸¹⁰

Company	Date tender received	Amount of tender	Awarded contract
Henry Boot	Prior to deadline	£4,103,013	YES
Lovell	Prior to deadline	£4,236,037	
Bullock	Prior to deadline	£4,265,641	
Mowlem	Prior to deadline	£4,297,416	
G & J Seddon	Prior to deadline	£4,321,975	
Frank Haslam Milan	Prior to deadline	£4,417,900	

³⁸⁰⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁸⁰⁸ Information from client, OFT Document Reference 8498b.

³⁸⁰⁹ Information from client, OFT Document Reference 8498b.

³⁸¹⁰ Information from client, OFT Document Reference 8498b.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Henry Boot – ‘Sheet 28’

IV.1306. As part of its leniency application, Henry Boot’s legal representatives provided a ‘Sheet 28’ (tender build-up) for this tender on which, under the section headed ‘Competition’, the following handwritten entries have been made:³⁸¹¹

*‘CARILLION HOUSING
FRANK HASLAM MILAN
SEDDON Ⓢ from HBC 4321874
BULLOCK Ⓢ from HBC 4265641
MOWLEM Ⓢ “ “ 4297416’*

Evidence from leniency applicant Henry Boot

IV.1307. Henry Boot’s legal representatives also provided to the OFT a table headed ‘Overall Schedule for the Main Estimating Department’³⁸¹², which includes this tender. In respect of this tender the table shows comments made by those reviewing the tender documents, which confirm that a cover price was given to Bullock, Mowlem and G & J Seddon, as follows. Ian Bayston (‘IPB’), a Chief Estimator at Henry Boot, stated, ‘*I don’t think there’s any doubt about this one: we have clearly given covers to 3 of our competitors – (which competitors - - check the sheet 28 in the estimator’s file). HBC (UK) [Henry Boot] properly priced it though*’, while Duncan Abraham (‘DA’), an estimator at Henry Boot, stated, ‘*It is clear from the documentation that Seddon, Bullock and Mowlem all took a cover from us on this one. The writing on the file appears to be John Dawson’s*’.³⁸¹³

Witness evidence from leniency applicant Henry Boot

IV.1308. During interviews conducted in connection with its leniency application, Henry Boot employees and ex-employees provided general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.363 to IV.374 above and is relied upon by the OFT in relation to this tender.

IV.1309. During an interview with the OFT on 23 March 2007, John Dawson (‘JD’), a retired Chief Estimator at Henry Boot, confirmed how he would record when Henry Boot had given a cover as detailed in paragraphs IV.374 above. In relation to this tender JD confirmed that he completed the ‘Sheet 28’ and when asked what ‘Ⓢ’ indicated stated ‘*...that indicates that 3 competitors which is very unusual, asked us for help on this job, being Seddon, Bullock and Mowlem’ and ‘the figures that are to the right of it are the figures that obviously I decided to give them once we’d arrived at our figure of 4.10’*’.³⁸¹⁴

IV.1310. During an interview with the OFT on 22 March 2007, Michael Mosley (‘MM’), Managing Director of Henry Boot, confirmed that cover was provided to

³⁸¹¹ Leniency application, OFT Document Reference B1905.

³⁸¹² Leniency application, OFT Document Reference B1595.

³⁸¹³ Leniency application, OFT Document Reference B1595, page 7.

³⁸¹⁴ Interview transcript, OFT Document Reference 11211, page 13.

Bullock, Mowlem and Seddon stating '*...the call [to the contractors] would've been by John Dawson but John and I would've discussed ... the figures we were gonna give them*'.³⁸¹⁵

Evidence from leniency applicant Carillion³⁸¹⁶

IV.1311. As part of its leniency application, Carillion's legal representatives advised '[Carillion] *is unable to confirm positively whether or not a cover was taken by Mowlem in respect of the Contract. However, it is acknowledged that the document [Henry Boot 'Sheet 28'] and the explanation provided by Henry Boot Construction (UK) Ltd suggest that this was the case and Carillion has no grounds for contradicting that explanation*'.³⁸¹⁷

IV.1312. In its response to the Statement, Mowlem stated that it '*... does not contest that certain employees (and/or former employees) participated in each of the three Relevant Alleged Infringements nor does it contest its liability...*'.³⁸¹⁸

Evidence from other companies – Bullock

IV.1313. The OFT wrote to Bullock on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Bullock had participated in bid rigging on this tender. In response to this letter Bullock admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved*'.³⁸¹⁹

IV.1314. The OFT subsequently wrote to Bullock's ultimate parent company at the time of this Infringement, Renew, on 6 November 2007, asking it to comment on Bullock's response to the OFT's Fast Track Offer, given that the OFT intended to hold Renew jointly and severally liable for any infringements committed by Bullock in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Renew stated '*... [Renew] is unable to make any comment on the agreements entered into by either company [Allenbuild or Bullock]*'.³⁸²⁰

IV.1315. In its response to the Statement, Bullock stated that it '*...has admitted its participation in bid rigging activities (i.e. cover pricing) by corroborating the OFT's claims in respect of the tenders listed in the Fast Track Offer...*'.³⁸²¹

Evidence from other companies – Seddon

IV.1316. The OFT wrote to Seddon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participating in bid rigging on this tender, in return for an admission that Seddon had participated in bid rigging on this tender. In response to this letter, G & J Seddon responded, admitting '*We engaged in bid rigging activities on this*

³⁸¹⁵ Interview transcript, OFT Document Reference 11215, page 8.

³⁸¹⁶ Mowlem was acquired by Carillion on 23 February 2006.

³⁸¹⁷ Leniency application, OFT Document Reference B4025a.

³⁸¹⁸ Written representations of Mowlem, 27 June 2008, paragraph 1.4.

³⁸¹⁹ Response from Bullock, OFT Document Reference 10263, page 2.

³⁸²⁰ Response from Renew, OFT Document Reference 14130, page 2.

³⁸²¹ Written representations of Bullock, 26 June 2008, paragraph 1.6.1.

tender but cannot recall details of the other party/parties involved.³⁸²² G & J Seddon also confirmed that it had taken a cover on this tender.³⁸²³

IV.1317. The OFT subsequently wrote again to G & J Seddon's ultimate parent company at the time of this Infringement, Seddon, on 5 November 2007, asking it to comment on G & J Seddon's response to the OFT's Fast Track Offer, given that the OFT intended to hold Seddon jointly and severally liable for any infringements committed by G & J Seddon in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Seddon said *'We confirm that Seddon Group Limited ("SGL") support and adopt G&J Seddon Limited ("G&JS") acceptance of the reduction of penalty offer and that SGL does not intend to comment upon matters ... or to make any submissions on this case at the present time'*.³⁸²⁴

IV.1318. In its response to the Statement, G & J Seddon confirmed in respect of this Infringement that it *'... has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of Infringement'*.³⁸²⁵

The OFT's analysis of the evidence and finding

IV.1319. From the evidence presented above, the OFT draws the following conclusions.

IV.1320. Henry Boot, Bullock, Mowlem and G & J Seddon each accepted an invitation to tender for this contract.

IV.1321. All companies submitted a tender. It appears that Henry Boot completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.

IV.1322. Bullock, Mowlem and G & J Seddon were all unable to submit a tender by the return date and/or did not want to win this contract.

IV.1323. In regard to Mowlem, Henry Boot's *'Sheet 28'* for this tender records *'MOWLEM... © " " ... 4297416'*, under the heading *'Competition'*. Henry Boot confirmed that this shows that it gave a cover price of the figure shown to the company noted. Furthermore, the figure Henry Boot recorded on the *'Sheet 28'* against Mowlem was identical to the figure that Mowlem submitted for the tender.

IV.1324. In addition, Carillion has acknowledged that the facts suggest that it took a cover price from Henry Boot on this tender, and that it has no grounds for contradicting this explanation of the facts.

IV.1325. In regard to Bullock, Henry Boot's *'Sheet 28'* for this tender records *'BULLOCK... © from HBC ... 4265641'*, under the heading *'Competition'*. Henry Boot confirmed that this shows that it gave a cover price of the figure shown to the company noted. Furthermore, the figure Henry Boot recorded on the *'Sheet*

³⁸²² Response from Seddon, OFT Document Reference 10826, page 2.

³⁸²³ Response from Seddon, OFT Document Reference 10825, page 1.

³⁸²⁴ Response from Seddon Group, OFT Document Reference 14027.

³⁸²⁵ Written representations of G & J Seddon, 27 June 2008, paragraph 6.

28' against Bullock was identical to the figure that Bullock submitted for the tender.

IV.1326. In addition, Bullock has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.1327. In regard to G & J Seddon, Henry Boot's 'Sheet 28' for this tender records 'SEDDON... © from us ... 4321874', under the heading 'Competition'. Henry Boot confirmed that this shows that it gave a cover price of the figure shown to the company noted. Furthermore, the figure Henry Boot recorded on the 'Sheet 28' against G & J Seddon was only £101 less than the figure that G & J Seddon submitted for the tender. The OFT considers that G & J Seddon chose a figure to submit that was close to the cover price provided by Henry Boot.

IV.1328. In addition, G & J Seddon has admitted taking a cover price on this tender, in response to the OFT's letter of 22 March 2007.

IV.1329. The OFT notes in addition that the tenders submitted by Bullock, Mowlem and G & J Seddon were all higher than the tender submitted by Henry Boot, the pattern consistent with cover prices having been provided.

IV.1330. The OFT therefore concludes that contact took place between Henry Boot and Bullock, between Henry Boot and Mowlem, and between Henry Boot and G & J Seddon. The OFT also concludes that Henry Boot supplied figures to each of Bullock, Mowlem and G & J Seddon for cover bids.

IV.1331. The OFT is satisfied that the facts set out in paragraphs IV.1306 to IV.1330 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.³⁸²⁶ In particular:

- (a) the provision of figures for cover bids from Henry Boot to each of Bullock, Mowlem and G & J Seddon was not unilateral³⁸²⁷, and contravenes the principle against direct or indirect contact between competitors;³⁸²⁸
- (b) Bullock, Mowlem and G & J Seddon can each be presumed to have taken account of the information received from Henry Boot (i.e. the respective cover prices) when determining their own conduct in the tendering process,³⁸²⁹ and
- (c) Henry Boot can be presumed to have taken account of the information it received from each of Bullock, Mowlem and G & J Seddon (i.e. that none of them intended to submit competitive bids) when determining its own conduct in the tendering process.³⁸³⁰

IV.1332. In its response to the Statement, Henry Boot stated in respect of this Infringement that it '*denies that its knowledge of Bullock, Mowlem and G & J Seddon taking cover prices affected its own conduct in the tendering process. Henry Boot calculated its tender price in isolation from its knowledge of the*

³⁸²⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁸²⁷ See paragraph IV.73 of the General comments on cover pricing section.

³⁸²⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁸²⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁸³⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

*intentions of other contractors*³⁸³¹ and *'Henry Boot was not aware of the intentions of all the tenderers and Henry Boot genuinely wanted to be awarded this tender, it was clearly in Henry Boot's interests to tender competitively'*.³⁸³²

The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption³⁸³³ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Henry Boot has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Henry Boot's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

IV.1333. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Henry Boot and Bullock, between Henry Boot and Mowlem, and between Henry Boot and G & J Seddon in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Saxton Gardens Phase 2, tender deadline 20 December 2000.

Immunity and leniency assessment

IV.1334. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1335. Henry Boot informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Henry Boot will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1336. In respect of this tender, the OFT became aware of bid rigging activities by virtue of information provided by leniency party Henry Boot. Mowlem will not therefore receive 100 per cent immunity in respect of this tender. However, Mowlem will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

³⁸³¹ Written representations of Henry Boot, 27 June 2008, paragraph 6.3.

³⁸³² Written representations of Henry Boot, 27 June 2008, paragraph 6.4.

³⁸³³ See paragraph III.58 of the Legal Background section.

Infringement 40: Upgrade of Six Gregory Flats, Phase 4, Kipling Close, Worksop, Notts – 21 December 2000
Client: Bassetlaw District Council
Parties: Bodill and G Hurst³⁸³⁴

IV.1337. On 28 November 2000, Bassetlaw District Council ('Bassetlaw D C') sought tenders for upgrade of six Gregory Flats, Phase 4, Kipling Close, Worksop, Notts. The return date for the tender was 14:15 on 21 December 2000 and thirteen companies were invited to tender: Bassetlaw D C – DLO, Bodill, D J Atkinson Ltd, Baggaley & Jenkins, J J & A R Jackson, G Hurst, Hewitt and Maughan Ltd, JE & WE Odlin, G G Middleton, SHL Ltd, Leronimo Ltd, Beaufort and Connaught.³⁸³⁵

IV.1338. Bassetlaw D C received the following tender returns by 21 December 2000:³⁸³⁶

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Bassetlaw D C – DLO	19 December 2000	11:20	£60,812.03	Yes
Bodill	21 December 2000	11:35	£85,269.00	
D J Atkinson Ltd	21 December 2000	11:50	£72,672.00	
Baggaley & Jenkins	21 December 2000	12:07	£82,785.00	
J J & A R Jackson	21 December 2000	13:30	£78,842.00	
G Hurst	21 December 2000	13:40	£72,666.00	

IV.1339. The seven other companies declined to tender on or by 28 November 2000.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1340. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten:³⁸³⁷

1. BODILL
2. JACKSONS
3. B & J
- * 4. G HURST GRAHAM [...] [C]
WILL RING US THURS A.M.'

³⁸³⁴ The information from the client (OFT Document Reference 7142) states that the G Hurst subsidiary tendering for this contract was PDH, which was at the time named G Hurst & Sons (Contractors) Limited. Other than in the subsection 'Evidence from other companies – PDH', references in this Infringement to 'G Hurst' are therefore references to Participant Company PDH.

³⁸³⁵ Information from client, OFT Document Reference 7142.

³⁸³⁶ Information from client, OFT Document Reference 7142.

³⁸³⁷ Leniency application, OFT Document Reference 0524.

IV.1341. The tender sheet for this tender also contains a ringed letter 'C' in the top right hand corner of the tender sheet and at the foot of the sheet it states that Bodill's submitted price was £85,269.00.³⁸³⁸

Evidence from leniency applicant Bodill

IV.1342. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1343. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.³⁸³⁹ In respect of this tender, Bodill confirmed that it received a cover price from G Hurst³⁸⁴⁰ and that it submitted a *'token tender'*.³⁸⁴¹

IV.1344. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1345. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is applicable to this tender.

Evidence from other companies – G Hurst

IV.1346. The OFT wrote to PDH on 27 April 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that PDH had participated in bid rigging on this tender. In response to this letter David Hurst, Managing Director of PDH, in a telephone call on 15 June 2007 confirmed that PDH was rejecting the OFT's Fast Track Offer.³⁸⁴²

IV.1347. The OFT subsequently wrote to PDH's ultimate parent company at the time of this Infringement, G Hurst, on 6 November 2007, asking it to comment on PDH's response to the OFT's Fast Track Offer, given that the OFT intended to hold G Hurst jointly and severally liable for any infringements committed by PDH in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, G Hurst said it was *'...not aware of and do not believe there has been any contravention of the Competition Act 1998 by this Company'*.³⁸⁴³

IV.1348. The telephone number set out in Bodill's tender sheet, [.....] [C], was the PDH telephone number, indicating that Bodill contacted PDH in respect of this tender.³⁸⁴⁴

³⁸³⁸ Leniency application, OFT Document Reference 0524.

³⁸³⁹ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

³⁸⁴⁰ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

³⁸⁴¹ Tender Analysis, OFT Document Reference 0849, page 1.

³⁸⁴² File note of telephone conversation, OFT Document Reference 10743.

³⁸⁴³ Response from G Hurst & Sons, OFT Document Reference 14056, page 1.

³⁸⁴⁴ FAME Report, OFT Document Reference 11914, page 14.

IV.1349. In their responses to the Statement, G Hurst and PDH each stated '*The company believes that this evidence is not conclusive that the G Hurst [sic] cooperated with Bodills*' in respect of this Infringement.³⁸⁴⁵ G Hurst and PDH further noted that Graham Rye, the director of PDH with responsibility for estimating and the submission of tenders had not been part of the management structure since 30 April 2004. The companies therefore noted that the current Managing Director was '*unable to defend or comment further on any alleged action of a former Director of the company*'.³⁸⁴⁶

IV.1350. The OFT considers that the information as set out in the Statement together with the evidence from the OFT's file provided with the Statement was sufficient for G Hurst and PDH to review their records and/or contact relevant individuals and locate the necessary information for its own defence. It appears that to the extent that G Hurst and PDH are unable to adduce evidence in their defence this results from management changes and/or not having kept records in respect of this tender, rather than the OFT's case being insufficient. However, the absence of documentary records or direct access to witnesses cannot of itself exculpate G Hurst from an Infringement where other evidence is available which the OFT considers implicates it, and indeed is sufficient to substantiate its involvement.

The OFT's analysis of the evidence and finding

IV.1351. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.1352. Bodill and G Hurst each accepted an invitation to tender for this contract.

IV.1353. G Hurst completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work.

IV.1354. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.

IV.1355. In regard to G Hurst, Bodill's tender sheet records '*G HURST GRAHAM [.....] [C] WILL RING US THURS A.M.*' and there is a ringed letter 'C' in the top right hand corner of the tender sheet. Bodill has confirmed that this shows that it received a cover price from G Hurst. Bodill recorded on the tender sheet the figure £85,269.00 as the tender figure and this was the figure that Bodill submitted. Furthermore, the telephone number set out in Bodill's tender sheet, [.....] [C], is the G Hurst telephone number, indicating that Bodill contacted G Hurst in respect of this tender on the Thursday morning, the day that the tender submission was due.

IV.1356. The OFT notes in addition that the tender submitted by Bodill was higher than the tender submitted by G Hurst, a pattern consistent with a cover price having been provided.

³⁸⁴⁵ Written representations of G Hurst & Sons, 27 May 2008, page 3; and written representations of PDH, 27 May 2008, page 3.

³⁸⁴⁶ Written representations of G Hurst & Sons, 27 May 2008, page 3; and written representations of PDH, 27 May 2008, page 3.

IV.1357. The OFT therefore concludes that contact took place between G Hurst and Bodill. The OFT also concludes that G Hurst supplied a figure to Bodill for a cover bid.

IV.1358. The OFT is satisfied that the facts set out in paragraphs IV.1340 to IV.1357 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁸⁴⁷ In particular:

- (a) the provision of a figure for a cover bid from G Hurst to Bodill was not unilateral³⁸⁴⁸, and contravenes the principle against direct or indirect contact between competitors;³⁸⁴⁹
- (b) Bodill can be presumed to have taken account of the information received from G Hurst (i.e. the cover price) when determining its own conduct in the tendering process;³⁸⁵⁰ and
- (c) G Hurst can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁸⁵¹

IV.1359. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and G Hurst, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for upgrade of six Gregory Flats, Phase 4, Kipling Close, Worksop, Notts, tender deadline 21 December 2000.

Immunity and leniency assessment

IV.1360. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1361. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 41: Chilwell T. A. Centre, Garage and Workshop – 11 January 2001
Client: East Midlands Reserve Forces and Cadet Association
Parties: Sol and Ballast

IV.1362. On 20 November 2000, the East Midlands Reserve Forces and Cadet Association ('EMRFCA') sought tenders for the construction of additional garages and workshop in Chilwell. The following six companies were invited to

³⁸⁴⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁸⁴⁸ See paragraph IV.73 of the General comments on cover pricing section.

³⁸⁴⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁸⁵⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁸⁵¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

tender: Conrad Construction Ltd, Sol, Dean & Dyball, Thomas Fish, Mowlem and Ballast. The closing date for return of tender was 11 January 2001 by 12:00 noon.³⁸⁵²

IV.1363. EMRFCA received the following tender returns:³⁸⁵³

Company	Date and time tender received	Amount of Tender	Awarded Tender
Conrad Construction Ltd	1:50 pm 11 January 2001	£664,153.56	
Sol	12:00 noon 11 January 2001	£649,982.00	
Dean & Dyball	12:00 noon 11 January 2001	£648,990.00	
Thomas Fish	12:00 noon 11 January 2001	£653,073.00	
Mowlem	12:00 noon 11 January 2001	£661,431.00	
Ballast	12:00 noon 11 January 2001	£617,667.00	Yes

Evidence of agreement and/or concerted practice

Contemporaneous evidence from leniency applicant Sol – Tender Register and Estimating Board Report, dated 22 January 2001

IV.1364. During the OFT visit to Sol's premises under section 27 on 18 January 2006 a copy of Sol's Tender Register was taken. This contained the following entry for this contract:³⁸⁵⁴

DATE DUE	JOB DESCRIPTION	CLIENT	ARCHITECT	QUANTITY SURVEYOR
11 JAN '01	CHILWELL TA CENTRE ADDITIONAL GARAGE & WORKSHOP	EAST MIDLAND RESERVE FORCES & CADET ASSOCIATION	BUILDING DESIGN P'SHIP	BUILDING DESIGN P'SHIP

TYPE	TENDER SUM	ESTIMATOR	COMPETITION	RESULTS & COMMENTS
B.Q.	649,982	'C'	CONRAD CONSTRUCTION (STRATFORD ON AVON) MOWLEM FISH BALLAST CONSTRUCTION DEAN DYBELL	BALLAST WILTSHIRE BOQ CALLED

IV.1365. During the OFT visit to Sol's premises, a copy of Sol's Estimating Board Report ('EBR') was also taken, which contains the following entry for this contract:³⁸⁵⁵

³⁸⁵² Information from client, OFT Document Reference 7803.

³⁸⁵³ Information from client, OFT Document Reference 7803.

³⁸⁵⁴ Tender Register, OFT Document Reference 4169, page 20.

³⁸⁵⁵ Estimating Board Report, OFT Document Reference 4167, page 64.

<u>DATE</u>	<u>PROJECT</u>	<u>CLIENT</u>	<u>ARCHITECT</u>	<u>QUANTITY SURVEYOR</u>	<u>JOB</u>	<u>LOCATION</u>
11 Jan '01	Chilwell TA Centre Garage & Workshop	East Midlands Reserve Forces & Cadet Association	Building Design P'ship	Building Design P'ship	NB	Notts

<u>TYPE</u>	<u>FUNDED</u>	<u>SECTOR</u>	<u>TENDER VALUE</u>	<u>MARGIN</u>	<u>ESTIMATOR</u>
BQ	Public	Government	£649,982		'C'

Evidence from leniency applicant Sol

IV.1366. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.1367. In particular, Sol provided the OFT with an analysis of its tender sheets since March 2000. In respect of the tender for the Chilwell T.A. Centre Garage and Workshop, dated 11 January 2001, Sol confirmed that it took a cover price from a 'Ken Orde'³⁸⁵⁶ at Ballast because '*Project too small but a Client we have carried out a number of projects for*'.³⁸⁵⁷

IV.1368. In its response to the Statement, Sol confirmed in respect of this Infringement that it '*...considers EMRFCA to be a valued and established client. Sol had previously undertaken 4 other jobs for EMRFCA. The Chilwell job carried a value circa £660,000 which Sol, deemed to [sic] small for it. Allowing for inflation this can be shown by the comparison of the value of this job with the previous jobs Sol had carried out for EMRFCA ... Sol did not wish to offend EMRFCA and therefore sought a cover price from Ballast, which was duly provided*'.³⁸⁵⁸

Witness evidence from leniency applicant Sol

IV.1369. During interviews conducted in connection with its leniency application, Sol's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.1370. When interviewed in connection with this tender, John Cummings ('JC'), Chief Estimator of Sol, identified the handwriting in the Tender Register as his, with the exception of that in the '*Competition*' column which he identified as that of estimators' assistant Shirley Peters. He was asked when the entries had been made. He replied, '*...when the tender... arrived...when the tender sum, which would have been, you know, a day or half a day before the tender was due*

³⁸⁵⁶ The same individual was referred to in John Cummings' interview as Ken Orpe (see paragraph IV.1371). The OFT does not consider this discrepancy to be material and notes that no Party has made representations to the contrary.

³⁸⁵⁷ Tender Cover Price Analysis, OFT Document Reference 4359, page 3.

³⁸⁵⁸ Written representations of Sol, 27 June 2008, Annex 2, Detailed Explanation, paragraphs 1 and 2.

in'.³⁸⁵⁹ He was asked what 'C' in the 'Estimator' column meant. He replied, 'The 'C' means cover'.³⁸⁶⁰ He was asked to explain what the names in the 'Competition' column denoted. JC said, 'Yeah, they're competitors, yeah. I mean, some of them I'm more familiar with than others. Obviously out here, you know, Conrad Construction, no, it doesn't ring any loud bells but all the others do'.³⁸⁶¹

IV.1371. JC confirmed, 'I had a cover from Ballast Wiltshire'³⁸⁶², and confirmed that this would have been based on his recollection. He said that 'the guy who gave' him the cover price, Ken Orpe, had worked with him for ten years.³⁸⁶³

IV.1372. JC said that the entry 'BALLAST WILTSHIRE BOQ CALLED' would have been made post-tender, when the client requested Ballast's Bill of Quantities.³⁸⁶⁴

IV.1373. In connection with the EBR, JC was asked what the 'C' in the 'Estimator' column meant. He replied, 'Cover'. He was further asked what the 'Tender Value' of '649,982' was. He replied, 'That's the, you know, the cover price I got'.³⁸⁶⁵

Evidence from other companies – Ballast

IV.1374. The OFT wrote to Ballast on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Ballast had participated in bid rigging on this tender. In response to this letter the OFT received information that Ballast had been dissolved.³⁸⁶⁶

IV.1375. The OFT subsequently wrote to Ballast's ultimate parent company at the time of this Infringement, Ballast Nedam, on 8 November 2007, asking it to comment on the letter sent Ballast on 22 March 2007 in respect of the OFT's Fast Track Offer, given that the OFT intended to hold Ballast Nedam jointly and severally liable for any infringements committed by Ballast in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Ballast Nedam admitted 'Ballast PLC engaged in bid rigging activities on this tender but Ballast Nedam NV cannot recall details of the other party/parties involved'.³⁸⁶⁷

IV.1376. In its response to the Statement, Ballast Nedam confirmed that this Infringement '*...relates to a call for tender for the construction of the Chilwell T.A. Centre. According to the [Statement], Ballast plc gave a cover price to a company called Sol which apparently had indicated that it did not want to win the contract as it considered it to be too small. Ballast plc won the contract*

³⁸⁵⁹ Interview transcript, OFT Document Reference 11369, page 5.

³⁸⁶⁰ Interview transcript, OFT Document Reference 11369, page 5.

³⁸⁶¹ Interview transcript, OFT Document Reference 11369, page 5.

³⁸⁶² Interview transcript, OFT Document Reference 11369, page 6.

³⁸⁶³ Interview transcript, OFT Document Reference 11369, page 6. JC also suggested that Ballast's head office was in Chilwell, the location of the works that were the subject of this tender. However Ballast Nedam confirmed in its response to the Statement, that it did not have an office in Chilwell (written representations of Ballast Nedam, 26 September 2008, footnote 5).

³⁸⁶⁴ Interview transcript, OFT Document Reference 11369, page 7.

³⁸⁶⁵ Interview transcript, OFT Document Reference 11369, page 7.

³⁸⁶⁶ Response from Deloitte & Touche, OFT Document Reference 10239.

³⁸⁶⁷ Response from Ballast Nedam, OFT Document Reference 14173, page 3.

over four competitors (excluding Sol). There is no indication or suggestion that Ballast plc attempted to give cover prices to the other four participants in the tender. The value of the contract amounted to £617,677'.³⁸⁶⁸ Ballast Nedam's response goes on to make remarks in mitigation '[w]ithout contesting the evidence and facts presented in the SO'.³⁸⁶⁹

The OFT's analysis of the evidence and finding

IV.1377. From the evidence presented above, the OFT draws the following conclusions.

IV.1378. Sol and Ballast each accepted an invitation to tender for this contract. It appears that Ballast completed the estimating process for the tender for this contract. This is shown by the fact that it submitted the lowest bid and won the contract.

IV.1379. Sol was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1380. Sol's Tender Register entry for this contract shows that Sol submitted the sum of £649,982 and entered 'C' in the 'Estimator' column of the same document. This indicates that Sol did not appoint an estimator for this tender but instead sought a cover price. Sol has confirmed in its leniency application that it took a cover price from Ballast because the project was too small.

IV.1381. In interview, JC of Sol confirmed that, based upon his recollection, he obtained a cover price from Ken Orpe at Ballast.

IV.1382. Sol's EBR for this tender shows that the figure £649,982 in the 'Tender Sum' column was the same as that recorded in the 'Tender Register'. JC of Sol confirmed in interview that this figure was the cover price he obtained for this tender. There is no entry in the 'Margin' [profits and overheads] column and a 'C' is entered in the 'Estimator' column of the EBR. These indicate that JC reported the figure of £649,982 to Sol's Board as its tender submission price for this tender and that this figure was a cover price. It was, therefore, unnecessary to appoint an estimator to produce any preliminary figures.

IV.1383. The tender figure of £649,982 submitted by Sol is in keeping with a cover price being sufficiently higher than the winning bid to remain credible while also ensuring that the undertaking lost the tender.

IV.1384. The OFT notes that of the companies that submitted bids for this tender, only two submitted bids below Sol's, and that only Ballast's bid was significantly below that of Sol. It is therefore highly unlikely that Sol obtained a cover price from anyone other than Ballast for this tender. The OFT also notes that the only other company below Sol, Dean & Dyball, was not named in Sol's list of companies with whom it engaged in cover pricing.³⁸⁷⁰

IV.1385. The OFT notes that both companies have admitted to engaging in bid rigging in respect of this tender.

³⁸⁶⁸ Written representations of Ballast Nedam, 26 September 2008, paragraph 23.

³⁸⁶⁹ Written representations of Ballast Nedam, 26 September 2008, paragraph 26.

³⁸⁷⁰ Cover Prices – Company and Contact Person, OFT Document Reference 4361.

IV.1386. The OFT therefore concludes that contact took place between Sol and Ballast. The OFT also concludes that Ballast supplied a figure to Sol for a cover bid.

IV.1387. The OFT is satisfied that the facts set out in paragraphs IV.1364 to IV.1386 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁸⁷¹ In particular:

- (a) The provision of a figure for a cover bid from Ballast to Sol was not unilateral³⁸⁷², and contravenes the principle against direct or indirect contact between competitors;³⁸⁷³
- (b) Sol can be presumed to have taken account of the information received from Ballast (i.e. the cover price) when determining its own conduct in the tendering process;³⁸⁷⁴ and
- (c) Ballast can be presumed to have taken account of the information it received from Sol (i.e. that Sol did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁸⁷⁵

IV.1388. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Ballast and Sol in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for refurbishment work at Chilwell T. A. Centre, Foresters House, Chilwell date of tender 11 January 2001.

Immunity and leniency assessment

IV.1389. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1390. Sol did not inform the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities during the visit by the OFT under section 27 to Sol's premises on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Sol in respect of this Infringement.

Infringement 42: Uxbridge College, Academy Building – 12 January 2001
Client: Uxbridge College
Parties: Mansell and Try Accord³⁸⁷⁶

IV.1391. In 2001, Uxbridge College sought tenders for a new build Academy Building, Uxbridge College.³⁸⁷⁷ The following five companies were invited to tender: Bickerton Construction, Haymills, Leadbitter Construction, Mansell and Try

³⁸⁷¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁸⁷² See paragraph IV.73 of the General comments on cover pricing section.

³⁸⁷³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁸⁷⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁸⁷⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁸⁷⁶ Try Accord is a subsidiary of Galliford Try.

³⁸⁷⁷ Information from client, OFT Document Reference 9903f.

Accord, the date and time of tender return was 12 January 2001 before 12:00 noon.³⁸⁷⁸

IV.1392. Uxbridge College received the following tender returns:³⁸⁷⁹

Company	Date & time tender received	Amount of tender	Awarded contract
Bickerton Construction Ltd	12 January 2001 before 12:00 noon	£5,004,638	
Haymills	12 January 2001 before 12:00 noon	£5,096,995	
Leadbitter Construction	12 January 2001 before 12:00 noon	£4,741,000	
Mansell	12 January 2001 before 12:00 noon	£4,722,693	
Try Accord	12 January 2001 before 12:00 noon	£3,837,611	YES

IV.1393. In its response to the Statement, Galliford Try stated '*The tender commenced as a Traditional Tender, and Try Accord actually submitted a tender price of approximately £4,450,000, having given a cover price to Mansell of £4,722,693. The price set out in the SO (£3,837,611) is the contract price, i.e. the price for which Try Accord ultimately agreed to undertake a different scope of work ... Effectively, this was a negotiated contract*'.³⁸⁸⁰

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.1394. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a Mansell managing estimator, workload reports. The 2001 workload report for major projects contained the following entry:³⁸⁸¹

EST NO.	LOCATION/DESCRIPTION	OUR BID			
		BID	NET	LESS PROV.	% MARGIN
67603	Uxbridge – College, Academy Building		4722693	4722693	

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS. %	
			1 of 3		(Try Accord)

Evidence from leniency applicant Mansell

IV.1395. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.³⁸⁸² This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

³⁸⁷⁸ Information from client, OFT Document Reference 9903f.

³⁸⁷⁹ Information from client, OFT Document Reference 9903f.

³⁸⁸⁰ Written representations of Galliford Try, 27 June 2008, paragraph 6.17.2.

³⁸⁸¹ Leniency application, OFT Document Reference B3538, page 2.

³⁸⁸² Leniency application, OFT Document Reference B0734.

IV.1396. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Try Accord and that this cover price was taken due to *'insufficient tender period: resource'* at Mansell.³⁸⁸³

Witness evidence from leniency applicant Mansell

IV.1397. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.1398. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *'...that's the company I, I actually received that ... cover from'*.³⁸⁸⁴ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.³⁸⁸⁵

Evidence from other companies – Galliford Try

IV.1399. The OFT wrote to Galliford Try on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Galliford Try had participated in bid rigging on this tender. In response to this letter Galliford Try admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party / parties involved'*.³⁸⁸⁶

IV.1400. In its response to the Statement, Galliford Try stated *'Galliford Try has decided not to withdraw its acceptance of the Fast Track Offer Letter'*³⁸⁸⁷ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.1401. From the evidence presented above, the OFT draws the following conclusions.

IV.1402. Mansell and Try Accord each accepted an invitation to tender for this contract.

IV.1403. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Try Accord completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Try Accord being the lowest received and the fact that it won the contract.

IV.1404. Mansell's 2001 workload report records *'(Try Accord)'*, in the Remarks column. Mansell confirmed that this shows that it took a cover price from the

³⁸⁸³ Leniency application, OFT Document Reference B1351, page 2.

³⁸⁸⁴ Interview transcript, OFT Document Reference 11516, page 21.

³⁸⁸⁵ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

³⁸⁸⁶ Response from Galliford Try, OFT Document Reference 10320, page 3.

³⁸⁸⁷ Written representations of Galliford Try, 27 June 2008, paragraph 1.7.

company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.1405. In addition, Galliford Try has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.1406. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Try Accord, the pattern consistent with a cover price having been provided.

IV.1407. In addition the OFT notes that Try Accord's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from Try Accord.

IV.1408. The OFT therefore concludes that contact took place between Mansell and Try Accord. The OFT also concludes that Try Accord supplied a figure to Mansell for a cover bid.

IV.1409. The OFT is satisfied that the facts set out in paragraphs IV.1394 to IV.1408 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁸⁸⁸ In particular:

- (a) the provision of a figure for a cover bid from Try Accord to Mansell was not unilateral³⁸⁸⁹, and contravenes the principle against direct or indirect contact between competitors;³⁸⁹⁰
- (b) Mansell can be presumed to have taken account of the information received from Try Accord (i.e. the cover price) when determining its own conduct in the tendering process;³⁸⁹¹ and
- (c) Try Accord can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁸⁹²

IV.1410. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Try Accord in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Uxbridge College, Academy Building, tender deadline 12 January 2001.

Immunity and leniency assessment

IV.1411. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

³⁸⁸⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁸⁸⁹ See paragraph IV.73 of the General comments on cover pricing section.

³⁸⁹⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁸⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁸⁹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.1412. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 43: Prebendal Estate, Phase 3, 52 Housing Refurbishments
 Aylesbury – 17 January 2001**
Client: Aylesbury Vale District Council
Parties: Mansell and J J McGinley

IV.1413. On 28 November 2000, Aylesbury Vale District Council ('AVDC') sought tenders for housing refurbishment works to 52 dwellings at Prebendal Farm Estate.³⁸⁹³ The following five companies were invited to tender: Basil Wyatt and Sons, Fergal Contracting Co Ltd, J B Leadbitter & Co Ltd, J J McGinley and Mansell, the date and time of tender return was 17 January 2001 at noon.³⁸⁹⁴

IV.1414. AVDC received the following tender returns:³⁸⁹⁵

Company	Date tender received	Amount of tender	Awarded contract
Fergal Contracting Co Ltd	17 January 2001	£839,066.85	YES ³⁸⁹⁶
J B Leadbitter & Co Ltd	17 January 2001	£891,643.00	
Basil Wyatt and Sons	17 January 2001	£976,354.00	
J J McGinley	17 January 2001	£989,267.96	
Mansell	17 January 2001	£1,126,525.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.1415. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a Mansell managing estimator, workload reports. The 2001 workload report for major projects contained the following entry:³⁸⁹⁷

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
67947	Aylesbury – Prebendal Estate Ph.3 – 52 Refurbs.		1126525	1126525		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
					(JJ McGinley)

³⁸⁹³ Information from client, OFT Document Reference 7100, page 3.

³⁸⁹⁴ Information from client, OFT Document Reference 7100, page 3.

³⁸⁹⁵ Information from client, OFT Document Reference 7100, page 5.

³⁸⁹⁶ Information from client, OFT Document Reference 7100, page 7. The OFT notes that Fergal Contracting Co. Ltd final amended tender of £869,061.44 was recommended for acceptance. The OFT has not been advised as to whether they were awarded the contract.

³⁸⁹⁷ Leniency application, OFT Document Reference B3538, page 2.

Evidence from leniency applicant Mansell

IV.1416. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.³⁸⁹⁸ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.1417. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from J J McGinley and that this cover price was taken due to '*insufficient tender period: resource*' at Mansell.³⁸⁹⁹

Witness evidence from leniency applicant Mansell

IV.1418. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.1419. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender, when asked what J J McGinley in brackets indicated, BR stated '*That I would have gone to them [to get a cover price]*'.³⁹⁰⁰ BR also stated that J J McGinley '*tend to do that sort of work*'.³⁹⁰¹ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.³⁹⁰²

Evidence from other companies – J J McGinley

IV.1420. The OFT wrote to [.....] [C] on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that [.....] [C] had participated in bid rigging on this tender. The OFT received a response to this letter from the legal representatives of J J McGinley who in this letter stated that J J McGinley admitted '*We engaged in cover pricing activities on this tender with Mansell*'.³⁹⁰³

IV.1421. The OFT subsequently wrote to J J McGinley's ultimate parent company at the time of this Infringement, McGinley Holdings, on 6 November 2007, asking it to comment on J J McGinley's response to the OFT's Fast Track Offer, given that the OFT intended to hold McGinley Holdings jointly and severally liable for any infringements committed by J J McGinley in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, McGinley Holdings' legal representatives stated '*Our client is not able to*

³⁸⁹⁸ Leniency application, OFT Document Reference B0734.

³⁸⁹⁹ Leniency application, OFT Document Reference B1351, page 2.

³⁹⁰⁰ Interview transcript, OFT Document Reference 11516, page 22.

³⁹⁰¹ Interview transcript, OFT Document Reference 11516, page 22.

³⁹⁰² Written representations of Mansell, 27 June 2008, Annex 1, page 6.

³⁹⁰³ Response from J J McGinley, OFT Document Reference 11019, page 1.

respond to the admission of liability by JJM [J J McGinley] concerning events which took place as much as 6 years ago, as neither our client nor our firm has been able to review any of JJM's contract papers in question ...'.³⁹⁰⁴

IV.1422. In its response to the Statement, J J McGinley confirmed that *'it appears that [J J] McGinley engaged in cover pricing with Mansell'*³⁹⁰⁵ in respect of this Infringement. Although McGinley Holdings responded to the Statement, it did not make any specific comment with regard to this Infringement, other than to draw attention to *'factual matters'* which included that *'Mansell sought from JJM a cover price'* and *'Mansell submitted a cover price'*.³⁹⁰⁶

The OFT's analysis of the evidence and finding

IV.1423. From the evidence presented above, the OFT draws the following conclusions.

IV.1424. Mansell and J J McGinley each accepted an invitation to tender for this contract.

IV.1425. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1426. Mansell's 2001 workload report records *'(JJ McGinley)'*, in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.1427. In addition, J J McGinley has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.1428. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that J J McGinley admitted that the party with whom it engaged in bid rigging was Mansell, without being shown the OFT's evidence that Mansell was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.1429. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by J J McGinley, the pattern consistent with a cover price having been provided.

IV.1430. The OFT therefore concludes that contact took place between Mansell and J J McGinley. The OFT also concludes that J J McGinley supplied a figure to Mansell for a cover bid.

IV.1431. The OFT is satisfied that the facts set out in paragraphs IV.1415 to IV.1430 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁹⁰⁷ In particular:

³⁹⁰⁴ Response from McGinley Holdings, OFT Document Reference 14194.

³⁹⁰⁵ Written representations of J J McGinley, 27 June 2008 paragraph 7.

³⁹⁰⁶ Written representations of McGinley Holdings, 27 June 2008, paragraph 32.

³⁹⁰⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from J J McGinley to Mansell was not unilateral³⁹⁰⁸, and contravenes the principle against direct or indirect contact between competitors;³⁹⁰⁹
- (b) Mansell can be presumed to have taken account of the information received from J J McGinley (i.e. the cover price) when determining its own conduct in the tendering process;³⁹¹⁰ and
- (c) J J McGinley can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁹¹¹

IV.1432. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and J J McGinley in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Prebendal Estates, Phase 3, 52 housing refurbishments, tender deadline 17 January 2001.

Immunity and leniency assessment

IV.1433. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1434. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 44: Hospital Street, Dudley Road – 19 January 2001
Client: The City Hospital NHS Trust
Parties: Thomas Vale and Shaylor

IV.1435. On 20 December 2000, The City Hospital NHS Trust ('City Hospital NHS'), now known as Sandwell and West Birmingham Hospitals NHS Trust, sought tenders for the upgrade of Hospital Street, Dudley Road, Birmingham. The following six companies were invited to tender: Wygar, Shaylor³⁹¹², Mansell, Thomas Vale, G F Tomlinson and Chase Norton.³⁹¹³ The deadline for the receipt of tenders was 12:00 noon on 19 January 2001.

IV.1436. City Hospital NHS received the following tender returns:³⁹¹⁴

³⁹⁰⁸ See paragraph IV.73 of the General comments on cover pricing section.

³⁹⁰⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁹¹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁹¹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁹¹² The OFT notes that the client's response records F J Shaylor as tendering for this contract. Until 1 October 2002, Shaylor was known as F J Shaylor (Builders) Limited.

³⁹¹³ Information from client, OFT Document Reference 9695.

³⁹¹⁴ Information from client, OFT Document Reference 9695.

Company	Time & Date tender received	Amount of tender	Awarded contract
Wygar	19 January 2001 Noon	£311,389	
Shaylor	18 January 2001 Noon	£289,346	Yes
Mansell	19 January 2001 Noon	£319,515	
Thomas Vale	19 January 2001 Noon	£303,380	
G F Tomlinson	19 January 2001 Noon	£305,270	
Chase Norton	19 January 2001 Noon	£358,437	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.1437. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:³⁹¹⁵

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T4697	BM	The City Hospital NHS Trust	Upgrading of Hospital Street, Dudley Road, Birmingham		AA

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	19/01/2001 Noon	303,380		Wygar, Mansell, Kilroe, Shaylor	

IV.1438. The Tender Status spreadsheet was maintained at Thomas Vale’s head office by Christopher Keith Trickett (‘CKT’), Chief Estimator at Thomas Vale, who kept a ‘*little black book*’³⁹¹⁶ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Shaylor plus names and a telephone number.³⁹¹⁷

Evidence from leniency applicant Thomas Vale

IV.1439. At Annex 14³⁹¹⁸ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 53 of the schedule under Annex 14 and within the section for 2000 tenders is the following entry:³⁹¹⁹

³⁹¹⁵ Tender Status spreadsheet, OFT Document Reference 4522, page 12.

³⁹¹⁶ Interview Transcript, OFT Document Reference 11418, page 21.

³⁹¹⁷ Contact list, OFT Document Reference 11086, page 22.

³⁹¹⁸ Leniency application, OFT Document Reference 4568.

³⁹¹⁹ Leniency application, OFT Document Reference 4568, page 53.

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T4697	19 January	The City Hospital NHS Trust	Upgrading of Hospital Street, Dudley Road, Birmingham	Taken (Shaylor)	Yes (Tender Spreadsheet)

IV.1440. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.1441. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application³⁹²⁰ and Shaylor appears on this list.

IV.1442. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.1443. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.1444. CKT said that the initials 'AA' which appear in the estimator column for this tender were for Anthony (Tony) Allport ('AA')³⁹²¹ and that the letters 'BM', which appear in the column marked 'DIV', stand for Building and Maintenance Division, based at Thomas Vale's head office.³⁹²² CKT said that AA was Building and Maintenance Division's 'main estimator'³⁹²³ until he emigrated to New Zealand in 2004. In interview, CKT referred to the entry in the Tender Status spreadsheet for this tender as follows: *'Well Tony Allport - AA is the estimator, category B is the category which indicated at that time that it probably was a cover. Thomas Vale's figure was £303,380, the tender return date the 19th of January 2001 and Shaylors are highlighted in the box which indicates Shaylors was a cover figure'*.³⁹²⁴ CKT confirmed that the Tender Status spreadsheet would have been updated at the time by AA and that Richard Shaylor, director of Shaylor, would have been contacted by Thomas Vale for a cover price.

IV.1445. In its response to the Statement, Shaylor noted that Richard Shaylor could not recall a specific contact from Thomas Vale in relation to this tender and suggested that it was more likely that contact was made with Shaylor's estimator responsible for the tender.³⁹²⁵ This is not significant to the OFT's finding of an infringement and the OFT is not imposing any form of uplift at step 4 of Shaylor's penalty calculation for director involvement for this

³⁹²⁰ Cover pricing activity: Key competitors, OFT Document Reference 4524.

³⁹²¹ Interview transcript, OFT Document Reference 13855, page 20.

³⁹²² Interview transcript, OFT Document Reference 11418, page 10.

³⁹²³ Interview transcript, OFT Document Reference 11418, page 3.

³⁹²⁴ Interview transcript, OFT Document Reference 13855, page 20.

³⁹²⁵ Written representations of Shaylor, 25 June 2008, paragraph 3.2.3.

Infringement. Richard Shaylor was not listed as a director at Companies House at the time of this Infringement.

Evidence from other companies – Shaylor

IV.1446. The OFT wrote to Shaylor on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Shaylor had participated in bid rigging on this tender. In response, Shaylor wrote to the OFT on 27 April 2007³⁹²⁶ and admitted that it engaged in cover pricing on this tender but *'cannot recall details of the other party/parties involved'*. In its response to the OFT's Fast Track Offer, Shaylor stated it had not made admissions where it believed no cover had been given or taken or where there was a lack of information.³⁹²⁷ The OFT infers from this that where an admission was made, Shaylor had some form of information or evidential support for that admission.

IV.1447. In its response to the Statement, Shaylor stated *'Shaylor is not withdrawing any of these admissions or proposing to challenge the evidence in relation to any of the three alleged infringements'*.³⁹²⁸

The OFT's analysis of the evidence and finding

IV.1448. From the evidence presented above, the OFT draws the following conclusions.

IV.1449. Thomas Vale and Shaylor each accepted an invitation to tender for the upgrade to Hospital Street, Dudley Road, Birmingham.

IV.1450. Shaylor completed the estimating process for the tender and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Shaylor being the lowest received and the fact that it won the contract.

IV.1451. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that this was a cover price.

IV.1452. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records four competitors who were also invited to tender for this contract, namely Wygar, Mansell, Kilroe and Shaylor. Shaylor is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged. Thomas Vale's bid to the client on the Tender Status spreadsheet is *'£303,380.00'* which matches the amount recorded by the client City Hospital NHS.

IV.1453. City Hospital NHS also received a tendered amount of £289,346 from Shaylor, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Shaylor to

³⁹²⁶ Response from Shaylor, OFT Document Reference 10837, page 5.

³⁹²⁷ Response from Shaylor, OFT Document Reference 10837, page 3.

³⁹²⁸ Oral representations of Shaylor, 29 July 2008, pages 2 and 3.

Thomas Vale. Shaylor is the only company whose figure is below that of Thomas Vale and so Thomas Vale could only have received cover from Shaylor.

IV.1454. The OFT notes that although four competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Shaylor. This indicates that a conscious decision was made to differentiate Shaylor from the other known competitors. In addition, the designated estimator for this tender was AA who was said by CKT to be one of those who could be depended upon to update the Tender Status spreadsheet reliably. CKT said that AA was *'quite good at this, to be honest. He was probably the one guy [other than CKT] who did keep it up to date'*.³⁹²⁹ CKT added *'he was quite disciplined and able to sort of update it'*.³⁹³⁰

IV.1455. Thomas Vale admitted that Shaylor was one of the key competitors with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price had been received by Thomas Vale from Shaylor.

IV.1456. Finally, both parties admit to bid rigging activities on this tender. In response to the OFT's letter of 22 March 2007, Shaylor admitted to giving a cover price on this tender, but did not recall the other party/parties involved.

IV.1457. The OFT therefore concludes that contact took place between Thomas Vale and Shaylor. The OFT also concludes that Shaylor supplied a figure to Thomas Vale for a cover bid.

IV.1458. The OFT is satisfied that the facts set out in paragraphs IV.1437 to IV.1457 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁹³¹ In particular:

- (a) the provision of a figure for a cover bid from Shaylor to Thomas Vale was not unilateral³⁹³², and contravenes the principle against direct or indirect contact between competitors;³⁹³³
- (b) Thomas Vale can be presumed to have taken account of the information received from Shaylor (i.e. the cover price) when determining its own conduct in the tendering process;³⁹³⁴ and
- (c) Shaylor can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.³⁹³⁵

IV.1459. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Shaylor in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the upgrade to Hospital Street, Dudley Road, Birmingham, tender deadline 19 January 2001.

³⁹²⁹ Interview transcript, OFT Document Reference 11419, pages 7 and 8.

³⁹³⁰ Interview transcript, OFT Document Reference 11419, page 10.

³⁹³¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁹³² See paragraph IV.73 of the General comments on cover pricing section.

³⁹³³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁹³⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁹³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.1465. The tender sheet for this tender states that Bodill's submitted figure was £179,371.³⁹³⁹

IV.1466. Andrew Bodill ('AB'), an estimator at Bodill, priced this tender and therefore, as explained in paragraphs IV.237 to IV.241 above, he made a copy of the original tender sheet. AB's copy tender sheet was also provided to the OFT. The annotations under the section headed '*Tenderers*' are identical on both copies, demonstrating that AB's copy is an exact photocopy of the original. AB has indicated that the handwritten annotations '*£206092.00p. © Peter Baines [.....] [C]*', under the section headed '*Tenderers*' were made by him.³⁹⁴⁰ AB also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1467. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1468. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.³⁹⁴¹ In respect of this tender, Bodill confirmed that it gave a cover price to Peter Baines.³⁹⁴²

IV.1469. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1470. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Peter Baines

IV.1471. The OFT wrote to Peter Baines on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Peter Baines had participated in bid rigging on this tender. In response to this letter, Peter Baines admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party involved*'.³⁹⁴³

IV.1472. In its response to the Statement, Peter Baines confirmed its acceptance of the OFT's Fast Track Offer.³⁹⁴⁴

³⁹³⁹ Tender sheet, OFT Document Reference 0526.

³⁹⁴⁰ Contracts document, OFT Document Reference 6426, pages 41 and 52.

³⁹⁴¹ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

³⁹⁴² Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

³⁹⁴³ Response from Peter Baines, OFT Document Reference 10758, page 2.

³⁹⁴⁴ Written representations of Peter Baines, 26 June 2008, paragraphs 3.1 to 3.4 and 5.5.

The OFT's analysis of the evidence and finding

IV.1473. From the evidence presented above, the OFT draws the following conclusions.

IV.1474. Bodill and Peter Baines each accepted an invitation to tender for this contract.

IV.1475. Bodill completed the estimating process for the tender for this contract and they submitted a bid with the hope of winning the work.

IV.1476. Peter Baines were unable to submit a tender by the return date and/or did not want to win this tender.

IV.1477. In regard to Peter Baines, Bodill's tender sheet records '*£206092.00p.* ©3. *Peter Baines* [.....] [C]'. Bodill has confirmed that this indicates that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £206,092 against Peter Baines, a figure that was identical other than the reversal of two of the figures, to the tender price that Peter Baines submitted, which was £206,902. Furthermore, the telephone number set out in Bodill's tender sheet, '[.....] [C]', is a telephone number for Peter Baines³⁹⁴⁵, indicating that Bodill contacted Peter Baines in respect of this tender.

IV.1478. The OFT notes in addition that the tender submitted by Peter Baines was higher than the tender submitted by Bodill, the pattern consistent with a cover price having been provided. Furthermore, the OFT also notes that Peter Baines has admitted to bid rigging in relation to this tender.

IV.1479. The OFT therefore concludes that contact took place between Peter Baines and Bodill. The OFT also concludes that Bodill supplied a figure to Peter Baines for a cover bid.

IV.1480. The OFT is satisfied that the facts set out in paragraphs IV.1464 to IV.1479 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.³⁹⁴⁶ In particular:

- (a) the provision of a figure for a cover bid from Bodill to Peter Baines was not unilateral³⁹⁴⁷, and contravenes the principle against direct or indirect contact between competitors;³⁹⁴⁸
- (b) Peter Baines can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;³⁹⁴⁹ and
- (c) Bodill can be presumed to have taken account of the information it received from Peter Baines (i.e. that Peter Baines did not intend to submit a competitive bid) when determining its conduct in the tendering process.³⁹⁵⁰

IV.1481. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place

³⁹⁴⁵ FAME report, OFT Document Reference 12301, page 1.

³⁹⁴⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁹⁴⁷ See paragraph IV.73 of the General comments on cover pricing section.

³⁹⁴⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁹⁴⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁹⁵⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Peter Baines and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the repair of storm-damaged roofs at Rock City, Talbot Street, Nottingham, tender deadline 19 January 2001.

Immunity and leniency assessment

IV.1482. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1483. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 46: New House at Western Terrace, The Park, Nottingham – 22 January 2001
Client: Marsh & Grochowski
Parties: Bodill, G F Tomlinson, North Midland and Robert Woodhead

IV.1484. On 13 December 2000, Marsh & Grochowski sought tenders for a new house at Western Terrace, The Park, Nottingham. The return date for the tender was 22 January 2001 and six companies were invited to tender: William Woodsend, Robert Woodhead, North Midland, Craske, Bodill and G F Tomlinson.³⁹⁵¹

IV.1485. Marsh & Grochowski received the following tender returns on 22 January 2001:³⁹⁵²

Company	Date tender received	Amount of tender	Awarded the tender
William Woodsend	22 January 2001	£329,200	
Robert Woodhead	22 January 2001	£324,015	
North Midland	22 January 2001	£319,988	
Craske	22 January 2001	£232,814	Yes
Bodill	22 January 2001	£286,395	
G F Tomlinson	22 January 2001	£310,483	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1486. In Bodill’s original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed ‘Tenderers’, the following entries have been made, all of which are handwritten:³⁹⁵³

³⁹⁵¹ Information from client, OFT Document Reference 8711.

³⁹⁵² Information from client, OFT Document Reference 8711.

³⁹⁵³ Tender sheet, OFT Document Reference 0527.

1. BODILL

£310400 ① 2. TOMLINSON © FROM US
26 Wks Mr. THOMPSON

3. FRUDD

£319999 ② 4. 24 Wks NORTH MIDS CONST © FROM US
NOTTINGHAM [...] [C] CHRIS WHEELHOUSE

£324015 ③ 5. R. WOODHEAD © FROM US
26 Wks Ben [...] [C] BOB JOHNSON
Hunter

[...] [C] 6. WOODSEND [...] [C]

7. CRASKE'

IV.1487. The tender sheet states that Bodill's submitted figure was £286,395.³⁹⁵⁴

IV.1488. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations '£310400 ① 26 Wks', '£319999 ② 24 Wks NORTH MIDS CONST © FROM US [.....] [C] CHRIS WHEELHOUSE', '£324015 ③ 26 Wks Ben Hunter', '£329107 TBA' and 'CRASKE' under the section headed 'Tenderers' were made by him.³⁹⁵⁵ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1489. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '© FROM US Mr. THOMPSON', '© FROM US [.....] [C] BOB JOHNSON' and '©? FROM US' under the section headed 'Tenderers' were made by him.³⁹⁵⁶ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1490. In its response to the Statement, North Midland suggested that the handwritten notes on the tender sheet were not reliable because they included the name of Frudd, which did not tender for this contract.³⁹⁵⁷ The OFT does not consider this undermines the accuracy of the remainder of the notes on the tender sheet. The OFT considers it entirely possible that Bodill initially recorded a list of companies whom it believed, or had been informed, were tendering for the project. That list subsequently proved not to be entirely accurate, but was still used in the meantime (as the fact that Frudd was not tendering for this contract may not have become apparent to Bodill until after the tender deadline) for annotating those companies which *did* tender and to whom a cover was provided. The OFT notes that there is no indication on the tender sheet that any

³⁹⁵⁴ Tender sheet, OFT Document Reference 0527.

³⁹⁵⁵ Contracts document, OFT Document Reference 6426, pages 86 and 98.

³⁹⁵⁶ Contracts document, OFT Document Reference 6426, pages 1 and 13.

³⁹⁵⁷ Written representations of North Midland, 26 June 2008, page 4.

contact was made with Frudd, and therefore does not consider that the presence of Frudd's name on the list in any way undermines its conclusions that contact was made with other companies on the tender sheet, as indicated by the annotation '©' on that sheet.

IV.1491. North Midland also suggested that if Chris Wheelhouse ('CW'), North Midland's estimator for this contract, had contacted Bodill for a cover price he would have left his direct number instead of North Midland's switchboard number.³⁹⁵⁸ The OFT does not consider that the fact that Bodill recorded a switchboard number on its tender sheet, rather than CW's direct line telephone number, undermines the OFT's case that CW requested a cover price from Bodill on this tender. Bodill has recorded a contact number for North Midland, which North Midland has itself identified as its switchboard number, and the contemporaneous evidence further notes CW's name, whom North Midland has confirmed was the estimator on this tender. Not leaving a direct telephone number is in no way incompatible with requesting a cover price. CW may have chosen for any number of reasons to leave the switchboard number, or indeed may have not left a number at all such that Bodill had to contact him via the central number.

Evidence from leniency applicant Bodill

IV.1492. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1493. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.³⁹⁵⁹ In respect of this tender, Bodill confirmed that it gave cover prices to G F Tomlinson, North Midland, Robert Woodhead and William Woodsend.³⁹⁶⁰

IV.1494. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1495. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – G F Tomlinson

IV.1496. The OFT wrote to G F Tomlinson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that G F Tomlinson had participated in bid rigging on this tender. In response to this letter, G F Tomlinson admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.³⁹⁶¹

³⁹⁵⁸ Written representations of North Midland, 26 June 2008, page 4.

³⁹⁵⁹ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

³⁹⁶⁰ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

³⁹⁶¹ Response from G F Tomlinson, OFT Document Reference 10347, page 2.

IV.1497. The OFT subsequently wrote to G F Tomlinson's ultimate parent company at the time of this Infringement, G F Tomlinson Group, on 5 November 2007, asking it to comment on G F Tomlinson's response to the OFT's Fast Track Offer, given that the OFT intended to hold G F Tomlinson Group jointly and severally liable for any infringements committed by G F Tomlinson in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, G F Tomlinson Group said it did not wish to comment on the response from its subsidiary G F Tomlinson.³⁹⁶²

IV.1498. In their response to the Statement, G F Tomlinson and G F Tomlinson Group stated *'Tomlinson has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement'*³⁹⁶³ in respect of this Infringement.

Evidence from other companies – Robert Woodhead

IV.1499. The OFT wrote to Robert Woodhead on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Robert Woodhead had participated in bid rigging on this tender. In response to this letter, Robert Woodhead admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.³⁹⁶⁴

IV.1500. The OFT subsequently wrote to Robert Woodhead's ultimate parent company at the time of this Infringement, Woodhead Holdings, on 4 March 2008, asking it to comment on Robert Woodhead's response to the OFT's Fast Track Offer, given that the OFT intended to hold Woodhead Holdings jointly and severally liable for any infringements committed by Robert Woodhead in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Woodhead Holdings stated *'Whilst not accepting that Robert Woodhead Holdings Ltd could have any liability in this case, the company is aware of the agreement reached between Robert Woodhead Ltd and the OFT, and would adopt the same position as Robert Woodhead Ltd'*.³⁹⁶⁵

IV.1501. In its response to the Statement, Robert Woodhead reiterated its acceptance of the OFT's Fast Track Offer and its admission in respect of this Infringement.³⁹⁶⁶

Evidence from other companies – North Midland

IV.1502. The OFT wrote to North Midland on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that North Midland had participated in bid rigging on this tender. In response to this letter, North Midland said *'NMC [North Midland] bid for this contract. It bid*

³⁹⁶² Response from G F Tomlinson Group, OFT Document Reference 13979.

³⁹⁶³ Written representations of G F Tomlinson and G F Tomlinson Group, 23 June 2008, paragraph 4.

³⁹⁶⁴ Response from Robert Woodhead, OFT Document Reference 10810, page 1.

³⁹⁶⁵ Response from Woodhead Holdings, OFT Document Reference 14442.

³⁹⁶⁶ Written representations of Robert Woodhead, 2 July 2008, paragraph 3.2.

to win and is not aware of the occurrence of any attempted or actual bid rigging or cover pricing in the context of this tender.³⁹⁶⁷

IV.1503. In its response to the Statement, North Midland stated that it submitted a genuine bid for this contract.³⁹⁶⁸ CW, North Midland's estimator for this contract, stated that he recalled preparing a bill of quantities and attending site visits and did not recall taking a cover price on this project.³⁹⁶⁹ North Midland also provided a letter from a subcontractor which recalled that North Midland had contacted it to price one aspect of this contract.³⁹⁷⁰

IV.1504. The OFT has given this evidence full and careful consideration. On balance, however, it remains unpersuaded that this is sufficient to displace the evidence of the contemporaneous documents and witness explanations thereof, which do indicate that a cover price was taken by North Midlands in respect of this tender. The OFT notes that there may be many reasons why a company may start to price a contract but then closer to the submission deadline decide to take a cover. That North Midland began pricing the contract, and contacted a sub-contractor to this end, are not incompatible with it having decided later on that it could not complete the pricing process or that it did not wish to win the contract after all. The OFT does not therefore consider that the evidence from North Midland counters the contemporaneous documents and witness explanations to the effect that a cover was taken.

IV.1505. In its response to the Statement, North Midland suggested that the entry in Bodill's tender sheet '*£319999 @ 24 Wks NORTH MIDS CONST @ FROM US [.....] [C] CHRIS WHEELHOUSE*' was '*consistent with post tender information exchange*'.³⁹⁷¹ The OFT does not consider that this alternative explanation is credible. First, if Bodill was recording the results of the tender the OFT cannot see why it would have noted a price that was different from the price that was actually submitted by North Midland (even if the difference is small), whereas it was common practice when taking a cover price to alter the price received from the competitor before submitting it. Secondly, the alternative explanation of post-tender information exchange does not explain and is seemingly inconsistent with the inclusion of the annotation '*@ FROM US*'. This is particularly so given that the same annotation is used in connection with two other firms on the tender sheet, both of which have confirmed that they engaged in bid-rigging.³⁹⁷² Thirdly, while North Midland has suggested that '*there is no reason why this information (the contract length of 24 weeks) would be exchanged pre-tender in the context of cover pricing*'³⁹⁷³, the OFT notes that on the contrary, it was not uncommon for a contractor to provide contract length at the same time as the cover price to its competitor in order to prevent the taker of the cover price from accidentally winning the contract by submitting the cover price along with a short, attractive contract length – see, for example, Infringements 126, 139 and 239. In summary, North Midland's assertions are not credible when examined alongside the contemporaneous evidence and the witness explanations provided in support.

³⁹⁶⁷ Response from North Midland, OFT Document Reference 10721.

³⁹⁶⁸ Written representations of North Midland, 26 June 2008, pages 3 to 5.

³⁹⁶⁹ Written representations of North Midland, 26 June 2008, Appendix 4.

³⁹⁷⁰ Written representations of North Midland, 26 June 2008, Appendix 8.

³⁹⁷¹ Written representations of North Midland, 26 June 2008, pages 4 and 5.

³⁹⁷² See paragraphs IV.1498 and IV.1501.

³⁹⁷³ Written representations of North Midland, 26 June 2008, page 5.

[...] [C]

IV.1506. [...] [C]

IV.1507. [...] [C]³⁹⁷⁴

The OFT's analysis of the evidence and finding

IV.1508. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.1509. Bodill, G F Tomlinson, North Midland and Robert Woodhead each accepted an invitation to tender for this contract.

IV.1510. It appears that Bodill completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work.

IV.1511. In regard to G F Tomlinson, Bodill's tender sheet records '*£310400* ① *TOMLINSON © FROM US Mr. THOMPSON*' against G F Tomlinson. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ① recorded against G F Tomlinson to show that G F Tomlinson was the first party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that G F Tomlinson submitted a lower tender figure than the second and third companies to be given a cover price, North Midland and Robert Woodhead. Furthermore, Bodill recorded on the tender sheet the figure £310,400 against G F Tomlinson, a figure that was only £83 lower than the tender price that G F Tomlinson submitted for the work.

IV.1512. Bodill's tender sheet also recorded the name of a G F Tomlinson employee, '*Mr. THOMPSON*', providing further evidence that contact was made between the two parties. This is corroborated by information obtained from W R Bloodworth, a list of contacts for cover prices, which names '*Brian Thompson* [...] [C]' at G F Tomlinson.³⁹⁷⁵

³⁹⁷⁴ [...] [C]

³⁹⁷⁵ Contacts for Cover Prices, OFT Document Reference 3915, page 1.

IV.1513. The OFT also notes that both Bodill and G F Tomlinson have admitted to bid rigging in relation to this tender.

IV.1514. In regard to Robert Woodhead, Bodill's tender sheet records '£324015 ③ *R. WOODHEAD © FROM US*' against Robert Woodhead. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ③ recorded against Robert Woodhead to show that Robert Woodhead was the third company to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Robert Woodhead submitted a higher tender figure than the first and second companies to be given a cover price, G F Tomlinson and North Midland. Furthermore, Bodill recorded on the tender sheet the figure £324,015 against Robert Woodhead, a figure that was identical to the tender that Robert Woodhead submitted for the work.

IV.1515. Bodill's tender sheet also recorded the telephone number of '[.....] [C]', against Robert Woodhead providing further evidence that contact was made between the two parties. This is corroborated by company information for Robert Woodhead which lists its telephone number as '[...] [C]'.³⁹⁷⁶

IV.1516. The OFT also notes that both Bodill and Robert Woodhead have admitted to bid rigging in relation to this tender.

IV.1517. In regard to North Midland, Bodill's tender sheet records '£319999 ② *NORTH MIDS CONST © FROM US*' against North Midland. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ② recorded against North Midland to show that North Midland was the second company to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that North Midland submitted a higher tender figure than the first company to be given a cover price, G F Tomlinson, and a lower tender figure than the third company to be given a cover price, Robert Woodhead. Furthermore, Bodill recorded on the tender sheet the figure £319999 against North Midland, a figure that was only £11 higher than the tender that North Midland submitted for the work.

IV.1518. This entry in Bodill's tender sheet also records the name '*CHRIS WHEELHOUSE*', whom North Midland have confirmed was their estimator for this tender. Bodill's tender sheet also recorded the telephone number of '[...] [C]', against North Midland providing further evidence that contact was made between the two parties. This is corroborated by company information for North Midland which lists its telephone number as '[...] [C]'.³⁹⁷⁷

IV.1519. Although North Midland has not admitted engaging in this bid rigging activity, the OFT considers that the admission by the other parties of engaging in bid rigging activities for this tender, supports the OFT's interpretation of Bodill's

³⁹⁷⁶ FAME report, OFT Document Reference 12442, page 1.

³⁹⁷⁷ FAME report, OFT Document Reference 12272, page 1.

tender sheet as indicating that North Midland too was provided with a cover price. Additionally, information obtained from Wildgoose, a list of contacts, names North Midland with the identical telephone contact number to that on Bodill's tender sheet.

IV.1520. The OFT notes in addition that the tenders submitted by G F Tomlinson, North Midland and Robert Woodhead were higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.1521. [...] [C]

IV.1522. The OFT therefore concludes that contact took place between G F Tomlinson and Bodill, between North Midland and Bodill, and between Robert Woodhead and Bodill. The OFT also concludes that Bodill supplied figures to each of G F Tomlinson, North Midland and Robert Woodhead for cover bids.

IV.1523. The OFT is satisfied that the facts set out in paragraphs IV.1486 to IV.1522 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.³⁹⁷⁸ In particular:

- (a) the provision of figures for cover bids from Bodill to each of G F Tomlinson, North Midland and Robert Woodhead was not unilateral³⁹⁷⁹, and contravenes the principle against direct or indirect contact between competitors;³⁹⁸⁰
- (b) G F Tomlinson, North Midland and Robert Woodhead can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own conduct in the tendering process,³⁹⁸¹ and
- (c) Bodill can be presumed to have taken account of the information it received from each of G F Tomlinson, North Midland and Robert Woodhead (i.e. that none of them intended to submit competitive bids) when determining its conduct in the tendering process.³⁹⁸²

IV.1524. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between G F Tomlinson and Bodill, between North Midland and Bodill, and between Robert Woodhead and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for a new

³⁹⁷⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

³⁹⁷⁹ See paragraph IV.73 of the General comments on cover pricing section.

³⁹⁸⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

³⁹⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

³⁹⁸² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

house at Western Terrace, The Park, Nottingham, tender deadline 22 January 2001.

Immunity and leniency assessment

IV.1525. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1526. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 47: Environmental Works at Burley Lodge, Leeds – 31 January 2001
Client: Leeds City Council
Parties: Strata (formerly known as Weaver), Ackroyd & Abbott, Ballast and Henry Boot

IV.1527. On 20 December 2000, Leeds City Council sought tenders for environmental works at Burley Lodge, Leeds. The following seven companies were invited to tender: Strata, Frank Haslam Milan, Ackroyd & Abbott, Lovell, Henry Boot, Connaught and Ballast.³⁹⁸³ The deadline for receipt of tenders was 12:00 noon on 31 January 2001.

IV.1528. Leeds City Council received the following tender returns:³⁹⁸⁴

Company	Date tender received	Amount of tender	Awarded contract
Strata	Received before tender deadline	£1,841,751.00	
Frank Haslam Milan	Received before tender deadline	£1,613,999.00	Yes
Ackroyd & Abbott	Received before tender deadline	£1,970,866.00	
Lovell	Received before tender deadline	£1,720,763.00	
Henry Boot	Received before tender deadline	£1,919,077.00	
Connaught	Received before tender deadline	£1,849,444.00	
Ballast	Received before tender deadline	£1,935,817.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Contract Information Sheet (BOB sheet)

IV.1529. During the OFT's search of Strata's premises a contract information sheet, or BOB sheet, was found.³⁹⁸⁵ The BOB sheet contained the following entries typed in the tender results box:³⁹⁸⁶

³⁹⁸³ Information from client, OFT Document Reference 8499.

³⁹⁸⁴ Information from client, OFT Document Reference 8499.

³⁹⁸⁵ Contract Information Sheet, OFT Document Reference 3872.

³⁹⁸⁶ Contract Information Sheet, OFT Document Reference 3872.

TENDER RESULTS		
% DIFF	CONTRACTOR	VALUE
	WEAVER	1841731
4.1996092	H BOOT (C)	1919077
5.1085365	BALLAST (C)	1935817
7.0115826	A & A (C)	1970866
	CONNAUGHT	
	F H M	

Contemporaneous documentary evidence from leniency applicant Henry Boot – Extract of Tender Register

IV.1530. As part of its leniency application, Henry Boot’s legal representatives provided an extract of its Tender Register for the main estimating department from January 2000 to March 2006. In respect of this tender the following handwritten entry has been made:³⁹⁸⁷

Month Enquiry Received	No	Year	Sector	Region	Subm Date	Client	Project
"	3	01	B	NE	31.1.01	LEEDS CC	ENVIRONMENTAL WORKS AT BURLEY LODGE

Professionals	Value	Submitted Value	Est	Plan	Buyer	Com Appr	War r	Bon d	PC G	M D Co
	1900000	1919077	IP B	-	-	-				B

Evidence from leniency applicant – Strata

IV.1531. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file ‘Covers from Jan 2000 – Dec 2001’ and ‘contracts in hand’ documents. This list contained the following entry:³⁹⁸⁸

³⁹⁸⁷ Tender Register, OFT Document Reference B1594, page 8.

³⁹⁸⁸ Schedule of covers, OFT Document Reference 4054, page 5.

Date	Project	Strata ref no
31/01/2001	Environmental Works at Burley Lodge, Leeds	T195/00

Cover to	Cover from	Company Name	Company Address	Contract Secured
✓		H Boot / Ballast / Ackroyd & Abbott	HB; Dronfield B; Leeds A&A; 2 Rotherham Road Sheffield	

IV.1532. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Evidence from leniency applicant – Henry Boot

IV.1533. Henry Boot’s legal representatives also provided to the OFT a list of contacts found in the main estimating department. This list contained the following handwritten entry:³⁹⁸⁹

*‘STRARTA [sic] [...] [C]
Duncan Ironmonger.’*

IV.1534. In its response to the Statement, Henry Boot stated *‘Henry Boot accepts the OFT’s description of events’*³⁹⁹⁰ in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.1535. During interviews conducted in connection with its leniency application, Strata’s past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Witness evidence from leniency applicant - Henry Boot

IV.1536. During interviews conducted in connection with its leniency application, Henry Boot’s past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.363 to IV.374 above and is relied upon by the OFT in relation to this tender.

IV.1537. During an interview with the OFT on 22 March 2007, Ian Bayston (‘IB’), Chief Estimator at Henry Boot, explained that he was the estimator allocated the tender.³⁹⁹¹ IB confirmed that although he had no recollection regarding this tender, he accepted that on the basis of the documentary evidence put to him (i.e. the entry on Strata’s BOB sheet and the fact that the figure Strata recorded was the same as the figure Henry Boot submitted), it showed that Strata gave Henry Boot a figure for a cover price for this contract.³⁹⁹² IB stated that either

³⁹⁸⁹ Contact list, OFT Document Reference B1597, page 37.

³⁹⁹⁰ Written representations of Henry Boot, 16 February 2009, paragraph 7.1.

³⁹⁹¹ Interview transcript, OFT Document Reference 11212, page 16.

³⁹⁹² Interview transcript, OFT Document Reference 11212, page 16.

Duncan Ironmonger ('DI') or John Slack could have been the individual at Strata who provided the cover price.³⁹⁹³ IB continued '... *the reason we probably phoned them was 'cause we knew ... we knew of them, we knew the lads'*.³⁹⁹⁴

Contemporaneous documentary evidence from non leniency applicant Ackroyd & Abbott – Tender Register

IV.1538. During the OFT's search of Ackroyd & Abbott's premises a tender register was found. The entry for this tender shows:³⁹⁹⁵

NO	TITLE	RCVD	T/A	RETURN	TIME / VENUE
2078	ENVIRONMENTAL WORKS AT BURLEY LODGE LEEDS Ⓐ & (QS) LEEDS C.C	22 DEC	30 JAN 2001	31 JAN 2001	NOON/ LEEDS

VALUE	COMPETITION	PERIOD
£1.80M £600000.	TBA	12 Months
① A + A ② H Boots ③ CONNAUGHT GROUP ④ BALLAST PLC ⑤ F.H. MILAN		

IV.1539. Also during the search of Ackroyd & Abbott's premises a contact list was found. An entry on this list shows:³⁹⁹⁶

'WEAVER [...] [C]'

Evidence from other companies – Ackroyd & Abbott

IV.1540. The OFT wrote to Ackroyd & Abbott on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Ackroyd & Abbott had participated in bid rigging on this tender. In response to this letter Ackroyd & Abbott did not admit cover pricing in relation to this tender.³⁹⁹⁷ Ackroyd & Abbott stated '*... we have interviewed Peter Horsepool (Chairman and Managing Director), Richard Abbott (Chief Estimator, 1995-2006), John Parkins (Senior Estimator, 2000-2006); and Chris Taylor (Estimator, 2003-2006). We have also reviewed with these individuals the documents that were seized by the OFT during its Section 28 visit. As you are aware the construction work for Ackroyd & Abbott Limited was actually carried out by a dormant subsidiary company, Ackroyd & Abbott Construction Limited, until it stopped trading in 2006. At that time the majority of the employees were made redundant including the estimators named above and the documents of the company were destroyed following a relocation of the remaining parts of Ackroyd & Abbott Ltd. No documents were destroyed with intention of destroying evidence. As a result, it has not been possible to*

³⁹⁹³ Interview transcript, OFT Document Reference 11212, page 17.

³⁹⁹⁴ Interview transcript, OFT Document Reference 11212, page 17.

³⁹⁹⁵ Tender Register, OFT Document Reference 1288, page 13.

³⁹⁹⁶ Contact List, OFT Document Reference 1221, page 40.

³⁹⁹⁷ Response from Ackroyd & Abbott, OFT Document Reference 10192, page 2.

uncover any documentary evidence other than the documents that were seized by the OFT.³⁹⁹⁸

IV.1541. However, in its response to the Statement, Ackroyd & Abbott stated that it had '*... considered the evidence obtained by the OFT and accept that [it] participated in [this] Infringement*'.³⁹⁹⁹

Evidence from other companies – Ballast

IV.1542. The OFT wrote to Ballast on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Ballast had participated in bid rigging on this tender. In response to this letter the OFT received information that Ballast had been dissolved.⁴⁰⁰⁰

IV.1543. The OFT subsequently wrote to Ballast's ultimate parent company at the time of this Infringement, Ballast Nedam, on 8 November 2007, asking it to comment on the letter sent Ballast on 22 March 2007 in respect of the OFT's Fast Track Offer, given that the OFT intended to hold Ballast Nedam jointly and severally liable for any infringements committed by Ballast in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Ballast Nedam admitted '*Ballast PLC engaged in bid rigging activities on this tender but Ballast Nedam NV cannot recall details of the other party/parties involved*'.⁴⁰⁰¹

IV.1544. In its response to the Statement, Ballast Nedam stated '*According to the SO, Ballast plc received a cover price from a company called Strata along with two other competitors*'.⁴⁰⁰² Ballast Nedam's response goes on to make remarks in mitigation '[w]ithout contesting the evidence and facts presented in the SO'.⁴⁰⁰³

The OFT's analysis of the evidence and finding

IV.1545. From the evidence presented above, the OFT draws the following conclusions.

IV.1546. Strata, Ackroyd & Abbott, Henry Boot and Ballast each accepted an invitation to tender for environmental works at Burley Lodge, Leeds.

IV.1547. Strata completed the estimating process for the tender for this contract. It appears that Strata wanted to win the tender for this contract and submitted a bid with hope of winning the work.

IV.1548. Ackroyd & Abbott, Ballast and Henry Boot were unable to submit a tender by the return date and/or did not want to win this contract.

IV.1549. In regard to Henry Boot, Strata's BOB sheet records '*4.1996092 H BOOT (C) 1919077*' typed in the tender results box. DI confirmed that a '*(C)*' written next to a competitor's name alongside a figure and a percentage difference shows

³⁹⁹⁸ Response from Ackroyd & Abbott, OFT Document Reference 10191.

³⁹⁹⁹ Written representations of Ackroyd & Abbott, 2 July 2008, paragraph 78.

⁴⁰⁰⁰ Response from Deloitte & Touche, OFT Document Reference 10239.

⁴⁰⁰¹ Response from Ballast Nedam, OFT Document Reference 14173, page 3.

⁴⁰⁰² Written representations of Ballast Nedam, 26 September 2008, paragraph 24.

⁴⁰⁰³ Written representations of Ballast Nedam, 26 September 2008, paragraph 26.

that Strata gave a cover price to the company noted, as in this case. Furthermore, the figure noted on Strata's BOB sheet is the exact figure submitted by Henry Boot. The OFT considers in the light of the contemporaneous evidence from Strata and both Strata's and IB's admissions and explanations of that contemporaneous evidence, that Strata supplied Henry Boot with a cover price for this tender.

IV.1550. In regard to Ballast, Strata's BOB sheet records '*5.1085365 BALLAST (C) 1935817*' typed in the tender results box. DI confirmed that a '(C)' written next to a competitor's name alongside a figure and a percentage difference shows that Strata gave a cover price to the company noted, as in this case. Furthermore, the figure noted on Strata's BOB sheet is the exact figure submitted by Ballast. The OFT considers in the light of the contemporaneous evidence from Strata and DI's admission and explanation of the contemporaneous evidence, that Strata supplied Ballast with a cover price for this tender.

IV.1551. In regard to Ackroyd & Abbott, Strata's BOB sheet records '*7.0115826 A & A (C) 1970866*' typed in the tender results box. DI confirmed that a '(C)' written next to a competitor's name alongside a figure and a percentage difference shows that Strata gave a cover price to the company noted, as in this case. Furthermore, the figure noted on Strata's BOB sheet is the exact figure submitted by Ackroyd & Abbott. The OFT considers in the light of the contemporaneous evidence from Strata, and DI's admission and explanation of the contemporaneous evidence, that Strata supplied Ackroyd & Abbott with a cover price for this tender.

IV.1552. The OFT notes that the tenders submitted by Ackroyd & Abbott, Ballast and Henry Boot were higher than the tender submitted by Strata, the pattern consistent with cover prices having been provided.

IV.1553. The OFT notes that all of the Parties have now admitted that they participated in this Infringement.

IV.1554. The OFT therefore concludes that contact took place between Strata and Ackroyd & Abbott, between Strata and Ballast and between Strata and Henry Boot. The OFT also concludes that Strata supplied figures to each of Ackroyd & Abbott, Ballast and Henry Boot for cover bids.

IV.1555. The OFT is satisfied that the facts set out in paragraphs IV.1529 to IV.1554 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁰⁰⁴ In particular:

- (a) the provision of figures for cover bids from Strata to each of Ackroyd & Abbott, Ballast and Henry Boot was not unilateral⁴⁰⁰⁵, and contravenes the principle against direct or indirect contact between competitors;⁴⁰⁰⁶
- (b) Ackroyd & Abbott, Ballast and Henry Boot can each be presumed to have taken account of the information received from Strata (i.e. the

⁴⁰⁰⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁰⁰⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁰⁰⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- respective cover prices) when determining their own respective conduct in the tendering process;⁴⁰⁰⁷ and
- (c) Strata can be presumed to have taken account of the information it received from Ackroyd & Abbott, Ballast and Henry Boot (i.e. that neither Ackroyd & Abbott, Ballast nor Henry Boot intended to submit a competitive bid) when determining its conduct in the tendering process.⁴⁰⁰⁸

IV.1556. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Strata and Ackroyd & Abbott, between Strata and Ballast and between Strata and Henry Boot in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for environmental works at Burley Lodge, Leeds, tender deadline 31 January 2001.

Immunity and leniency assessment

IV.1557. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1558. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

IV.1559. In addition, as the OFT was already aware of the bid rigging activities by virtue of the information found at Strata, Henry Boot will not receive 100 per cent immunity in respect of this tender. However, Henry Boot will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 48: Herschel Grammar School, Music and Drama Block, Slough – 9 February 2001

Client: Herschel Grammar School

Parties: Mansell and Ballast

IV.1560. On 12 January 2001, Herschel Grammar School, Slough, sought tenders for a music and drama block.⁴⁰⁰⁹ The following six companies were invited to tender: Ballast, Collier & Catley Ltd, Feltham Construction Ltd, Francis, Full Construction and Mansell. The date and time of tender return was 9 February 2001 at 12:00 noon.⁴⁰¹⁰

⁴⁰⁰⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰⁰⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰⁰⁹ Information from client, OFT Document Reference 8305.

⁴⁰¹⁰ Information from client, OFT Document Reference 8305.

IV.1561. Herschel Grammar School received the following tender returns:⁴⁰¹¹

Company	Date and time tender received	Amount of tender	Awarded contract
Francis	9 February 2001 before noon	£349,507.64	YES
Feltham Construction Ltd	9 February 2001 before noon	£379,890.30	
Full Construction	9 February 2001 before noon	£382,858.00	
Mansell	9 February 2001 before noon	£395,795.00	
Collier & Catley Ltd	9 February 2001 before noon	£412,922.00	
Ballast	9 February 2001 before noon	£425,634.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender summary

IV.1562. As part of its leniency application, Mansell’s legal representatives provided a tender summary sheet for this tender, which shows the tender figure Mansell submitted for this tender ‘395,795’ and at the bottom is handwritten ‘© Ballast Construction £426K’.⁴⁰¹²

Evidence from leniency applicant Mansell

IV.1563. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁴⁰¹³ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.1564. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell gave a cover price to Ballast.⁴⁰¹⁴

Witness evidence from leniency applicant Mansell

IV.1565. During interviews conducted in connection with its leniency application, Barry Russ (‘BR’), a Mansell managing estimator, provided further general explanation of Mansell’s participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.1566. During an interview with the OFT on 1 May 2007, BR advised what would happen when a competitor asked for a cover price from Mansell as detailed in paragraphs IV.486 to IV.488 above. In relation to this tender BR stated ‘... *it is our tender adjudication sheet, so you know ... it’s the bid we put in at 395, and by virtue of having this little C in brackets there ... that’s the figure I would have given to Ballast Construction*’ and ‘... *Ballast would have put in a figure not lower than that, I would suggest ... of 426, so they may have added*

⁴⁰¹¹ Information from client, OFT Document Reference 8305.

⁴⁰¹² Tender summary sheet, OFT Document Reference B1352.

⁴⁰¹³ Leniency application, OFT Document Reference B0734.

⁴⁰¹⁴ Leniency application, OFT Document Reference B1351, page 2.

something to it or rounded it up.⁴⁰¹⁵ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁴⁰¹⁶

Evidence from other companies – Ballast

IV.1567. The OFT wrote to Ballast on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Ballast had participated in bid rigging on this tender. In response to this letter the OFT received information that Ballast had been dissolved.⁴⁰¹⁷

IV.1568. The OFT subsequently wrote to Ballast's ultimate parent company at the time of this Infringement, Ballast Nedam, on 8 November 2007, asking it to comment on the letter sent Ballast on 22 March 2007 in respect of the OFT's Fast Track Offer, given that the OFT intended to hold Ballast Nedam jointly and severally liable for any infringements committed by Ballast in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Ballast Nedam admitted *'Ballast PLC engaged in bid rigging activities on this tender but Ballast Nedam NV cannot recall details of the other party/parties involved'*.⁴⁰¹⁸

IV.1569. In its response to the Statement, Ballast Nedam stated *'According to the SO, Ballast plc received a cover price from a company called Mansell for this tender'*.⁴⁰¹⁹ Ballast Nedam's response goes on to make remarks in mitigation *'[w]ithout contesting the evidence and facts presented in the SO'*.⁴⁰²⁰

The OFT's analysis of the evidence and finding

IV.1570. From the evidence presented above, the OFT draws the following conclusions.

IV.1571. Mansell and Ballast each accepted an invitation to tender for this contract.

IV.1572. Both companies submitted a tender. Ballast was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1573. Mansell's tender summary for this tender shows *'© Ballast Construction £426K'*. Mansell confirmed that this shows that it gave a cover price to Ballast. In interview, BR of Mansell confirmed that he would have given a cover price to the company noted of the amount shown. The OFT notes that Ballast's bid was very close to this figure and that it was occasionally the case that a company provided with a rounded cover price (such as £426K) would submit a tender that was less rounded (such as £425,634.00 in this instance) in order to make the tender look more genuine.

⁴⁰¹⁵ Interview transcript, OFT Document Reference 11516, page 23.

⁴⁰¹⁶ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁴⁰¹⁷ Response from Deloitte & Touche, OFT Document Reference 10239.

⁴⁰¹⁸ Response from Ballast Nedam, OFT Document Reference 14173, page 3.

⁴⁰¹⁹ Written representations of Ballast Nedam, 26 September 2008, paragraph 25.

⁴⁰²⁰ Written representations of Ballast Nedam, 26 September 2008, paragraph 26.

- IV.1574. The OFT further notes that the tender submitted by Ballast was higher than the tender submitted by Mansell, the pattern consistent with a cover price having been provided.
- IV.1575. In addition, Ballast Nedam admitted that Ballast engaged in bid rigging on this tender. Both Parties have therefore admitted to their involvement in this Infringement.
- IV.1576. The OFT therefore concludes that contact took place between Mansell and Ballast. The OFT also concludes that Mansell supplied a figure to Ballast for a cover bid.
- IV.1577. The OFT is satisfied that the facts set out in paragraphs IV.1562 to IV.1576 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁰²¹ In particular:
- (a) the provision of a figure for a cover bid from Mansell to Ballast was not unilateral⁴⁰²², and contravenes the principle against direct or indirect contact between competitors;⁴⁰²³
 - (b) Ballast can be presumed to have taken account of the information received from Mansell (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁰²⁴ and
 - (c) Mansell can be presumed to have taken account of the information it received from Ballast (i.e. that Ballast did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁰²⁵

IV.1578. In its response to the Statement, Balfour Beatty stated *'The OFT has adduced no evidence that the giving of a cover was taken into account by Balfour Beatty and Mansell when pricing its tenders nor is there any evidence that the giving of a cover had any effect on these parties' pricing of the tender'*.⁴⁰²⁶ The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁴⁰²⁷ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Balfour Beatty has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Balfour Beatty's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

IV.1579. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Ballast in breach of the Chapter I prohibition, which had

⁴⁰²¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁰²² See paragraph IV.73 of the General comments on cover pricing section.

⁴⁰²³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁰²⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰²⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰²⁶ Written representations of Balfour Beatty, 27 June 2008, paragraph 10.8.

⁴⁰²⁷ See paragraph III.58 of the Legal Background section.

the object of bid rigging in relation to the tender for a music and drama block, Herschel Grammar School, Slough, tender deadline 9 February 2001.

Immunity and leniency assessment

IV.1580. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1581. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 49: **New Build of a Medical Centre, Two Storey Doctors Surgery, Pharmacy and Dental Surgery, Car Park and Landscaping at the New Medical Centre, Lawley, Telford – 16 March 2001**

Client: **Gould Singleton Architects Limited**
Parties: **Thomas Vale and Arthur M Griffiths**

IV.1582. On 14 February 2001 Gould Singleton Architects Limited ('Gould Singleton'), sought tenders for the new build of a medical centre, two-storey doctor's surgery, pharmacy and dental surgery, car park and landscaping at the New Medical Centre, Lawley, Telford. The following six companies were invited to tender: Arthur M Griffiths, Frank Galliers, Thomas Vale, Harper, Mansell, and Lemmeleg. The deadline for the receipt of tenders was 12:00 noon on 16 March 2001.⁴⁰²⁸

IV.1583. Gould Singleton received the following tender returns:⁴⁰²⁹

Company	Time and Date tender received	Amount of tender	Awarded contract
Arthur M Griffiths	Post 09:00 16 March 2001	£671,234.00	Yes
Frank Galliers	Post 09:00 16 March 2001	£683,568.71	
Thomas Vale	Post 09:00 16 March 2001	£688,886.00	
Harper	Post 09:00 16 March 2001	£689,679.00	
Mansell	Post 09:00 16 March 2001	£698,204.00	
Lemmeleg	10:54 16 March 2001	£732,488.15	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.1584. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁴⁰³⁰

⁴⁰²⁸ Information from client, OFT Document Reference 13672.

⁴⁰²⁹ Information from client, OFT Document Reference 13672.

⁴⁰³⁰ Tender Status spreadsheet, OFT Document Reference 4522, page 14.

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T4741	B	Dr Pringle and Lawley Medical Practice	New Medical Centre, Lawley, Telford		CKT	B	12/03/2001 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
688,886		Griffiths, Mansell, Harper, Gallier,	

IV.1585. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁴⁰³¹ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Arthur M Griffiths plus names and a telephone number.⁴⁰³²

Evidence from leniency applicant Thomas Vale

IV.1586. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.1587. At Annex 14⁴⁰³³ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 48 of the schedule under Annex 14 and within the section for 2001 tenders is the following entry:⁴⁰³⁴

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T4741	12 March	Dr Pringle and Lawley Medical Centre	New Medical Centre, Lawley, Telford	Taken (Griffiths)	Yes (Tender Spreadsheet)

IV.1588. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

⁴⁰³¹ Interview transcript, OFT Document Reference 11418, page 21.

⁴⁰³² Contact list, OFT Document Reference 11086, page 9.

⁴⁰³³ Leniency application, OFT Document Reference 4568.

⁴⁰³⁴ Leniency application, OFT Document Reference 4568, page 48.

IV.1589. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁴⁰³⁵ and 'A M Griffiths' appears on this list.

IV.1590. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.1591. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.1592. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letter 'B', which appears in the column marked 'DIV', stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁴⁰³⁶ In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: *'Yeah, the category there actually is a B, which, as you're aware from previous interviews was the revised category from a C to a B, which indicated a cover. Tender return date 12 March 2001, Thomas Vale's submitted tender £688,886, and the contractors named on the right hand side, the bold figure, bold lettering is against Griffiths of Wolverhampton, which indicates that we got a cover from AM Griffiths'*.⁴⁰³⁷ CKT said that his contact within Arthur M Griffiths at the time would have been either Maurice Walsh ('MW'), Managing Director, or Gary Wildsmith ('GW'), Commercial Director.

Evidence from leniency applicant Arthur M Griffiths

IV.1593. As part of its leniency application, Arthur M Griffiths provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.182 to IV.188 above and is relied upon by the OFT in relation to this tender.

IV.1594. Following the issue of the Statement, Arthur M Griffiths did not submit any written or oral representations specifically in respect of this Infringement.

Witness Evidence from leniency applicant Arthur M Griffiths

IV.1595. In respect of this tender, in interview MW, on being shown by the OFT the relevant entry from Thomas Vale's Tender Status spreadsheet, said *'Again, I know nothing about that. You know, I'm not going to admit to something that I don't know about'*.⁴⁰³⁸

IV.1596. Also in respect of this tender, in interview GW, on being shown by the OFT the relevant entry from Thomas Vale's Tender Status spreadsheet, said *'I may*

⁴⁰³⁵ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁴⁰³⁶ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁴⁰³⁷ Interview transcript, OFT Document Reference 13865, pages 3 and 4.

⁴⁰³⁸ Interview transcript, OFT Document Reference 13291, page 20.

have been the estimator, but I certainly didn't provide Thomas Vale anything'.⁴⁰³⁹

The OFT's analysis of the evidence and finding

IV.1597. From the evidence presented above, the OFT draws the following conclusions.

IV.1598. Thomas Vale and Arthur M Griffiths each accepted an invitation to tender for this contract.

IV.1599. Arthur M Griffiths completed the estimating process for this contract and it submitted a tender with the hope of winning the work. This is shown by the facts that it submitted the lowest price and that it won the tender.

IV.1600. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.

IV.1601. Thomas Vale's contemporaneous Tender Status spreadsheet maintained in electronic format by Chief Estimator CKT, records four competitors who were also invited to tender for this contract, namely Arthur M Griffiths, Mansell, Harper and Frank Galliers. Arthur M Griffiths is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the tender had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is £688,886 which matches the amount recorded by the client Gould Singleton.

IV.1602. Gould Singleton also received a tendered amount of £671,234 from Arthur M Griffiths, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Arthur M Griffiths to Thomas Vale.

IV.1603. The OFT notes that although four competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Arthur M Griffiths. This indicates that a conscious decision was made to differentiate Arthur M Griffiths from the other three competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price and make contact with Arthur M Griffiths at the time. It also indicates that CKT himself made contact with Arthur M Griffiths.

IV.1604. Thomas Vale admitted that '*A M Griffiths*' was one of the '*key competitors*' with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet indicates that a cover price had been received from Arthur M Griffiths and he had an entry for Arthur M Griffiths in a contact book he used to telephone other contractors for the purpose of obtaining cover prices. He also named MW and GW as contacts from Arthur M Griffiths.

⁴⁰³⁹ Interview transcript, OFT Document Reference 13292, page 33.

IV.1605. Although Arthur M Griffiths does not recall that it engaged in this bid rigging activity on this tender, the OFT considers that the contemporaneous evidence, together with Thomas Vale's admission and explanation of that evidence, shows that Arthur M Griffiths did indeed engage in bid rigging on this tender.

IV.1606. The OFT therefore concludes that contact took place between Thomas Vale and Arthur M Griffiths, and that Arthur M Griffiths supplied a figure to Thomas Vale in order that it could submit a bid to the client that was not intended to win the contract.

IV.1607. The OFT is satisfied that the facts set out in paragraphs IV.1584 to IV.1606 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁰⁴⁰ In particular:

- (a) the provision of a figure for a cover bid from Arthur M Griffiths to Thomas Vale was not unilateral⁴⁰⁴¹, and contravenes the principle against direct or indirect contact between competitors;⁴⁰⁴²
- (b) Thomas Vale can be presumed to have taken account of the information received from Arthur M Griffiths (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁰⁴³ and
- (c) Arthur M Griffiths can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁰⁴⁴

IV.1608. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Arthur M Griffiths in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the new build of a medical centre, two-storey doctor's surgery, pharmacy and dental surgery, car park and landscaping at the New Medical Centre, Lawley, Telford, tender deadline 16 March 2001.

Immunity and leniency assessment

IV.1609. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1610. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1611. In respect of this tender, the OFT became aware of Arthur M Griffiths' involvement in bid rigging activities by virtue of the information provided by

⁴⁰⁴⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁰⁴¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁰⁴² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁰⁴³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰⁴⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Thomas Vale. Arthur M Griffiths will not therefore receive 100 per cent immunity in respect of this tender. However, Arthur M Griffiths will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 50: 12 Self-Contained Flats, Castle Street, Mansfield Woodhouse – 30 March 2001
Client: Nottingham Community Housing Association
Parties: Bodill and Adam Eastwood

IV.1612. On 2 March 2001, Nottingham Community Housing Association sought tenders for new build of 12 self-contained flats, club room and staff accommodation at Castle Street, Mansfield Woodhouse. The return date for the tender was 12:00 noon on 30 March 2001 and five companies were invited to tender: J & S Seddon Ltd, Carillion Housing Ltd, Allenbuild, Bodill and Adam Eastwood.⁴⁰⁴⁵

IV.1613. Nottingham Community Housing Association received the following tender returns:⁴⁰⁴⁶

Company	Date tender received	Amount of tender	Awarded the contract
J & S Seddon Ltd	On or prior to 30 March 2001	£668,973	
Carillion Housing Ltd	On or prior to 30 March 2001	£671,890	
Allenbuild	On or prior to 30 March 2001	£534,000	
Bodill	On or prior to 30 March 2001	£545,598	Yes
Adam Eastwood	On or prior to 30 March 2001	£574,300	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Bodill – tender sheet

IV.1614. In Bodill's original tender sheet for '12 No SELF CONTAINED FLATS, CLUB ROOM & STAFF ACCOMODATION AT CASTLE STREET MANSFIELD WOODHOUSE NOTTS', provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following handwritten entries have been made.⁴⁰⁴⁷

⁴⁰⁴⁵ Information from client, OFT Document Reference 9156.

⁴⁰⁴⁶ Information from client, OFT Document Reference 9156.

⁴⁰⁴⁷ Tender sheet, OFT Document Reference 0531.

1. *BODILL*

2. *CARILLION*

3. *ALLAN BUILD*

4. *J.S. SEDDON*

5. *B & K*

£574300

6. *EASTWOODS © FROM US
RING A TRANTER FRI AM*

IV.1615. The tender sheet for this contract states that Bodill's tender was £545598.⁴⁰⁴⁸

IV.1616. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations '*£574300*' and '*EASTWOODS*' under the section headed '*Tenderers*' were made by him.⁴⁰⁴⁹ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1617. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*© FROM US RING A. TRANTER FRI AM.*' under the section headed '*Tenderers*' were made by him.⁴⁰⁵⁰ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1618. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1619. In particular, Bodill provided to the OFT a '*Tender Analysis – Schedule of Covers taken & given*' since March 2000.⁴⁰⁵¹ In respect of the tender for '*12 no Flats Castle Street Mansfield, Notts*', Bodill confirmed that it gave one cover price in relation to this tender.⁴⁰⁵²

IV.1620. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1621. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

⁴⁰⁴⁸ Tender sheet, OFT Document Reference 0531.

⁴⁰⁴⁹ Contracts document, OFT Document Reference 6426, pages 86 and 99.

⁴⁰⁵⁰ Contracts document, OFT Document Reference 6426, pages 1 and 14.

⁴⁰⁵¹ Tender Analysis, OFT Document Reference 0849.

⁴⁰⁵² Tender Analysis, OFT Document Reference 0849, page 1.

Witness evidence from leniency applicant Adam Eastwood

IV.1622. During an interview conducted on 21 February 2007 in connection with its leniency application, Adrian Tranter ('AT'), Managing Director of Adam Eastwood, stated '*The lead of Stepping Stones [its name for the client] lived opposite Chris Stubbs ... Chris' [s] neighbour became somewhat too involved for our liking. He was always knocking on Chris' [s] door every night. ... Chris came to see me so he was very uncomfortable that if we won the work that this guy would be on his doorstep morning, noon and night ... to save a certain amount of integrity for Chris we took a cover rather than just sending it back*'.⁴⁰⁵³ AT confirmed that he received a cover price from Bodill on the basis of the documentary evidence shown to him during the interview with the OFT.⁴⁰⁵⁴

IV.1623. In its response to the Statement, Adam Eastwood reiterated that it took a cover price from Bodill in respect of this Infringement.⁴⁰⁵⁵

The OFT's analysis of the evidence and finding

IV.1624. From the evidence presented above, the OFT draws the following conclusions.

IV.1625. Bodill and Adam Eastwood each accepted an invitation to tender for 12 new self-contained flats and staff accommodation at Mansfield Woodhouse.

IV.1626. Bodill completed the estimating process for the tender for this contract. Bodill wanted to win the tender for this contract and submitted a bid with the hope of winning the work, shown by the fact that it submitted the lowest tender and subsequently won the contract.

IV.1627. Adam Eastwood has stated that it did not want to win this contract. One of its estimators was being bothered by the client at home and felt that if Adam Eastwood won the tender, the situation would only get worse.

IV.1628. Bodill's tender sheet records '*© FROM US*' against '*EASTWOODS*'. Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £574300 against Adam Eastwood, a figure that was identical to the tender that Adam Eastwood submitted for the work. Bodill's tender sheet states '*RING A TRANTER FRI AM*'. '*A TRANTER*' was the Managing Director of Adam Eastwood, AT, interviewed by the OFT. The OFT assumes that '*FRI AM*' referred to the morning of the day of the deadline for submission of tenders, consistent with the pattern of exchanging a cover price at the last minute, on the day a tender was due.

IV.1629. During interview, AT recalled taking a cover price on this contract and confirmed on the basis of the documentary evidence shown to him (i.e. the Bodill tender sheet) that Adam Eastwood obtained a cover price from Bodill. The OFT considers in the light of the contemporaneous evidence from Bodill and Bodill's admission and explanation of that contemporaneous evidence, and AT's

⁴⁰⁵³ Interview transcript, OFT Document Reference 11095, page 13.

⁴⁰⁵⁴ Interview transcript, OFT Document Reference 11095, page 14.

⁴⁰⁵⁵ Written representations of Adam Eastwood, 26 June 2008, page 3.

recollection and admission, that Bodill supplied Adam Eastwood with a cover price for this tender.

IV.1630. The OFT also notes that the tender submitted by Adam Eastwood was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided by Bodill.

IV.1631. The OFT therefore concludes that contact took place between Adam Eastwood and Bodill. The OFT also concludes that Bodill supplied a figure to Adam Eastwood for a cover bid.

IV.1632. The OFT is satisfied that the facts set out in paragraphs IV.1614 to IV.1631 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁰⁵⁶ In particular:

- (a) the provision of a figure for a cover bid from Bodill to Adam Eastwood was not unilateral⁴⁰⁵⁷, and contravenes the principle against direct or indirect contact between competitors;⁴⁰⁵⁸
- (b) Adam Eastwood can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁰⁵⁹ and
- (c) Bodill can be presumed to have taken account of the information it received from Adam Eastwood (i.e. that Adam Eastwood did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁰⁶⁰

IV.1633. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Adam Eastwood and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for 12 new self-contained flats at Castle Street, Mansfield Woodhouse, tender deadline 30 March 2001.

Immunity and leniency assessment

IV.1634. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1635. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1636. In respect of this tender, the OFT became aware of Adam Eastwood's involvement in bid rigging activities by virtue of the information provided by

⁴⁰⁵⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁰⁵⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁰⁵⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁰⁵⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰⁶⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Bodill. Adam Eastwood will not therefore receive 100 per cent immunity in respect of this tender. However, Adam Eastwood will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 51: Not included in the Decision

Infringement 52: New Build Extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire – 17 April 2001
Client: Belvoir Care Estate Homes
Parties: Bodill and T Denman

IV.1637. On 27 February 2001, Belvoir Care Estate Homes sought tenders for a new build extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire. The return date for the tender was 17 April 2001 and five companies were invited to tender: William Woodsend, Bodill, T Denman, Thomas Fish and W R Bloodworth.⁴⁰⁶¹

IV.1638. Belvoir Care Estate Homes received the following tender returns on 17 April 2001:⁴⁰⁶²

Company	Date tender received	Amount of tender	Awarded the tender
William Woodsend	17 April 2001	£486,600	
Bodill	17 April 2001	£444,847	Yes
T Denman	17 April 2001	£475,930	
Thomas Fish	17 April 2001	£454,376	
W R Bloodworth	17 April 2001	£441,284	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1639. In Bodill’s original tender sheet, provided to the OFT as part of its leniency application, under the section headed ‘*Tenderers*’, the following entries have been made, all of which are handwritten:⁴⁰⁶³

⁴⁰⁶¹ Information from client, OFT Document Reference 7158.

⁴⁰⁶² Information from client, OFT Document Reference 7158.

⁴⁰⁶³ Tender sheet, OFT Document Reference 0536.

1. *BODILL*
2. *BLOODWORTH*
- Tel [...] [C]*
3. *T. DENMAN © FROM US*
P. HARGRAVES WILL RING 11/4/01
- £475900
- [...] [C]
- [...] [C]
4. *FISH.*
5. *Woodsend*

IV.1640. The tender sheet states that Bodill's submitted figure was £444,847.⁴⁰⁶⁴

IV.1641. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotation '*£475900*', under the section headed '*Tenderers*' was made by him.⁴⁰⁶⁵ JR also confirmed that this annotation was made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1642. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*Tel [...] [C] T DENMAN © FROM US P. HARGRAVES WILL RING 11/4/01*' under the section headed '*Tenderers*' were made by him.⁴⁰⁶⁶ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1643. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1644. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁴⁰⁶⁷ In respect of this tender, Bodill confirmed that it gave a cover price to T Denman.⁴⁰⁶⁸

IV.1645. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1646. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

⁴⁰⁶⁴ Tender sheet, OFT Document Reference 0536.

⁴⁰⁶⁵ Contracts document, OFT Document Reference 6426, pages 86 and 100.

⁴⁰⁶⁶ Contracts document, OFT Document Reference 6426, pages 1 and 16.

⁴⁰⁶⁷ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴⁰⁶⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

Evidence from other companies – T Denman

IV.1647. The OFT wrote to T Denman on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that T Denman had participated in bid rigging on this tender.

IV.1648. Subsequently protracted correspondence was entered into, whereby Mr W B Cragg, the Managing Director of T Denman, appeared initially to accept the OFT's Fast Track Offer. In an email of 18 May 2007 he made the following statements:⁴⁰⁶⁹

'What we do know is the practice of contractors pricing themselves out of work, when they are too committed to price a project in the given time and in order not to have themselves inadvertently removed from client lists by returning a tender invitation, has been an inherent known part of construction industry practice for many years and as a long established small business we have participated in this practice on occasions in previous years, although have no records of particular events'

'It would therefore be apparent that we are involved in these matters by implication and on a commercial basis alone we should be responsible people and mitigate the financial and commercial damage to this company by any actions within our means and therefore accept your offer of leniency in every case.'

IV.1649. However the OFT's offer was subsequently formally declined by letter, dated 24 July 2007⁴⁰⁷⁰ received from Berryman Shacklock LLP, acting for and on behalf of T Denman.⁴⁰⁷¹

IV.1650. In its response to the Statement, however, T Denman stated *'T Denman has no means of challenging the evidence now presented by the OFT in support of its allegations in relation to cover pricing, and therefore admits liability for the cover pricing infringements alleged by the OFT'*.⁴⁰⁷²

The OFT's analysis of the evidence and finding

IV.1651. From the evidence presented above, the OFT draws the following conclusions.

IV.1652. Bodill and T Denman each accepted an invitation to tender for this contract.

IV.1653. Bodill completed the estimating process for the tender for this contract and submitted a bid in the hope of winning the work.

IV.1654. T Denman was unable to submit a tender by the return date and/or did not want to win this tender.

⁴⁰⁶⁹ Response from T Denman, OFT Document Reference 10869.

⁴⁰⁷⁰ Response from T Denman, OFT Document Reference 13012.

⁴⁰⁷¹ Response from T Denman, OFT Document Reference 13010. This followed an earlier response dated 29 June 2007 from Berryman Shacklock LLP which stated the following:

'As you are aware, the practise of "cover pricing" has been endemic in the construction industry over many decades. Against that background, our client does acknowledge that it has engaged in cover pricing activity on a limited number of projects'.

⁴⁰⁷² Written representations of T Denman, 27 June 2008, paragraph 6.

IV.1655. In regard to T Denman, Bodill's tender sheet records '*T. DENMAN © FROM US £475900 P. HARGRAVES WILL RING 11/4/01*'. Bodill has confirmed that this indicates that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £475,900, a figure that was only £30 different from the tender that T Denman submitted for the work. Bodill's tender sheet also records the name and telephone number of a T Denman estimator, providing further evidence that contact was made between the two parties. This is further corroborated by the telephone number on T Denman's letterhead, '[...] [C]⁴⁰⁷³', which is the same as the handwritten contact number for T Denman on Bodill's tender sheet.

IV.1656. The OFT notes in addition that the tender submitted by T Denman was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.1657. Both Parties have now admitted their involvement in cover pricing in respect of this Infringement.

IV.1658. The OFT therefore concludes that contact took place between T Denman and Bodill. The OFT also concludes that Bodill supplied a figure to T Denman for a cover bid.

IV.1659. The OFT is satisfied that the facts set out in paragraphs IV.1639 to IV.1658 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁰⁷⁴ In particular:

- (a) the provision of a figure for a cover bid from Bodill to T Denman was not unilateral⁴⁰⁷⁵, and contravenes the principle against direct or indirect contact between competitors;⁴⁰⁷⁶
- (b) T Denman can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁰⁷⁷ and
- (c) Bodill can be presumed to have taken account of the information it received from T Denman (i.e. that T Denman did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁰⁷⁸

IV.1660. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between T Denman and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new build extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire, tender deadline 17 April 2001.

⁴⁰⁷³ Response from T Denman, OFT Document Reference 10865.

⁴⁰⁷⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁰⁷⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁰⁷⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁰⁷⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁰⁷⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.1661. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1662. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 53: **Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire – 19 April 2001**
Client: **Derbyshire County Council**
Parties: **Bodill, Admiral, E Manton**

IV.1663. On 20 March 2001, Derbyshire County Council ('Derbyshire CC') sought tenders for a classroom extension at Sudbury Primary School, Ashbourne, Derbyshire. The return date for the tender was 11:00 on 19 April 2001 and four companies were invited to tender: County Property Division, Admiral, Bodill and E Manton.⁴⁰⁷⁹

IV.1664. Derbyshire CC received the following tender returns by 11:00 on 19 April 2001:⁴⁰⁸⁰

Company	Date tender received	Amount of tender	Awarded the contract
County Property Division	Unable to tender		
Admiral	By 19 April 2001	£145,499	
Bodill	By 19 April 2001	£129,570	
E Manton	By 19 April 2001	£133,333	

IV.1665. Derbyshire CC allocated an 'anticipated value' to this project of £100,000.⁴⁰⁸¹ The three tenders received (all of which were from companies engaging in bid rigging) were all designated as 'price not acceptable' by Derbyshire CC.

IV.1666. Derbyshire CC therefore abandoned this first tender exercise and re-tendered for the contract, dispatching re-tender invitations on 26 April 2001.⁴⁰⁸² Four companies were invited to tender this second time, including only Bodill out of the original three. For the second tender exercise, the lowest price submitted was close to the original 'anticipated value' at £107,567, and this company was awarded the contract.⁴⁰⁸³

⁴⁰⁷⁹ Information from client, OFT Document Reference 7637, page 3.

⁴⁰⁸⁰ Information from client, OFT Document Reference 7637, page 3.

⁴⁰⁸¹ Information from client, OFT Document Reference 7637, page 4.

⁴⁰⁸² Information from client, OFT Document Reference 7636.

⁴⁰⁸³ Information from client, OFT Document Reference 7636.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Bodill – tender sheet

IV.1667. In Bodill's original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following handwritten entries have been made:⁴⁰⁸⁴

'

1. BODILL

2. E. MANTON © FROM US
£140504 J PORTER [...] [C] P.MORRIS S. HUGHES

3. ADMIRAL CONSTRUCTION © FROM US
£145499 [...] [C] M.SAVAGE'.

IV.1668. The tender sheet states that Bodill's tender figure was £129,570.⁴⁰⁸⁵

IV.1669. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations '*£140504*' and '*£145499*', under the section headed '*Tenderers*' were made by him.⁴⁰⁸⁶ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1670. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*© FROM US*', '[...] [C] P.MORRIS S. HUGHES' and '*ADMIRAL CONSTRUCTION © FROM US* [.....] [C] M.SAVAGE' under the section headed '*Tenderers*' were made by him.⁴⁰⁸⁷ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1671. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1672. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁴⁰⁸⁸ In respect of this tender, Bodill confirmed that it gave cover prices to Admiral and E Manton.⁴⁰⁸⁹

IV.1673. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

⁴⁰⁸⁴ Tender sheet, OFT Document Reference 0537.

⁴⁰⁸⁵ Tender sheet, OFT Document Reference 0537.

⁴⁰⁸⁶ Contracts document, OFT Document Reference 6426, pages 86 and 101.

⁴⁰⁸⁷ Contracts document, OFT Document Reference 6426, pages 1 and 15.

⁴⁰⁸⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465.

⁴⁰⁸⁹ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

Witness evidence from leniency applicant Bodill

IV.1674. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from leniency applicant Admiral

IV.1675. As part of its leniency application, Admiral provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

IV.1676. In particular, Admiral provided to the OFT an analysis of its projects since January 2000 and in respect of this tender, Admiral confirmed that it received a cover price.⁴⁰⁹⁰

IV.1677. Following the issue of the Statement, Admiral did not contest its participation in this Infringement.⁴⁰⁹¹

Witness evidence from leniency applicant Admiral

IV.1678. During interviews conducted in connection with its leniency application, Admiral's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

IV.1679. Andrew Clarkson ('AC'), Estimating Director at Admiral, confirmed in interview in respect of this tender, *'I know that we didn't price it, and we took a cover on it'*.⁴⁰⁹² AC could not recall the company from whom Admiral obtained a cover, but on being shown by the OFT the Bodill tender sheet for this tender he said, *'that suggests to me that this is the company that we rang and asked them if they could help us out with a, a figure'*.⁴⁰⁹³ AC also confirmed in respect of Bodill's tender sheet that it was Admiral's telephone number and that the price handwritten against Admiral was the tender figure that Admiral submitted.⁴⁰⁹⁴ In respect of the reference to *'M.SAVAGE'* on the Bodill tender sheet AC said that *'it looks as if, at the time that they did it, it looks as if I wasn't in and that Matthew [Savage] took the cover call'*.⁴⁰⁹⁵ Keith Roebuck confirmed in interview, *'Matthew Savage; that's Stephen Savage[']s, son; he worked over a period of several years, leaving us a good number of years ago'*.⁴⁰⁹⁶ Stephen Savage also said in respect of this tender, *'That we would have just taken a cover on it'*.⁴⁰⁹⁷

⁴⁰⁹⁰ Schedule of projects, OFT Document Reference 5189, page 3.

⁴⁰⁹¹ Written representations of Admiral, 26 June 2008, paragraph 21.1.

⁴⁰⁹² Interview transcript, OFT Document Reference 13299, page 19.

⁴⁰⁹³ Interview transcript, OFT Document Reference 13299, page 20.

⁴⁰⁹⁴ Interview transcript, OFT Document Reference 13299, page 20.

⁴⁰⁹⁵ Interview transcript, OFT Document Reference 13299, page 20.

⁴⁰⁹⁶ Interview transcript, OFT Document Reference 13297, page 6.

⁴⁰⁹⁷ Interview transcript, OFT Document Reference 13298, page 9.

Evidence from other companies – E Manton

- IV.1680. The OFT wrote to E Manton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty it might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that E Manton had participated in bid rigging on this tender. In response to this letter, E Manton admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party / parties involved'*.⁴⁰⁹⁸ E Manton's legal representatives, Irwin Mitchell, confirmed that *'staff remain ... in the Small Works division and employee recollections confirm that the company was involved in cover pricing in 4 of the contracts as noted'*.⁴⁰⁹⁹ This was one of those four contracts.
- IV.1681. In its response to the Statement, and despite its original admission being based on the recollections of its employees as noted in the previous paragraph, E Manton suggested that there might be alternative explanations for the contemporaneous and witness evidence set out above, although it was unable to provide anything to support those alternative explanations and at its highest, presented a case that it was *'impossible to conclude with any degree of certainty what really happened'*.⁴¹⁰⁰ Since it was unclear whether E Manton was withdrawing its earlier admission of bid rigging in respect of this infringement, the OFT wrote to E Manton on 23 December 2008 requesting confirmation of its position. In response, E Manton stated that it *'...wishes to maintain its earlier admission of participation in cover pricing in relation to all tenders particularised in the the [sic] OFT's original offer. My client does not wish to withdraw the admission made in relation to [this Infringement]'*.⁴¹⁰¹

The OFT's analysis of the evidence and finding

- IV.1682. From the evidence presented above, the OFT draws the following conclusions.
- IV.1683. Bodill, Admiral and E Manton each accepted an invitation to tender for this contract.
- IV.1684. Bodill completed the estimating process for the tender for the contract. It appears that Bodill wanted to win the tender for this contract and submitted a bid with the hope of winning the work.
- IV.1685. Admiral and E Manton were unable to submit a tender by the return date and/or did not want to win this contract.
- IV.1686. In regard to Admiral, Bodill's tender sheet records *'£145499 ADMIRAL CONSTRUCTION © FROM US [.....] [C] M.SAVAGE'* against Admiral. Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £145,499 against Admiral, a figure that was identical to the tender that Admiral submitted for the work.

⁴⁰⁹⁸ Response from E Manton, OFT Document Reference 11003, page 2.

⁴⁰⁹⁹ Response from Irwin Mitchell, OFT Document Reference 10996, page 1.

⁴¹⁰⁰ Written representations of E Manton, 25 June 2008, pages 20 to 22.

⁴¹⁰¹ Email response from E Manton, 10 December 2008.

- IV.1687. Bodill's tender sheet also records the name of an Admiral employee and the Admiral telephone number, providing further evidence that contact was made between the two parties. Admiral, as part of its leniency application, admitted that it took a cover on this tender before being shown the OFT's evidence. When the specific evidence from Bodill in relation to this tender was put to AC in interview, he admitted that Admiral took a cover from Bodill, as described in paragraph IV.1679 above.
- IV.1688. In regard to E Manton, Bodill's tender sheet records '*E. MANTON* © *from us J PORTER* [.....] [C] *P.MORRIS S. HUGHES*' against E Manton. Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £140,504 against E Manton, while E Manton submitted a tender figure of £133,333. There are a number of possible reasons for the discrepancy, such as that Bodill informed E Manton of its own tender figure as well as the proposed cover figure of £140,504, and that E Manton chose a figure between Bodill's figure and the cover price provided by Bodill, to submit as its tender for the work. In light of both Parties' admissions, the discrepancy does not undermine the case that a cover bidding arrangement was made, a price was communicated and both Parties acted on the market in knowledge of that arrangement. Rather, the OFT considers that this provides additional corroboration that the handwritten annotation '*£140504*' was made prior to the tender submission, as the post tender information would have indicated that E Manton's tender figure was in fact £133,333.
- IV.1689. In any event, both Bodill and E Manton have confirmed that a cover price was communicated, so it is irrelevant that the amount tendered by E Manton differed from the price communicated.
- IV.1690. Bodill's tender sheet also records the names of estimators and the telephone number of E Manton, providing further evidence that contact was made between the two parties. Information obtained from Thomas Vale, a list of competitors⁴¹⁰², names for E Manton '*John Porter, Phil Morris* [...] [C]' as people with whom it also engaged in cover pricing.
- IV.1691. E Manton admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007. E Manton's admission was based on recollections of cover pricing in relation to this tender by its employees. E Manton subsequently confirmed its admission to engaging in bid rigging activities on this tender, in an email dated 10 December 2008.
- IV.1692. The OFT notes in addition that the tenders submitted by Admiral and E Manton were both higher than the tender submitted by Bodill, a pattern consistent with cover prices having been provided by Bodill.
- IV.1693. The OFT further notes that no other company submitted a bid lower than Bodill's bid, and that only Bodill could therefore have given E Manton a cover in respect of this tender.
- IV.1694. The OFT therefore concludes that contact took place between Admiral and Bodill and E Manton and Bodill. The OFT also concludes that Bodill supplied figures to each of Admiral and E Manton for cover bids. The OFT notes that all

⁴¹⁰² Contact list, OFT Document Reference 11086, page 15.

three of the tenders submitted for this work at a primary school were the subject of bid rigging, and that even the lowest tender was some £30,000 above the client's 'anticipated value' of the project. The OFT further notes that when the project was re-tendered to different companies due to the original prices being 'not acceptable', the lowest bid was over £20,000 lower than the original lowest bid.

IV.1695. The OFT is satisfied that the facts set out in paragraphs IV.1667 to IV.1694 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴¹⁰³ In particular:

- (a) the provision of figures for cover bids from Bodill to each of Admiral and E Manton was not unilateral⁴¹⁰⁴, and contravenes the principle against direct or indirect contact between competitors;⁴¹⁰⁵
- (b) Admiral and E Manton can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process;⁴¹⁰⁶ and
- (c) Bodill can be presumed to have taken account of the information it received from Admiral and E Manton (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁴¹⁰⁷

IV.1696. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Admiral and Bodill, and between E Manton and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for a classroom extension at Sudbury Primary School, Ashbourne, Derbyshire, tender deadline 19 April 2001.

Immunity and leniency assessment

IV.1697. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1698. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1699. In respect of this tender, the OFT became aware of Admiral's involvement in bid rigging activities by virtue of the information provided by Bodill. Admiral will not therefore receive 100 per cent immunity in respect of this tender. However, Admiral will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁴¹⁰³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴¹⁰⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁴¹⁰⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴¹⁰⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴¹⁰⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 54: Toilet Refurbishment – CPS, King Edward Court, Nottingham – 27 April 2001
Client: Crown Prosecution Service
Parties: Loach, Bodill, Thorndyke

IV.1700. On 3 April 2001, Donaldsons LLP ('Donaldsons'), on behalf of the Crown Prosecution Service ('CPS'), sought tenders for refurbishment work to the toilets at the offices of the CPS, King Edward Court, Nottingham.⁴¹⁰⁸ The following five companies were invited to tender: Loach, Hill, Thorndyke, Sandell Interiors Limited ('Sandell'), and Bodill.⁴¹⁰⁹ The deadline for the receipt of tenders was 12:00 noon on Friday 27 April 2001.

IV.1701. Donaldsons received the following tender returns:⁴¹¹⁰

Company	Date and time tender received	Amount of tender	Awarded contract
Hill	27 April 2001 09:00	£87,620.00	
Thorndyke	27 April 2001 09:00	£79,863.00	
Sandell	27 April 2001 09:00	£65,079.91	Yes
Bodill	27 April 2001 10:49	£85,490.00	
Loach	27 April 2001 09:00	£84,898.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1702. Bodill's original tender sheet⁴¹¹¹ relating to the toilet refurbishment at CPS, King Edward Court, provided to the OFT as part of its leniency application, has a 'C' within a circle in the top right hand corner of the page, together with, under the section headed '*Tenderers*', the following entries, all of which are handwritten:

1. *Bodill*
 2. *Loach*
 * 3. *Thorndyke. Ian Thorndyke*
 £ 79863 [.....] [C] *will ring Thurs.'*

IV.1703. The tender sheet states that Bodill's submitted figure was £85,490.00.

IV.1704. Juris Rozentals ('JR'), Chief Estimator at Bodill, has indicated that he made the handwritten annotation '*£79863*'.⁴¹¹²

IV.1705. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotation '*Ian Thorndyke [.....] [C] will ring Thurs.'* was made by him.⁴¹¹³

⁴¹⁰⁸ Information from client, OFT Document Reference 7691.

⁴¹⁰⁹ Information from client, OFT Document Reference 7691.

⁴¹¹⁰ Information from client, OFT Document Reference 7691.

⁴¹¹¹ Tender sheet, OFT Document Reference 0544.

⁴¹¹² Contracts document, OFT Document Reference 6426, pages 86 and 103.

⁴¹¹³ Contracts document, OFT Document Reference 6426, pages 1 and 18.

Evidence from leniency applicant Bodill

IV.1706. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1707. In particular, Bodill provided to the OFT a *'Tender Analysis - Schedule of Covers taken & given'*⁴¹¹⁴ since March 2000, which records that Bodill did receive a cover on this tender and entered a token tender, but does not name the provider.

IV.1708. Bodill also provided to the OFT a *'Tender Analysis - Tender Sheets March 2000 – November 2004'*.⁴¹¹⁵ This confirmed that Bodill received a cover price from Thorndyke in respect of this tender.

IV.1709. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1710. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1711. During the interview of JR this tender was specifically mentioned and the Bodill tender sheet⁴¹¹⁶ shown to him. When asked if Bodill had taken a cover he replied, *'Yes, yes, certainly'*.⁴¹¹⁷ Questioned as to the figure for the cover price he said *'Well our figure is the figure at the bottom there'*, indicating the figure *'£ 85490:00'*. Referring to the figure *'£79863'* he said, *'That's my writing, but the 85490 at the bottom is not mine, that's, I think that's David's, and I can't, I can't remember how we got hold of that figure ... Thorndike's might have said, well, our figure is 79863, keep yourselves out of the way'*.⁴¹¹⁸

IV.1712. When questioned as to whether the inclusion of the figure *'£ 79863'* was possibly post tender market intelligence from the client, he replied *'Yeah, thinking about it, yeah, it's a possibility, but I really don't recall, I mean, it's so long ago now'*.⁴¹¹⁹ It was then suggested to him, based on the appearance of the tender sheet, the absence of any tender build up analysis, the lower figure next to Thorndyke's name and a higher figure from Bodill as the tender figure, that this was not market research, but more likely, a cover taken. JR answered, *'Yes, yeah'*.⁴¹²⁰

⁴¹¹⁴ Tender Analysis, OFT Document Reference 0849, page 2.

⁴¹¹⁵ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

⁴¹¹⁶ Tender sheet, OFT Document Reference 0544.

⁴¹¹⁷ Interview transcript, OFT Document Reference 11152, page 9.

⁴¹¹⁸ Interview transcript, OFT Document Reference 11152, page 9.

⁴¹¹⁹ Interview transcript, OFT Document Reference 11152, page 10.

⁴¹²⁰ Interview transcript, OFT Document Reference 11152, page 10.

Contemporaneous documentary evidence from leniency applicant Loach – tender spreadsheets

IV.1713. During the OFT’s search of Loach’s premises, three printed spreadsheets were found, two of these spreadsheets⁴¹²¹ contained the following entry:

	Contract	Sum	Margin	%	Won	Note	Job No.	Opposition
27-Apr	Toilet refurbishment, CPS King Edward Court, Nottingham	84,898				Cover		THORNDYKE/ HillBros/ Bodill

IV.1714. A third spreadsheet, headed ‘*Small Works Tenders*’ and marked 2001, contained the following entry:⁴¹²²

	Contract	Sum	Margin	%	Won	Note	Winner	Var %	Job No.	Opposition
27-Apr	Toilet refurbishment CPS King Edward Court, Nottingham	84,898	12,000	14.13%						THORNDYKE / HillBros/ Bodill

Evidence from leniency applicant Loach

IV.1715. As part of its leniency application, Loach’s legal representatives provided a general explanation of its participation in cover pricing.⁴¹²³ This evidence is set out in paragraphs IV.453 to IV.469 above and is relied upon by the OFT in relation to this tender.

IV.1716. In its response to the Statement, Loach stated ‘*Loach took a cover on this tender due to a lack of estimating resources and the inability to return the tender for future marketing considerations*’⁴¹²⁴ in respect of this Infringement.

Witness evidence from leniency applicant Loach

IV.1717. During interviews conducted in connection with its leniency application, Loach’s employees provided further general explanation of its participation in cover pricing, and subsequent alteration of tender sheets. This evidence is set out in paragraphs IV.453 to IV.469 above and is relied upon by the OFT in relation to this tender.

IV.1718. Andrew Arbon-Davis (‘AA’), Chief Estimator at Loach at the time of this tender, was further interviewed on 19 April 2007, and specific reference was made to the CPS, King Edward Court tender. When questioned as to why the name Thorndyke was in capital letters on the tender spreadsheets he replied, ‘

⁴¹²¹ Contract and Small Works spreadsheets, OFT Document References 2989 and 3726.

⁴¹²² Small Works Tender spreadsheet, OFT Document Reference 2946, page 5.

⁴¹²³ Leniency application, OFT Document References 4014 and 4017.

⁴¹²⁴ Written representations of Loach, 26 June 2008, page 19.

think they're in capital letters because they secured the job'.⁴¹²⁵ Asked if it was a method of recording whether or not they had given Loach a cover he answered, *'No ... I mean, we obviously took a cover on that job so we've taken it from somebody. So we may well have taken it from them and they may still have been successful in winning the job*'.⁴¹²⁶ Having taken a cover, Loach has not retained any documentation in respect of this tender, which would assist in identifying the provider. It was suggested to AA that of the three named contractors on their tender spreadsheet the cover had more likely come from Thorndyke. He replied. *'... it could well be that it was Thorndyke that gave us a cover, yes...there would be confidence to get a cover price from them if we wanted to*'.⁴¹²⁷

Evidence from other companies - Thorndyke

IV.1719. The OFT wrote to Pricewaterhouse Coopers LLP, the appointed liquidator for Thorndyke, on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Thorndyke had participated in bid rigging on this tender. The OFT received no response to that letter, and in a follow-up call Pricewaterhouse Coopers LLP confirmed that they understood that the OFT would treat the absence of a response as a rejection of its offer.⁴¹²⁸

IV.1720. Following the issue of the Statement, Thorndyke did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.1721. From the evidence presented above, the OFT draws the following conclusions.

IV.1722. Bodill, Loach, and Thorndyke each accepted an invitation to tender for the contract to refurbish the toilets at the CPS, King Edward Court, Nottingham.

IV.1723. Bodill and Loach were unable to submit a tender by the return date and/or did not want to win this tender.

IV.1724. With regard to the handwritten annotations on the Bodill tender sheet, *'£79863. * 3. Thorndyke. Ian Thorndyke [...] [C] will ring Thurs.'*, the *'*'* next to Thorndyke indicates that Bodill received a cover from that company.⁴¹²⁹ DW admitted writing the reference *'Ian Thorndyke [.....] [C] will ring Thurs'*.⁴¹³⁰ The telephone number is that listed to Thorndyke⁴¹³¹ and Thursday is the day before the deadline for submission of tenders. This indicates that contact took place between the two tenderers prior to the submission of Bodill's tender and that it is unlikely that these annotations were made as a result of post tender market intelligence. The figures *'£79863'* and *'£85490:00'* are confirmed by Donaldsons as the figures submitted by Thorndyke and Bodill respectively.

⁴¹²⁵ Interview transcript, OFT Document Reference 11321, page 8.

⁴¹²⁶ Interview transcript, OFT Document Reference 11321, page 8.

⁴¹²⁷ Interview transcript, OFT Document Reference 11321, page 9.

⁴¹²⁸ File note of telephone conversation, OFT Document Reference 10889.

⁴¹²⁹ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴¹³⁰ Contracts document, OFT Document Reference 6426, pages 1 and 18.

⁴¹³¹ FAME report, OFT Document Reference 12552, page 15.

- IV.1725. The OFT notes in addition that the tender submitted by Bodill was the same as that recorded in Bodill's tender sheet and that Bodill submitted a tender which was higher than the tender submitted by Thorndyke, a pattern consistent with a cover price having been provided.
- IV.1726. With regard to Loach, Loach's tender spreadsheet⁴¹³² indicates a cover was taken and this is confirmed by AA in his interview, although there is no record of the company that provided it.
- IV.1727. Loach submitted a price of £84,898.00, approximately six per cent above that of Thorndyke. This is consistent with a cover price having also been provided by Thorndyke. The information received from Donaldsons is that the contract was won by Sandell, with Thorndyke coming second.
- IV.1728. With regard to Loach's inability to confirm with certainty the origin of the cover price, the OFT notes that the only possible providers of cover to Loach were Thorndyke and Sandell, given that these were the only companies that submitted tenders lower than Loach. Loach admitted that it would have been confident in receiving a cover price from Thorndyke (see paragraph IV.1718 above). Loach made no contemporaneous mention of Sandell in the '*Opposition*' section of its tender register, nor is Sandell mentioned in the lists⁴¹³³ provided by Loach of companies believed to be involved in cover pricing. The OFT considers that in the absence of any evidence against Sandell and in the light of the admissions by Bodill and Loach of cover pricing in this tender that their tender spreadsheet and tender sheets provide corroborating evidence that Thorndyke supplied both Bodill and Loach with cover prices for this tender.
- IV.1729. The OFT further notes the implausibility of AA's suggestion that '*THORNDYKE*' was in capital letters on the tender spreadsheets '*because they secured the job*'. Thorndyke did not win this tender.
- IV.1730. The OFT also considers it significant that Loach, having been made aware of the OFT's visits to other companies involved in this investigation, subsequently drew up a second, amended tender spreadsheet⁴¹³⁴, in which all references to cover pricing were removed, which is significant to this particular tender. This demonstrated that Loach knew that its conduct was wrong and decided to destroy evidence of such conduct.
- IV.1731. The OFT considers that the alteration of the tender spreadsheets is evidence that the original spreadsheet⁴¹³⁵ containing the reference '*cover*' recorded against this tender is an accurate contemporaneous note of Loach's action on receipt of the application to tender.
- IV.1732. The OFT notes in addition that the tender submitted by Loach was the same as that recorded in Loach's tender sheet and that Loach submitted a tender which was higher than the tender submitted by Thorndyke, the pattern consistent with a cover price having been provided.

⁴¹³² Contract and Small Works spreadsheets, OFT Document References 2989 and 3726.

⁴¹³³ List of Companies Involved in Cover Pricing, OFT Document Reference 4027 and 4028.

⁴¹³⁴ Small Works Tender spreadsheet 2001, OFT Document Reference 2946, page 5.

⁴¹³⁵ Contract and Small Works spreadsheets, OFT Document References 2989 and 3726.

IV.1733. In respect of Thorndyke, although it has not admitted engaging in this bid rigging activity, the OFT considers that the contemporaneous evidence from Bodill together with Bodill's admission and explanation of that evidence, and the evidence from Loach, confirms that Thorndyke did in fact engage in bid rigging activity on this tender.

IV.1734. The OFT therefore concludes that contact took place between Bodill and Thorndyke, and between Loach and Thorndyke, and that Thorndyke supplied figures to both Bodill and Loach for cover bids.

IV.1735. The OFT is satisfied that the facts set out in paragraphs IV.1702 to IV.1734 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴¹³⁶ In particular:

- (a) the provision of figures for cover bids from Thorndyke to each of Bodill and Loach was not unilateral⁴¹³⁷, and contravenes the principle against direct or indirect contact between competitors,⁴¹³⁸
- (b) Bodill and Loach can each be presumed to have taken account of the information received from Thorndyke (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁴¹³⁹ and
- (c) Thorndyke can be presumed to have taken account of the information it received from Bodill and Loach (i.e. that neither of them intended to submit a competitive bid) when determining its conduct in the tendering process.⁴¹⁴⁰

IV.1736. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Bodill and Thorndyke and Loach and Thorndyke in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the toilet refurbishment work at the CPS, King Edward Court, Nottingham, tender deadline 27 April 2001.

Immunity and leniency assessment

IV.1737. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1738. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1739. In respect of this tender, the OFT became aware of Loach's bid rigging activities by virtue of the information obtained during the visit under section 28. Loach will not therefore receive 100 per cent immunity in respect of this tender.

⁴¹³⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴¹³⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁴¹³⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴¹³⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴¹⁴⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

However, Loach will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 55: **Alteration and Extension to Front Entrance, Cantrell Primary School, Bullwell, Nottingham – 27 April 2001**
Client: **Nottingham City Council**
Parties: **Bodill and John Cawley**

IV.1740. In 2001, Nottingham City Council sought tenders for the alteration and extension to front entrance at Cantrell Primary School, Bullwell, Nottingham. The return date for the tender was 12:00 noon on 27 April 2001 and six companies were invited to tender: Bodill, Herbert Baggaley, John Cawley, Thomas Long, Nottingham City Building Works and G F Tomlinson.⁴¹⁴¹

IV.1741. Nottingham City Council received the following tender returns prior to the tender expiry date on 27 April 2001:⁴¹⁴²

Company	Date and time tender received	Amount of tender	Awarded the tender
Bodill	Information not available	£93,526	
Herbert Baggaley	Information not available	£228,729*	
John Cawley	Information not available	£105,962	
Thomas Long	Information not available	£214,397*	Yes
Nottingham City Building Works	Information not available	£91,250	
G F Tomlinson	Information not available	£86,877	

IV.1742. This tender exercise was advertised at the same time as another tender for Cantrell Primary School, mobile classroom replacement, which had the same tender deadline of 27 April 2001 (see paragraphs IV.1776 to IV.1811 below).⁴¹⁴³ Herbert Baggaley and Thomas Long (each marked above with an asterisk) submitted combined bids for both Cantrell Primary School tenders while the other tenderers priced up each tender separately.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1743. In Bodill's original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entries for Bodill, Thomas Long and Cawley:⁴¹⁴⁴

⁴¹⁴¹ Information from client, OFT Document Reference 9121.

⁴¹⁴² Information from client, OFT Document Reference 9121.

⁴¹⁴³ Information from client, OFT Document Reference 9119.

⁴¹⁴⁴ Tender sheet, OFT Document Reference 0542.

		1. <i>Bodill</i>
		2. <i>T.Long</i>
A	£131688	3. <i>Cawley</i> © <i>FROM US</i>
B	£105962	<i>N.GREENE</i> [.....] [C]
		4. <i>BAGGALEY</i>
		5. <i>TOMLINSON</i>

IV.1744. The tender sheet states that Bodill's submitted figure was £123,712.⁴¹⁴⁵

IV.1745. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations 'A £131688' and 'B £105962' under the section headed 'Tenderers' were made by him.⁴¹⁴⁶ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1746. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '© FROM US' and 'N.GREENE [.....] [C]' under the section headed 'Tenderers' were made by him.⁴¹⁴⁷ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1747. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1748. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁴¹⁴⁸ In respect of this tender, Bodill confirmed that it gave a cover price to John Cawley.⁴¹⁴⁹ Bodill stated on a separate analysis sheet⁴¹⁵⁰ that it gave two cover prices for this tender. The OFT considers that this referred to the fact that it offered two cover prices to John Cawley, one for this part of the two tenders if priced separately (£131,688) and one for this part of the two tenders if priced together (£105,962). Bodill apparently offered different cover prices to John Cawley for this tender because savings were able to be made by the amalgamation of the works. There is no indication that Bodill gave a cover price to anyone else for this tender.

IV.1749. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

⁴¹⁴⁵ Tender sheet, OFT Document Reference 0542. The OFT notes that this is the Tender A figure, as shown on OFT Document Reference 9122, page 2.

⁴¹⁴⁶ Contracts document, OFT Document Reference 6426, pages 86 and 104.

⁴¹⁴⁷ Contracts document, OFT Document Reference 6426, pages 1 and 20.

⁴¹⁴⁸ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴¹⁴⁹ Tender Analysis – Tender sheets, OFT Document Reference 0465, page 2.

⁴¹⁵⁰ Tender Analysis, OFT Document Reference 0849, page 2.

Witness evidence from leniency applicant Bodill

IV.1750. During interviews conducted in connection with its leniency application, Bodill’s employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1751. In respect of this tender, JR explained the relationship with the associated tender for the mobile classroom replacement at Cantrell Primary School, JR explained that ‘... they [the client] said right, well, what is your price for each job being done in isolation and how much would you want for each job, if the jobs were carried out simultaneously, at the same time’.⁴¹⁵¹ JR further explained that, ‘if the two jobs were done together, then that element [the preliminaries element] would be cheaper [for the works to the front entrance] because the preliminaries element was already included in that job [the mobile classroom replacement]’.⁴¹⁵² JR confirmed that the reason for the two different figures marked against John Cawley on Bodill’s tender sheet for the alteration and extension to the front entrance at Cantrell Primary School was to indicate a cover price for each job done in isolation and a cover price if both jobs were carried out simultaneously.⁴¹⁵³

Contemporaneous documentary evidence from leniency applicant John Cawley – Project list

IV.1752. On the project list, provided by John Cawley to the OFT as part of its leniency application, is typewritten:⁴¹⁵⁴

<i>EST NO</i>	<i>DATE DUE SENT IN</i>	<i>EST BY</i>	<i>CLIENT</i>	<i>PROJECT TITLE DESCRIPTION</i>	<i>AMOUNT</i>	<i>FILED</i>	<i>INVOICE</i>
93	27.4.01	RG	N.C.C.	Carhill Primary School	17321.00	RGO	
94	27.4.01	RG	N.C.C.	Carhill Primary School	17321.00	RGO	
95	27.4.01	RG	N.C.C.	Carhill Primary School	131688.00	RGO	
96	27.4.01	RG	N.C.C.	Carhill Primary School	105962.00	RGO	

Evidence from leniency applicant John Cawley

IV.1753. As part of its leniency application, John Cawley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.441 to IV.452 above and is relied upon by the OFT in relation to this tender.

IV.1754. Following the issue of the Statement, John Cawley did not submit any written or oral representations.

⁴¹⁵¹ Interview transcript, OFT Document Reference 11152, page 10.

⁴¹⁵² Interview transcript, OFT Document Reference 11152, page 11.

⁴¹⁵³ Interview transcript, OFT Document Reference 11152, pages 11 and 12.

⁴¹⁵⁴ Project list, OFT Document Reference 6079, page 3.

Witness evidence from leniency applicant John Cawley

IV.1755. During interviews conducted in connection with its leniency application, John Cawley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.441 to IV.452 above and is relied upon by the OFT in relation to this tender.

IV.1756. In respect of this tender Nicholas Greene ('NG'), Director of John Cawley, could not recall it specifically, but on being shown by the OFT the Bodill tender sheet for this tender, NG said in respect of the entry 'A £131688 B £105962 Cawley® FROM US N.GREENE [.....] [C]' that '*..again we've taken the cover but why it's A and B I've got no idea*'.⁴¹⁵⁵

IV.1757. In respect of the particular circumstances of this tender along with the associated tender for the mobile classroom replacement at Cantrell Primary School, NG said, '*I remember we talked about this with my father [Richard Greene] and he knows that the way that that job was procured with three or four different tenders within one tender was silly, and so pretty confusing at the time....normally it's just one price, that's it, all encompassing*'.⁴¹⁵⁶

IV.1758. Richard Greene ('RG'), a director of John Cawley, on being shown by the OFT the Bodill tender sheet for this tender, confirmed that the special nature of this tender influenced John Cawley's decision as to whether it wanted to win the work and that it approached Bodill for a cover.⁴¹⁵⁷

IV.1759. RG also confirmed in respect of the details entered on John Cawley's project list for this tender, that the spelling '*Carhill*' under the column headed '*Project Title Description*' should have read Cantrell.⁴¹⁵⁸

[...] [C]

IV.1760. [...] [C]^{4159 4160 4161}

[...] [C]

IV.1761. [...] [C]⁴¹⁶²

⁴¹⁵⁵ Interview transcript, OFT Document Reference 11305, page 10.

⁴¹⁵⁶ Interview transcript, OFT Document Reference 11305, page 9.

⁴¹⁵⁷ Interview transcript, OFT Document Reference 11304, page 11.

⁴¹⁵⁸ Interview transcript, OFT Document Reference 11304, page 10.

⁴¹⁵⁹ [...] [C]

⁴¹⁶⁰ [...] [C]

⁴¹⁶¹ [...] [C]

⁴¹⁶² [...] [C]

[...] [C]

[...] [C]

IV.1762. [...] [C]⁴¹⁶³ 4164

The OFT's analysis of the evidence and finding

IV.1763. From the evidence presented above, the OFT draws the following conclusions.

IV.1764. Bodill and John Cawley each accepted an invitation to tender for this tender.

IV.1765. Bodill completed the estimating process for the tender for this contract. It appears that Bodill wanted to win the tender for this contract and that it submitted a bid with the hope of winning the work. John Cawley was unable to submit a tender by the tender return date and/or did not want to win this contract.

IV.1766. In regard to John Cawley, Bodill's tender sheet records 'A £131688', 'B £105962'. Bodill has confirmed that this shows that it gave John Cawley cover prices for this tender. Bodill recorded these two figures on the tender sheet and one of these figures, '£105962', was identical to the tender price that John Cawley submitted for this tender. It is also noted that both of the figures provided by Bodill to John Cawley for this tender have been entered in the 'AMOUNT' column in John Cawley's project list, namely for 'EST NO 95' the figure '£131688' and for 'EST NO 96' the figure '£105962'.

IV.1767. Bodill's tender sheet also records 'Cawley © FROM US N.GREENE [.....] [C]' and the OFT notes more specifically that this indicates that Bodill was to contact NG at John Cawley in order to give it a cover price, providing further evidence that contact was made between the two parties. Furthermore, on being shown Bodill's tender sheet, both NG and RG of John Cawley accepted that John Cawley was provided with a cover price by Bodill.

IV.1768. The OFT notes in addition that the tender submitted by John Cawley was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided. Both parties have admitted to bid rigging in respect of this tender.

IV.1769. [...] [C]

⁴¹⁶³ [...] [C]

⁴¹⁶⁴ [...] [C]

[...] [C]

IV.1770. The OFT therefore concludes that contact took place between John Cawley and Bodill. The OFT also concludes that Bodill supplied a figure to John Cawley for a cover bid.

IV.1771. The OFT is satisfied that the facts set out in paragraphs IV.1743 to IV.1770 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴¹⁶⁵ In particular:

- (a) the provision of a figure for a cover bid from Bodill to John Cawley was not unilateral⁴¹⁶⁶, and contravenes the principle against direct or indirect contact between competitors;⁴¹⁶⁷
- (b) John Cawley can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁴¹⁶⁸ and
- (c) Bodill can be presumed to have taken account of the information it received from John Cawley (i.e. that John Cawley did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴¹⁶⁹

IV.1772. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between John Cawley and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the alteration and extension to front entrance at Cantrell Primary School, Bullwell, Nottingham, tender deadline 27 April 2001.

Immunity and leniency assessment

IV.1773. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1774. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁴¹⁶⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴¹⁶⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁴¹⁶⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴¹⁶⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴¹⁶⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.1775. In respect of this tender, the OFT became aware of John Cawley's involvement in bid rigging activities by virtue of the information provided by Bodill. John Cawley will not therefore receive 100 per cent immunity in respect of this tender. However, John Cawley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 56: Mobile Classroom Replacement, Cantrell Primary School, Bullwell, Nottingham – 27 April 2001
Client: Nottingham City Council
Parties: Bodill and John Cawley

IV.1776. In 2001, Nottingham City Council sought tenders for a mobile classroom replacement at Cantrell Primary School, Bullwell, Nottingham. The return date for the tender was 12:00 noon on 27 April 2001 and six companies were invited to tender: Bodill, Herbert Baggaley, John Cawley, Thomas Long, Nottingham City Building Works and G F Tomlinson.⁴¹⁷⁰

IV.1777. Nottingham City Council received the following tender returns prior to the tender expiry date on 27 April 2001:⁴¹⁷¹

Company	Date and time tender received	Amount of tender	Awarded the tender
Bodill	Information not available	£159,728	
Herbert Baggaley	Information not available	£228,729*	
John Cawley	Information not available	£173,210	
Thomas Long	Information not available	£214,397*	Yes
Nottingham City Building Works	Information not available	£139,520	
G F Tomlinson	Information not available	£131,454	

IV.1778. This tender exercise was advertised at the same time as another tender for Cantrell Primary School, alteration and extension to the front entrance, which had the same tender deadline of 27 April 2001 (see paragraphs IV.1740 to IV.1775 above).⁴¹⁷² Herbert Baggaley and Thomas Long (each marked above with an asterisk) submitted combined bids for both Cantrell Primary School tenders while the other tenderers priced up each tender separately.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.1779. In Bodill's original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten except the entries for Bodill, Thomas Long and Cawley:⁴¹⁷³

⁴¹⁷⁰ Information from client, OFT Document Reference 9119.

⁴¹⁷¹ Information from client, OFT Document Reference 9119.

⁴¹⁷² Information from client, OFT Document Reference 9121.

⁴¹⁷³ Tender sheet, OFT Document Reference 0541.

1. *Bodill*
 2. *T.Long*
 3. *Cawley* © ~~FROM US~~
 4. *BAGGALEY*
 5. *TOMLINSON*.
- A* £173210.00
B £173210.00
- N.GREENE* [.....] [C]

IV.1780. The tender sheet states that Bodill's submitted figure was £159,728.⁴¹⁷⁴

IV.1781. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations '*A* £173210.00', '*B* £173210.00' and '~~FROM US~~', under the section headed '*Tenderers*' were made by him.⁴¹⁷⁵ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1782. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '© ~~FROM US~~' and '*N.GREENE* [.....] [C]' under the section headed '*Tenderers*' were made by him.⁴¹⁷⁶ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1783. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1784. As part of its leniency application, Bodill also provided to the OFT an analysis of its tender sheets since March 2000.⁴¹⁷⁷ In respect of this tender, Bodill confirmed that it gave a cover price to John Cawley.⁴¹⁷⁸ Bodill stated on a separate analysis sheet⁴¹⁷⁹ that it gave two cover prices for this tender. The OFT considers that this referred to the fact that it offered two cover prices to John Cawley, one for this part of the two tenders if priced separately (£173,210) and one for this part of the two tenders if priced together (also £173,210 in this instance). For the other part of the two tenders, the works on the front entrance, Bodill apparently offered different cover prices to John Cawley because savings were able to be made by the amalgamation of the works. There is no indication that Bodill gave a cover price to anyone else for this tender.

⁴¹⁷⁴ Tender sheet, OFT Document Reference 0541.

⁴¹⁷⁵ Contracts document, OFT Document Reference 6426, pages 86 and 104.

⁴¹⁷⁶ Contracts document, OFT Document Reference 6426, pages 1 and 19. The OFT notes that both JR and DW have claimed authorship of the comment '~~FROM US~~' – the writing is, however, consistent with that of DW elsewhere on this document and on the tender sheet for the Alteration and Extension to the Front Entrance, and does appear to be that of DW.

⁴¹⁷⁷ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴¹⁷⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 2.

⁴¹⁷⁹ Tender Analysis, OFT Document Reference 0849, page 2.

IV.1785. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.1786. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1787. In respect of this tender JR explained the relationship with the associated tender for the alteration and extension to the front entrance at Cantrell Primary School, '*...they [the client] said right, well, what is your price for each job being done in isolation and how much would you want for each job, if the jobs were carried out simultaneously, at the same time*'.⁴¹⁸⁰ JR further explained that, '*if the two jobs were done together, then that element [the preliminaries element] would be cheaper [for the works to the Front Entrance] because the preliminaries element was already included in that job [the Mobile Classroom replacement]*'.⁴¹⁸¹ JR confirmed that for this tender for the mobile classroom replacement, the cover prices given to John Cawley were identical at £173,210, because the savings to be made for combining the two tenders were incorporated in the cover price for the other tender for the works to the front entrance.⁴¹⁸²

Contemporaneous documentary evidence from leniency applicant John Cawley – Project list

IV.1788. On the project list, provided by John Cawley to the OFT as part of its leniency application, is typewritten:⁴¹⁸³

<i>EST NO</i>	<i>DATE DUE SENT IN</i>	<i>EST BY</i>	<i>CLIENT</i>	<i>PROJECT TITLE DESCRIPTION</i>	<i>AMOUNT</i>	<i>FILED</i>	<i>INVOICE</i>
<i>93</i>	<i>27.4.01</i>	<i>RG</i>	<i>N.C.C.</i>	<i>Carhill Primary School</i>	<i>17321.00</i>	<i>RGO</i>	
<i>94</i>	<i>27.4.01</i>	<i>RG</i>	<i>N.C.C.</i>	<i>Carhill Primary School</i>	<i>17321.00</i>	<i>RGO</i>	
<i>95</i>	<i>27.4.01</i>	<i>RG</i>	<i>N.C.C.</i>	<i>Carhill Primary School</i>	<i>131688.00</i>	<i>RGO</i>	
<i>96</i>	<i>27.4.01</i>	<i>RG</i>	<i>N.C.C.</i>	<i>Carhill Primary School</i>	<i>105962.00</i>	<i>RGO</i>	

Evidence from leniency applicant John Cawley

IV.1789. As part of its leniency application, John Cawley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.441 to IV.452 above and is relied upon by the OFT in relation to this tender.

⁴¹⁸⁰ Interview transcript, OFT Document Reference 11152, page 10.

⁴¹⁸¹ Interview transcript, OFT Document Reference 11152, page 11.

⁴¹⁸² Interview transcript, OFT Document Reference 11152, pages 11 and 12.

⁴¹⁸³ Project list, OFT Document Reference 6079, page 3.

IV.1790. Following the issue of the Statement, John Cawley did not submit any written or oral representations.

Witness evidence from leniency applicant John Cawley

IV.1791. During interviews conducted in connection with its leniency application, John Cawley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.441 to IV.452 above and is relied upon by the OFT in relation to this tender.

IV.1792. In respect of this tender Nicholas Greene ('NG'), Director of John Cawley, could not recall the specific details of this tender, but on being shown by the OFT the Bodill tender sheet for this tender, NG said in respect of the entry 'A £173210.00', 'B £173210.00' Cawley © ~~FROM~~ US N.GREENE [.....] [C]', that '*...I don't recall it but it would be us just taking a cover, yes. And that's their details recording our name*⁴¹⁸⁴ and '*... we took a cover from Bodill's*'.⁴¹⁸⁵

IV.1793. In respect of the particular circumstances of this tender along with the associated tender for the alteration and extension to the front entrance at Cantrell Primary School NG said, '*I remember we talked about this with my father [Richard Greene] and he knows that the way that that job was procured with three or four different tenders within one tender was silly, and so pretty confusing at the time....normally it's just one price, that's it, all encompassing*'.⁴¹⁸⁶

IV.1794. Richard Greene ('RG'), a director of John Cawley, on being shown by the OFT the Bodill tender sheet for this tender, said in respect of the entry 'A £173210.00', 'B £173210.00' Cawley © ~~FROM~~ US N.GREENE [.....] [C]', '*yeah, it rings a bell. It was silly really.....Because it meant a lot of extra work, splitting it all up, instead of sending to each subcontractor, you had to send them four little packages.....and then, if you don't know whether you're going to get all the job or one of them, it affects the way you price it....No well, I'll keep out of this*'.⁴¹⁸⁷ RG confirmed that the special nature of this tender influenced John Cawley's decision as to whether it wanted to win the work and that it approached Bodill for a cover.⁴¹⁸⁸

IV.1795. RG also confirmed in respect of the details entered on John Cawley's project list for this tender, that the decimal point had been entered incorrectly under the column 'Amount' for the figure '17321.00', and that it should have read £173,210 and that the spelling 'Carhill' under the column headed 'Project Title Description' should have read Cantrell.⁴¹⁸⁹

[...] [C]

IV.1796. [...] [C]⁴¹⁹⁰ 4191 4192

⁴¹⁸⁴ Interview transcript, OFT Document Reference 11305, page 9.

⁴¹⁸⁵ Interview transcript, OFT Document Reference 11305, page 9.

⁴¹⁸⁶ Interview transcript, OFT Document Reference 11305, page 9.

⁴¹⁸⁷ Interview transcript, OFT Document Reference 11304, page 11.

⁴¹⁸⁸ Interview transcript, OFT Document Reference 11304, pages 11 and 12.

⁴¹⁸⁹ Interview transcript, OFT Document Reference 11304, pages 10 and 11.

⁴¹⁹⁰ [...] [C]

⁴¹⁹¹ [...] [C]

⁴¹⁹² [...] [C]

[...] [C]

[...] [C]

IV.1797. [...] [C] ⁴¹⁹³

[...] [C]

IV.1798. [...] [C] ⁴¹⁹⁴ ⁴¹⁹⁵

The OFT's analysis of the evidence and finding

IV.1799. From the evidence presented above, the OFT draws the following conclusions.

IV.1800. Bodill and John Cawley each accepted an invitation to tender for this contract.

IV.1801. Bodill completed the estimating process for the tender for this contract. It appears that Bodill wanted to win the tender for this contract and that it submitted a bid with the hope of winning the work. John Cawley was unable to submit a tender by the tender return date and/or did not want to win this contract.

IV.1802. In regard to John Cawley, Bodill's tender sheet records 'A £173210.00', 'B £173210.00'. Bodill has confirmed that this shows that it gave John Cawley cover prices for this tender. Bodill recorded on the tender sheet the figure £173,210, a figure that was identical to the tender price that John Cawley submitted.

IV.1803. Bodill's tender sheet also records 'Cawley © ~~FROM~~ US N. GREENE [.....] [C]' and the OFT notes more specifically that this shows that Bodill was to contact NG at John Cawley in order to give it a cover price, providing further evidence that contact was made between the two parties. Furthermore, on being shown Bodill's tender sheet, both NG and RG of John Cawley accepted that John

⁴¹⁹³ [...] [C]

⁴¹⁹⁴ [...] [C]

⁴¹⁹⁵ [...] [C]

Cawley was provided with a cover price by Bodill. NG specifically said on being shown the Bodill tender sheet that *'that's their details recording our name'* and *'... we took a cover from Bodill's'*.

IV.1804. The OFT notes in addition that the tender submitted by John Cawley was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided. Both parties have admitted to bid rigging in respect of this tender.

IV.1805. [...] [C]

IV.1806. The OFT therefore concludes that contact took place between John Cawley and Bodill. The OFT also concludes that Bodill supplied a figure to John Cawley for a cover bid.

IV.1807. The OFT is satisfied that the facts set out in paragraphs IV.1779 to IV.1806 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴¹⁹⁶ In particular:

- (a) the provision of a figure for a cover bid from Bodill to John Cawley was not unilateral⁴¹⁹⁷, and contravenes the principle against direct or indirect contact between competitors;⁴¹⁹⁸
- (b) John Cawley can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁴¹⁹⁹ and
- (c) Bodill can be presumed to have taken account of the information it received from John Cawley (i.e. that John Cawley did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴²⁰⁰

IV.1808. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between John Cawley and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a mobile classroom replacement at Cantrell Primary School, Bullwell, Nottingham, tender deadline 27 April 2001.

⁴¹⁹⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴¹⁹⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁴¹⁹⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴¹⁹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²⁰⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.1809. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1810. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1811. In respect of this tender, the OFT became aware of John Cawley's involvement in bid rigging activities by virtue of the information provided by Bodill. John Cawley will not therefore receive 100 per cent immunity in respect of this tender. However, John Cawley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 57: Early Excellence Centre, Aughton Nursery School – 30 April 2001
Client: Rotherham Metropolitan Borough Council
Parties: Wildgoose and Bramall

IV.1812. On 26 March 2001, Rotherham Metropolitan Borough Council sought tenders for the construction of a new extension at Aughton Nursery School, Early Excellence Centre.⁴²⁰¹ The following seven companies were invited to tender: Bramall, George Hurst and Sons Ltd, RMBC Building Works Department, Totty, Wildgoose, Walter G Birch Ltd and J & S Seddon (Building) Ltd.⁴²⁰² The deadline for receipt of tenders was 11:00 am on 30 April 2001.⁴²⁰³

IV.1813. Rotherham Metropolitan Borough Council received the following tender returns:⁴²⁰⁴

Company	Time & Date tender received	Amount of tender	Awarded contract
Bramall	Not identifiable	£624,986.00	
George Hurst and Sons Ltd	Not identifiable	£578,624.00	
RMBC – Building Works Department	Not identifiable	£586,678.57	Yes
Totty	Not identifiable	£582,991.00	
Wildgoose	Not identifiable	£589,249.00	
Walter G Birch Ltd	Not identifiable	£658,856.00	
J & S Seddon (Building) Ltd	Not identifiable	£654,141.73	

⁴²⁰¹ Information from client, OFT Document Reference 10651.

⁴²⁰² Information from client, OFT Document Reference 10651.

⁴²⁰³ Information from client, OFT Document Reference 10651.

⁴²⁰⁴ Information from client, OFT Document Reference 10651.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Wildgoose – Tender Enquiry Register and Tender Finance Statement

IV.1814. During the OFT’s search of Wildgoose’s premises, an Enquiry Register was found. The Enquiry Register contained the following entry:⁴²⁰⁵

E.NO	DATES RECEIVED	RETURN	PROJECT	CLIENT
01/112	29/3	30/4	Early Excellence Centre, Aughton Nursery School	Rotherham Metropo Borough Council

Q/S	ARCHITECT	TENDER DELIVERY – TENDER SUM	DIFF.	EST.	RST
Rotherham Borough Council Tel [...] [C]		Rotherham £589249.00		RH	

IV.1815. As part of its leniency application, Wildgoose provided to the OFT a Tender Finance Statement for this contract. Page four of the Tender Finance Statement contained the following handwritten entry, under the heading, ‘*Competition*’:⁴²⁰⁶

COMPETITION
BRAMALL C
SEDDON
TOTTY
DLO
WCL
MARSHALL
G. HURST

Contemporaneous documentary evidence from leniency applicant Bramall – Tender Register

IV.1816. During the OFT’s search of Bramall’s premises, a tender register was found. The tender register contained the following handwritten entry:⁴²⁰⁷

⁴²⁰⁵ Tender Enquiry Register, OFT Document Reference 0095, page 22.

⁴²⁰⁶ Tender Finance Statement, OFT Document Reference 0404, page 4.

⁴²⁰⁷ Tender register, OFT Document Reference B0100, page 11.

Est No.	Customer/Project		Date due in	Tender Sum
3347 500K LA Other	Rotherham MBC – Early Excellence Centre at Aughton Nursery School, Sheffield	B	30 th April 01 (11am)	624986.00

Contribution	Competition Bids			O/No.
	Wildgoose			

Evidence from leniency applicant - Bramall

IV.1817. As part of its leniency application, Bramall provided to the OFT a list of ‘*Definite and Probably Covers Taken*’. This list contained the following entry:⁴²⁰⁸

Est No.		Customer/Project	Reg	Date due in	Tender Sum
3347	500K LA other	Rotherham MBC – Early Excellence Centre at Aughton Nursery School, Sheffield	B	30 April 2001 (11am)	624986.00

Contribution	Competitor Bids	NAB comments	PA comments
	Wildgoose (T) ANO (T) Seddon (T) Totty (T) Walter Birch (T) Rotherham MBE DLO (T) 586, 678	There is only one name in the tender book (Wildgoose) which suggests to me that we took a cover from them	This was non- standard work and we probably took a cover from Wildgoose

DS comments	Status on EMS (blue) or other evidence (green)
That looks to me as though we took help from Wildgoose for help	Budget

IV.1818. In its response to the Statement, Bramall confirmed that it does not ‘...*dispute the fact of taking or giving cover prices, and specifically in relation to [this Infringement]*’.⁴²⁰⁹

⁴²⁰⁸ Covers schedule provided by Bramall, OFT Document Reference B1420, page 5.

⁴²⁰⁹ Written representations of Bramall, 27 June 2008, paragraph 1.1.

Witness evidence from leniency applicant – Bramall

IV.1819. During interviews conducted in connection with its leniency application, Bramall’s employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.243 to IV.273 above and is relied upon by the OFT in relation to this tender.

IV.1820. During an interview on 27 March 2007, Neil Baxter (‘NB’), Managing Director, was asked what he could recall in relation to this contract. NB stated, *‘The only entry that we had in our tender log book for this one was from Wildgoose and that suggests that it could have been a cover but not the type of work that we would have wanted to carry out it was school work’*.⁴²¹⁰ NB confirmed that it is possible that Wildgoose provided Bramall with a cover price for this tender.⁴²¹¹

Evidence from leniency applicant - Wildgoose

IV.1821. In its response to the Statement, Wildgoose confirmed that it *‘...accepts that it gave Bramall Construction a cover price on this tender’*.⁴²¹²

Witness evidence from leniency applicant - Wildgoose

IV.1822. During interviews conducted in connection with its leniency application, Wildgoose’s past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.726 to IV.742 above and is relied upon by the OFT in relation to this tender.

IV.1823. During an interview on 17 April 2007, Richard Hubble (‘RH’), a senior estimator for Wildgoose from 2000 to September 2002, was asked if he could recall anything about this contract. RH replied, *‘... no ... by the looks of it I priced it but I can’t remember the job’*.⁴²¹³ RH confirmed that he was the estimator for this contract as confirmed by *‘RH’* [Richard Hubble’s initials] handwritten on the enquiry register in the *‘EST’* column of the Enquiry Register.⁴²¹⁴

IV.1824. The OFT showed RH the Tender Finance Statement for this contract, and asked him to explain the entries on page four, headed *‘competition’*. RH stated, *‘... top one Bramall Construction, they’ve rung us and asked for some help’*.⁴²¹⁵ RH confirmed that the tender register showed this *‘because of the ‘C’ next to it, we’ve helped them out. And then the rest of it’s the competition, Seddons from Stoke, Totty Construction, DLO the direct labour organisation, obviously ourselves, and Marshalls, I’ve heard of and G. Hurst Construction’*.⁴²¹⁶

The OFT’s analysis of the evidence and finding

IV.1825. From the evidence presented above, the OFT draws the following conclusions.

⁴²¹⁰ Interview transcript, OFT Document Reference 11169, page 10.

⁴²¹¹ Interview transcript, OFT Document Reference 11169, page 10.

⁴²¹² Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2004), paragraph 5.35.1.

⁴²¹³ Interview transcript, OFT Document Reference 11445, page 10.

⁴²¹⁴ Interview transcript, OFT Document Reference 11445, page 10.

⁴²¹⁵ Interview transcript, OFT Document Reference 11445, page 10.

⁴²¹⁶ Interview transcript, OFT Document Reference 11445, page 10.

- IV.1826. Wildgoose and Bramall each accepted an invitation to tender for the contract for the construction of a new extension at Aughton Nursey School.
- IV.1827. Both companies submitted a tender. Wildgoose completed the estimating process for the tender and submitted a bid with the hope of winning the work.
- IV.1828. Bramall did not have the time to complete the estimating process and/or it did not want to win the contract, due to the type of work involved.
- IV.1829. Wildgoose's '*Tender Finance Statement*' records '*BRAMALL C*', handwritten in the competition box. RH confirmed that this shows that Wildgoose gave a cover price to Bramall. He said, '*Bramall Construction, they've rung us and asked for some help ... we've helped them out*'.⁴²¹⁷ The OFT notes that no '*C*' is recorded against any of the other competitors written on the '*Tender Finance Statement*'.
- IV.1830. Bramall's Tender Register records '*Wildgoose*' in the '*Competition Bids*' box. NB confirmed that this shows that Bramall possibly took a cover price from Wildgoose and that this was a type of work which Bramall did not usually want to carry out. The OFT considers it significant that Bramall named Wildgoose as the company with which it possibly engaged in cover pricing, without being shown the OFT's existing evidence in respect of Wildgoose. In the light of the contemporaneous evidence from both Wildgoose and Bramall, and RH's and NB's explanation of the contemporaneous evidence, the OFT considers that Wildgoose supplied Bramall with a cover price for this tender.
- IV.1831. In addition the OFT notes that the tender submitted by Bramall was higher than the tender submitted by Wildgoose, the pattern consistent with a cover price having been provided.
- IV.1832. The OFT therefore concludes that contact took place between Wildgoose and Bramall. The OFT also concludes that Wildgoose supplied a figure to Bramall for a cover bid.
- IV.1833. The OFT is satisfied that the facts set out in paragraphs IV.1814 to IV.1832 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴²¹⁸ In particular:
- (a) the provision of a figure for a cover bid from Wildgoose to Bramall was not unilateral⁴²¹⁹, and contravenes the principle against direct or indirect contact between competitors;⁴²²⁰
 - (b) Bramall can be presumed to have taken account of the information received from Wildgoose (i.e. the cover price) when determining its own conduct in the tendering process;⁴²²¹ and
 - (c) Wildgoose can be presumed to have taken account of the information it received from Bramall (i.e. that Bramall did not intend to submit a

⁴²¹⁷ Interview transcript, OFT Document Reference 11445, page 10.

⁴²¹⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴²¹⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁴²²⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴²²¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

competitive bid) when determining its conduct in the tendering process.⁴²²²

IV.1834. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Wildgoose and Bramall, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the construction of a new extension at Aughton Nursery School, tender deadline 30 April 2001.

IV.1835. In its response to the Statement, Bramall disputed the OFT's finding that Bramall took into account the information it received from Wildgoose when determining its conduct, asserting instead that '*...Bramall's conduct was determined at a very preliminary stage, i.e. when Bramall decided not to allocate time and staff to the estimation process and therefore before any alleged contact with Wildgoose*'.⁴²²³ The OFT does not accept Bramall's interpretation of events as it is clear from Bramall's admission of taking a cover price that Bramall did in fact take account of the information it received from Wildgoose by submitting a bid at or around the level communicated to it by Wildgoose.

IV.1836. In their responses to the Statement, both Wildgoose and Bramall disputed the OFT's finding that Wildgoose would have taken account of Bramall's intention to not submit a competitive bid when determining its conduct. Bramall asserted that the '*...fact that shortly before the tender submission deadline [Wildgoose] might have been informed that one of the possible competitors might not intend to win the tender but there were other genuine competitive prices returned, could not have affected its decision in terms of what conduct to adopt when it received the tender invitation and started the estimation process*'.⁴²²⁴ Wildgoose stated that it '*continued to price the project as competitively as it could*'.⁴²²⁵

IV.1837. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁴²²⁶ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Wildgoose or Bramall has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept the assertion that the cover pricing did not affect Wildgoose's actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

Immunity and leniency assessment

IV.1838. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100

⁴²²² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²²³ Written representations of Bramall, 27 June 2008 (as amended on 30 March 2009), paragraph 2.14.1.

⁴²²⁴ Written representations of Bramall, 27 June 2008 (as amended on 30 March 2009), paragraph 2.14.1.

⁴²²⁵ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2004), paragraph 5.36.2.

⁴²²⁶ See paragraph III.58 of the Legal Background section.

per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1839. Wildgoose informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Wildgoose will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.1840. In respect of this tender, the OFT became aware of Bramall's involvement in bid rigging activities by virtue of the information provided by Wildgoose. Bramall will not therefore receive 100 per cent immunity in respect of this tender. However, Bramall will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 58: The Toll House, Stratford upon Avon – 8 May 2001
Client: Antler Homes Midlands Ltd
Parties: Thomas Vale and Greswolde

IV.1841. On 30 March 2001, Antler Homes Midlands Ltd sought tenders for a new build of a residential development at The Toll House, Stratford upon Avon. The following five companies were invited to tender: Palmac Contracting Ltd, Mayway Construction Ltd, Greswolde, Crosbee & Atkins and Thomas Vale.⁴²²⁷ The deadline for the receipt of tenders was 12:00 noon on 8 May 2001.⁴²²⁸

IV.1842. Antler Homes Midlands Ltd received the following tender returns:⁴²²⁹

Company	Time & Date tender received	Amount of tender	Awarded contract
Palmac Contracting Ltd	8 May 2001 before 12:00 noon	£1,043,162	Yes
Mayway Construction Ltd	8 May 2001 before 12:00 noon	£1,223,009	
Greswolde	8 May 2001 before 12:00 noon	£1,244,899	
Crosbee & Atkins	8 May 2001 before 12:00 noon	£1,266,806	
Thomas Vale	8 May 2001 before 12:00 noon	£1,298,520	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.1843. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁴²³⁰

⁴²²⁷ Information from client, OFT Document Reference 7059.

⁴²²⁸ Information from client, OFT Document Reference 7059.

⁴²²⁹ Information from client, OFT Document Reference 7059.

⁴²³⁰ Tender Status spreadsheet, OFT Document Reference 4522, page 15.

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T4793	P	Antler Homes Midlands Ltd	Residential Development, The Toll House, Stratford upon Avon		AJB	B	30/04/2001 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
1,298,520		Greswolde, Crosbie and Atkins,	

Evidence from leniency applicant Thomas Vale

IV.1844. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.1845. At Annex 14⁴²³¹ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 55 of the schedule under Annex 14 and within the section for 2000 tenders is the following entry:⁴²³²

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T4793	30 April	Antler Homes Midlands Ltd	Residential Development, The Toll House, Stratford upon Avon	Taken (Greswolde)	Yes (Tender Spreadsheet)

IV.1846. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.1847. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application.⁴²³³ The name 'Greswold' appears on this list.

⁴²³¹ Leniency application, OFT Document Reference 4568.

⁴²³² Leniency application, OFT Document Reference 4568, page 55.

⁴²³³ Cover pricing activity: Key competitors, OFT Document Reference 4524.

IV.1848. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.1849. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.1850. As indicated by the letter 'P' in the Tender Status spreadsheet, this tender was allocated to the Special Projects Division, based at Thomas Vale's head office. CKT explained that all tenders at the head office were booked through him but estimators in different divisions would have been aware of the requirement to either update the spreadsheet themselves or inform CKT of what had occurred once the tender had been submitted, including where assistance had been sought from other contractors. CKT also said that the initials 'AJB' in the estimator column were for Anthony (Tony) Bastable ('AJB'), who left Thomas Vale's employment in 2005.⁴²³⁴ In interview, CKT referred to the entry in the Tender Status spreadsheet for this tender as follows: *'Yes, it's tender return date of the 30th of April 2001, contract figure, or tender figure of £1,298,520. Greswolde are in bold letters which indicates we went to Greswolde for a cover figure'*.⁴²³⁵ CKT confirmed that AJB would have made contact with Greswolde for a cover price *'because they generally dealt with their own cover figures in the projects division'*.⁴²³⁶

Evidence from other companies – Greswolde

IV.1851. The OFT wrote to Greswolde on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greswolde had participated in bid rigging on this tender. In response Greswolde, through their legal representatives, admitted engaging *'in bid rigging activities on this tender with THOMAS VALE CONSTRUCTION'*.⁴²³⁷

IV.1852. The OFT subsequently wrote to Greswolde's ultimate parent company at the time of this Infringement, Mantisson, on 5 November 2007, asking it to comment on Greswolde's response to the OFT's Fast Track Offer, given that the OFT intended to hold Mantisson jointly and severally liable for any infringements committed by Greswolde in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Mantisson did not make any comment.⁴²³⁸

⁴²³⁴ Interview transcript, OFT Document Reference 13855, page 7.

⁴²³⁵ Interview transcript, OFT Document Reference 13855, page 22.

⁴²³⁶ Interview transcript, OFT Document Reference 13855, page 22.

⁴²³⁷ Response from Greswolde, OFT Document Reference 10364, page 3.

⁴²³⁸ Response from Mantisson, OFT Document Reference 13986.

IV.1853. In their response to the Statement, Greswolde and Mantisson stated *'Greswolde is not...challenging the OFT's substantive allegations in relation to each of the Alleged Infringements and maintains its acceptance of the terms of the Fast Track Offer'*.⁴²³⁹

The OFT's analysis of the evidence and finding

IV.1854. From the evidence presented above, the OFT draws the following conclusions.

IV.1855. Thomas Vale and Greswolde each accepted an invitation to tender for the new build of residential development at The Toll House, Stratford upon Avon.

IV.1856. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.

IV.1857. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT and available to estimators at Thomas Vale's head office, including AJB within Special Projects Division, records two competitors for this tender, namely Greswolde and *'Crosbie and Atkins'*. Greswolde is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated by Special Projects Division. Thomas Vale's bid is recorded by the client as £1,298,520 which matches the figure recorded by Thomas Vale on the Tender Status spreadsheet.

IV.1858. Antler Homes Midlands Ltd also received a tendered amount of £1,244,899 from Greswolde, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Greswolde to Thomas Vale.

IV.1859. The OFT notes that although two competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one company is highlighted in bold, i.e. Greswolde. This indicates that a conscious decision was made to differentiate Greswolde from the other competitor.

IV.1860. Thomas Vale admitted that Greswolde was one of the *'key competitors'* with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price had been received by Thomas Vale from Greswolde and AJB would have obtained the cover price.

IV.1861. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Greswolde admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides independent corroboration of the OFT's evidence in respect of this tender.

IV.1862. The OFT therefore concludes that contact took place between Thomas Vale and Greswolde. The OFT also concludes that Greswolde supplied a figure to Thomas Vale for a cover bid.

⁴²³⁹ Written representations of Greswolde and Mantisson, 27 June 2008, paragraph 2.5.

IV.1863. The OFT is satisfied that the facts set out in paragraphs IV.1843 to IV.1862 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴²⁴⁰ In particular:

- (a) the provision of a figure for a cover bid from Greswolde to Thomas Vale was not unilateral⁴²⁴¹, and contravenes the principle against direct or indirect contact between competitors;⁴²⁴²
- (b) Thomas Vale can be presumed to have taken account of the information received from Greswolde (i.e. the cover price) when determining its own conduct in the tendering process;⁴²⁴³ and
- (c) Greswolde can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴²⁴⁴

IV.1864. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Greswolde in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the new build at The Toll House, Stratford upon Avon, tender deadline 8 May 2001.

Immunity and leniency assessment

IV.1865. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1866. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 59: Alterations, Improvements & Extension, Burnholme College, York – 8 May 2001
Client: City of York Council
Parties: Strata (formerly known as Weaver) and Simons

IV.1867. On 9 April 2001, City of York Council sought tenders for alterations, improvements and extension at Burnholme College, York.⁴²⁴⁵ The following six companies were invited to tender: Simons, P S Turner Construction Limited, Thomas Armstrong Construction Limited, P Casey, Weaver and Totty.⁴²⁴⁶ The deadline for receipt of tenders was 12:00 noon on 8 May 2001.⁴²⁴⁷

⁴²⁴⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴²⁴¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴²⁴² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴²⁴³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²⁴⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²⁴⁵ Information from client, OFT Document Reference 7401.

⁴²⁴⁶ Information from client, OFT Document Reference 7401.

⁴²⁴⁷ Information from client, OFT Document Reference 7401.

IV.1868. City of York Council received the following tender returns:⁴²⁴⁸

Company	Time & Date tender received	Amount of tender	Awarded contract
Simons	No records available	£1,795,608	
P S Turner Construction Limited	No records available	£1,577,237 Tender withdrawn due to contractor's arithmetical error	
Thomas Armstrong Construction Limited	No records available	£1,685,308	
P Casey	No records available	£1,892,001	
Weaver [Strata]	No records available	£1,639,297	Yes
Totty	No records available	£1,795,497	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Contract Information Sheet (BOB sheet)

IV.1869. During the OFT's search of Strata's premises, a contract information sheet, or BOB sheet, was found.⁴²⁴⁹ The BOB sheet contained the following entries typed in the tender results box:⁴²⁵⁰

TENDER RESULTS		
% DIFF	CONTRACTOR	VALUE
	WEAVER	1639297
7.6680967	SIMONS (C)	1765000
	TOTTY	
	CASEY	
	ALLENBUILD	
	THOMAS ARMSTRONG	

Evidence from leniency applicant - Strata

IV.1870. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. This list contained the following entry:⁴²⁵¹

⁴²⁴⁸ Information from client, OFT Document Reference 7401.

⁴²⁴⁹ Contract, OFT Document Reference 3099.

⁴²⁵⁰ Contract, OFT Document Reference 3099.

⁴²⁵¹ Schedule of covers, OFT Document Reference 4054, page 6.

Date	Project	Strata ref no
08/05/2001	Alts, Imps & Extns to Burnholme College, York	T43/01

Cover to	Cover from	Company Name	Company Address	Contract Secured
✓		Simons	York\$	Yes

IV.1871. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Strata

IV.1872. During interviews conducted in connection with its leniency application, Strata’s past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from leniency applicant - Simons

IV.1873. In its response to the Statement, Simons confirmed its support for ‘...*the OFT’s desire to eradicate cover pricing and, unlike some parts of the construction industry, does not seek to excuse it or to minimise its potential effects on competition. Rather Simons Group acknowledges that cover pricing is unlawful (and distorts competition), and accepts responsibility for the failings of its subsidiaries SCL [Simons] and Wrights [Wrights (Lincoln)] in taking cover prices in the three bid situations [including this Infringement] described in the [Statement]...’.*⁴²⁵²

Witness evidence from leniency applicant – Simons

IV.1874. During interviews conducted in connection with its leniency application, Simons’ employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.567 to IV.592 above and is relied upon by the OFT in relation to this tender.

IV.1875. Also during an interview with the OFT on 15 March 2007, conducted in connection with Simons’s leniency application, Phil Bowers (‘PB’), Regional Manager of Simons’s York office, provided further information regarding the tender for this contract. PB stated that ‘... *It doesn’t mean anything to me at all. However it is in our tender book at York and obviously it went through the York office’.*⁴²⁵³ PB was shown the BOB sheet found at Strata⁴²⁵⁴ and asked whether Strata was a company with whom Simons would have exchanged cover prices in the past, to which PB replied, ‘*It’s possible. I can’t remember but it’s possible, yes’.*⁴²⁵⁵ PB confirmed that Strata’s admission that it gave a cover price to Simons, based on the evidence found at Strata, could well be accurate and could be confirmed by comparing the price Simons submitted, as

⁴²⁵² Written representations of Simons, 26 June 2008, paragraph 1.3.

⁴²⁵³ Interview transcript, OFT Document Reference 12819, page 8.

⁴²⁵⁴ Contract, OFT Document Reference 3099.

⁴²⁵⁵ Interview transcript, OFT Document Reference 12819, page 10.

recorded on its tender register, with the figure Strata recorded on the BOB sheet.⁴²⁵⁶

The OFT's analysis of the evidence and finding

IV.1876. From the evidence presented above, the OFT draws the following conclusions.

IV.1877. Strata and Simons each accepted an invitation to tender for the contract for alterations, improvements and an extension to Burnholme College, York.

IV.1878. Both companies submitted a tender. Strata completed the estimating process for the tender for this contract and it appears that it submitted a genuine bid. This is shown by the price submitted by Strata being the lowest received and the fact that it won the contract.

IV.1879. Simons did not have the time to complete the estimating process and/or it did not want to win the contract.

IV.1880. Strata's contract information sheet records '*7.6680967 SIMONS (C) 1765000*' typed in the tender results box. Paul Throssell ('PT'), an Estimator at Strata, confirmed that a (C) written next to a competitor's name alongside a figure and a percentage difference shows that Strata gave a cover price to the company noted, as in this case. The OFT considers in the light of the contemporaneous evidence from Strata, PT's explanation of how covers given were recorded and PB's acceptance based on Strata's admission that Strata gave a cover price to Simons, that Strata supplied Simons with a cover price for this tender.

IV.1881. In addition the OFT notes that the tender submitted by Simons was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided. The OFT does not consider it significant that the figure eventually submitted by Simons, £1,795,608, differs from the amount shown against Simons, £1,765,000, on Strata's BOB sheet. It is likely that Simons was made aware by Strata of the amount Strata intended to bid, and that Simons selected its own figure for a cover bid that differed from Strata's recommended amount but was even more comfortably above Strata's bid, to avoid winning the contract.

IV.1882. The OFT notes that both Parties have admitted their involvement in cover pricing in respect of this Infringement.

IV.1883. The OFT therefore concludes that contact took place between Strata and Simons. The OFT also concludes that Strata supplied a figure to Simons for a cover bid.

IV.1884. The OFT is satisfied that the facts set out in paragraphs IV.1869 to IV.1883 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴²⁵⁷ In particular:

- (a) the provision of a figure for a cover bid from Strata to Simons was not unilateral⁴²⁵⁸, and contravenes the principle against direct or indirect contact between competitors;⁴²⁵⁹

⁴²⁵⁶ Interview transcript, OFT Document Reference 12819, page 10.

⁴²⁵⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (b) Simons can be presumed to have taken account of the information received from Strata (i.e. the cover price) when determining its own conduct in the tendering process;⁴²⁶⁰ and
- (c) Strata can be presumed to have taken account of the information it received from Simons (i.e. that Simons did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴²⁶¹

IV.1885. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Simons and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for alterations, improvements and extensions to Burnholme College, York, tender deadline 8 May 2001.

Immunity and leniency assessment

IV.1886. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1887. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this infringement.

IV.1888. In respect of this tender, the OFT became aware of Simons' involvement in bid rigging activities by virtue of the information obtained during the visit to Strata's offices under section 28 on 6 and 7 July 2005. Simons will not therefore receive 100 per cent immunity in respect of this tender. However, Simons will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 60: Not included in the Decision

Infringement 61: Fire Safety Works to Two Tower Blocks at Gleadless & Jordonthorpe Sheffield – 29 May 2001
Client: Sheffield City Council
Parties: Strata (formerly known as Weaver) and Baggaley & Jenkins

IV.1889. On 26 April 2001, Sheffield City Council sought tenders for improvements to the fire safety standard of two sheltered tower blocks. The following five companies were invited to tender: Baggaley & Jenkins, P Casey, Frank Haslam

⁴²⁵⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁴²⁵⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴²⁶⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²⁶¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Milan, Pitchmastic plc and Strata.⁴²⁶² The deadline for receipt of tenders was 12:00 noon on 29 May 2001.

IV.1890. Sheffield City Council received the following tender returns:⁴²⁶³

Company	Time & Date tender received	Amount of tender	Awarded contract
Baggaley & Jenkins	Prior to 12:00 noon on 29 May 2001	£529,628.00	
P Casey	Prior to 12:00 noon on 29 May 2001	£414,909.00	
Frank Haslam Milan	Prior to 12:00 noon on 29 May 2001	£378,379.00	Yes
Pitchmastic plc	Prior to 12:00 noon on 29 May 2001	£434,583.89	
Weaver [Strata]	Prior to 12:00 noon on 29 May 2001	£509,531.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Contract Information Sheet (BOB sheet)

IV.1891. During the OFT's search of Strata's premises a contract information sheet, or BOB sheet, was found.⁴²⁶⁴ The BOB sheet contained the following entries typed in the tender results box:⁴²⁶⁵

TENDER RESULTS		
% DIFF	CONTRACTOR	VALUE
	WEAVER	509531
	FHM	
	CASEY	
3.9442503	BAGGALEY & JENKINS (C	529628

Evidence from leniency applicant - Strata

IV.1892. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. This list contained the following entry:⁴²⁶⁶

Date	Project	Strata ref no
29/05/2001	Fire Safety Works to 2 Tower Blocks @ Gleadless & Jordanthorpe, Sheff	T55/01

Cover to	Cover from	Company Name	Company Address	Contract Secured
✓		Baggaley & Jenkins	Mansfield	

⁴²⁶² Information from client, OFT Document Reference 9340.

⁴²⁶³ Information from client, OFT Document Reference 9340.

⁴²⁶⁴ Contract Information Sheet, OFT Document Reference 3879.

⁴²⁶⁵ Contract Information Sheet, OFT Document Reference 3879, page 2.

⁴²⁶⁶ Schedule of covers, OFT Document Reference 4054, page 6.

IV.1893. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Strata

IV.1894. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Baggaley & Jenkins

IV.1895. The OFT wrote to Baggaley & Jenkins on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Baggaley & Jenkins had participated in bid rigging on this tender. In response to this letter Baggaley & Jenkins admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved*'.⁴²⁶⁷

IV.1896. In its response to the Statement, Baggaley & Jenkins confirmed '*...it had already admitted to engaging in cover pricing in relation to the 3 tenders identified by the OFT [including this Infringement] ... Baggaley & Jenkins wishes to state at the outset that it regrets its past involvement in cover pricing and has taken, and will continue to take, appropriate measures to ensure that the practice has ceased and will not be repeated*'.⁴²⁶⁸

The OFT's analysis of the evidence and finding

IV.1897. From the evidence presented above, the OFT draws the following conclusions.

IV.1898. Strata and Baggaley & Jenkins each accepted an invitation to tender for the contract for fire safety works to two tower blocks at Gleadless & Jordonthorpe Sheffield.

IV.1899. Both companies submitted a tender. Strata completed the estimating process for this tender and submitted a tender with the hope of winning the contract. Baggaley & Jenkins was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1900. Strata's contract information sheet records '*3.9442503 BAGGALEY ^ JENKINS (C 529628*' typed in the tender results box. Paul Throssell ('PT'), an Estimator at Strata, confirmed that a (C) written next to a competitor's name alongside a figure and a percentage difference shows that Strata gave a cover price to the company noted, as in this case. The OFT considers in the light of the contemporaneous evidence from Strata, PT's explanation of how covers given were recorded and Baggaley & Jenkins's admission that it received a cover price, that Strata supplied Baggaley & Jenkins with a cover price for this tender.

⁴²⁶⁷ Response from Baggaley & Jenkins, OFT Document Reference 10236, page 2.

⁴²⁶⁸ Written representations of Baggaley & Jenkins, 27 June 2008, paragraphs 3 and 4.

IV.1901. In addition, the OFT notes that the tender submitted by Baggaley & Jenkins was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided. The OFT further notes that the figure recorded against Baggaley & Jenkins by Strata on its BOB sheet, £529628, is the same as the bid submitted by Baggaley & Jenkins. PT confirmed generally in interview that this was the figure that Strata would have given (to Baggaley & Jenkins, in this instance) as a cover price.

IV.1902. The OFT notes that both Parties have admitted their involvement in cover pricing in respect of this Infringement.

IV.1903. The OFT therefore concludes that contact took place between Strata and Baggaley & Jenkins. The OFT also concludes that Strata supplied a figure to Baggaley & Jenkins for a cover bid.

IV.1904. The OFT is satisfied that the facts set out in paragraphs IV.1891 to IV.1903 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴²⁶⁹ In particular:

- (a) the provision of a figure for a cover bid from Strata to Baggaley & Jenkins was not unilateral⁴²⁷⁰, and contravenes the principle against direct or indirect contact between competitors;⁴²⁷¹
- (b) Baggaley & Jenkins can be presumed to have taken account of the information received from Strata (i.e the cover price) when determining its own conduct in the tendering process;⁴²⁷² and
- (c) Strata can be presumed to have taken account of the information it received from Baggaley & Jenkins (i.e. that Baggaley & Jenkins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴²⁷³

IV.1905. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Baggaley & Jenkins and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for fire safety works to two tower blocks at Gleadless & Jordonthorpe, Sheffield, tender deadline 29 May 2001.

Immunity and leniency assessment

IV.1906. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1907. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of

⁴²⁶⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴²⁷⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁴²⁷¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴²⁷² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²⁷³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 62: **General Building/Fit-out of John Street Market, Bradford – 6 June 2001**
Client: **City of Bradford Metropolitan District Council**
Parties: **Irwins and Lotus**

IV.1908. Bovis Lend Lease undertook the tendering process on behalf of the City of Bradford Metropolitan District Council ('Metropolitan M.B.C').⁴²⁷⁴ On 26 April 2001, Bovis Lend Lease sought tenders for the general building/fit-out of John Street Market.⁴²⁷⁵ The following four companies were invited to tender: Irwins, Lotus, EPH Ltd and Adana Construction Ltd.⁴²⁷⁶ The deadline for receipt of tenders was originally 12:00 noon on 18 May 2001, but this was changed to 12:00 noon on 6 June 2001.⁴²⁷⁷

IV.1909. Bovis Lend Lease received the following tender returns:⁴²⁷⁸

Company	Time & Date tender received	Amount of tender	Awarded contract
Lotus	12:00 noon 6 June 2001	£853,879.00	Yes
Irwins	12:00 noon 6 June 2001	£970,669.00	
EPH Ltd	12:00 noon 6 June 2001	£800,265.35	
Adana Construction Ltd	N/A	N/A	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register

IV.1910. During the OFT's search of Irwins' premises a Tender Register was found. The tender register contained the following entry in respect of this tender:⁴²⁷⁹

⁴²⁷⁴ Information from client, OFT Document Reference 7239.

⁴²⁷⁵ Information from client, OFT Document Reference 7222.

⁴²⁷⁶ Information from client, OFT Document Reference 7222.

⁴²⁷⁷ File note of telephone conversation, OFT Document Reference 7225A.

⁴²⁷⁸ Information from client, OFT Document Reference 7222.

⁴²⁷⁹ Tender Register, OFT Document Reference A0339, page 31.

Tender no and date Received	Project	Client	Type of Works, % Diff		Amount tendered
0401041 27 April 665	John Street Market Bradford General Building/Fit out	City of Bradford Bovis Halliday Clark Ltd Turners & Townsend	P&S	C	970669

Tender return date	Estimator	Notes
Fri 18 May 2001	PW	Lotus

Evidence from leniency applicant – Irwins

IV.1911. As part of its leniency application, Irwins' legal representatives provided a general explanation of its participation in cover pricing.⁴²⁸⁰ The evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.1912. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for '*Covers Taken*' and '*Covers Given*', which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson ('IPN'), Estimating Director, into potential cover prices. At number 49 of the '*Covers Taken*' schedule is the following entry:⁴²⁸¹

	Year	Tender Ref	Description	Client	Date	Value	Cover From
49		0401041	Gen Builders Package John St Market Bradford	City of Bradford	18.05.01	970696	Lotus

Individual Contact	Notes
Malcolm White	

⁴²⁸⁰ Leniency application, OFT Document Reference A0714.

⁴²⁸¹ Covers Taken schedule, OFT Document Reference A0718, page 5.

IV.1913. Irwins also provided to the OFT a schedule listing its competitors' contact details. The name of Lotus appears on the list and '*Malcolm White*' is named as the contact point with a telephone number of [...] [C].⁴²⁸²

IV.1914. Irwins further provided to the OFT its tender return/Form of Tender for this contract. This Form of Tender states that it was for a refurbishment project at John Street Market. The Form of Tender was signed on 1 June 2001 and the figure Irwins submitted was £970,669.00.⁴²⁸³

IV.1915. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Irwins

IV.1916. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.1917. Also during this interview, IPN was shown the '*Tender Register*'⁴²⁸⁴ and in particular the reference to the entry for General Building works at John Street Market, Bradford and was asked if he could recall anything about that contract. IPN replied '*Yeah. ... Although it says City of Bradford, this was actually for Bovis. They were the main contractor*'.⁴²⁸⁵ IPN confirmed that the presence of a 'C' in the fifth column on the tender register shows that Irwins took a cover in relation to that contract.⁴²⁸⁶ IPN further confirmed that on the basis that '*Lotus*' is handwritten in the final column on the tender register, Irwins received a cover price from Lotus, '*I think Lotus on them, yeah*'.⁴²⁸⁷

Evidence from other companies – Lotus

IV.1918. The OFT wrote to Lotus on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lotus had participated in bid rigging on this tender. In response to this letter Lotus admitted that '*we engaged in bid rigging activities on this tender but cannot recall details of the other parties involved*'.⁴²⁸⁸

IV.1919. Following the issue of the Statement, Lotus confirmed that '*...Lotus is compelled... to accept its participation in the Alleged Infringements...*'.⁴²⁸⁹

The OFT's analysis of the evidence and finding

IV.1920. From the evidence presented above, the OFT draws the following conclusions.

⁴²⁸² Directory, OFT Document Reference A0715, page 4.

⁴²⁸³ Form of Tender, OFT Document Reference A0807.

⁴²⁸⁴ Tender Register, OFT Document Reference A0339, page 31.

⁴²⁸⁵ Interview transcript, OFT Document Reference 11254, page 13.

⁴²⁸⁶ Interview transcript, OFT Document Reference 11254, pages 13 and 14.

⁴²⁸⁷ Interview transcript, OFT Document Reference 11254, page 14.

⁴²⁸⁸ Response from Lotus, OFT Document Reference 10528, page 2.

⁴²⁸⁹ Written representations of Lotus, 26 June 2008, paragraph 7.3.

IV.1921. Irwins and Lotus each accepted an invitation to tender for the general building of John Street Market, Bradford. Irwins was unable to submit a tender by the return date and/or did not want to win this contract.

IV.1922. Irwins' Tender Register records '*Lotus*' handwritten in the final column. Lotus is the only competitor named on Irwins' Tender Register for this tender. IPN confirmed that this shows that it received a cover price from the company noted.

IV.1923. Also a '*C*' is handwritten in the fifth column of the tender register. IPN confirmed that the C in this column shows that Irwins sought a cover price in relation to this contract. Both Parties have accepted that they participated in this Infringement. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN's admission and explanation of the contemporaneous evidence and the admission by Lotus, that Lotus supplied Irwins with a cover price for this tender.

IV.1924. The OFT further notes that the tender submitted by Irwins was higher than the tender submitted by Lotus, the pattern consistent with a cover price having been provided.

IV.1925. The OFT therefore concludes that contact took place between Irwins and Lotus. The OFT also concludes that Lotus supplied a figure to Irwins for a cover bid.

IV.1926. The OFT is satisfied that the facts set out in paragraphs IV.1910 to IV.1925 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴²⁹⁰ In particular:

- (a) the provision of a figure for a cover bid from Lotus to Irwins was not unilateral⁴²⁹¹, and contravenes the principle against direct or indirect contact between competitors;⁴²⁹²
- (b) Irwins can be presumed to have taken account of the information received from Lotus (i.e the cover price) when determining its own conduct in the tendering process;⁴²⁹³ and
- (c) Lotus can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴²⁹⁴

IV.1927. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and Lotus, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for general building works at John Street Market, Bradford, tender deadline 6 June 2001.

⁴²⁹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴²⁹¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴²⁹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴²⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴²⁹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.1928. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1929. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this Infringement.

Infringement 63: 13 Flats, Charnwood House, Brant Hill Road, Woodhouse Eaves, Leicestershire – 29 June 2001

Client: Western Range Ltd

Parties: J H Hallam, Linford and K W Brookes

IV.1930. On 11 May 2001, Western Range Ltd sought tenders for the refurbishment and conversion of the existing building and the addition of an attached new build block to create 13 flats at Charnwood House, Brant Hill Road, Woodhouse Eaves, Leicestershire. The return date for the tender was 12:00 noon on 29 June 2001 and five companies were invited to tender: GW Deeley Ltd, Adam Eastwood, J H Hallam, K W Brookes, and Linford.⁴²⁹⁵

IV.1931. Western Range Ltd received the following tender returns on 29 June 2001:⁴²⁹⁶

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
GW Deeley Ltd	Withdrew 21.05.01			
Adam Eastwood	29 June 2001	11:05	£1,796,028.69	Yes
J H Hallam	29 June 2001	11:10	£1,898,942.54	
K W Brookes	29 June 2001	10:15	£1,989,857.00	Tender Withdrawn 04.07.01
Linford	29 June 2001	08:30	£1,997,562.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant J H Hallam – Incoming Tender/Individual Tender Report Sheet

IV.1932. During the OFT's search of J H Hallam's premises, an Incoming Tender/Individual Tender Report Sheet was recovered in relation to this tender. In the top right hand corner it allocates the tender a unique number E844. To the top left of the sheet in the box marked Estimator Allocated it has the initials 'WJP' which stand for William Packer ('WP'), the Chief Estimator at J H Hallam.

⁴²⁹⁵ Information from client, OFT Document Reference 9994.

⁴²⁹⁶ Information from client, OFT Document Reference 9994.

In the middle right of the page is a box containing the following handwritten entries:⁴²⁹⁷

	Opposition	Won By✓
1	LINFORD (COVER)	
2	KW BROOKS (COVER)	
3		
4		
5		

IV.1933. Linford stated in its response to the Statement in respect of the document referred to in the previous paragraph, '*... Linford would comment that there is no guarantee that it has not been created or at least edited retrospectively. Linford refers the OFT to the fact that the document was submitted by a leniency applicant which has every motivation to provide the OFT with documentation that indicates the involvement of its competitors in cover pricing*'.⁴²⁹⁸

IV.1934. The OFT does not accept Linford's assertion that the Incoming Tender/Individual Tender Report Sheet was submitted by J H Hallam to implicate its competitors.

IV.1935. First, as stated in the Statement and in paragraph IV.1932 above, this document was not submitted by J H Hallam in the first instance, but was recovered by the OFT during an unannounced search of J H Hallam's premises. The document was then re-submitted by J H Hallam as part of its leniency application.⁴²⁹⁹ At the time, J H Hallam had not yet applied for leniency and J H Hallam would not have had the opportunity to tamper with the document as Linford suggests. Nor would it have had any reason to make the alterations suggested by Linford in the period between the date of the Infringement and the date of the OFT's search of its premises.

IV.1936. Linford also suggested that the OFT's interview with Spencer Robinson ('SR') supported its contention of retrospective amendment, stating: '*...Linford would draw the OFT's attention to the comments of Spencer Robinson, an estimator at J H Hallam. He comments, in relation to the inclusion of a "C" on an Incoming Tender Report Sheet, that "...I assume John's [John Richards at J H Hallam] written that on there to pass the information to you, because that wouldn't have been done – you know it's more likely I've taken the information ...yeah, that's what I'd assume that is, is obviously when he's been trawling through all this information to forward to yourself he's then handwritten that in there...*'.⁴³⁰⁰ The OFT notes that the responses of SR quoted by Linford were given when he was being questioned on a document related to a Board Meeting on a tender which is not the subject of this Decision. That document was provided by J H Hallam after making its application for leniency, rather than obtained on the search. The OFT therefore does not accept that SR's comments on another document unrelated to this Infringement affect the conclusions it is able to draw from this particular document in any respect.

⁴²⁹⁷ Tender report sheet, OFT Document Reference 5036, see also 2872.

⁴²⁹⁸ Written representations of Linford, 26 June 2008, paragraph 6.24.

⁴²⁹⁹ The OFT notes that document 5036 contains additional pricing information not included in document 2872, however the evidence referred to in IV.1932 remains unchanged.

⁴³⁰⁰ Written representations of Linford, 26 June 2008, paragraph 6.25.

IV.1937. However, the OFT has nonetheless reviewed the later manuscript additions to that unrelated document and has compared them to the handwritten entries on the Tender Report Sheet described in paragraph IV.1932. The manuscript entries which refer to Linford on that Tender Report Sheet do not bear a resemblance to the later manuscript additions referred to by SR. The style of handwriting matches the remainder of the entries on the Tender Report Sheet. The OFT therefore considers that there is no reason to believe that the reference to 'Linford (Cover)' is not contemporaneous to the completion of the remainder of the Tender Report Sheet. The OFT does not therefore accept there is any other basis for Linford's assertion that the Incoming Tender/Individual Tender Report Sheet was edited retrospectively.

IV.1938. Linford's response to the Statement advanced two alternative explanations for the 'LINFORD (COVER)' entry in the Incoming Tender/Individual Tender Report Sheet: (i) '*...J H Hallam intended to win this tender and, if required, planned to provide a cover price to other participating tenderers, Linford (and K W Brookes)...*'⁴³⁰¹ and (ii) '*... [t]he inclusion of "(COVER)" next to the names of the competitors it was aware were invited to tender therefore referred to the fact that these would be companies which J H Hallam could contact to request a cover price, in the event that it decided not to competitively price the tender*'.⁴³⁰²

IV.1939. The OFT does not consider that the alternative explanations put forward by Linford are supported by the interviews with J H Hallam's employees (see below) or the pattern of bid price submitted. It also notes the absence of any argument by Linford that it actually *did* price the bids, either with or without any supporting evidence such as its own contemporaneous bid workings or estimates, or witness evidence from its own employees, which might have supported such alternative inferences being drawn from the contemporaneous documents.

Evidence from leniency applicant J H Hallam

IV.1940. As part of its leniency application, J H Hallam provided a general explanation of its participation in cover pricing.⁴³⁰³ This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.1941. In particular, J H Hallam provided to the OFT a schedule entitled '*Projects Involving Cover Pricing March 2000 – June 2005*'. Examination of the entry relevant to this tender shows that J H Hallam gave cover prices to Linford and K W Brookes.⁴³⁰⁴

IV.1942. In its response to the Statement, J H Hallam stated '*JH Hallam does not contest the OFT's findings of infringement*'.⁴³⁰⁵

⁴³⁰¹ Written representations of Linford, 26 June 2008, paragraph 6.43.

⁴³⁰² Written representations of Linford, 26 June 2008, paragraph 6.44.

⁴³⁰³ Leniency application, OFT Document Reference 4969.

⁴³⁰⁴ Schedule of Covers, OFT Document Reference 4977, page 5.

⁴³⁰⁵ Written representations of J H Hallam, 27 June 2008, paragraph 73.

Witness evidence from leniency applicant J H Hallam

IV.1943. During interviews conducted in connection with its leniency application, J H Hallam's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.1944. Additional evidence in relation to this tender comes from the interview of WP, the estimator allocated to this tender. His response to questions concerning this tender was as follows:⁴³⁰⁶

Q. 'It's 13 Flats, Charnwood House, Woodhouse Eves

A. Right

Q. Hallams have admitted okay a cover to K W Brookes and Linford and the client was Western Range Limited. Again I have your incoming tender report

A. Which was me

Q. Exhibit 5036

A. Yes

Q. And you confirm that in the top right corner look is WJP which you established is yourself

A. Yes

Q. And the other highlighted area on this particular copy shows Linford and K H Brookes [sic] with words cover in brackets next to them

A. Right

Q. So your interpretation or explanation of that would be that...

A. We gave a cover price to those two people

Q. Now it doesn't actually show figures on this for Linford and K H Brookes [sic] would that have been recorded anywhere

A. I don't think so in actual fact, There is a sheet afterwards which gives a list of prices

Q. No, but you couldn't be sure

A. I couldn't be sure which one of those went to Linfords or Brookes.

Q. But they did get covers

Q. Is that the list provided by the client

⁴³⁰⁶ Interview transcript, OFT Document Reference 12756, page 10.

A. *That's the list submitted by the client'*

IV.1945. Linford's response to the Statement referred to the OFT's interview of WP, stating that '[h]e [WP] *offers no reply to the OFT question whether a cover price was actually given...*'⁴³⁰⁷

IV.1946. The OFT does not accept Linford's assertion. The OFT points out not only that WP stated in the above extract, *'We gave a cover price to those two people'* but also that WP stated in the same interview:⁴³⁰⁸

Q. *'...Right. So in fact you admitted to me giving or taking a cover in four jobs [including 13 Flats, Charnwood House, Brant Hill Road, Leicestershire] in total in the last few minutes.*

A. *Right*

Q. *On what basis do you make the admission. Is it based on the documents that you have seen [or] recollection of individual contracts.*

A. *I think on both instances yes.*

Q. *You are quite satisfied that what you said is the accurate truth.*

A. *I am'*

IV.1947. Linford also stated in its response to the Statement in respect of this Infringement that *'...[d]espite William Packer being the person responsible for this tender, he provides no detail on when and between whom any actual contact on cover prices between J H Hallam and Linford (or K W Brookes) may have taken place...'*⁴³⁰⁹

IV.1948. Although WP did not recall this contract specifically, the OFT considers that WP's responses, by way of explanation of the contemporaneous documentation referred to above, provide strong evidence that a cover price *'was actually given'* to Linford in respect of this Infringement. Although WP could not recall with whom he discussed the cover price, he did confirm that the contemporaneous Incoming Tender/Individual Tender Report Sheet document would be an accurate record of what took place. His answers, in respect of the process by which J H Hallam generally gave cover prices, and in respect of this particular Infringement, do not support Linford's suggested alternative explanations for the Incoming Tender/Individual Tender Report Sheet.

Evidence from other companies – Linford

IV.1949. The OFT wrote to Linford on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Linford had participated in bid rigging on this tender. The OFT's Fast Track Offer was

⁴³⁰⁷ Written representations of Linford, 26 June 2008, paragraph 6.37.

⁴³⁰⁸ Interview transcript, OFT Document Reference 12756, pages 11 to 12.

⁴³⁰⁹ Written representations of Linford, 26 June 2008, paragraph 3.2.5 (b).

formally declined by letter, dated 30 April 2007⁴³¹⁰ received from lawyers Pinsent Masons acting on behalf of Linford.

IV.1950. The OFT subsequently wrote to Linford's ultimate parent company at the time of this Infringement, F & E V Linford, on 5 November 2007, asking it to comment on Linford's response to the OFT's Fast Track Offer, given that the OFT intended to hold F & E V Linford jointly and severally liable for any infringements committed by Linford in respect of which the OFT ultimately decided to impose financial penalties. The OFT spoke to a representative of F & E V Linford Limited on 11 December 2007 who stated that Linford *'does not wish to make any comments regarding the second fast track letter at this stage'*.⁴³¹¹

IV.1951. Linford concluded in its response to the Statement in respect of this Infringement *'...Linford submits that the OFT's conclusions are imprecise, speculative and unproven, failing to take into account plausible alternative explanations and without any corroboration from sources except J H Hallam itself...'*.⁴³¹² For reasons given above, the OFT does not accept Linford's conclusions.

IV.1952. In its response to the Statement, Linford argued that the Tender Return Document referred to in paragraph IV.1931 above *'is an apparently contemporaneous document created by Western Range Limited with details of the tenders including those of Linford and K W Brookes. It contains no reference to any cover prices and merely records the tenders from those invited to tender, making it of no evidential value whatsoever in relation to the OFT's assertions...'*.⁴³¹³ The OFT does not rely on this document itself in support of any allegation of cover pricing. The document clearly does not indicate whether cover prices were given. However, the OFT considers it is good evidence of the bids which were received by Western Range Ltd for this contract. And, the OFT considers that those bids themselves may support further inferences. In this case, the level of the bids evidenced by this document are consistent with the pattern of a cover price having been accepted by Linford.

IV.1953. Indeed, Linford itself seeks to draw an equivalent inference from this document, namely from the indication that K W Brookes withdrew its tender which it suggests *'does not fit with the pattern of a company which has allegedly obtained a cover price'*.⁴³¹⁴ The OFT does not accept this particular inference. The submission of a tender is in no way inconsistent with K W Brookes having received a cover price from J H Hallam, and neither is the withdrawal of that tender five days post-submission. In any event, the OFT is not proceeding against K W Brookes for reasons given below and therefore does not need to speculate as to what the withdrawal of that company's tender may signify – it does not undermine any inferences that may be drawn in respect of Linford.

IV.1954. Linford further stated in its response, *'[i]t is also pertinent to the OFT's claims that Linford's own tender price is 5 per cent above J H Hallam's, which is*

⁴³¹⁰ Response from Linford, OFT Document Reference 10522.

⁴³¹¹ File note of telephone conversation, OFT Document Reference 14073.

⁴³¹² Written representations of Linford, 26 June 2008, paragraph 6.51.

⁴³¹³ Written representations of Linford, 26 June 2008, paragraph 6.28.

⁴³¹⁴ Written representations of Linford, 26 June 2008, paragraph 6.30.

*outside the range of "2-4 per cent" which Hallam stated it applied for cover pricing (OFT interview with Spencer Robinson)'.*⁴³¹⁵ The OFT does not consider that this alters the OFT's analysis of the evidence. The OFT points out that SR stated in the same interview:⁴³¹⁶

Q. 'You said two or three percent, was there a specific formula?

A. No-

Q. Always x number of percent, or just?

A. No, I mean we arrived at a tender figure and it was a million pounds I'd look at it and think, I probably wouldn't even put a percent on, I'll shove 40 grand on, something like that...'

IV.1955. The OFT considers that the above responses of SR outline practices that are consistent with J H Hallam having provided Linford with a cover price five per cent above its own submitted price. A cover price of five per cent more than the provider's bid price is also consistent with industry practice as outlined at IV.65 to IV.69 and IV.75 to IV.77 above.

Evidence from other companies – K W Brookes

IV.1956. K W Brookes ceased trading on 28 July 2005.⁴³¹⁷ The company was placed into administration with Mazars LLP, Lancaster House, 67, Newhall Street, Birmingham, B3 1NG. The matter was dealt with by Mr A.S. Wood. On 12 July 2007, in response to an enquiry from the OFT as to the status and assets of the company the following reply was received stating *'...I can confirm that no part of the above company's business was transferred to any third part following my appointment as Administrator. All construction contracts ceased prior to our appointment. The only assets realised were motor vehicles that were sold by private treaty...'*⁴³¹⁸

IV.1957. A search of Companies House records shows that the company K W Brookes was formally dissolved on 5 May 2007.⁴³¹⁹ In the light of the foregoing, the OFT has no basis on which to pursue K W Brookes, for bid rigging in relation to this tender.

The OFT's analysis of the evidence and finding

IV.1958. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.1959. J H Hallam, Linford, and K W Brookes each accepted an invitation to tender for this contract.

⁴³¹⁵ Written representations of Linford, 26 June 2008, paragraph 6.31.

⁴³¹⁶ Interview transcript, OFT Document Reference 12754, page 8.

⁴³¹⁷ File note of telephone enquiry, OFT Document Reference 13005A.

⁴³¹⁸ Response from Mazars LLP, OFT Document Reference 13005.

⁴³¹⁹ Companies House registry, OFT Document Reference 12170.

IV.1960. Linford and K W Brookes were unable to submit a tender by the return date and/or did not want to win this contract.

IV.1961. In regard to Linford, the contemporaneous document discussed in paragraph IV.1932 above, confirms that J H Hallam gave a cover price to Linford. This is identified by means of the handwritten entry '*LINFORDS (COVER)*' in the opposition box. J H Hallam confirmed in the schedule enclosed with its leniency application that it gave a cover price to Linford in respect of this tender. Further confirmation comes from the interview of WP which states:

Q. 'And the other highlighted area on this particular copy shows Linford and K H Brookes [sic] with words cover in brackets next to them

A. Right

Q. So your interpretation or explanation of that would be that...

A. We gave a cover price to those two people'

IV.1962. The OFT notes that Linford submitted a bid of £1,997,562, which was higher than J H Hallam's and is consistent with the pattern of a cover price having been received. The OFT similarly notes that K W Brookes submitted a bid of £1,989,857, which was higher than J H Hallam's and is consistent with the pattern of a cover price having been received.

IV.1963. The OFT therefore concludes that contact took place between J H Hallam and Linford. The OFT also concludes that J H Hallam supplied a figure to Linford for a cover bid.

IV.1964. The OFT is satisfied that the facts set out in paragraphs IV.1932 to IV.1963 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴³²⁰ In particular:

- (a) the provision of a figure for a cover bid from J H Hallam to Linford was not unilateral⁴³²¹, and contravenes the principle against direct or indirect contact between competitors;⁴³²²
- (b) Linford can be presumed to have taken account of the information received from J H Hallam (i.e. the cover price) when determining its own conduct in the tendering process;⁴³²³ and
- (c) J H Hallam can be presumed to have taken account of the information it received from Linford (i.e. that Linford did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴³²⁴

IV.1965. Accordingly, having considered Linford's submissions, in particular in respect of each piece of evidence individually, the OFT concludes that the totality of the evidence as set out above, considered as whole, establishes that an agreement and/or concerted practice was in place between J H Hallam and Linford in

⁴³²⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴³²¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴³²² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴³²³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴³²⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

breach of the Chapter I prohibition. This had the object of bid rigging, in relation to the tender for the refurbishment and conversion of the existing building and addition of an attached new build block, to create 13 flats at Charnwood House, Brant Hill Road, Woodhouse Eaves, Leicestershire, date of tender 29 June 2001.

IV.1966. The OFT has uncovered evidence that K W Brookes entered into bid rigging activities contrary to the Chapter I prohibition. However, as K W Brookes has been dissolved since the date of the Infringement, and as the OFT has been unable to identify a successor undertaking, there is no legal entity that can be held liable for K W Brookes' conduct. The OFT therefore does not intend to take any action against K W Brookes in respect of this tender.

Immunity and leniency assessment

IV.1967. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1968. J H Hallam informed the OFT of the bid rigging activities in respect of this tender as part of its leniency application and was granted immunity from penalty in respect of those activities. The OFT now notes that it did in fact have some information on the bid rigging activities from documents obtained on its earlier visit to J H Hallam's premises (see paragraph IV.1932 above), but noting the contents of the Statement and the OFT's leniency agreement with J H Hallam, and the fact that this is not one of J H Hallam's most recent three Infringements, the OFT will not impose a penalty on J H Hallam in respect of this Infringement.

Infringement 64: Priestnall CDT Extensions and Alterations – 9 July 2001
Client: Metropolitan Borough of Stockport
Parties: Strata (formerly known as Weaver) and P Casey

IV.1969. On 18 June 2001, the Metropolitan Borough of Stockport sought tenders for an extension and alterations at Priestnall High School. The following five companies were invited to tender: John Turner & Sons Ltd, Weaver, Whitfield & Brown, P Casey & Co Ltd and Walter Carefoot & Sons.⁴³²⁵ The deadline for receipt of tenders was 12:00 noon on 9 July 2001.⁴³²⁶

IV.1970. The Metropolitan Borough of Stockport received the following tender returns:⁴³²⁷

⁴³²⁵ Information from client, OFT Document Reference 9612.

⁴³²⁶ Information from client, OFT Document Reference 9612.

⁴³²⁷ Information from client, OFT Document Reference 9612.

Company	Time & Date tender received	Amount of tender	Awarded contract
John Turner & Sons Ltd	10:10 on 9 July 2001	£342,648.00	
Weaver [Strata]	10:55 on 9 July 2001	£317,649.00	
Whitfield & Brown	11:35 on 9 July 2001	£344,104.00	
P Casey	11:35 on 9 July 2001	£294,475.00	Yes
Walter Carefoot & Sons	11:50 on 9 July 2001	£319,146.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata- Form of Tender

IV.1971. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents, mostly Form of Tenders and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:⁴³²⁸

'from Casey'

IV.1972. The Form of Tender also stated that Strata's figure was £317,649.

Evidence from leniency applicant - Strata

IV.1973. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. The entry for this tender stated as follows:⁴³²⁹

Date	Project	Strata ref no
09/07/2001	Priestnall CDT Extns & Alts for Stockport MBC	T80/01

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXM/107	Casey & Co	PO Box 54 Rydings Rd, Wardle Rochdale, Lancs OL12 9PS	

IV.1974. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Strata

IV.1975. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

⁴³²⁸ Form of Tender, OFT Document Reference 3325, page 1.

⁴³²⁹ Schedule of covers, OFT Document Reference 4054, page 4.

Evidence from other companies – P Casey

IV.1976. The OFT wrote to P Casey on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that P Casey had participated in bid rigging on this tender. In response to this letter P Casey admitted *'We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party involved'*.⁴³³⁰ P Casey added that *'The company has few hard copy documents relating to the suspect tenders and does not maintain electronic tender documents. The estimator employed during the period of the suspect tenders emigrated to New Zealand in 2005 and has been unable to provide any reliable recollections of the tenders in question. For these reasons, the company has only been able to consider incomplete records and it neither has evidence to indicate that cover pricing activity occurred nor an evidential basis upon which to challenge the allegations...'*⁴³³¹

IV.1977. The OFT subsequently wrote to P Casey's ultimate parent company at the time of this Infringement, The Casey Group, on 6 November 2007, asking it to comment on P Casey's response to the OFT's Fast Track Offer, given that the OFT intended to hold The Casey Group jointly and severally liable for any infringements committed by P Casey in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter The Casey Group admitted *'We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party/parties involved. We have no actual knowledge nor evidence of cover pricing having occurred in relation to this tender ...'*⁴³³² The Casey Group also stated *'We also submit that all of the tenders should fall to be dealt with by The Casey Group Limited as the relevant parent company'*.⁴³³³

IV.1978. In its response to the Statement, P Casey stated that it had *'... not been able to establish any further facts concerning the alleged infringements referred to in the [Statement, including this Infringement] and consequently can provide no additional assistance to the Office of Fair Trading'*.⁴³³⁴

The OFT's analysis of the evidence and finding

IV.1979. From the evidence presented above, the OFT draws the following conclusions.

IV.1980. Strata and P Casey each accepted an invitation to tender for the contract for an extension and alterations at Priestnall High School.

IV.1981. P Casey completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work. This is shown by the price submitted by P Casey being the lowest received and that they won the contract.

⁴³³⁰ Response from P Casey, OFT Document Reference 10732, page 3.

⁴³³¹ Response from P Casey, OFT Document Reference 10731, page 1.

⁴³³² Response from P & C Casey Limited, OFT Document Reference 14202, page 3.

⁴³³³ Response from P & C Casey Limited, OFT Document Reference 14201, page 1.

⁴³³⁴ Written representations of P Casey, 27 June 2008, page 2.

- IV.1982. Strata was unable to submit a tender by the return date and/or did not want to win this contract.
- IV.1983. Strata's Form of Tender records '*from Casey*' handwritten in the top right hand corner. Strata confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and Strata's admission and explanation of the contemporaneous evidence and P Casey's admission of cover pricing activity in relation to this tender, that P Casey supplied Strata with a cover price for this tender.
- IV.1984. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by P Casey, the pattern consistent with a cover price having been provided
- IV.1985. In addition the OFT notes that P Casey's tender figure is the only figure below Strata's tender figure, and the OFT is therefore satisfied that Strata could only have received a cover figure from P Casey.
- IV.1986. The OFT notes that both Parties have admitted their involvement in cover pricing in respect of this Infringement.
- IV.1987. The OFT therefore concludes that contact took place between Strata and P Casey. The OFT also concludes that P Casey supplied a figure to Strata for a cover bid.
- IV.1988. The OFT is satisfied that the facts set out in paragraphs IV.1971 to IV.1987 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴³³⁵ In particular:
- (a) the provision of a figure for a cover bid from P Casey to Strata was not unilateral⁴³³⁶, and contravenes the principle against direct or indirect contact between competitors;⁴³³⁷
 - (b) Strata can be presumed to have taken account of the information received from P Casey (i.e the cover price) when determining its own conduct in the tendering process;⁴³³⁸ and
 - (c) P Casey can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴³³⁹
- IV.1989. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between P Casey and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for an extension and alterations at Priestnall High School, tender deadline 9 July 2001.

⁴³³⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴³³⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁴³³⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴³³⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴³³⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.1990. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.1991. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 65: Consolidation Works at Fairham Community College, Clifton, Nottingham – 9 July 2001

Client: Nottingham City Council

Parties: Bodill, Baggaley & Jenkins and Craske

IV.1992. In 2001, Nottingham City Council ('Nottingham CC') sought tenders for consolidation works at Fairham Community College, Clifton, Nottingham. The return date for the tender was 12:00 noon on 9 July 2001 and five companies were invited to tender: Nottingham City Building Works, Bodill, Craske, Herbert Baggaley and Baggaley & Jenkins.⁴³⁴⁰

IV.1993. Nottingham CC received the following tender returns on or by 12:00 noon on 9 July 2001:⁴³⁴¹

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Nottingham City Building Works	Did not return tender			
Bodill	9 July 2001		£713,816	Yes
Craske	9 July 2001		£740,100	
Herbert Baggaley	9 July 2001		£737,137	
Baggaley & Jenkins	9 July 2001		£729,995	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Bodill – tender sheet

IV.1994. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following handwritten entries have been made:⁴³⁴²

⁴³⁴⁰ Information from client, OFT Document Reference 9123.

⁴³⁴¹ Information from client, OFT Document Reference 9123.

⁴³⁴² Tender sheet, OFT Document Reference 0557.

1. *BODILL.*

2. *BAGGALEY*

(ON SITE NOW) 3. *B & J* © *from us (1)*
£729995 *RING JAMES MON AM*

4. [...] [C]

£740100 5. *CRASKE.* © *from us (2)*
RING DAVE MON AM

6. *DIRECT WORKS?'*

IV.1995. The tender sheet states that Bodill's submitted figure was £713,816.⁴³⁴³

IV.1996. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations '*£729995*' next to '*B & J*' and '*£740100*' next to '*CRASKE*', under the section headed '*Tenderers*' were made by him.⁴³⁴⁴ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.1997. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*© FROM US (1) RING JAMES MON AM*' next to '*B & J*' and '*© FROM US (2) RING DAVE MON AM*' next to '*CRASKE*', under the section headed '*Tenderers*' were made by him.⁴³⁴⁵ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.1998. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.1999. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000. In respect of this tender, Bodill confirmed that it gave cover prices to Baggaley & Jenkins and Craske. [...] [C]⁴³⁴⁶

IV.2000. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.2001. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

⁴³⁴³ Tender sheet, OFT Document Reference 0557.

⁴³⁴⁴ Contracts document, OFT Document Reference 6426, pages 86 and 108.

⁴³⁴⁵ Contracts document, OFT Document Reference 6426, pages 1 and 23.

⁴³⁴⁶ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

[...] [C]

IV.2002. [...] [C]^{4347 4348 4349}

[...] [C]

IV.2003. [...] [C]⁴³⁵⁰

Evidence from other companies – Baggaley & Jenkins

IV.2004. During the two OFT visits to Baggaley & Jenkins, under section 27 on 19 November 2004 and section 28 on 14 June 2005, no information was obtained in relation to this tender. The OFT wrote to Baggaley & Jenkins on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty it might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Baggaley & Jenkins had participated in bid rigging on this tender. In response to this letter, Baggaley & Jenkins admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party / parties involved'*.⁴³⁵¹

IV.2005. During the visit under section 27 on 19 November 2004 an organisational chart was obtained which names J M Ward ('JW') as Director, Estimating & Buying.⁴³⁵²

IV.2006. In its response to the Statement, Baggaley & Jenkins stated *'In accordance with the terms of the Fast Track Offer, Baggaley & Jenkins accepts liability for this Alleged Infringement'*⁴³⁵³ in respect of this Infringement. JW confirmed in his witness statement, *'I made the decision to take a cover price and spend my time pricing other jobs where I thought we had more chance of winning'*.⁴³⁵⁴

Evidence from other companies – Craske

IV.2007. The OFT wrote to Craske on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged

⁴³⁴⁷ [...] [C]

⁴³⁴⁸ [...] [C]

⁴³⁴⁹ [...] [C]

⁴³⁵⁰ [...] [C]

⁴³⁵¹ Response from Baggaley & Jenkins, OFT Document Reference 10233, page 2.

⁴³⁵² Organisational chart, OFT Document Reference 0046.

⁴³⁵³ Written representations of Baggaley & Jenkins, 27 June 2008, paragraph 27.

⁴³⁵⁴ Written representations of Baggaley & Jenkins, 27 June 2008, Annex D, paragraph 11.

participation in bid rigging on this tender, in return for an admission that Craske had participated in bid rigging on this tender. Craske, which is dissolved, did not respond to this letter.

Evidence from other companies – Loach

IV.2008. [...] [C] ⁴³⁵⁵

IV.2009. During the section 28 visit a list of competitors was obtained from Loach which lists against the entry Baggaley & Jenkins, '[.....] [C] *James Ward*'. ⁴³⁵⁶

IV.2010. [...] [C] ⁴³⁵⁷

IV.2011. [...] [C]

The OFT's analysis of the evidence and finding

IV.2012. From the evidence presented above, the OFT draws the following conclusions.

IV.2013. Bodill, Baggaley & Jenkins and Craske each accepted an invitation to tender for this contract.

IV.2014. Bodill completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Bodill being the lowest received and that it won the contract.

IV.2015. Baggaley & Jenkins and Craske were unable to submit a tender by the return date and/or did not want to win this tender.

IV.2016. In regard to Baggaley & Jenkins, Bodill's tender sheet records '*3. B & J © from us (1) £729995 RING JAMES MON AM*' against Baggaley & Jenkins. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has '*(1)*' recorded against Baggaley & Jenkins to indicate that Baggaley & Jenkins was the first party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers indicate the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Baggaley & Jenkins submitted a lower tender figure than the second company to be given a cover price, Craske. Furthermore, Bodill recorded on the

⁴³⁵⁵ [...] [C]

⁴³⁵⁶ Competitors, OFT Document Reference 2954, page 3.

⁴³⁵⁷ [...] [C]

tender sheet the figure £729,995 against Baggaley & Jenkins, a figure that was identical to the tender that Baggaley & Jenkins submitted for the work.

- IV.2017. Bodill's tender sheet also records the name of a Baggaley & Jenkins estimator, 'James', providing further evidence that contact was made between the two parties. This is corroborated by an organisational chart obtained from Baggaley & Jenkins which names J M Ward as Director, Estimating and Buying.⁴³⁵⁸ Additionally, information obtained from both Loach, a list of competitors⁴³⁵⁹, and W R Bloodworth, a list of contacts for cover prices⁴³⁶⁰, names James Ward at Baggaley & Jenkins with a telephone contact number of [...] [C].
- IV.2018. Bodill's tender sheet records that Bodill was due to telephone Baggaley & Jenkins on Monday morning. The OFT takes this to mean the morning of Monday 9 July 2001, the date for return of tenders, and notes that this is consistent with the pattern of cover pricing (with transmission of figures frequently taking place at the last minute).
- IV.2019. Finally, Baggaley & Jenkins admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.
- IV.2020. In regard to Craske, Bodill's tender sheet records '5. CRASKE. © from us (2) £740100 RING DAVE MON AM' against Craske. Bodill has confirmed that this indicates that it gave the company in question a cover price. The tender sheet also has '(2)' recorded against Craske to indicate that Craske was the second party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers indicate the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Craske submitted a higher figure than the first company to be given a cover price, Baggaley & Jenkins. Furthermore, Bodill recorded on the tender sheet the figure £740,100 against Craske, a figure that was identical to the tender that Craske submitted for the work.
- IV.2021. Bodill's tender sheet also records the name of a Craske estimator, 'Dave', providing further evidence that contact was made between the two parties. Information obtained from W R Bloodworth, a list of contacts for cover prices⁴³⁶¹, names Dave Rollinson at Craske with a telephone contact number of [...] [C].
- IV.2022. Bodill's tender sheet recorded that Bodill was due to telephone Craske on Monday morning. The OFT takes this to mean the morning of Monday 9 July 2001, the date for return of tenders, and notes that this is consistent with the pattern of cover pricing (with transmission of figures frequently taking place at the last minute).
- IV.2023. Although Craske, which is now dissolved, has not admitted engaging in this bid rigging activity, the OFT considers that the strong and compelling evidence in respect of the other parties involved in bid rigging activities for this tender, all of whom admit to those activities, reinforces the backdrop of collusion and

⁴³⁵⁸ Organisational chart, OFT Document Reference 0046.

⁴³⁵⁹ Competitors, OFT Document Reference 2954, page 3.

⁴³⁶⁰ Contacts for cover prices, OFT Document Reference 3915, page 2.

⁴³⁶¹ Contacts for cover prices, OFT Document Reference 3915, page 1.

strengthens the weight of the evidence against Craske set out in the preceding paragraphs.

IV.2024. The OFT notes in addition that the tenders submitted by Baggaley & Jenkins and Craske were both higher than the tender submitted by Bodill, a pattern consistent with cover prices having been provided by Bodill.

IV.2025. [...] [C]

IV.2026. [...] [C]

IV.2027. The OFT therefore concludes that contact took place between Baggaley & Jenkins and Bodill and between Craske and Bodill. The OFT also concludes that Bodill supplied figures to each of Baggaley & Jenkins and Craske for cover bids.

IV.2028. The OFT is satisfied that the facts set out in paragraphs IV.1994 to IV.2027 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴³⁶² In particular:

- (a) the provision of figures for cover bids from Bodill to each of Baggaley & Jenkins and Craske was not unilateral⁴³⁶³, and contravenes the principle against direct or indirect contact between competitors;⁴³⁶⁴
- (b) Baggaley & Jenkins and Craske can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process;⁴³⁶⁵ and
- (c) Bodill can be presumed to have taken account of the information it received from Baggaley & Jenkins and Craske (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁴³⁶⁶

IV.2029. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Baggaley & Jenkins and Bodill and between Craske and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for consolidation works at Fairham Community College, Clifton, Nottingham, tender deadline 9 July 2001.

IV.2030. The OFT has uncovered evidence that Craske entered into bid rigging activities contrary to the Chapter I prohibition. However, as Craske has been dissolved since the date of the Infringement, and as the OFT has been unable to identify a successor undertaking, there is no legal entity that can be held liable for the

⁴³⁶² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴³⁶³ See paragraph IV.73 of the General comments on cover pricing section.

⁴³⁶⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴³⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴³⁶⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement entered into by Craske. The OFT therefore does not intend to take any action against Craske in respect of this Infringement.

Immunity and leniency assessment

IV.2031. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2032. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 66: New Assembly Hall – Seely Church Primary School Nottingham
– 13 July 2001**

Client: Hall Grey Architects

Parties: Loach, Bodill, Beaufort and Peter Baines

IV.2033. On 18 June 2001, Hall Grey Architects ('Hall Grey'), on behalf of the Seely Church Primary School, sought tenders for the construction of a new assembly hall at Seely Church Primary School, Burnstump Hill, Arnold, Nottingham.⁴³⁶⁷ The following five companies were invited to tender: Loach, Bodill, Beaufort, Peter Baines and Wheatley Construction.⁴³⁶⁸ The deadline for the receipt of tenders was 12:00 noon on Friday 13 July 2001.

IV.2034. Hall Grey received the following tender returns:⁴³⁶⁹

Company	Date and time tender received	Amount of tender	Awarded contract
Bodill	13 July 2001 12:00 noon	£417,815	Yes
Loach	13 July 2001 12:00 noon	£443,819	
Beaufort	13 July 2001 12:00 noon	£459,654	
Peter Baines	13 July 2001 12:00 noon	£462,100	
Wheatley Construction	Did not return tender		

IV.2035. The contemporaneous documentation for this project states '*The approved building works total for this project is £294,725.00. The lowest tender received is that submitted by Bodill & Sons Contractors in the sum of £417,815.00, which is £123,090.00 in excess of the approval*'.⁴³⁷⁰

⁴³⁶⁷ Information from client, OFT Document Reference 8244.

⁴³⁶⁸ Information from client, OFT Document Reference 8244.

⁴³⁶⁹ Information from client, OFT Document Reference 8244.

⁴³⁷⁰ Information from client, OFT Document Reference 8246, page 2.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.2036. Bodill's original tender sheet⁴³⁷¹ relating to this tender, provided to the OFT as part of its leniency application, has under the section headed '*Tenderers*', the following entries, all of which are handwritten with the exception of the name '*Bodill*':

'	1. <i>Bodill</i>	
£ 443819 ✓	2. <i>LOACH</i> © <i>FROM US RING</i>	①
	<i>JOHN ROWE</i> [...] [C]	
	3. <i>BEAUFORT</i> © <i>MICK THOMSETT</i>	②
£ 459654 ✓	513700 [...] [C] <i>or Darren</i>	
£ 462100 ✓	4. <i>PETER BAINES</i> ©	③
	<i>Steve BAINES</i> [...] [C]'	

IV.2037. The tender sheet states that Bodill's submitted figure was £417,815.00.⁴³⁷²

IV.2038. Juris Rozentals ('JR'), Chief Estimator at Bodill, has indicated that the handwritten annotations on Bodill's tender sheet, '*£443819 ✓*', '*①*' *£ 459654 ✓* © *MICK THOMSETT* ② *513700* [.....] [C] *or Darren*', '*③*', and '*£462100 ✓*' under the heading '*Tenderers*' were made by him.⁴³⁷³ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.2039. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations on Bodill's tender sheet, '© *FROM US RING JOHN ROWE* [.....] [C]'

 and '© *Steve BAINES* [.....] [C]' were made by him.⁴³⁷⁴ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.2040. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.2041. In particular, Bodill provided to the OFT a '*Tender Analysis of Covers taken and given since March 2000*'⁴³⁷⁵, which records that Bodill gave out three cover prices on this tender.

IV.2042. Bodill also provided to the OFT a '*Tender Analysis - Tender Sheets March 2000 – November 2004*'.⁴³⁷⁶ This confirmed that Bodill gave cover prices to Loach, Beaufort and Peter Baines in respect of this tender.

⁴³⁷¹ Tender sheet, OFT Document Reference 0559.

⁴³⁷² Tender sheet, OFT Document Reference 0559.

⁴³⁷³ Contracts document, OFT Document Reference 6426, pages 86 and 109.

⁴³⁷⁴ Contracts document, OFT Document Reference 6426, pages 1 and 24.

⁴³⁷⁵ Tender Analysis, OFT Document Reference 0849, page 2.

IV.2043. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.2044. During interviews conducted in connection with its leniency application, Bodill’s employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from leniency applicant Loach – tender spreadsheets

IV.2045. During the OFT’s search of Loach’s premises, two printed spreadsheets were found, one in paper form⁴³⁷⁷ and the other retrieved from one of the company computers⁴³⁷⁸, both made reference to this tender.

IV.2046. The two spreadsheets found on the search contained the following entry:⁴³⁷⁹

	Contract	Sum	Margin	%	Won	Note	Job No.	Opposition
13 - Jul	New Assembly Hall, Seely Church School, Arnold	443,819				Cover		Bodill

IV.2047. As part of its leniency application, Loach provided two further printed spreadsheets, one a copy of those referred to in paragraph IV.2045 above,⁴³⁸⁰ and the other containing similar information, with the omission of the reference to ‘cover’. This spreadsheet, headed ‘*Small Works Tenders*’ and marked 2001, contained the following entry:⁴³⁸¹

	Contract	Sum	Margin	%	Won	Note	Winner	Var %	Job No.	Opposition
13 - Jul	New Assembly Hall, Seely Church School, Arnold	443,819	45,000	10.14%						Bodill

Evidence from leniency applicant Loach

IV.2048. As part of its leniency application, Loach’s legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.453 to IV.469 above and is relied upon by the OFT in relation to this tender.

⁴³⁷⁶ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

⁴³⁷⁷ Contract spreadsheet, OFT Document Reference 2989.

⁴³⁷⁸ Small works tenders spreadsheet, OFT Document Reference 3726.

⁴³⁷⁹ Contract spreadsheet and Small works tenders spreadsheet, OFT Document References 2989 and 3726.

⁴³⁸⁰ Contract spreadsheet, OFT Document Reference 4026, page 19.

⁴³⁸¹ Small works tenders spreadsheet, OFT Document Reference 4026, page 41.

IV.2049. In its response to the Statement, Loach stated *'Loach took a cover from Bodills on this tender due to a lack of estimating resources and the inability to return the tender for future marketing considerations'*⁴³⁸² in respect of this Infringement.

Witness evidence from leniency applicant Loach

IV.2050. During interviews conducted in connection with its leniency application, Loach's employees provided further general explanation of its participation in cover pricing, and the subsequent alteration of tender sheets to remove any reference to *'cover'*. This evidence is set out in paragraphs IV.453 to IV.469 above and is relied upon by the OFT in relation to this tender.

IV.2051. Andrew Arbon-Davis ('AA'), Chief Estimator at Loach at the time of this tender, was interviewed on 19 April 2007, and specific reference was made to the tender for the new Assembly Hall at Seely Church School. He immediately confirmed that Loach had taken a cover, *'Yep. Cover'*⁴³⁸³ and when shown copies of the spreadsheets referred to in paragraph IV.2046 above, he said. *'Well, I was going to say that was probably one of the clearer ones from the information we've got. In all probability as there was only one name there and we took a cover, we took a cover from that one name. That just confirms that'*.⁴³⁸⁴

IV.2052. AA confirmed that the alteration to the spreadsheet shown in paragraph IV.2046 to remove the references to *'Cover'* was made at his instigation and the reasons are explained in full in paragraphs IV.463 to IV.464 above.

Evidence from other companies - Beaufort

IV.2053. The OFT wrote to Beaufort on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Beaufort had participated in bid rigging on this tender. In response to this letter, Beaufort replied through Elliot Mather LLP, by letter dated 18 April 2007, confirming its involvement in bid rigging activities in general and accepting the offered reduction.⁴³⁸⁵ In relation to this specific tender, Beaufort stated *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁴³⁸⁶

IV.2054. The OFT subsequently wrote to Beaufort's ultimate parent company at the time of this Infringement, Beaufort Holdings, on 5 November 2007, asking it to comment on Beaufort's response to the OFT's Fast Track Offer, given that the OFT intended to hold Beaufort Holdings jointly and severally liable for any infringements committed by Beaufort in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Beaufort Holdings said *'The company confirms that it shall not be making any comments*

⁴³⁸² Written representations of Loach, 26 June 2008, page 20.

⁴³⁸³ Interview transcript, OFT Document Reference 11321, page 11.

⁴³⁸⁴ Interview transcript, OFT Document Reference 11321, page 11.

⁴³⁸⁵ Response from Beaufort, OFT Document Reference 10244.

⁴³⁸⁶ Response from Beaufort, OFT Document Reference 10245, page 3.

on either its subsidiary, Beaufort Construction (S-IN-A) Limited's response to the reduced penalty offer, nor your proposed actions'.⁴³⁸⁷

IV.2055. In their response to the Statement, Beaufort and Beaufort Holdings confirmed their acceptance of the OFT's Fast Track Offer.⁴³⁸⁸

Evidence from other companies – Peter Baines

IV.2056. The OFT wrote to Peter Baines on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Peter Baines had participated in bid rigging on this tender. In response to this letter, Peter Baines replied in general by letter dated 24 April 2007, *'In light of the fact that we can neither prove nor disprove the Company's involvement in taking a cover price and the likely cost of trying to defend this position, we feel that it is prudent to accept the reduction of penalty offer in order to enable us all to close this matter off as soon as possible'.⁴³⁸⁹* With particular reference to this tender, Peter Baines stated *'We engaged in bid rigging activities in this tender but cannot recall details of the other parties involved'.⁴³⁹⁰*

IV.2057. In its response to the Statement, Peter Baines confirmed its acceptance of the OFT's Fast Track Offer.⁴³⁹¹

⁴³⁸⁷ Response from Beaufort Holdings, OFT Document Reference 13915.

⁴³⁸⁸ Written representations of Beaufort and Beaufort Holdings, 27 June 2008, page 1.

⁴³⁸⁹ Response from Peter Baines, OFT Document Reference 10757.

⁴³⁹⁰ Response from Peter Baines, OFT Document Reference 10758, page 2.

⁴³⁹¹ Written representations of Peter Baines, 26 June 2008, paragraphs 3.1 to 3.4 and 5.5.

The OFT's analysis of the evidence and finding

IV.2058. From the evidence presented above, the OFT draws the following conclusions.

IV.2059. Bodill, Loach, Beaufort and Peter Baines each accepted an invitation to tender for this contract.

IV.2060. Loach, Beaufort and Peter Baines were unable to submit a tender by the return date and/or did not want to win this tender. It appears that Bodill completed the estimating process for this contract and submitted a bid with the hope of winning the work. This is shown by the price submitted by Bodill being the lowest received and the fact that it won the contract.

IV.2061. With regard to Loach, Loach's tender spreadsheet shows that a cover was taken from Bodill and this is confirmed by AA in his interview. The Bodill tender sheet records '*£443819 ✓ 2. LOACH © FROM US RING JOHN ROWE [.....] [C] ①*'. Bodill has confirmed that the number ① refers to the order in which cover prices were given to competitors.⁴³⁹² The OFT notes in this connection that Loach's tender price was the next highest after Bodill. The telephone number recorded is that of Loach and John Rowe is employed by Loach as an estimator.⁴³⁹³ Loach's submission was £443,819.00, an amount identical to that recorded on Bodill's tender sheet.

IV.2062. The OFT also considers it significant that Loach, having been made aware of the OFT's visits to other companies involved in this investigation, subsequently drew up a second, amended tender spreadsheet⁴³⁹⁴, in which all references to cover pricing were removed. This demonstrated that Loach knew that its conduct was wrong and decided to destroy evidence of such conduct.

IV.2063. The OFT considers that the alteration of the tender spreadsheets is evidence that the original spreadsheets⁴³⁹⁵ containing the reference '*cover*' recorded against this tender are an accurate contemporaneous note of Loach's action on receipt of the application to tender.

IV.2064. Loach has admitted to bid rigging in respect of this tender.

IV.2065. With regard to Beaufort, Bodill's tender sheet records '*£459654 ✓ 3. BEAUFORT © MICK THOMSETT ② 513700 [.....] [C] or Darren*'. Bodill has confirmed that the number ② refers to the order in which cover prices were given to competitors.⁴³⁹⁶ The OFT notes in this connection that Beaufort's tender price was the next highest after Loach. Beaufort submitted a price of £459,654.00, an amount identical to that recorded on Bodill's tender sheet. The list of '*Contacts for Cover Prices*'⁴³⁹⁷ produced by W R Bloodworth in its leniency application shows Mike Thomsett as a contact at Beaufort with the contact number of [...] [C].

⁴³⁹² Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴³⁹³ Interview transcript, OFT Document Reference 11313, pages 1 and 2.

⁴³⁹⁴ Contract spreadsheet, OFT Document Reference 4026, page 19.

⁴³⁹⁵ Contract spreadsheet and Small works tenders spreadsheet, OFT Document Reference 2989 and 3726.

⁴³⁹⁶ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴³⁹⁷ Contacts For Cover Prices, OFT Document Reference 3915, page 1.

IV.2066. Beaufort has admitted to bid rigging in respect of this tender, in response to the OFT's letter of 22 March 2007.

IV.2067. With regard to Peter Baines, Bodill's tender sheet records '£462100 ✓ 4. PETER BAINES © ③ Steve BAINES [.....] [C]'. Bodill has confirmed that the number ③ refers to the order in which cover prices were given to competitors.⁴³⁹⁸ The OFT notes in this connection that Peter Baines's tender price was the next highest after Beaufort. Peter Baines submitted a price of £462,100.00, an amount identical to that recorded on Bodill's tender sheet. The telephone number, '[.....] [C]' is that of the offices of Peter Baines and Stephen Baines is the managing director, verified on the company headed paper.⁴³⁹⁹

IV.2068. Peter Baines has admitted to bid rigging in respect of this tender, in response to the OFT's letter of 22 March 2007.

IV.2069. The OFT notes in addition that Loach, Beaufort and Peter Baines all submitted tenders which were higher than the tender submitted by Bodill, the pattern consistent with cover prices having been provided.

IV.2070. All four companies have admitted to bid rigging in respect of this tender. The OFT notes that Hall Grey did not receive any tenders from companies not involved in bid rigging, and that all received tenders were therefore affected by the bid rigging process for this tender. The OFT also notes Hall Grey's comment that the lowest tender received for these primary school works was more than £120,000 higher than its original approved price.

IV.2071. The OFT therefore concludes that contact took place between Bodill and Loach, between Bodill and Beaufort, and between Bodill and Peter Baines. The OFT also concludes that Bodill supplied figures to each of Loach, Beaufort and Peter Baines for their respective cover bids.

IV.2072. The OFT is satisfied that the facts set out in paragraphs IV.2036 to IV.2071 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁴⁰⁰ In particular:

- (a) the provision of figures for cover bids from Bodill to each of Loach, Beaufort and Peter Baines was not unilateral⁴⁴⁰¹, and contravenes the principle against direct or indirect contact between competitors;⁴⁴⁰²
- (b) Loach, Beaufort and Peter Baines can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁴⁴⁰³ and
- (c) Bodill can be presumed to have taken account of the information it received from each of Loach, Beaufort and Peter Baines (i.e. that none

⁴³⁹⁸ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴³⁹⁹ Response from Peter Baines, OFT Document Reference 10757.

⁴⁴⁰⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁴⁰¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁴⁰² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁴⁰³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

of them intended to submit a competitive bid) when determining its conduct in the tendering process.⁴⁴⁰⁴

IV.2073. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Loach and Bodill, Beaufort and Bodill, and Peter Baines and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the construction of a new assembly hall at the Seely Church Primary School, Burnstump Hill, Arnold, Nottingham, tender deadline 13 July 2001.

Immunity and leniency assessment

IV.2074. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2075. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.2076. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information provided by Bodill. Loach will not therefore receive 100 per cent immunity in respect of this tender. However, Loach will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 67: Robert Mellors Primary School, Nottingham – 25 July 2001
Client: Nottinghamshire County Council
Parties: P Waller and Hill

IV.2077. On 11 July 2001, Nottinghamshire County Council (NCC) sought tenders for disabled access works at Robert Mellors Primary School, Bonnington Drive, Arnold, Nottinghamshire.⁴⁴⁰⁵ The following four companies were invited to tender: Hill, P Waller, Gedling Construction Limited, and Ramsdale Building Services Limited.⁴⁴⁰⁶ The deadline for the receipt of tenders was 10:00 on Wednesday 25 July 2001.

IV.2078. NCC received the following tender returns:⁴⁴⁰⁷

⁴⁴⁰⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁴⁰⁵ Information from client, OFT Document Reference 9460.

⁴⁴⁰⁶ Information from client, OFT Document Reference 9460.

⁴⁴⁰⁷ Information from client, OFT Document Reference 9460.

Company	Date and time tender received	Amount of tender	Awarded contract
Hill	25 July 2001 by 10:00 a.m.	£2,215	Yes
P Waller	25 July 2001 by 10:00 a.m.	£2,480	
Gedling Construction Limited	No response received	No tender received	
Ramsdale Building Services Limited	No response received	No tender received	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant P Waller - Diaries

IV.2079. During the OFT's search of P Waller's premises, a number of desk diaries were found belonging to Philip Waller ('PW'), Managing Director of P Waller, and Hilary Jane Waller, referred to throughout as Jane Waller ('JW'), Director and Company Secretary of P Waller. The 2001 diaries in respect of both parties are relevant to this tender.

IV.2080. JW's 2001 diary contained the following entry:⁴⁴⁰⁸

' 2001 July
 Wednesday 25
 Ring Jeff at Hill Bros. re cover
 ✓ for Robert Mellors School 10 am
 [.....] [C]'

IV.2081. PW's 2001 diary contains two references to Robert Mellors Primary School on 24 and 25 July:
 Tuesday 24 July 2001⁴⁴⁰⁹

' QUOTE ST GILBERT'S CHURCH
 —"—— ROBERT MELLORS SCHOOL ✓'

and Wednesday 25 July 2001⁴⁴¹⁰

' ROBERT MELLORS
 PRIMARY SCHOOL
 10 AM COVER'

IV.2082. During the OFT's search a blue folder marked 'Tenderers'⁴⁴¹¹ was found belonging to JW, later referred to by PW as JW's 'tender book notes'⁴⁴¹², the pages are divided into columns, one entitled 'Name of Contractor', containing a list of company names, contacts and contact numbers, and the other columns headed with the names of different tenders. One page⁴⁴¹³ contains a column

⁴⁴⁰⁸ Jane Waller's diary, OFT Document Reference 3622, page 111.

⁴⁴⁰⁹ Philip Waller's diary, OFT Document Reference 4038, page 205.

⁴⁴¹⁰ Philip Waller's diary, OFT Document Reference 4038, page 206.

⁴⁴¹¹ Contact list, OFT Document Reference 3610.

⁴⁴¹² Interview transcript, OFT Document Reference 13285, page 2.

⁴⁴¹³ Contact list, OFT Document Reference 3610, page 6.

headed 'Rob Mellor' and a reference to 'Hill Bros' and 'Hill Bros – Jeff'. The tender book notes were used by JW, in a similar manner to her diaries, to show which companies she had approached for a cover price and from whom she succeeded in obtaining such cover prices.⁴⁴¹⁴

Evidence from leniency applicant P Waller

IV.2083. As part of its leniency application, P Waller provided a general explanation of its participation in cover pricing.⁴⁴¹⁵ This evidence is set out in paragraphs IV.517 to IV.526 above and is relied upon by the OFT in relation to this tender.

IV.2084. In addition, P Waller produced a schedule of 'Tenders Received'⁴⁴¹⁶, which lists the Robert Mellors School tender as one in which P Waller took a cover price from Hill.

IV.2085. Following the issue of the Statement, P Waller did not submit any written or oral representations.

Witness evidence from leniency applicant P Waller

IV.2086. During the interviews conducted in connection with its leniency application, P Waller's directors provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.517 to IV.526 above and is relied upon by the OFT in relation to this tender.

IV.2087. During the interview of PW, this tender was specifically mentioned and the extract from JW's diary shown to him. When asked to explain the entry he replied, 'We took a cover from Jeff at Hill Brothers for this project'.⁴⁴¹⁷ Asked about the existence of documents relating to this tender, PW said, 'if we took a cover we had no interest in the contract it would be kept for a month maybe, but then we would literally destroy the documents. So we would struggle to know anything about some of these contracts because we just kept no details'.⁴⁴¹⁸

Evidence from other companies – Hill

IV.2088. During the OFT's visit to Hill under section 27 on 24 January 2007, no information was produced in relation to this contract.

IV.2089. The OFT wrote to Hill on 26 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Hill had participated in bid rigging on this tender. In response to this letter, Hill replied by letter dated 27 April 2007, 'We do not accept that we are guilty of any offence under the act as alleged' and declined the OFT's Fast Track Offer.⁴⁴¹⁹

⁴⁴¹⁴ Interview transcript, OFT Document Reference 13285, page 3.

⁴⁴¹⁵ Leniency application, OFT Document Reference 4034.

⁴⁴¹⁶ Tenders received schedule, OFT Document Reference 4507.

⁴⁴¹⁷ Interview transcript, OFT Document Reference 13285, page 4.

⁴⁴¹⁸ Interview transcript, OFT Document Reference 13285, page 3.

⁴⁴¹⁹ Response from Hill, OFT Document Reference 10409.

IV.2090. However, in its response to the Statement, Hill stated that it had not accepted the OFT's Fast Track Offer because it lacked documentary records from which to determine whether any infringement may have been committed. It submitted that this was *'part corroborated'* by the fact that the OFT's inspections found no relevant documentation. Hill stated *'[i]n light of the information now provided, Hill Bros. accepts the alleged infringements are infringements, and apologises for its wrongdoing'*.⁴⁴²⁰

The OFT's analysis of the evidence and finding

IV.2091. From the evidence presented above, the OFT draws the following conclusions.

IV.2092. P Waller and Hill both accepted an invitation to tender for this contract.

IV.2093. P Waller was unable to submit a tender by the return date and/or did not want to win this tender. It appears that Hill completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Hill being the lowest received and the fact that it won the contract.

IV.2094. The OFT considers that the handwritten entries in the diaries and the tender book notes, referred to in paragraphs IV.2079 to IV.2082 above, provide evidence that P Waller obtained a cover price from Hill.

IV.2095. The handwritten entry on 25 July 2001 in JW's diary *'Ring Jeff at Hill Bros. re cover for Robert Mellors School 10 am [...]* [C]⁴⁴²¹ relates to the date and time of the deadline for the submission of tender documents, and the number *'[...]* [C]⁴⁴²² is the telephone number for Hill. It is noted that one of the directors of Hill at that time was Eric Geoffrey Wilkinson, who is likely to be the *'Jeff'* in question.⁴⁴²³

IV.2096. The entry in JW's diary is ticked, which JW confirmed in interview means that P Waller was successful in obtaining a cover price from the company mentioned.⁴⁴²⁴

IV.2097. PW confirmed that P Waller took a cover price from Hill and that all documentation (other than the diary and tender book notes) relating to tenders where a cover had been taken or where the tender had not been won was destroyed within a month.

IV.2098. The OFT notes that P Waller submitted a price of £2,480, a figure above that of Hill, the pattern consistent with a cover price having been taken from Hill. The OFT also notes that Hill's bid was the only one below P Waller's and therefore concludes that P Waller could not have obtained a cover price from any other company. In addition, the OFT considers in the light of the admission by P Waller of cover pricing in this tender, that the diaries and tender book notes provide corroborating evidence that Hill supplied a cover price to P Waller.

⁴⁴²⁰ Written representations of Hill, 23 June 2008, paragraph 3.

⁴⁴²¹ Jane Waller's diary, OFT Document Reference 3622, page 111.

⁴⁴²² FAME report, OFT Document Reference 12053, page 1.

⁴⁴²³ Written representations of Hill, 23 June 2008, paragraph 2

⁴⁴²⁴ Interview transcript, OFT Document Reference 13285, page 3.

- IV.2099. The OFT notes that both parties have now accepted liability in respect of this Infringement.
- IV.2100. The OFT therefore concludes that contact took place between P Waller and Hill and that Hill supplied a figure to P Waller for a cover bid.
- IV.2101. The OFT is satisfied that the facts set out in paragraphs IV.2079 to IV.2100 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁴²⁵ In particular:
- (a) the provision of a figure for a cover bid from Hill to P Waller was not unilateral⁴⁴²⁶, and contravenes the principle against direct or indirect contact between competitors;⁴⁴²⁷
 - (b) P Waller can be presumed to have taken account of the information received from Hill (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁴²⁸ and
 - (c) Hill can be presumed to have taken account of the information it received from P Waller (i.e. that P Waller did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁴²⁹
- IV.2102. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between P Waller and Hill in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the disabled access works at Robert Mellors Primary School, Bonnington Drive, Arnold, Nottinghamshire, tender deadline 25 July 2001.

Immunity and leniency assessment

- IV.2103. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.2104. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to P Waller on 6 July 2005. P Waller will not therefore receive 100 per cent immunity in respect of this tender. However, P Waller will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁴⁴²⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁴²⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁴²⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁴²⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁴²⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 68: Pre-War Improvements 2001/02 – Replacement Kitchens, Swadlincote – 30 July 2001
Client: South Derbyshire District Council
Parties: Derwent Valley, Greenwood and E Manton

IV.2105. On 2 July 2001, South Derbyshire District Council ('South Derbyshire DC') sought tenders for the replacement of kitchens including decoration and electrical improvements as part of pre-war improvements, Swadlincote. The following seven companies were invited to tender: Harvey & Clark Limited, J & S Seddon Limited, Derwent Valley, E Manton, Greenwood, Carillion Housing Limited and J P Niken Limited. The deadline for the receipt of tenders was 10:00 on 30 July 2001.⁴⁴³⁰

IV.2106. South Derbyshire DC received the following tender returns:⁴⁴³¹

Company	Time & Date tender received	Amount of tender	Awarded contract
Harvey & Clark Limited	Not recorded	£229,717.00	Yes
J & S Seddon Limited	Not recorded	£299,809.10	
Derwent Valley	Not recorded	£380,606.00	
E Manton	Not recorded	£412,860.00	
Greenwood	Not recorded	£414,820.00	
Carillion Housing Limited	Not recorded	Declined	
J P Niken Limited	Not recorded	Late Tender Returned Unopened	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.2107. During the OFT's search of Derwent Valley's premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁴⁴³²

Tender No.	Return Date	Tender Details	Opposition	Tender	
05/07/01	30/7/01	PRE-WAR IMPROVEMENTS 2001/02 – REPLACEMENT KITCHENS, SWADLINCOTE FOR SOUTH DERBYSHIRE DISTRICT COUNCIL	Manton (C) Greenwood (C)	380,606.00	3rd

Evidence from leniency applicant Derwent Valley

IV.2108. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

⁴⁴³⁰ Information from client, OFT Document Reference 9212.

⁴⁴³¹ Information from client, OFT Document Reference 9212.

⁴⁴³² Tender schedule, OFT Document Reference 1912, page 26.

IV.2109. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as *'DVC1 List of Covers Given'*. The information in the summary was based on the tender schedule kept by Pat Tunncliffe ('PT'), an ex-estimator at Derwent Valley, and contained the following extract:⁴⁴³³

Date	Contract	Company Involved
July 2001	Replacement kitchens Swadlincote for SDDC	Manton, Greenwoods

IV.2110. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Greenwood Bldg Cont (Msfld) Ltd'* appears on this list with the name *'Ken Taylor'* as a contact the name *'Manton'* is also on this list.⁴⁴³⁴

IV.2111. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.2112. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.2113. In regard to this tender, a voluntary interview was conducted with Derwent Valley's former estimator PT who dealt with this tender. PT confirmed during interview that he kept and maintained the tender schedule referred to in paragraphs IV.309 to IV.317 above. PT went on to refer to the tender schedule in respect of this tender saying *'it certainly wasn't a job that I was particularly interested in'* and *'I can't honestly remember giving the covers out, although I do know Greenwood and chances are I would have phoned them up if we were giving a cover'*. Referring to Greenwood and E Manton, PT confirmed that he gave covers to these two companies.⁴⁴³⁵

IV.2114. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender. Although he could not specifically recall it, DS referred to the entry for the tender in the schedule and the letter 'C' after Greenwood and E Manton and commented *'my own personal thought would think that there's been a cover there'*.⁴⁴³⁶

Contemporaneous documentary evidence from other companies – Greenwood

IV.2115. During the OFT's initial visit to the premises of Greenwood a tender enquiry list was obtained. This list contained the following entry:⁴⁴³⁷

⁴⁴³³ List of Covers Given, OFT Document Reference 3940, page 2.

⁴⁴³⁴ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942.

⁴⁴³⁵ Interview transcript, OFT Document Reference 14237, pages 10 and 11.

⁴⁴³⁶ Interview transcript, OFT Document Reference 13478, pages 12 and 13.

⁴⁴³⁷ Tender/Enquiry list, OFT Document Reference 0034, page 27.

EST NO.	CLIENT	PROJECT REF	DATE	TIME	AREA	SIGN
4278	SOUTH DERBYS D.C.	PRE-WAR IMPROVEMENTS 2001/02 REPLACEMENT KITCHENS	30/07/01	10:00	SWADLINC	CS

DATE	ESTIMATE VALUE	RST
19/7	414,820.00	N/A

Evidence from other companies – Greenwood

IV.2116. The OFT wrote to Wilson Pitts, the administrator for Greenwood, on 22 March 2007 offering Greenwood a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greenwood had participated in bid rigging on this tender. A response was received from Begbies Traynor informing the OFT that ‘... *we have now ceased to act as administrators pursuant to the provisions of paragraph 84 of schedule B1 of the Insolvency Act 1986 which facilitates the ending of an administration order by dissolution of the company. ... As we have ceased to act as administrators of the company we are not in a position to enter into any agreement on its behalf*’.⁴⁴³⁸ The OFT has not been able to establish any successor party to Greenwood with undertaking identity in respect of this tender. The OFT will not therefore be pursuing either Greenwood or any successor company to Greenwood in respect of this tender.

Witness evidence from other companies - Greenwood

IV.2117. During an interview conducted on 12 October 2006, Chris Stendall (‘CS’), estimator for Greenwood, commented in general terms on Greenwood’s participation in bid rigging activities. He asked the OFT ‘*Why don’t you ask me if we’ve taken a cover or given a cover. ... of course I have done that and I believe that probably every other contractor in the country has probably done that on certain occasions*’.⁴⁴³⁹ CS explained, ‘... *the only reason for doing that is to make sure you’re tender ... a figure goes into the client and that you’re kept in the loop for next time*’.⁴⁴⁴⁰ CS confirmed that the exchange of cover prices was always carried out by telephone.⁴⁴⁴¹ At Greenwood, the exchange of cover prices usually occurred ‘*towards the end, I suppose when I, you know they realize you couldn’t do something or they wanted help*’.⁴⁴⁴² CS stated that if he received a cover price he would record it ‘... *in a notebook and then, it would go onto the tender sheet*’.⁴⁴⁴³ During interview CS confirmed that when referring to a ‘notebook’ he actually was referring to a post-it note.⁴⁴⁴⁴

⁴⁴³⁸ Response from Begbies Traynor, OFT Document Reference 10358.

⁴⁴³⁹ Interview transcript, OFT Document Reference 6362, page 18.

⁴⁴⁴⁰ Interview transcript, OFT Document Reference 6362, page 18.

⁴⁴⁴¹ Interview transcript, OFT Document Reference 6362, pages 19 and 20.

⁴⁴⁴² Interview transcript, OFT Document Reference 6362, page 21.

⁴⁴⁴³ Interview transcript, OFT Document Reference 6362, page 21.

⁴⁴⁴⁴ Interview transcript, OFT Document Reference 6362, page 22.

IV.2118. CS was interviewed for a second time on 28 February 2007 and was questioned regarding this tender. Whilst he could not recall the tender he agreed that it was possible that Greenwood took a cover price. CS also confirmed that he dealt with the tender while at Greenwood.⁴⁴⁴⁵

Evidence from other companies – E Manton

IV.2119. The OFT wrote to E Manton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that E Manton had participated in bid rigging on this tender. E Manton, represented by Irwin Mitchell Solicitors, indicated via letter on 24 April 2007 that it was willing to make admissions to involvement in cover pricing in relation to a number of suspect contracts.⁴⁴⁴⁶ Subsequently Irwin Mitchell Solicitors provided a completed suspect tender schedule. This schedule included *'Pre-War Improvements (2001-02) Replacement Kitchens, Swadlincote'* to which William McMurray ('WM'), Managing Director of E Manton, admitted having participated in bid rigging activities and wrote *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁴⁴⁴⁷

IV.2120. In its response to the Statement, E Manton stated in respect of this Infringement *'...[t]he fact that EM Limited took a cover price on this tender had absolutely no impact on the final outcome...'*⁴⁴⁴⁸ It further stated that E Manton *'...would definitely have viewed this tender opportunity as commercially unappealing for the following reasons:*

- *EM's track record of winning this type of domestic refurbishment work was poor. It could seldom get its bid low enough to win the contract.*
- *Working in occupied properties can be problematic.*
- *EM had not carried out much previous work in that area. It does not have an established supplier base and sub-contractor base in Derbyshire.*

It is unlikely that EM was aware the tender was coming in and that it had the opportunity to plan the work into the employed estimators' schedule'.⁴⁴⁴⁹

IV.2121. E Manton later confirmed its position again stating *'...E Manton Limited wishes to maintain its earlier admission of participation in cover pricing in relation to all tenders particularised in the the [sic] OFT's original [reduction of penalty] offer...'*⁴⁴⁵⁰

Evidence from other companies – Robert Woodhead

IV.2122. During the OFT's search at Robert Woodhead a phone number book belonging to CS was found. In this phone number book is the entry *'Derwent Valley, Pat Tunncliffe [...] [C]'*.⁴⁴⁵¹

⁴⁴⁴⁵ Interview transcript, OFT Document Reference 13423, pages 14 and 15.

⁴⁴⁴⁶ Response from E Manton, OFT Document Reference 10996.

⁴⁴⁴⁷ Response from E Manton, OFT Document Reference 11000, page 3.

⁴⁴⁴⁸ Written representations of E Manton, 25 June 2008, page 23.

⁴⁴⁴⁹ Written representations of E Manton, 25 June 2008, pages 22 to 23.

⁴⁴⁵⁰ Email from E Manton, 10 December 2008.

⁴⁴⁵¹ Contact list, OFT Document Reference 3640, page 23.

The OFT's analysis of the evidence and finding

IV.2123. From the evidence presented above, the OFT draws the following conclusions.

IV.2124. Derwent Valley, Greenwood and E Manton each accepted an invitation to tender for this contract. Greenwood and E Manton were unable to submit a tender by the return date and/or did not want to win this contract.

IV.2125. In regard to Greenwood, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Greenwood with the letter 'C' in brackets next to it. Derwent Valley stated that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.2126. PT, who was the estimator for this tender, recalled that Derwent Valley was not particularly interested in winning the tender. He confirmed that he wrote the entry in the tender schedule and that in his opinion it meant that he gave covers to both Greenwood and E Manton. This was corroborated in interview by DS, who agreed from the entry in the tender schedule that he believed that Derwent Valley had given cover prices in respect of this tender.

IV.2127. CS, who was an estimator at Greenwood at the time of this tender, initialled the Greenwood tender enquiry list and agreed he dealt with it. CS also had in his possession the telephone number for PT who was the estimator at Derwent Valley.

IV.2128. In regard to E Manton, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor E Manton with the letter 'C' in brackets next to it. Derwent Valley stated that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.2129. As noted above, PT confirmed that he wrote the entry in the tender schedule and that in his opinion it meant that he gave covers to both Greenwood and E Manton. This was corroborated in interview by DS, who agreed from the entry in the tender schedule that he believed that Derwent Valley had given cover prices in respect of this tender.

IV.2130. E Manton has admitted engaging in bid rigging activity in respect of this tender, although it was unable to recall the identity of the party with whom it engaged in bid rigging. The OFT notes that E Manton was not the successful party for this tender and as such may not have retained any records.

IV.2131. Derwent Valley also included in its list of companies who exchange cover prices the names of Greenwood and E Manton.

IV.2132. In addition, the OFT notes that South Derbyshire DC received a tendered amount of £380,606 from Derwent Valley, which is lower than the amounts tendered by Greenwood and E Manton. This fits into the pattern consistent with cover prices having been given by Derwent Valley to Greenwood and E Manton.

IV.2133. The OFT therefore concludes that contact took place between Derwent Valley and Greenwood and between Derwent Valley and E Manton. The OFT also

concludes that Derwent Valley supplied figures to each of Greenwood and E Manton for cover bids.

IV.2134. The OFT is satisfied that the facts set out in paragraphs IV.2107 to IV.2133 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁴⁵² In particular:

- (a) the provision of figures for cover bids from Derwent Valley to Greenwood and E Manton was not unilateral⁴⁴⁵³, and contravenes the principle against direct or indirect contact between competitors;⁴⁴⁵⁴
- (b) Greenwood and E Manton can each be presumed to have taken account of the information received from Derwent Valley (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁴⁴⁵⁵ and
- (c) Derwent Valley can be presumed to have taken account of the information it received from Greenwood and E Manton (i.e. that neither Greenwood nor E Manton intended to submit competitive bids) when determining its own conduct in the tendering process.⁴⁴⁵⁶

IV.2135. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Derwent Valley and Greenwood, and between Derwent Valley and E Manton, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for pre-war improvements – replacement of kitchens, 30 July 2001.

Immunity and leniency assessment

IV.2136. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2137. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

Infringement 69: Stoke Poges School – 13 August 2001
Client: Buckinghamshire County Council
Parties: Mansell and Francis

IV.2138. On 17 July 2001, Buckinghamshire County Council sought tenders for alteration and new build works to form combined school, Stoke Poges

⁴⁴⁵² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁴⁵³ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁴⁵⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁴⁵⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁴⁵⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

School.⁴⁴⁵⁷ The following six companies were invited to tender: Borrás Construction Ltd, Francis, J J McGinley, Mansell, The Buxton Group and Try Accord, the date and time of tender return was noon on 13 August 2001.⁴⁴⁵⁸

IV.2139. Buckinghamshire County Council received the following tender returns:⁴⁴⁵⁹

Company	Date & time tender received	Amount of tender	Awarded contract
Borrás Construction Ltd	13 August 2001 before noon	£1,438,902	
J J McGinley	13 August 2001 before noon	£1,414,937	
Mansell	13 August 2001 before noon	£1,381,118	
The Buxton Group	13 August 2001 before noon	£1,305,589	
Try Accord	13 August 2001 before noon	£1,347,387	
Francis	13 August 2001 before noon	£1,232,436	YES

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.2140. As part of its leniency application, Mansell’s legal representatives provided Barry Russ’s (‘BR’), a Mansell managing estimator, workload reports. The 2001 workload report for major projects contained the following entry:⁴⁴⁶⁰

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
69492	Stoke Poges School		1381118			

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS. %	
					(Francis Bros.)

Evidence from leniency applicant Mansell

IV.2141. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁴⁴⁶¹ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.2142. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Francis and that this cover price was taken due to ‘*insufficient tender period: resource*’ at Mansell.⁴⁴⁶²

⁴⁴⁵⁷ Information from client, OFT Document Reference 7273.

⁴⁴⁵⁸ Information from client, OFT Document Reference 7273.

⁴⁴⁵⁹ Information from client, OFT Document Reference 7273.

⁴⁴⁶⁰ Leniency application, OFT Document Reference B3538, page 2.

⁴⁴⁶¹ Leniency application, OFT Document Reference B0734.

⁴⁴⁶² Leniency application, OFT Document Reference B1351, page 2.

Witness evidence from leniency applicant Mansell

IV.2143. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.2144. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR, when asked what '(Francis Bros.)' indicated, stated '*So they ... would have been the ones giving me that figure*'.⁴⁴⁶³ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁴⁴⁶⁴

Evidence from other companies – Francis

IV.2145. The OFT wrote to Francis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Francis had participated in bid rigging on this tender. In response to this letter Francis advised that it was '*unable to make the admissions*' as it had been '*unable to find any evidence that it [Francis] has been guilty of the bid rigging activities alleged against it...*'.⁴⁴⁶⁵

IV.2146. The OFT subsequently wrote to Francis's ultimate parent company at the time of this Infringement, Barrett, on 6 November 2007, asking it to comment on Francis's response to the OFT's Fast Track Offer, given that the OFT intended to hold Barrett jointly and severally liable for any infringements committed by Francis in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Barrett stated '*Barrett has ... nothing to add to the comments that have already been made to you on behalf of Francis Construction*'.⁴⁴⁶⁶

IV.2147. In their response to the Statement, however, Francis stated '*Francis does not contest the OFT's findings of infringement against Francis Construction*'.⁴⁴⁶⁷

The OFT's analysis of the evidence and finding

IV.2148. From the evidence presented above, the OFT draws the following conclusions.

IV.2149. Mansell and Francis each accepted an invitation to tender for this contract.

IV.2150. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Francis completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Francis being the lowest received and the fact that it won the contract.

⁴⁴⁶³ Interview transcript, OFT Document Reference 11516, pages 25 and 26.

⁴⁴⁶⁴ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁴⁴⁶⁵ Response from Francis, OFT Document Reference 10285, page 1.

⁴⁴⁶⁶ Response from Barrett, OFT Document Reference 14050.

⁴⁴⁶⁷ Written representations of Francis, 2 July 2008, paragraph 3.

IV.2151. Mansell's 2001 workload report records '(Francis Bros.)', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.2152. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Francis, the pattern consistent with a cover price having been provided.

IV.2153. In addition, Francis has now stated that it does not contest its involvement in cover pricing in respect of this Infringement.

IV.2154. The OFT therefore concludes that contact took place between Mansell and Francis. The OFT also concludes that Francis supplied a figure to Mansell for a cover bid.

IV.2155. The OFT is satisfied that the facts set out in paragraphs IV.2140 to IV.2154 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁴⁶⁸ In particular:

- (a) the provision of a figure for a cover bid from Francis to Mansell was not unilateral⁴⁴⁶⁹, and contravenes the principle against direct or indirect contact between competitors;⁴⁴⁷⁰
- (b) Mansell can be presumed to have taken account of the information received from Francis (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁴⁷¹ and
- (c) Francis can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁴⁷²

IV.2156. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Francis in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Stoke Poges School, tender deadline 13 August 2001.

Immunity and leniency assessment

IV.2157. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁴⁴⁶⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁴⁶⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁴⁷⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁴⁷¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁴⁷² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.2158. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 70: **Brick Cladding and Associated Works, 15 Cornish Dwellings, Phase 7, Milton Drive, Worksop, Notts – 15 August 2001**
Client: **Bassetlaw District Council**
Parties: **Bodill and G Hurst⁴⁴⁷³**

IV.2159. On 16 July 2001, Bassetlaw District Council ('Bassetlaw D C') sought tenders for brick cladding and associated works, 15 Cornish dwellings, Phase 7, Milton Drive, Worksop, Notts. The return date for the tender was 14:15 on 15 August 2001 and eight companies were invited to tender: Bassetlaw D C – DLO, Bodill, Connaught, G G Middleton, G Hurst, Hewitt and Maughan Ltd, C Millward Ltd and Clayfield Construction Ltd.⁴⁴⁷⁴

IV.2160. Bassetlaw D C received the following tender returns by 15 August 2001:⁴⁴⁷⁵

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Bassetlaw D C – DLO	14 August 2001	10:30	£186,523.25	
Bodill	15 August 2001	7:15	£127,782.00	
Connaught	15 August 2001	9:45	£139,895.00	
G G Middleton	15 August 2001	9:55	£131,599.00	
G Hurst	15 August 2001	12:32	£118,555.00	Yes
Hewitt and Maughan Ltd	15 August 2001	13:32	£124,061.00	

IV.2161. The remaining two companies declined to tender, on or before 16 July 2001.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.2162. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten:⁴⁴⁷⁶

- '
1. BODILL
 2. MIDDLETONS [...] [C]
 - * 3. G HURST GRAHAM RYE
Tel [...] [C] WILL RING US'

⁴⁴⁷³ The information from the client (OFT Document Reference 7143) stated that the G Hurst subsidiary tendering for this contract was PDH, which was at the time named G Hurst & Sons (Contractors) Limited. Other than in the subsection headed 'Evidence from other companies – PDH, references in this Infringement to 'G Hurst' are therefore references to the Participant Company, PDH.

⁴⁴⁷⁴ Information from client, OFT Document Reference 7143.

⁴⁴⁷⁵ Information from client, OFT Document Reference 7143.

⁴⁴⁷⁶ Tender sheet, OFT Document Reference 0567.

IV.2163. The tender sheet for this tender also contains a ringed letter 'C' in the top right-hand corner of the tender sheet and at the foot of the sheet it states that Bodill's submitted price was £127,782.00.⁴⁴⁷⁷

Evidence from leniency applicant Bodill

IV.2164. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.2165. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁴⁴⁷⁸ In respect of this tender, Bodill confirmed that it received a cover price from G Hurst⁴⁴⁷⁹ and that it submitted a '*token tender*'.⁴⁴⁸⁰

IV.2166. [...] [C]⁴⁴⁸¹

IV.2167. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.2168. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – PDH

IV.2169. The OFT wrote to PDH on 27 April 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that PDH, had participated in bid rigging on this tender. In response to this letter David Hurst, Managing Director of PDH, in a telephone call on 15 June 2007 confirmed that PDH were rejecting the OFT's Fast Track Offer.⁴⁴⁸²

IV.2170. The OFT subsequently wrote to PDH's ultimate parent company at the time of this Infringement, G Hurst, on 6 November 2007, asking it to comment on PDH's response to the OFT's Fast Track Offer, given that the OFT intended to hold G Hurst jointly and severally liable for any infringements committed by PDH in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, G Hurst said it is '*...not aware of and do*

⁴⁴⁷⁷ Tender sheet, OFT Document Reference 0567.

⁴⁴⁷⁸ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴⁴⁷⁹ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

⁴⁴⁸⁰ Tender Analysis, OFT Document Reference 0849, page 2.

⁴⁴⁸¹ [...] [C]

⁴⁴⁸² File note of telephone conversation, OFT Document Reference 10743.

not believe there has been any contravention of the Competition Act 1998 by this Company'.⁴⁴⁸³

IV.2171. In their responses to the Statement, G Hurst & Sons and PDH each stated *'The company believes that this evidence is not conclusive that the G Hurst [sic] cooperated with Bodills'* in respect of this Infringement.⁴⁴⁸⁴ G Hurst & Sons and PDH further noted that Graham Rye, the director of PDH with responsibility for estimating and the submission of tenders had not been part of the management structure since 30 April 2004. The companies therefore noted that the current Managing Director was *'unable to defend or comment further on any alleged action of a former Director of the company'*.⁴⁴⁸⁵

IV.2172. The OFT considers that the information as set out in the Statement together with the evidence from the OFT's file provided with the Statement was sufficient for G Hurst and PDH to review their records and/or contact relevant individuals and locate the necessary information for its own defence. It appears that to the extent that G Hurst and PDH are unable to adduce evidence in their defence this results from management changes and/or not having kept records in respect of this tender, rather than the OFT's case being insufficient. However, the absence of documentary records or direct access to witnesses cannot of itself exculpate G Hurst from an Infringement where other evidence is available which the OFT considers implicates it, and indeed is sufficient to substantiate its involvement.

The OFT's analysis of the evidence and finding

IV.2173. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.2174. Bodill and G Hurst each accepted an invitation to tender for this contract.

IV.2175. G Hurst completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by G Hurst being the lowest received and that it won the contract.

IV.2176. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.

IV.2177. In regard to G Hurst, Bodill's tender sheet records *'G HURST GRAHAM [.....] [C] WILL RING US THURS A.M.'* and there is a ringed letter 'C' in the top right hand corner of the tender sheet. Bodill has confirmed that this shows that it received a cover price from G Hurst. Bodill recorded on the tender sheet the figure £127,782.00 as the tender figure and this was the figure that Bodill submitted. Furthermore, the telephone number set out in Bodill's tender sheet, [.....] [C], was the G Hurst telephone number⁴⁴⁸⁶, indicating that Bodill contacted G Hurst in respect of this tender.

⁴⁴⁸³ Response from G Hurst & Sons, OFT Document Reference 14056, page 1.

⁴⁴⁸⁴ Written representations of G Hurst & Sons, 27 May 2008, page 3; and written representations of PDH, 27 May 2008, page 3.

⁴⁴⁸⁵ Written representations of G Hurst & Sons, 27 May 2008, page 4; and written representations of PDH, 27 May 2008, page 3.

⁴⁴⁸⁶ FAME report, OFT Document Reference 11914, page 14.

IV.2178. The OFT notes in addition that the tender submitted by Bodill was higher than the tender submitted by G Hurst, a pattern consistent with a cover price having been provided.

IV.2179. The OFT therefore concludes that contact took place between G Hurst and Bodill. The OFT also concludes that G Hurst supplied a figure to Bodill for a cover bid.

IV.2180. The OFT is satisfied that the facts set out in paragraphs IV.2162 to IV.2179 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁴⁸⁷ In particular:

- (a) the provision of a figure for a cover bid from G Hurst to Bodill was not unilateral⁴⁴⁸⁸, and contravenes the principle against direct or indirect contact between competitors;⁴⁴⁸⁹
- (b) Bodill can be presumed to have taken account of the information received from G Hurst (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁴⁹⁰ and
- (c) G Hurst can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁴⁹¹

IV.2181. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and G Hurst, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for brick cladding and associated works, 15 Cornish dwellings, Phase 7, Milton Drive, Worksop, Notts, tender deadline 15 August 2001.

Immunity and leniency assessment

IV.2182. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2183. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 71: Not included in the Decision

⁴⁴⁸⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁴⁸⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁴⁸⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁴⁹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁴⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 72: Proposed IT Suite, Rawdon Street, Derby, Indian Community Centre & DTC – 24 August 2001
Client: Indian Community Centre/Derby Technical College
Parties: Derwent Valley and Davlyn

IV.2184. On 3 August 2001, the Indian Community Centre & DTC sought tenders for a proposed IT suite at Rawdon Street, Derby. The following five companies were invited to tender: Derwent Valley, Greenhill Construction (Derby) Ltd, Peter Baines, B & K Building Services and Davlyn. The deadline for the receipt of tenders was 12:00 noon on 24 August 2001.⁴⁴⁹²

IV.2185. Indian Community Centre & DTC employed Armson & Partners, an independent project management company, to deal with the tendering process and they received the following tender returns:⁴⁴⁹³

Company	Date tender received	Amount of tender	Awarded contract
B & K Building Services	24 August 2001	£41,300.58	
Greenhill Construction Derby Ltd	24 August 2001	£43,484.00	
Peter Baines	24 August 2001	£45,481.00	
Derwent Valley	24 August 2001	£37,777.00	✓
Davlyn	24 August 2001	£41,046.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.2186. During the OFT's search of Derwent Valley's premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁴⁴⁹⁴

TENDER NR.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	✓
01/08/01	24/8/01	PROPOSED IT SUITE RAWDON STREET DERBY INDIAN COMMUNITY CENTRE & DTC	Davlyn (C)	37,777.00	1st

Evidence from leniency applicant Derwent Valley

IV.2187. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.2188. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price

⁴⁴⁹² Information from client, OFT Document Reference 13725.

⁴⁴⁹³ Information from client, OFT Document Reference 13725.

⁴⁴⁹⁴ Tender schedule, OFT Document Reference 1912, page 27.

to a competitor for that tender, marked as *'DVC1 List of Covers Given'*. The information in the summary was based on the tender schedule kept by Pat Tunnicliffe ('PT'), an ex-estimator at Derwent Valley, and contained the following extract:⁴⁴⁹⁵

Date	Contract	Company Involved
August 2001	IT Suite Indian Community Centre	Davlyn

IV.2189. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Davlyn Construction Ltd'* appears on this list with the address *'Unit 5B Sir Francis Ley Ind Park Shaftsbury St. Derby'* and as a contact the name *'Dave'*.⁴⁴⁹⁶

IV.2190. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.2191. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.2192. In regard to this tender, a voluntary interview was conducted with PT, who dealt with this tender. PT, referring to the tender schedule in respect of this tender, remembered it and said *'we tendered for it, won it, 'cause that looks like first, we gave a cover to Davlyn'*.⁴⁴⁹⁷ PT commented on a recollection of meeting a quantity surveyor from *'Armsons'* [Armson & Partners] and said *'I went round the job with him, I think I priced it and by the look of it we won it. And obviously Davlyn looked for help and we gave it'*.⁴⁴⁹⁸ When asked if he recalled the name of anyone at Davlyn he would have dealt with PT said *'I can't remember the name of the chap that phoned up but it would have just been a phone call. Are you pricing it? Yes. Can I have help? Yes'*.⁴⁴⁹⁹

IV.2193. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender. DS recalled the tender and, on examining the entry for it in the tender schedule, said *'it says Davlyn with a (C) at the side of it, and it was a tender sum was £37,777 and we was first'*.⁴⁵⁰⁰ Asked what the entry of *'Davlyn (C)'* meant, DS replied *'I would say that means cover'*⁴⁵⁰¹ and went on to confirm this was a cover price given to Davlyn by Derwent Valley commenting, *'I think we've given there, obviously Davlyn have rung us and asked us for a cover'*.⁴⁵⁰²

Evidence from leniency applicant Davlyn

⁴⁴⁹⁵ List of Covers Given, OFT Document Reference 3940, page 2.

⁴⁴⁹⁶ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 2.

⁴⁴⁹⁷ Interview transcript, OFT Document Reference 14237, page 11.

⁴⁴⁹⁸ Interview transcript, OFT Document Reference 14237, page 11.

⁴⁴⁹⁹ Interview transcript, OFT Document Reference 14237, page 12.

⁴⁵⁰⁰ Interview transcript, OFT Document Reference 13478, page 13.

⁴⁵⁰¹ Interview transcript, OFT Document Reference 13478, page 13.

⁴⁵⁰² Interview transcript, OFT Document Reference 13478, page 13.

IV.2194. As part of its leniency application, Davlyn provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.293 to IV.302 above and is relied upon by the OFT in relation to this tender.

IV.2195. In its response to the Statement, Davlyn did not contest its involvement in this infringement.

Witness evidence from leniency applicant – Davlyn

IV.2196. During interviews conducted in connection with its leniency application, Davlyn's employees provided general explanation of its participation in and recording of cover pricing. This is set out in paragraphs IV.293 to IV.302 above and is relied upon by the OFT in relation to this tender.

IV.2197. During interview, Davlyn's estimator, David Goodhead ('DG') was asked about this tender. DG did not recall it and explained that any documents associated with it would have been disposed of due to the age of the tender. DG agreed that Derwent Valley was a company with whom Davlyn did exchange cover prices in the past.⁴⁵⁰³ Referring to the Derwent Valley tender schedule and the entry '*Davlyn (C)*', when asked if it was feasible that Derwent Valley gave Davlyn a cover price in respect of this tender DG replied '*It's feasible, yes. I can't confirm whether they did or didn't, either from, A, paperwork or B, recollection*'.⁴⁵⁰⁴

The OFT's analysis of the evidence and finding

IV.2198. From the evidence presented above, the OFT draws the following conclusions.

IV.2199. Derwent Valley and Davlyn each accepted an invitation to tender for this contract. Derwent Valley completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Derwent Valley being the lowest received and the fact it won the contract.

IV.2200. Davlyn was unable to submit a tender by the return date and/or did not want to win this contract.

IV.2201. Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes a reference to competitor Davlyn with the letter 'C' in brackets next to it. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.2202. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover price to Davlyn.

IV.2203. This was corroborated in interview by DS at Derwent Valley, who agreed that the entry in the tender schedule showed that Derwent Valley gave a cover price in respect of this tender to Davlyn.

⁴⁵⁰³ Interview transcript, OFT Document Reference 11180, pages 2 and 3.

⁴⁵⁰⁴ Interview transcript, OFT Document Reference 11180, pages 3 and 4.

IV.2204. Although Davlyn has not admitted engaging in bid rigging activity in respect of this tender, the OFT notes that Davlyn was not the successful party for this tender and as such may not have any records. Davlyn's estimator, DG, confirmed that it was '*feasible*' that Davlyn obtained a cover price from Derwent Valley for this tender.

IV.2205. Derwent Valley also included in its list of companies who exchange cover prices the name of Davlyn.

IV.2206. In addition, the OFT notes that Indian Community Centre & DTC received a tendered amount of £37,777 from Derwent Valley, which is lower than the amount tendered by Davlyn. This fits into the pattern consistent with a cover price having been given to Davlyn from Derwent Valley.

IV.2207. The OFT also notes that Davlyn submitted a tendered amount of £41,046 in respect of this tender and came second to Derwent Valley. This shows that the only company from whom Davlyn could have received a cover price was Derwent Valley, who submitted the lowest bid and won the tender.

IV.2208. The OFT therefore concludes that contact took place between Derwent Valley and Davlyn. The OFT also concludes that Derwent Valley supplied a figure to Davlyn for a cover bid.

IV.2209. The OFT is satisfied that the facts set out in paragraphs IV.2186 to IV.2208 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁵⁰⁵ In particular:

- (a) the provision of a figure for a cover bid from Derwent Valley to Davlyn was not unilateral⁴⁵⁰⁶, and contravenes the principle against direct or indirect contact between competitors;⁴⁵⁰⁷
- (b) Davlyn can be presumed to have taken account of the information received from Derwent Valley (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁵⁰⁸ and
- (c) Derwent Valley can be presumed to have taken account of the information it received from Davlyn (i.e. that Davlyn did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁵⁰⁹

IV.2210. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Davlyn, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for proposed IT suite, Rawdon Street, Derby, Indian Community Centre & DTC, tender dated 24 August 2001.

⁴⁵⁰⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁵⁰⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁵⁰⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁵⁰⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁵⁰⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.2211. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2212. In respect of this tender, the OFT became aware of Derwent Valley's involvement in bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

IV.2213. In respect of this tender, the OFT became aware of Davlyn's involvement in bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Davlyn will not therefore receive 100 per cent immunity in respect of this tender. However, Davlyn will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 73: Not included in the Decision

Infringement 74: Toxicology Laboratory, City Hospital, Birmingham – 7 September 2001

Client: The City Hospital NHS Trust

Parties: Thomas Vale and Wygar

IV.2214. On 7 August 2001, The City Hospital NHS Trust ('City Hospital NHS'), now known as Sandwell and West Birmingham Hospitals NHS, sought tenders for the extension to the Toxicology Laboratory, City Hospital, Dudley Road, Birmingham. The following six companies were invited to tender: Shaylor, E Manton, Mansell, Wygar, Kendrick Construction and Thomas Vale.⁴⁵¹⁰ The deadline for the receipt of tenders was 12:00 noon on 7 September 2001.

IV.2215. City Hospital NHS received the following tender returns:⁴⁵¹¹

Company	Time & Date tender received	Amount of tender	Awarded contract
Shaylor	7 September 2001 (time not recorded)	£417,474	
E Manton	7 September 2001 (time not recorded)	£481,760	
Mansell	7 September 2001 (time not recorded)	£495,820	
Wygar	7 September 2001 (time not recorded)	£344,695	Yes
Kendrick Construction	7 September 2001 (time not recorded)	£465,252	
Thomas Vale	7 September 2001 (time not recorded)	£375,194	

⁴⁵¹⁰ Information from client, OFT Document Reference 9703.

⁴⁵¹¹ Information from client, OFT Document Reference 9703.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.2216. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁴⁵¹²

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T4930	BM	City Hospital NHS Trust	Toxicology Laboratory, City Hosp, Dudley Road, Birmingham		CKT	B	07/09/2001 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
375,194		Mansell, Wygar, Manton	

IV.2217. The Tender Status spreadsheet was maintained at Thomas Vale’s head office by Christopher Keith Trickett (‘CKT’), Chief Estimator at Thomas Vale, who kept a *‘little black book’*⁴⁵¹³ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Wygar plus names and telephone number.⁴⁵¹⁴

Evidence from leniency applicant Thomas Vale

IV.2218. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.2219. At Annex 14⁴⁵¹⁵ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 50 of the schedule under Annex 14 and within the section for 2001 tenders is the following entry:⁴⁵¹⁶

⁴⁵¹² Tender Status spreadsheet, OFT Document Reference 4522, page 20.

⁴⁵¹³ Interview transcript, OFT Document Reference 11418, page 21.

⁴⁵¹⁴ Contact list, OFT Document Reference 11086, page 27.

⁴⁵¹⁵ Leniency application, OFT Document Reference 4568.

⁴⁵¹⁶ Leniency application, OFT Document Reference 4568, page 50.

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T4930	07 September	City Hospital NHS Trust	Toxicology Laboratory, City Hosp, Dudley Road, Birmingham	Taken (Wyggar)	Yes (Tender Spreadsheet)

IV.2220. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.2221. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁴⁵¹⁷ and Wygar appears on this list.

IV.2222. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.2223. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.2224. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letters 'BM', which appear in the column marked 'DIV', stand for Building and Maintenance Division, based at Thomas Vale's head office.⁴⁵¹⁸ In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: *'Then entry is a tender return date of the 7th of September 2001, £375,194 our tender figure, Wygar in bold indicating that Wygar gave us a cover figure'*.⁴⁵¹⁹ CKT said that he would have dealt with the tender on behalf of Building and Maintenance Division and he had an entry for Wygar in his book of contacts.

Evidence from other companies – Wygar

IV.2225. The OFT wrote to Wygar on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wygar had participated in bid rigging on this tender. In response, Wygar stated in its letter to the OFT dated 25 April 2007 that it had given a cover price on this tender.⁴⁵²⁰ In addition, it stated *'We engaged in bid rigging activities (cover pricing) on this tender with Thomas Vale. Mr C Trickett'*.⁴⁵²¹

⁴⁵¹⁷ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁴⁵¹⁸ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁴⁵¹⁹ Interview transcript, OFT Document Reference 13855, page 23.

⁴⁵²⁰ Response from Wygar, OFT Document Reference 10938.

⁴⁵²¹ Response from Wygar, OFT Document Reference 10939, page 2.

IV.2226. The OFT subsequently wrote to Wygar's ultimate parent company at the time of this Infringement, Wygar Holdings, on 5 November 2007, asking it to comment on Wygar's response to the OFT's Fast Track Offer, given that the OFT intended to hold Wygar Holdings jointly and severally liable for any infringements committed by Wygar in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Wygar Holdings confirmed that it would *'support and adopt Wygar Construction Limited's acceptance of the reduction of penalty offer and that WHL does not intend to comment...or to make any submissions on this case at the present time'*.⁴⁵²²

IV.2227. In their response to the Statement, Wygar and Wygar Holdings stated *'Wygar has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement'*.⁴⁵²³

The OFT's analysis of the evidence and finding

IV.2228. From the evidence presented above, the OFT draws the following conclusions.

IV.2229. Thomas Vale and Wygar each accepted an invitation to tender for the contract for the extension to the Toxicology Laboratory, City Hospital, Birmingham. It appears that Wygar completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Wygar being the lowest received and the fact that it won the contract.

IV.2230. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.

IV.2231. Thomas Vale's contemporaneous Tender Status spreadsheet maintained in electronic format by Chief Estimator CKT, records three competitors who were also invited to tender for this contract, namely Mansell, Wygar and E Manton. Wygar is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is £375,194 which matches the amount recorded by the client City Hospital NHS.

IV.2232. City Hospital NHS also received a tendered amount of £344,695 from Wygar, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Wygar to Thomas Vale. The OFT notes that Wygar's tender bid is the only figure below that of Thomas Vale and so Thomas Vale could only have received cover from Wygar.

IV.2233. The OFT notes that although three competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Wygar. This indicates that a conscious decision was made to differentiate Wygar from the other two competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal

⁴⁵²² Response from Wygar Holdings, OFT Document Reference 14045.

⁴⁵²³ Written representations of Wygar and Wygar Holdings, 27 June 2008, paragraph 3.

knowledge of the decision to receive a cover price and make contact with Wygar at the time. It also indicates that CKT himself made contact with Wygar.

IV.2234. Thomas Vale admitted that Wygar was one of the ‘*key competitors*’ with whom it engaged in cover pricing activity. In interview, CKT agreed that the entry in Tender Status spreadsheet shows that he obtained a cover price from Wygar and he had an entry for Wygar in a contact book he used to telephone other contractors for the purpose of obtaining cover prices.

IV.2235. Both parties have admitted to bid rigging in relation to this tender. Wygar admitted that the party with whom it engaged in bid rigging was Thomas Vale and named CKT as the relevant contact, without being shown the OFT’s evidence that Thomas Vale and CKT were involved. This provides additional independent corroboration of the OFT’s evidence in respect of this tender.

IV.2236. The OFT therefore concludes that contact took place between Thomas Vale and Wygar and that Wygar supplied a figure to Thomas Vale in order that it could submit a bid to the client that was not intended to win the contract.

IV.2237. The OFT is satisfied that the facts set out in paragraphs IV.2216 to IV.2236 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁵²⁴ In particular:

- (a) the provision of a figure for a cover bid from Wygar to Thomas Vale was not unilateral⁴⁵²⁵, and contravenes the principle against direct or indirect contact between competitors;⁴⁵²⁶
- (b) Thomas Vale can be presumed to have taken account of the information received from Wygar (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁵²⁷ and
- (c) Wygar can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁵²⁸

IV.2238. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Wygar in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the extension to the Toxicology Laboratory, City Hospital, Birmingham, tender deadline 7 September 2001.

Immunity and leniency assessment

IV.2239. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁴⁵²⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁵²⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁵²⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁵²⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁵²⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.2240. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 75: **Refurbishment, Wattville Thomas J&I School, Handsworth – 18 September 2001**
Client: **Birmingham City Council**
Suspect Parties: **BBCL⁴⁵²⁹, Thomas Vale, Interclass and Pearce⁴⁵³⁰**

IV.2241. On 13 August 2001, Birmingham City Council sought tenders for refurbishment and extension to Wattville Thomas J&I School.⁴⁵³¹ The following six companies were invited to tender: BBCL, Harper, Interclass, Kendrick Const. Ltd, Pearce and Thomas Vale. The date of tender return was 18 September 2001 at 12:00 noon.⁴⁵³²

IV.2242. Birmingham City Council received the following tender returns:⁴⁵³³

Company	Date tender received	Amount of tender	Awarded contract
BBCL	18 September 2001	£1,064,354	YES
Harper	18 September 2001	£1,106,560	
Interclass	18 September 2001	£1,154,832	
Kendrick Const Ltd	18 September 2001	£1,126,209	
Pearce	18 September 2001	£1,129,845	
Thomas Vale	18 September 2001	£1,140,946	

IV.2243. As described in more detail in paragraphs II.1000 to II.1036 above, Pearce was at the relevant time acting under the terms of an agency agreement with Pearce Group when bidding for this tender, and Pearce Group was therefore the undisclosed principal involved in this tender process.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Balfour Beatty – Bid Risk Checklist and handwritten notes

IV.2244. As part of its leniency application, Balfour Beatty’s legal representatives provided a BBCL Southern Division Bid Risk Checklist for this tender⁴⁵³⁴, which contained the following:

⁴⁵²⁹ BBCL (Balfour Beatty Construction Ltd) is a subsidiary of Balfour Beatty.

⁴⁵³⁰ The OFT notes Pearce acted as an undisclosed agent of Pearce Group, therefore the Participant Company for this Infringement comprised both Pearce and Pearce Group.

⁴⁵³¹ Information from client, OFT Document Reference 7195.

⁴⁵³² Information from client, OFT Document Reference 7195.

⁴⁵³³ Information from client, OFT Document Reference 7195.

⁴⁵³⁴ BBCL Bid Risk Checklist, OFT Document Reference B1623.

Competition	<i>Harper Group Construction</i>
	<i>Kendrick</i>
	<i>Pearce Construction "C"</i>
	<i>Thomas Vale "C"</i>
	<i>Interclass "C"</i>

IV.2245. Balfour Beatty's legal representatives also provided handwritten notes headed 'WATTVILLE SCHOOL HANDSWORTH. COMPETITION'⁴⁵³⁵, belonging to Martyn Etheridge ('ME'), a senior estimator at BBCL, which show:

'GREG HOPKIN
HARPERS (WARLEY) [...] [C]

PEARCE CONSTRUCTION [...] [C]
GEORGE EVESHAM ↗
IAN TAYLOR TELFORD [...] [C] NO
BRIAN DUTTON ~~POSSIBLE COVER~~

THOMAS VALE - [...] [C]
CHRIS TRICKETT COVER

INTERCLASS - [...] [C] COVER
BOB ALLEN [...] [C]

KENDRICK CONSTRUCTION

<i>BBCL</i>	<i>£1,064,345</i>		
<i>PEARCE</i>	<i>£1,129,845</i>	<i>65,500</i>	<i>6.15%</i>
<i>THOMAS VALE</i>	<i>£1,140,946</i>	<i>76,601</i>	<i>7.20%</i>
<i>INTERCLASS</i>	<i>£1,154,832</i>	<i>90,487</i>	<i>8.50%</i>

IV.2246. Pearce, Crest Nicholson⁴⁵³⁶, and Pearce Group⁴⁵³⁷ suggested in their respective representations that because the handwritten note was undated, and because there was no clear indication as to when the 'C's on the bid risk checklist had been recorded, the OFT had not proven that these documents were contemporaneous.⁴⁵³⁸ The OFT considers first ME's confirmation in interview that the handwriting on the handwritten note was his and was made at the time of the tender⁴⁵³⁹, and secondly the date on the bid risk checklist of 17 September 2001, the day prior to the tender deadline, to be sufficient proof that both documents are in fact contemporaneous, i.e. that they were completed around the day of the tender submission deadline.

IV.2247. In their respective responses to the Statement, Pearce and Crest Nicholson suggested that the telephone numbers in the first half of this handwritten note

⁴⁵³⁵ Handwritten notes, OFT Document Reference B1622.

⁴⁵³⁶ The ultimate parent company of Pearce at the time of the Infringement. Pearce and Crest Nicholson responded separately to the Statement.

⁴⁵³⁷ The immediate parent company and undisclosed principal of Pearce, Pearce Group responded to the Supplementary Statement dated 16 April 2009.

⁴⁵³⁸ Written representations of Pearce, 14 July 2008, paragraphs 3.32 and 3.37; written representations of Crest Nicholson, 27 June 2008, paragraph 7.68; written representations of Pearce Group, 1 June 2009, paragraphs 4.19 and 4.26 to 4.27; oral representations of Pearce Group, 5 June 2009, page 11.

⁴⁵³⁹ Interview transcript, OFT Document Reference 11138, page 24.

indicated that ME initiated contact with Pearce, inconsistent with the typical process of cover pricing, and therefore were not evidence that a cover was given to Pearce.⁴⁵⁴⁰ The OFT notes that ME did state in interview that he had tried to contact other companies, including Pearce.⁴⁵⁴¹ However, ME's evidence was that this was to arrange a request to the client for an extension of the tender deadline.⁴⁵⁴² This is corroborated by the client information which shows that the tender deadline was extended from 11 September 2001 to 18 September 2001.⁴⁵⁴³ The OFT accepts that if the telephone numbers were all that this note contained, Pearce and Crest Nicholson's explanation might be plausible. However, this does not account for the entry 'cover', written next to each of the entries for Pearce, Thomas Vale and Interclass. In view of the inclusion of those particular entries, the OFT considers it most likely that ME originally contacted the other bidders to arrange a request for a tender extension and that some of those bidders either took the opportunity to request a cover price, or having already had an initial contact with ME later contacted him again with a request for a cover price.

IV.2248. In their respective representations Pearce, Crest Nicholson, and Pearce Group also suggested that the proximity of the word 'no' to the word 'cover' in the first half of the handwritten note, under the heading '*Pearce Construction*', implied that no cover was actually given; rather the crossed out '*possible*' indicates the cover was at first a possibility which then became a 'no'.⁴⁵⁴⁴ The OFT does not consider this interpretation plausible. First, it fails to account for the entries in the second half of the note (as to which see paragraphs IV.2249 to IV.2251 below). Had ME prepared a 'possible' cover price for Pearce, but Pearce decided to submit a genuine bid and not to accept a cover, the OFT would expect that the figure the client received from Pearce would be different from the figure next to Pearce's name on the second half of this handwritten note. Secondly, the OFT considers that the 'no' relates to the crossed out phone number and '*Telford*', and it notes that there is a [...] [C] located in Telford with that telephone number⁴⁵⁴⁵ which was not the company tendering for this contract.

IV.2249. In their respective representations Pearce, Crest and Pearce Group suggested that the figures in the second half of the sheet were a record of information gathered post tender⁴⁵⁴⁶, rather than of the cover figures prepared for those parties, because ME had stated in interview he would '*seek to find out what other parties had bid for the contract*'⁴⁵⁴⁷, and because the '*entry of the four names at the bottom appears to have been made at a different time or times to*

⁴⁵⁴⁰ Written representations of Pearce, 14 July 2008, paragraph 3.34; written representations of Crest Nicholson, 27 June 2008, paragraph 7.69.

⁴⁵⁴¹ Interview transcript, OFT Document Reference 11138, page 24.

⁴⁵⁴² Interview transcript, OFT Document Reference 11138, page 24.

⁴⁵⁴³ Information from client, OFT Document Reference 7195.

⁴⁵⁴⁴ Written representations of Pearce, 14 July 2008, paragraphs 3.35 to 3.36; written representations of Crest Nicholson, 27 June 2008, paragraphs 7.70 and 7.74; oral representations of Crest, 25 July 2008, pages 14 to 15; written representations of Pearce Group, 1 June 2009, paragraphs 1.3 and 4.23; and oral representations of Pearce Group, 5 June 2009, page 13.

⁴⁵⁴⁵ [...] [C]

⁴⁵⁴⁶ Written representations of Pearce, 14 July 2008, paragraph 3.38; written representations of Crest Nicholson, 27 June 2008, paragraphs 7.77 to 7.78; oral representations of Crest Nicholson, 25 July 2008, page 15; written representations of Pearce Group, 1 June 2009, paragraph 4.28; and oral representations of Pearce Group, 5 June 2009, page 12.

⁴⁵⁴⁷ Written representations of Crest Nicholson, 27 June 2008, paragraph 7.77.

the entries above'.⁴⁵⁴⁸ The OFT considers this alternative suggestion to be implausible for the following reasons.

IV.2250. First, the list contains prices for only three out of five of BBCL's competitors. If this were post-tender information, the OFT would expect to see a complete list, and certainly that the second and third lowest tenders would be included. The OFT notes that ME did have contact details for at least the remaining bidder Harper; this information is recorded on the handwritten note itself. The OFT therefore considers this explanation implausible in view of the absence in particular of Harper's price details from the list. Secondly, the three out of five of BBCL's competitors that are included in the second half of the note are the same three competitors as are noted in the first half of the note with the entry 'cover' next to their names. Finally, any number of explanations consistent with cover pricing could account for the upper and lower sections having been recorded at different times (see, for example, paragraph IV.2247 above regarding the possibility that initial contact was made with these companies for the purposes of seeking a deferral of the tender submission deadline) and the OFT does not therefore consider this a contraindication to cover pricing.

IV.2251. Overall, the OFT does not accept that the two halves of this note should be disaggregated in the manner that Pearce, Crest and the Pearce Group effectively suggest. Read together the OFT considers it clear that the first half of the note records contact details for companies who have requested covers, and that the second half records the price given to those companies. The OFT does not rely on any particular entry in isolation, but rather interprets the document as a whole, and concludes that taken as a whole it represents strong and compelling evidence of BBCL having provided a cover price to Pearce, Thomas Vale and Interclass.

Evidence from leniency applicant Balfour Beatty

IV.2252. Balfour Beatty's legal representatives also provided to the OFT a schedule setting out instances of cover pricing uncovered or suspected within BBCL, where covers were given. In respect of this tender the schedule shows that BBCL gave cover prices to Thomas Vale, Interclass and Pearce.⁴⁵⁴⁹

IV.2253. Following the issue of the Statement, Balfour Beatty did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Balfour Beatty

IV.2254. During interviews conducted in connection with its leniency application, Balfour Beatty employees and ex-employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.189 to IV.203 above and is relied upon by the OFT in relation to this tender.

IV.2255. During an interview with the OFT on 30 March 2007, ME advised what would happen when a competitor asked for a cover price from Balfour Beatty as detailed in paragraphs IV.195 to IV.197 above. ME advised that his role was *'to estimate and, and win building contracts for the south-east which includes*

⁴⁵⁴⁸ Written representations of Pearce Group, 1 June 2009, paragraph 4.26.

⁴⁵⁴⁹ Cover pricing schedule, OFT Document Reference B1604, page 1.

Birmingham ... as well as the London office'.⁴⁵⁵⁰ In relation to this tender ME stated *'I completed the [bid risk] check list'* and when asked what the 'C' in speech marks next to Thomas Vale, Interclass and Pearce indicated, ME stated *'C stands for cover'*.⁴⁵⁵¹

IV.2256. In relation to the handwritten notes, ME confirmed that it was his handwriting and in relation to the notes relating to Pearce at the top of the page stated *'... I'm surmising 'cos I can't remember this completely is that Pearce Construction have got several offices: one in Evesham, one in Telford, and ... it was finding who, which office was dealing with it ... We were asking for tender extension on this job ... so those would probably contact them and ask me if they could ask for one as well'*.⁴⁵⁵²

IV.2257. Regarding the notes relating to Thomas Vale, ME stated *'They came to me asking for cover, and that was obviously the name of the company, the person who spoke to me and the telephone number so that I could get back to them with a number'*.⁴⁵⁵³

IV.2258. When asked about the notes of numbers at the bottom of the document, ME stated *'... that is a list, not of all the competitors, but of Balfour Beatty's price plus the three companies who asked me to give them a cover price. And those are the numbers I told them to go in on, with the difference between our figure and their figure, and a percentage of what it would be'*.⁴⁵⁵⁴ When asked whether he had been in contact with the noted companies and given them the cover prices, ME stated *'Yeah ... I would have had contact with them'*.⁴⁵⁵⁵

IV.2259. In their respective responses to the Statement and Supplementary Statement, Pearce, Crest Nicholson, and Pearce Group suggested that ME's witness evidence was unreliable and not a specific recollection of this tender due to his use of the phrases *'I'm surmising'*, *'this is a bit more vague'* and *'I can't remember this completely'*.⁴⁵⁵⁶ They also noted his comment about Pearce having an office in Telford, which it did not, suggesting this also cast doubt on his reliability.⁴⁵⁵⁷ The OFT notes that ME only used the above-mentioned qualifying phrases when discussing the particular entry, in the first half of his handwritten note under the heading *'Pearce Construction'*, of 'Telford' and the crossed out phone number, as described in paragraph IV.2256 above. It is clear that ME was offering a possible explanation for the presence of this additional information. He was not stating with certainty that Pearce did in fact have an office in Telford. Indeed, as indicated in paragraph IV.2248 above, though Pearce do not have an office in Telford, the similarly named C J Pearce does and the crossed out telephone number on this note is theirs. The OFT considers it likely that ME's recollection was of making an initial contact with this company in error. Further, and in contrast, when discussing the remainder of

⁴⁵⁵⁰ Interview transcript, OFT Document Reference 11138, page 2.

⁴⁵⁵¹ Interview transcript, OFT Document Reference 11138, page 23.

⁴⁵⁵² Interview transcript, OFT Document Reference 11138, page 24.

⁴⁵⁵³ Interview transcript, OFT Document Reference 11138, page 24.

⁴⁵⁵⁴ Interview transcript, OFT Document Reference 11138, page 24.

⁴⁵⁵⁵ Interview transcript, OFT Document Reference 11138, page 24.

⁴⁵⁵⁶ Written representations of Pearce, 14 July 2008, paragraph 3.31; written representations of Pearce Group, 1 June 2009, paragraph 4.18 and 4.22.

⁴⁵⁵⁷ Written representations of Pearce, 14 July 2008, paragraphs 3.34 and 3.37; written representations of Crest Nicholson, 27 June 2008, paragraph 7.69 and 7.73; written representations of Pearce Group, 1 June 2009, paragraph 4.22; and oral representations of Pearce Group, 5 June 2009, page 12.

his handwritten note and this tender ME's evidence did not include any qualifications, as is demonstrated in his explanation of the figures at the bottom of the page, set out in paragraph IV.2258 above. As discussed in paragraph IV.2246 above, if ME initiated contact with Pearce this does not indicate that cover pricing did not take place. The OFT does not therefore accept that ME's evidence is unreliable.

IV.2260. In its response to the Statement, Pearce suggested that the meaning of 'C' on the bid risk checklist was unclear because ME did not recall providing a cover to Pearce. Pearce stated '[ME] *specifically states that "this is a bit more vague" and "I can't remember this completely"*'.⁴⁵⁵⁸ The OFT notes that the quote referenced by Pearce in fact refers to parts of the handwritten note, as indicated above, and not to the bid risk checklist. When asked what the 'C' on the bid risk checklist indicated, ME did not demonstrate any uncertainty, stating clearly '*C stands for cover*'.⁴⁵⁵⁹

IV.2261. Pearce and Pearce Group also noted in their responses that ME stated in interview that Pearce was not a company '*Balfour Beatty would generally have exchanged cover prices with*'.⁴⁵⁶⁰ The OFT does not consider this in any way undermines the contemporaneous documents and supporting witness evidence in respect of this tender. If it were indeed unusual for BBCL to provide a cover to Pearce (and the OFT does not consider it necessary to determine this point) the OFT considers that that in fact would make the witness evidence in respect of this tender more reliable. ME is more likely to remember an unusual interaction than one which was barely distinguishable from a myriad of regular contacts.

IV.2262. In its response to the Statement, Crest Nicholson alleged that the OFT ignored the evidence of PC although he had been interviewed in relation to this tender.⁴⁵⁶¹ The OFT notes that PC had no personal knowledge of this contract and the contemporaneous notes were not his. Therefore he did not provide independent recollection or explanation of the contemporaneous documents.⁴⁵⁶² The OFT does not consider PC's lack of recollection to be any indication that a cover exchange either did or did not occur on this tender, particularly since he was not the estimator for this tender. PC did, however, state when asked what the 'C' on the bid risk checklist meant, '*I assume that would indicate that we've given a cover to those three*'.⁴⁵⁶³ This would, if anything, support ME's account as to the meaning of the 'C's on the bid risk checklist.

Contemporaneous documentary evidence from leniency applicant Thomas Vale –

IV.2263. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁴⁵⁶⁴

⁴⁵⁵⁸ Written representations of Pearce, 14 July 2008, paragraph 3.31.

⁴⁵⁵⁹ Interview transcript, OFT Document Reference 11138, page 23.

⁴⁵⁶⁰ Written representations of Pearce, 14 July 2008, paragraph 3.31; written representations of Pearce Group, 1 June 2009, paragraph 4.18.

⁴⁵⁶¹ Written representations of Crest, 27 June 2008, paragraph 7.65; oral representations of Crest, 25 July 2008, page 14.

⁴⁵⁶² Interview transcript, OFT Document Reference 11137, pages 16 to 17.

⁴⁵⁶³ Interview transcript, OFT Document Reference 11137, page 16.

⁴⁵⁶⁴ Tender Status spreadsheet, OFT Document Reference 4522, page 20.

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £
T4927	B	Birmingham City Council	Refurbishment, Wattville J & I School, Handsworth	

EST	CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
CKT	B	11/09/2001 Noon	1,140,948		Harper, Pearce, Balfour Beatty , Interclass, Kendrick	

IV.2264. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁴⁵⁶⁵ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Balfour Beatty plus names, including Martyn Etheridge and a telephone number.⁴⁵⁶⁶

Evidence from leniency applicant Thomas Vale

IV.2265. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.2266. At Annex 14⁴⁵⁶⁷ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 45 of the schedule under Annex 14 and within the section for 2001 tenders is the following entry:⁴⁵⁶⁸

Tab.	Tender No.	Date	Client	Comments
1	T4927	11 September	Birmingham City Council	Refurbishment, Wattville J & I School, Handsworth

Cover Given/Taken	Evidence
Taken (Balfour Beatty)	Yes (Tender Spreadsheet)

IV.2267. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.2268. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its

⁴⁵⁶⁵ Interview transcript, OFT Document Reference 11418, page 21.

⁴⁵⁶⁶ Contact list, OFT Document Reference 11086, page 2.

⁴⁵⁶⁷ Leniency application, OFT Document Reference 4568.

⁴⁵⁶⁸ Leniency application, OFT Document Reference 4568, page 45.

participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.2269. CKT admitted that the initials 'CKT' which appear in the estimator column for this tender were his. In interview, CKT explained that he had dealt with the tender and in respect of the entry in the Tender Status spreadsheet, stated '*CKT, myself, was the estimator. B, again, perhaps now infers there's no Cs appearing, so B would infer to me that that's a cover figure ... and amongst a list of names, Balfour Beatty is highlighted, which infers to me that they gave a cover figure*'.⁴⁵⁶⁹ CKT confirmed that the telephone number [.....] [C], which appeared on the handwritten notes from Balfour Beatty, was the main switchboard number for Thomas Vale's Stourport office.⁴⁵⁷⁰

Evidence from other companies – Interclass

IV.2270. The OFT wrote to Interclass on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Interclass had participated in bid rigging on this tender. In response to this letter Interclass admitted '*We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party/parties involved*'.⁴⁵⁷¹ Interclass also stated that it had taken a cover price on this tender.⁴⁵⁷² In its response to the OFT's Fast Track Offer, Interclass divided its admissions into three categories: tenders where a cover price was given; tenders where a cover price was taken; and tenders where it had no evidence available. This tender was included in the cover prices taken category, indicating that Interclass's admission was based on some evidence available to it.⁴⁵⁷³

IV.2271. The OFT subsequently wrote to Interclass's ultimate parent company at the time of this Infringement, Interclass Holdings, on 5 November 2007, asking it to comment on Interclass's response to the OFT's Fast Track Offer, given that the OFT intended to hold Interclass Holdings jointly and severally liable for any infringements committed by Interclass in respect of which the OFT ultimately decided to impose financial penalties. The OFT spoke to a representative of Interclass Holdings on 6 December 2007 who stated that Interclass Holdings '*does not intend to make any comments regarding the second fast track letter*'.⁴⁵⁷⁴

IV.2272. In their response to the Statement, Interclass and Interclass Holdings confirmed that '*Interclass has accepted the OFT's Fast Track Offer and does not contest the OFT's finding of infringement*'⁴⁵⁷⁵ in respect of this Infringement.

⁴⁵⁶⁹ Interview transcript, OFT Document Reference 11419, page 11.

⁴⁵⁷⁰ Interview transcript, OFT Document Reference 11419, page 9.

⁴⁵⁷¹ Response from Interclass, OFT Document Reference 10418, page 3.

⁴⁵⁷² Response from Interclass, OFT Document Reference 10417, page 1.

⁴⁵⁷³ Interclass response, OFT Document Reference 10417, page 1.

⁴⁵⁷⁴ File note of telephone conversation, OFT Document Reference 13997.

⁴⁵⁷⁵ Written representations of Interclass and Interclass Holdings, 27 June 2008, paragraph 4

Evidence from other companies – Pearce, Pearce Group and Crest Nicholson

IV.2273. The OFT wrote to Pearce on 7 November 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Pearce had participated in bid rigging on this tender. In response to this letter Pearce Group stated '*... it would be wholly inappropriate for Pearce Group Limited to accept the OFT's offer of a reduction in any financial penalty in return for an admission of liability ...*'.⁴⁵⁷⁶

IV.2274. The OFT also wrote to Pearce's ultimate parent company at the time of this Infringement, Crest Nicholson, on 7 November 2007, asking it to comment on the OFT's Fast Track Offer to Pearce, given that the OFT intended to hold Crest Nicholson jointly and severally liable for any infringements committed by Pearce in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Crest Nicholson's legal representatives stated '*... having made enquiries of current directors and employees and having searched for potentially relevant documentation, Crest has been unable to verify these allegations and cannot, therefore, acting in good faith, admit liability*'.⁴⁵⁷⁷

IV.2275. In their responses to the Statement and the Supplementary Statement, Pearce and Pearce Group asserted that the evidence from Interclass and Thomas Vale regarding this tender should not reflect on Pearce's involvement in this Infringement.⁴⁵⁷⁸ While the OFT does not consider that the evidence from Interclass or Thomas Vale implicates Pearce in this Infringement, it does consider their admissions with regard to this tender serve as corroboration of the OFT's interpretations of the contemporaneous documents and witness evidence, in particular the meaning of the 'C's on the bid risk checklist, the meaning of 'cover' on the handwritten note and the explanation for the tender prices recorded on the lower half of the handwritten note. The OFT therefore takes the evidence from Interclass and Thomas Vale into account in this respect only when assessing the strength of the evidence implicating Pearce.

IV.2276. In response to the OFT's letter of 27 July 2009, following the High Court Judgment described in paragraphs II.1576 to II.1580 above, Crest Nicholson stated that it '*is willing to admit that the evidence now provided by the OFT in relation to... [this infringement]...demonstrates that Pearce Midland engaged in bid-rigging in relation to that contract by accepting a cover price from Balfour Beatty*'.⁴⁵⁷⁹ Crest Nicholson further stated that it '*does not contest that it is jointly and severally liable, together with Pearce Group and Pearce Midlands as their historic parent company, for the commission of [Alleged] Infringement 75*'.

The OFT's analysis of the evidence and provisional finding

IV.2277. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

⁴⁵⁷⁶ Response from Pearce Group Limited, OFT Document Reference 14160.

⁴⁵⁷⁷ Response from Crest Nicholson, OFT Document Reference 14151, page 1.

⁴⁵⁷⁸ Written representations of Pearce, 14 July 2008, paragraphs 3.9 and 3.41 to 3.42; written representations of Pearce Group, 1 June 2009, paragraphs 1.2 and 4.8 to 4.12.

⁴⁵⁷⁹ Response from Crest Nicholson, 10 August 2009.

- IV.2278. BBCL, Thomas Vale, Interclass and Pearce⁴⁵⁸⁰ each accepted an invitation to tender for this contract.
- IV.2279. All four companies submitted a tender. It appears that BBCL completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.
- IV.2280. Thomas Vale, Interclass and Pearce were unable to submit a tender by the return date and/or did not want to win this contract.
- IV.2281. In regard to Thomas Vale, Balfour Beatty's BBCL Southern Division Bid Risk Checklist shows '*Thomas Vale "C"*' and handwritten notes show '*THOMAS VALE CHRIS TRICKETT - [.....] [C] COVER*' and '*THOMAS VALE £1,140,946 76,601 7.20%*'. Balfour Beatty confirmed that this shows that it gave a cover price to the company noted of the amount shown. The OFT notes that the figure noted on the handwritten notes against Thomas Vale, was identical to the figure that Thomas Vale submitted. [.....] [C] has been confirmed as the telephone number of Thomas Vale's Stourport office, and Thomas Vale has confirmed that Chris Trickett dealt with this tender.
- IV.2282. In addition, Thomas Vale's Tender Status spreadsheet shows this tender as a Category B and '*Balfour Beatty*' is marked in bold lettering. Thomas Vale has admitted that the use of the letter '*B*' in the category column and the appearance of Balfour Beatty in bold, shows that a cover was taken from Balfour Beatty. Furthermore the OFT notes that although five competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one of these is highlighted in bold i.e. Balfour Beatty. This indicates that a conscious decision was made to differentiate Balfour Beatty from the other competitors.
- IV.2283. In regard to Interclass, Balfour Beatty's BBCL Southern Division Bid Risk Checklist shows '*Interclass "C"*' and handwritten notes show '*INTERCLASS BOB ALLEN - [.....] [C] COVER*' and '*INTERCLASS £1,154,832 90,487 8.50%*'. Balfour Beatty confirmed that this shows that it gave a cover price to the company noted of the amount shown. The OFT notes that the figure noted on the handwritten notes against Interclass, was identical to the figure that Interclass submitted. In respect of the name, Bob Allen, and the telephone number, [.....] [C], these appear under an entry for Interclass in a contacts list provided by Thomas Vale.⁴⁵⁸¹
- IV.2284. In addition, Interclass has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007. The OFT notes that Interclass admitted that it took a cover price without sight of the OFT's evidence that it took rather than gave a cover price. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.2285. In regard to Pearce, Balfour Beatty's BBCL Southern Division Bid Risk Checklist shows '*Pearce Construction "C"*' and '*PEARCE CONSTRUCTION GEORGE EVESHAM 7 [.....] [C] 1 IAN TAYLOR TELFORD [.....] [C] NO BRIAN DUTTON POSSIBLE COVER*' and '*PEARCE £1,129,845 65,500 6.15%*'.

⁴⁵⁸⁰ As noted above, the Participant Company for this Infringement comprised both Pearce and Pearce Group. Any reference to Pearce in this section should therefore be taken as referring to the entirety of the Participant Company.

⁴⁵⁸¹ Contact list, OFT Document Reference 11086, page 11.

Balfour Beatty confirmed that this shows that it gave a cover price to the company noted of the amount shown. The OFT notes that the figure noted on the handwritten notes against Pearce, was identical to the figure that Pearce submitted. The telephone number, [.....] [C], appears under an entry for Pearce in a contacts list provided by Thomas Vale.⁴⁵⁸²

IV.2286. The OFT notes that Crest Nicholson has now admitted that the evidence in this Infringement demonstrates that Pearce accepted a cover price from Balfour Beatty.

IV.2287. The OFT further notes that the tenders submitted by Thomas Vale, Interclass and Pearce were all higher than the tender submitted by BBCL, the pattern consistent with cover prices having been provided.

IV.2288. The OFT therefore concludes that contact took place between BBCL and Thomas Vale, between Balfour Beatty and Interclass, and between BBCL and Pearce. The OFT also concludes that BBCL supplied figures to each of Thomas Vale, Interclass and Pearce for cover bids.

IV.2289. The OFT is satisfied that the facts set out in paragraphs IV.2244 to IV.2288 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁵⁸³ In particular:

- (a) the provision of figures for cover bids from BBCL to each of Thomas Vale, Interclass and Pearce was not unilateral⁴⁵⁸⁴, and contravenes the principle against direct or indirect contact between competitors;⁴⁵⁸⁵
- (b) Thomas Vale, Interclass and Pearce can each be presumed to have taken account of the information received from BBCL (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁴⁵⁸⁶ and
- (c) BBCL can be presumed to have taken account of the information it received from Thomas Vale, Interclass and Pearce (i.e. that none of them intended to submit competitive bids) when determining its conduct in the tendering process.⁴⁵⁸⁷

IV.2290. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between BBCL and Thomas Vale, between BBCL and Interclass, and between BBCL and Pearce in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment, Wattville Thomas J&I School, Handsworth, tender deadline 18 September 2001.

Immunity and leniency assessment

IV.2291. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100

⁴⁵⁸² Contact list, OFT Document Reference 11086, page 20.

⁴⁵⁸³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁵⁸⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁵⁸⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁵⁸⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁵⁸⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2292. Thomas Vale informed the OFT of the bid rigging activities (involving Thomas Vale and BBCL) in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.2293. Balfour Beatty informed the OFT of further bid rigging activities (involving Pearce and Interclass) in respect of this tender before the OFT became aware of these further activities from any other source. Balfour Beatty will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 76: Not included in the Decision

Infringement 77: **New Primary School, Riverside Development, Oundle Road, Peterborough – 1 October 2001**
Client: **Peterborough City Council**
Parties: **Jackson⁴⁵⁸⁸ and Marriott⁴⁵⁸⁹**

IV.2294. On 29 August 2001, Peterborough City Council ('Peterborough CC') sought tenders for a new primary school, Riverside Development, Oundle Road, Peterborough. The return date for the tender was 1 October 2001 and seven companies were invited to tender: Linpave Building Limited, Bernard Ward Limited, Granville Building Company Limited, Marriott, Jackson, Peterborough City Contract Services and Acrabuild Limited.⁴⁵⁹⁰

IV.2295. Peterborough CC received the following tender returns by 1 October 2001:⁴⁵⁹¹

⁴⁵⁸⁸ Jackson is a subsidiary of Propensity.

⁴⁵⁸⁹ Marriott is a trading division of Kier.

⁴⁵⁹⁰ Information from client, OFT Document Reference 8973.

⁴⁵⁹¹ Information from client, OFT Document Reference 8973.

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Linpave Building Limited	29 August 2001	By 1 October 2001	£1,493,200.00	
Bernard Ward Limited	29 August 2001	By 1 October 2001	£1,554,100.43	Yes
Granville Building Company Limited	29 August 2001	By 1 October 2001	£1,679,110.00	
Marriott	29 August 2001	By 1 October 2001	£1,693,849.00	
Jackson	29 August 2001	By 1 October 2001	£1,839,493.00	
Peterborough City Contract Services	29 August 2001	Declined to Tender 1 October 2001		
Acrabuild Limited	29 August 2001	Declined to Tender 1 October 2001		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson’s Tender Book

IV.2296. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten:⁴⁵⁹²

Enquiry Number	Date Received	Employer	Location	Description of Works
E3468	31.8.01	Peterborough City Council	Peterborough	New Primary School

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
		£1,839,493	C Cover from Marriotts HG.	Noon 1.10.01

Evidence from leniency applicant Propensity

IV.2297. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.2298. In particular, Propensity provided to the OFT an analysis of its tender book since 4 January 2000 and in respect of this tender, Propensity confirmed that it received a cover price from Marriott.⁴⁵⁹³

⁴⁵⁹² Tender register, OFT Document Reference A0905, page 18.

⁴⁵⁹³ Table of cover pricing, OFT Document Reference A1274, page 2.

IV.2299. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁴⁵⁹⁴

Witness evidence from leniency applicant Propensity

IV.2300. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.2301. John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender book⁴⁵⁹⁵ and that in most instances it would be he who arranged the cover price.⁴⁵⁹⁶ JR said in respect of the entry in the tender book, for this tender, '*that Jackson's received a price from Marriotts and the figure recorded in the column, £1.8 million or thereabouts was the figure that was submitted*'.⁴⁵⁹⁷ JR also confirmed that the figure given by Marriotts was the figure that he submitted for this tender.⁴⁵⁹⁸ JR explained that the 'C' stood for '*competitive tender*'.⁴⁵⁹⁹

Evidence from other companies – Kier

IV.2302. The OFT wrote to Kier on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Kier had participated in bid rigging on this tender. In response to this letter, Kier said that it was unable to accept the OFT's Fast Track Offer.⁴⁶⁰⁰

IV.2303. Kier stated in its response to the Statement that it did not wish to comment on the Alleged Infringements other than to make comments and observations which should be taken into account when calculating any penalty.⁴⁶⁰¹ Such points are addressed in Section VI (Enforcement) below.

The OFT's analysis of the evidence and finding

IV.2304. From the evidence presented above, the OFT draws the following conclusions.

IV.2305. Jackson and Marriott each accepted an invitation to tender for this contract.

IV.2306. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.2307. In regard to Marriott, Jackson's tender book states, '*Cover from Marriotts*'. Propensity has confirmed that this shows that it received a cover price from Marriott. Jackson recorded in the tender book the figure £1,839,493, as the tender figure and this was the figure that Jackson submitted.

⁴⁵⁹⁴ Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁴⁵⁹⁵ Interview transcript, OFT Document Reference 11347, page 10.

⁴⁵⁹⁶ Interview transcript, OFT Document Reference 11347, page 11.

⁴⁵⁹⁷ Interview transcript, OFT Document Reference 11347, page 16.

⁴⁵⁹⁸ Interview transcript, OFT Document Reference 11347, page 16.

⁴⁵⁹⁹ Interview transcript, OFT Document Reference 11347, page 13.

⁴⁶⁰⁰ Response from Kier, OFT Document Reference 10477.

⁴⁶⁰¹ Written representations of Kier, 27 June 2008, paragraphs 1.2 and 2.1.

- IV.2308. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by Marriott, a pattern consistent with a cover price having been provided.
- IV.2309. The OFT therefore concludes that contact took place between Marriott and Jackson. The OFT also concludes that Marriott supplied a figure to Jackson for a cover bid.
- IV.2310. The OFT is satisfied that the facts set out in paragraphs IV.2296 to IV.2309 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁶⁰² In particular:
- (a) the provision of a figure for a cover bid from Marriott to Jackson was not unilateral⁴⁶⁰³, and contravenes the principle against direct or indirect contact between competitors;⁴⁶⁰⁴
 - (b) Jackson can be presumed to have taken account of the information received from Marriott (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁶⁰⁵ and
 - (c) Marriott can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁶⁰⁶
- IV.2311. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and Marriott, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new primary school, Riverside Development, Oundle Road, Peterborough, tender deadline 1 October 2001.

Immunity and leniency assessment

- IV.2312. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.2313. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁴⁶⁰² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁶⁰³ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁶⁰⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁶⁰⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁶⁰⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 78: 15 Dwellings, Station Road, Kimberley Phase 2 – 8 October 2001
Client: Derwent Housing Association
Parties: Strata (formerly known as Weaver), Bodill and Robert Woodhead

IV.2314. On 3 September 2001, Derwent Housing Association sought tenders for 15 dwellings, Station Road, Kimberley Phase 2.⁴⁶⁰⁷ The following four companies were invited to tender: Adam Eastwood, Robert Woodhead, Weaver and Bodill.⁴⁶⁰⁸ The deadline for receipt of tenders was 12:00 noon on 8 October 2001.⁴⁶⁰⁹

IV.2315. Derwent Housing Association received the following tender returns:⁴⁶¹⁰

Company	Date tender received	Amount of tender	Awarded contract
Adam Eastwood	Before tender deadline	£751,374.75	Yes
Robert Woodhead	Before tender deadline	£886,617.00	
Weaver [Strata]	Before tender deadline	£897,990.00	
Bodill	Before tender deadline	£849,534.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – Form of Tender

IV.2316. In Bodill's original tender sheet for this contract, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following handwritten entries have been made:⁴⁶¹¹

1. Bodill

£897750 2. WEAVER © FROM US
 DERBY D. IRONMONGER [...] [C]

3. EASTWOODS

£886617 4. WOODHEAD © FROM US
 Ring Bob Johnson Mon AM

IV.2317. The tender sheet for this tender states that Bodill's tender was £849,534.⁴⁶¹²

Contemporaneous documentary evidence from leniency applicant Strata - Form of Tender

IV.2318. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents, mostly Forms of

⁴⁶⁰⁷ Information from client, OFT Document Reference 7663.

⁴⁶⁰⁸ Information from client, OFT Document Reference 7663.

⁴⁶⁰⁹ Information from client, OFT Document Reference 7663.

⁴⁶¹⁰ Information from client, OFT Document Reference 7663.

⁴⁶¹¹ Tender sheet, OFT Document Reference 0580.

⁴⁶¹² Tender sheet, OFT Document Reference 0580.

Tender and result letters, was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:⁴⁶¹³

'FROM BODILL'

IV.2319. The Form of Tender was signed by Duncan Ironmonger ('DI'), an estimator at Strata on 8 October 2001. The figure Strata submitted for this tender was £897,990.00.⁴⁶¹⁴

Evidence from leniency applicant Bodill

IV.2320. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.2321. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000. In respect of this tender, Bodill confirmed that it gave cover prices to Strata and Robert Woodhead.⁴⁶¹⁵

IV.2322. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Evidence from leniency applicant - Strata

IV.2323. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file *'Covers from Jan 2000 – Dec 2001'* and 'contracts in hand' documents. This list included the following entry:⁴⁶¹⁶

Date	Project	Strata ref no
08/10/2001	15 Dwlg's Station Rd, Kimberley, Nottm, for Derwent Housing Association	T120/01

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXN/107	Bodill Construction	Sherwood Street, Portland Road, Hucknall, Notts NG15 7SD	

IV.2324. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.2325. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in

⁴⁶¹³ Form of Tender, OFT Document Reference 3297.

⁴⁶¹⁴ Form of Tender, OFT Document Reference 3297.

⁴⁶¹⁵ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

⁴⁶¹⁶ Schedule of covers, OFT Document Reference 4054, page 7.

cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Witness evidence from leniency applicant - Strata

IV.2326. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is applicable to this tender.

Evidence from other companies – Robert Woodhead

IV.2327. The OFT wrote to Robert Woodhead on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Robert Woodhead had participated in bid rigging on this tender. In response to this letter Robert Woodhead admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁴⁶¹⁷

IV.2328. The OFT subsequently wrote to Robert Woodhead's ultimate parent company at the time of this Infringement, Woodhead Holdings, on 4 March 2008, asking it to comment on Robert Woodhead's response to the OFT's Fast Track Offer, given that the OFT intended to hold Woodhead Holdings jointly and severally liable for any infringements committed by Robert Woodhead in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Woodhead Holdings stated *'Whilst not accepting that Robert Woodhead Holdings Ltd could have any liability in this case, the company is aware of the agreement reached between Robert Woodhead Ltd and the OFT, and would adopt the same position as Robert Woodhead Ltd'*.⁴⁶¹⁸

IV.2329. In its response to the Statement, Robert Woodhead stated *'Woodhead admitted participation in each of these Alleged Infringements in its Response to the OFT Offer'* and *'Woodhead stands by its admission of the Alleged Infringements'*.⁴⁶¹⁹ It further stated *'Woodhead would have needed to place a bid for this contract in order to stay on the tender list of Derwent Housing Association'*.⁴⁶²⁰

The OFT's analysis of the evidence and finding

IV.2330. From the evidence presented above, the OFT draws the following conclusions.

IV.2331. Strata, Bodill and Robert Woodhead each accepted an invitation to tender for 15 dwellings, Station Rd, Kimberley, Nottingham Phase 2.

IV.2332. Bodill completed the estimating process for the tender for this contract. It appears that Bodill wanted to win the tender for this contract and submitted a bid with hope of winning the work.

⁴⁶¹⁷ Response from Robert Woodhead, OFT Document Reference 10807, page 2.

⁴⁶¹⁸ Response from Woodhead Holdings, OFT Document Reference 14442.

⁴⁶¹⁹ Written representations of Robert Woodhead, 2 July 2008, paragraph 3.2.

⁴⁶²⁰ Written representations of Robert Woodhead, 2 July 2008, paragraph 3.4.3.

- IV.2333. Strata and Robert Woodhead were unable to submit a tender by the return date and/or did not want to win this contract.
- IV.2334. In regard to Strata, Bodill's tender sheet records '*WEAVER* © *FROM US D. IRONMONGER* [.....] [C]' against Strata. Bodill has confirmed that this shows that it gave the company in question a cover price. Duncan Ironmonger was the name of an estimator at Strata⁴⁶²¹ and [.....] [C] was a Weaver telephone number.⁴⁶²² Furthermore, Bodill recorded on the tender sheet the figure £897750 against Strata, a figure that was very similar to the tender that Strata submitted for the work.
- IV.2335. In addition the OFT found further corroborating contemporaneous evidence at Strata's premises. Strata's Form of Tender records '*FROM BODILL*', handwritten in the top right hand corner. Strata confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked '*Covers from Jan 2000 to Dec 2001*', which Strata confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and Bodill, and both Strata's and Bodill's admissions and explanations of the contemporaneous evidence, that Bodill supplied Strata with a cover price for this tender.
- IV.2336. In regard to Robert Woodhead, Bodill's tender sheet records '*WOODHEAD* © *FROM US Ring Bob Johnson Mon am*' against Robert Woodhead. Bodill has confirmed that this shows that it gave the company in question a cover price. The OFT considers that '*Mon AM*' was the morning of Monday 8 October 2001, the day of the deadline for submission of the tender. The OFT notes that this is consistent with the pattern of cover prices being exchanged at the last minute, prior to submission of a tender.
- IV.2337. Furthermore, Bodill recorded on the tender sheet the figure £886617 against Robert Woodhead, a figure that was identical to the tender that Robert Woodhead submitted for the work. Bodill's tender sheet also records the name of an estimator at Robert Woodhead, providing further evidence that contact was made between the two parties. A list of contractors found at the premises of P Waller also confirms that there was a contact at Robert Woodhead with the name of '*Bob Johnson*'.⁴⁶²³
- IV.2338. Finally, Robert Woodhead admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007. The OFT considers in the light of the contemporaneous evidence from Bodill, and both parties' admissions of bid rigging, that Bodill supplied Robert Woodhead with a cover price for this tender.
- IV.2339. The OFT further notes that the tenders submitted by Strata and Robert Woodhead were higher than the tender submitted by Bodill, the pattern consistent with cover prices having been provided.

⁴⁶²¹ Interview transcript, OFT Document Reference 13138, page 2.

⁴⁶²² Weaver Construction Limited letterhead, OFT Document Reference 3370.

⁴⁶²³ Contact list, OFT Document Reference 3610, page 3.

IV.2340. The OFT therefore concludes that contact took place between Bodill and Strata and between Bodill and Robert Woodhead. The OFT also concludes that Bodill supplied figures to each of Strata and Robert Woodhead for cover bids.

IV.2341. The OFT is satisfied that the facts set out in paragraphs IV.2316 to IV.2340 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁶²⁴ In particular:

- (a) the provision of figures for cover bids from Bodill to each of Strata and Robert Woodhead was not unilateral⁴⁶²⁵, and contravenes the principle against direct or indirect contact between competitors;⁴⁶²⁶
- (b) Strata and Robert Woodhead can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process;⁴⁶²⁷ and
- (c) Bodill can be presumed to have taken account of the information it received from Strata and Robert Woodhead (i.e. that neither Strata nor Robert Woodhead intended to submit a competitive bid) when determining its conduct in the tendering process.⁴⁶²⁸

IV.2342. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Bodill and Strata and between Bodill and Robert Woodhead in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for 15 Dwellings, Station Road, Kimberley Phase 2, tender deadline 8 October 2001.

Immunity and leniency assessment

IV.2343. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2344. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.2345. In respect of this tender, the OFT first became aware of Strata's involvement in bid rigging activities by virtue of the information provided by Bodill. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this infringement.

⁴⁶²⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁶²⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁶²⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁶²⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁶²⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 79: Fullhurst Community College, Phase C, Braunstone, Leicester – 23 October 2001
Client: Leicester City Council
Parties: J H Hallam and T Denman

IV.2346. On 6 September 2001, Leicester City Council sought tenders for alterations and extension to office and classroom facility including associated services and other works, at Fullhurst Community College. The return date for the tender was 15:00 on 23 October 2001 and six companies were invited to tender: Brown & Shaw (Builders) Ltd, J H Hallam, Makers Industrial Ltd, Mansell, T Denman, and Pitchmastic plc.⁴⁶²⁹

IV.2347. Leicester City Council received the following tender returns on 23 October 2001:⁴⁶³⁰

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
Brown & Shaw (Builders) Ltd	23 October 2001	12:30	£207,320.00	
J H Hallam	23 October 2001	14:30	£189,487.00	Yes
Makers Industrial Ltd	23 October 2001	09:40	£190,631.00	
Mansell	23 October 2001	14:00	£212,312.00	
T Denman	23 October 2001	08:33	£209,843.21	
Pitchmastic plc		No Tender		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from J H Hallam – Incoming Tender Report

IV.2348. As part of its leniency application, J H Hallam provided a contemporaneous Incoming Tender Report Sheet relating to this tender.⁴⁶³¹ In the section relating to *'Tendering Contractors'*, row eight, is the following handwritten entry of Steve Gill, the allocated estimator:

'Cover ! Denmans Phil Hargreaves'

Evidence from leniency applicant J H Hallam

IV.2349. As part of its leniency application, J H Hallam provided a general explanation of its participation in cover pricing.⁴⁶³² This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.2350. In particular, J H Hallam provided to the OFT a schedule entitled *'Projects involving cover pricing March 2000 – June 2005'*. Examination of the entry relevant to this tender shows that J H Hallam provided a cover price to Phil Hargreaves at T Denman.⁴⁶³³

⁴⁶²⁹ Information from client, OFT Document Reference 8567.

⁴⁶³⁰ Information from client, OFT Document Reference 8567.

⁴⁶³¹ Incoming Tender/Tender Report, OFT Document Reference 5045.

⁴⁶³² Leniency application, OFT Document Reference 4969.

⁴⁶³³ Schedule of Covers, OFT Document Reference 4977, page 6.

IV.2351. In its response to the Statement, J H Hallam stated '*JH Hallam does not contest the OFT's findings of infringement*'.⁴⁶³⁴

Witness evidence from leniency applicant J H Hallam

IV.2352. During interviews conducted in connection with its leniency application, J H Hallam's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.2353. Additional evidence in relation to this tender comes from the interview of Steve Gill the estimator for J H Hallam. His response to questions concerning this tender was as follows:⁴⁶³⁵

Q. *'.....I will show you that and that's OFT document 5045....cover Denman's, I can't I think that's a name.*

A. *It is Phil Hargreaves, yes. As obviously I can't remember it would indicate that we probably did give a cover to Denman.*

Q. *On that document 5045 is that your handwriting.*

A. *It is'*

Evidence from other companies – T Denman

IV.2354. The OFT wrote to T Denman on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that T Denman had participated in bid rigging on this tender.

IV.2355. Subsequently protracted correspondence was entered into, whereby Mr W B Cragg the Managing Director of T Denman appeared initially to accept the OFT's offer. In an email of 18 May 2007 he made the following statements:

'What we do know is the practice of contractors pricing themselves out of work, when they are too committed to price a project in the given time and in order not to have themselves inadvertently removed from client lists by returning a tender invitation, has been an inherent known part of construction industry practise for many years and as a long established small business we have participated in this practise on occasions in previous years, although have no records of particular events.

*It would therefore be apparent that we are involved in these matters by implication and on a commercial basis alone we should be responsible people and mitigate the financial and commercial damage to this company by any actions within our means and therefore accept your offer of leniency in every case.'*⁴⁶³⁶

⁴⁶³⁴ Written representations of J H Hallam, 27 June 2008, paragraph 73.

⁴⁶³⁵ Interview transcript, OFT Document Reference 12755, pages 10 and 11.

⁴⁶³⁶ Response from T Denman, OFT Document Reference 10869.

IV.2356. In a letter dated 29 June 2007, received from Berryman Shacklock LLP, solicitors acting on behalf of T Denman, the following admission was made:

*'As you are aware, the practice of "cover pricing" has been endemic in the construction industry over many decades. Against that background, our client does acknowledge that it has engaged in cover pricing activity on a limited number of projects.'*⁴⁶³⁷

IV.2357. However the letter went on to state:

'...it has been unable to identify any specific evidence of any involvement with cover pricing on those projects....'

IV.2358. The overall assertion was therefore that T Denman had engaged in cover pricing, but not on the tenders identified by the OFT.

IV.2359. The OFT's Fast Track Offer was then formally declined by a letter from Berryman, dated 24 July 2007.⁴⁶³⁸

IV.2360. However, T Denman stated subsequently in its response to the Statement that *'...T Denman has no means of challenging the evidence now presented by the OFT in support of its allegations in relation to cover pricing, and therefore admits liability for the cover pricing infringements alleged by the OFT.'*⁴⁶³⁹

The OFT's analysis of the evidence and finding

IV.2361. From the evidence presented above, the OFT draws the following conclusions.

IV.2362. J H Hallam and T Denman each accepted an invitation to tender for this contract.

IV.2363. J H Hallam appears to have completed the estimating process for the tender, and submitted a bid with the intention of winning the work. This is shown by the price submitted by J H Hallam being the lowest recorded, and the fact that it won the contract.

IV.2364. T Denman was unable to submit a tender by the return date and/or did not want to win this contract.

IV.2365. In regard to T Denman, J H Hallam has confirmed that Steve Gill's handwritten entry *'Cover! Denmans Phil Hargreaves'* on the incoming tender report, for this tender shows that it provided cover to T Denman. This was confirmed in interview by Steve Gill, and T Denman is the only competitor named on the incoming tender report.

IV.2366. Both T Denman and J H Hallam have admitted liability in specific terms for this Infringement.

⁴⁶³⁷ Response from T Denman, OFT Document Reference 13010.

⁴⁶³⁸ Response from T Denman, OFT Document Reference 13012.

⁴⁶³⁹ Written representations of T Denman, 27 June 2008, paragraph 6.

- IV.2367. The OFT further notes that the tender submitted by T Denman was higher than the tender submitted by J H Hallam, the pattern consistent with a cover price having been received.
- IV.2368. The OFT therefore concludes that contact took place between J H Hallam and T Denman. The OFT also concludes that J H Hallam supplied a figure to T Denman for a cover bid.
- IV.2369. The OFT is satisfied that the facts set out in paragraphs IV.2348 to IV.2368 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁶⁴⁰ In particular:
- (a) the provision of a figure for a cover bid from J H Hallam to T Denman was not unilateral⁴⁶⁴¹, and contravenes the principle against direct or indirect contact between competitors;⁴⁶⁴²
 - (b) T Denman can be presumed to have taken account of the information received from J H Hallam (i.e. the cover price) when determining its own respective conduct in the tendering process;⁴⁶⁴³ and
 - (c) J H Hallam can be presumed to have taken account of the information it received from T Denman (i.e. that T Denman did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁶⁴⁴

IV.2370. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between J H Hallam and T Denman, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the alterations and extension to office and classroom facility including associated services and other works, at Fullhurst Community College, date of tender 23 October 2001.

Immunity and leniency assessment

- IV.2371. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.2372. J H Hallam informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. J H Hallam will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁴⁶⁴⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁶⁴¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁶⁴² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁶⁴³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁶⁴⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 80: Upgrade of Four Bungalows, Doncaster Road, Costhorpe, Nottinghamshire – 1 November 2001
Client: Bassetlaw District Council
Parties: Bodill and J J & A R Jackson

IV.2373. On 28 September 2001, Bassetlaw District Council sought tenders for the upgrade of four bungalows, Doncaster Road, Costhorpe, Nottinghamshire. The return date for the tender was 1 November 2001 and nine companies were invited to tender: Beaufort, Hewitt and Maughan Ltd, Bodill, CPS (Contractors) Ltd, J J & A R Jackson, Bassetlaw District Council – DLO, JW & WE Odlin, G G Middleton and SHL Ltd.⁴⁶⁴⁵

IV.2374. Bassetlaw District Council received the following tender returns on 1 November 2001:⁴⁶⁴⁶

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Beaufort	1 November 2001	10:00	£119,895.00	
Hewitt and Maughan Ltd	1 November 2001	11:00	£119,455.00	
Bodill	1 November 2001	12:50	£117,552.00	
CPS (Contractors) Ltd	1 November 2001	12:50	£120,951.00	
J J & A R Jackson	1 November 2001	13:10	£111,247.00	Yes
Bassetlaw District Council – DLO	No tender received			
JW & WE Odlin	Declined to submit tender			
G G Middleton	Declined to submit tender			
SHL Ltd	Declined to submit tender			

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.2375. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten:⁴⁶⁴⁷

1. BODILL

*2. JACKSONS TREVOR MOOR
WILL RING WED [...] [C]

3. HEWIT & MAUGHAN'

⁴⁶⁴⁵ Information from client, OFT Document Reference 7144.

⁴⁶⁴⁶ Information from client, OFT Document Reference 7144.

⁴⁶⁴⁷ Tender sheet, OFT Document Reference 0587.

IV.2376. The tender sheet for this tender also contains a ringed letter 'C' in the top right hand corner of the tender sheet and at the foot of the sheet it states that Bodill's submitted price was £117,552.00.⁴⁶⁴⁸

IV.2377. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2001 which contains an entry for this tender on 1 November which reads '*14.15 MODS .4 DWELLINGS, COSTHORPE (C) (WORKSOP)*'.⁴⁶⁴⁹ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, '*It means that we're looking for some help, a cover, a cover price*'.⁴⁶⁵⁰

Evidence from leniency applicant Bodill

IV.2378. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.2379. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁴⁶⁵¹ In respect of this tender, Bodill confirmed that it received a cover price from J J & A R Jackson⁴⁶⁵² and that it submitted a 'token tender'.⁴⁶⁵³

Witness evidence from leniency applicant Bodill

IV.2380. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – J J & A R Jackson

IV.2381. The OFT wrote to J J & A R Jackson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that J J & A R Jackson had participated in bid rigging on this tender. In response to this letter, J J & A R Jackson admitted that, '*we provided a cover price to Bodill & Sons Ltd of Nottingham. We won the job*'.⁴⁶⁵⁴

IV.2382. Following the issue of the Statement, J J & A R Jackson did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.2383. From the evidence presented above, the OFT draws the following conclusions.

IV.2384. Bodill and J J & A R Jackson each accepted an invitation to tender for this contract.

⁴⁶⁴⁸ Tender sheet, OFT Document Reference 0587.

⁴⁶⁴⁹ 2001 Diary, OFT Document Reference 0106, page 22 obtained during visit to Bodill's premises under section 27 on 19 November 2004.

⁴⁶⁵⁰ Interview transcript, OFT Document Reference 6337, page 4.

⁴⁶⁵¹ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴⁶⁵² Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

⁴⁶⁵³ Tender Analysis, OFT Document Reference 0849, page 2.

⁴⁶⁵⁴ Response from J J & A R Jackson, OFT Document Reference 10443, page 2.

- IV.2385. J J & A R Jackson completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work. This is shown by the price submitted by J J & A R Jackson being the lowest received and that they won the contract.
- IV.2386. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.2387. In regard to J J & A R Jackson, as well as the ringed letter 'C' in the top right hand corner of the tender sheet, Bodill's tender sheet records '*JACKSONS TREVOR MOOR WILL RING WED [.....] [C]*'. Bodill has confirmed that this shows that it received a cover price from J J & A R Jackson. The OFT considers that this also shows more specifically that J J & A R Jackson's estimator was to phone Bodill on the day before the date for submitting the tender, in order to provide a cover price. Bodill recorded on the tender sheet the figure £117,552.00 as the tender figure and this was the figure that Bodill submitted. Furthermore, the telephone number set out in Bodill's tender sheet, [.....] [C], is the J J & A R Jackson telephone number⁴⁶⁵⁵, providing further corroboration that Bodill contacted J J & A R Jackson in respect of this tender.
- IV.2388. The OFT notes in addition that JR has an entry in his diary on the date for submitting the tender, which JR has confirmed shows Bodill were looking for a cover price for this tender.
- IV.2389. The OFT also notes that the tender submitted by Bodill was higher than the tender submitted by J J & A R Jackson, a pattern consistent with a cover price having been provided.
- IV.2390. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that J J & A R Jackson admitted that the party with whom it engaged in bid rigging was Bodill, without being shown the OFT's evidence that Bodill was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.2391. The OFT therefore concludes that contact took place between J J & A R Jackson and Bodill. The OFT also concludes that J J & A R Jackson supplied a figure to Bodill for a cover bid.
- IV.2392. The OFT is satisfied that the facts set out in paragraphs IV.2375 to IV.2391 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁶⁵⁶ In particular:
- (a) the provision of a figure for a cover bid from J J & A R Jackson to Bodill was not unilateral⁴⁶⁵⁷, and contravenes the principle against direct or indirect contact between competitors,⁴⁶⁵⁸

⁴⁶⁵⁵ FAME report, OFT Document Reference 12105, page 1.

⁴⁶⁵⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁶⁵⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁶⁵⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Bodill can be presumed to have taken account of the information received from J J & A R Jackson (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁶⁵⁹ and
- (c) J J & A R Jackson can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁶⁶⁰

IV.2393. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and J J & A R Jackson, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the upgrade of four bungalows, Doncaster Road, Costhorpe, Nottinghamshire, tender deadline 1 November 2001.

Immunity and leniency assessment

IV.2394. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2395. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Bodill in respect of this Infringement.

IV.2396. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.⁴⁶⁶¹ The OFT first became aware of this tender as a result of the entry in a document found during a section 27 visit to Bodill on 19 November 2004⁴⁶⁶², which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made. Nevertheless, as stated in paragraph IV.2395 above, the OFT is not imposing any financial penalty on Bodill in respect of this Infringement.

Alleged Infringement 81: Not included in the Decision

⁴⁶⁵⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁶⁶⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁶⁶¹ Written representations of Bodill, 26 June 2008, paragraph 3.5.

⁴⁶⁶² 2001 Diary, OFT Document Reference 0106, as discussed in paragraph IV.2377.

IV.2402. Bodill also provided to the OFT a '*Tender Analysis – Tender Sheets March 2000 – November 2004*'.⁴⁶⁶⁸ This confirms that Bodill gave covers to Herbert Baggaley and G Carter in respect of this tender.

IV.2403. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.2404. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.2405. David Wraith ('DW'), whose role is to provide estimating support at Bodill, confirmed that the handwritten annotations, '*£498617*' and '*© FROM US*' next to '*BAGGALEY*', and the annotations '*£484870*' and '*© FROM US ROB TURNER [.....] [C]*' next to '*CARTER CONSTRUCTION*' were made by him.⁴⁶⁶⁹ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley - Estimate

IV.2406. In interview, Anton Newell ('AN'), at the time of this tender an estimator at Herbert Baggaley, produced a copy of the original estimate⁴⁶⁷⁰ submitted by Roger Hayes ('RH'), Chief Estimator until he left Herbert Baggaley in October 2002, on behalf of Herbert Baggaley. The figure submitted by RH was '*£ 498,617.00*'. The copy estimate produced by AN was in RH's handwriting and was signed by him on behalf of the company.

Evidence from leniency applicant Herbert Baggaley

IV.2407. As part of its leniency application, Herbert Baggaley's legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.2408. In its response to the Statement, Herbert Baggaley stated '*Baggaleys recognises the OFT's analysis of its involvement*'⁴⁶⁷¹ in respect of this Infringement.

Witness evidence from leniency applicant Herbert Baggaley

IV.2409. During interviews conducted in connection with its leniency application, Herbert Baggaley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

⁴⁶⁶⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

⁴⁶⁶⁹ Contracts document, OFT Document Reference 6426, pages 1 and 27.

⁴⁶⁷⁰ Estimate, OFT Document Reference 6402, page 4.

⁴⁶⁷¹ Written representations of Herbert Baggaley, 27 June 2008, paragraph 2.

IV.2410. AN was interviewed on 19 April 2007, and specific reference was made to the tender for CPIG repair work at HMP, Nottingham. AN said, *'all I've managed to find on that one is the internal estimate, with a copy of the tender attached to the back of it. And on here I've put down no recollection [of cover pricing], but possibly Thomas Fish'*.⁴⁶⁷² AN, in interview with the OFT, was shown the Bodill tender sheet for this contract which states, *'£498617 @ BAGGALEY. © FROM US'*. In response to a question from the OFT as to whether the Bodill tender sheet shows that Bodill may have provided a cover to Herbert Baggaley, AN said *'they may have done'*.⁴⁶⁷³ When asked if it was the practice of Herbert Baggaley to use the exact figure given to it as a cover price, he said, *'we tended to use the exact price that they gave us'*.⁴⁶⁷⁴

IV.2411. RH had been interviewed on 13 February 2007, before the OFT had sight of the copy estimate referred to in paragraph IV.2406 above. RH was asked about this tender and other tenders, his recollection of any of them was very limited and in respect of this tender he said, *'I don't understand what a CP repair is. Her Majesty's Prison. The project doesn't ring any bells to me'*, but he said that AN would have arranged cover pricing at Herbert Baggaley.⁴⁶⁷⁵

Evidence from other companies – G Carter

IV.2412. The OFT wrote to G Carter on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that G Carter had participated in bid rigging on this tender.

IV.2413. G Carter confirmed on 19 April 2007 that Rob Turner had worked as an estimator for G Carter but that he was no longer employed by them.⁴⁶⁷⁶

IV.2414. However, the OFT did not receive a response to the Fast Track Offer by the date for acceptance of 26 April 2007.⁴⁶⁷⁷ The OFT informed G Carter's legal representatives, Berryman Shacklock LLP, on 18 May 2007 that as a reply had not been received by the deadline the OFT would treat this as a rejection of the OFT's Fast Track Offer. Berryman Shacklock LLP confirmed that it understood the situation.⁴⁶⁷⁸

IV.2415. The OFT subsequently received a letter dated 2 August 2007 from Berryman Shacklock LLP which said *'Our client is well aware that the practice of "giving and taking covers/help" has been endemic in the construction industry for many years. It accepts that it is possible, if not likely that against that background, it has engaged in that activity itself.'*

However, having made detailed enquires as to the contracts to which you refer in the annex of your penalty offer letter, it cannot find evidence that it engaged

⁴⁶⁷² Interview transcript, OFT Document Reference 11317, page 16.

⁴⁶⁷³ Interview transcript, OFT Document Reference 11317, page 17.

⁴⁶⁷⁴ Interview transcript, OFT Document Reference 11317, page 16.

⁴⁶⁷⁵ Interview transcript, OFT Document Reference 13391, pages 7 and 8.

⁴⁶⁷⁶ File note of telephone conversation, OFT Document Reference 10294.

⁴⁶⁷⁷ File note of telephone conversation, OFT Document Reference 10297.

⁴⁶⁷⁸ File note of telephone conversation, OFT Document Reference 10297.

in such activity on those specific matters and it is against that background that it did not apply for the reduction of penalty.⁴⁶⁷⁹

IV.2416. Following the issue of the Statement, G Carter did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.2417. From the evidence presented above, the OFT draws the following conclusions.

IV.2418. Bodill, G Carter and Herbert Baggaley each accepted an invitation to tender for the contract to make CPIG repairs at HMP, Nottingham.

IV.2419. It appears that Bodill completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Bodill being the lowest received by the client, and the fact that Bodill won the contract.

IV.2420. G Carter and Herbert Baggaley were unable to submit a tender by the return date and/or did not want to win this tender.

IV.2421. In regard to Herbert Baggaley, Bodill's tender sheet contains the following entry '*£498617 2. ② BAGGALEY. © FROM US*'. Bodill has confirmed that '*© FROM US*' shows that it gave a cover price to the company named. Bodill's '*Explanatory Note of Tender Sheet*'⁴⁶⁸⁰ explained that the ② next to Herbert Baggaley's name shows that Herbert Baggaley was the second company to approach Bodill for a cover price in respect of this tender. The OFT notes that Herbert Baggaley's submitted tender figure was indeed the second lowest of the tenders above Bodill's figure, after G Carter. The OFT also notes that Herbert Baggaley submitted a tender of £498,617, matching the amount recorded on Bodill's tender sheet. In addition, Bodill's '*Tender Analysis – Tender Sheets March 2000 – November 2004*' confirmed that a cover price was given to Herbert Baggaley. In the light of all of this information, the OFT considers that Bodill gave a cover price to Herbert Baggaley.

IV.2422. The OFT also notes that Herbert Baggaley's tender was higher than the tender submitted by Bodill, the pattern consistent with a cover price having been provided.

IV.2423. In regard to G Carter, Bodill's tender sheet contains the following entry '*£484870 3. ① CARTER CONSTRUCTION © FROM US ROB TURNER [...] [C]*' (the latter figure being a telephone number that is two digits short due to running off the edge of the page). Bodill has confirmed that '*© FROM US*' shows that it gave a cover price to the company named. Bodill's '*Explanatory Note of Tender Sheet*' explained that the ① next to G Carter's name shows that G Carter was the first company to request a cover price from Bodill in respect of this tender. The OFT notes that G Carter's submitted tender figure was indeed the lowest of the tenders above Bodill's figure. The OFT also notes that G Carter submitted a tender of £484,870, matching the amount recorded on Bodill's tender sheet.

⁴⁶⁷⁹ Response from G Carter, OFT Document Reference 13017.

⁴⁶⁸⁰ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

IV.2424. The OFT notes that G Carter confirmed that Rob Turner had worked as an estimator for them. Furthermore, the OFT refers to a list of *'Contacts for Cover Prices'*⁴⁶⁸¹ provided to the OFT in W R Bloodworth's leniency application, which lists Rob Turner as a contact at G Carter and the company telephone number as [.....] [C]. This number is also recorded by Herbert Baggaley as a contact number for G Carter on its *'Pre-tender Quality Plan'*⁴⁶⁸² in respect of the tender for Assessment Centre Glen Parva 28 October 2003. The OFT also notes the admission of Herbert Baggaley, given in respect of the tender for the Assessment Centre Glen Parva 28 October 2003 (see Infringement 169) that G Carter was *'another company that we would regularly have been giving and receiving covers from'*.⁴⁶⁸³ That admission is framed in general terms, and supports an inference that G Carter was in the practice of accepting cover prices. The OFT considers it therefore supports a conclusion that G Carter accepted a cover price in respect of this bid.

IV.2425. In addition, Bodill confirmed that a cover price was given to G Carter for this tender for CPIG Repair work.

IV.2426. The OFT also notes that G Carter's tender was higher than the tender submitted by Bodill, the pattern consistent with a cover price having been provided.

IV.2427. The OFT further notes that although G Carter has not admitted to bid rigging specifically in relation to this tender, it has accepted that it is *'probable, if not likely'* that it has engaged in cover pricing activities more generally.

IV.2428. The OFT therefore concludes that contact took place between Bodill and G Carter, and between Bodill and Herbert Baggaley, and that Bodill supplied both G Carter and Herbert Baggaley with figures for cover bids.

IV.2429. The OFT is satisfied that the facts set out in paragraphs IV.2399 to IV.2428 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁶⁸⁴ In particular:

- (a) the provision of figures for cover bids from Bodill to each of G Carter and Herbert Baggaley was not unilateral⁴⁶⁸⁵, and contravenes the principle against direct or indirect contact between competitors;⁴⁶⁸⁶
- (b) G Carter and Herbert Baggaley can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁴⁶⁸⁷ and
- (c) Bodill can be presumed to have taken account of the information it received from G Carter and Herbert Baggaley (i.e. that neither of them intended to submit a competitive bid) when determining its conduct in the tendering process.⁴⁶⁸⁸

⁴⁶⁸¹ Contacts For Cover Prices, OFT Document Reference 3915, page 1.

⁴⁶⁸² Pre-tender Quality Plan, OFT Document Reference 3905, page 33.

⁴⁶⁸³ Interview transcript, OFT Document Reference 11317, page 33.

⁴⁶⁸⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁶⁸⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁶⁸⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁶⁸⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁶⁸⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.2430. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Bodill and G Carter, and between Bodill and Herbert Baggaley, in breach of the Chapter I prohibition, which each had the object of bid rigging in relation to the tender for CPIG repair work at HMP, Nottingham, tender deadline 20 November 2001.

Immunity and leniency assessment

IV.2431. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2432. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.2433. In respect of this tender, the OFT became aware of Herbert Baggaley's involvement in bid rigging activities by virtue of the information provided by Bodill. Herbert Baggaley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Herbert Baggaley in respect of this Infringement.

Infringement 83: Business Centre Extension and New Training Centre, Driffield – 28 November 2001

Client: East Riding of Yorkshire Council

Parties: Strata (formerly known as Weaver) and Geo Houlton

IV.2434. On 1 November 2001, East Riding of Yorkshire Council sought tenders for a business centre extension and new training centre, Driffield.⁴⁶⁸⁹ The following four companies were invited to tender: Frank Brambles Ltd, Geo Houlton, Weaver and Hall.⁴⁶⁹⁰ The deadline for receipt of tenders was 12:00 noon on 28 November 2001.⁴⁶⁹¹

IV.2435. East Riding of Yorkshire Council received the following tender returns:⁴⁶⁹²

⁴⁶⁸⁹ Information from client, OFT Document Reference 7823.

⁴⁶⁹⁰ Information from client, OFT Document Reference 7823.

⁴⁶⁹¹ Information from client, OFT Document Reference 7823.

⁴⁶⁹² Information from client, OFT Document Reference 7823.

Company	Time & Date tender received	Amount of tender	Awarded contract
Frank Brambles Ltd	8:30 am on 28 November 2001	£325,333	Yes
Geo Houlton	10:50 am on 28 November 2001	£368,620	
Weaver [Strata]	11:00 am on 28 November 2001	£388,120	
Hall	Not Returned	N/A	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Form of Tender

IV.2436. During the OFT's search of Strata's premises a ring binder file marked 'Covers from Jan 2000 to Dec 2001' containing various documents – mostly Form of Tenders and result letters – was found. A Form of Tender found within this file contained the following handwritten entry on the top right hand corner:⁴⁶⁹³

'FROM G HOULTON'

IV.2437. The Form of Tender was signed by Julian Kawecky on 27 November 2001. The Form of Tender also stated that Strata's figure was £388,120.00.⁴⁶⁹⁴

Evidence from leniency applicant Strata

IV.2438. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 to Dec 2001' and 'contracts in hand' documents. This list contained the following entry:⁴⁶⁹⁵

Date	Project	Strata ref no
27/11/2001	Extn to Bus. Centre and New Training Centre, Driffield for East Riding Council	T147/01

Cover to	Cover from	Company Name	Company Address	Contract Secured
	✓ OFT:BXM/107	G Houlton	Hull	

IV.2439. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Strata

IV.2440. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its

⁴⁶⁹³ Form of Tender, OFT Document Reference 3289.

⁴⁶⁹⁴ Form of Tender, OFT Document Reference 3289.

⁴⁶⁹⁵ Schedule of covers, OFT Document Reference 4054, page 8.

participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Geo Houlton

IV.2441. The OFT wrote to Geo Houlton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Geo Houlton had participated in bid rigging on this tender. In response to this letter Geo Houlton admitted *'We engaged in bid rigging activities on this tender with Weaver and with Clark'*.⁴⁶⁹⁶

IV.2442. The OFT subsequently wrote to Geo Houlton's ultimate parent company at the time of this Infringement, Geo Houlton Holdings, on 5 November 2007, asking it to comment on Geo Houlton's response to the OFT's Fast Track Offer, given that the OFT intended to hold Geo Houlton Holdings jointly and severally liable for any infringements committed by Geo Houlton in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Geo Houlton Holdings stated in a telephone call with the OFT on 12 December 2007 that it had no comments to make regarding the OFT's Fast Track Offer.⁴⁶⁹⁷

IV.2443. Following the issue of the Statement, Geo Houlton confirmed that it was *'not disputed that Houlton participated in cover pricing during the relevant period set out in the Statement'*.⁴⁶⁹⁸

The OFT's analysis of the evidence and finding

IV.2444. From the evidence presented above, the OFT draws the following conclusions.

IV.2445. Strata and Geo Houlton each accepted an invitation to tender for the contract for a business centre extension and new training centre at Driffield.

IV.2446. Both companies submitted a tender. Strata was unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.2447. Strata's Form of Tender records *'FROM G HOULTON'*, handwritten in the top right hand corner. Strata confirmed that this shows that it received a cover price from the company noted. This Form of Tender was also found in the file marked *'Covers from Jan 2000 to Dec 2001'*, which Strata confirmed contained documents and records of covers taken. The OFT considers in the light of the contemporaneous evidence from Strata and Strata's admission and explanation of that contemporaneous evidence, in addition to Geo Houlton's admission that it engaged in bid rigging with Strata, that Geo Houlton supplied Strata with a cover price for this tender. The OFT notes that the tender submitted by Strata was higher than the tender submitted by Geo Houlton, the pattern consistent with a cover price having been provided from Geo Houlton to Strata.

IV.2448. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Geo Houlton admitted that the party with whom it engaged in

⁴⁶⁹⁶ Response from Geo Houlton, OFT Document Reference 10323, page 2.

⁴⁶⁹⁷ File note of telephone conversation, OFT Document Reference 13967.

⁴⁶⁹⁸ Written representations of Geo Houlton, 25 June 2008, paragraph 52.

bid rigging was Strata, without being shown the OFT's evidence that Strata was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.2449. While the OFT notes that Geo Houlton also admitted collusion with another party, 'Clark', in respect of this tender the OFT does not have sufficient evidence that 'Clark' was involved in cover pricing and will not therefore be pursuing this aspect. The OFT notes that Clark is not named by East Riding of Yorkshire Council as having been invited to bid for this contract.

IV.2450. The OFT therefore concludes that contact took place between Strata and Geo Houlton. The OFT also concludes that Geo Houlton supplied a figure to Strata for a cover bid.

IV.2451. The OFT is satisfied that the facts set out in paragraphs IV.2436 to IV.2450 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁶⁹⁹ In particular:

- (a) the provision of a figure for a cover bid from Geo Houlton to Strata was not unilateral⁴⁷⁰⁰, and contravenes the principle against direct or indirect contact between competitors;⁴⁷⁰¹
- (b) Strata can be presumed to have taken account of the information received from Geo Houlton (i.e the cover price) when determining its own conduct in the tendering process;⁴⁷⁰² and
- (c) Geo Houlton can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁷⁰³

IV.2452. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Geo Houlton and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the business centre extension and new training centre, Driffield, tender deadline 28 November 2001.

Immunity and leniency assessment

IV.2453. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2454. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI

⁴⁶⁹⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁷⁰⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁷⁰¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁷⁰² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁷⁰³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

(Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 84: Inclusion Unit Extension, St Benedict Catholic School & Performing Arts College – 30 November 2001
Client: St Benedict Catholic School
Parties: Derwent Valley and Davlyn

IV.2455. On 8 November 2001, St Benedict Catholic School sought tenders for an inclusion unit extension at St Benedict Catholic School & Performing Arts College. The following five companies were invited to tender: Derwent Valley, Davlyn, Greenhill, Milward and Peter Baines. The deadline for the receipt of tenders was 30 November 2001.⁴⁷⁰⁴

IV.2456. St Benedict Catholic School received the following tender returns:⁴⁷⁰⁵

Company	Date tender received	Amount of tender	Awarded contract
Derwent Valley	30 November 2001	£70,405.00	Yes
Davlyn	30 November 2001	£74,890.00	
Greenhill	30 November 2001	£78,387.00	
Milward	30 November 2001	£86,658.27	
Peter Baines	30 November 2001	£94,044.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Register

IV.2457. During the search of Derwent Valley’s premises a Tender Register was found. The Tender Register contained the following entry in respect of this tender:⁴⁷⁰⁶

TENDER NR	RETURN DATE	DETAILS	OPPOSITION	TENDER	✓
02/11/01	30/11/01	INCLUSION UNIT EXTENSION ST BENEDICT CATHOLIC SCHOOL & PERFORMING ARTS COLLEGE	Baines Greenhill Milward Davlyn (C)	70405	✓ 1st

Evidence from leniency applicant Derwent Valley

IV.2458. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

⁴⁷⁰⁴ Information from client, OFT Document Reference 9536.

⁴⁷⁰⁵ Information from client, OFT Document Reference 9536.

⁴⁷⁰⁶ Tender schedule, OFT Document Reference 1912, page 29.

IV.2459. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as *'DVC1 List of Covers Given'*. The information in the summary contains the following extract:⁴⁷⁰⁷

<i>Date</i>	<i>Contract</i>	<i>Company Involved</i>
<i>November 2001</i>	<i>Inclusion Unit St Benedict Catholic School</i>	<i>Davlyn</i>

IV.2460. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Davlyn Construction Ltd'* appears on this list with the address *'Unit 5B Sir Francis Ley Ind Park Shaftesbury St. Derby'* and a contact named, *'Dave'*.⁴⁷⁰⁸

IV.2461. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Evidence from leniency applicant Davlyn

IV.2462. As part of its leniency application, Davlyn provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.293 to IV.302 above and is relied upon by the OFT in relation to this tender.

IV.2463. In its response to the Statement, Davlyn did not contest its involvement in this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.2464. During interviews conducted in connection with its leniency application, Derwent Valley directors and estimators provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.2465. In regard to this tender, a voluntary interview was conducted with David Stone ('DS'), Managing Director of Derwent Valley, on 27 April 2007. DS confirmed that the entries on Derwent Valley's tender register are, *'... Baines, Greenwood is it, or Greenhill, Millward and Davlyn'*.⁴⁷⁰⁹ DS stated that written next to Davlyn, *'There is a C ... I'd say, again, that means a cover to Davlyn'*.⁴⁷¹⁰ DS stated that Pat Tunnicliffe ('PT'), an ex-estimator at Derwent Valley, would have dealt with this contract.⁴⁷¹¹ DS confirmed that Derwent Valley won the tender for this contract.⁴⁷¹²

IV.2466. During an interview with the OFT on 9 May 2007, conducted in connection with Derwent Valley's leniency application, PT provided further information in relation to this tender. PT confirmed that he could recall the contract, *'... I do and we did it. I'm pretty certain that I priced that, and again it looks as though*

⁴⁷⁰⁷ List of Covers Given, OFT Document Reference 3940, page 2.

⁴⁷⁰⁸ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 2.

⁴⁷⁰⁹ Interview transcript, OFT Document Reference 13478, page 14.

⁴⁷¹⁰ Interview transcript, OFT Document Reference 13478, page 14.

⁴⁷¹¹ Interview transcript, OFT Document Reference 13478, page 14.

⁴⁷¹² Interview transcript, OFT Document Reference 13478, page 15.

Davlyn wanted a cover.⁴⁷¹³ Although PT could not recall any conversations he had with Davlyn, PT confirmed that he would have been the estimator at Derwent Valley who would have given a cover price to Davlyn.⁴⁷¹⁴

Witness evidence from leniency applicant Davlyn

IV.2467. During interviews conducted in connection with its leniency application, Davlyn's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.293 to IV.302 above and is relied upon by the OFT in relation to this tender.

IV.2468. In regard to this tender, a voluntary interview was conducted with David Goodhead ('DG'), an estimator for Davlyn. DG confirmed that Davlyn had tendered for and completed projects at St Benedict Catholic School in the past.⁴⁷¹⁵ Although DG could not specifically recall taking a cover from Derwent Valley in relation to this contract, he did confirm that Derwent Valley was a company with whom Davlyn exchanged cover prices, and stated that therefore *'it is feasible'* that Davlyn did indeed take a cover price from Derwent Valley in relation to this tender.⁴⁷¹⁶

The OFT's analysis of the evidence and finding

IV.2469. From the evidence presented above, the OFT draws the following conclusions.

IV.2470. Derwent Valley and Davlyn each accepted an invitation to tender for this contract.

IV.2471. Davlyn was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Derwent Valley completed the estimating process for this tender and that it submitted a bid with the hope of winning the contract. This is shown by the price submitted by Derwent Valley being the lowest received and the fact that it won the contract.

IV.2472. Derwent Valley's Tender Register shows *'Davlyn (C)'* handwritten in the *'Opposition'* column. Both DS and PT of Derwent Valley confirmed that this shows that a cover price was given to Davlyn. Also, Derwent Valley confirmed in its leniency application that it gave a cover price to Davlyn for this tender, and that Davlyn was a company with whom it exchanged cover prices more generally.

IV.2473. Although DG of Davlyn did not recall taking a cover price in relation to this tender, he stated that Derwent Valley was a company with whom Davlyn had engaged in cover pricing, and stated that *'it is feasible'* that Davlyn took a cover price from Derwent Valley in relation to this tender.

IV.2474. The OFT considers in the light of the contemporaneous evidence from Derwent Valley and both DS and PT's admissions and explanations of the contemporaneous evidence, that Derwent Valley supplied Davlyn with a cover price for this tender.

⁴⁷¹³ Interview transcript, OFT Document Reference 14237, page 12.

⁴⁷¹⁴ Interview transcript, OFT Document Reference 14237, page 12.

⁴⁷¹⁵ Interview transcript, OFT Document Reference 11180, page 8.

⁴⁷¹⁶ Interview transcript, OFT Document Reference 11180, page 8.

IV.2475. The OFT notes that the tender submitted by Davlyn was higher than the tender submitted by Derwent Valley, the pattern consistent with a cover price having been provided.

IV.2476. The OFT therefore concludes that contact took place between Derwent Valley and Davlyn. The OFT also concludes that Derwent Valley supplied a figure to Davlyn for a cover bid.

IV.2477. The OFT is satisfied that the facts set out in paragraphs IV.2457 to IV.2476 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁷¹⁷ In particular:

- (a) the provision of a figure for a cover bid from Derwent Valley to Davlyn was not unilateral⁴⁷¹⁸, and contravenes the principle against direct or indirect contact between competitors;⁴⁷¹⁹
- (b) Davlyn can be presumed to have taken account of the information received from Derwent Valley (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁷²⁰ and
- (c) Derwent Valley can be presumed to have taken account of the information it received from Davlyn (i.e. that Davlyn did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁷²¹

IV.2478. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Davlyn in breach of the Chapter I prohibition, which had the object of bid rigging in relation to an inclusion unit extension at St Benedict Catholic School & Performing Arts College, tender deadline 30 November 2001.

Immunity and leniency assessment

IV.2479. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2480. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 to Derwent Valley on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

IV.2481. In respect of this tender, the OFT became aware of Davlyn's involvement in bid rigging activities by virtue of the information obtained during the visit under

⁴⁷¹⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁷¹⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁷¹⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁷²⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁷²¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

section 28 to Derwent Valley. Davlyn will not therefore receive 100 per cent immunity in respect of this tender. However, Davlyn will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 85: **New Press Foundations & Associated Alteration Works – Derby Daily Telegraph, Derby – 3 December 2001**
Client: **Derby Daily Telegraph**
Parties: **Herbert Baggaley and Bowmer & Kirkland**

IV.2482. On 23 November 2001, Derby Daily Telegraph sought tenders for the construction of new press foundations and associated alteration works at Derby Daily Telegraph, Meadow Road, Derby, DE1 2BH.⁴⁷²² The following two companies were invited to tender: Herbert Baggaley and Bowmer & Kirkland.⁴⁷²³ The deadline for the receipt of tenders was 10:00 am on 3 December 2001.

IV.2483. Derby Daily Telegraph received the following tender returns:⁴⁷²⁴

Company	Date and time tender received	Amount of tender	Awarded contract
Bowmer & Kirkland	3 December 2001 Before 10:00 am	£581,127.60	Yes
Herbert Baggaley	3 December 2001 Before 10:00 am	£596,375.00	

IV.2484. The contemporaneous documentation for this project shows that Britcon Limited were subsequently requested to submit a bid and states *'Britcon Ltd submitted bid of £571,074.00 by 12 noon on 21 December 2001. The Project Team interviewed Britcon during January 2002'*.⁴⁷²⁵ Alan Brough Associates, the structural engineer appointed for the project followed up references provided by Britcon and subsequently recommended that Bowmer & Kirkland be appointed for the project.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley

IV.2485. During the OFT's search of Herbert Baggaley's premises the *'Tendering Schedule'*⁴⁷²⁶, a handwritten record of tenders received, was found, which contained the original entry relating to this tender. The words *'Cover Price'* are recorded against this entry, in the columns used for recording the result.

IV.2486. The computer created *'Tenders Schedule'*⁴⁷²⁷ recorded this tender as tender number *'T01/152'* with a *'C'* recorded in the column headed *'A, B, C, R'*, the column which indicated Herbert Baggaley's interest in the tender. Herbert Baggaley confirmed that these letters denoted as follows: *'A'* very interested,

⁴⁷²² Information from client, OFT Document Reference 7613.

⁴⁷²³ Information from client, OFT Document Reference 7613.

⁴⁷²⁴ Information from client, OFT Document Reference 7613.

⁴⁷²⁵ Information from client, OFT Document Reference 7613, page 3.

⁴⁷²⁶ Tendering Schedule, OFT Document Reference 1642.

⁴⁷²⁷ Tenders Schedule, OFT Document Reference 1658, page 2.

'B' interested, 'C' cover price, and 'R' tender returned to client unquoted.⁴⁷²⁸ Herbert Baggaley also provided the OFT with a 'List of Tenders'⁴⁷²⁹, a document similar in content to the 'Tenders Schedule', which also recorded a 'C' against this tender.

IV.2487. As part of its leniency application Herbert Baggaley produced an invoice⁴⁷³⁰ numbered 8901 and headed 'Baggaley Construction'. The invoice was made out to Bowmer & Kirkland Ltd., and dated '12.11.02' and contained the following information:

'CONTRACT: New Press Foundations Derby Daily Telegraph...

*FOR THE ATTENTION OF PAUL CROFT
PRIVATE & CONFIDENTIAL*

<i>JOINERY WORKS</i>	<i>9792.00</i>
	<i>VAT @ 17½ % 1713.60</i>
	<i>TOTAL DUE</i>
<i>11505.60'</i>	

Evidence from leniency applicant Herbert Baggaley

IV.2488. As part of its leniency application, Herbert Baggaley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.2489. In particular, Herbert Baggaley produced a 'Schedule of Potential Payments & Receipts [and] Copy Invoices as Listed'.⁴⁷³¹ The schedule contained amongst others the following entries:

'Receipts

<i>Doc. No.</i>	<i>Invoice</i>	<i>Date</i>	<i>Contractor</i>	<i>Amount</i>
<i>1.5</i>	<i>8901</i>	<i>12.11.02</i>	<i>Bowmer & Kirkland Ltd</i>	<i>£9,792.00</i>

Comment

<i>Doc. No.</i>	<i>Job/Tender No.</i>	<i>Invoice</i>	<i>Comment (From recollection)</i>
<i>1.5</i>	<i>T01-52</i>	<i>8901</i>	<i>Bowmer & Kirkland Ltd is believed to have requested HBC to submit a covered bid in return for invoiced amount.</i>

⁴⁷²⁸ Interview transcript, OFT Document Reference 11317, page 9.

⁴⁷²⁹ List of tenders, OFT Document Reference 3896, page 14.

⁴⁷³⁰ Invoice, OFT Document Reference 3895, page 6.

⁴⁷³¹ Potential Payments and Receipts, OFT Document Reference 3895, page 2.

Witness evidence from leniency applicant Herbert Baggaley

- IV.2490. During interviews conducted in connection with its leniency application, Herbert Baggaley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.
- IV.2491. Roger Hayes ('RH'), Chief Estimator until he left Herbert Baggaley in October 2002, was interviewed on 13 February 2007, and specific reference was made to the tender for the new press foundations. RH stated that he recalled this tender: *'I have a vague recollection of going to the site at the Daily Telegraph and having a look around the job there with Chris Collison and perhaps expressing concern about doing that project, so we might have taken a cover on that one'*.⁴⁷³²
- IV.2492. It was explained to RH that it was believed that there had been a financial payment made in respect of this tender, and he said *'Yes. As I recall we were given a fee by Bowmer Kirkland as much as the competition on the project was limited the job from my point of view, from Chris Collinson's point of view, was very, very unattractive. It was flawed with potential problems and risks and we didn't need those kind of risks at this moment in time and I can't remember whether we contacted Bowmer Kirklands or Bowmer Kirklands contacted us, but yes there was a fee arrangement. We stood down'*.⁴⁷³³
- IV.2493. RH was shown the extract from Herbert Baggaley's tendering schedule.⁴⁷³⁴ He said, *'I recognise it'*. He was asked who had completed the entry and he said *'That's my handwriting'*, and when asked if *'Cover Price'* was also in his handwriting RH said *'Yes, it is'*.⁴⁷³⁵ RH then confirmed that Invoice 8901⁴⁷³⁶ was raised in respect of this tender and that it was false and that the payment of £9,792 was the fee received by Herbert Baggaley to stand down. He said *'That's the compensation payment. Yes'*, and in reference to *'Paul Croft'* he said *'He would have been the person at Bowmer and Kirkland who gave me the help, cover price'*. Asked if the invoice had been paid, RH said *'I believe so. It may have been collected after I left, it may have been collected at the time I left. I didn't deal with that aspect of it'*.⁴⁷³⁷
- IV.2494. Anton Newell ('AN'), Herbert Baggaley's Chief Estimator, was interviewed on 2 November 2006, and specific reference was made to the Invoice 8901.⁴⁷³⁸ AN was asked if he had knowledge of it. He said, *'Some knowledge of it yes, because it was set up by Roger before he left and he left around the time that we would have been due the payment, and so as I took over one to chase to say 'when are you going to...''*.⁴⁷³⁹
- IV.2495. In a second interview on 29 April 2007, AN was asked whether the documents held by the OFT showed that Herbert Baggaley had taken a cover price. He said *'Yeah, in the right hand column you do have that phrase, yeah'*.

⁴⁷³² Interview transcript, OFT Document Reference 13391, page 7.

⁴⁷³³ Interview transcript, OFT Document Reference 13391, page 8.

⁴⁷³⁴ Tendering schedule, OFT Document Reference 1642.

⁴⁷³⁵ Interview transcript, OFT Document Reference 13391, pages 8 and 9.

⁴⁷³⁶ Invoice 8901, OFT Document Reference 3895, page 6.

⁴⁷³⁷ Interview transcript, OFT Document Reference 13391, page 9.

⁴⁷³⁸ Invoice 8901, OFT Document Reference 3895, page 6.

⁴⁷³⁹ Interview transcript, OFT Document Reference 6372, page 16.

Asked about the 'C' in the column reflecting Herbert Baggaley's interest in the tender in the Tenders Schedule, AN said, *'Yeah, with the backup of the other information, then yeah ... We may have done some work on it, but we wouldn't have submitted an active price effectively'*. He also confirmed that Bowmer & Kirkland was a company with whom Herbert Baggaley would exchange cover prices.⁴⁷⁴⁰

IV.2496. Richard Ian Baggaley ('RIB'), Herbert Baggaley's Managing Director, was interviewed on 2 November 2006 and in particular the subject of compensation payments was raised with him. He confirmed that he was aware that Herbert Baggaley had been involved in such payments and in particular he recalled this tender. *'The one that I am aware of, I'm aware of it via hearsay through the office, is the one with Bowmer and Kirkland, which is invoice one five [Herbert Baggaley's reference to invoice 8901]. But other than an awareness that there was an arrangement on that particular job...'*⁴⁷⁴¹ He confirmed that at some point he would have been aware of all compensation matters, *'I would have been aware of them, yes'*.⁴⁷⁴²

IV.2497. Reference was made to Herbert Baggaley's attitude towards compensation payments and RIB said *'The attitude was if there was an opportunity to recover bidding costs, it was something that would be done'*.⁴⁷⁴³

Evidence from other companies – Bowmer & Kirkland

IV.2498. The OFT wrote to Bowmer & Kirkland on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Bowmer & Kirkland had participated in bid rigging on this tender. In response to this letter, Bowmer & Kirkland replied through Geldards LLP, by letter dated 25 April 2007, confirming its involvement in 'selective' bid rigging activities and accepting the offered reduction in respect of certain tenders.⁴⁷⁴⁴ In relation to this specific tender, Bowmer & Kirkland made no admissions.⁴⁷⁴⁵

IV.2499. In interview on 16 January 2008, Paul Craft ('PC'), an ex-commercial manager of the Civils Division at Bowmer & Kirkland, when asked about the invoice from Herbert Baggaley, explained that someone had contacted him from Herbert Baggaley about an outstanding payment. PC stated that he had agreed to deal with the payment and that he had advised the caller to send him an invoice, but that he could not recall to whom he had spoken at Herbert Baggaley.⁴⁷⁴⁶

IV.2500. In interview on 16 January 2008, Peter Watson ('PW'), a former Director at Bowmer & Kirkland, when asked whether there was any joinery work on this job, stated that there could have been joinery work and that Bowmer & Kirkland would usually have used in-house joiners. PW could not recall Herbert Baggaley being involved in joinery work on this job.⁴⁷⁴⁷

⁴⁷⁴⁰ Interview transcript, OFT Document Reference 11317, page 18.

⁴⁷⁴¹ Interview transcript, OFT Document Reference 6371, page 8.

⁴⁷⁴² Interview transcript, OFT Document Reference 6371, page 8.

⁴⁷⁴³ Interview transcript, OFT Document Reference 6371, page 9.

⁴⁷⁴⁴ Response from Bowmer & Kirkland, OFT Document Reference 10255.

⁴⁷⁴⁵ Response from Bowmer & Kirkland, OFT Document Reference 10256, page 5.

⁴⁷⁴⁶ Interview note, OFT Document Reference 14348, page 2.

⁴⁷⁴⁷ Interview note, OFT Document Reference 14346, page 4.

- IV.2501. After reviewing the evidence set out in the Statement, Bowmer & Kirkland accepted that one of its employees had given a cover price and a monetary payment to Herbert Baggaley in relation to this tender.⁴⁷⁴⁸ Bowmer & Kirkland also stated that it was very likely that PC was not telling the truth about his involvement in the cover price and compensation payment arrangement, and that it was reasonable to assume that PC was aware, when authorising payment of the invoice from Herbert Baggaley, that this related to a compensation payment. However, Bowmer & Kirkland stated that no one else within the company had any knowledge of the arrangement with Herbert Baggaley, and that PC had acted on his own as a *'rogue employee'*.⁴⁷⁴⁹
- IV.2502. In this respect, Bowmer & Kirkland stated that it was reserving its rights to argue that PC had acted beyond the scope of his authority in making the compensation payment, and questioned how this would affect Bowmer & Kirkland's culpability.⁴⁷⁵⁰
- IV.2503. Even if Bowmer & Kirkland is correct in its assertion that the Infringement was committed by PC acting beyond the scope of his authority (which the OFT does not necessarily accept), the OFT considers that PC would form part of the same economic unit as his employer, Bowmer & Kirkland, and therefore part of the same undertaking. The OFT's ability to hold Bowmer & Kirkland liable for the Infringement remains unaffected. Any question of PC exceeding his authority is a contractual matter to be resolved between Bowmer & Kirkland and PC, and does not affect the OFT's ability to enforce the provisions of the Act against Bowmer & Kirkland.
- IV.2504. Bowmer & Kirkland submitted in its response to the Statement that, in order for to establish that the compensation payment arrangement constitutes price fixing, the OFT must show that PC, or another Bowmer & Kirkland employee: (i) had knowledge of the payment, (ii) was in a position to adjust the tender upward, and (iii) could do so with confidence that it would not have lost the tender to a third party. Bowmer & Kirkland argued that PC was not in a position to influence the tender price, that PW (who did fix the tender price) was not privy to the compensation payment arrangement, and that there is no evidence of the payment being factored into the tender price. As such, Bowmer & Kirkland concluded that no price fixing took place.⁴⁷⁵¹
- IV.2505. The OFT does not accept this line of argument, and considers that the compensation payment arrangement resulted in a tender price above the competitive level, whether or not there was an explicit agreement between Bowmer & Kirkland and Herbert Baggaley to add the amount of the payment to the tender price. Furthermore, since the OFT considers that the arrangement to make a compensation payment had as its object the restriction of competition, it is not necessary for the OFT to prove whether Bowmer & Kirkland did in fact add the agreed amount to its tender price.⁴⁷⁵²

⁴⁷⁴⁸ Written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 32, 48 to 49 and 55; and oral representations of Bowmer & Kirkland, 1 August 2008, pages 13, 15, 21 to 23, 31 and 35.

⁴⁷⁴⁹ Written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 42 to 45, 47 to 51 and 54 to 55; and oral representations of Bowmer & Kirkland, 1 August 2008, page 17.

⁴⁷⁵⁰ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 57.

⁴⁷⁵¹ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 56; and oral representations of Bowmer & Kirkland, 1 August 2008, page 29.

⁴⁷⁵² See paragraph III.151 of the Legal Background section.

The OFT's analysis of the evidence and finding

- IV.2506. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.
- IV.2507. Herbert Baggaley and Bowmer & Kirkland each accepted an invitation to tender for this contract.
- IV.2508. Herbert Baggaley was unable to submit a tender by the return date and/or did not want to win this tender. Herbert Baggaley has stated that it did not want the tender due to problems perceived by RH at the site.
- IV.2509. It appears that Bowmer & Kirkland completed the estimating process for this contract and submitted a bid with the hope of winning the work. This is shown by the price submitted by Bowmer & Kirkland being the lowest received and the fact that it won the contract.
- IV.2510. Contact with Bowmer & Kirkland is admitted by RH, and this contact resulted in a cover price being given by Bowmer & Kirkland to Herbert Baggaley, and an arrangement being made whereby Bowmer & Kirkland would make a compensation payment to Herbert Baggaley. Herbert Baggaley took a cover price from Bowmer & Kirkland, as confirmed by the entries in its contemporaneous '*Tendering Schedule*' and '*Tenders Schedule*'. Herbert Baggaley could not have taken a cover price from anyone other than Bowmer & Kirkland since only two companies were invited to tender at that stage. Herbert Baggaley then submitted a tender above that of Bowmer & Kirkland, the pattern consistent with a cover price having been provided. Having reviewed the evidence, Bowmer & Kirkland has also accepted that it gave a cover price and made a compensation payment to Herbert Baggaley.
- IV.2511. The OFT considers that the evidence is inconclusive as regards which Party initiated the compensation payment arrangement, and what the Parties' motives were in making and accepting that payment.
- IV.2512. According to some evidence provided by Herbert Baggaley, it was asked by Bowmer & Kirkland to submit a cover price in return for the compensation payment;⁴⁷⁵³ and RH also stated in interview that Herbert Baggaley '*stood down*'.⁴⁷⁵⁴ However, in its response to the Statement, Herbert Baggaley stated that it had already decided it was unable to submit a tender by the return date and/or that it did not wish to win the tender due to the problems and risks identified with the job. Herbert Baggaley submitted that the compensation payment was, therefore, made in order to compensate it for its tender costs incurred, rather than in return for standing aside from a job that it would otherwise have pursued.⁴⁷⁵⁵
- IV.2513. Bowmer & Kirkland also strongly disputed that it had asked Herbert Baggaley to stand down, pointing out that RH made no reference in his witness evidence to Bowmer & Kirkland *asking* Herbert Baggaley to submit a cover price. In this respect, Bowmer & Kirkland also pointed to RH's inability to recall which Party

⁴⁷⁵³ Potential Payments and Receipts, OFT Document Reference 3895, page 2.

⁴⁷⁵⁴ Interview transcript, OFT Document Reference 13391, page 8.

⁴⁷⁵⁵ Written representations of Herbert Baggaley, 27 June 2008, paragraph 3.

initiated the discussion about the compensation payment (see paragraph IV.2492, above), and concluded that ‘...*there is no supporting evidence that B&K requested Herbert Baggaley to stand down in return for payment*’.⁴⁷⁵⁶ Bowmer & Kirkland also submitted that the level of Herbert Baggaley’s tender price (at 2.6 per cent higher than Bowmer & Kirkland’s) demonstrates that Herbert Baggaley did not literally ‘stand down’.⁴⁷⁵⁷ Moreover, Bowmer & Kirkland stated that Herbert Baggaley was not a strong competitor due to the nature of the job and, as such, Bowmer & Kirkland would have had no reason to pay money to ‘*neutralise*’ what its senior management would have viewed as a ‘*weak competitor*’.⁴⁷⁵⁸

IV.2514. Both Parties therefore maintain that Herbert Baggaley did not stand down in return for the compensation payment, and the OFT has not obtained documentary evidence from any other source to suggest that Herbert Baggaley ‘stood down’ from the tender process. The OFT therefore makes no finding in this respect. In any event, on either Party’s account, contacts took place between Bowmer & Kirkland and Herbert Baggaley, which resulted in Bowmer & Kirkland giving a cover price and making a compensation payment to Herbert Baggaley, which amounts to an infringement of the Act. The question of which Party initiated the arrangement is also not material to the OFT’s case.

IV.2515. It is not apparent from evidence whether Herbert Baggaley and Bowmer & Kirkland expressly agreed to include the level of agreed compensation in Bowmer & Kirkland’s tender bid, or whether Bowmer & Kirkland did in fact include an additional sum in its bid as a result of the arrangement with Herbert Baggaley. Bowmer & Kirkland submitted in its response to the Statement that there is no evidence to prove the compensation payment was factored into its final tender price, and that it is improbable it would have done this.⁴⁷⁵⁹ In any event it is not necessary for the OFT to make any finding that the Parties agreed to include a specific sum in their respective tender bids, or that either did so, in order to find an infringement.⁴⁷⁶⁰

IV.2516. Subsequently, Herbert Baggaley raised an invoice⁴⁷⁶¹ for ‘*Joinery Works*’ to the value of £9,792.00 plus VAT, with an invoice total of £11,505.60, in respect of the New Press Foundations Derby Daily Telegraph. Herbert Baggaley has confirmed that the invoice was false and that no such ‘*Joinery Works*’ were carried out. The invoice was marked for the attention of PC at Bowmer & Kirkland. Herbert Baggaley confirmed that this was the person who would have provided it with a cover price. Bowmer & Kirkland has confirmed that the invoice was settled, on the instructions of PC.⁴⁷⁶²

IV.2517. Herbert Baggaley has admitted to bid rigging in respect of this tender and to entering into a financial compensation agreement with Bowmer & Kirkland in return for taking a cover bid.

⁴⁷⁵⁶ Written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 36 to 37 and 52.

⁴⁷⁵⁷ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 36.

⁴⁷⁵⁸ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 54.

⁴⁷⁵⁹ Written representations of Bowmer & Kirkland Limited, 4 July 2008, paragraph 56; and oral representations of Bowmer & Kirkland, 1 August 2008, page 29.

⁴⁷⁶⁰ See paragraph III.149 to III.155 of the Legal Background section.

⁴⁷⁶¹ Invoice, OFT Document Reference 3895, page 6.

⁴⁷⁶² Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 49; and oral representations of Bowmer & Kirkland, 1 August 2008, pages 15, 22 to 23.

IV.2518. The OFT notes that Bowmer & Kirkland has accepted that one of its employees it gave a cover price to Herbert Baggaley in respect of this tender and that a payment was made by Bowmer & Kirkland to Herbert Baggaley. Bowmer & Kirkland has also stated that PC was involved in both the cover pricing and the compensation payment arrangement. The OFT also notes there was no recollection within Bowmer & Kirkland that Herbert Baggaley undertook any joinery work on this job, and furthermore Bowmer & Kirkland suggests that it was likely that it would have used its own joinery department to carry out such work.

IV.2519. The OFT therefore concludes that contact took place between Herbert Baggaley and Bowmer & Kirkland. The OFT also concludes that Bowmer & Kirkland supplied a figure to Herbert Baggaley for a cover bid, and that Bowmer & Kirkland agreed to make a compensation payment of over £9,700 to Herbert Baggaley. This payment was facilitated by the production of a false invoice relating to work that was not carried out by Herbert Baggaley.

IV.2520. The OFT is satisfied that the facts set out in paragraphs IV.2485 to IV.2519 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁷⁶³ In particular:

- (a) the provision of a figure for a cover bid and a compensation payment from Bowmer & Kirkland to Herbert Baggaley were not unilateral⁴⁷⁶⁴, and contravene the principle against direct or indirect contact between competitors;⁴⁷⁶⁵
- (b) the agreement between Bowmer & Kirkland and Herbert Baggaley that Bowmer & Kirkland would supply a figure to Herbert Baggaley for a cover bid and that Bowmer & Kirkland would pay compensation to Herbert Baggaley had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁴⁷⁶⁶
- (c) Herbert Baggaley can be presumed to have taken account of the information it received from Bowmer & Kirkland (i.e. the cover price, the agreement to pay compensation, and the agreed level of compensation) when determining its own conduct in the tendering process;⁴⁷⁶⁷ and
- (d) Bowmer & Kirkland can be presumed to have taken account of the information it received from Herbert Baggaley (i.e. the agreement to pay compensation, the agreed level of compensation and that Herbert Baggaley did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁷⁶⁸

IV.2521. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Herbert Baggaley and Bowmer & Kirkland, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the

⁴⁷⁶³ See paragraphs III.3 and II.89 to III.157 of the Legal Background section.

⁴⁷⁶⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁷⁶⁵ See paragraphs III.48 to III.51, III.93 to III.94, and III.139 to III.140 of the Legal Background section.

⁴⁷⁶⁶ See paragraphs III.150 to III.152 of the Legal Background section.

⁴⁷⁶⁷ See paragraphs III.58, III.95 to III.96, III.125, III.142, and III.156 to III.157 of the Legal Background section.

⁴⁷⁶⁸ See paragraphs III.58, III.95 to III.96, III.125, III.142, and III.156 to III.157 of the Legal Background section.

construction of new press foundations and associated alteration works at Derby Daily Telegraph, Meadow Road, Derby, tender deadline 3 December 2001.

Immunity and leniency assessment

IV.2522. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2523. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Herbert Baggaley on 14 June 2005. Herbert Baggaley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Herbert Baggaley in respect of this Infringement.

Infringement 86: Trustwide Fire Improvements at Various Sites, Leicestershire and Rutland Healthcare NHS Trust – 3 December 2001
Client: Atkinson Leah
Parties: Bodill and T Denman

IV.2524. In 2001, Atkinson Leah sought tenders for trustwide fire improvements at various sites, Leicestershire and Rutland Healthcare NHS Trust. The return date for the tender was 3 December 2001 and five companies were invited to tender: J H Hallam, Ruco Ltd, Seddon, T Denman and Bodill.⁴⁷⁶⁹

IV.2525. Atkinson Leah received the following tender returns by 3 December 2001:⁴⁷⁷⁰

Company	Date tender received	Amount of tender	Awarded the tender
J H Hallam	No information	£318,786.00	
Ruco Ltd	No information	£307,284.27	Yes
Seddon	No information	£479,995.00	
T Denman	No information	£375,107.00	
Bodill	No information	£349,490.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.2526. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten:⁴⁷⁷¹

⁴⁷⁶⁹ Information from client, OFT Document Reference 13619.

⁴⁷⁷⁰ Information from client, OFT Document Reference 13619.

⁴⁷⁷¹ Tender sheet, OFT Document Reference 0594.

1. *BODILL*
 2. *DENMAN © FROM US
M HOWARD Tel [...] [C]*
 3. *ROUCO - LEICESTER*
 4. *SEDDONS*
 5. *HALLAMS '*
- £375107

IV.2527. The tender sheet states that Bodill's submitted figure was £349,490.⁴⁷⁷²

IV.2528. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotation '£375107', under the section headed '*Tenderers*' was made by him.⁴⁷⁷³ JR also confirmed that this annotation was made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.2529. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*DENMAN © FROM US M HOWARD Tel [.....] [C]*' under the section headed '*Tenderers*' were made by him.⁴⁷⁷⁴ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.2530. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.2531. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁴⁷⁷⁵ In respect of this tender, Bodill confirmed that it gave a cover price to T Denman.⁴⁷⁷⁶

IV.2532. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.2533. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – T Denman

IV.2534. The OFT wrote to T Denman on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its

⁴⁷⁷² Tender sheet, OFT Document Reference 0594.

⁴⁷⁷³ Contracts document, OFT Document Reference 14310, page 2.

⁴⁷⁷⁴ Contracts document, OFT Document Reference 14311, page 2.

⁴⁷⁷⁵ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁴⁷⁷⁶ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 3.

alleged participation in bid rigging on this tender, in return for an admission that T Denman had participated in bid rigging on this tender.

IV.2535. Subsequently protracted correspondence was entered into, whereby Mr W B Cragg, the Managing Director of T Denman, appeared initially to accept the OFT's Fast Track Offer. In an email of 18 May 2007 he made the following statements:

'What we do know is the practice of contractors pricing themselves out of work, when they are too committed to price a project in the given time and in order not to have themselves inadvertently removed from client lists by returning a tender invitation, has been an inherent known part of construction industry practice for many years and as a long established small business we have participated in this practice on occasions in previous years, although have no records of particular events.

*'It would therefore be apparent that we are involved in these matters by implication and on a commercial basis alone we should be responsible people and mitigate the financial and commercial damage to this company by any actions within our means and therefore accept your offer of leniency in every case.'*⁴⁷⁷⁷

IV.2536. However the OFT's offer was subsequently formally declined by a letter, dated 24 July 2007⁴⁷⁷⁸ received from Berryman Shacklock LLP, solicitors acting for and on behalf of T Denman.⁴⁷⁷⁹

IV.2537. In its response to the Statement, however, T Denman stated *'T Denman has no means of challenging the evidence now presented by the OFT in support of its allegations in relation to cover pricing, and therefore admits liability for the cover pricing infringements alleged by the OFT'*.⁴⁷⁸⁰

The OFT's analysis of the evidence and finding

IV.2538. From the evidence presented above, the OFT draws the following conclusions.

IV.2539. Bodill and T Denman each accepted an invitation to tender for this contract.

IV.2540. Bodill completed the estimating process for the tender for this contract and submitted a bid in the hope of winning the work. T Denman was unable to submit a tender by the return date and/or did not want to win this tender.

IV.2541. In regard to T Denman, Bodill's tender sheet records *'DENMAN © FROM US £375107 M HOWARD Tel [.....] [C]'*. Bodill has confirmed that this shows that it gave T Denman a cover price. Bodill recorded on the tender sheet the figure £375,107, a figure that was identical to the tender price that T Denman submitted for the work. Bodill's tender sheet also records the name

⁴⁷⁷⁷ Response from T Denman, OFT Document Reference 10869.

⁴⁷⁷⁸ Response from T Denman, OFT Document Reference 13012.

⁴⁷⁷⁹ Response from T Denman, OFT Document Reference 13010. This followed an earlier response dated 29 June 2007 from Berryman Shacklock LLP which stated the following:

'As you are aware, the practise of "cover pricing" has been endemic in the construction industry over many decades. Against that background, our client does acknowledge that it has engaged in cover pricing activity on a limited number of projects'.

⁴⁷⁸⁰ Written representations of T Denman, 27 June 2008, paragraph 6.

and telephone number of a T Denman estimator, providing further evidence that contact was made between the two parties. This is further corroborated by the telephone number on T Denman's letterhead⁴⁷⁸¹, [.....] [C], which is the same as the handwritten contact number for T Denman on Bodill's tender sheet and the information contained in the FAME report which names an estimator by the name of Mr M J Howard.⁴⁷⁸²

IV.2542. The OFT notes in addition that the tender submitted by T Denman was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.2543. Both Parties have now admitted their involvement in cover pricing in respect of this Infringement.

IV.2544. The OFT therefore concludes that contact took place between T Denman and Bodill. The OFT also concludes that Bodill supplied a figure to T Denman for a cover bid.

IV.2545. The OFT is satisfied that the facts set out in paragraphs IV.2526 to IV.2544 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁷⁸³ In particular:

- (a) the provision of a figure for a cover bid from Bodill to T Denman was not unilateral⁴⁷⁸⁴, and contravenes the principle against direct or indirect contact between competitors;⁴⁷⁸⁵
- (b) T Denman can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁷⁸⁶ and
- (c) Bodill can be presumed to have taken account of the information it received from T Denman (i.e. that T Denman did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁷⁸⁷

IV.2546. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and T Denman, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for trustwide fire improvements at various sites, Leicestershire and Rutland Healthcare NHS Trust, tender deadline 3 December 2001.

Immunity and leniency assessment

IV.2547. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁴⁷⁸¹ Response from Denman, OFT Document Reference 10865.

⁴⁷⁸² FAME report, OFT Document Reference 12528, page 13.

⁴⁷⁸³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁷⁸⁴ See paragraph IV.39 of the General section.

⁴⁷⁸⁵ See paragraph III.27 and III.36 of the Legal Background section.

⁴⁷⁸⁶ See paragraph III.43, III.44, and III.80 of the Legal Background section.

⁴⁷⁸⁷ See paragraph III.43, III.44, and III.80 of the Legal Background section.

IV.2548. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 87: Not included in the Decision

Infringement 88: Renal Dialysis Unit, City Hospital, Birmingham – 5 December 2001

Client: The City Hospital NHS Trust

Parties: Thomas Vale and Wygar

IV.2549. On 13 November 2001, The City Hospital NHS Trust ('City Hospital NHS'), now known as Sandwell and West Birmingham Hospitals NHS, sought tenders for refurbishment of existing Ward D14 to a Renal Dialysis Unit at City Hospital, Dudley Road, Birmingham. The following six companies were invited to tender: Shaylor, Wygar, Benson Midlands, Mansell, Arthur M Griffiths and Thomas Vale.⁴⁷⁸⁸ The deadline for the receipt of tenders was 12:00 noon on 5 December 2001.

IV.2550. City Hospital NHS received the following tender returns:⁴⁷⁸⁹

Company	Date tender received	Amount of tender	Awarded contract
Shaylor	5 December 2001	£489,290	
Wygar	5 December 2001	£437,181	Yes
Benson Midlands	5 December 2001	£437,615	
Mansell	5 December 2001	£503,319	
Arthur M Griffiths	5 December 2001	£514,224	
Thomas Vale	5 December 2001	£467,813	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.2551. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁴⁷⁹⁰

⁴⁷⁸⁸ Information from client, OFT Document Reference 9704.

⁴⁷⁸⁹ Information from client, OFT Document Reference 9704.

⁴⁷⁹⁰ Tender Status spreadsheet, OFT Document Reference 4522, page 22.

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T5001	B	City Hospital NHS Trust	Conversions to form Renal Dialysis Unit		CKT	B	05/12/2001 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
467,813		Mansell, Benson, Wygar, Shaylor	

IV.2552. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁴⁷⁹¹ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Wygar plus names and a telephone number.⁴⁷⁹²

Evidence from leniency applicant Thomas Vale

IV.2553. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and in particular, the use of the Tender Status spreadsheet, is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.2554. At Annex 14⁴⁷⁹³ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 43 of the schedule under Annex 14 and within the section for 2001 tenders is the following entry:⁴⁷⁹⁴

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5001	05 December	Shropshire CC	Conversions to form Renal Dialysis Unit	Taken (Wygar)	Yes (Tender Spreadsheet)

IV.2555. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

⁴⁷⁹¹ Interview transcript, OFT Document Reference 11418, page 21.

⁴⁷⁹² Contact list, OFT Document Reference 11086, page 27.

⁴⁷⁹³ Leniency application, OFT Document Reference 4568.

⁴⁷⁹⁴ Leniency application, OFT Document Reference 4568, page 43.

IV.2556. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁴⁷⁹⁵ and Wygar appears on this list.

IV.2557. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.2558. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.2559. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letter 'B', which appears in the column marked 'DIV', stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁴⁷⁹⁶ In interview, CKT referred to the entry in the Tender Status spreadsheet for this tender as follows: *'Yeah, CKT the estimator which is myself, category B tender cover, 5th of December 2001 the tender return date, Thomas Vale tender £467,813, Wygar in bold indicating a figure from Wygar'*.⁴⁷⁹⁷

Evidence from other companies – Wygar

IV.2560. The OFT wrote to Wygar on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wygar had participated in bid rigging on this tender. In response, Wygar stated in its letter to the OFT dated 25 April 2007 that it had given a cover price on this tender.⁴⁷⁹⁸ In addition, it stated *'We engaged in bid rigging activities (cover pricing) on this tender with Thomas Vale. Mr C Trickett'*.⁴⁷⁹⁹

IV.2561. The OFT subsequently wrote to Wygar's ultimate parent company at the time of this Infringement, Wygar Holdings, on 5 November 2007, asking it to comment on Wygar's response to the OFT's Fast Track Offer, given that the OFT intended to hold Wygar Holdings jointly and severally liable for any infringements committed by Wygar in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Wygar Holdings confirmed that it would *'support and adopt Wygar Construction Limited's acceptance of the reduction of penalty offer and that WHL does not intend to comment...or to make any submissions on this case at the present time'*.⁴⁸⁰⁰

IV.2562. In its response to the Statement, Wygar *'Wygar has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement'*.⁴⁸⁰¹

⁴⁷⁹⁵ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁴⁷⁹⁶ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁴⁷⁹⁷ Interview transcript, OFT Document Reference 13855, page 27.

⁴⁷⁹⁸ Response from Wygar, OFT Document Reference 10938.

⁴⁷⁹⁹ Response from Wygar, OFT Document Reference 10939, page 3.

⁴⁸⁰⁰ Response from Wygar Holdings, OFT Document Reference 14045.

⁴⁸⁰¹ Written representations of Wygar, 27 June 2008, paragraph 3.

The OFT's analysis of the evidence and finding

IV.2563. From the evidence presented above, the OFT draws the following conclusions.

IV.2564. Thomas Vale and Wygar each accepted an invitation to tender for the contract for the refurbishment of an existing ward to a Renal Dialysis Unit, City Hospital, Birmingham. It appears that Wygar completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Wygar being the lowest received and the fact that it won the contract.

IV.2565. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicates that a cover price was sought.

IV.2566. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records four competitors who were also invited to tender for this contract, namely Mansell, Benson, Wygar and Shaylor. Wygar is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is £467,813 which matches the amount recorded by the client City Hospital NHS.

IV.2567. City Hospital NHS also received a tendered amount of £437,181 from Wygar, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Wygar to Thomas Vale.

IV.2568. The OFT notes that although four competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Wygar. This indicates that a conscious decision was made to differentiate Wygar from the other three competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price and make contact with Wygar at the time. It also indicates that CKT himself made contact with Wygar.

IV.2569. Thomas Vale admitted that Wygar was one of the *'key competitors'* with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price was received from Wygar. CKT had an entry for Wygar in a contact book he used to telephone other contractors for the purpose of obtaining cover prices.

IV.2570. Both Parties have admitted to bid rigging in relation to this tender. Wygar admitted that the party with whom it engaged in bid rigging was Thomas Vale and named CKT as the relevant contact, without being shown the OFT's evidence that Thomas Vale and CKT were involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.2571. The OFT therefore concludes that contact took place between Thomas Vale and Wygar and that Wygar supplied a figure to Thomas Vale in order that it could submit a bid to the client that was not intended to win the contract.

IV.2572. The OFT is satisfied that the facts set out in paragraphs IV.2551 to IV.2571 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁸⁰² In particular:

- (a) the provision of a figure for a cover bid from Wygar to Thomas Vale was not unilateral⁴⁸⁰³, and contravenes the principle against direct or indirect contact between competitors;⁴⁸⁰⁴
- (b) Thomas Vale can be presumed to have taken account of the information received from Wygar (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁸⁰⁵ and
- (c) Wygar can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁸⁰⁶

IV.2573. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Wygar in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the refurbishment of an existing ward to a Renal Dialysis Unit, City Hospital, Birmingham, tender deadline 5 December 2001.

Immunity and leniency assessment

IV.2574. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2575. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 89: Extension to Offices, Meadow House, Bath Street, Mansfield –
11 December 2001**
Client: Nottinghamshire County Council
Parties: Herbert Baggaley, Thomas Fish and Mansell

IV.2576. On 9 November 2001, Nottinghamshire County Council sought tenders for the extension to offices at Meadow House, Bath Street, Mansfield.⁴⁸⁰⁷ The following four companies were invited to tender: Herbert Baggaley, Thomas Fish, Mansell

⁴⁸⁰² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁸⁰³ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁸⁰⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁸⁰⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁸⁰⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁸⁰⁷ Information from client, OFT Document Reference 9478.

and Wrights, the date and time of tender return was 11 December 2001 at 10:00 am.⁴⁸⁰⁸

IV.2577. Nottinghamshire County Council received the following tender returns:⁴⁸⁰⁹

Company	Date & time tender received	Amount of tender	Awarded contract
Herbert Baggaley	10 December 2001	£747,395	Yes
Thomas Fish	11 December 2001 by 10:00 am	£779,831	
Mansell	11 December 2001 by 10:00 am	£789,433	
Wright's	11 December 2001 by 10:00 am	£796,447	

Evidence of agreement and/or concerted practice

Contemporaneous Documentary Evidence from leniency applicant Herbert Baggaley – Invoices

IV.2578. During the OFT's search of Herbert Baggaley's premises an invoice was found. The invoice was received from Thomas Fish. The invoice was headed '*Thomas Fish and Sons Limited*' and was made out to '*Herbert Baggaley Construction*', dated '*26 June 2002*' with an invoice number of '*1/5302/11331/MWL*' and contained the following information:⁴⁸¹⁰

'For the attention of Roger Hayes

<i>MEADOW HOUSE, MANSFIELD</i>	<i>Goods</i>
<i>Supply of specialist pumping equipment</i>	<i>£2,500.00</i>
<i>Goods Total:</i>	<i>£2,500.00</i>
<i>VAT Total</i>	<i>£437.50 VAT at 17.5%</i>
<i>INVOICE TOTAL</i>	<i>£2,937.50'</i>

IV.2579. The invoice also shows a date stamp, '*11 Jul 2002*', next to which is written '*pd*'.

IV.2580. As part of its leniency application, Herbert Baggaley provided two invoices in respect of this tender. The first of these invoices is identical to the one described at paragraph IV.2578 above.⁴⁸¹¹ The second of these invoices was received from Mansell. The invoice was headed '*MANSELL*' and was made out to '*BAGGLEY CONSTRUCTION LTD*', dated '*30.06.2002*' and contained the following information:⁴⁸¹²

⁴⁸⁰⁸ Information from client, OFT Document Reference 9478.

⁴⁸⁰⁹ Information from client, OFT Document Reference 9478.

⁴⁸¹⁰ Invoice, OFT Document Reference 0346.

⁴⁸¹¹ Schedule of Potential Payments & Receipts, OFT Document Reference 3903, page 4.

⁴⁸¹² Schedule of Potential Payments & Receipts, OFT Document Reference 3903, page 3.

'MEADOW HOUSE, MANSFIELD

<i>CARRY OUT TEMPORARY EARTH WORK SUPPORT.</i>	<i>2,500.00</i>
	<i>GOODS TOTAL 2,500.00</i>
	<i>VAT TOTAL</i>
<i>437.50</i>	
	<i>INVOICE TOTAL £2,937.50</i>
	<i>PAYMENT DUE ON OR BEFORE 31.07.2002'</i>

IV.2581. The invoice also shows a date stamp, '5 Jul 2002', next to which is written 'pd 24/7'.

Contemporaneous Documentary Evidence from leniency applicant Thomas Fish – Invoice

IV.2582. As part of its leniency application, Thomas Fish provided an invoice in respect of this tender. The invoice was made out to 'Herbert Baggaley Construction', dated '26 June 2002' with an invoice number of '1/5302/11331/MWL' and contained the following information:⁴⁸¹³

'For the attention of Roger Hayes

<i>MEADOW HOUSE, MANSFIELD</i>	<i>Goods</i>
<i>Supply of specialist pumping equipment</i>	<i>£2,500.00</i>
<i>Goods Total:</i>	<i>£2,500.00</i>
<i>VAT Total</i>	<i>£437.50</i>
<i>VAT at 17.5%</i>	
<i>INVOICE TOTAL</i>	<i>£2,937.50'</i>

IV.2583. This invoice is identical to the invoice found at the premises of Herbert Baggaley, except that this copy is not headed 'Thomas Fish and Sons Limited' and the stamp is undated and reads 'GOODS £2500-00'.

Contemporaneous Documentary Evidence from leniency applicant Mansell – Account enquiry, Invoice and handwritten notes

IV.2584. During the OFT's search of Mansell's premises various documents were found relating to this tender. The first document is a 'Customer Account Enquiry' computer printout. The entry on this document states:⁴⁸¹⁴

⁴⁸¹³ Invoice, OFT Document Reference 3981, page 2.

⁴⁸¹⁴ Customer Account Enquiry, OFT Document Reference B0120.

'Customer Account Enquiry

<i>Customer</i>	<i>BAG 801</i>	<i>BAGGALEY CONSTRUCTION LTD</i>
<i>STERLING</i>		<i>BAUMS LANE</i>
<i>Telephone</i>		<i>MANSFIELD</i>
<i>Fax</i>		<i>NOTTS</i>
<i>Limit</i>		<i>NG18 2RA</i>
<i>Balance</i>	<i>0.00</i>	
<i>Debt ltr</i>		

Transactions from history file

<i>Our Ref</i>	<i>Date</i>	<i>Ext Ref</i>	<i>Type</i>	<i>Value</i>	<i>Discount</i>	<i>Due</i>	<i>Sta</i>
<i>E25329</i>	<i>30/06/02</i>		<i>Inv</i>	<i>2937.50</i>		<i>16/08/02</i>	<i>PD</i>
<i>BK117170</i>	<i>16/08/02</i>	<i>4741</i>	<i>Csh</i>	<i>2937.50-</i>		<i>16/08/02</i>	<i>PD</i>
	<i>Transaction Total</i>			<i>0.00</i>			<i>STER'</i>

IV.2585. The second document found was an invoice sent from Mansell to Herbert Baggaley. The invoice was headed '*MANSELL*' and was made out to '*BAGGALEY CONSTRUCTION LTD*', dated '*30.06.2002*' and contained the following information:⁴⁸¹⁵

'MEADOW HOUSE, MANSFIELD

<i>CARRY OUT TEMPORARY EARTH WORK SUPPORT.</i>	<i>2,500.00</i>	
	<i>GOODS TOTAL</i>	<i>2,500.00</i>
	<i>VAT TOTAL</i>	
<i>437.50</i>	<i>INVOICE TOTAL</i>	<i>£2,937.50</i>
	<i>PAYMENT DUE ON OR BEFORE</i>	<i>31.07.2002'</i>

IV.2586. This invoice is identical to the one supplied by Herbert Baggaley as part of its leniency application, apart from the fact that this version does not contain a date stamp but instead has two handwritten additions, '*TO CLI... MARK ENVELOPE F.A.O. ROGER HAYES 4/7/02*' and '*pd 14/8*'.

IV.2587. A handwritten note was also found at the premises of Mansell, relating to this tender. This handwritten note states:⁴⁸¹⁶

⁴⁸¹⁵ Invoice, OFT Document Reference B0121.

⁴⁸¹⁶ Handwritten note, OFT Document Reference B0122.

'3/7/02
From Andy Pownell

E25329

INVoice to:-

SALES LEDGER

Baggaley Construction Ltd
Baums Lane
Mansfield
Notts
NG18 2RA

BAG801

Re: Meadow House Mansfield.

Carry out Temporary Earth Work Support

£2500-00
+ VAT
(28 days)

P101 86 5820

Please send in envelope
Marked for the attention
Of Roger Hayes.

31/7/02

Copy of INV. To ANDY'

IV.2588. This handwritten note also contains a date stamp, 'RECEIVED 03 JUL 2002' and is signed.

IV.2589. Finally, another handwritten note was found at the premises of Mansell. This note was attached to a copy of the invoice headed 'Mansell', dated 30 June 2002, and stated:⁴⁸¹⁷

'-I cant find invoice

*SE 25329
Bagley Construction
Require further info
they don't know why we
have sent them an invoice
they don't recognise
Customer reference*

*Dave
Abrahart [...] [C]'*

IV.2590. As part of its leniency application, Mansell provided a document headed 'SUBCONTRACTOR PAYMENT CERTIFICATE' dated 14 August 2002, which has boxes containing the names and addresses of Herbert Baggaley and Mansell, and refers to 'MEADOW HOUSE MANSFIEL' with a 'Description of Work' being 'Measured Work', and shows 'Discount 2500.00' plus VAT with a total payable value of '2,937.50'. The certificate is date stamped, and although

⁴⁸¹⁷ Handwritten note, OFT Document Reference B0123.

not completely clear it appears to have originated from Herbert Baggaley and be for Mansell's attention.⁴⁸¹⁸ There are the following handwritten annotations on this document: 'SE25329' and 'BAG801'.

Evidence from leniency applicant – Herbert Baggaley

IV.2591. As part of its leniency application, Herbert Baggaley's legal representatives provided a general explanation of its participation in cover pricing.⁴⁸¹⁹ This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.2592. In addition, Herbert Baggaley also produced a 'SCHEDULE OF POTENTIAL PAYMENTS & RECEIPTS [AND] COPY INVOICES AS LISTED'. The schedule contained amongst others the following entries:⁴⁸²⁰

'Payments

<i>Doc. No.</i>	<i>Invoice</i>	<i>Date</i>	<i>Contractor</i>	<i>Amount</i>	<i>Contract No.</i>
1.2	SE25329	30.06.02	Mansell Construction Services Ltd	£2,500.00	12078
1.3	1/5302/11331/MWL	26.06.02	Thomas Fish & Sons Ltd	£2,500.00	12078

Comment

<i>Doc. No.</i>	<i>Job/Tender No.</i>	<i>Invoice</i>	<i>Comment (From recollection)</i>
1.2-1.3	12078-E01-147		HBC and two other contractors agreed to put £5,000 on to the costing. Each unsuccessful party would receive £2,500 to offset expenses from successful party.

IV.2593. A report prepared by Herbert Baggaley's legal representatives, sent on 18 January 2006, provided additional information with regard to 'Inter Contractor Invoicing'. Herbert Baggaley stated *'It is commonplace for Contractors to buy and sell goods and services to and from each other. In the period between January 2000 and November 2005, HBC [Herbert Baggaley Construction] estimates that there were approximately between 800 and 1,000 inter-Contractor invoices to which HBC was a party ...'*⁴⁸²¹

IV.2594. *'Each Invoice was investigated and an audit trail carried out to confirm it represented a genuine transaction. From these Invoices HBC has uncovered payments made or received for which there was no accompanying paper trail or internal stock or service records. Upon further investigation, a Schedule of Payments and Invoices was extracted which could constitute payments made in respect of covers given or received between 2000 and 2003...'*⁴⁸²²

⁴⁸¹⁸ Subcontractor Payment Certificate, OFT Document Reference B4119, page 6.

⁴⁸¹⁹ Leniency application, OFT Document Reference 3899.

⁴⁸²⁰ Schedule of Potential Payments & Receipts, OFT Document Reference 3903, page 2.

⁴⁸²¹ Leniency application, OFT Document Reference 3899, page 8.

⁴⁸²² Leniency application, OFT Document Reference 3899, page 8.

IV.2595. *'HBC has no evidence and, therefore, no certainty that any of its current employees has instigated any of the transactions reflected in these Invoices. The payment to it by third parties has been taken as a useful recompense for costs being incurred. Even in the provision of a cover, routine costs are incurred by HBC. On other occasions a job might initially be seen as of high interest but on review of the further details and job specifications might be discarded as of no interest and therefore worthy of a cover. If on such occasions costs had already been incurred and a third party had offered an estimator a payment to offset those, then such a payment had occasionally been accepted'*.⁴⁸²³

IV.2596. In respect of this particular tender, Herbert Baggaley's legal representatives stated: *'HBC confirms that these invoices are in respect of the Meadows House project. It had originally been a Mansfield Brewery building constructed by HBC. On Wolverhampton and Dudley Brewery's taking over Mansfield Brewery, the building was sold to Nottinghamshire County Council (NCC). The contract was for a "Shell and Core" Contract with NCC as the purchasing client. The value was in the region of £1 Million'*.⁴⁸²⁴

IV.2597. Herbert Baggaley also provided a list of *'Third Party Contractors'*. Herbert Baggaley stated that *'This list contains details of other Contractors with whom HBC has dealt in the use of cover pricing ... Given the lack of written records of individual covers, it is not always possible for HBC's estimators to say for certain as to which individual within another contract[or] dealt with that cover. However, the OFT is to take it that where a Contractor is listed as being party to a cover under the Schedule of Tenders, then the individual contact listed within Document 2 [3] is to be the person involved. Where there are more than one name given for a Contractor, then the first name is to be taken as the probable contact'*.⁴⁸²⁵ Within the *'List of Third Party Contractors'* are the following entries:⁴⁸²⁶

<i>Contractor</i>	<i>Contact</i>	<i>Telephone number</i>
<i>Thomas Fish & Sons</i>	<i>Pete Stone, Clive Simpson, Martin Lane, Ben Kewell, Martin Ledingham</i>	<i>[.....] [C]</i>
<i>Mansell</i>	<i>Ralph Sheppard, Richard Hough, Paul Winson, Ken Lockwood</i>	<i>[.....] [C]</i>
<i>Mansell</i>	<i>Robert Lowe</i>	<i>[.....] [C]</i>

Evidence from leniency applicant – Thomas Fish

IV.2598. As part of its leniency application, Thomas Fish produced a report headed, *'TENDER BIDDING INVOLVING THE EXCHANGING OF FEES'*. In relation to this tender Thomas Fish stated *'In early 2002 we agreed to accept a fee from Baggaley Construction in exchange for taking a cover on we think a project at Mansfield Brewery. The arrangement was made between Roger Hayes of*

⁴⁸²³ Leniency application, OFT Document Reference 3899, page 9.

⁴⁸²⁴ Leniency application, OFT Document Reference 3899, page 9.

⁴⁸²⁵ Leniency application, OFT Document Reference 3899, page 7.

⁴⁸²⁶ List of Third Party Contractors, OFT Document Reference 3897, pages 2 and 3.

Baggaley and Martin Lane and we sent an invoice to Baggaley for £2,500 + VAT on 26 June 2002.⁴⁸²⁷

Witness evidence from leniency applicant Herbert Baggaley

IV.2599. During an interview with the OFT on 2 November 2006, Anton Newell ('AN'), an estimator at Herbert Baggaley at the time of this tender, stated that he was not directly involved in this arrangement and when asked who was involved stated *'That would have been Rodger [sic] [Hayes] who was chief estimator at the time ... I would have been aware of it'*. AN explained that Roger Hayes would have sought approval from a director and thought that this would have been either Pat Cassidy or Ian Baggaley.⁴⁸²⁸

IV.2600. During an interview with the OFT on 13 February 2007, Roger Hayes ('RH'), Chief Estimator until he left Herbert Baggaley in October 2002, explained that he could not recall whether there had been a compensation payment: *'The only thing I can recall is we were not successful ...'*⁴⁸²⁹ When shown the invoices from Mansell and Thomas Fish, RH stated *'Yeah. The evidence is there and we didn't win the job so that cost Baggaley's £5,000'*.⁴⁸³⁰ When asked who he would have spoken to at Thomas Fish, RH stated *'... Martin Lane'* and at Mansell *'Ken Lockwood'*.⁴⁸³¹

Witness evidence from leniency applicant Thomas Fish

IV.2601. During an interview with the OFT on 8 May 2007, Martin Lane ('ML'), former Associate Director of Thomas Fish, stated *'I recall we didn't price it. We got some help from Baggaley's ... I can't remember pricing it. I know we got ... that was the one where we got this fee, isn't it?'*⁴⁸³² ML further stated *'I can remember it now. It was, Baggaley's built the brewery, and it was closed down or converted. Nottingham County Council, we did price it. Roger Hayes, I'm sure it was Roger Hayes that suggested a fee on that one ... they won the job'*.⁴⁸³³ ML was advised that Thomas Fish had admitted taking a cover and stated *'Yeah, we invoiced them for a pump'*.⁴⁸³⁴ ML explained *'We had a policy because Peter brought in, well, he didn't like the County Council so we didn't price County Council jobs at that time'*.⁴⁸³⁵

IV.2602. In respect of the process of invoicing Herbert Baggaley for payment, ML stated *'Well, on this occasion, what you'd do is I sorted out the fee, so I'd go to Chris Parker, who was then the accounts manager and say where do you want this money put in ... I think it went to Archer Exchange, bin 331. So, it was basically an invoice raised against Archer Exchange. It was a contract which I was doing anyway, and it just gets, you know, put in the paperwork there'*. When asked why the invoice had been made out in respect of a pump, ML stated *'I sat there on the phone and he said put it down as a pump. I said why? [Roger said]: Oh, I've been told to put it down as a pump. I said oh, okay then,*

⁴⁸²⁷ Leniency application, OFT Document Reference 3962, page 2.

⁴⁸²⁸ Interview transcript, OFT Document Reference 6372, page 15.

⁴⁸²⁹ Interview transcript, OFT Document Reference 13391, page 13.

⁴⁸³⁰ Interview transcript, OFT Document Reference 13391, page 13.

⁴⁸³¹ Interview transcript, OFT Document Reference 13391, page 13.

⁴⁸³² Interview transcript, OFT Document Reference 13315, page 20.

⁴⁸³³ Interview transcript, OFT Document Reference 13315, page 20.

⁴⁸³⁴ Interview transcript, OFT Document Reference 13315, page 20.

⁴⁸³⁵ Interview transcript, OFT Document Reference 13315, page 22.

fine. That's why it ended up as a pump ... I can only assume that ... I thought maybe it's sort of a bog, maybe its bad ground conditions, so a pump will get lost in it, you know'.⁴⁸³⁶ ML explained that the invoice number 11331 was his job.⁴⁸³⁷

IV.2603. ML stated that he would have gone to Peter [Woodhouse] for a decision as to whether to proceed with the arrangement.⁴⁸³⁸

Witness evidence from leniency applicant Mansell

IV.2604. During an interview with the OFT on 18 April 2007, Kenneth Lockwood ('KL'), who was Chief Estimator in the Nottingham office, on being shown the invoice referred to at paragraph IV.2580 above, stated '*I recognise that ... we were paid by Baggaley to back off that*'.⁴⁸³⁹ In respect of this tender KL stated '*... it were representative of probably at the time if we tried to go for that, the thing is the council Nottingham, that's county council isn't it ... we wouldn't have said no particularly to the county council because, at the time ... there was something, some ... projects coming up ... partnering type projects, I mean they were looking at it, early days of that. So we probably would have ... wanted to, sort of, stay in right with them but, I'm sure that will be representative of abortive work really*'.⁴⁸⁴⁰

IV.2605. When asked why the invoice was made out for carrying out temporary earth work supports, KL stated '*... you got to process an invoice, you've got to put it down for something to, to that company*'.⁴⁸⁴¹ In respect of who contacted him from Herbert Baggaley, KL stated '*... it would have been the chief estimator at that time*'.⁴⁸⁴²

The OFT's analysis of the evidence and finding

IV.2606. From the evidence presented above, the OFT draws the following conclusions.

IV.2607. Herbert Baggaley, Thomas Fish and Mansell each accepted an invitation to tender for this contract. All companies submitted a tender by 11 December 2001.

IV.2608. It appears that Herbert Baggaley completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Herbert Baggaley being the lowest received and the fact that it won the contract. Although RH's recollection of the tender was that it was a job which Herbert Baggaley lost, it is clear from the information provided by Herbert Baggaley and by the client that Herbert Baggaley did in fact win this job.

IV.2609. KL of Mansell stated that it was paid by Herbert Baggaley to '*back off*' from this contract, in return for a compensation payment of £2,500 exclusive of

⁴⁸³⁶ Interview transcript, OFT Document Reference 13315, page 21.

⁴⁸³⁷ Interview transcript, OFT Document Reference 13315, page 22.

⁴⁸³⁸ Interview transcript, OFT Document Reference 13315, pages 21 and 22.

⁴⁸³⁹ Interview transcript, OFT Document Reference 11511, page 26.

⁴⁸⁴⁰ Interview transcript, OFT Document Reference 11511, page 26.

⁴⁸⁴¹ Interview transcript, OFT Document Reference 11511, page 27.

⁴⁸⁴² Interview transcript, OFT Document Reference 11511, page 27.

VAT. KL advised that the contact at Herbert Baggaley would have been the Chief Estimator, who was RH at the time of this tender.

- IV.2610. Although the evidence of ML of Thomas Fish appears confused as to whether it priced this job, he recalled a cover price being taken from Herbert Baggaley in return for a payment of £2,500 exclusive of VAT, commenting that Thomas Fish had a policy of not pricing County Council projects at the time.
- IV.2611. Herbert Baggaley's schedule of potential payments, prepared as part of its leniency application, stated that all three parties, Herbert Baggaley, Thomas Fish and Mansell agreed to add a figure of £5,000 to their tender figures and that it was agreed that the successful tenderer would then pay compensation of £2,500 to each of the losing tenderers. However, Herbert Baggaley has not been able to provide any relevant witness or contemporaneous documentary information to explain the nature of the arrangement that resulted in it paying each of Mansell and Thomas Fish £2,500 plus VAT.
- IV.2612. Subsequently, on 26 June 2002, Thomas Fish raised an invoice for '*Supply of specialist pumping equipment*' for a total of £2,500.00 plus VAT, with an invoice total of £2,937.50. ML recalled that he sorted out the invoice, asking Chris Parker (then Accounts Manager at Thomas Fish) to raise an invoice in respect of a job on which ML was already working. ML stated that RH had suggested that the invoice be made out in respect of a pump. ML has confirmed that the invoice was raised against another job he was working on and is therefore false.
- IV.2613. On 30 June 2002, Mansell raised an invoice for '*CARRY OUT OF TEMPORARY EARTH WORK SUPPORT*' for a total of £2,500.00 plus VAT, with an invoice total of £2,937.50. From the information provided by Herbert Baggaley and Mansell, it appears that this too was a false invoice.
- IV.2614. According to the contemporaneous annotations on these invoices, it appears that both were subsequently paid, on 11 July 2002 and 24 July 2002 respectively.
- IV.2615. All three parties have confirmed that compensation payments were agreed upon, which resulted in each of Thomas Fish and Mansell raising false invoices and Herbert Baggaley paying each of Thomas Fish and Mansell pursuant to such invoices £2,500 exclusive of VAT, each. According to Thomas Fish's version of events, this fee was in return for Thomas Fish taking a cover price or at least putting in an uncompetitive tender.
- IV.2616. KL of Mansell stated that it was paid by Herbert Baggaley to '*back off*' from this contract, but Mansell argued in its response to the Statement that it did not take a cover price from Herbert Baggaley, and disputed that this conclusion could be drawn from KL's evidence.⁴⁸⁴³ Aside from KL's recollection of '*backing off*', there is no other evidence to suggest that Mansell submitted a cover price in respect of this tender and, in particular, Herbert Baggaley has no specific recollection of this tender.

⁴⁸⁴³ Written representations of Balfour Beatty Group, 27 June 2008, Annex 1, point 25 and Annex 8, point 4.

IV.2617. Having regard to the totality of the evidence, the OFT considers that compensation payments were made by Herbert Baggaley to each of Thomas Fish and Mansell, and that the payment to Thomas Fish was made as part of an arrangement for Thomas Fish to submit a cover bid. The OFT makes no finding as to whether Mansell submitted a cover price, although the evidence suggests that, given KL's recollection of 'backing off' and the agreement to make a compensation payment, Mansell did not submit a bid with the hope of winning the work.

IV.2618. The OFT has insufficient evidence on which to conclude whether Herbert Baggaley included the amount of the agreed compensation in its tender price or whether Thomas Fish and/or Mansell expressly agreed that Herbert Baggaley should do so. The OFT considers that it is not necessary to reach any finding as to whether the companies agreed to include the compensation sum in any Party's tender price, or in fact included such sum, in order to conclude that the arrangement amounted to an infringement.

IV.2619. The OFT therefore concludes that contact took place between Herbert Baggaley and Thomas Fish, and between Herbert Baggaley and Mansell, including the provision of a cover price by Herbert Baggaley to Thomas Fish. The OFT also concludes that Herbert Baggaley made compensation payments to both Thomas Fish and Mansell and that these payments were facilitated by the production of false invoices by Thomas Fish in respect of '*Supply of specialist pumping equipment*' and by Mansell in respect of '*CARRY OUT OF TEMPORARY EARTH WORK SUPPORT*'.

IV.2620. The OFT is satisfied that the facts set out in paragraphs IV.2578 to IV.2619 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁴⁸⁴⁴ In particular:

- (a) the provision of a cover price and compensation payment from Herbert Baggaley to Thomas Fish and the provision of a compensation payment from Herbert Baggaley to Mansell was not unilateral⁴⁸⁴⁵, and contravenes the principle against direct or indirect contact between competitors;⁴⁸⁴⁶
- (b) the bilateral agreements between Herbert Baggaley and each of Thomas Fish and Mansell that the successful tenderer would pay compensation to the unsuccessful tenderer of £2,500 exclusive of VAT had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁴⁸⁴⁷
- (c) Herbert Baggaley can be presumed to have taken account of the information it received from each of Thomas Fish and Mansell (i.e. the agreement to pay compensation, the agreed level of compensation, and that Thomas Fish did not intend to submit a competitive bid) when determining its own conduct in the tendering process;⁴⁸⁴⁸ and
- (d) Thomas Fish and Mansell can each be presumed to have taken account of the information they received from Herbert Baggaley (i.e. the agreement to pay compensation, the agreed level of compensation and,

⁴⁸⁴⁴ See paragraphs III.3 and III.89 to III.157 of the Legal Background section.

⁴⁸⁴⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁸⁴⁶ See paragraphs III.48 to III.51, III.93 to III.94, and III.139 to III.140 of the Legal Background section.

⁴⁸⁴⁷ See paragraphs III.150 to III.152 of the Legal Background section.

⁴⁸⁴⁸ See paragraphs III.58, III.142 and III.156 to III.157, and in relation to the cover price III.95 to III.96 and III.125 of the Legal Background section.

in the case of Thomas Fish, the cover price) when determining their own respective conduct in the tendering process.⁴⁸⁴⁹

IV.2621. Accordingly, the OFT therefore concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Herbert Baggaley and Thomas Fish, and between Herbert Baggaley and Mansell, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for extension to offices at Meadow House, Bath Street, Mansfield, tender deadline 11 December 2001.

Immunity and leniency assessment

IV.2622. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2623. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during a section 28 visit to Herbert Baggaley on 14 June 2005. Neither Thomas Fish nor Mansell will therefore receive 100 per cent immunity in respect of this tender. However, Thomas Fish and Mansell will each receive their normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.2624. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during a section 28 visit to Herbert Baggaley on 14 June 2005. Herbert Baggaley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Herbert Baggaley in respect of this Infringement.

IV.2625. In its response to the Statement, Fish Holdings submitted that, whilst Herbert Baggaley was the first Party to obtain a leniency marker in relation to this Infringement, it was Thomas Fish that provided the critical evidence enabling the OFT to meet the standard of proof. It argued that it should therefore enjoy a reduction in penalty sufficient to cancel out the increase in penalty that arises due to the Infringement being a compensation payment arrangement (see paragraph VI.167 below).⁴⁸⁵⁰

IV.2626. The OFT has applied immunity and leniency reductions in this case in line with its published guidance. Thomas Fish and Fish Holdings will receive a reduction in penalty, which has been calculated taking into account the stage at which it came forward, the evidence in the OFT's possession and the evidence provided by it. It should be noted that the award of any such reduction in penalty is within the OFT's discretion, taking into account these factors.⁴⁸⁵¹

IV.2627. The OFT has decided to set a higher starting point for its penalty calculation for Infringements involving compensation payments due to the seriousness of

⁴⁸⁴⁹ See paragraphs III.58, III.142 and III.156 to III.157, and in relation to the cover price III.95 to III.96 and III.125 of the Legal Background section.

⁴⁸⁵⁰ Written representations of Fish Holdings, 27 June 2008, paragraphs 19 to 23.

⁴⁸⁵¹ OFT *Guidance as to the appropriate amount of a penalty* (OFT423, December 2004), at paragraphs 3.13 to 3.15.

these offences. The OFT does not consider that the evidence provided by Thomas Fish detracts from the seriousness of the Infringement and, therefore, should not result in a lower starting point for the penalty calculation.

IV.2628. Fish Holdings has also submitted that its penalty in relation to this Infringement should not be uplifted as a result of the involvement of one of its Directors, Peter Woodhouse. Whilst Fish Holdings did not dispute that Peter Woodhouse had knowledge of cover pricing in the company, it argued that the OFT's conclusions in this respect were based entirely on evidence provided voluntarily by Thomas Fish.⁴⁸⁵² It therefore submitted that it should be granted a reduction in penalty for its cooperation sufficient to cancel out any uplift for director involvement. In this respect, it referred to a European Commission decision⁴⁸⁵³ involving a discount to an undertaking's fine for voluntarily providing information relating to the duration of the relevant infringement.

IV.2629. Other than in relation to infringements of which the OFT was previously unaware, it is not the OFT's policy to examine individually the facts or elements of an infringement that the evidence from a leniency applicant discloses. Rather, and as previously, noted, the level of reduction in penalty for Thomas Fish has been calculated having regard to the evidence in the OFT's possession and the evidence provided by Thomas Fish in the round.

Infringement 90: **Diabetes Centre, City Hospital, Dudley Road, Birmingham – 17 December 2001**
Client: **The City Hospital NHS Trust**
Parties: **Thomas Vale and Wygar**

IV.2630. On 13 November 2001, The City Hospital NHS Trust ('City Hospital NHS'), now known as Sandwell and West Birmingham Hospitals NHS, sought tenders for refurbishment to the Diabetes Centre, City Hospital, Dudley Road, Birmingham. The following six companies were invited to tender: Shaylor, Wygar, Chase Norton, William Weaver Ltd, Arthur M Griffiths and Thomas Vale.⁴⁸⁵⁴ The deadline for the receipt of tenders was 12:00 noon on 17 December 2001.

IV.2631. City Hospital NHS received the following tender returns:⁴⁸⁵⁵

⁴⁸⁵² Written representations of Fish Holdings, 27 June 2008, paragraph 25.

⁴⁸⁵³ Commission Decision in Case C.37.533 *Choline Chloride*, 9 December 2004 at paragraph 218 (OJ L190, 22 July 2005, page 22). The OFT notes that in this case the Commission awarded a discount in recognition of effective cooperation by the undertaking concerned *outside* the scope of the leniency programme.

⁴⁸⁵⁴ Information from client, OFT Document Reference 9702.

⁴⁸⁵⁵ Information from client, OFT Document Reference 9702.

Company	Time & Date tender received	Amount of tender	Awarded contract
Shaylor	17 December 2001 (time not recorded)	£373,337	
Wygar	17 December 2001 (time not recorded)	£318,714	
Chase Norton	17 December 2001 (time not recorded)	£329,543	
William Weaver Ltd	17 December 2001 (time not recorded)	£302,653	
Arthur M Griffiths	17 December 2001 (time not recorded)	£407,221	
Thomas Vale	17 December 2001 (time not recorded)	£347,918 ⁴⁸⁵⁶	

IV.2632. The work subject to this tender was not carried out due to a re-evaluation of the project by City Hospital NHS.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.2633. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁴⁸⁵⁷

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T5019	B	City Hospital NHS Trust	Diabetes Centre, Dudley Road, Birmingham		CKT	B	17/12/2001 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
347,918		Wygar,	

IV.2634. The Tender Status spreadsheet was maintained at Thomas Vale’s head office by Christopher Keith Trickett (‘CKT’), Chief Estimator at Thomas Vale, who kept a *‘little black book’*⁴⁸⁵⁸ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Wygar plus names and telephone number.⁴⁸⁵⁹

Evidence from leniency applicant Thomas Vale

IV.2635. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

⁴⁸⁵⁶ Incorrectly recorded as £341,918 in Information from client, OFT Document Reference 9702. Correct figure confirmed in file note of telephone conversation, OFT Document Reference 13258.

⁴⁸⁵⁷ Tender Status spreadsheet, OFT Document Reference 4522, page 23.

⁴⁸⁵⁸ Interview transcript, OFT Document Reference 11418, page 21.

⁴⁸⁵⁹ Contact list, OFT Document Reference 11086, page 27.

IV.2636. At Annex 14⁴⁸⁶⁰ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 37 of the schedule under Annex 14 and within the section for 2001 tenders is the following entry:⁴⁸⁶¹

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5019	17 December	City Hospital NHS Trust	Diabetes Centre, Dudley Road, Birmingham	Taken (Wyggar)	Yes (Tender Spreadsheet)

IV.2637. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.2638. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁴⁸⁶² and Wygar appears on this list.

IV.2639. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.2640. During interviews conducted in connection with its leniency application, Thomas Vale’s employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.2641. CKT admitted that the initials ‘*CKT*’, which appear in the estimator column for this tender, were his own and that the letter ‘*B*’, which appears in the column marked ‘*DIV*’, stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁴⁸⁶³ In interview, CKT referred to the entry in the Tender Status spreadsheet for this tender as follows: ‘*CKT myself the estimator, category B tender, 17th of December 2001 the tender return date, Thomas Vale figure £347,918... Wygar are in bold and that indicates they gave us a cover*’.⁴⁸⁶⁴

⁴⁸⁶⁰ Leniency application, OFT Document Reference 4568.

⁴⁸⁶¹ Leniency application, OFT Document Reference 4568, page 37.

⁴⁸⁶² Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁴⁸⁶³ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁴⁸⁶⁴ Interview transcript, OFT Document Reference 13855, page 27.

Evidence from other companies – Wygar

IV.2642. The OFT wrote to Wygar on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wygar had participated in bid rigging on this tender. In response, Wygar stated in its letter to the OFT dated 25 April 2007 that it had given a cover price on this tender.⁴⁸⁶⁵ In addition, it stated *'We engaged in bid rigging activities (cover pricing) on this tender with Thomas Vale. Mr C Trickett'*.⁴⁸⁶⁶

IV.2643. The OFT subsequently wrote to Wygar's ultimate parent company at the time of this Infringement, Wygar Holdings, on 5 November 2007, asking it to comment on Wygar's response to the OFT's Fast Track Offer, given that the OFT intended to hold Wygar Holdings jointly and severally liable for any infringements committed by Wygar in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Wygar Holdings confirmed that it would *'support and adopt Wygar Construction Limited's acceptance of the reduction of penalty offer and that WHL does not intend to comment...or to make any submissions on this case at the present time'*.⁴⁸⁶⁷

IV.2644. In their response to the Statement, Wygar stated *'Wygar has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement'*.⁴⁸⁶⁸

The OFT's analysis of the evidence and finding

IV.2645. From the evidence presented above, the OFT draws the following conclusions.

IV.2646. Thomas Vale and Wygar each accepted an invitation to tender for the contract for the refurbishment to the Diabetes Centre, City Hospital, Birmingham.

IV.2647. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicates that it sought a cover price.

IV.2648. Thomas Vale's contemporaneous Tender Status spreadsheet maintained in electronic format by Chief Estimator CKT, records Wygar as a competitor who was also invited to tender for this contract. Wygar is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged. Thomas Vale's bid to the client on the Tender Status spreadsheet is £347,918 which matches that recorded by the client City Hospital NHS.

IV.2649. City Hospital NHS also received a tendered amount of £318,714 from Wygar, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Wygar to Thomas Vale.

⁴⁸⁶⁵ Response from Wygar, OFT Document Reference 10938.

⁴⁸⁶⁶ Response from Wygar, OFT Document Reference 10939, page 4.

⁴⁸⁶⁷ Response from Wygar Holdings, OFT Document Reference 14045.

⁴⁸⁶⁸ Written representations of Wygar, 27 June 2008, paragraph 3.

IV.2650. The OFT notes that although only one competitor has been recorded on Thomas Vale's Tender Status spreadsheet, this one company is highlighted in bold, i.e. Wygar. The remainder of the entry for this tender, apart from the tender number (which is always in bold) is in normal font, which indicates that a conscious decision was made to highlight Wygar. In addition, the fact that the tender had been allocated to Building Division, for which CKT was the manager, means that it is likely that the entry in the Tender Status spreadsheet was accurate and that CKT had personal knowledge of the decision to receive a cover price from Wygar at the time.

IV.2651. Thomas Vale admitted that Wygar was one of the 'key competitors' with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price was received from Wygar. CKT had an entry for Wygar in a contact book he used to telephone other contractors for the purpose of obtaining cover prices.

IV.2652. Both parties have admitted to bid rigging in relation to this tender. Wygar admitted that the party with whom it engaged in bid rigging was Thomas Vale and named CKT as the relevant contact, without being shown the OFT's evidence that Thomas Vale and CKT were involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.2653. The OFT therefore concludes that contact took place between Thomas Vale and Wygar and that Wygar supplied a figure to Thomas Vale in order that it could submit a bid to the client that was not intended to win the contract.

IV.2654. The OFT is satisfied that the facts set out in paragraphs IV.2633 to IV.2653 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁸⁶⁹ In particular:

- (a) the provision of a figure for a cover bid from Wygar to Thomas Vale was not unilateral⁴⁸⁷⁰, and contravenes the principle against direct or indirect contact between competitors;⁴⁸⁷¹
- (b) Thomas Vale can be presumed to have taken account of the information received from Wygar (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁸⁷² and
- (c) Wygar can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁸⁷³

IV.2655. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Wygar in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the refurbishment to the Diabetes Centre, City Hospital, Birmingham, tender deadline 17 December 2001.

⁴⁸⁶⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁸⁷⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁸⁷¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁸⁷² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁸⁷³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.2656. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2657. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 91: Repairs to 13 Wimpey No-fines Houses, High Wycombe – 19 December 2001
Client: Wycombe District Council
Parties: Mansell and J J McGinley

IV.2658. On 26 November 2001, Wycombe District Council sought tenders for no-fines refurbishment, High Wycombe.⁴⁸⁷⁴ The following four companies were invited to tender: Connaught, DR Jones Ltd, J J McGinley and Mansell, the date and time of tender return was 19 December 2001 at 12:00 noon.⁴⁸⁷⁵

IV.2659. Wycombe District Council received the following tender returns:⁴⁸⁷⁶

Company	Date & Time tender received	Amount of tender	Awarded contract
DR Jones Ltd	19 December 2001 8:25 am	£683,828.00	YES ⁴⁸⁷⁷
Connaught	19 December 2001 10:30 am	£758,084.57	
Mansell	19 December 2001 10:30 am	£798,670.00	
J J McGinley	19 December 2001 10:35 am	£720,529.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.2660. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a Mansell managing estimator, workload reports. The 2001 workload report for special projects contained the following entry:⁴⁸⁷⁸

⁴⁸⁷⁴ Information from client, OFT Document Reference 10091.

⁴⁸⁷⁵ Information from client, OFT Document Reference 10091. The OFT notes that the date is incorrectly recorded on Wycombe District Council's schedule as 19 March 2002.

⁴⁸⁷⁶ Information from client, OFT Document Reference 10091.

⁴⁸⁷⁷ Information from client, OFT Document Reference 10091. The OFT notes that Wycombe District council negotiated with DR Jones Ltd to carry out the works on 8 No. Dwellings only.

⁴⁸⁷⁸ 2001 workload report for special projects, OFT Document Reference B3539, page 1.

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
72597	High Wycombe – Repairs to 13 Wimpey No-Fines House		798670	798670		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
					(JJ McGinley)

Evidence from leniency applicant Mansell

IV.2661. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁴⁸⁷⁹ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.2662. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from J J McGinley and that this cover price was taken due to *‘insufficient resource: occupied building’* at Mansell.⁴⁸⁸⁰

IV.2663. In its response to the Statement, Mansell did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Mansell

IV.2664. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell’s participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.2665. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *‘JJ McGinley would have given us a, a cover figure on that one’*.⁴⁸⁸¹

Evidence from other companies – J J McGinley

IV.2666. The OFT wrote to [.....] [C] on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that [.....] [C] had participated in bid rigging on this tender. The OFT received a response to this letter from the legal representatives of J J McGinley who in this letter stated that J J McGinley admitted *‘We engaged in cover pricing activities on this tender with Mansell’*.⁴⁸⁸²

⁴⁸⁷⁹ Leniency application, OFT Document Reference B0734.

⁴⁸⁸⁰ Leniency application, OFT Document Reference B1351, page 2.

⁴⁸⁸¹ Interview transcript, OFT Document Reference 11516, page 28.

⁴⁸⁸² Response from J J McGinley, OFT Document Reference 11019, page 2.

IV.2667. The OFT subsequently wrote to J J McGinley's ultimate parent company at the time of this Infringement, McGinley Holdings, on 6 November 2007, asking it to comment on J J McGinley's response to the OFT's Fast Track Offer, given that the OFT intended to hold McGinley Holdings jointly and severally liable for any infringements committed by J J McGinley in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, McGinley Holdings' legal representatives stated *'Our client is not able to respond to the admission of liability by JJM [J J McGinley] concerning events which took place as much as 6 years ago, as neither our client nor our firm has been able to review any of JJM's contract papers in question ...'*⁴⁸⁸³

IV.2668. In its response to the Statement, J J McGinley confirmed that *'it appears that [J J] McGinley engaged in cover pricing with Mansell'*⁴⁸⁸⁴ in respect of this Infringement. Although McGinley Holdings responded to the Statement, it did not make any specific comment with regard to this Infringement, other than to draw attention to *'factual matters'* which included that *'Mansell sought from JJM a cover price'* and *'Mansell submitted a cover price'*.⁴⁸⁸⁵

The OFT's analysis of the evidence and finding

IV.2669. From the evidence presented above, the OFT draws the following conclusions.

IV.2670. Mansell and J J McGinley each accepted an invitation to tender for this contract.

IV.2671. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.2672. Mansell's 2001 workload report records *'(JJ McGinley)'*, in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.2673. In addition, J J McGinley has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.2674. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that J J McGinley admitted that the party with whom it engaged in bid rigging was Mansell, without being shown the OFT's evidence that Mansell was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.2675. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by J J McGinley, the pattern consistent with a cover price having been provided.

IV.2676. The OFT therefore concludes that contact took place between Mansell and J J McGinley. The OFT also concludes that J J McGinley supplied a figure to Mansell for a cover bid.

⁴⁸⁸³ Response from McGinley Holdings, OFT Document Reference 14194.

⁴⁸⁸⁴ Written representations of J J McGinley, 27 June 2008, paragraph 7.

⁴⁸⁸⁵ Written representations of McGinley Holdings, 27 June 2008, paragraph 32.

IV.2677. The OFT is satisfied that the facts set out in paragraphs IV.2660 to IV.2676 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁸⁸⁶ In particular:

- (a) the provision of a figure for a cover bid from J J McGinley to Mansell was not unilateral⁴⁸⁸⁷, and contravenes the principle against direct or indirect contact between competitors;⁴⁸⁸⁸
- (b) Mansell can be presumed to have taken account of the information received from J J McGinley (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁸⁸⁹ and
- (c) J J McGinley can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁸⁹⁰

IV.2678. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and J J McGinley in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for no-fines refurbishment, High Wycombe, tender deadline 19 December 2001.

Immunity and leniency assessment

IV.2679. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2680. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 92: Not included in the Decision

Infringement 93: Waverley Street Clinic, Derby – 21 December 2001
Client: Derby City Primary Care Trust
Parties: Derwent Valley and Peter Baines

IV.2681. On 6 December 2001, Derby City Primary Care Trust sought tenders for the refurbishment of a health clinic premises at Waverley Street, Derby. The following four companies were invited to tender: Derwent Valley, Peter Baines,

⁴⁸⁸⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁸⁸⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁸⁸⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁸⁸⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁸⁹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Milward and Pride Building Limited. The deadline for the receipt of tenders was 21 December 2001.⁴⁸⁹¹

IV.2682. Derby City Primary Care Trust received the following tender returns:⁴⁸⁹²

Company	Date and time tender received*	Amount of tender	Awarded contract
Milward	21 December 2001 2:33pm to 2:43pm	£117,131.98 + VAT	Yes
Peter Baines	21 December 2001 2:33pm to 2:43pm	£129,238.00 + VAT	
Pride Building Limited	21 December 2001 2:33pm to 2:43pm	£135,258.00 + VAT	
Derwent Valley	21 December 2001 2:33pm to 2:43pm	£142,131.00 + VAT	
* Envelopes were not stamped so times refer to when the envelopes containing the bids were opened.			

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.2683. During the OFT's search of Derwent Valley's premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁴⁸⁹³

TENDER NO.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	
01/12/01	21/12/01	EXTENSION & ALTERATIONS TO WAVERLEY STREET CLINIC, DERBY FOR CENTRAL DERBY PRIMARY CARE TRUST	Baines Pride Milward	142,131	Cover from Baines

Evidence from leniency applicant Derwent Valley

IV.2684. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.2685. In its leniency application, Derwent Valley set out a summary of all tenders from April 2000 to July 2004 where Derwent Valley had taken a cover price from a competitor for that tender, marked as 'DVC2 List of Covers Taken'. The information in the summary was based on the tender book kept by the Pat Tunnicliffe ('PT'), an ex-estimator for Derwent Valley, and contained the following extract:⁴⁸⁹⁴

⁴⁸⁹¹ Information from client, OFT Document Reference 7604.

⁴⁸⁹² Information from client, OFT Document Reference 7604.

⁴⁸⁹³ Tender schedule, OFT Document Reference 1912, page 29.

⁴⁸⁹⁴ Summary of tenders, OFT Document Reference 3941.

Date	Contract	Company Involved
December 2001	Extension to Waverley Street Clinic	Peter Baines Ltd

IV.2686. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Peter Baines Ltd'* appears on this list with the address *'Wood Lane Derby'*.⁴⁸⁹⁵

IV.2687. In its response to the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.2688. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.2689. In regard to this tender, a voluntary interview was conducted with PT. PT confirmed that he kept and maintained the tender schedule referred to in paragraphs IV.309 and IV.317 above. In regard to this contract PT said that he could not recall it, but as it was a Health Board job and an alteration it was likely that David Stone ('DS'), Managing Director of Derwent Valley, had priced it. PT confirmed it was his handwriting in the schedule and when he was questioned as to whether the entry in the schedule, *'Cover from Baines'*, meant that this was a cover price from Peter Baines, PT referred to the tender schedule in respect of this tender and responded *'That's right, that's what it looks like there'*. PT went on to say that he would have completed that entry at the time of the tender.⁴⁸⁹⁶

IV.2690. DS was also interviewed in regard to this tender. Although he could not recall dealing with it, he identified the handwriting on the schedule as being PT's. When DS was asked whether Derwent Valley took a cover price, DS referred to the entry of *'Cover from Baines'* and responded, *'To me, it looks like it, yeah'*.⁴⁸⁹⁷

Evidence from other companies – Peter Baines

IV.2691. The OFT wrote to Peter Baines on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Peter Baines had participated in bid rigging on this tender. Peter Baines replied to this letter on 24 April 2007 and enclosed a completed schedule of suspect tenders signed by Stephen Baines, Managing Director. In respect of this tender Peter Baines stated *'We engaged in bid rigging activities on this tender but cannot recall details of the other party involved'*.⁴⁸⁹⁸ Peter Baines stated in its covering letter that it had a lack of records and had had several changes of

⁴⁸⁹⁵ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 2.

⁴⁸⁹⁶ Interview transcript, OFT Document Reference 14237, pages 12 and 13.

⁴⁸⁹⁷ Interview transcript, OFT Document Reference 13478, page 15.

⁴⁸⁹⁸ Response from Peter Baines, OFT Document Reference 10758, page 3.

personnel and could therefore '*neither prove nor disprove*' its involvement in cover pricing.⁴⁸⁹⁹

IV.2692. In its response to the Statement, Peter Baines did not make any representations specifically in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.2693. From the evidence presented above, the OFT draws the following conclusions.

IV.2694. Derwent Valley and Peter Baines each accepted an invitation to tender for this contract. Derwent Valley was unable to submit a tender by the return date and/or did not want to win this tender.

IV.2695. Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Peter Baines with the words '*Cover from*' preceding it. Derwent Valley confirmed that this refers to a cover price having been received. The figure in the schedule for this tender of '*142,131*' directly corresponds to the figure of £142,131 that Derwent Valley submitted as its bid for the tender.

IV.2696. PT, the estimator for this tender, said that he did not recall the tender but that it was his entry in the schedule and it meant that Derwent Valley had received a cover price from Peter Baines.

IV.2697. This was corroborated in interview by DS, who agreed that the entry in the tender schedule showed that Derwent Valley received a cover price in respect of this tender from Peter Baines.

IV.2698. Peter Baines has admitted engaging in bid rigging activity in respect of this tender. Although it cannot recall the identity of the party with whom it engaged in bid rigging, the OFT notes that Peter Baines was not the successful party for this tender and that it stated that it did not have any records of unsuccessful tenders.

IV.2699. Derwent Valley also included Peter Baines in its list of companies who exchange cover prices.

IV.2700. In addition, the OFT notes that Derbyshire County Council received a tendered amount of £142,131 from Derwent Valley, which is higher than the amount tendered by Peter Baines. This fits into the pattern consistent with a cover price having been given to Derwent Valley from Peter Baines.

IV.2701. The OFT therefore concludes that contact took place between Derwent Valley and Peter Baines. The OFT also concludes that Peter Baines supplied a figure to Derwent Valley for a cover bid.

IV.2702. The OFT is satisfied that the facts set out in paragraphs IV.2683 to IV.2701 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁹⁰⁰ In particular:

⁴⁸⁹⁹ Response from Peter Baines, OFT Document Reference 10757.

⁴⁹⁰⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from Peter Baines to Derwent Valley was not unilateral⁴⁹⁰¹, and contravenes the principle against direct or indirect contact between competitors;⁴⁹⁰²
- (b) Derwent Valley can be presumed to have taken account of the information received from Peter Baines (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁹⁰³ and
- (c) Peter Baines can be presumed to have taken account of the information it received from Derwent Valley (i.e. that Derwent Valley did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁴⁹⁰⁴

IV.2703. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Peter Baines, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Waverley Street Clinic, Derby, tender deadline 21 December 2001.

Immunity and leniency assessment

IV.2704. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2705. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

Infringement 94: Proposed Club Fandango, Morley, Leeds – 23 January 2002
Client: JF Hinchcliffe & Partners
Parties: Irwins and C J Ellmore

IV.2706. On 2 January 2002, JF Hinchcliffe & Partners sought tenders for a proposed Club Fandango, Morley, Leeds.⁴⁹⁰⁵ The following three companies were invited to tender: Jack Lunn, Irwins, C J Ellmore.⁴⁹⁰⁶ The deadline for receipt of tenders was 12:00 noon on 23 January 2002.⁴⁹⁰⁷

IV.2707. JF Hinchcliffe & Partners received the following tender returns.⁴⁹⁰⁸

⁴⁹⁰¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁹⁰² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁹⁰³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁹⁰⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁹⁰⁵ Information from client, OFT Document Reference 8005.

⁴⁹⁰⁶ Information from client, OFT Document Reference 8005.

⁴⁹⁰⁷ Information from client, OFT Document Reference 8005.

⁴⁹⁰⁸ Information from client, OFT Document Reference 8005.

Company	Time & Date tender received	Amount of tender	Awarded contract
Jack Lunn	12:00 noon on 23 January 2002	£425,620	
Irwins	12:00 noon on 23 January 2002	£414,769	
C J Ellmore	12:00 noon on 23 January 2002	£393,298	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register

IV.2708. During the OFT's search of Irwins' premises a Tender Register was found. The Tender Register contained the following entries in respect of this tender:⁴⁹⁰⁹

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered
0102002 3 Jan 676	Proposed Club Fandango Morley	Jackie Barlow & Partners J.F Hinchliffe & Partners Rawdon	P & S C	414769

Date tender Due	Estimator	Competition
Wednesday 23 January	IPN	Ellmore

Evidence from leniency applicant – Irwins

IV.2709. As part of its leniency application, Irwins' legal representatives provided a general explanation of its participation in cover pricing.⁴⁹¹⁰ This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.2710. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for '*Covers Taken*' and '*Covers Given*', which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson ('IPN'), Estimating Director at Irwins, into potential cover prices. At number 62 of the '*Covers Taken*' schedule is the following entry:⁴⁹¹¹

⁴⁹⁰⁹ Tender Register, OFT Document Reference A0339, page 38.

⁴⁹¹⁰ Leniency application, OFT Document Reference A0714.

⁴⁹¹¹ Leniency application, OFT Document Reference A0718, page 6.

	Year	Tender Ref	Description	Client	Date	Value	Cover From
62		0102004	Club Fandango Morley	Jackie Barlow & Partners	25.01.02	414769	Ellmore

Individual Contact	Notes
Steve Ellmore	

IV.2711. C J Ellmore stated in its response to the Statement that the *'Covers Taken'* table was not drawn up at the time the tenders were made, but that it was prepared by Irwins *'from an investigation which started after the search by the OFT of Irwins' premises'*.⁴⁹¹² As indicated in paragraph IV.413 above, the *'Covers Taken'* table was compiled from Irwins' records, and witness evidence provides an explanation of its contents. The table provides evidence of Irwins' position as to its engagement in cover pricing on this tender, and as such constitutes additional evidence to the available contemporaneous records and witness evidence.

IV.2712. Irwins also provided to the OFT a schedule listing its competitors' contact details.⁴⁹¹³ The name of *'Ellmore Construction'* appears on the list and *'Steve Ellmore'*, Managing Director⁴⁹¹⁴ is named as the contact with a telephone number of [...] [C].⁴⁹¹⁵

IV.2713. Irwins further provided to the OFT its tender return letter for this contract.⁴⁹¹⁶ The letter states that it was for 99/01 Fandango's, 4 Brunswick Street, Morley. The letter was signed on 23 January 2002 and the figure Irwins submitted was £414,769.

IV.2714. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Irwins

IV.2715. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins' leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.2716. Also during this interview, IPN was shown the *'Tender Register'*⁴⁹¹⁷ and, in particular, the reference to the entry for the proposed Fandango Club, Morley, Leeds and was asked if he could recall anything about that contract. IPN replied *'I took a cover on that ... Ellmore's was in for it ...'*⁴⁹¹⁸ IPN confirmed that the

⁴⁹¹² Written representations of C J Ellmore, 26 June 2008, paragraph 42.

⁴⁹¹³ Leniency application, OFT Document Reference A0715, page 3.

⁴⁹¹⁴ Interview transcript, OFT Document Reference 11255, page 3.

⁴⁹¹⁵ Leniency application, OFT Document Reference A0715, page 3.

⁴⁹¹⁶ Leniency application, OFT Document Reference A0791.

⁴⁹¹⁷ Tender Register, OFT Document Reference A0339, page 38.

⁴⁹¹⁸ Interview transcript, OFT Document Reference 11255, page 4.

presence of a 'C' in the fourth column on the tender register shows that Irwins took a cover in relation to that contract.⁴⁹¹⁹ IPN also confirmed that the presence of the handwritten entry 'Ellmore' in the final column on the Tender Register shows that Irwins took a cover from C J Ellmore.⁴⁹²⁰

Evidence from other companies – C J Ellmore

IV.2717. The OFT wrote to C J Ellmore on 23 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that C J Ellmore had participated in bid rigging on this tender. The OFT received an email from Rupert Nevin of Keeble Hawson, representing C J Ellmore on 4 May 2007 stating '*... we are not in a position to advise our client...without disclosure*'.⁴⁹²¹ The OFT notes C J Ellmore's rejection of the OFT's Fast Track Offer.

IV.2718. C J Ellmore stated in their written response to the Statement in respect of this Infringement that '*...It is CJ Ellmore's case that no cover was given or offered*'.⁴⁹²² CJ Ellmore provided a witness statement from its Managing Director, Stephen Ellmore ('SE'), which stated that '*I am aware that Ellmores has been approached to give cover prices on occasions in the past and that cover pricing has gone on in some form within the industry. It is Ellmores' policy however not to give or receive cover prices or engage in any other anti-competitive behaviour. This policy was first put in writing in March 2005 but it has always been Ellmores' policy to comply with the law in all respects*'.⁴⁹²³ The OFT considers that the evidence of CJ Ellmore's company policy regarding cover pricing, which was not in writing at the time of this tender, does not serve to establish that cover pricing did not take place in relation to this tender, in breach of that policy.

IV.2719. The witness statement further stated that SE was the estimator responsible for CJ Ellmore's tender for the proposed Club Fandango contract. SE stated '*I know that, in terms of this contract and generally, Ellmores did not provide a cover to Irwins, or at all*'.⁴⁹²⁴

IV.2720. They further stated that '*...it [the entry in the Tender Register] would be equally consistent with... Irwins having received information from other sources about the amount of money that C J Ellmore was due to tender at*'.⁴⁹²⁵ In its response to the Statement, C J Ellmore asked the OFT to consider the possibility that a contractor (A) bidding for a contract could have provided a subcontractor with its full bid price, perfectly legitimately, and for that subcontractor to inform another contractor (B) bidding for the same contract of the full bid price of contractor (A).⁴⁹²⁶ The OFT does not consider this theoretical alternative explanation provided by C J Ellmore to be at all plausible. There is no evidence that Irwins obtained a cover price via a subcontractor for

⁴⁹¹⁹ Interview transcript, OFT Document Reference 11255, page 5.

⁴⁹²⁰ Interview transcript, OFT Document Reference 11255, page 5.

⁴⁹²¹ Response from C J Ellmore, OFT Document Reference 10952, page 1.

⁴⁹²² Written representations of C J Ellmore, 26 June 2008, paragraph 45.

⁴⁹²³ Witness statement of Stephen Ellmore, 26 June 2008, paragraph 10.

⁴⁹²⁴ Witness statement of Stephen Ellmore, 26 June 2008, paragraph 14.

⁴⁹²⁵ Written representations of C J Ellmore, 26 June 2008, paragraph 53.

⁴⁹²⁶ Oral representations of C J Ellmore, 16 July 2008, page 5.

this Infringement, but there is evidence from Irwins that it obtained the cover price direct from C J Ellmore.

IV.2721. The OFT notes the direct contradiction between the evidence of IPN, who recalls taking a cover price from C J Ellmore and the evidence of SE, who denies providing a cover price. Both individuals were directly involved in estimating for this tender. The OFT notes that IPN's evidence is consistent with the markings on the contemporaneous tender register. Moreover, the accuracy of entries in Irwin's Tender Register, and the accompanying witness evidence of IPN, has also been confirmed by other Parties' admissions of cover pricing in relation to Infringements 62, 157 and 165. In light of those factors, the OFT considers, that, on balance, the evidence of IPN should be preferred to that of SE.

The OFT's analysis of the evidence and finding

IV.2722. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.2723. Irwins and C J Ellmore each accepted an invitation to tender for the contract for a proposed Club Fandango, Morley, Leeds. Irwins was unable to submit a tender by the return date and/or did not want to win this contract.

IV.2724. C J Ellmore appears to have completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work, since its price was the lowest received and it came first in the tender process.

IV.2725. Irwins' Tender Register records '*Ellmore*' handwritten in the final column. IPN confirmed that he received a cover price from C J Ellmore. Also '*C*' is handwritten in the type of work/ percentage difference column. IPN confirmed that '*C*' in this column shows that Irwins sought a cover price in relation to this contract.

IV.2726. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN's admission and explanation of the contemporaneous evidence, that C J Ellmore supplied Irwins with a cover price for this tender.

IV.2727. The OFT further notes that the tender submitted by Irwins was higher than the tender submitted by C J Ellmore, the pattern consistent with a cover price having been provided.

IV.2728. In addition the OFT notes that C J Ellmore's tender figure is the only figure below Irwin's tender figure, and so the OFT is satisfied that Irwins could only have received a cover figure from C J Ellmore.

IV.2729. The OFT therefore concludes that contact took place between Irwins and C J Ellmore. The OFT also concludes that C J Ellmore supplied a figure to Irwins for a cover bid.

IV.2730. The OFT is satisfied that the facts set out in paragraphs IV.2708 to IV.2729 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁹²⁷ In particular:

- (a) the provision of a figure for a cover bid from C J Ellmore to Irwins was not unilateral⁴⁹²⁸, and contravenes the principle against direct or indirect contact between competitors;⁴⁹²⁹
- (b) Irwins can be presumed to have taken account of the information received from C J Ellmore (i.e the cover price) when determining its own conduct in the tendering process;⁴⁹³⁰ and
- (c) C J Ellmore can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁹³¹

IV.2731. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and C J Ellmore, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Club Fandango, Morley, Leeds, tender deadline 23 January 2002.

Immunity and leniency assessment

IV.2732. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2733. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 to Irwins on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this Infringement.

Infringement 95: Five No. Health Centres, Primary Care Trust (East), East Midlands – 4 February 2002

Client: Leicester & Rutland NHS Trust

Parties: J H Hallam and B & A

IV.2734. On 4 January 2002, Leicester & Rutland NHS Trust sought tenders for the refurbishment of various Health Centres within the City East PCT. The return date for the tender was 12:00 noon on 4 February 2002 and four companies were invited to tender: J H Hallam, D W Hicks Ltd, B & A and Thorndyke.⁴⁹³²

⁴⁹²⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁹²⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁹²⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁹³⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁹³¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁹³² Information from client, OFT Document Reference 8584.

IV.2735. Leicester & Rutland NHS Trust received the following tender returns on 4 February 2002:⁴⁹³³

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
J H Hallam	4 February 2002	10:55	£250,968	
D.W. Hicks Ltd	4 February 2002	12:00	£112,000	
B & A	4 February 2002	11:00	£267,839	
Thorndyke	4 February 2002	09:05	£139,129	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant J H Hallam – Diary Entries

IV.2736. During the OFT’s search of J H Hallam’s premises, diaries used by Steve Gill (‘SG’), an estimator at J H Hallam, were recovered. On the diary page for 4 February 2002, the following entries have been made, all of which are handwritten:⁴⁹³⁴

*‘Tenders due - (1) PCT East . – Hallam £250 968
B & A £267 839 ✓’*

Evidence from leniency applicant J H Hallam

IV.2737. As part of its leniency application, J H Hallam provided a general explanation of its participation in cover pricing.⁴⁹³⁵ This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.2738. To further assist the OFT enquiry, J H Hallam provided a detailed interpretation of the annotations made in SG’s diary for the 4 February 2002.⁴⁹³⁶ Specifically identifying this as Contract Reference No E 393, the document shows *‘cover to B & A’*.⁴⁹³⁷

IV.2739. As part of its leniency application, J H Hallam also provided to the OFT a schedule entitled *‘Projects involving cover pricing March 2000 – June 2005’*. Examination of the entry relevant to this tender, confirms J H Hallam gave a cover price to B & A of £267,839.⁴⁹³⁸

IV.2740. In its response to the Statement, J H Hallam stated *‘JH Hallam does not contest the OFT’s findings of infringement.’*⁴⁹³⁹

Witness evidence from leniency applicant J H Hallam

IV.2741. During interviews conducted in connection with its leniency application, J H Hallam’s employees provided further general explanation of its participation in

⁴⁹³³ Information from client, OFT Document Reference 8584.

⁴⁹³⁴ 2002 Diary, OFT Document Reference 2920, page 27.

⁴⁹³⁵ Leniency application, OFT Document Reference 4969.

⁴⁹³⁶ Leniency application, OFT Document Reference 5056.

⁴⁹³⁷ Leniency application, OFT Document Reference 5056.

⁴⁹³⁸ Leniency application, OFT Document Reference 4977, page 8.

⁴⁹³⁹ Written representations of J H Hallam, 27 June 2008, paragraph 73.

cover pricing. This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.2742. Additional evidence in relation to this tender comes from the interview of SG⁴⁹⁴⁰, the estimator allocated to this tender. His response to questions concerning his diary entries for the 4 February 2002 relating to this tender were as follows:⁴⁹⁴¹

Q. *'.....Now on this one I will show you document 2920 which is again a highlighted area.*

A. *Yes*

Q. *And does that indicate a cover, you gave cover to B & A?*

A. *It does'*

Evidence from other companies – B & A

IV.2743. The OFT wrote to B & A on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that B & A had participated in bid rigging on this tender. B & A did not respond to this letter and on 8 May 2007 confirmed in a telephone conversation with the OFT that it was rejecting the OFT's Fast Track Offer.⁴⁹⁴²

IV.2744. However, in its response to the Statement, B & A stated that as the individual estimators involved had left the company in 2007, are now not contactable, and B & A does not have records in respect of this tender that *'...B & A has no means of challenging the evidence now presented by the OFT in support of the allegations in relation to cover pricing, and therefore admits liability for the cover pricing infringements alleged by the OFT'*.⁴⁹⁴³

The OFT's analysis of the evidence and finding

IV.2745. From the evidence presented above, the OFT draws the following conclusions.

IV.2746. J H Hallam and B & A each accepted an invitation to tender for this contract.

IV.2747. J H Hallam completed the estimating process for the tender for this contract, and appears to have submitted a bid with the intention of winning the work.

IV.2748. B & A was unable to submit a tender by the return date and/or did not want to win this contract.

IV.2749. In regard to B & A, J H Hallam has confirmed that SG's diary entry '*B & A £267 839*' shows that it gave the company in question a cover price. This

⁴⁹⁴⁰ Interview transcript, OFT Document Reference 12755.

⁴⁹⁴¹ Interview transcript, OFT Document Reference 12755, page 11.

⁴⁹⁴² File note of telephone conversation, OFT Document Reference 10227.

⁴⁹⁴³ Written representations of B & A, 27 June 2008, paragraphs 4 to 6.

figure is identical to the tender figure received by the client, Leicester & Rutland NHS Trust, on the tender return date.⁴⁹⁴⁴

IV.2750. Both B & A and J H Hallam have admitted liability for engaging in cover pricing in respect of this tender.

IV.2751. The OFT notes in addition that the tender submitted by B & A was higher than the tender submitted by J H Hallam, a pattern consistent with a cover price having been provided.

IV.2752. The OFT therefore concludes that contact took place between B & A and J H Hallam. The OFT also concludes that J H Hallam supplied a figure to B & A for a cover bid.

IV.2753. The OFT is satisfied that the facts set out in paragraphs IV.2736 to IV.2752 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁹⁴⁵ In particular:

- (a) the provision of a figure for a cover bid from J H Hallam to B & A was not unilateral⁴⁹⁴⁶, and contravenes the principle against direct or indirect contact between competitors;⁴⁹⁴⁷
- (b) B & A can be presumed to have taken account of the information received from J H Hallam (i.e. the cover price) when determining its own conduct in the tendering process;⁴⁹⁴⁸ and
- (c) J H Hallam can be presumed to have taken account of the information it received from B & A (i.e. that B & A did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁹⁴⁹

IV.2754. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between B & A and J H Hallam, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment of Five No. Health Centres within the Primary Care Trust (East), Leicester & Rutland NHS Trust, date of tender 4 February 2002.

Immunity and leniency assessment

IV.2755. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2756. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to J H Hallam on 6 July 2005. J H Hallam will not therefore receive 100 per cent

⁴⁹⁴⁴ Information from client, OFT Document Reference 8584.

⁴⁹⁴⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁹⁴⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁹⁴⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁹⁴⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁹⁴⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

immunity in respect of this tender. However, J H Hallam will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 96: Sir John Moore Primary School, Appleby Magna, Derbyshire – 7 February 2002
Client: Sir John Moore Foundation
Parties: J H Hallam and Linford

IV.2757. On 18 December 2001, the Sir John Moore Foundation sought tenders for refurbishment, adaptations, and internal and external repairs to the main and sundry buildings of Sir John Moore Primary School. The return date for the tender was 12:00 noon on 7 February 2002 and six companies were invited to tender: J H Hallam, William Sapcote, Wildgoose, Linford, Thomas Fish, and Crane.⁴⁹⁵⁰

IV.2758. The Sir John Moore Foundation received the following tender returns on 7 February 2002.⁴⁹⁵¹

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
J H Hallam	7 February 2002	Unknown	£1,464,860	
William Sapcote	7 February 2002	Unknown	£1,356,140	
Wildgoose	7 February 2002	Unknown	£1,658,854	
Linford	7 February 2002	Unknown	£1,234,178	Yes
Thomas Fish	7 February 2002	Unknown	£1,782,470	
Crane	Withdrew	Not Applicable	Not Applicable	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant J H Hallam – Original Documents

Estimating Report for 20 February 2002 board meeting

IV.2759. During the OFT’s search of J H Hallam’s premises Richard Blount’s (‘RB’) Estimating Report for a board meeting on 20 February 2002 was recovered.⁴⁹⁵² The following typed entry was recorded in relation to the Sir John Moore Primary School:

<i>E Nr</i>	<i>Project</i>	<i>Client</i>	<i>Type</i>	<i>Tender</i>	<i>Mar</i>	<i>Res.</i>	<i>Comment</i>
						%	
887	Sir John Moore The Trustee Primary School refurb G1	P&S	1,464,820		C'		

IV.2760. Linford stated in its response to the Statement in respect of this document that ‘...[i]t is not clear what “C” means from the face of the document and nor

⁴⁹⁵⁰ Information from client, OFT Document Reference 9784.

⁴⁹⁵¹ Information from client, OFT Document Reference 9784.

⁴⁹⁵² Estimating Report, OFT Document Reference 2653.

from any explanation offered by J H Hallam...'.⁴⁹⁵³ The OFT does not accept this assertion. RB clearly confirmed in interview the meaning of 'C' in the monthly board reports, as stated in paragraph IV.422 above.

IV.2761. Linford also argued that *'...[t]here is no mention in this document of Linford at all, whether as being the provider or recipient of a cover price'.⁴⁹⁵⁴ The OFT accepts this. Indeed, RB explained in interview that he did not usually record the identity of companies from whom J H Hallam had taken a cover price in this document (see paragraph IV.422 above). However, the OFT does not rely on this document in isolation, but rather considers it alongside other contemporaneous documentation which does refer to Linford (see below). The OFT considers that this other documentation can supply both corroboration for, and an explanation of, the 'C' indicated in this document.*

IV.2762. Finally, Linford suggested that *'...there is no guarantee that [this document] has not been adjusted retrospectively or created by Linford [sic. presumably J H Hallam] a self serving leniency application, in relation to its leniency application. The Estimating Report makes no reference to when it was created or last updated, which indicates that the document could realistically have been edited since the Alleged Infringement (particularly in the light of Spencer Robinson's comments that documentation may have been edited retrospectively to assist J H Hallam's leniency application)'.⁴⁹⁵⁵*

IV.2763. The OFT does not accept Linford's assertion that the Estimating Report was submitted by J H Hallam to implicate its competitors.

IV.2764. First, as stated in the Statement and in paragraph IV.2759 above, this document was not submitted by J H Hallam, but was recovered by the OFT during an unannounced search of J H Hallam's premises. J H Hallam would not have had the opportunity to tamper with the document as Linford suggests. Nor would it have had any reason to make the alterations suggested by Linford in the period between the date of the Infringement and the date of the OFT's search of its premises.

IV.2765. Second, the OFT does not accept Linford's suggestion that the OFT's interview with Spencer Robinson ('SR') supports its contention of retrospective amendment. The OFT notes that the responses of SR quoted by Linford were given when he was being questioned on a document related to a Board Meeting on a tender which is not the subject of this Decision.⁴⁹⁵⁶ His responses also related to handwritten entries, whereas this document is entirely type-written and with no handwritten annotations. The OFT therefore does not accept that the witness' comments affect the conclusions it is able to draw from this particular document in any respect.

Estimating Report for 16 January 2002 board meeting

IV.2766. To further assist the OFT enquiry, J H Hallam provided a copy of RB's Estimating Report for a board meeting on 16 January 2002.⁴⁹⁵⁷ The following

⁴⁹⁵³ Written representations of Linford, 26 June 2008, paragraph 6.54.

⁴⁹⁵⁴ Written representations of Linford, 26 June 2008, paragraph 6.54.

⁴⁹⁵⁵ Written representations of Linford, 26 June 2008, paragraph 6.53.

⁴⁹⁵⁶ Estimating Report, OFT Document Reference 4990.

⁴⁹⁵⁷ Estimating Report, OFT Document Reference 5052.

entries were recorded in relation to the Sir John Moore Primary School. The entry is typed apart from the entry under the heading '*Comment*'.

'Current Tenders

<i>E Nr</i>	<i>Project</i>	<i>Client</i>	<i>Type</i>	<i>Approx£</i>	<i>Date</i>	<i>Comment</i>
887	Sir John Moore Primary School refurb G1	The Trustees	P&S	1,200,000.00	7-Feb-02	Cover Taken from Linford see Attached

IV.2767. In its response to the Statement, Linford repeated its suggestion that this document could have been retrospectively amended, citing the comments of SR in support.⁴⁹⁵⁸ Again, the OFT notes that the responses of SR quoted by Linford in support of its assertion concern an unrelated Board Meeting document relating to a tender which is not the subject of this Decision.⁴⁹⁵⁹ However the OFT has reviewed the later manuscript additions to that unrelated documents and compared them to the handwritten entries on this document. The comment '*Cover Taken from Linford see Attached*' on the Estimating Report of January 2002 bears a close resemblance to the entry on document 4990 which SR has confirmed was a later addition intended to pass information to the OFT. The OFT therefore accepts that manuscript comment to be a later addition, and not contemporaneous to the tender process.

Incoming Tender Report Sheet

IV.2768. As part of its leniency application, J H Hallam provided a copy of the Incoming Tender Report Sheet relating to this tender with the following notations:⁴⁹⁶⁰

In the section marked '*Opposition*' is the following handwritten entry:

'Linfords - Gave us a cover'

In the section marked '*Notes/Remarks*' is the following handwritten entry:

'Cover taken from Linfords'

IV.2769. In its response to the Statement, Linford repeated its suggestion that this document could have been retrospectively amended, citing the comments of SR in support.⁴⁹⁶¹ Again, the OFT notes that the responses of SR quoted by Linford in support of its assertion concern an unrelated Board Meeting document relating to a tender which is not the subject of this Decision.⁴⁹⁶² However the OFT has reviewed the later manuscript additions to that unrelated document and compared them to the handwritten entries on this document. The handwritten entries in this document, in particular the references to Linford, do not bear a resemblance to either of the later additions in the unrelated document.

⁴⁹⁵⁸ Written representations of Linford, 26 June 2008, paragraphs 6.57 to 6.58.

⁴⁹⁵⁹ Estimating Report, OFT Document Reference 4990.

⁴⁹⁶⁰ Incoming Tender Report Sheet, OFT Document Reference 5053.

⁴⁹⁶¹ Written representations of Linford, 26 June 2008, paragraphs 6.62 to 6.63.

⁴⁹⁶² Estimating Report, OFT Document Reference 4990.

IV.2770. Linford suggested further that its contention of retrospective amendment was supported by the fact that *'the manuscript remark "Linfords – gave us a cover" is in different handwriting to the remainder of the company names under the "Opposition" section, which draws into question both the evidential reliability and the contemporaneous nature of the document'*.⁴⁹⁶³ The OFT does not accept this argument. The handwriting in the entry *'Linfords – gave us a cover'* matches the remainder of the entries on the Tender Report Sheet. Although the other entries in the 'Opposition' section may be in different handwriting (they may alternatively be the same handwriting but using all capitals) this does not undermine the point that the relevant entry is clearly made by the same person that completed the Incoming Tender Report Sheet.

IV.2771. The OFT therefore considers that there is no reason to believe that the references to Linford in this document are not contemporaneous to the completion of the remainder of the Incoming Tender Report Sheet.

IV.2772. The OFT further considers it likely that it was the contemporaneous markings on this document that led to the comment *'Cover Taken from Linford see Attached'* being added to the Estimating Report sheet for the 16 January 2002 board meeting, referred to at paragraph IV.2766 above.

IV.2773. In conclusion, the OFT relies on the documents described at paragraphs IV.2759 and IV.2768 as being documentary evidence contemporaneous to the Infringement. The OFT accepts that the manuscript comment on the document described at paragraph IV.2766 is likely to have been a later addition, and it is therefore not relied on by the OFT as constituting contemporaneous documentary evidence. It is however, supported by the contemporaneous documents, and is likely to have been compiled using the information contained in those documents.

Evidence from leniency applicant J H Hallam

IV.2774. As part of its leniency application, J H Hallam provided a general explanation of its participation in cover pricing.⁴⁹⁶⁴ This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.2775. In particular, J H Hallam provided to the OFT a schedule entitled *'Projects involving cover pricing March 2000 – June 2005'*. Examination of the entry relevant to this tender shows that J H Hallam received a cover price from Linford of £1,464,870.⁴⁹⁶⁵

IV.2776. Following the issue of the Statement, J H Hallam did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant J H Hallam

IV.2777. During interviews conducted in connection with its leniency application, J H Hallam's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

⁴⁹⁶³ Written representations of Linford, 26 June 2006, paragraph 6.62.

⁴⁹⁶⁴ Leniency application, OFT Document Reference 4969.

⁴⁹⁶⁵ Leniency application, OFT Document Reference 4977, page 7.

IV.2778. Additional evidence in relation to this tender comes from the interview of SR, the estimator allocated to this tender. His response to questions concerning this tender was as follows:

'I can remember the job and I remember that we did take a cover

...

I remember the job because it was – we got all the tender information through and I went out to make a visit to the site and when we got there it was – I think they tried to do it on the cheap. It was a horrible job so we decided not to price it in the end'.⁴⁹⁶⁶

IV.2779. Linford stated in its response to the Statement that *'...Spencer Robinson has no particular recollection of Alleged Infringement 96 other than it was "a horrible job" on which they took a cover price...'.⁴⁹⁶⁷* Linford also noted that SR was *'not asked to comment on any of the manuscript remarks in Richard Blount's Estimating Report or the Incoming Tender Report, nor their authorship'.⁴⁹⁶⁸*

IV.2780. The OFT considers the interview with SR to be good corroborating evidence for the contemporaneous documents discussed above. Although SR could not recall the company from whom J H Hallam took a cover price without sight of the contemporaneous evidence, he did have a clear recollection of the job and the fact that J H Hallam took a cover price. Although he was not asked to comment specifically on the Estimating Report or the Incoming Tender Report, he had already indicated that it would not be within his remit to prepare these documents.⁴⁹⁶⁹ SR was therefore not in a position to comment on them. That does not, however, render his evidence as to matters that were within his remit any less reliable.

Evidence from other companies – Linford

IV.2781. The OFT wrote to Linford on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Linford had participated in bid rigging on this tender. The OFT's Fast Track Offer was formally declined by letter, dated 30 April 2007⁴⁹⁷⁰ received from lawyers Pinsent Masons acting on behalf of Linford.

IV.2782. The OFT subsequently wrote to Linford's ultimate parent company at the time of this Infringement, F & E V Linford, on 5 November 2007, asking it to comment on Linford's response to the OFT's Fast Track Offer, given that the OFT intended to hold F & E V Linford jointly and severally liable for any infringements committed by Linford in respect of which the OFT ultimately decided to impose financial penalties. The OFT spoke to a representative of F &

⁴⁹⁶⁶ Interview transcript, OFT Document Reference 12754, page 13.

⁴⁹⁶⁷ Written representations of Linford, 26 June 2008, paragraph 6.77.

⁴⁹⁶⁸ Written representations of Linford, 26 June 2008, paragraph 6.77.

⁴⁹⁶⁹ Interview transcript, OFT Document Reference 12754, page 11.

⁴⁹⁷⁰ Response from Linford, OFT Document Reference 10522.

E V Linford on 11 December 2007 who stated that Linford *'does not wish to make any comments regarding the second fast track letter at this stage'*.⁴⁹⁷¹

IV.2783. Linford suggested in its response to the Statement that the available evidence was open to two alternative explanations: first that it the evidence *'...more plausibly relate to J H Hallam's intentions on being invited to tender than whether a cover price was, in the end, actually given or received by J H Hallam'*.⁴⁹⁷² This argument as to the 'presumed intent' of J H Hallam appears to reflect the argument more fully advanced in respect of Infringement 63 – i.e. that (i) *'...J H Hallam intended to win this tender and, if required, planned to provide a cover price to other participating tenderers, Linford...'*⁴⁹⁷³ and (ii) *'...these would be companies which J H Hallam could contact to request a cover price, in the event that it decided not to competitively price the tender'*.⁴⁹⁷⁴ Secondly, Linford also repeated its suggestion of retrospective amendment of the documents by J H Hallam as a plausible alternative explanation of the evidence.⁴⁹⁷⁵

IV.2784. The OFT does not consider that the alternative explanations put forward by Linford are supported by the interviews with J H Hallam's employees or the bid price submitted by Linford (see below). It also notes the absence of any argument by Linford that it actually *did not* provide a cover price, either with or without any supporting evidence such as witness evidence from its own employees, which might have supported such alternative inferences being drawn from the contemporaneous documents.

IV.2785. For reasons already given above, the OFT does not consider the allegation of retrospective amendment to be made out in respect of the Estimating Report for the board meeting of 20 February 2002, or the Incoming Tender Report Sheet, although it accepts there may have been such an amendment in respect of the Estimating Report for the board meeting of 16 January 2002. Therefore there remains contemporaneous documentary evidence available, for which retrospective amendment is not a plausible explanation.

IV.2786. On that basis, the OFT does not consider either of Linford's suggested alternative explanations any more plausible than that which the OFT has concluded to be correct, namely that Linford did provide a cover price to J H Hallam, which J H Hallam accepted. That conclusion is supported by contemporaneous documentation, and the witness evidence of J H Hallam's employees

The OFT's analysis of the evidence and finding

IV.2787. From the evidence and arguments presented above, and having considered the Parties' representations, the OFT draws the following conclusions.

IV.2788. J H Hallam and Linford each accepted an invitation to tender for this contract.

⁴⁹⁷¹ File note of telephone conversation, OFT Document Reference 14073.

⁴⁹⁷² Written representations of Linford, 26 June 2008, paragraph 6.78.

⁴⁹⁷³ Written representations of Linford, 26 June 2008, paragraph 6.43.

⁴⁹⁷⁴ Written representations of Linford, 26 June 2008, paragraph 6.44.

⁴⁹⁷⁵ Written representations of Linford, 26 June 2008, paragraph 6.81.

- IV.2789. Linford appears to have completed the estimating process for the tender, and submitted a bid with the intention of winning the work. This is shown by the price submitted by Linford being the lowest recorded and the fact that it won the contract.
- IV.2790. J H Hallam did not want to submit a tender and did not want to win this contract.
- IV.2791. In regard to Linford, the contemporaneous documents discussed in paragraphs IV.2759 and IV.2768 above confirm that J H Hallam received a cover price from Linford. Specifically, the document mentioned in paragraph IV.2759 shows that cover was taken, by means of the typed letter 'C', an in-house method at J H Hallam of indicating that a cover price had been taken. In addition, the internal estimating document cited in paragraph IV.2768 includes, handwritten entries stating '*Linford's – Gave us cover*' and '*Cover taken from Linford's*'.
- IV.2792. The OFT notes that the tender submitted by J H Hallam was higher than the tender submitted by Linford, a pattern consistent with a cover price having been received.
- IV.2793. Linford stated in its response to the Statement that '*...the fact that J H Hallam's tender price was 19 per cent higher than that of Linford, considerably higher and therefore inconsistent with the pattern of cover pricing and J H Hallam's own understanding of cover pricing, involving a band of 2-4 per cent...*'⁴⁹⁷⁶ reinforces its suggestion that no cover price was actually given by Linford to J H Hallam. Linford also stated that '*...[i]t seems questionable that J H Hallam would take a cover price so out of kilter with there [sic] own "band"...*'⁴⁹⁷⁷
- IV.2794. The OFT does not accept Linford's assertion. The OFT does not consider the manner in which J H Hallam understood and/or determined the cover prices it provided to other bidders in other tender processes to be relevant to Linford's provision of a cover price to J H Hallam in respect of this Infringement. Nor does it consider it possible to impute to J H Hallam some knowledge of the 'band' into which the cover prices it received fell. The OFT has not suggested that Linford informed J H Hallam of its own actual bid price for the Sir John Moore Primary School tender, and it would only be possible to determine the 19 per cent band if it was provided with an actual bid price as well as the cover price. As indicated in paragraph IV.73 above, the motivation for cover pricing was usually reciprocity – one company trusted another to provide it a reasonable cover price in order that it should likewise receive a reasonable cover price in future. J H Hallam would have been dependent on Linford to provide a figure within a reasonable 'band'; it would not have been in a position where it could assess the reasonableness of the figure it received and reject it if it fell outside the two to four per cent band that it itself adopted.
- IV.2795. Linford noted in its response to the Statement⁴⁹⁷⁸ that there are discrepancies between the tender figures from J H Hallam recorded by the Sir John Moore Foundation (£1,464,860), the contemporaneous estimating document

⁴⁹⁷⁶ Written representations of Linford, 26 June 2008, paragraph 6.82.2.

⁴⁹⁷⁷ Written representations of Linford, 26 June 2008, paragraph 6.67.

⁴⁹⁷⁸ Written representations of Linford, 26 June 2008, paragraphs 6.55 and 6.64.

(£1,464,820), and the schedule of projects involving cover pricing submitted by J H Hallam (£1,464,870). The OFT considers the slight difference (no more than £50) to be immaterial given the price levels involved. The difference between the figure recorded contemporaneously and that in J H Hallam's composite schedule may simply be a clerical error, given that '2' and '7' may look similar in a small type font. Linford also noted⁴⁹⁷⁹ the discrepancies between these figures, and the figure recorded in the Estimating Report for the 16 January Board Meeting (£1,200,000). However, the OFT does not consider this inconsistent. The latter document was prepared over three weeks before the tender submission deadline and as such is likely to include only an approximate estimate of the value of the contract set out prior to J H Hallam receiving a cover price from Linford, whereas the other documents record the value of the cover price provided.

IV.2796. The OFT therefore concludes that contact took place between Linford and J H Hallam. The OFT also concludes that Linford supplied a figure to J H Hallam for a cover bid.

IV.2797. The OFT is satisfied that the facts set out in paragraphs IV.2759 to IV.2796 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁹⁸⁰ In particular:

- (a) the provision of a figure for a cover bid from Linford to J H Hallam was not unilateral⁴⁹⁸¹, and contravenes the principle against direct or indirect contact between competitors;⁴⁹⁸²
- (b) J H Hallam can be presumed to have taken account of the information received from Linford (i.e. the cover price) when determining its own conduct in the tendering process,⁴⁹⁸³ and
- (c) Linford can be presumed to have taken account of the information it received from J H Hallam (i.e. that J H Hallam did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁴⁹⁸⁴

IV.2798. Accordingly, the OFT concludes that the totality of the evidence as set out above, establishes that an agreement and/or concerted practice was in place between Linford and J H Hallam, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment, adaptations, and internal and external repairs, to the main and sundry buildings of Sir John Moore Primary School, date of tender 7 February 2002.

Immunity and leniency assessment

IV.2799. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁴⁹⁷⁹ Written representations of Linford, 26 June 2008, paragraph 6.59.

⁴⁹⁸⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁹⁸¹ See paragraph IV.73 of the General comments on cover pricing section.

⁴⁹⁸² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁴⁹⁸³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁴⁹⁸⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.2800. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to J H Hallam on 6 July 2005. J H Hallam will not therefore receive 100 per cent immunity in respect of this tender. However, J H Hallam will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 97: Refurbishment 92 Dwellings, Mandeville Road Housing Estate, Aylesbury – 7 February 2002
Client: Wycombe District Council
Parties: Mansell and J J McGinley

IV.2801. On 31 December 2001 Aylesbury Vale District Council ('AVDC') sought tenders for housing refurbishment works to 92 dwellings at Mandeville Road Estate.⁴⁹⁸⁵ The following five companies were invited to tender: Basil Wyatt and Sons, Fergal Contracting Co. Ltd, J B Leadbitter & Co. Ltd, J J McGinley and Mansell, the date and time of tender return was 7 February 2002 at noon.⁴⁹⁸⁶

IV.2802. AVDC received the following tender returns:⁴⁹⁸⁷

Company	Date tender received	Amount of tender	Awarded contract
Fergal Contracting Co. Ltd	7 February 2002	£1,346,946.37	YES ⁴⁹⁸⁸
Basil Wyatt and Sons	7 February 2002	£1,456,278.00	
J B Leadbitter & Co. Ltd	7 February 2002	£1,490,701.00	
J J McGinley	7 February 2002	£1,680,200.00	
Mansell	7 February 2002	£1,823,320.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.2803. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a Mansell managing estimator, workload reports. The 2002 workload report for prime projects contained the following entry:⁴⁹⁸⁹

⁴⁹⁸⁵ Information from client, OFT Document Reference 7102, page 3. The OFT notes that the date of this letter is 31 December 2002, however from the return date of the tender the OFT believes the correct date to be 31 December 2001.

⁴⁹⁸⁶ Information from client, OFT Document Reference 7102, page 3.

⁴⁹⁸⁷ Information from client, OFT Document Reference 7102, page 4.

⁴⁹⁸⁸ Information from client, OFT Document Reference 7102, page 6. The OFT notes that Fergal Contracting Co. Ltd final amended tender of £1,364,047.42 was recommended for acceptance, the OFT has not been advised as to whether they were awarded the contract.

⁴⁹⁸⁹ Leniency application, OFT Document Reference B3538, page 3.

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
70981	Aylesbury – Refurb. 92 dwellings Mandeville Road Estate		1823320			

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
					(J.J.McGinley)

Evidence from leniency applicant Mansell

IV.2804. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁴⁹⁹⁰ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.2805. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from J J McGinley and that this cover price was taken due to *‘insufficient tender period: resource’* at Mansell.⁴⁹⁹¹

Witness evidence from leniency applicant Mansell

IV.2806. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell’s participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.2807. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR, when asked if Mansell took a cover price from J J McGinley, stated ‘Yes’ and also stated *‘it’s probably it was just ... they were the last ones to give us a cover on that sort of work and we’ll try them again this time’*.⁴⁹⁹² In its response to the Statement, Mansell clarified that BR’s admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁴⁹⁹³

Evidence from other companies – J J McGinley

IV.2808. The OFT wrote to [...] [C] on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that [...] [C] had participated in bid rigging on this tender. The OFT received a response to this letter from the legal representatives of J J McGinley who in this letter stated that J J McGinley admitted *‘We engaged in cover pricing activities on this tender with Mansell’*.⁴⁹⁹⁴

⁴⁹⁹⁰ Leniency application, OFT Document Reference B0734.

⁴⁹⁹¹ Leniency application, OFT Document Reference B1351, page 1.

⁴⁹⁹² Interview transcript, OFT Document Reference 11516, page 29.

⁴⁹⁹³ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁴⁹⁹⁴ Response from J J McGinley, OFT Document Reference 11019, pages 2 and 3.

IV.2809. The OFT subsequently wrote to J J McGinley's ultimate parent company at the time of this Infringement, McGinley Holdings, on 6 November 2007, asking it to comment on J J McGinley's response to the OFT's Fast Track Offer, given that the OFT intended to hold McGinley Holdings jointly and severally liable for any infringements committed by J J McGinley in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, McGinley Holdings' legal representatives stated *'Our client is not able to respond to the admission of liability by JJM [J J McGinley] concerning events which took place as much as 6 years ago, as neither our client nor our firm has been able to review any of JJM's contract papers in question ...'*⁴⁹⁹⁵

IV.2810. In its response to the Statement, J J McGinley confirmed that *'it appears that [J J] McGinley engaged in cover pricing with Mansell'*⁴⁹⁹⁶ in respect of this Infringement. Although McGinley Holdings responded to the Statement, it did not make any specific comment with regard to this Infringement, other than to draw attention to *'factual matters'* which included that *'Mansell sought from JJM a cover price'* and *'Mansell submitted a cover price'*.⁴⁹⁹⁷

The OFT's analysis of the evidence and finding

IV.2811. From the evidence presented above, the OFT draws the following conclusions.

IV.2812. Mansell and J J McGinley each accepted an invitation to tender for this contract.

IV.2813. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.2814. Mansell's 2002 workload report records *'(J.J.McGinnley)'*, in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.2815. In addition, J J McGinley has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.2816. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that J J McGinley admitted that the party with whom it engaged in bid rigging was Mansell without being shown the OFT's evidence that Mansell was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.2817. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by J J McGinley, the pattern consistent with a cover price having been provided.

⁴⁹⁹⁵ Response from McGinley Holdings, OFT Document Reference 14194.

⁴⁹⁹⁶ Written representations of J J McGinley, 27 June 2008, paragraph 7.

⁴⁹⁹⁷ Written representations of McGinley Holdings, 27 June 2008, paragraph 32.

IV.2818. The OFT therefore concludes that contact took place between Mansell and J J McGinley. The OFT also concludes that J J McGinley supplied a figure to Mansell for a cover bid.

IV.2819. The OFT is satisfied that the facts set out in paragraphs IV.2803 to IV.2818 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁴⁹⁹⁸ In particular:

- (a) the provision of a figure for a cover bid from J J McGinley to Mansell was not unilateral⁴⁹⁹⁹, and contravenes the principle against direct or indirect contact between competitors;⁵⁰⁰⁰
- (b) Mansell can be presumed to have taken account of the information received from J J McGinley (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁰⁰¹ and
- (c) J J McGinley can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁰⁰²

IV.2820. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and J J McGinley in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment 92 dwellings, Mandeville Road Housing Estate, Aylesbury, tender deadline 7 February 2002.

Immunity and leniency assessment

IV.2821. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2822. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 98: Conversion of Davers Steel Building, Sheffield – 20 February 2002
Client: Howells Solicitors
Parties: Wildgoose and Herbert Baggaley

IV.2823. On 18 January 2002, Howells Solicitors sought tenders for the conversion of Davers Steel Building, Sheffield.⁵⁰⁰³ The following six companies were invited to

⁴⁹⁹⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁴⁹⁹⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁰⁰⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁰⁰¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁰⁰² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁰⁰³ Information from client, OFT Document Reference 8410.

tender: Wildgoose, Herbert Baggaley, George Hurst & Sons Limited, Ackroyd & Abbott, G Hurst and Clayfield Construction.⁵⁰⁰⁴ The deadline for the receipt of tenders was 12:00 noon on 20 February 2002.

IV.2824. Howells Solicitors received the following tender returns:⁵⁰⁰⁵

Company	Tender received	Amount of tender	Awarded contract
Wildgoose	Before 12:00 noon on 20 February 2002	£1,402,197.00	Yes
Herbert Baggaley	Before 12:00 noon on 20 February 2002	£1,438,999.03	
George Hurst & Sons Ltd	After 12:00 noon on 20 February 2002	£1,489,220.00	
Ackroyd & Abbott	Before 12:00 noon on 20 February 2002	£1,557,398.00	
G Hurst	Before 12:00 noon on 20 February 2002	£1,644,300.00	
Clayfield Construction	Before 12:00 noon on 20 February 2002	£1,678,904.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Wildgoose – Enquiry Register, Tender Finance Statement and Invoice

IV.2825. During the OFT’s search of Wildgoose’s premises, an Enquiry Register was found.⁵⁰⁰⁶ The Enquiry Register contained the following entry:⁵⁰⁰⁷

<i>E.NO</i>	<i>DATES RECEIVED</i>	<i>RETURN</i>	<i>PROJECT</i>	<i>CLIENT</i>
<i>02/68</i>	<i>21/1</i>	<i>13/2</i>	<i>Conversion of the Davers Steel building, Sheffield</i>	<i>Howells Solicitors</i>

<i>Q/S</i>	<i>ARCHITECT</i>	<i>TENDER DELIVERY – TENDER SUM</i>	<i>DIFF.</i>	<i>EST.</i>	<i>RST</i>
<i>Turner & Townsend [.....] [C]</i>	<i>John Hill Associates [.....] [C]</i>		<i>H.Bagg</i>	<i>DT/D/R</i>	<i>1st</i>

IV.2826. As part of its leniency application, Wildgoose provided a copy of the tender finance statement for this tender. The tender finance statement shows that ‘D/R/PT’ [David Rollinson and Paul Taylor] were the estimators allocated this

⁵⁰⁰⁴ Information from client, OFT Document Reference 8410.

⁵⁰⁰⁵ Information from client, OFT Document Reference 8410.

⁵⁰⁰⁶ Tender Enquiry Register, OFT Document Reference 0094.

⁵⁰⁰⁷ Tender Enquiry Register, OFT Document Reference 0094, page 6.

tender to price and that Wildgoose intended to submit a tender of '£1,121,387.00' for this contract.⁵⁰⁰⁸

IV.2827. In addition, Wildgoose provided an invoice received in respect of 'Davers Building, Sheffield'. The invoice was numbered '8683' and headed 'BAGGALEY CONSTRUCTION', was made out to 'Wildgoose Construction', dated '16.8.02', and contained the following information.⁵⁰⁰⁹

'Attn Brian Bennett

Ref Davers Building Sheffield *4.912.00*

Joinery Works.

<i>VAT @17½ %</i>	<i>859.60</i>
<i>TOTAL DUE</i>	<i>5.771.60'</i>

IV.2828. The invoice was also annotated with a payment stamp dated 16 August and a letter 'P'. The initials 'BB' were also handwritten. This suggests that Bryan Bennett ('BB'), Estimating Director at Wildgoose, authorised payment of this invoice.

Contemporaneous Documentary Evidence from leniency applicant Herbert Baggaley – Invoice

IV.2829. As part of its leniency application, Herbert Baggaley provided an invoice submitted in respect of 'Davers Building Sheffield'. The invoice was numbered '8683' and headed 'BAGGALEY CONSTRUCTION', was made out to 'Wildgoose Construction', dated '16.8.02', and contained the following information:⁵⁰¹⁰

'Attn Brian Bennett

Ref Davers Building Sheffield *4.912.00*

Joinery Works.

<i>VAT @17½ %</i>	<i>859.60</i>
<i>TOTAL DUE</i>	<i>5.771.60'</i>

IV.2830. This invoice is identical to the one produced by Wildgoose, apart from the fact that it has a different stamp, 'POSTED TO COMPUTER DATE 22.8.02 BY [signature]'.⁵⁰¹¹

⁵⁰⁰⁸ Tender Finance Statement, OFT Document Reference 0453. David Rollinson explained that the original sum Wildgoose submitted was £1,402,197.00. However the client informed Wildgoose that it was over budget and asked Wildgoose to submit an amended figure taking into account various savings. The final figure was £1,121,387.96. Wildgoose did not retain the original tender finance statement.

⁵⁰⁰⁹ Invoice, OFT Document Reference 0361.

⁵⁰¹⁰ Invoice 8683, OFT Document Reference 3895, page 7.

⁵⁰¹¹ Invoice 8683, OFT Document Reference 3895, page 7.

Evidence from leniency applicant – Herbert Baggaley

IV.2831. As part of its leniency application, Herbert Baggaley also produced a ‘*Schedule of Potential Payments & Receipts [and] Copy Invoices as Listed*’. The schedule contained amongst others the following entries.⁵⁰¹²

‘Receipts

<i>Doc. No.</i>	<i>Invoice</i>	<i>Date</i>	<i>Contractor</i>	<i>Amount</i>
<i>1.6</i>	<i>8683</i>	<i>16.08.02</i>	<i>Wildgoose Construction Ltd</i>	<i>£4,912.00</i>

Comment

<i>Doc. No.</i>	<i>Job/Tender No.</i>	<i>Invoice</i>	<i>Comment (From recollection)</i>
<i>1.6</i>	<i>T02-009</i>	<i>8683</i>	<i>Both HBC and Wildgoose Construction Ltd were pricing and HBC offered £5,000 to stand aside.</i>

IV.2832. A report prepared by Herbert Baggaley’s legal representatives, Actons, sent on 18 January 2006, provided additional information regarding this contract and the invoice provided and stated *‘This project was an unattractive alteration one for HBC. Howells Solicitors were the clients. The contact at the other Contractor was Brian Bennett, a Director. His reference was on the invoice although he was one of four at that Contractor’s Estimating Department’*.⁵⁰¹³

IV.2833. With regards to *‘Inter Contractor Invoicing’*, Herbert Baggaley’s legal representatives stated *‘It is commonplace for Contractors to buy and sell goods and services to and from each other. In the period between January 2000 and November 2005, HBC [Herbert Baggaley Construction] estimates that there were approximately between 800 and 1,000 inter-Contractor invoices to which HBC was a party ... Each Invoice was investigated and an audit trail carried out to confirm it represented a genuine transaction. From these Invoices HBC has uncovered payments made or received for which there was no accompanying paper trail or internal stock or service records. Upon further investigation, a Schedule of Payments and Invoices was extracted which could constitute payments made in respect of covers given or received between 2000 and 2003...’*.⁵⁰¹⁴

IV.2834. *‘HBC has no evidence and, therefore, no certainty that any of its current employees has instigated any of the transactions reflected in these Invoices. The payment to it by third parties has been taken as a useful recompense for costs being incurred. Even in the provision of a cover, routine costs are incurred by HBC. On other occasions a job might initially be seen as of high interest but on review of the further details and job specifications might be discarded as of no interest and therefore worthy of a cover. If on such occasions costs had*

⁵⁰¹² Leniency application, OFT Document Reference 3895, page 2.

⁵⁰¹³ Leniency application, OFT Document Reference 3899, page 10.

⁵⁰¹⁴ Leniency application, OFT Document Reference 3899, page 8.

already been incurred and a third party had offered an estimator a payment to offset those, then such a payment had occasionally been accepted'.⁵⁰¹⁵

IV.2835. Herbert Baggaley also provided a list of 'Third Party Contractors'.⁵⁰¹⁶ Herbert Baggaley's legal representatives stated that 'This list contains details of other Contractors with whom HBC has dealt in the use of cover pricing ... Given the lack of written records of individual covers, it is not always possible for HBC's estimators to say for certain as to which individual within another contract dealt with that cover. However, the OFT is to take it that where a Contractor is listed as being party to a cover under the Schedule of Tenders, then the individual contact listed within Document 2 [3] is to be the person involved. Where there are more than one name given for a Contractor, then the first name is to be taken as the probable contact'.⁵⁰¹⁷ On page five of the 'List of Third Party Contractors' is entered:⁵⁰¹⁸

<i>Contractor</i>	<i>Contact</i>	<i>Telephone number</i>
<i>Wildgoose Construction</i>	<i>Richard Hubble, Graham Barber, Phil Stiff, Brian Bennett, Malcolm Clark</i>	<i>[...] [C]</i>

Witness evidence from leniency applicant Wildgoose

IV.2836. BB, provided a witness statement to the OFT, in which he provided details in relation to this tender. BB stated, 'We received the enquiry on 21 January 2002 and submitted the tender on 13 February. The client's quantity surveyors were Turner & Townsend and the architect, John Hill Associates. The Enquiry Register shows that the estimators responsible for pricing the work were Paul Taylor and David Rollinson. At some stage, I believe someone from Herbert Baggaley Construction Limited ("Baggaleys") rang one of our estimators to establish if we would be submitting a tender. I assume either that they had been asked for assistance from other contractors and were trying to establish the likely remaining competition or, that due to the complex nature of the works, they were gathering information to enable them to make a decision as to whether or not they should submit a tender'.⁵⁰¹⁹

IV.2837. BB continued, 'Some time later, I spoke with Baggaleys regarding the tender arrangement. I cannot recall the precise details of the arrangement but I believe that it is most likely that both companies were submitting bona fide tenders and a suggestion was made that the winner should pay the loser £5,000 to be set against tender costs. The suggestion would have been approved by the executive directors and reiterated at the tender adjudication meeting. We were subsequently awarded the contract and completed the works. The tender was a competitive submission and the final account shows a poor final return, below that of the tendered profit margin'.⁵⁰²⁰ BB stated 'The tender finance statement... shows no monies were added to the tender bid to cover the £5,000 sum and this would have been paid out of profits achieved.

⁵⁰¹⁵ Leniency application, OFT Document Reference 3899, page 9.

⁵⁰¹⁶ Leniency application, OFT Document Reference 3897.

⁵⁰¹⁷ Leniency application, OFT Document Reference 3899, page 7.

⁵⁰¹⁸ Leniency application, OFT Document Reference 3897, page 5.

⁵⁰¹⁹ Witness Statement, OFT Document Reference 14263, page 13.

⁵⁰²⁰ Witness Statement, OFT Document Reference 14263, page 13.

*Subsequently, Baggaleys sent us an invoice dated 16 August 2002 for £4912 plus VAT for joinery works’.*⁵⁰²¹

IV.2838. In a further witness statement provided to the OFT, BB stated, *‘Notes were never made at the time regarding this issue and therefore I cannot recollect specific names or the timing of conversations that took place. However, I believe that the discussions would have taken place around halfway through the tender period when it may have been apparent that only Wildgoose and Baggaleys were pricing for it’.*⁵⁰²²

IV.2839. BB also stated, *‘I have since been informed that one of the estimators, David Rollinson, gave Baggaleys a cover on this project. I do not recall being aware of this at the time. However, I am not always informed of those covers given, unlike when covers are to be taken’.*⁵⁰²³

IV.2840. During an interview with the OFT on 1 November 2006, BB confirmed his comments in paragraphs IV.2836 to IV.2839 above. He confirmed that the money was paid by Wildgoose to Herbert Baggaley, *‘possibly they decided that it wasn’t a job they wanted, possibly that he couldn’t get it done in time ... we still paid them the £5,000’.*⁵⁰²⁴

IV.2841. David Rollinson (‘DR’), Senior Estimator provided a witness statement to the OFT, in which he provided details in relation to this tender. DR stated *‘This was the first job I priced as an estimator at Wildgoose. I recall that I spoke to either Roger or Anton from Baggaleys and gave them a cover on this file. I cannot recall exactly when I spoke to them but it would have been after we had finished pricing the project. I would not have written anything down when giving a cover but I would have made sure that they had a reasonable margin above ours. The tender was submitted on 20 February 2002 in the sum of £1,402,197.00. The client then informed us that we were over budget and asked us to submit an amended figure taking into account various savings. The final figure was £1,121,387.96. Unfortunately, we have not retained the original tender finance statement and only have a copy of the working form of the statement that was used by the surveyors. There are no entries in this tender finance statement to known competitors’.*⁵⁰²⁵

IV.2842. During an interview with the OFT on 1 November 2006, DR provided additional details regarding the giving of a cover price to Herbert Baggaley. With regard to the initial phone call DR stated *‘... they would have rung us ... pre-tender’* and that Herbert Baggaley would have asked, *‘Are you costing the job yet? Can you give us help?’.*⁵⁰²⁶ DR confirmed that he would have had to ask BB’s permission in order to give a cover price to a competitor, and in this instance BB agreed.⁵⁰²⁷

IV.2843. Eric Alan Clarke, (‘EAC’) Finance Director at Wildgoose, provided a witness statement to the OFT, in which he provided details in relation to this tender. EAC stated, *‘On 16 August 2002 we received an invoice from Herbert Baggaley*

⁵⁰²¹ Witness Statement, OFT Document Reference 14263, pages 13 and 14.

⁵⁰²² Further Witness Statement, OFT Document Reference 14268, page 2.

⁵⁰²³ Further Witness Statement, OFT Document Reference 14268, page 3.

⁵⁰²⁴ Interview transcript, OFT Document Reference 6330, page 12.

⁵⁰²⁵ Witness Statement, OFT Document Reference 14273, page 3.

⁵⁰²⁶ Interview transcript, OFT Document Reference 6321, pages 11 and 12.

⁵⁰²⁷ Interview transcript, OFT Document Reference 6321, page 12.

Limited ("Baggaleys") for the attention of Bryan Bennett and which refers to "Davers Building, Sheffield – Joinery Works "... In this case the Accounts Department would not have found any order from Wildgoose as in actual fact the invoice did not relate to joinery works as stated. In the circumstances, I believe that the Accounts Department would have referred the matter back to Bryan Bennett as he was the person with knowledge of the invoice'.⁵⁰²⁸

Witness evidence from leniency applicant Herbert Baggaley

IV.2844. During an interview on 2 November 2006, Anton Newell ('AN'), who became Chief Estimator in October 2002 and prior to that worked as an estimator at Herbert Baggaley, was asked if he could recall anything about this contract. AN replied *'At some stage we would have decided that it was not the best job for us for whatever reason ... I can't remember specific details about this but we may have contacted ... another builder and asked for some help, we were already taking help off of Wildgoose, so we would then have to go to Wildgoose. It may have become apparent at that time that possibly there was only us two pricing it'.⁵⁰²⁹* AN confirmed that *'It probably would have been me in the first instance'* who contacted BB at Wildgoose. *'He's an estimator, ... we've known him from previous covers where we'd exchanged so we knew to deal with him'.⁵⁰³⁰*

IV.2845. During an interview on 13 February 2007 Roger Hayes ('RH'), Chief Estimator until he left Herbert Baggaley in October 2002, was asked if he could recall anything about this tender. RH replied, *'That's ringing no bells whatsoever, sorry ... I can only interpret it as yes that must have been a compensation payment. The specifics are beyond me'.⁵⁰³¹*

The OFT's analysis of the evidence and finding

IV.2846. From the evidence presented above, the OFT draws the following conclusions.

IV.2847. Wildgoose and Herbert Baggaley each accepted an invitation to tender for this contract.

IV.2848. Herbert Baggaley explained that this tender *'... was not the best job for us'⁵⁰³²,* and Herbert Baggaley therefore did not want to win this tender.

IV.2849. It appears that Wildgoose completed the estimating process for this tender and submitted a bid with the hope of winning the work. This is shown by the price submitted by Wildgoose being the lowest received and the fact that it won the contract.

IV.2850. Contact between Wildgoose and Herbert Baggaley is admitted by BB and DR of Wildgoose and by RH of Herbert Baggaley. The contact resulted in the offer of a compensation payment and the giving of a cover price. According to Wildgoose, the compensation payment was to be paid to *'the loser of the tender'*, although Herbert Baggaley claims that Wildgoose offered it *'£5000 to*

⁵⁰²⁸ Witness Statement, OFT Document Reference 14270, pages 3 and 4.

⁵⁰²⁹ Interview transcript, OFT Document Reference 6372, page 16.

⁵⁰³⁰ Interview transcript, OFT Document Reference 6372, page 16.

⁵⁰³¹ Interview transcript, OFT Document Reference 13390, page 14.

⁵⁰³² Interview transcript, OFT Document Reference 6372, page 16.

stand aside'. In any event, prior to final tenders Herbert Baggaley obtained a cover price from Wildgoose. BB claims not to have known about this when he agreed to the compensation payment arrangement, however DR stated that he would have had to ask BB's permission before giving the cover price which he claims he gave to Herbert Baggaley.

IV.2851. The OFT also notes that Herbert Baggaley could have not taken a cover price from anyone other than Wildgoose, as the remaining four tenderers submitted prices above that of Herbert Baggaley.

IV.2852. It is irrelevant whether all individuals involved in the arrangement at Wildgoose were aware of all aspects of the arrangement or that the original arrangement, which may not have involved the giving of a cover price, subsequently changed to include the giving and receiving of a cover price. At a minimum, on either Party's account various contacts took place between Wildgoose and Herbert Baggaley and those contacts resulted in the giving of a cover price to Herbert Baggaley and the payment of a compensation payment.

IV.2853. In its response to the Statement, Wildgoose accepted that a cover price may have been provided to Herbert Baggaley *'at the last minute'* by DR.⁵⁰³³ Wildgoose disputed, however, that the compensation payment and cover price were connected.⁵⁰³⁴ It submitted that BB was unaware that Herbert Baggaley had taken a cover price from Wildgoose when he made an agreement with Herbert Baggaley to make a compensation payment. Likewise, that DR was unaware of the compensation payment agreement.⁵⁰³⁵ As noted above, however, it is irrelevant to the OFT's finding of an infringement whether BB and DR were aware of all of the aspects of the arrangement with Herbert Baggaley.

IV.2854. Wildgoose also disputed that it had asked Herbert Baggaley to *'stand aside'* from the tender process and to take a cover price in return for a compensation payment. Wildgoose questioned, if this were the case, why Herbert Baggaley had approached DR for a cover price, rather than BB with whom it had made the compensation payment arrangement.⁵⁰³⁶

IV.2855. The OFT notes the conflicting evidence from Herbert Baggaley and Wildgoose regarding the motivation for the compensation payment arrangement. It is not necessary, however, for the OFT to determine whether the compensation payment was made in return for Herbert Baggaley *'standing down'* or as *'compensation'* for its tender costs, in order to find an infringement. As such, the OFT makes no finding on this point.

IV.2856. Moreover, it is not necessary for the OFT to determine whether Wildgoose and/or Herbert Baggaley expressly agreed to include the agreed level of compensation in their final tender price or whether in fact they did include such sums in either of their respective tenders.

IV.2857. Notwithstanding BB's view that Wildgoose's tender documentation records no monies added to its tender price as a result of the agreement to pay

⁵⁰³³ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.47.1.

⁵⁰³⁴ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraphs 4.71, 4.82 and 5.47.1.

⁵⁰³⁵ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.46.

⁵⁰³⁶ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.38.2.

compensation to Herbert Baggaley in the event that Wildgoose was successful, this is immaterial. It is not necessary or indeed possible for the OFT to determine the actual effect of such an exchange of information in any particular tender process. Such an exchange was clearly made in order to influence the conduct of each of the parties in the tender process and in fact did do so. As such it had as its object a restriction and/or distortion of competition and is clearly prohibited by the Chapter I prohibition.⁵⁰³⁷

IV.2858. Following submission of final tenders, Herbert Baggaley raised an invoice for 'Joinery Works' to the value of £4,912.00 plus VAT, with an invoice total of £5,771.60, in respect of Davers Steel Building, Sheffield. Wildgoose has confirmed that this invoice was false. The invoice was marked for the attention of BB at Wildgoose. A stamp on the copy held by Wildgoose shows that this invoice was paid on 16 August 2002.

IV.2859. Both Wildgoose and Herbert Baggaley have admitted to bid rigging in respect of this tender and to entering into a financial compensation agreement with the other party. The OFT notes that Herbert Baggaley named 'Wildgoose' and provided evidence of the compensation payment without sight of the OFT's evidence that Herbert Baggaley and Wildgoose were involved in bid rigging and a financial agreement on this tender. This provides additional corroboration of the contemporaneous evidence.

IV.2860. The OFT therefore concludes that contact took place between Wildgoose and Herbert Baggaley. The OFT also concludes that Wildgoose supplied a figure to Herbert Baggaley for a cover bid, and that an arrangement was made for the winner of the tender to pay the loser of the tender a compensation payment. This payment was facilitated by the production of a false invoice relating to 'joinery supplied'. Although Wildgoose has claimed that the amount of the compensation payment came out of its profits rather than being added to the tender, the OFT notes that Wildgoose's original tender was substantially higher than its final tender figure agreed with the client, and that it was this original tender figure which was calculated at the time the agreement to make a compensation payment was reached.

IV.2861. Wildgoose submitted, in its response to the Statement, that it priced the tender competitively and did not take into account any agreement with Herbert Baggaley when deciding the final tender price. Wildgoose stated '*shortly after the submission of the tender, the Wildgoose estimator, [DR] wrote to the client's [quantity surveyor], Turner & Townsend, stating 'we feel substantial savings can be made to the above scheme and would welcome discussions with yourselves, and await your further instructions'.*'⁵⁰³⁸ Wildgoose produced a copy of this letter, which was sent by DR to Turner & Townsend on 21 February 2002. Wildgoose went on to state that, following discussions with Turner & Townsend, a number of areas were identified for potential savings, and that Wildgoose's initial tender figure was subsequently reduced to reflect savings of £280,809.⁵⁰³⁹

IV.2862. Wildgoose suggested that '*it approached the client to recommend areas where 'substantial savings' could be made to the project, thereby demonstrating that*

⁵⁰³⁷ See paragraphs III.149 to III.154 of the Legal Background section.

⁵⁰³⁸ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.43.

⁵⁰³⁹ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.44.

*Wildgoose was endeavouring to provide the client with a very competitive price.*⁵⁰⁴⁰

IV.2863. This does not accord, however, with DR's recollection of events. DR stated that *'The tender was submitted on 20 February 2002 in the sum of £1,402,197.00. The client then informed us that we were over budget and asked us to submit an amended figure taking into account various savings. The final figure was £1,121,387.96.'*⁵⁰⁴¹ DR's recollection of events is consistent with the letter from DR to Turner & Townsend dated 21 February 2002, in which DR stated that he was responding to a letter from Turner & Townsend dated 20 February 2002 (the closing date for tender submission). A copy of the earlier letter from Turner & Townsend was not provided to the OFT by Wildgoose.

IV.2864. Rather than demonstrating that Wildgoose approached the client to suggest substantial savings, the OFT concludes that Wildgoose's initial tender price was too high, that Turner & Townsend requested a lower tender price and that, following discussions, Turner & Townsend secured a reduction of £280,809, equating to nearly 20 per cent off Wildgoose's initial tender price.

IV.2865. Wildgoose made further submissions about the level of profit margin on this tender, arguing that it had struggled to fully recover its overhead costs which, it claimed, demonstrated that it had not inflated its profit margin at the client's expense.⁵⁰⁴² Wildgoose quoted a percentage figure which it said represented the level of its overhead costs for the year 2002, but did not submit any evidence in support of this figure. In any event, the OFT does not consider Wildgoose's profit margin to be conclusive evidence of whether or not it reflected the amount of the compensation payment in its tender price.

IV.2866. In summary, the OFT does not necessarily accept the arguments advanced by Wildgoose in support of its contention that it did not inflate its tender price to reflect the compensation payment to Herbert Baggaley. As noted above, however, it is not necessary for the OFT to prove that the Parties expressly agreed to add the amount of the compensation payment to the final tender price, or that they did in fact do so. As such, the OFT ultimately makes no finding in this respect.

IV.2867. The OFT is satisfied that the facts set out in paragraphs IV.2825 to IV.2866 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁰⁴³ In particular:

- (a) the contacts between Wildgoose and Herbert Baggaley resulting in the provision of a cover bid and the payment of a compensation payment from Wildgoose to Herbert Baggaley were not unilateral⁵⁰⁴⁴, and contravene the principle against direct or indirect contact between competitors;⁵⁰⁴⁵

⁵⁰⁴⁰ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.38.3.

⁵⁰⁴¹ Witness Statement, OFT Document Reference 14273, page 3.

⁵⁰⁴² Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.45.

⁵⁰⁴³ See paragraphs III.3 and II.89 to III.157 of the Legal Background section.

⁵⁰⁴⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁰⁴⁵ See paragraphs III.48 to III.51, III.93 to III.94, and III.139 to III.140 of the Legal Background section.

- (b) the agreement between Wildgoose and Herbert Baggaley that the successful tenderer would pay compensation to the unsuccessful tenderer and that Herbert Baggaley would receive a compensation payment had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁵⁰⁴⁶
- (c) Herbert Baggaley can be presumed to have taken account of the information it received from Wildgoose (i.e. the cover price, the agreement to pay compensation, and the agreed level of compensation) when determining its own conduct in the tendering process;⁵⁰⁴⁷ and
- (d) Wildgoose can be presumed to have taken account of the information it received from Herbert Baggaley (i.e. the agreement to pay compensation, the agreed level of compensation, and that Herbert Baggaley did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁰⁴⁸

IV.2868. Wildgoose submitted in its response to the Statement that it did not take into account the information received from Herbert Baggaley when determining its own conduct in the tendering process. Wildgoose maintained that it '*continued to price the project competitively, as is evidenced by its approach to the [quantity surveyor] to identify 'substantial savings'.*'⁵⁰⁴⁹

IV.2869. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁵⁰⁵⁰ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Wildgoose has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept that Wildgoose did not increase its tender sum to account for the compensation payment, that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

IV.2870. In any event, the OFT notes that the requirement for an undertaking to have altered its conduct on the market as a result of reciprocal contact with a competitor is a necessary element of proving a concerted practice, but the OFT is not required to demonstrate this element where the Parties admit that they concluded an agreement. The OFT notes that Wildgoose referred a number of times in its response to the Statement to an 'agreement' with Herbert Baggaley.⁵⁰⁵¹ Furthermore, Wildgoose has admitted that its conduct infringed the Act⁵⁰⁵² and by implication, therefore, that it was party to either an anti-competitive agreement or concerted practice.

⁵⁰⁴⁶ See paragraphs III.150 to III.152 of the Legal Background section.

⁵⁰⁴⁷ See paragraphs III.58, III.95 to III.96, III.125, III.142, and III.156 to III.157 of the Legal Background section.

⁵⁰⁴⁸ See paragraphs III.58, III.95 to III.96, III.125, III.142, and III.156 to III.157 of the Legal Background section.

⁵⁰⁴⁹ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraphs 4.82 and 5.47.3.

⁵⁰⁵⁰ See paragraph III.58 of the Legal Background section.

⁵⁰⁵¹ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 5.46 and 5.47.3.

⁵⁰⁵² Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 4.36.

IV.2871. To the extent that Wildgoose submits this Infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

IV.2872. The OFT therefore concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Wildgoose and Herbert Baggaley, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the conversion of Davers Steel Building, Sheffield, tender deadline 20 February 2002.

Immunity and leniency assessment

IV.2873. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2874. Wildgoose informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Wildgoose will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.2875. In respect of this tender, the OFT became aware of Herbert Baggaley's involvement in bid rigging activities by virtue of the information provided by Wildgoose. Herbert Baggaley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Herbert Baggaley in respect of this Infringement.

Alleged Infringement 99: Not included in the Decision

Infringement 100: New Classrooms, Heart of England School, Balsall Common, Solihull – 25 February 2002

Client: Solihull Metropolitan Borough Council

Parties: BBCL⁵⁰⁵³ and William Sapcote

IV.2876. On 21 January 2002, Solihull Metropolitan Borough Council sought tenders for the design and build of three new classrooms, Heart of England School, Balsall Common, Solihull.⁵⁰⁵⁴ The following six companies were invited to tender: Ashe Construction Ltd, BBCL⁵⁰⁵⁵, Benfield Construction Ltd, E Manton, Interclass and William Sapcote. The date and time of tender return was 25 February 2002 at noon.⁵⁰⁵⁶

IV.2877. Solihull Metropolitan Borough Council received the following tender returns:⁵⁰⁵⁷

⁵⁰⁵³ BBCL (Balfour Beatty Construction Ltd) is a subsidiary of Balfour Beatty.

⁵⁰⁵⁴ Information from client, OFT Document Reference 9195.

⁵⁰⁵⁵ Information from client, OFT Document Reference 9195. The OFT notes that the information for client shows that this tender went Balfour Beatty Refurbishment Ltd, however it appears that BBCL dealt with the tender process.

⁵⁰⁵⁶ Information from client OFT Document Reference 9195.

⁵⁰⁵⁷ Information from client OFT Document Reference 9195.

Company	Date and time tender received	Amount of tender	Awarded contract
Interclass	25 February 2002 at noon	£253,161.40	YES
E Manton	25 February 2002 at noon	£404,664.00	
Benfield Construction Ltd	25 February 2002 at noon	£359,977.00	
Ashe Construction Ltd	25 February 2002 at noon	£411,356.00	
William Sapcote	25 February 2002 at noon	£393,340.00	
BBCL	25 February 2002 at noon	£279,441.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Balfour Beatty – Bid Risk Checklist and two sets of handwritten notes

IV.2878. As part of its leniency application, Balfour Beatty’s legal representatives provided a BBCL Southern Division Bid Risk Checklist for this tender⁵⁰⁵⁸, which contained the following:

<i>Competition</i>	<i>Sapcote (Cover)</i>
	<i>Interclass</i>

IV.2879. Balfour Beatty’s legal representatives also provided handwritten notes in respect of this tender⁵⁰⁵⁹, belonging to Martyn Etheridge (‘ME’), a senior estimator at BBCL, which show:

*‘COVER 5% £292,340 SANCOTE
4.62%’*

IV.2880. Further handwritten notes, headed ‘HEART OF ENGLAND SCHOOL – BALSALL COMMON’⁵⁰⁶⁰, belonging to ME, show:

*‘COVER SANCOTE PETER PEARY [...] [C]
£293,340’*

Evidence from leniency applicant Balfour Beatty

IV.2881. Balfour Beatty’s legal representatives also provided to the OFT a schedule setting out instances of cover pricing uncovered or suspected within BBCL, where covers were given. In respect of this tender the schedule shows that BBCL gave a cover price to William Sapcote.⁵⁰⁶¹

Witness evidence from leniency applicant Balfour Beatty

IV.2882. During interviews conducted in connection with its leniency application, Balfour Beatty employees and ex-employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.189 to IV.203 above and is relied upon by the OFT in relation to this tender.

⁵⁰⁵⁸ Leniency application, OFT Document Reference B1625.

⁵⁰⁵⁹ Leniency application, OFT Document Reference B1626b.

⁵⁰⁶⁰ Leniency application, OFT Document Reference B3889.

⁵⁰⁶¹ Leniency application, OFT Document Reference B1604, page 1.

IV.2883. During an interview with the OFT on 30 March 2007, ME, advised what would happen when a competitor asked for a cover price from BBCL as detailed in paragraphs IV.195 to IV.197 above. ME advised that his role was *'to estimate and, and win building contracts for the south-east which includes Birmingham ... as well as the London office'*.⁵⁰⁶² In respect of the BBCL Southern Division Bid Risk Checklist, ME stated *'I completed it ...'*⁵⁰⁶³ and in respect of the entry for Sapcote, stated *'... they came to me asking me to give them help on a tender ... with a tender ... figure to go in on'* and in respect of the competition stated *'But that competition [Sapcote and Interclass] is the competition we knew about; there may have been more. We don't know'*.⁵⁰⁶⁴

IV.2884. In relation to the handwritten notes ME stated *'Yes, my handwriting'*. When asked about the notes showing percentages and a figure of 292,340, ME stated *'That was the number we gave Sapcote to go in, or no lower than that number, and that it was roughly about 5 percent I gave them, but it actually worked out 4.62. It was just noting down ... the number we gave out'*.⁵⁰⁶⁵ In respect of the other page of notes, ME stated *'I'd just written it down somewhere else and I got the number slightly different as well ... by £1,000'* and *'He's [Peter Perry] the contact at Sapcote, yeah. He was, is the guy who approached me and that's why I've documented his name and number'*.⁵⁰⁶⁶

Evidence from other companies – William Sapcote

IV.2885. The OFT wrote to William Sapcote on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that William Sapcote had participated in bid rigging on this tender. In response to this letter William Sapcote did not admit that it engaged in bid rigging activities on this tender.⁵⁰⁶⁷

IV.2886. The OFT subsequently wrote to William Sapcote's ultimate parent company at the time of this Infringement, Sapcote Holdings, on 5 November 2007, asking it to comment on William Sapcote's response to the OFT's Fast Track Offer, given that the OFT intended to hold Sapcote Holdings jointly and severally liable for any infringements committed by William Sapcote in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Sapcote Holdings' legal representatives stated that Sapcote Holdings had no further comment to make.⁵⁰⁶⁸

IV.2887. Following the issue of the Statement, neither William Sapcote nor Sapcote Holdings submitted any written or oral representations.

The OFT's analysis of the evidence and finding

IV.2888. From the evidence presented above, the OFT draws the following conclusions.

⁵⁰⁶² Interview transcript, OFT Document Reference 11138, page 2.

⁵⁰⁶³ Interview transcript, OFT Document Reference 11138, pages 25 and 26.

⁵⁰⁶⁴ Interview transcript, OFT Document Reference 11138, page 26.

⁵⁰⁶⁵ Interview transcript, OFT Document Reference 11138, page 26.

⁵⁰⁶⁶ Interview transcript, OFT Document Reference 11138, page 26.

⁵⁰⁶⁷ Response from William Sapcote, OFT Document Reference 10898 and 10899, page 3.

⁵⁰⁶⁸ Response from Sapcote Holdings, OFT Document Reference 14035.

- IV.2889. BBCL and William Sapcote each accepted an invitation to tender for this contract.
- IV.2890. Both companies submitted a tender. William Sapcote was unable to submit a tender by the return date and/or did not want to win this contract. It appears that BBCL completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.
- IV.2891. BBCL Southern Division Bid Risk Checklist provided by Balfour Beatty's legal representatives for this tender shows '*Sapcote (Cover)*' and handwritten notes show '*COVER 5% £292,340 SAPCOTE 4.62%*', and '*COVER SAPCOTE PETER PEARY [.....] [C] £293,340*'. Balfour Beatty confirmed that this shows that it gave a cover price to William Sapcote in the amount shown.
- IV.2892. The OFT notes that William Sapcote's bid was exactly £100,000 higher than the cover price given by BBCL, with every other digit matching the cover price of £293,340. It appears that William Sapcote either inflated the price further in order to ensure that it did not win the tender, or that it misheard the figure provided by BBCL.
- IV.2893. The telephone number noted on the handwritten notes of ME at BBCL, '[... ..] [C]', matches with the telephone number for William Sapcote, as shown on the letterhead on its response to the OFT's letter of 22 March 2007.
- IV.2894. The OFT notes that the tender submitted by William Sapcote was higher than the tender submitted by BBCL, the pattern consistent with a cover price having been provided. The OFT further notes that BBCL was apparently only aware of one other competitor for this tender, Interclass, who won the tender. As Interclass's tender was below BBCL's, BBCL could only have provided cover to William Sapcote.
- IV.2895. The OFT therefore concludes that contact took place between BBCL and William Sapcote. The OFT also concludes that BBCL supplied a figure to William Sapcote for a cover bid.
- IV.2896. The OFT is satisfied that the facts set out in paragraphs IV.2878 to IV.2895 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁰⁶⁹ In particular:
- (a) the provision of a figure for a cover bid from BBCL to William Sapcote was not unilateral⁵⁰⁷⁰, and contravenes the principle against direct or indirect contact between competitors;⁵⁰⁷¹
 - (b) William Sapcote can be presumed to have taken account of the information received from BBCL (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁰⁷² and
 - (c) BBCL can be presumed to have taken account of the information it received from William Sapcote (i.e. that William Sapcote did not intend

⁵⁰⁶⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁰⁷⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁰⁷¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁰⁷² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

to submit a competitive bid) when determining its conduct in the tendering process.⁵⁰⁷³

IV.2897. In its response to the Statement, Balfour Beatty stated *'The OFT has adduced no evidence that the giving of a cover was taken into account by Balfour Beatty and Mansell when pricing its tenders nor is there any evidence that the giving of a cover had any effect on these parties' pricing of the tender.*⁵⁰⁷⁴

IV.2898. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁵⁰⁷⁵ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Balfour Beatty has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Balfour Beatty's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that Balfour Beatty submitted that this infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

IV.2899. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between BBCL and William Sapcote in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the design and build of three new classrooms, Heart of England School, Balsall Common, Solihull, tender deadline 25 February 2002.

Immunity and leniency assessment

IV.2900. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2901. Balfour Beatty informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Balfour Beatty will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 101: Not included in the Decision

⁵⁰⁷³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁰⁷⁴ Written representations of Balfour Beatty, 27 June 2008, paragraph 10.8.

⁵⁰⁷⁵ See paragraph III.58 of the Legal Background section.

Infringement 102: Centre for Organic Horticulture Phase 1, Ryton Organic Gardens, Coventry – 15 April 2002
Client: Ryton Organic Gardens
Parties: Thomas Vale and Greswolde

IV.2902. On 18 February 2002, Ryton Organic Gardens sought tenders for a new build of a centre for organic horticulture, Ryton Organic Gardens, Coventry. The following six companies were invited to tender: Thomas Vale, Greswolde, William Sapcote, Stepnell Ltd, Benson and GAJ.⁵⁰⁷⁶ The deadline for the receipt of tenders was 15 April 2002 at midday.

IV.2903. Ryton Organic Gardens received the following tender returns:⁵⁰⁷⁷

Company	Time and Date tender received	Amount of tender	Awarded contract
Thomas Vale	15 April 2002 midday	£585,400	
Greswolde	15 April 2002 midday	£527,718	
William Sapcote	15 April 2002 midday	£566,740	
Stepnell Ltd	15 April 2002 midday	£551,148	
Benson	15 April 2002 midday	£523,555	
GAJ	15 April 2002 midday	£510,377	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale –Tender Status spreadsheet

IV.2904. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁵⁰⁷⁸

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5082	B	Ryton Organic Gardens	Centre for Organic Horticulture, Phase 1		CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	08/04/02 Noon	585,400		Greswolde, Sapcote, GAJ, Benson, Stepnell	

IV.2905. The Tender Status spreadsheet was maintained at Thomas Vale’s head office by Christopher Keith Trickett (‘CKT’), Chief Estimator at Thomas Vale, who kept a *‘little black book’*⁵⁰⁷⁹ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this list, there is an entry for Greswolde plus contact names and telephone number.⁵⁰⁸⁰

⁵⁰⁷⁶ Information from client, OFT Document Reference 13232.

⁵⁰⁷⁷ Information from client, OFT Document Reference 13232.

⁵⁰⁷⁸ Tender Status spreadsheet, OFT Document Reference 4522, page 25.

⁵⁰⁷⁹ Interview transcript, OFT Document Reference 11418, page 21.

⁵⁰⁸⁰ Contact list, OFT Document Reference 11086, page 9.

Evidence from leniency applicant Thomas Vale

IV.2906. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.2907. At Annex 14⁵⁰⁸¹ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 35 of the schedule under Annex 14 and within the section for 2002 tenders is the following entry:⁵⁰⁸²

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5082	08 April	Ryton Organic Gardens	Centre for Organic Horticulture, Phase 1	Taken (Greswolde)	Yes (Tender Spreadsheet)

IV.2908. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.2909. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁵⁰⁸³ and 'Greswold' appears on this list.

IV.2910. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.2911. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.2912. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letter 'B', which appears in the column marked 'DIV', stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁵⁰⁸⁴ Thomas Vale categorised this as a Category B tender which indicated that it was a cover price.

⁵⁰⁸¹ Leniency application, OFT Document Reference 4568.

⁵⁰⁸² Leniency application, OFT Document Reference 4568, page 35.

⁵⁰⁸³ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁵⁰⁸⁴ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

Evidence from other companies – Greswolde

IV.2913. The OFT wrote to Greswolde on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greswolde had participated in bid rigging on this tender. In response Greswolde, through its legal representatives, admitted engaging *'in bid rigging activities on this tender with THOMAS VALE CONSTRUCTION'*.⁵⁰⁸⁵

IV.2914. The OFT subsequently wrote to Greswolde's ultimate parent company at the time of this Infringement, Mantisson, on 5 November 2007, asking it to comment on Greswolde's response to the OFT's Fast Track Offer, given that the OFT intended to hold Mantisson jointly and severally liable for any infringements committed by Greswolde in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Mantisson did not make any comment.⁵⁰⁸⁶

IV.2915. In their response to the Statement, Greswolde and Mantisson stated *'Greswolde is not...challenging the OFT's substantive allegations in relation to each of the Alleged Infringements and maintains its acceptance of the terms of the Fast Track Offer'*.⁵⁰⁸⁷

The OFT's analysis of the evidence and finding

IV.2916. From the evidence presented above, the OFT draws the following conclusions.

IV.2917. Thomas Vale and Greswolde each accepted an invitation to tender for the construction of a new centre for organic horticulture, Phase 1, Ryton Organic Gardens, Coventry.

IV.2918. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.

IV.2919. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records five competitors who were also invited to tender for this contract, namely *'Greswolde, Sapcote, GAJ, Benson and Stepnell'*. Greswolde is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is recorded as £585,400, matching that recorded by the client.

IV.2920. The OFT notes that although five competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Greswolde. This indicates that a conscious decision was made to differentiate Greswolde from the other four competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT

⁵⁰⁸⁵ Response from Greswolde, OFT Document Reference 10364, page 3.

⁵⁰⁸⁶ Response from Mantisson, OFT Document Reference 13986.

⁵⁰⁸⁷ Written representations of Greswolde and Mantisson, 27 June 2008, paragraph 2.5.

had personal knowledge of the decision to receive a cover price and make contact with Greswolde at the time. It also indicates that CKT himself made contact with Greswolde.

IV.2921. Thomas Vale admitted that Greswolde was one of the *'key competitors'* with whom it engaged in cover pricing activity. CKT had an entry for Greswolde in a contact book he used to telephone other contractors for the purpose of obtaining cover prices.

IV.2922. Greswolde's own bid of £527,718 is lower than that tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Greswolde to Thomas Vale.

IV.2923. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Greswolde admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides independent corroboration of the OFT's evidence in respect of this tender.

IV.2924. The OFT therefore concludes that contact took place between Thomas Vale and Greswolde. The OFT also concludes that Greswolde supplied a figure to Thomas Vale for a cover bid.

IV.2925. The OFT is satisfied that the facts set out in paragraphs IV.2904 to IV.2924 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁰⁸⁸ In particular:

- (a) the provision of a figure for a cover bid from Greswolde to Thomas Vale was not unilateral⁵⁰⁸⁹, and contravenes the principle against direct or indirect contact between competitors;⁵⁰⁹⁰
- (b) Thomas Vale can be presumed to have taken account of the information received from Greswolde (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁰⁹¹ and
- (c) Greswolde can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵⁰⁹²

IV.2926. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Greswolde and Thomas Vale in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for Phase 1 of the new build of a centre for organic horticulture, Ryton Organic Gardens, Coventry, tender deadline 15 April 2002.

⁵⁰⁸⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁰⁸⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁰⁹⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁰⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁰⁹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.2927. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2928. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 103: Refurbishment of Psychiatric Services, Wards S2 and S3, Addenbrookes Hospital, Cambridge – 16 April 2002
Client: Addenbrookes Hospital, Cambridge University Hospitals NHS Foundation Trust
Parties: Jackson⁵⁰⁹³ and Haymills

IV.2929. On 18 March 2002, Addenbrookes Hospital ('Addenbrookes') sought tenders for the refurbishment of Psychiatric Services, Wards S2 and S3, Addenbrookes Hospital, Cambridge. The return date for the tender was 16 April 2002 and six companies were invited to tender: F W Cocksedge & Sons Ltd, Haymills, R G Carter, Wates Construction Ltd, T Butler & Son (Sawston) Ltd and Jackson.⁵⁰⁹⁴

IV.2930. Addenbrookes received the following tender returns prior to 12:00 noon on 16 April 2002:⁵⁰⁹⁵

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
F W Cocksedge & Sons Ltd	16 April 2002	Prior to Noon	£894,040.88	
Haymills	16 April 2002	Prior to Noon	£875,125.00	
R G Carter	16 April 2002	Prior to Noon	£849,461.26	Yes
Wates Construction Ltd	16 April 2002	Prior to Noon	£962,740.00	
T Butler & Son (Sawston) Ltd	16 April 2002	Prior to Noon	£886,969.59	
Jackson	16 April 2002	Prior to Noon	£927,416.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson Tender book

IV.2931. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten:⁵⁰⁹⁶

⁵⁰⁹³ Jackson is a subsidiary of Propensity.

⁵⁰⁹⁴ Information from client, OFT Document Reference 6976.

⁵⁰⁹⁵ Information from client, OFT Document Reference 6976.

⁵⁰⁹⁶ Tender book, OFT Document Reference A0905, page 25.

Enquiry Number	Date Received	Employer	Location	Description of Works
E3539	15.3.02	Addenbrookes NHS Trust	Cambridge	Refurbishment of Wards S2 & S3 to Mental Health

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
5 of 6	£849,461	£927,416	Cover from Haymills	16.4.02

Evidence from leniency applicant Propensity

IV.2932. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.2933. In particular, Propensity provided to the OFT an analysis of its Tender Records Book since 4 January 2000, and in respect of this tender, Propensity confirmed that it received a cover price from Haymills.⁵⁰⁹⁷

IV.2934. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁵⁰⁹⁸

Witness evidence from leniency applicant Propensity

IV.2935. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.2936. John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender book⁵⁰⁹⁹ and that in most instances it would be himself that arranged the cover price.⁵¹⁰⁰

Evidence from other companies – Haymills

IV.2937. The OFT wrote to Haymills on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Haymills had participated in bid rigging on this tender. In response to this letter, Haymills admitted '*We engaged in cover pricing (a form of bid rigging activities) on this tender with Jacksons*'.⁵¹⁰¹

⁵⁰⁹⁷ Leniency application, OFT Document Reference A1274, page 3.

⁵⁰⁹⁸ Written representations of Propensity et al, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁵⁰⁹⁹ Interview transcript, OFT Document Reference 11347, page 10.

⁵¹⁰⁰ Interview transcript, OFT Document Reference 11347, page 11.

⁵¹⁰¹ Response from Haymills, OFT Document Reference 11069, page 2.

IV.2938. In its response Haymills enclosed a copy of its Tender Analysis Form for this tender and under the section headed '*Competition*' it says '*Jackson – C*'.⁵¹⁰² Haymills confirmed that '*a cover price was given by Haymills*' and that '*the relevant competitor is Jacksons*'.⁵¹⁰³

IV.2939. The OFT subsequently wrote to Haymills' ultimate parent company at the time of this Infringement, Corringway, on 6 November 2007, asking it to comment on Haymills' response to the OFT's Fast Track Offer, given that the OFT intended to hold Corringway jointly and severally liable for any infringements committed by Haymills in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Corringway said '*Corringway is prepared to confirm that it proposes to respect the terms of Haymills' acceptance of its participation in the alleged infringements, and that it does not propose to make representations denying Haymills' participation in the bid-rigging activities in relation to the suspect tenders which are set out in Annex 1 of the OFT's letter of 22 March 2007 to Haymills ...*'.⁵¹⁰⁴

IV.2940. In its response to the Statement, Haymills stated that it '*...does not challenge its participation in cover pricing and its breach of the Chapter I prohibition in respect of ... [this Infringement]. Haymills Group regrets its participation in cover pricing and now operates a strict policy of competition law compliance.*'⁵¹⁰⁵

The OFT's analysis of the evidence and finding

IV.2941. From the evidence presented above, the OFT draws the following conclusions.

IV.2942. Jackson and Haymills each accepted an invitation to tender for this contract.

IV.2943. Haymills completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.2944. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.2945. In regard to Haymills, Jackson's tender book states, '*Cover from Haymills*'. Propensity has confirmed that this shows that it received a cover price from Haymills. Jackson recorded in the tender book the figure £927,416, as the tender figure and this was the figure that Jackson submitted.

IV.2946. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by Haymills, a pattern consistent with a cover price having been provided.

IV.2947. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Haymills admitted that it gave a cover price to Jackson, without being shown the OFT's evidence that Jackson took a cover price from Haymills. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

⁵¹⁰² Tender Analysis Form, OFT Document Reference 11072, page 1.

⁵¹⁰³ Response from Haymills, OFT Document Reference 10404, pages 4 and 5.

⁵¹⁰⁴ Response from Corringway, OFT Document Reference 14143, page 1.

⁵¹⁰⁵ Written representations of Haymills, 27 June 2008, paragraph 2.

IV.2948. The OFT therefore concludes that contact took place between Haymills and Jackson. The OFT also concludes that Haymills supplied a figure to Jackson for a cover bid.

IV.2949. The OFT is satisfied that the facts set out in paragraphs IV.2931 to IV.2948 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵¹⁰⁶ In particular:

- (a) the provision of a figure for a cover bid from Haymills to Jackson was not unilateral⁵¹⁰⁷, and contravenes the principle against direct or indirect contact between competitors;⁵¹⁰⁸
- (b) Jackson can be presumed to have taken account of the information received from Haymills (i.e. the cover price) when determining its own conduct in the tendering process;⁵¹⁰⁹ and
- (c) Haymills can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵¹¹⁰

IV.2950. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and Haymills, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment of Psychiatric Services, Wards S2 and S3, Addenbrookes Hospital, Cambridge, tender deadline 16 April 2002.

Immunity and leniency assessment

IV.2951. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2952. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁵¹⁰⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵¹⁰⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁵¹⁰⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵¹⁰⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵¹¹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 104: Alterations to Café and Conservatory Extension, Burton College
– 22 April 2002
Client: Burton College
Parties: Wildgoose and Mansell

IV.2953. On 18 March 2002, Burton College sought tenders for café alterations and a conservatory extension at Burton College, Lichfield Street, Burton on Trent.⁵¹¹¹ The following six companies were invited to tender: Herbert Baggaley, G F Tomlinson, Mansell, Wildgoose, Sol and Paragon Catering Equipment Services Ltd.⁵¹¹² The deadline for the receipt of tenders was 12:00 noon on 22 April 2002.

IV.2954. Burton College received the following first round of tender returns:⁵¹¹³

Company	Date tender received	Amount of tender	Awarded contract
Herbert Baggaley	Before 12:00 noon on 22 April 2002	£583,125	
G F Tomlinson	Before 12:00 noon on 22 April 2002	£688,742	
Mansell	Before 12:00 noon on 22 April 2002	£556,283	
Sol	Before 12:00 noon on 22 April 2002	£682,104	
Wildgoose	Before 12:00 noon on 22 April 2002	£544,541	Yes
Paragon	No tender received	-	

IV.2955. Wildgoose and Mansell were requested by Burton College to provide priced 'Bills of Quantities' after the tender deadline and submit a revised tender, which they did⁵¹¹⁴ and Burton College confirmed that the work subject of the tender was carried out by Wildgoose although certain items were omitted due to the available budget.⁵¹¹⁵

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Wildgoose – Post Tender Submission Adjustments and Invoice

IV.2956. As part of its leniency application, Wildgoose provided a copy of a two page document, headed '*Post Tender Submission Adjustments*' completed by Bryan Bennett ('BB'), Estimating Director at Wildgoose, in respect of this tender and showing various handwritten calculations:⁵¹¹⁶

⁵¹¹¹ Information from client, OFT Document Reference 7309.

⁵¹¹² Information from client, OFT Document Reference 7309.

⁵¹¹³ Information from client, OFT Document Reference 7309.

⁵¹¹⁴ Witness statement, OFT Document Reference 14269, page 1 and response from Mansell, OFT Document Reference 14352, page 2.

⁵¹¹⁵ Information from client, OFT Document Reference 7309.

⁵¹¹⁶ Post Tender Submission Adjustments, OFT Document Reference 4514.

Contemporaneous Documentary Evidence from leniency applicant Mansell – Invoice, Customer Account Enquiry, handwritten note and internal email

IV.2959. As part of its leniency application, Mansell provided a copy of an invoice submitted to Wildgoose. The invoice is identical to the one produced by Wildgoose, apart from the handwritten endorsements made by Wildgoose and Mansell on their respective invoices.⁵¹¹⁸

IV.2960. In particular, Mansell provided a Customer Account Enquiry for a customer named 'WILDGOOSE CONSTRUCTION LTD' showing that an invoice for £11,732.38 was paid on 31 December 2002.⁵¹¹⁹ The invoice is referred to as 'External Estimating Services'.⁵¹²⁰ Mansell also provided a handwritten note which contains Wildgoose's name, address and telephone number and the following information:⁵¹²¹

'£9,985.00 + VAT 1747.39

Joinery for Burton College

*Mark invoice for attention
of Brian Bennett*

*FROM ANDY
P101 86 6105 WIL003'*

IV.2961. This note has a stamp on it, which reads 'RECEIVED 7 OCT 2002' and is signed.⁵¹²²

IV.2962. In addition, Mansell provided a copy of an email dated 17 June 2002 from Robert Tudge, Commercial Manager for Mansell's Eastern business unit at the time of this tender, to Kenneth Lockwood ('KL'), who was a Chief Estimator in the Nottingham office at Mansell, which gives as its subject 'Burton College' and states 'How do we get our hands on the £10K?'.⁵¹²³

Witness evidence from leniency applicant Wildgoose

IV.2963. On 10 January 2008, BB provided a further witness statement to the OFT, in which he provided details in relation to this tender. BB stated, 'I recall, post tender, exchanging figures with the estimator from Mansells (possibly Ken Lockwood) to obtain an indication of our competitiveness. During this conversation, we discussed difficult aspects of the project and our respective approaches to them'.⁵¹²⁴

IV.2964. BB continued 'We were advised later, most probably by [the client], that our tender and one other were under consideration. It transpired that the other tender under consideration was Mansell's. [The client] then requested a priced Bill of Quantities to be prepared, which we duly submitted ... This request by

⁵¹¹⁸ Invoice, OFT Document Reference B4120, page 2.

⁵¹¹⁹ Customer Account Enquiry, OFT Document Reference B4120, page 4

⁵¹²⁰ Customer Account Enquiry, OFT Document Reference B4120, page 5

⁵¹²¹ Handwritten note, OFT Document Reference B4120, page 3.

⁵¹²² Handwritten note, OFT Document Reference B4120, page 3.

⁵¹²³ Email, OFT Document Reference 14353.

⁵¹²⁴ Witness Statement, OFT Document Reference 14269, page 1.

the client left us in a dilemma as both Wildgoose and Mansells were aware of each other's tender figures. Mansells had submitted a tender sum of £556,282 which was a difference of £11,741 from our bid. The Mansells' estimator had, as previously stated, divulged information to me during our conversation that they had submitted provisional figures for the roofing and glazing. This meant that both companies could use the knowledge of each other's original tender to their own advantage when preparing the priced Bill of Quantities and revised tender which, in my view, made our revised tender offer of £419,323 even more competitive'.⁵¹²⁵

- IV.2965. Regarding the calculations he made on the 'Post Tender Submission Adjustments', BB said *'It will be seen from these calculations that, after the savings, I estimated that there was a tender difference of £23,199 between Mansells and Wildgoose. However, the figures provided for the glazing and roofing were so close that if the client had exchanged each party's costs for these elements, either party may have won the tender. Therefore, in order to have a better chance of winning the tender, we identified savings of approximately £32,000 to ensure that Wildgoose's tender was even more competitive and stood a greater chance of securing the contract'.⁵¹²⁶*
- IV.2966. BB continued *'A conversation took place with Mansells during the second stage of negotiations in which it was agreed that the losing party would recoup its estimating costs from the winner and a sum of approximately £10,000 was agreed upon. However, no money was added to the tender price and the money would be paid from any profits secured from the contract. Further, there was no agreement as to who would win the tender. As far as I am concerned, this was a legitimate tender and no discussions took place about sharing work. I priced the tender and did so very competitively. I also consider our actions in exchanging tender figures post tender resulted in the client receiving a much more competitive tender for his project than would otherwise have been the case'.⁵¹²⁷*
- IV.2967. BB added *'Once the Mansells invoice was received in Wildgoose, it was logged onto the Accounts system as a cost against the project and I signed it off accordingly. I am unable to confirm why "joinery" has been inserted on the invoice to Wildgoose. I can only suggest that Mansells had a joinery division which is why it was used a reference'.⁵¹²⁸*
- IV.2968. During an interview with the OFT on 1 November 2006, BB was asked who made the initial contact between Wildgoose and Mansell. BB stated *'I can't recall ... I don't know whether we rang them or they rang us, to be quite honest'⁵¹²⁹ and 'I do know with Mansell's, we exchanged figures. They knew what our figure was, we knew what their figure was. And in fact we had a fairly in-depth discussion about the pluses and minuses, the difficulties on the job, how we'd tackled it, and thought nothing more of it, you know. They wished us good luck on the job, it looked like we were possibly the lowest. We subsequently were found to be the lowest. But it was over budget. And the client needed to find savings ... And they were going to – I think it was the*

⁵¹²⁵ Witness Statement, OFT Document Reference 14269, pages 1 and 2.

⁵¹²⁶ Witness Statement, OFT Document Reference 14269, page 2.

⁵¹²⁷ Witness Statement, OFT Document Reference 14269, page 2.

⁵¹²⁸ Witness Statement, OFT Document Reference 14269, pages 2 and 3.

⁵¹²⁹ Interview transcript, OFT Document Reference 6330, page 73.

lowest two, which happened to be ourselves and Mansell's. Obviously, when Mansell's found out that they'd been approached, we were both going to try and beat each other's figure ... We knew it wasn't very far apart from each other. We both wanted the job, and we did everything in our powers to try and – try and ensure that we beat Mansell's ... During the period, a discussion took place between ourselves and Mansell's that one of us is going to lose the job, lets put something in for the second man's efforts'.⁵¹³⁰

IV.2969. BB added that he could not recall who he made the arrangement with at Mansell, other than that it was possibly KL. He confirmed that Wildgoose's Managing Director and at least one other director would have been aware of the arrangement with Mansell.⁵¹³¹ BB also explained that in his discussions with Mansell *'I can't recall the exact details, but they'd made a comment that the – a certain element of the roof work was very difficult, and they put a provisional sum in for it. Provisional because they don't know what it's likely to cost ... And they put in a very low provisional sum. So I suppose I was trying to discredit their provisional sum by making our work for the roof appear expensive. And all that meant was that the figure didn't go up because we'd inflated the price, it was just the moneys were moved about ... But it was really just to hopefully say to the client, 'Just revisit the element of work on the roof. Be certain that, you know, it is right' '.⁵¹³²*

Witness evidence from leniency applicant Mansell

IV.2970. During an interview with the OFT on 18 April 2007, KL was asked about this tender and, in particular, the invoice sent to Wildgoose. KL said *'I haven't got any recollection of this one. I mean I don't say, I'm not saying that I'm going to try and sort of avoid doing it, I'm just saying that it doesn't ring a bell. But having said that, Wildgoose Construction and Brian Bennett I know very well, so I mean it could have been, you know'.⁵¹³³* Asked about the evidence from Wildgoose regarding the arrangement made between Mansell and Wildgoose that the winning contractor would pay the losing contractor's estimating costs, KL said *'Well, it does ring true, in fact, just before we came in I was mentioning this one and I'm convinced that, now, what you've just said convinces me of my memory which is still very vague. But I'm convinced we were added onto this tender list by the client, er, simply as, just sort of beefing up the tender list. I'm sure we were approached to say would we go on a tender list and there was something in it for us, but I believe ... as I was saying earlier on I'm convinced this is one where we were approached to appear to be on the tender list. The client wanted Wildgoose do the job, I'm convinced of it, that's where it came from ... so he'd go to the contractor that he wanted to do the job and suggest that that contractor get two other people to put quotes in'.⁵¹³⁴*

IV.2971. KL continued *'I'd have to say on record, I don't honestly remember it in detail but, yeah, so ... you have to realize that I was constantly, I mean we talked about so many things over years and years. I mean these, all these people, particular people like Brian Bennett, I mean, we talked about all sorts of things ... I mean lots and lots of things, so it was, it was not just an occasional ring so*

⁵¹³⁰ Interview transcript, OFT Document Reference 6330, pages 72 and 73.

⁵¹³¹ Interview transcript, OFT Document Reference 6330, page 74.

⁵¹³² Interview transcript, OFT Document Reference 6330, page 76.

⁵¹³³ Interview transcript, OFT Document Reference 11511, pages 29 and 30.

⁵¹³⁴ Interview transcript, OFT Document Reference 11511, page 30.

I wouldn't remember in detail ... but certainly ... I can see what's happened there [Burton College] but as I say you can't prove it, you can't say anything for definite so I'd rather say ... no comment'.⁵¹³⁵ KL thought that this contract was not one that Mansell tried competitively to win.⁵¹³⁶

IV.2972. As part of its leniency application, Mansell made enquiries with its current employees about this tender and only one current employee in its Nottingham office, Andy Pownall ('AP'), management accountant, could have dealt with this contract. AP confirmed that the annotation 'P101 86 6105 WIL003' on the handwritten note⁵¹³⁷ was in his handwriting and that it related to the customer and job references on the invoice. AP also confirmed that the words 'From Andy' were in the handwriting of Tony Seals, a finance sale administrator who left Mansell in June 2007. AP was unable to recognise the other handwriting on the handwritten note, which appeared to be by two different people, although he believed it was not the writing of KL. AP had no recollection of processing this invoice or of any other aspect of the tender itself. AP was, however, confident that he did process the invoice because his handwriting was on the note.⁵¹³⁸

IV.2973. In particular, Mansell made enquiries with three of its former employees about this tender: KL, Robert Tudge ('RT'), former Commercial Manager and Roman Rozycki ('RR'), a former senior estimator. KL, RT and RR had no recollection of the tender although RR recalled that he conducted a site visit with other Mansell employees, which suggested very clearly that this was a fully costed and competitively priced tender. In respect of the documentation provided by Wildgoose, KL suggested that there may well have been contact between Mansell and Wildgoose and that an anti-competitive arrangement of some sort suggested itself as the most likely explanation. KL, RT and RR agreed that it would have been extremely unlikely that Mansell and Wildgoose would have shared costs for producing the 'Bills of Quantities' in this way, that is by Mansell invoicing Wildgoose directly.⁵¹³⁹

IV.2974. RR and RT were at a loss to explain the invoice. Each believed that Mansell's Eastern Region had not been involved in cover pricing or other anti-competitive activity and that failing to compete for a tender which had clearly been initially priced seemed particularly surprising. RT and RR felt that the business emphasis in the Eastern Region at the time of this tender had been to secure as much work as possible. RT had no recollection of the email he sent on 17 June 2002 to KL. RT agreed that the email does appear to be untoward and he could not provide a reason why such a request would be made in the normal course of business.⁵¹⁴⁰

IV.2975. KL believed that a possible explanation of the invoice sent by Mansell to Wildgoose was that Mansell would have pulled out of the tender, even though it had initially submitted an independently costed bid, in exchange for payment. KL thought Mansell might have done this at the time of or soon after submitting the bid. However, although he believed this was a plausible view, he reiterated

⁵¹³⁵ Interview transcript, OFT Document Reference 11511, pages 30 and 31.

⁵¹³⁶ Interview transcript, OFT Document Reference 11511, page 30.

⁵¹³⁷ Handwritten note, OFT Document Reference B4120, page 3.

⁵¹³⁸ Response from Mansell, OFT Document Reference B4285, page 1.

⁵¹³⁹ Response from Mansell, OFT Document Reference 14352, page 3.

⁵¹⁴⁰ Response from Mansell, OFT Document Reference 14352, page 3.

that he had no specific recollection and that his view represented speculative interpretation.⁵¹⁴¹

IV.2976. As a result of its enquiries with the three former employees, Mansell said that it is unable to provide an admission of an infringement in relation to this tender. Mansell, however, accepted that an infringement was a very likely interpretation of the evidence provided by the OFT, supported in part by RT's email and in part by the views expressed by RT, RR and KL. Mansell's acceptance of an infringement was therefore based on unsubstantiated interpretation of limited evidence. Mansell was unable to explain precisely why the invoice was sent to Wildgoose although it was able to confirm that the joinery work on the invoice did not take place.⁵¹⁴²

IV.2977. In its response to the Statement, Mansell did not seek to dispute the OFT's provisional finding of an infringement but stated that there was no evidence that it either submitted a cover price in return for a compensation payment, or inflated its own bid to account for the compensation payment.⁵¹⁴³

The OFT's analysis of the evidence and finding

IV.2978. From the evidence presented above, the OFT draws the following conclusions.

IV.2979. Wildgoose and Mansell each accepted an invitation to tender for this contract. Wildgoose and Mansell submitted the two lowest first round tenders and were asked by the client to submit priced 'Bills of Quantities' and revised tenders, which they duly did.

IV.2980. BB explained that Wildgoose wanted to win the tender and that, when asked by the client to submit a priced 'Bill of Quantities' and revised tender, he did so with the hope of winning the work. Wildgoose submitted the lowest bid and it won the contract.

IV.2981. BB also explained that prior to the priced 'Bill of Quantities' and revised tender being requested by the client, he exchanged detailed information with Mansell about the other's original tender figure including tender figure and cost breakdowns. The fact that Wildgoose and Mansell exchanged information about their first round tenders is supported by the entries made by BB in the Post Tender Submission Adjustments in calculating the priced 'Bill of Quantities' which refer to Mansell's original tender figure and also Mansell's provisional figures for roofing and glazing.⁵¹⁴⁴

IV.2982. The exchange of pricing information between competitors during the course of an ongoing tender process is anti-competitive because it is capable of influencing their future conduct during the tender process. This is particularly the case where such information is exchanged between the only tenderers still competing in the tender process. In this instance, by BB's own admission, both Wildgoose and Mansell were able to and did use the knowledge of each other's first round tender figures when preparing the final priced 'Bill of Quantities' and revised tenders requested by the client.

⁵¹⁴¹ Response from Mansell, OFT Document Reference 14352, page 3.

⁵¹⁴² Response from Mansell, OFT Document Reference 14352, pages 3 and 4.

⁵¹⁴³ Written representations of Balfour Beatty Group, 27 June 2008, paragraph 7.1.

⁵¹⁴⁴ Post Tender Submission Adjustments, OFT Document Reference 4514.

- IV.2983. Wildgoose submitted that it had no reason to believe that the tender was ongoing, as it considered it to be a single-stage process. Indeed, Wildgoose submitted that, by adopting a two-stage process, the client was in breach of the terms of the tender, which provided for a single stage tender. As such, Wildgoose only exchanged figures after the bids were submitted which, it suggested, was common practice in the construction industry.⁵¹⁴⁵
- IV.2984. The OFT considers that by exchanging price information at a time when the tender had not yet been awarded, Wildgoose and Mansell were running the risk of having to submit further information to the client and/or revise their tenders whilst in possession of a competitor's commercially sensitive information. The OFT notes that it was not uncommon for customers to seek further details from two or more bidders before awarding tenders, or to seek further reductions from the lowest bidder(s) before deciding whether to proceed with a project.
- IV.2985. In any event, the OFT has not concluded that the exchange between Mansell and Wildgoose of tender prices already submitted was of itself an infringement, but that this exchange constitutes a material fact relevant to the finding of a compensation payment arrangement.
- IV.2986. BB expressed his view that the exchange of first round tender information including figures with Mansell resulted in Wildgoose submitting a '*more competitive*' tender in the hope of winning the work. Similarly, Wildgoose submitted in its response to the Statement that its knowledge of Mansell's first round tender price led to it identifying as many savings as possible in order to secure the contract, and that the compensation payment had no, or at worst a very limited, effect on competition.⁵¹⁴⁶ The OFT does not necessarily accept that the contact between Wildgoose and Mansell made the second stage of the tender process more competitive, noting that there are references in the evidence provided by Wildgoose to '*...we should retain as profits extra monies added*' and '*lets put something in for the second man's efforts*' which have not been explained by Wildgoose and which imply that some upward adjustment may have been made to the price as well as the reductions identified.⁵¹⁴⁷
- IV.2987. It is not necessary or indeed possible for the OFT to determine the actual effect of either the exchange of information or the compensation payment arrangement in any particular tender process. The arrangement was clearly made in order to influence the conduct of each of the parties in the tender process and in fact did do so. As such it has as its object a restriction and/or distortion of competition and is clearly prohibited by the Chapter I prohibition.⁵¹⁴⁸ Furthermore, Wildgoose has accepted that its conduct constitutes an infringement by 'object'.⁵¹⁴⁹
- IV.2988. BB also explained that following the priced 'Bill of Quantities' and revised tender being requested by the client, Wildgoose and Mansell agreed that the successful tenderer would pay the losing party's estimating costs and a figure

⁵¹⁴⁵ Written representations of Wildgoose, 27 June 2008 (amended 1 April 2009), paragraphs 5.49.2 to 5.49.3, 5.52 to 5.56 and 5.60.1 and Annex G.

⁵¹⁴⁶ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraphs 5.49.1, 5.49.4 and 5.57.

⁵¹⁴⁷ See paragraphs IV.2956 and IV.2968 above.

⁵¹⁴⁸ See paragraphs III.143 to III.150 of the Legal Background section.

⁵¹⁴⁹ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraphs 4.36.

of approximately £10,000 was agreed. Subsequently, Mansell raised an invoice for '*Joinery for Burton College*' for £9,985.00 plus VAT, with an invoice total of £11,732.38. BB has confirmed that this invoice was false and that no such '*Joinery Works*' were carried out.

IV.2989. Mansell provided its copy of the same invoice and confirmed that it was paid by Wildgoose and that the work on the invoice did not take place. However, the lack of clear recollections about this tender provided by Mansell's current and former employees makes it difficult for the OFT to reach any conclusions about whether Mansell submitted a priced '*Bill of Quantities*' and final tender in the hope of winning this tender or whether either it took a cover, or, having received details of Wildgoose's first round bid, simply put in a high final tender, knowing that it would not win the tender. The OFT makes no findings in relation to whether Mansell submitted a tender as opposed to a cover bid or whether it informed Wildgoose of its intentions not to compete fully in preparing the final tender.

IV.2990. In reaching this conclusion, it is not necessary for the OFT to determine whether Mansell and Wildgoose expressly agreed to include the agreed level of compensation in their final tender price or whether in fact they did include such sums in either of their respective tenders.

IV.2991. Nothing in Mansell's evidence contradicts any of the above analysis. The OFT also notes Mansell's acceptance of a likely infringement in relation to this tender based on the evidence provided by Wildgoose, supported in part by RT's email and the views expressed by KL, RR and RT.

IV.2992. The OFT therefore concludes that contact took place between Wildgoose and Mansell. The OFT also concludes that Wildgoose and Mansell exchanged information about their original tender figures prior to submitting priced '*Bills of Quantities*' and revised tenders to the client for this tender. The OFT further concludes that Wildgoose and Mansell at least made an arrangement in relation to this tender that the successful tenderer would pay £10,000 to the unsuccessful tenderer, which resulted in Wildgoose making a compensation payment to Mansell, and that this payment was facilitated by the production of a false invoice in relation to '*Joinery for Burton College*'.

IV.2993. The OFT is satisfied that the facts set out in paragraphs IV.2956 to IV.2992 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵¹⁵⁰ In particular:

- (a) the provision/receipt of a compensation payment from Wildgoose to Mansell which followed the exchange of information between Wildgoose and Mansell relating to their respective first round tender bids were not unilateral, and contravene the principle against direct or indirect contact between competitors;⁵¹⁵¹
- (b) the agreement between Wildgoose and Mansell on the level of compensation to be paid to the unsuccessful tenderer, had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁵¹⁵²

⁵¹⁵⁰ See paragraphs III.3 and III.89 to III.157 of the Legal Background section.

⁵¹⁵¹ See paragraphs III.48 to III.51 and III.139 to III.140 of the Legal Background section.

⁵¹⁵² See paragraphs III.150 to III.152 of the Legal Background section.

- (c) Wildgoose can be presumed to have taken account of the information it received from Mansell and has confirmed that it did so (i.e. the details of Mansell's first round tender bid, the agreement to pay compensation, and the agreed level of compensation) when determining its own conduct in the tendering process,⁵¹⁵³ and
- (d) Mansell can be presumed to have taken account of the information it received from Wildgoose (i.e. the details of Wildgoose's first round tender bid, the agreement to pay compensation, and the agreed level of compensation) when determining its own conduct in the tendering process.⁵¹⁵⁴

IV.2994. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Wildgoose and Mansell, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the alteration to café and conservatory extension at Burton College, tender deadline 22 April 2002.

Immunity and leniency assessment

IV.2995. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.2996. Wildgoose informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Wildgoose will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.2997. In respect of this tender, the OFT became aware of Mansell's involvement in bid rigging activities by virtue of the information provided by Wildgoose. Mansell will not therefore receive 100 per cent immunity in respect of this tender. However, Mansell will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 105: Alterations and Extensions to Haigh Hall Medical Centre – 23 April 2002

Client: MHB Partnership

Parties: Irwins and C J Ellmore

IV.2998. On 29 March 2002, MHB Partnership sought tenders for alterations and extensions to Haigh Hall Medical Centre, Haigh Hall Road, Greengates, Leeds.⁵¹⁵⁵ The following six companies were invited to tender: Apex Construction Services Ltd, C J Ellmore, Brenville Construction Ltd, Irwins, Lotus and Totty Building.⁵¹⁵⁶ The deadline for receipt of tenders was 12:00 noon on 23 April 2002.⁵¹⁵⁷

⁵¹⁵³ See paragraphs III.58, III.142 and III.156 to III.157 of the Legal Background section.

⁵¹⁵⁴ See paragraphs III.58, III.142 and III.156 to III.157 of the Legal Background section.

⁵¹⁵⁵ Information from client, OFT Document Reference 8765.

⁵¹⁵⁶ Totty Building is a subsidiary of Propensity.

⁵¹⁵⁷ Information from client, OFT Document Reference 8765.

IV.2999. MHB Partnership received the following tender returns:⁵¹⁵⁸

Company	Date tender received	Amount of tender	Awarded contract
Apex Construction Services Ltd	Before noon on 23 April 2002	£374,927.94	Yes
C J Ellmore	Before noon on 23 April 2002	£409,748.00	
Brenville Construction Ltd	Before noon on 23 April 2002	£419,921.00	
Irwins	Before noon on 23 April 2002	£440,669.00	
Lotus	Before noon on 23 April 2002	£453,604.00	
Totty Building	Before noon on 23 April 2002	£456,024.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register and Form of Tender

IV.3000. During the OFT's search of Irwins' premises a Tender Register was found. The Tender Register contained the following entries in respect of this tender:⁵¹⁵⁹

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered
0402032 2 april 2002 682	Alterations & Extensions Haigh Hall Medical Centre Greengates	Dr W Passant and Partners M.HB Partnerships QS DAQ architects Horsforth	B of Q C	440669

Date tender Due	Estimator	Competition
Tues 23 april 2002	IPN	Ellmore cover to [...] [C]

IV.3001. In connection with its leniency application, Irwins provided to the OFT its tender return letter for this contract.⁵¹⁶⁰ The Form of Tender states that it was for alterations and extensions at Haigh Hall Medical Centre, Greengates, Bradford. The letter was signed on 23 April 2002 by Ivan Peter Nelson ('IPN'), Estimating Director at Irwins, and the figure Irwins submitted was £440,669.00.⁵¹⁶¹

⁵¹⁵⁸ Information from client, OFT Document Reference 8765.

⁵¹⁵⁹ Tender Register, OFT Document Reference A0339, page 42.

⁵¹⁶⁰ Form of Tender, OFT Document Reference A0782.

⁵¹⁶¹ Form of Tender, OFT Document Reference A0782, page 1.

Evidence from leniency applicant – Irwins

IV.3002. As part of its leniency application, Irwins’ legal representatives provided a general explanation of its participation in cover pricing.⁵¹⁶² This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.3003. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for ‘Covers Taken’ and ‘Covers Given’, which detail projects/contracts identified by the company during the course of an internal investigation conducted by IPN into potential cover prices. At number 73 of the ‘Covers Taken’ schedule is the following entry:⁵¹⁶³

	Year	Tender Ref	Description	Client	Date	Value	Cover From
73		0402032	Alt.& Ext. Haigh Hall Med Centre Greengates	Dr W Passant & Partners	23.04.02	440696	Ellmore (cover to [...]) [C]

Individual Contact	Notes
Steve Ellmore	

IV.3004. Irwins also provided to the OFT a schedule listing its competitors’ contact details. The name of ‘Ellmore Construction’ appears on the list and ‘Steve Ellmore’, Managing Director⁵¹⁶⁴ is named as the contact with a telephone number of [...] [C].⁵¹⁶⁵

IV.3005. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Irwins

IV.3006. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins’ leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.3007. Also during this interview, IPN was shown the Tender Register⁵¹⁶⁶ and in particular the entry for alterations and extensions at Haigh Hall Medical Centre and was asked if the entry was written in his handwriting. IPN replied ‘It’s all my writing’.⁵¹⁶⁷ IPN confirmed that the presence of a ‘C’ in the fourth column

⁵¹⁶² Leniency application, OFT Document Reference A0714.

⁵¹⁶³ Leniency application, OFT Document Reference A0718, page 7.

⁵¹⁶⁴ Interview transcript, OFT Document Reference 11255, page 3.

⁵¹⁶⁵ Contact list, OFT Document Reference A0715, page 3.

⁵¹⁶⁶ Tender Register, OFT Document Reference A0339, page 42.

⁵¹⁶⁷ Interview transcript, OFT Document Reference 11255, page 6.

on the Tender Register shows that Irwins took a cover in relation to that contract.⁵¹⁶⁸ IPN also confirmed that the presence of the handwritten entry 'Ellmore' in the final column on the Tender Register shows that Irwins took a cover from C J Ellmore.⁵¹⁶⁹ In relation to the handwritten entry 'cover to [...] [C]', also written in the final column of the Tender Register, IPN was uncertain as to the meaning of this entry but confirmed that he it was unlikely that he would have given a cover price to [...] [C].⁵¹⁷⁰

IV.3008. In its response to the Statement, C J Ellmore suggested that the OFT had not proven that IPN confirmed that Irwins received a cover price from C J Ellmore, because '*(a) IPN did not remember the contract, (b) he could not understand the entry in the Tender Register, and (c) he thought that he might have put the entry down so he knew a bit more about it*'.⁵¹⁷¹

IV.3009. C J Ellmore's analysis is flawed in this respect. With regard to points (b) and (c), these refer to the entry 'cover to [...] [C]', not to the entry 'Ellmore'. In respect of (a), it is not necessary for IPN to remember the obtaining of the cover price from C J Ellmore – it is sufficient that he has confirmed that the contemporaneous record of a cover price having been taken from that company (the 'C' in the fourth column, accompanied by the name 'Ellmore' in the final column), was correct.

IV.3010. The OFT notes that IPN's evidence in respect of the use of 'C' and its meaning is clear and consistent. Moreover, the accuracy of entries in Irwin's Tender Register, and the accompanying witness evidence of IPN, has also been confirmed by other Parties' admissions of cover pricing in relation to Infringements 62, 157 and 165.

[...] [C]

IV.3011. [...] [C]

IV.3012. [...] [C] ⁵¹⁷²

Evidence from other companies – C J Ellmore

IV.3013. The OFT wrote to C J Ellmore on 23 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that C J Ellmore had participated in bid rigging on this tender. The OFT received an email from Keeble Hawson, representing C J Ellmore, on 4 May 2007 stating

⁵¹⁶⁸ Interview transcript, OFT Document Reference 11255, page 6.

⁵¹⁶⁹ Interview transcript, OFT Document Reference 11255, pages 6 and 7.

⁵¹⁷⁰ Interview transcript, OFT Document Reference 11255, page 8.

⁵¹⁷¹ Written representations of C J Ellmore, 26 June 2008, paragraph 83.

⁵¹⁷² [...] [C]

'... we are not in a position to advise our client...without disclosure'.⁵¹⁷³ The OFT notes C J Ellmore's rejection of the OFT's Fast Track Offer.

IV.3014. C J Ellmore's legal representatives stated in their written response to the Statement in respect of this Infringement that *'...it [the entry in the Tender Register] would be equally consistent with... Irwins having received information from other sources about the amount of money that C J Ellmore was due to tender at'*.⁵¹⁷⁴ C J Ellmore provided a witness statement from its Managing Director, Stephen Ellmore ('SE'), which stated that *'I am aware that Ellmores has been approached to give cover prices on occasions in the past and that cover pricing has gone on in some form within the industry. It is Ellmores' policy however not to give or receive cover prices or engage in any other anti-competitive behaviour. This policy was first put in writing in March 2005 but it has always been Ellmores' policy to comply with the law in all respects'*.⁵¹⁷⁵ The witness statement further stated that the estimator at C J Ellmore responsible for this tender was Brian French ('BF'), who is still employed by C J Ellmore.⁵¹⁷⁶

IV.3015. The OFT considers that this evidence of C J Ellmore's company policy regarding cover pricing, which was not in writing at the time of this tender, does not serve to establish that cover pricing did not take place in relation to this tender, in breach of that policy. Although SE was *'involved in estimating from 1987 to 2002'* it remains possible that other members of the estimating team, including BF, may have given cover prices to competitors, including Strata, without the knowledge of SE. The OFT notes that no evidence from BF as to his recollection of events concerning this tender was provided by C J Ellmore.

IV.3016. In its response to the Statement, C J Ellmore asked the OFT to consider the possibility that a contractor (A) bidding for a contract could have provided a subcontractor with its full bid price, perfectly legitimately, and for that subcontractor to inform another contractor (B) bidding for the same contract of the full bid price of contractor (A).⁵¹⁷⁷ The OFT does not consider this theoretical alternative explanation provided by C J Ellmore to be at all plausible. There is no evidence that Irwins obtained a cover price via a subcontractor for this Infringement, but there is evidence from Irwins that it obtained a cover price direct from C J Ellmore.

IV.3017. In its response to the Statement, C J Ellmore also quoted the CAT's judgment in *JJB Sports Plc and Allsports Ltd v OFT* [2004] CAT 17 at 206:

*'As regards price fixing cases... cartels are by their nature hidden and secret; little or nothing many [sic] be committed to writing. In our view, even a single item of evidence, or wholly circumstantial evidence, depending on the particular context in the particular circumstances, many [sic] be sufficient to meet the required standard...'*⁵¹⁷⁸

⁵¹⁷³ Response from C J Ellmore, OFT Document Reference 10952, page 1.

⁵¹⁷⁴ Written representations of C J Ellmore, 26 June 2008, paragraph 85.

⁵¹⁷⁵ Witness statement of Stephen Ellmore, 26 June 2008, paragraph 10.

⁵¹⁷⁶ Witness statement of Stephen Ellmore, 26 June 2008, paragraphs 11 to 12.

⁵¹⁷⁷ Oral representations of C J Ellmore, 16 July 2008, page 5.

⁵¹⁷⁸ Written representations of C J Ellmore, 26 June 2008, paragraph 90.

IV.3018. C J Ellmore stated in this regard:

*'...C J Ellmore submits that in this case the OFT relies to a significant extent on the detailed evidence of the companies who have been asked to be treated leniently...'*⁵¹⁷⁹

IV.3019. Contrary to C J Ellmore's assertion, the principal piece of evidence in respect of this Infringement is the contemporaneous Tender Register obtained during the OFT's unannounced site visit to Irwins, and this is supported by the Irwins 'Covers Taken' schedule submitted as part of its leniency application and the interview with IPN. The OFT does not accept C J Ellmore's implied assertion that Irwins might have changed or fabricated evidence as part of a strategy to cooperate with the OFT and implicate its competitors. Any suggestion that either IPN or Irwins sought to obtain an advantage by fabricating evidence cannot be sustained and has not been supported by any contemporaneous evidence contradicting the OFT's case. Irwins does not stand to receive immunity for this Infringement and it is therefore inherently unlikely that it would fabricate evidence that would leave it exposed to a financial penalty.

IV.3020. In its response to the Statement, C J Ellmore stated:

*'...[w]hat's striking about this particular case and the figures, when you have a chance to go back and have a look at the figures ... is that rather than being between nought and 5%, which is what [...] [C] said was by and large what they were up to when they were involved in cover pricing, the percentages here are 11.49, you can call it 11 if you like, 21.9, or 22 to round it up, and when one looks at the actual figures ... it doesn't have the flavour of some of the other infringements that you've looked at...'*⁵¹⁸⁰

IV.3021. The OFT has not made any allegation against [...] [C] in respect of this Infringement and as such C J Ellmore's comparison of figures is irrelevant. The OFT notes that in any event, Irwins' bid price was 7.5 per cent higher than the bid price of C J Ellmore, a range consistent with acknowledged industry cover pricing practice (see paragraphs IV.99 to IV.104 above).

The OFT's analysis of the evidence and finding

IV.3022. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.3023. Irwins, C J Ellmore [.....] [C] each accepted an invitation to tender for the contract for alterations and extensions to Haigh Hall Medical Centre, Leeds. [.....] [C] Irwins were unable to submit a tender by the return date and/or did not want to win this tender.

IV.3024. With regards to C J Ellmore, Irwins' Tender Register records 'Ellmore' handwritten in the final column. IPN confirmed that he received a cover price from C J Ellmore, since C J Ellmore is the only competitor named on this document (other than the entry 'Cover to [...] [C]'). Also 'C' is handwritten in the type of work/ percentage difference column. IPN confirmed that 'C' in this

⁵¹⁷⁹ Written representations of C J Ellmore, 26 June 2008, paragraph 91.

⁵¹⁸⁰ Oral representations of C J Ellmore, 16 July 2008, page 15.

column shows that Irwins sought a cover price in relation to this contract. The OFT considers in the light of the contemporaneous evidence from Irwins, Irwins' admission, and IPN's explanation of that contemporaneous evidence, that C J Ellmore supplied Irwins with a cover price for this tender.

IV.3025. The OFT notes that the tender submitted by Irwins was higher than the tender submitted by C J Ellmore, a pattern consistent with a cover price having been provided.

IV.3026. [...] [C]⁵¹⁸¹

IV.3027. The OFT therefore concludes that contact took place between Irwins and C J Ellmore. The OFT also concludes that C J Ellmore supplied a figure to Irwins for a cover bid.

IV.3028. The OFT is satisfied that the facts set out in paragraphs IV.3000 to IV.3027 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵¹⁸² In particular:

- (a) the provision of a figure for a cover bid from C J Ellmore to Irwins was not unilateral⁵¹⁸³, and contravenes the principle against direct or indirect contact between competitors;⁵¹⁸⁴
- (b) Irwins can be presumed to have taken account of the information received from C J Ellmore (i.e the cover price) when determining its own conduct in the tendering process;⁵¹⁸⁵ and
- (c) C J Ellmore can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵¹⁸⁶

IV.3029. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and C J Ellmore in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations and extensions to Haigh Hall Medical Centre, Leeds, tender deadline 23 April 2002.

Immunity and leniency assessment

⁵¹⁸¹ [...] [C]

⁵¹⁸² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵¹⁸³ See paragraph IV.73 of the General comments on cover pricing section.

⁵¹⁸⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵¹⁸⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵¹⁸⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3030. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3031. In respect of this tender, the OFT became aware of Irwins' involvement in bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this Infringement.

Infringement 106: International House, Elmdon Trading Estate, Birmingham – 26 April 2002
Client: Standard Life Investments
Parties: Thomas Vale and William Sapcote

IV.3032. On 22 March 2002, Standard Life Investments sought tenders for refurbishment of International House, Elmdon Trading Estate, Birmingham. The following six companies were invited to tender: A & H Construction and Development plc, Allenbuild, Moss Construction Ltd, Mowlem, William Sapcote and Thomas Vale.⁵¹⁸⁷ The deadline for the receipt of tenders was 26 April 2002.

IV.3033. Standard Life Investments received the following tender returns:⁵¹⁸⁸

Company	Date tender received	Amount of tender	Awarded contract
A & H Construction and Development plc	26 April 2002	£2,710,770	
Allenbuild	26 April 2002	£2,785,051	
Moss Construction Ltd	26 April 2002	£2,798,761	
Mowlem	26 April 2002	£2,771,727	
William Sapcote	26 April 2002	£2,823,840	
Thomas Vale	26 April 2002	£2,687,141	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale

IV.3034. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Summary sheet for this tender, also known as the QA EST6 form.⁵¹⁸⁹ Under the section headed '*COMPETITION*' is the following entry:

⁵¹⁸⁷ Information from client, OFT Document Reference 9589.

⁵¹⁸⁸ Information from client, OFT Document Reference 9589.

⁵¹⁸⁹ Tender Summary, OFT Document Reference 4694, page 8.

*'Moss
Mowlem
A & H
Allenbuild
System by Design (Leeds)
(C) Sapcote £2,823,840 (TBA)'*

IV.3035. The names of the competitors are in typed manuscript but the entries '*(C)*' and '*£2,823,840 (TBA)*' are both handwritten.⁵¹⁹⁰

IV.3036. Thomas Vale also provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁵¹⁹¹

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5100	B	Standard Life Assurance	Refurbishment, International House, Elmdon Trading Estate, Birmingham	2,000,000	REP

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
	26/04/2002 Noon	2,687,141		Mowlem, Moss, A & H, Sapcote, Allenbuild	

IV.3037. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁵¹⁹² of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this list, there is an entry for '*Sapcote*' plus contact names and telephone numbers.⁵¹⁹³

Evidence from leniency applicant Thomas Vale

IV.3038. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and in particular, the use of the Tender Summary sheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.3039. At Annex 14⁵¹⁹⁴ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 35 of the schedule under Annex 13 and within the section for 2002 tenders is the following entry:⁵¹⁹⁵

⁵¹⁹⁰ Tender Summary, OFT Document Reference 4694, page 8.

⁵¹⁹¹ Tender Status spreadsheet, OFT Document Reference 4522, page 25.

⁵¹⁹² Interview transcript, OFT Document Reference 11418, page 21.

⁵¹⁹³ Contact list, OFT Document Reference 11086, page 23.

⁵¹⁹⁴ Leniency application, OFT Document Reference 4568.

⁵¹⁹⁵ Leniency application, OFT Document Reference 4568, page 35.

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5100	26 April	Standard Life Assurance	Refurbishment, International House	Given (Sapcote - £2,823,840)	Yes (Tender Summary Sheet)

IV.3040. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁵¹⁹⁶ and William Sapcote appears on this list.

IV.3041. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.3042. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave an explanation of the use of the Tender Summary sheet to record cover prices given to its competitors.

IV.3043. In interview CKT confirmed that this tender was allocated to estimator Robin Perks ('REP'), who worked within the Building Division (also known as Traditional), for which CKT was the estimating manager.⁵¹⁹⁷ CKT said *'I do distinctly remember that it was the first job that Robin actually priced, when he joined us...I also recall that it was the first job that he actually won'*.⁵¹⁹⁸ CKT referred to the relevant entry in the Tender Status spreadsheet as follows: *'T5100 is the tender number, B is the Building Division...REP is the estimator. There's no category entered, but I can say it was an A tender, tender return date 26th of the fourth 2002, and the tender figure, £2,687,141, and there is a list of competitors, but none of them are highlighted which obviously confirms that we did price it, but I do remember we did price it'*.⁵¹⁹⁹

IV.3044. CKT referred to the Tender Summary sheet⁵²⁰⁰ and said that it would have been created by REP and *'the fact that that is produced, or is here, also confirms it was a real, live tender...that we priced'*.⁵²⁰¹ CKT admitted that he made the handwritten annotations on the Tender Summary sheet and that these entries show that he would have agreed and provided a figure of £2,823,840 as a cover price to William Sapcote.⁵²⁰² He also explained *'in brackets, TBA, which is a contract period that I suggested they put to be agreed'*.⁵²⁰³ Finally, CKT confirmed that he would have dealt with Peter Perry, Estimating Director of William Sapcote.⁵²⁰⁴

⁵¹⁹⁶ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁵¹⁹⁷ Interview transcript, OFT Document Reference 11419, page 11.

⁵¹⁹⁸ Interview transcript, OFT Document Reference 11419, page 12.

⁵¹⁹⁹ Interview transcript, OFT Document Reference 11419, page 12.

⁵²⁰⁰ Tender Summary, OFT Document Reference 4694, page 8.

⁵²⁰¹ Interview transcript, OFT Document Reference 11419, page 12.

⁵²⁰² Interview transcript, OFT Document Reference 11419, page 13.

⁵²⁰³ Interview transcript, OFT Document Reference 11419, page 13.

⁵²⁰⁴ Interview transcript, OFT Document Reference 11419, pages 13 and 14.

IV.3045. REP was also interviewed and he agreed that this was a tender that he dealt with and that it was priced competitively and successfully by Thomas Vale. He said that the list of competitors on the Tender Summary sheet⁵²⁰⁵ would have been entered by him whilst preparing the tender. He also agreed that the handwritten entries on the same document were made by CKT and show that *'we obviously gave Sapcote a cover'*.⁵²⁰⁶ REP believed the exchange of a cover price would have been dealt with by CKT. He stated *'obviously, you know, a lot of people know everybody else in the industry, so most people would know to speak to Chris...probably was by him I would have thought. I mean I was obviously sort of very new there at the time'*.⁵²⁰⁷

Evidence from other companies – William Sapcote

IV.3046. The OFT wrote to William Sapcote on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that William Sapcote had participated in bid rigging on this tender. In response to this letter, William Sapcote admitted participating in bid rigging activity and stated *'We may have engaged in cover pricing activities on this tender but cannot recall details of other parties'*.⁵²⁰⁸

IV.3047. The OFT subsequently wrote to William Sapcote's ultimate parent company at the time of this Infringement, Sapcote Holdings, on 6 November 2007, asking it to comment on William Sapcote's response to the OFT's Fast Track Offer, given that the OFT intended to hold Sapcote Holdings jointly and severally liable for any infringements committed by William Sapcote in respect of which the OFT ultimately decided to impose financial penalties. Sapcote Holdings did not respond with any substantive comments.⁵²⁰⁹

IV.3048. Following the issue of the Statement, neither William Sapcote nor Sapcote Holdings submitted any written or oral representations.

The OFT's analysis of the evidence and finding

IV.3049. From the evidence presented above, the OFT draws the following conclusions.

IV.3050. Thomas Vale and William Sapcote each accepted an invitation to tender for this contract.

IV.3051. Thomas Vale completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work. This is shown by the fact that Thomas Vale provided the lowest tender amount and won the contract. William Sapcote was unable to submit a tender by the return date and/or did not want to win this contract.

IV.3052. Thomas Vale's contemporaneous Tender Summary sheet, maintained in electronic format by estimator Robin Perks within the Building Division, records six competitors who were also invited to tender for this contract, namely

⁵²⁰⁵ Tender Summary, OFT Document Reference 4694, page 8.

⁵²⁰⁶ Interview transcript, OFT Document Reference 11424, page 8.

⁵²⁰⁷ Interview transcript, OFT Document Reference 11424, page 10.

⁵²⁰⁸ Response from William Sapcote, OFT Document Reference 10899, page 4.

⁵²⁰⁹ Response from Sapcote Holdings, OFT Document Reference 14035.

'Moss, Mowlem, A & H, Allenbuild, System by Design (Leeds) [and] Sapcote'. Beside the entry for *'Sapcote'* is a handwritten letter 'C' in brackets, an amount and the letters 'TBA', also in brackets. In interview, both REP and CKT confirmed that the handwritten entries show that a cover price was given by Thomas Vale to William Sapcote. CKT admitted that he made the entries at the time and that he would have dealt with the request for a cover price from William Sapcote himself. The handwritten figure on the Tender Summary sheet of £2,823,840 matches William Sapcote's tender amount, recorded by the client Standard Life Investments.

- IV.3053. Standard Life Investments also received a tendered amount of £2,687,141 from Thomas Vale, which is lower than the amount tendered by William Sapcote. This fits into the pattern consistent with a cover price having been provided from Thomas Vale to William Sapcote.
- IV.3054. The OFT notes that although six competitors have been recorded on the Tender Summary sheet, only one of them has the handwritten letter 'C' and tender amount, which suggests a conscious decision was made to differentiate William Sapcote from the other competitors. The letter 'C' was commonly used within the industry to indicate a cover price.
- IV.3055. Thomas Vale admitted that William Sapcote was one of the *'key competitors'* with whom it engaged in cover pricing activity.
- IV.3056. Finally, William Sapcote also admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.
- IV.3057. The OFT therefore concludes that contact took place between William Sapcote and Thomas Vale and that Thomas Vale supplied a figure to William Sapcote in order that it could submit a bid to the client that was not intended to win the contract.
- IV.3058. The OFT is satisfied that the facts set out in paragraphs IV.3034 to IV.3057 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵²¹⁰ In particular:
- (a) the provision of a figure for a cover bid from Thomas Vale to William Sapcote was not unilateral⁵²¹¹, and contravenes the principle against direct or indirect contact between competitors;⁵²¹²
 - (b) William Sapcote can be presumed to have taken account of the information received from Thomas Vale (i.e. the cover price) when determining its own conduct in the tendering process;⁵²¹³ and
 - (c) Thomas Vale can be presumed to have taken account of the information it received from William Sapcote (i.e. that William Sapcote did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵²¹⁴

⁵²¹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵²¹¹ See paragraph IV.73 of the General comments on cover pricing section.

⁵²¹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵²¹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵²¹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3059. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and William Sapcote in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for International House, Elmdon Trading Estate, Birmingham, tender deadline 26 April 2002.

Immunity and leniency assessment

IV.3060. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3061. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 107: Gas Training Centre, Evesham College – 29 April 2002
Client: Evesham College
Parties: Thomas Vale and Speller-Metcalf

IV.3062. On 6 March 2002, Evesham College sought tenders for a new Gas Training Centre.⁵²¹⁵ The following four companies were invited to tender: Thomas Vale, William Sapcote, Pearce and Speller-Metcalf.⁵²¹⁶ The deadline for the receipt of tenders was 29 April 2002.

IV.3063. Evesham College received the following tender returns:⁵²¹⁷

Company	Date tender received	Amount of tender	Awarded contract
Thomas Vale	Not recorded	£497,586	
William Sapcote	Not recorded	£510,740	
Pearce	Not recorded	£549,844	
Speller-Metcalf	Not recorded	£461,060	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – tender spreadsheets

IV.3064. During the OFT’s visit at Thomas Vale’s head office, a spreadsheet for the Strategic Projects Division was obtained, which contained the following entry:⁵²¹⁸

⁵²¹⁵ This project was recorded by Thomas Vale in its contemporaneous documents as ‘Extension to Art Block’ at Evesham College. However, in view of the same date, location and bid amount, the OFT is satisfied that this is one and the same contract. The OFT assumes that the extension to the Art Block was made in order to provide the new Gas Training Centre.

⁵²¹⁶ Information from client, OFT Document Reference 13199.

⁵²¹⁷ Information from client, OFT Document Reference 13199.

⁵²¹⁸ Tender Report, OFT Document Reference 4192, page 1.

THOMAS VALE	Strategic Projects Tender Report April 2002 - March 2005
TENDERS	CAT A – Priced CAT B - Cover

Tender No.	Tender Type	Client	Description	Approx £	EST	CAT	Date Due
T5077		Evesham College	Extension to Art Block			B	29/04/2002 Noon

Tender Figure	Tender Status/ Position	Tendering Contractors	Successful Contractor	Contract Value
497,586	-	Sapcote, Pearce, Speller Metcalfe,		

IV.3065. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁵²¹⁹

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T5077	P	Evesham College	Extension to Art Block		CJD	B	29/04/2002 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
497,586		Sapcote, Pearce, Speller Metcalfe,	

Evidence from leniency applicant Thomas Vale

IV.3066. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.3067. At Annex 14⁵²²⁰ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 40 of the schedule under Annex 14 and within the section for 2002 tenders is the following entry:⁵²²¹

⁵²¹⁹ Tender Status spreadsheet, OFT Document Reference 4522, page 25.

⁵²²⁰ Leniency application, OFT Document Reference 4568.

⁵²²¹ Leniency application, OFT Document Reference 4568, page 40.

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5077	29 April	Evesham College	Extension to Art Block	Taken (Speller Metcalfe)	Yes (Tender Spreadsheet; Strategic Projects Tender Report)

IV.3068. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

IV.3069. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application.⁵²²² Speller-Metcalfe appears on this list.

IV.3070. In its response to the Statement, Thomas Vale stated in respect of this Infringement *'Thomas Vale accepts that the evidence provided by both Speller Metcalfe and Thomas Vale indicates that Speller Metcalfe gave a cover to Thomas Vale'*.⁵²²³

Witness evidence from leniency applicant Thomas Vale

IV.3071. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors. An explanation of the Strategic Projects Division spreadsheet is also set out at paragraphs IV.713 to IV.715 above.

IV.3072. As indicated by the letter 'P' in the Tender Status spreadsheet, this tender was allocated to the Special Projects Division, based at Thomas Vale's head office. CKT explained that all tenders at the head office were booked through him but estimators in different divisions would have been aware of the requirement to either update the spreadsheet themselves or inform CKT of what had occurred once the tender had been submitted, including where assistance had been sought from other contractors.⁵²²⁴ CKT also said that the initials 'CJD' in the estimator column were for Chris Duffy ('CJD').⁵²²⁵

IV.3073. In interview CJD said that he was aware of CKT's Tender Status spreadsheet and had access to it. He was also aware that if a competitor was named in bold in the Tendering Contractors column, it showed that assistance had been sought from that company. He said that he would make the entry in bold if he had been aware of the cover price *'usually after the tender's gone in, because we don't generally put anything...into this part of the section...up to that,*

⁵²²² Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁵²²³ Written representations of Thomas Vale, 27 June 2008, paragraph 17.5.

⁵²²⁴ Interview transcript, OFT Document Reference 13855, pages 4 to 8.

⁵²²⁵ Interview transcript, OFT Document Reference 13855, page 28.

generally that was done by Chris Trickett and then beyond that, the tender figure, the tender status, tender contractors, that would be done by anybody, any of us that wished to put any element in there'.⁵²²⁶

IV.3074. CJD said he could not recall seeing the Strategic Projects spreadsheet, maintained by bid manager Russell Burley. However, he conceded that it followed a similar format to the spreadsheet maintained by CKT.⁵²²⁷

IV.3075. CJD was shown the entry from CKT's Tender Status spreadsheet in relation to this tender and said *'Well, I've got no recollection of this one at all but if we didn't do much work on it then 2002, five years ago. It would indicate from there it's Speller Metcalfe in dark, that we took a cover, I guess*'.⁵²²⁸ CKT was also shown the entry in the Tender Status spreadsheet and commented *'Yes, P the projects division, CJD Chris Duffy the estimator, category B which indicates a cover, tender return date 29th of April 2002, Thomas Vale figure £497,586, Speller Metcalfe in bold which indicates that Speller Metcalfe gave us a cover*'.⁵²²⁹

Evidence from other companies – Speller-Metcalfe

IV.3076. The OFT wrote to Speller-Metcalfe on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Speller-Metcalfe had participated in bid rigging on this tender. In response to this letter, Speller-Metcalfe admitted that it *'engaged in bid rigging (COVER PRICING) activities on this tender with Thomas Vale, Stourport on Severn*'.⁵²³⁰ It added that *'we were approached for a cover price by Thomas Vale in the latter days of the tender period and provided them with a figure. We won this tender and carried out this project*'.⁵²³¹

IV.3077. In its response to the Statement, Speller-Metcalfe stated *'Speller-Metcalfe has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement*'⁵²³² in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.3078. From the evidence presented above, the OFT draws the following conclusions.

IV.3079. Thomas Vale and Speller-Metcalfe each accepted an invitation to tender for the new Gas Training Centre at Evesham College.

IV.3080. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.

IV.3081. Speller-Metcalfe completed the estimating process for this contract and it appears that it submitted a bid with the hope of winning the work. This is

⁵²²⁶ Interview transcript, OFT Document Reference 11416, pages 3 and 4.

⁵²²⁷ Interview transcript, OFT Document Reference 11416, page 4.

⁵²²⁸ Interview transcript, OFT Document Reference 11417, page 3.

⁵²²⁹ Interview transcript, OFT Document Reference 13855, page 28.

⁵²³⁰ Response from Speller-Metcalfe, OFT Document Reference 10844, page 2.

⁵²³¹ Response from Speller-Metcalfe, OFT Document Reference 10844, page 4.

⁵²³² Written representations of Speller-Metcalfe, 27 June 2008, paragraph 4.

shown by the price submitted by Speller-Metcalfe being the lowest received and the fact that it won the contract.

- IV.3082. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT and available to estimators at Thomas Vale's head office, including CJD within Special Projects Division, records three competitors for this tender, namely William Sapcote, Pearce and Speller-Metcalfe. Speller-Metcalfe is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated at the time by CJD. Thomas Vale's bid is recorded by the client as £497,586 which matches the figure recorded by Thomas Vale on the Tender Status spreadsheet.
- IV.3083. Evesham College also received a tendered amount of £461,060 from Speller-Metcalfe, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Speller-Metcalfe to Thomas Vale.
- IV.3084. Thomas Vale also maintained a spreadsheet within the Strategic Projects division, where tenders were categorised A for '*Priced*' or B for '*Cover*'. The entry for this tender is categorised as a Category B tender with three competitors listed, of which again only Speller-Metcalfe is highlighted in bold.
- IV.3085. The OFT notes that although three competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one company is highlighted in bold, i.e. Speller-Metcalfe. This indicates that a conscious decision was made to differentiate Speller-Metcalfe from the other competitors. In addition, Speller-Metcalfe was the only company highlighted in bold in the Special Projects Division spreadsheet, maintained by bid manager Russell Burley.
- IV.3086. Thomas Vale admitted that Speller-Metcalfe was one of the '*key competitors*' with whom it engaged in cover pricing activity. This tender was allocated to Thomas Vale's estimator CJD, who was fully aware of the use of the Tender Status spreadsheet and had access to it. In interview, he said that the entry in the spreadsheet for this tender indicated that he had obtained a cover price from Speller-Metcalfe. CJD said that in relation to contacting estimators from another contractor, he had '*two A4 sheets of paper...but it... had a few phone numbers in of contacts, yes, it would probably have about, I don't know, 40 or 50 phone numbers in there*'.⁵²³³ In interview, CKT also admitted that the entry in the Tender Status spreadsheet indicated a cover price had been sought and obtained by Thomas Vale from Speller-Metcalfe.
- IV.3087. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Speller-Metcalfe admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides independent corroboration of the OFT's evidence in respect of this tender.
- IV.3088. Finally, Speller-Metcalfe is the only company whose figure is below that of Thomas Vale and so Thomas Vale could only have received cover from Speller-Metcalfe.

⁵²³³ Interview transcript, OFT Document Reference 11416, page 5.

IV.3089. The OFT therefore concludes that contact took place between Thomas Vale and Speller-Metcalf. The OFT also concludes that Speller-Metcalf supplied a figure to Thomas Vale for a cover bid.

IV.3090. The OFT is satisfied that the facts set out in paragraphs IV.3064 to IV.3089 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵²³⁴ In particular:

- (a) the provision of a figure for a cover bid from Speller-Metcalf to Thomas Vale was not unilateral⁵²³⁵, and contravenes the principle against direct or indirect contact between competitors;⁵²³⁶
- (b) Thomas Vale can be presumed to have taken account of the information received from Speller-Metcalf (i.e. the cover price) when determining its own conduct in the tendering process;⁵²³⁷ and
- (c) Speller-Metcalf can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵²³⁸

IV.3091. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Speller-Metcalf in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the new Gas Training Centre at Evesham College, tender deadline 29 April 2002.

Immunity and leniency assessment

IV.3092. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3093. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 27 at Thomas Vale on 24 January 2006. Thomas Vale will not therefore receive 100 per cent immunity in respect of this tender. However, Thomas Vale will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 108: **Office Block, Sherwood Rise, Nottingham – 15 May 2002**
Client: **Davis Langdon & Everest**
Parties: **Herbert Baggaley and Adam Eastwood**

IV.3094. On 15 April 2002, Davis Langdon & Everest sought tenders for an office block, Sherwood Rise, Nottingham.⁵²³⁹ The following four companies were

⁵²³⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵²³⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁵²³⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵²³⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵²³⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵²³⁹ Information from client, OFT Document Reference 7546.

invited to tender: Coltham Construction Ltd, Adam Eastwood, North Midland Building and Herbert Baggaley.⁵²⁴⁰ The deadline for receipt of tenders was 12:00 noon on 15 May 2002.⁵²⁴¹

IV.3095. Davis Langdon & Everest received the following tender returns:⁵²⁴²

Company	Time & Date tender received	Amount of tender	Awarded contract
Coltham Construction Ltd	Noon on 15 May 2002	£679,178.00	
Adam Eastwood	Noon on 15 May 2002	£666,037.14	
North Midland Building	Noon on 15 May 2002	£570,110.00	Yes
Herbert Baggaley	Noon on 15 May 2002	£698,892.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant - Adam Eastwood – Handwritten Note

IV.3096. During the OFT’s search of Adam Eastwood’s premises a handwritten note was found.⁵²⁴³ The note contained the following entries in respect of this tender:

<i>Our Price</i>		<i>666 037.14</i>
<i>Add 4.933%</i>		<i>32 855.61</i>
<i>Baggaley</i>	<i>£</i>	<i>698 892.75</i>

Six hundred & sixty six thousand and thirty seven pounds and 14p.’

IV.3097. A completed Form of Tender for this contract was also found at Adam Eastwood. The Form of Tender shows that Adam Eastwood tendered £666.037.14 for this contract.⁵²⁴⁴ The Form of Tender was signed by C Stubbs on 15 May 2002.⁵²⁴⁵

Contemporaneous documentary evidence from leniency applicant – Herbert Baggaley – Tendering Schedule

IV.3098. During the OFT’s search of Herbert Baggaley’s premises a *‘Tendering Schedule’* was found.⁵²⁴⁶ The tendering schedule contained the following entries in respect of this tender:⁵²⁴⁷

⁵²⁴⁰ Information from client, OFT Document Reference 7546.

⁵²⁴¹ Information from client, OFT Document Reference 7546.

⁵²⁴² Information from client, OFT Document Reference 7546.

⁵²⁴³ Handwritten note, OFT Document Reference 1942.

⁵²⁴⁴ Form of Tender, OFT Document Reference 1943, page 1.

⁵²⁴⁵ Form of Tender, OFT Document Reference 1943, page 2.

⁵²⁴⁶ Tender Register, OFT Document Reference 1636.

⁵²⁴⁷ Tender Register, OFT Document Reference 1636, page 2.

DATE	PROJECT DETAILS	CLIENT	PROFESSIONALS	APPROX VALUE	DUE
16/4/02	Office/Building, 2A Sherwood Rise Nottingham	Estate Services Ltd	Davis Langdon and Everest	£500 K	15/5/02

TENDER TYPE	EST	BID	REF	POSITION	% DIFF
Design & Build	/	/	02/ 037	Cover Price	

Evidence from leniency applicant – Adam Eastwood

IV.3099. As part of its leniency application, Adam Eastwood’s legal representatives provided a general explanation of its participation in cover pricing.⁵²⁴⁸ This evidence is set out in paragraphs IV.159 to IV.165 above and is relied upon by the OFT in relation to this tender.

IV.3100. In addition to its leniency application, Adam Eastwood provided to the OFT a list of covers, which was compiled relying on recollections of managers within Adam Eastwood.⁵²⁴⁹ Adam Eastwood stated *‘there remains the possibility that there may a few [sic] other instances within the last five years, which escape specific recollection’*.⁵²⁵⁰ At number one on the list is the following entry:⁵²⁵¹

*‘Office Block, Sherwood Rise, Nottingham – July 2002
Eastwoods gave a cover price to Baggaley Construction
Eastwoods figure was £666,000.00
Eastwoods were not awarded the project, 2nd out of 4 No.
Cover given by Chris Stubbs OR Adrian Tranter of Eastwoods to Roger Hayes
of Baggaley Construction at request of Baggaley’s who said they didn’t want
the job.’*

IV.3101. In its response to the Statement, Adam Eastwood stated in respect of this Infringement, *‘Eastwoods gave Baggaleys a “cover” price, but this did not affect the outcome, with 3 fully competitive tenders, and the contract was awarded to North Midland Building by a wide margin.’*⁵²⁵² The OFT does not accept Adam Eastwood’s assertion that the provision of a cover price did not affect the outcome of the tender process, whilst noting that cover bidding is an ‘object’ infringement and as such whether or not an effect on competition can be demonstrated is irrelevant. At a minimum, absent the cover price arrangement Herbert Baggaley may have returned the tender, giving the client the opportunity to seek a replacement tenderer.

⁵²⁴⁸ Leniency application, OFT Document Reference 3949.

⁵²⁴⁹ Leniency application, OFT Document Reference 3949.

⁵²⁵⁰ Leniency application, OFT Document Reference 3949, page 1.

⁵²⁵¹ Leniency application, OFT Document Reference 3952, page 1.

⁵²⁵² Written representations of Adam Eastwood, 26 June 2008, page 3.

Evidence from leniency applicant – Herbert Baggaley

IV.3102. As part of its leniency application, Herbert Baggaley’s legal representatives provided a general explanation of its participation in cover pricing.⁵²⁵³ This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.3103. In addition to its leniency application, Herbert Baggaley provided a complete list of tenders received by HBC [Herbert Baggaley] from 1 January 2000.⁵²⁵⁴ The following entry appeared on the list of tenders:⁵²⁵⁵

DATE	PROJ NO	TENDER NO	CONTRACT NO	JOB DESCRIPTION/ESTIMATOR’S COMMENTS
15/04/2002	02/031OP	T02/037		Construction of Office Building, Nottingham NO RECOLLECTION

CLIENT	APPROX £000’S	A B C R	DUE	BID £000’S	RESULTS
Estate Incomes Ltd	500	C C	15/05/2002	698,892	C

IV.3104. Following the issue of the Statement, Herbert Baggaley did not submit any specific written or oral representations in respect of this Infringement.

Witness evidence from leniency applicant – Adam Eastwood

IV.3105. During separate interviews with the OFT on 21 February 2007, conducted in connection with Adam Eastwood’s leniency application, both Adrian Tranter (‘AT’), Managing Director of Adam Eastwood, and Chris Stubbs (‘CS’), Company Director of Adam Eastwood, provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.159 to IV.165 above and is relied upon by the OFT in relation to this tender.

IV.3106. During the interview with AT, he confirmed that *‘we actually priced this to win it ... We believe we went in with a very keen price. We gave a cover I think to, is it Baggaley’s on the list?’*⁵²⁵⁶ AT stated that he was unsure who within Adam Eastwood gave Herbert Baggaley the figure for a cover price, *‘... we know we gave it but we can’t remember which of us gave it’*.⁵²⁵⁷ AT confirmed that the handwritten note, described at paragraph IV.3096 above, was made by CS.⁵²⁵⁸

IV.3107. During the interview with CS, he was asked by the OFT if he could recall anything about this contract. CS replied *‘it was a contract in Nottingham that we wanted ... either myself or Adrian took a call from Baggaley’s can you give*

⁵²⁵³ Leniency application, OFT Document Reference 3894.

⁵²⁵⁴ List of tenders, OFT Document Reference 3896.

⁵²⁵⁵ List of tenders, OFT Document Reference 3896, page 13.

⁵²⁵⁶ Interview transcript, OFT Document Reference 11095, page 7.

⁵²⁵⁷ Interview transcript, OFT Document Reference 11095, page 7.

⁵²⁵⁸ Interview transcript, OFT Document Reference 11095, page 7.

us a help'.⁵²⁵⁹ CS was shown the handwritten note found during the OFT's visit and confirmed, 'That is my writing'.⁵²⁶⁰ CS explained, '... normally that would have gone in the bin for some reason it has been put in the tender file'.⁵²⁶¹ CS also confirmed that the figure provided to Herbert Baggaley for a cover price included an increase of 4.933 per cent, and that the information would have been relayed to Roger Hayes at Herbert Baggaley by phone, probably on the morning the tender return was due in to the client.⁵²⁶²

Witness evidence from leniency applicant – Herbert Baggaley

IV.3108. During an interview on 19 April 2007 with Anton Newell ('AN'), an estimator at Herbert Baggaley until he became Chief Estimator in October 2002, AN was shown Herbert Baggaley's tendering schedule entry for this tender and stated 'I can't remember who we took help off on that one ... A cover price on the tender'.⁵²⁶³

IV.3109. AN was then shown a copy of the handwritten note found at Adam Eastwood.⁵²⁶⁴ AN stated in reference to the comment 'our price 666 037.14 add 4.933%', 'its either that that's come from another contract [or] and it ties up with our figure, which suggests that that is who we took help from'.⁵²⁶⁵ The OFT confirmed that this document was taken from Adam Eastwood's premises during its visit, to which AN replied '... they would have been a company that we occasionally gave/received covers from'.⁵²⁶⁶

The OFT's analysis of the evidence and finding

IV.3110. From the evidence presented above, the OFT draws the following conclusions.

IV.3111. Adam Eastwood and Herbert Baggaley each accepted an invitation to tender for the contract for an office block, Sherwood Rise, Nottingham. Adam Eastwood has stated that Herbert Baggaley did not want to win this contract.

IV.3112. Adam Eastwood appears to have completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work.

IV.3113. A handwritten note found at Adam Eastwood records 'Our Price 666 037.14 Add 4.933% 32 855.61 Baggaley £698892.75' on a notepad. Both AT and CS confirmed that this note shows that Adam Eastwood gave a cover price to Herbert Baggaley. Corroborating contemporaneous documentary evidence was also found at Herbert Baggaley. A tendering schedule found at Herbert Baggaley records 'Cover price' written against this contract. AN confirmed that this shows that Herbert Baggaley was given a cover price for this tender, but he could not recall from whom.

⁵²⁵⁹ Interview transcript, OFT Document Reference 11094, page 6.

⁵²⁶⁰ Interview transcript, OFT Document Reference 11094, page 6.

⁵²⁶¹ Interview transcript, OFT Document Reference 11094, page 6.

⁵²⁶² Interview transcript, OFT Document Reference 11094, page 6.

⁵²⁶³ Interview transcript, OFT Document Reference 11317, page 22.

⁵²⁶⁴ Handwritten note, OFT Document Reference 1942.

⁵²⁶⁵ Interview transcript, OFT Document Reference 11317, page 22.

⁵²⁶⁶ Interview transcript, OFT Document Reference 11317, page 22.

IV.3114. The OFT notes that the tender submitted by Herbert Baggaley was higher than the tender submitted by Adam Eastwood, the pattern consistent with a cover price having been provided.

IV.3115. The OFT further considers in the light of the contemporaneous evidence found at both Adam Eastwood and Herbert Baggaley, and each of AT's, CS's and AN's admissions and explanations of the contemporaneous evidence, that contact took place between Adam Eastwood and Herbert Baggaley and that Adam Eastwood supplied Herbert Baggaley with a cover price for this tender

IV.3116. The OFT is satisfied that the facts set out in paragraphs IV.3096 to IV.3115 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵²⁶⁷ In particular:

- (a) the provision of a figure for a cover bid from Adam Eastwood to Herbert Baggaley was not unilateral⁵²⁶⁸, and contravenes the principle against direct or indirect contact between competitors;⁵²⁶⁹
- (b) Herbert Baggaley can be presumed to have taken account of the information received from Adam Eastwood (i.e the cover price) when determining its own conduct in the tendering process;⁵²⁷⁰ and
- (c) Adam Eastwood can be presumed to have taken account of the information it received from Herbert Baggaley (i.e. that Herbert Baggaley did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵²⁷¹

IV.3117. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Adam Eastwood and Herbert Baggaley, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for an office block, Sherwood Rise, Nottingham, tender deadline 15 May 2002.

Immunity and leniency assessment

IV.3118. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3119. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 14 June 2005 to the premises of Herbert Baggaley. Therefore Herbert Baggaley will not receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Herbert Baggaley in respect of this Infringement.

⁵²⁶⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵²⁶⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁵²⁶⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵²⁷⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵²⁷¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3120. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 14 June 2005 to the premises of Herbert Baggaley. Therefore Adam Eastwood will not receive 100 per cent immunity in respect of this tender. However, Adam Eastwood will receive the normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 109: Not included in the Decision

Infringement 110: Fire Damage Refurbishment, 22 Midlame Gardens, Bulwell – 30 May 2002

Client: Tuntum Housing Association

Parties: Derwent Valley and Hill

IV.3121. On 9 May 2002, Tuntum Housing Association sought tenders for the refurbishment of property following fire damage at 22 Midlame Gardens, Bulwell. The following two companies were invited to tender: Derwent Valley and Hill. The deadline for the receipt of tenders was 12:00 noon on 30 May 2002.⁵²⁷²

IV.3122. Tuntum Housing Association received the following tender returns:⁵²⁷³

Company	Date and time tender received	Amount of tender	Awarded contract
Hill	Prior to 12:00 noon 30 May 2002	£58,196.25	Yes
Derwent Valley	Prior to 12:00 noon 30 May 2002	£61,300.00	

IV.3123. Focus Consultants (UK) Ltd, who dealt with the tendering process on behalf of Tuntum Housing Association, stated in a report to Tuntum Housing Association dated June 2002 that, *'The tender figure submitted does not compare favourably with the pre-tender estimate. Whilst the tenders were obtained in competition, we believe the rates quoted are high, but some what reflective of the currently inflated tender market conditions'*.⁵²⁷⁴ The report in its recommendations/comments section goes on to say that, *'We are of the opinion that the Tender figure submitted by Hill (Bros) Nottingham Limited in the sum of £58,196.25 is technically in order. However we consider the tender figure too high, reflecting the current market conditions'*.⁵²⁷⁵

IV.3124. In its response to the Statement, in respect of this Infringement, Hill stated *'...[t]he tender was properly priced, and was priced by Mr Hallam. A true copy of Mr Hallam's pricing is attached...'*.⁵²⁷⁶

⁵²⁷² Information from client, OFT Document Reference 10153.

⁵²⁷³ Information from client, OFT Document Reference 10153.

⁵²⁷⁴ Report on Tenders, OFT Document 10154, page 3.

⁵²⁷⁵ Report on Tenders, OFT Document 10154, page 3.

⁵²⁷⁶ Written representations of Hill, 23 June 2008, paragraph 10.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.3125. During the OFT’s search of Derwent Valley’s premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁵²⁷⁷

TENDER NO.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	
02/05/02	30/05/02	FIRE DAMAGE REFURBISHMENT 22 MIDLAND GARDENS BULWELL FOR TUNTUM H.A.	Hill Bros	61300	Cover

Evidence from leniency applicant Derwent Valley

IV.3126. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3127. In its leniency application, Derwent Valley set out a summary of all tenders from April 2000 to July 2004 where Derwent Valley had taken a cover price from a competitor for that tender, marked as ‘DVC2 List of Covers Taken’. The information in the summary was based on the tender book kept by Pat Tunnicliffe (‘PT’), an ex-estimator at Derwent Valley, and contained the following extract:⁵²⁷⁸

Date	Contract	Company Involved
May 2002	Fire damage refurbishments 22 Midland Gdns Tuntum Hsg Assn	Hill Bros

IV.3128. Derwent Valley also provided to the OFT, as part of its leniency application, a ‘List of Contractors Exchanging Cover Prices’. The name ‘Hill Bros (Nottingham) Ltd’ appears on this list with the address ‘34 Marlborough Road Woodthorpe Notts’.⁵²⁷⁹

IV.3129. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.3130. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in

⁵²⁷⁷ Tender schedule, OFT Document Reference 1912, page 32.

⁵²⁷⁸ Leniency application, OFT Document Reference 3941, page 2. The entry for Midlame is incorrectly typed as Midland on the document.

⁵²⁷⁹ Leniency application, OFT Document Reference 3942, page 2.

paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3131. In regard to this tender, a voluntary interview was conducted with PT, who dealt with this tender. PT confirmed that he kept and maintained the tender schedule referred to in paragraphs IV.309 to IV.317 above. PT recalled doing a lot of work for Tuntum Housing Association but could not specifically recall this tender. PT referred to the tender schedule entry in respect of this tender, confirmed it was in his handwriting and that the entry meant that Derwent Valley had taken a cover price. When asked where the cover price had come from, PT said, *'Well seeing as I've only got one other name there I would be 99% certain it came from Hill Brothers'*.⁵²⁸⁰

IV.3132. David Stone ('DS'), the Managing Director of Derwent Valley, was also interviewed in regard to this tender and although he did not recall it specifically either⁵²⁸¹, from examining the entry in the tender schedule he said *'...it looks pretty obvious to me, that Hill Brothers, who were the opposite, who were on the opposition, were bidding and so we took a cover on it'*.⁵²⁸² He confirmed that Hill would have been the only competitor known to Derwent Valley.⁵²⁸³

Evidence from other companies – Hill

IV.3133. During the OFT's visit to Hill under section 27 on 24 January 2007, no information was produced in relation to this contract.

IV.3134. The OFT wrote to Hill on 26 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Hill had participated in bid rigging on this tender. In response to this letter, Hill replied by letter dated 27 April 2007, *'We do not accept that we are guilty of any offence under the act as alleged'* and declined the OFT's Fast Track Offer.⁵²⁸⁴

IV.3135. However, in its response to the Statement, Hill stated that it had not accepted the OFT's Fast Track Offer because it lacked documentary records from which to determine whether any infringement may have been committed. It submitted that this was *'part corroborated'* by the fact that the OFT's inspection found no relevant documentation. Hill stated *'[i]n light of the information now provided, Hill Bros. accepts the alleged infringements are infringements, and apologises for its wrongdoing'*⁵²⁸⁵ and *'It is accepted that provision of a cover price to Derwent Valley was wrongful...'* in respect of this Infringement.⁵²⁸⁶

The OFT's analysis of the evidence and finding

IV.3136. From the evidence presented above, the OFT draws the following conclusions.

⁵²⁸⁰ Interview transcript, OFT Document Reference 14237, page 15.

⁵²⁸¹ Interview transcript, OFT Document Reference 13478, page 17.

⁵²⁸² Interview transcript, OFT Document Reference 13478, page 18.

⁵²⁸³ Interview transcript, OFT Document Reference 13478, page 18.

⁵²⁸⁴ Response from Hill, OFT Document Reference 10409.

⁵²⁸⁵ Written representations of Hill, 23 June 2008, paragraph 3.

⁵²⁸⁶ Written representations of Hill, 23 June 2008, paragraph 10.

- IV.3137. Derwent Valley and Hill each accepted an invitation to tender for this contract. Derwent Valley was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.3138. Hill completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work. This is shown by the price submitted by Hill being the lowest received and the fact that it won the contract.
- IV.3139. Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Hill with the entry 'Cover' in the final column where this tender has been entered. Derwent Valley confirmed that the word 'Cover' written in such a manner refers to a cover price having been taken, in this case from Hill.
- IV.3140. PT, the estimator for this tender, said that although he did not recall the tender, his entry in the contemporaneous tender schedule meant that he took a cover price from Hill.
- IV.3141. This was corroborated in interview by DS, who also did not recall the tender but agreed that the entry in the tender schedule showed that Derwent Valley took a cover price in respect of this tender from Hill.
- IV.3142. The OFT notes that Hill is the only company whose figure was below that of Derwent Valley, and therefore Derwent Valley could only have received a cover price from Hill.
- IV.3143. Derwent Valley also included Hill in its list of companies who exchange cover prices.
- IV.3144. In addition, the OFT notes that Tuntum Housing Association received a tendered amount of £58,196.25 from Hill, which is lower than the amount tendered by Derwent Valley. This fits into the pattern consistent with a cover price having been given to Derwent Valley by Hill.
- IV.3145. Both Parties have now accepted liability in respect of this Infringement.
- IV.3146. On the basis of the above the OFT therefore concludes that contact took place between Derwent Valley and Hill. The OFT also concludes that Hill supplied a figure to Derwent Valley for a cover bid. The OFT also notes that all tenders for this contract were the subject of bid rigging and that the price submitted by Hill, although the lowest tender for the project, was considered by Focus Consultants (UK) Limited, a company employed to handle the tendering process, to be in excess of the anticipated cost of the project.
- IV.3147. The OFT is satisfied that the facts set out in paragraphs IV.3125 to IV.3146 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵²⁸⁷ In particular:
- (a) the provision of a figure for a cover bid from Hill to Derwent Valley was not unilateral⁵²⁸⁸, and contravenes the principle against direct or indirect contact between competitors;⁵²⁸⁹

⁵²⁸⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (b) Derwent Valley can be presumed to have taken account of the information received from Hill (i.e. the cover price) when determining its own conduct in the tendering process;⁵²⁹⁰ and
- (c) Hill can be presumed to have taken account of the information it received from Derwent Valley (i.e. that Derwent Valley did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵²⁹¹

IV.3148. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Hill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for fire damage refurbishment, 22 Midlame Gardens, Bulwell, tender dated 30 May 2002.

Immunity and leniency assessment

IV.3149. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3150. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

Alleged Infringement 111: Not included in the Decision

Infringement 112: Winthorpe Road Estate Repairs, Newark – 31 May 2002
Client: Newark and Sherwood District Council
Parties: Frudd and Baggaley & Jenkins

IV.3151. On 9 May 2002, Newark and Sherwood District Council ('Newark & Sherwood DC') sought tenders for repairs and redecoration to the Winthorpe Road Estate, Newark.⁵²⁹² The following six companies were invited to tender: Baggaley & Jenkins, Beaufort, Frudd, G Hurst, Greenwood and Rhodes Construction Nottingham. The deadline for the receipt of tenders was 10:00 am on 31 May 2002.⁵²⁹³

IV.3152. Newark & Sherwood DC received the following tender returns:⁵²⁹⁴

⁵²⁸⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁵²⁸⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵²⁹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵²⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵²⁹² Information from client, OFT Document Reference 8876.

⁵²⁹³ Information from client, OFT Document Reference 8876.

⁵²⁹⁴ Information from client, OFT Document Reference 8876.

Company	Date tender received	Amount of tender	Awarded contract
Baggaley & Jenkins	31 May 2002	£217,647	Yes
Beaufort	31 May 2002	£189,995 ⁵²⁹⁵	
Frudd	31 May 2002	£228,123	
G Hurst	31 May 2002	£229,201	
Greenwood	31 May 2002	£279,625	
Rhodes Construction Nottingham	Failed to return tender documents	n/a	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Frudd – Tender register

IV.3153. During the OFT's inspection at Frudd, a tender register was found with the following entry:⁵²⁹⁶

ESTIMATE DETAILS	REF NO	DATE RECEIVED	DATE RETURN	T.WESSEX REF	ARCH	EST CHECK
EXTERNAL REPAIRS + REDORATIONS @ WINTHORPE ROAD ESTATE, NEWARK, NOTTS. NEWARK AND SHERWOOD DISTRICT COUNCIL	ED/02/51	13/5/02	10.00am 31/5/02		✓	MAR

ENQUIRIES SENT	AJUDICATION DIRECTOR	RESULT	COMPETITORS	£	Y %LOW %HIGH	N
✓	ANS	C	B + J FBS Beaufort	228,123.00		

Evidence from leniency applicant Frudd

IV.3154. As part of its leniency application, Frudd provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the tender register is set out in paragraphs IV.335 to IV.351 above and is relied upon by the OFT in relation to this tender.

⁵²⁹⁵ Information from client, OFT Document Reference 8876. Beaufort withdrew from the tender process after tender opening.

⁵²⁹⁶ Tender register, OFT Document Reference 2018, page 17.

IV.3155. Frudd also compiled a spreadsheet setting out all tenders from 2000 to 2004 in respect of which Frudd had either given or taken a cover price. Under the section marked *'Cover prices received'*, is the following entry:⁵²⁹⁷

Date	Contract	Client	Contractors	Amount	Result
2002	Ext Repairs and Redecs Winthorpe Rd Est	Newark and Sherwood District Council	Frudd B & J Gave cover to us Beaufort	228123	Not won

IV.3156. Frudd also provided a contact list of competitors entitled *'MIC'S LIKELY LADS'*, which belonged to Michael Robbins ('MR'), former Chief Estimator at Frudd. In this list, there is an entry for Baggaley & Jenkins with a contact name of James Ward, an estimator at Baggaley & Jenkins at the time of the Infringement, and a telephone number. Within the same entry for Baggaley & Jenkins, the words *'Newark & Sherwood'* are also entered.⁵²⁹⁸

IV.3157. Following the issue of the Statement, Frudd did not submit any written or oral representations.

Witness evidence from leniency applicant Frudd

IV.3158. During interviews conducted in connection with its leniency application, Frudd's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.335 to IV.351 above and is relied upon by the OFT in relation to this tender.

IV.3159. In interview, Jenna Frudd ('JF'), Director of Frudd, confirmed that, as part of Frudd's leniency application, she had collated the spreadsheet of covers received and taken from its tender register books.⁵²⁹⁹ She also confirmed Frudd's bid and the deadline date in respect of this tender. Referring to the entry of the letter 'C' next to 'B & J' in the tender register, she said *'this indicates that Bagley [sic] and Jenkins gave Frudd a cover'*.⁵³⁰⁰ She said that the appearance of the initials 'MAR' in the estimator column shows that the tender was dealt with by Frudd's Chief Estimator MR.⁵³⁰¹

IV.3160. JF gave an account of why Frudd sought a cover price on this tender as follows: *'I recall this...because it's something David Frudd used to get irate about, why do we bother with Newark and Sherwood District Council, because Bagley [sic] and Jenkins always win their work, and it's a bit of a joke, so this is why I can recall it, because he used to kick off and say, just, don't even bother, just send it back, don't even bother, Mick [MR] always gave a cover price, so if there was a job that we really did want at any one time, we wouldn't be excluded from the tender list'*.⁵³⁰² JF added that *'external repairs and decoration is not our thing'*.⁵³⁰³

⁵²⁹⁷ Leniency application, OFT Document Reference 3985, page 2.

⁵²⁹⁸ Contact list, OFT Document Reference 3988, page 1.

⁵²⁹⁹ Interview transcript, OFT Document Reference 13104, page 10.

⁵³⁰⁰ Interview transcript, OFT Document Reference 13104, page 10.

⁵³⁰¹ Interview transcript, OFT Document Reference 13104, page 11.

⁵³⁰² Interview transcript, OFT Document Reference 13104, page 10.

⁵³⁰³ Interview transcript, OFT Document Reference 13104, page 11.

IV.3161. In interview, Paul Platts ('PP'), an estimator at Frudd, confirmed that the entry in the tender register shows a cover price had been received from Baggaley & Jenkins. PP said *'we tried on numerous occasions to get in with Newark and Sherwood District Council, pricing jobs...we priced...loads for them but never got anywhere...and I think, in the end, that Mick [MR] decided that...we'd wasted enough time pricing stuff for them...what we should have done is sent them back but we didn't want to be seen to be letting them down, so I think that's why...we took covers on...those particular jobs'*.⁵³⁰⁴ MR was not questioned about this tender; however, he confirmed in general terms that the appearance of a letter 'C' next to 'B & J' on the tender register generally showed that a cover price was taken from Baggaley & Jenkins.⁵³⁰⁵

Evidence from other companies – Baggaley & Jenkins

IV.3162. The OFT wrote to Baggaley & Jenkins on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Baggaley & Jenkins had participated in bid rigging on this tender. In response, Baggaley & Jenkins wrote to the OFT through its legal representatives on 25 April 2007⁵³⁰⁶ and admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the party/parties involved'*.⁵³⁰⁷

IV.3163. In its response to the Statement, Baggaley & Jenkins confirmed that it *'...accepts liability for this [Infringement]'*.⁵³⁰⁸

The OFT's analysis of the evidence and finding

IV.3164. From the evidence presented above, the OFT draws the following conclusions.

IV.3165. Frudd and Baggaley & Jenkins each accepted an invitation to tender for repairs and redecoration to the Winthorpe Road Estate, Newark. Frudd was unable to submit a tender by the return date and/or did not want to win this contract.

IV.3166. Frudd's contemporaneous tender register, maintained by Frudd's estimating department, records two competitors who were also invited to tender for this contract, namely 'B & J' and 'Beaufort'. The letter 'C' is marked next to 'B & J' which Frudd has confirmed shows that a cover price was received from that company. Frudd's bid to the client on the tender register is recorded by the letters 'FBS' [Frudd Building Services] for the amount of £228,123.00, which matches the amount recorded by Newark & Sherwood DC.

IV.3167. Newark & Sherwood DC also received a tendered amount of £217,647 from Baggaley & Jenkins, which is lower than the amount tendered by Frudd. This fits into the pattern consistent with a cover price having been provided from Baggaley & Jenkins to Frudd.

⁵³⁰⁴ Interview transcript, OFT Document Reference 13145, page 11.

⁵³⁰⁵ Interview transcript, OFT Document Reference 13115 page 19.

⁵³⁰⁶ Response from Baggaley & Jenkins, OFT Document Reference 10232.

⁵³⁰⁷ Response from Baggaley & Jenkins, OFT Document Reference 10236, page 4.

⁵³⁰⁸ Written representations of Baggaley & Jenkins, 27 June 2008, paragraph 33.

- IV.3168. The OFT notes that although two competitors have been recorded on the Tender register, the letter 'C' is noted alongside the entry for 'B & J'. The tender was allocated to Frudd's Chief Estimator MR, and MR had an entry for Baggaley & Jenkins in a contact list used to communicate with competitors for the purpose of obtaining cover prices. Against this entry there is a specific reference to 'Newark & Sherwood', the client for this particular tender, suggesting that Baggaley & Jenkins was a regular source of cover prices for tenders put out by this client.
- IV.3169. In interview, Frudd employees JF, PP and MR all agreed that the entry in the tender register shows that a cover price was received from Baggaley & Jenkins for this tender. Both JF and PP stated that MR would have dealt with the cover price and confirmed that covers were often sought from Baggaley & Jenkins for tenders for the client Newark & Sherwood DC, because it was felt that Baggaley & Jenkins would win the work anyway. In addition, JF stated that external repairs and redecoration *'is not our thing'*.
- IV.3170. Finally, both parties have admitted to bid rigging in relation to this tender.
- IV.3171. The OFT therefore concludes that contact took place between Frudd and Baggaley & Jenkins, and that Baggaley & Jenkins supplied a figure to Frudd in order that it could submit a bid to the client that was not intended to win the contract.
- IV.3172. The OFT is satisfied that the facts set out in paragraphs IV.3153 to IV.3171 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵³⁰⁹ In particular:
- (a) the provision of a figure for a cover bid from Baggaley & Jenkins to Frudd was not unilateral⁵³¹⁰, and contravenes the principle against direct or indirect contact between competitors;⁵³¹¹
 - (b) Frudd can be presumed to have taken account of the information received from Baggaley & Jenkins (i.e. the cover price) when determining its own conduct in the tendering process;⁵³¹² and
 - (c) Baggaley & Jenkins can be presumed to have taken account of the information it received from Frudd (i.e. that Frudd did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵³¹³
- IV.3173. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Frudd and Baggaley & Jenkins in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for repairs and redecoration to the Winthorpe Road Estate, Newark, tender deadline 31 May 2002.

⁵³⁰⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵³¹⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁵³¹¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵³¹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵³¹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.3174. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3175. In respect of this tender, the OFT became aware of bid rigging activities by virtue of information obtained during the visit under section 28 at Frudd on 29 June 2005. Frudd will not therefore receive 100 per cent immunity in respect of this tender. However, Frudd will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 113: Not included in the Decision

Infringement 114: Conversion and Extension of a CCTV Control Room at Beeston Police Station, Nottinghamshire – 8 July 2002

Client: Broxtowe Borough Council
Parties: Bodill and W R Bloodworth

IV.3176. On 13 June 2002, Broxtowe Borough Council sought tenders for the conversion and extension of a CCTV control room at Beeston Police Station, Nottinghamshire. The return date for the tender was 8 July 2002 and four companies were invited to tender: W R Bloodworth, Craske, Frudd and Bodill.⁵³¹⁴

IV.3177. Broxtowe Borough Council received the following tender returns on 8 July 2002:⁵³¹⁵

Company	Time and date tender received	Amount of tender	Awarded the tender
W R Bloodworth	10:58 8 July 2002	£58,003	Yes
Craske	Did not return tender		
Frudd	11:05 8 July 2002	£69,630	
Bodill	11:00 8 July 2002	£60,535	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.3178. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill.⁵³¹⁶

⁵³¹⁴ Information from client, OFT Document Reference 7266.

⁵³¹⁵ Information from client, OFT Document Reference 7266.

⁵³¹⁶ Tender sheet, OFT Document Reference 0625.

1. *Bodill*

- * 2. *BLOODWORTH. MICK*
WILL RING US. Tel [.....] [C]
3. *FRUDD*

IV.3179. The tender sheet states that Bodill's submitted price was £60,535 and has a © in the '*ESTIMATOR*' box.⁵³¹⁷

IV.3180. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2002 which contains an entry for this tender on 8 July which reads '*12.00 BEESTON POLICE STN. (C) (BEESTON)*'.⁵³¹⁸ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, '*It means that we're looking for some help, a cover, a cover price*'.⁵³¹⁹

Evidence from leniency applicant Bodill

IV.3181. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.3182. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000 and explained that when a '*' is written against a contractor's name it means that it gave Bodill a cover price.⁵³²⁰ In respect of this tender, Bodill confirmed that it received a cover price from W R Bloodworth⁵³²¹ and that it submitted a 'token tender'.⁵³²²

Witness evidence from leniency applicant Bodill

IV.3183. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from leniency applicant W R Bloodworth

IV.3184. As part of its leniency application, W R Bloodworth provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.718 to IV.725 above and is relied upon by the OFT in relation to this tender.

IV.3185. In its response to the Statement, W R Bloodworth stated '*Bloodworth has been granted leniency and does not contest the OFT's findings of infringement*'⁵³²³ in respect of this Infringement.

⁵³¹⁷ Tender sheet, OFT Document Reference 0625.

⁵³¹⁸ 2002 Diary, OFT Document Reference 0107, page 18, obtained during visit to Bodill's premises under section 27 on 19 November 2004.

⁵³¹⁹ Interview transcript, OFT Document Reference 6337, page 4.

⁵³²⁰ Explanatory Note of Tender Sheet, OFT Document Reference 0861, page 1.

⁵³²¹ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 4.

⁵³²² Tender Analysis, OFT Document Reference 0849, page 3.

⁵³²³ Written representations of W R Bloodworth, 27 June 2008, paragraph 3.

Witness evidence from leniency applicant W R Bloodworth

IV.3186. During interviews conducted in connection with its leniency application, W R Bloodworth's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.718 to IV.725 above and is relied upon by the OFT in relation to this tender.

IV.3187. In respect of this tender Michael Campbell ('MC'), an estimator at W R Bloodworth confirmed on being shown the Bodill tender sheet, '* *BLOODWORTH. MICK WILL RING US. Tel. [.....] [C]*'⁵³²⁴, that it was his telephone number⁵³²⁵, '*it means they [Bodill] took a cover*'⁵³²⁶ and that although MC could not recall giving Bodill a cover price for this tender, '*It is possible, yes*'.⁵³²⁷

The OFT's analysis of the evidence and finding

IV.3188. From the evidence presented above, the OFT draws the following conclusions.

IV.3189. Bodill and W R Bloodworth each accepted an invitation to tender for this contract.

IV.3190. Bodill was unable to submit a tender by the return date and/or did not want to win this tender. It appears that W R Bloodworth completed the estimating process for this contract and that it submitted a tender with the hope of winning the work. This is shown by the facts that it submitted the lowest price and that it won the tender.

IV.3191. In regard to W R Bloodworth, Bodill's tender sheet records '* *BLOODWORTH. MICK WILL RING US. Tel. [.....] [C]*'. Bodill has confirmed that this shows that it received a cover price from W R Bloodworth. The OFT considers that this also shows more specifically that Bodill would have had telephone contact with W R Bloodworth before the date for submitting its tender, in order to obtain its cover price. Bodill recorded on the tender sheet the figure £60,535 as the tender figure and this was the figure that Bodill submitted.

IV.3192. Bodill's tender sheet records the name of a W R Bloodworth estimator, '*Mick*', and the telephone number '[.....] [C]'. The word '*Mick*' refers to MC of W R Bloodworth, who has confirmed that this was W R Bloodworth's telephone number.

IV.3193. The OFT notes that JR of Bodill has an entry in his diary on the date for submitting the tender, which includes a 'C' in brackets, which JR has confirmed shows that Bodill was looking for a cover price for this tender.

IV.3194. Both Parties have admitted their involvement in cover pricing in respect of this Infringement.

⁵³²⁴ Tender sheet, OFT Document Reference 0625.

⁵³²⁵ Interview transcript, OFT Document Reference 6347, page 13.

⁵³²⁶ Interview transcript, OFT Document Reference 6347, page 13.

⁵³²⁷ Interview transcript, OFT Document Reference 6347, page 13.

IV.3195. The OFT notes in addition that W R Bloodworth's tender figure is the only figure below Bodill's tender figure, and the OFT is therefore satisfied that Bodill could only have received a cover figure from W R Bloodworth.

IV.3196. The OFT also notes that the tender submitted by Bodill was higher than the tender submitted by W R Bloodworth, a pattern consistent with a cover price having been provided.

IV.3197. The OFT therefore concludes that contact took place between W R Bloodworth and Bodill. The OFT also concludes that W R Bloodworth supplied a figure to Bodill for a cover bid.

IV.3198. The OFT is satisfied that the facts set out in paragraphs IV.3178 to IV.3197 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵³²⁸ In particular:

- (a) the provision of a figure for a cover bid from W R Bloodworth to Bodill was not unilateral⁵³²⁹, and contravenes the principle against direct or indirect contact between competitors;⁵³³⁰
- (b) Bodill can be presumed to have taken account of the information received from W R Bloodworth (i.e. the cover price) when determining its own conduct in the tendering process;⁵³³¹ and
- (c) W R Bloodworth can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵³³²

IV.3199. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and W R Bloodworth, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the conversion and extension of a CCTV control room at Beeston Police Station, Nottinghamshire, tender deadline 8 July 2002.

Immunity and leniency assessment

IV.3200. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3201. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Bodill in respect of this infringement.

⁵³²⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵³²⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵³³⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵³³¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵³³² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3202. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.⁵³³³ The OFT first became aware of this tender as a result of the entry in a document obtained during a section 27 visit to Bodill on 19 November 2004⁵³³⁴, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made. Nevertheless, as stated in paragraph IV.3201 above, the OFT is not imposing any financial penalty on Bodill in respect of this Infringement.

IV.3203. In respect of this tender, the OFT became aware of W R Bloodworth's involvement in bid rigging activities by virtue of the information provided by Bodill. W R Bloodworth will not therefore receive 100 per cent immunity in respect of this tender. However, W R Bloodworth will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 115: Classroom & Dining Room Refurbishment, Shirebrook School, Shirebrook, Nottinghamshire – 12 July 2002
Client: Derbyshire County Council
Parties: Bodill and E Taylor (trading as Carmalor)

IV.3204. In June 2002, E C Harris, acting on behalf of Derbyshire County Council, sought tenders for the classroom and dining room refurbishment of Shirebrook School, Shirebrook, Nottinghamshire. The return date for the tender was 12 July 2002 and four companies were invited to tender: Baggaley & Jenkins, Ian Whitehead Ltd, E Taylor (trading as Carmalor)⁵³³⁵ and Bodill.⁵³³⁶

IV.3205. E C Harris received the following tender returns on 12 July 2002:⁵³³⁷

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Baggaley & Jenkins	12 July 2002	Withdrawn	£96,407.30	
Ian Whitehead Ltd	12 July 2002		£167,000.00	Yes
Carmalor [E Taylor]	12 July 2002		£174,230.00	
Bodill	12 July 2002		£178,291.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.3206. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed *'Tenderers'*, the following entries have been made, all of which are handwritten except the entry for Bodill.⁵³³⁸

⁵³³³ Written representations of Bodill, 26 June 2008, paragraph 3.5.

⁵³³⁴ 2002 Diary, OFT Document Reference 0107, as discussed in paragraph IV.3180.

⁵³³⁵ In its description and analysis of this Infringement, for consistency with the available documentary and witness evidence, the OFT has referred to 'Carmalor' but notes that this is a trading name for E Taylor, which is accordingly the responsible legal entity.

⁵³³⁶ Information from client, OFT Document Reference 7795.

⁵³³⁷ Information from client, OFT Document Reference 7795.

1. *Bodill*

*2. *CARMALOR STEVE FOWKES/WAYNE*
[...] [C] *Ring THURS'*

IV.3207. The tender sheet states that Bodill's submitted price was £178,291.00.⁵³³⁹

IV.3208. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2002 which contains an entry for this tender on 12 July which reads '*11.00 SHIREBROOKE SCHOOL (C) (MATLOCK)*'.⁵³⁴⁰ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, '*It means that we're looking for some help, a cover, a cover price*'.⁵³⁴¹

Evidence from leniency applicant Bodill

IV.3209. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.3210. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁵³⁴² In respect of this tender, Bodill confirmed that it received a cover price from Carmalor⁵³⁴³ and that it submitted a token tender.⁵³⁴⁴

Witness evidence from leniency applicant Bodill

IV.3211. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – E Taylor

IV.3212. A tender summary sheet for July 2002, was obtained from E Taylor's premises during the section 27 inspection on 19 January 2006 and against the entry for Shirebrook School is typed '*cover*'.⁵³⁴⁵

IV.3213. During the OFT section 27 visit at E Taylor's premises on 19 January 2006, Mark Brown, the Managing Director of E Taylor, confirmed that Wayne Creed was employed as an estimator.⁵³⁴⁶

IV.3214. The OFT wrote to E Taylor on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that E

⁵³³⁸ Tender sheet, OFT Document Reference 0624.

⁵³³⁹ Tender sheet, OFT Document Reference 0624.

⁵³⁴⁰ 2002 Diary, OFT Document Reference 0107, page 18, obtained during visit to Bodill's premises under section 27 on 19 November 2004.

⁵³⁴¹ Interview transcript, OFT Document Reference 6337, page 4.

⁵³⁴² Explanatory Note of Tender Sheet, OFT Document Reference 0861, page 1.

⁵³⁴³ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 4.

⁵³⁴⁴ Tender Analysis, OFT Document Reference 0849, page 3.

⁵³⁴⁵ Tender summary sheet, OFT Document Reference 4306, page 1.

⁵³⁴⁶ Filenote, OFT Document Reference 5826.

Taylor had participated in bid rigging on this tender. In response to this letter, E Taylor said that after consideration it felt unable to accept the OFT's Fast Track Offer.⁵³⁴⁷

IV.3215. In its response to the Statement, E Taylor stated *'Having reviewed the relevant sections of the SO that relate to ourselves, and most particularly the 3rd party evidence referred to, we have a degree of empathy with the OFT as to why they have reached the conclusion that Carmalor were involved in cover pricing. Unfortunately, as a result of the death of [the former Managing Director]... and the departure of [former Estimating Director] Steve Fowkes... our ability to defend our position is significantly prejudiced by the fact that we have no access to contemporaneous documentary evidence. Nor can we offer any meaningful personal testimony from those allegedly involved in the practice, that would act as a legally adequate defence. Thus, we find ourselves in "no man's land" neither able to admit, nor adequately defend the allegations levelled at us.'*⁵³⁴⁸

IV.3216. However, with its response to the Statement, E Taylor submitted a statement from Wayne Creed ('WC'), the only person named in the Statement still employed by E Taylor. WC stated that *'I have no recollection of either making a call to nor receiving a call from Bodill in relation to either the giving or taking of a cover price on this matter'*.⁵³⁴⁹ WC also indicated that *'...I was not involved on a day to day basis in estimating work of this type. That work was controlled entirely by Steve Fowkes, who...reported directly to the then Managing Director, Mark Jackson.'*⁵³⁵⁰

IV.3217. The OFT appreciates that a company would not often keep a record of giving a cover price, and may no longer employ the persons alleged to have given that cover, and in that instance recognises the need to assess the quality of evidence implicating the accused party. The OFT also recognises that where a cover price was given by a sole employee, other employees or directors of that company may not be aware whether or not such conduct took place.

IV.3218. The OFT notes the contradiction between the witness evidence of WC and the contemporaneous evidence and overall explanation provided by JR. On balance, the OFT considers the latter to be more compelling. JR's evidence is consistent with the handwritten entries on the contemporaneous tender sheet and his diary. Further, in relation to Infringements 80, 114 and 127, amongst others described in this Decision, the contents of these Bodill tender documents and diary indicating that cover prices have been provided/accepted have been confirmed to be correct by evidence from other Parties. The OFT also notes that although WC states that he does not recall making or receiving a call to/from Bodill, he does not actually state that he did not do so, or that it would have been in any way contrary to the prevailing practice within E Taylor at the time to have done so. In light of those factors, the OFT considers that the contemporaneous evidence and explanation of JR should be preferred to that of WC.

⁵³⁴⁷ Response from E Taylor, OFT Document Reference 11006.

⁵³⁴⁸ Written representations of E Taylor, 27 June 2008, page 4.

⁵³⁴⁹ Witness statement of Wayne Creed, 25 June 2008, paragraph 6.

⁵³⁵⁰ Witness statement of Wayne Creed, 25 June 2008, paragraph 8.

The OFT's analysis of the evidence and finding

IV.3219. From the evidence presented above, the OFT draws the following conclusions.

IV.3220. Bodill and Carmalor each accepted an invitation to tender for this contract.

IV.3221. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.

IV.3222. In regard to E Taylor, Bodill's tender sheet records '*CARMALOR STEVE FOWKES/WAYNE* [.....] [C] *Ring THURS*'. Bodill has confirmed that this shows that it received a cover price from Carmalor. The OFT considers that this also indicates more specifically that Bodill was to phone Carmalor's estimator on the day before the date for submitting the tender in order to obtain its cover price. Bodill recorded on the tender sheet the figure £178,291 as the tender figure and this was the figure that Bodill submitted.

IV.3223. Bodill's tender sheet records the name of an Carmalor estimator, '*Steve Fowkes*', and the telephone number '[.....] [C]'. Information obtained from W R Bloodworth, a list of contacts for cover prices, names '*Steve*' at Carmalor with a telephone number contact number of '[.....] [C]⁵³⁵¹, providing further corroboration that Bodill contacted Carmalor, in respect of this tender.

IV.3224. The OFT notes in addition that JR has an entry in his diary on the date for submitting the tender, which JR has confirmed shows Bodill were looking for a cover price for this tender.

IV.3225. While E Taylor has not admitted to cover pricing in respect of this tender, the OFT notes that an internal list of tenders obtained from E Taylor had the word '*cover*' typed against this tender.

IV.3226. The OFT also notes that the tender submitted by Bodill was higher than the tender submitted by Carmalor, a pattern consistent with a cover price having been provided.

IV.3227. The OFT therefore concludes that contact took place between Carmalor and Bodill. The OFT also concludes that Carmalor supplied a figure to Bodill for a cover bid.

IV.3228. The OFT is satisfied that the facts set out in paragraphs IV.3206 to IV.3227 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵³⁵² In particular:

- (a) the provision of a figure for a cover bid from Carmalor to Bodill was not unilateral⁵³⁵³, and contravenes the principle against direct or indirect contact between competitors;⁵³⁵⁴

⁵³⁵¹ Contact list, OFT Document Reference 3915.

⁵³⁵² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵³⁵³ See paragraph IV.73 of the General comments on cover pricing section.

⁵³⁵⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Bodill can be presumed to have taken account of the information received from Carmalor (i.e. the cover price) when determining its own conduct in the tendering process;⁵³⁵⁵ and
- (c) Carmalor can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵³⁵⁶

IV.3229. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and Carmalor, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the classroom and dining room refurbishment of Shirebrook School, Shirebrook, Nottinghamshire, tender deadline 12 July 2002.

Immunity and leniency assessment

IV.3230. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3231. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Party in respect of this Infringement.

IV.3232. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.⁵³⁵⁷ The OFT first became aware of this tender as a result of the entry in a document obtained during a section 27 visit to Bodill on 19 November 2004⁵³⁵⁸, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made. Nevertheless, as stated in paragraph IV.3231 above, the OFT is not imposing any financial penalty on Bodill in respect of this Infringement.

⁵³⁵⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵³⁵⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵³⁵⁷ Written representations of Bodill, 26 June 2008, paragraph 3.5.

⁵³⁵⁸ 2002 Diary, OFT Document Reference 0107, as discussed in paragraph IV.3208.

Infringement 116: 45 Modernisations, Highbury Vale, Nottingham – 2 August 2002
Client: Nottingham City Council
Parties: Adam Eastwood, Mansell and Thomas Long

IV.3233. On 10 July 2002, Nottingham City Council sought tenders for 45 modernisations, Highbury Vale, Nottingham.⁵³⁵⁹ The following eight companies were invited to tender: Adam Eastwood, Bluestone, Clegg, IH Moore & Co Ltd, Mansell, North Midland, Nottingham City Building Works and Thomas Long. The date and time of tender return was 2 August 2002 at 12:00 noon.⁵³⁶⁰

IV.3234. Nottingham City Council received the following tender returns:⁵³⁶¹

Company	Date & Time tender received	Amount of tender	Awarded contract
Nottingham City Building Works	2 August 2002	£332,952.00	
Bluestone	Declined to tender		
Mansell	2 August 2002 10:35	£231,676.00	
IH Moore & Co Ltd	2 August 2002 16:15	£254,405.00	
North Midland	Declined to tender		
Adam Eastwood	2 August 2002	£222,418.00	YES
Clegg	Declined to tender		
Thomas Long	2 August 2002 11:40	£236,633.55	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Adam Eastwood – Handwritten Notes

IV.3235. As part of its leniency application, Adam Eastwood’s legal representatives provided handwritten notes headed ‘*Highbury Vale*’ which show pricing for the tender including a figure of £4000 for ‘*Prov Sums*’.⁵³⁶² The second page shows:⁵³⁶³

Thos Long
Mark Philips
 [...] [C]

3rd

1 5.65%

2 7.69%

Ken Lockwood
 [...] [C]
Mansell

IV.3236. At the bottom of the third page are notes which show ‘*Mansell 227676.24 + Provs (231000.00)*’ and ‘*Tho... Long 232,660.76 + Provs. (236660.00)*’.⁵³⁶⁴

⁵³⁵⁹ Information from client, OFT Document Reference 9116.

⁵³⁶⁰ Information from client, OFT Document Reference 9116.

⁵³⁶¹ Information from client, OFT Document Reference 9116.

⁵³⁶² Handwritten note, OFT Document Reference 3956, page 1.

⁵³⁶³ Handwritten note, OFT Document Reference 3956, page 2.

⁵³⁶⁴ Handwritten note, OFT Document Reference 3956, page 3.

Evidence from leniency applicant Adam Eastwood

IV.3237. As part of its leniency application, Adam Eastwood's legal representatives provided a general explanation of its participation in cover pricing.⁵³⁶⁵ This evidence is set out in paragraphs IV.159 to IV.165 above and is relied upon by the OFT in relation to this tender.

IV.3238. In addition to its leniency application, Adam Eastwood provided to the OFT a list of covers. At number eight of this list is the following entry:⁵³⁶⁶

*'45 Modernisations, Highbury Vale, Nottingham – October 2002
Eastwoods gave a cover price to Thomas Long and Mansell Construction
Eastwoods figure £222,400.00
Eastwoods were awarded the contract – out of 6 Tenderers.
Covers given by Paul Dodds of Eastwoods to Mark Philips of T. Long and Ken
Lockwood of Mansell'*

IV.3239. In their response to the Statement, Adam Eastwood and the Eastwood Foundation had *'No material observations'*⁵³⁶⁷ in respect of this Infringement.

Witness evidence from leniency applicant Adam Eastwood

IV.3240. During separate interviews with the OFT on 21 February 2007, conducted in connection with Adam Eastwood's leniency application, both Adrian Tranter ('AT'), Managing Director of Adam Eastwood, and Chris Stubbs ('CS'), Company Director of Adam Eastwood, provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.159 to IV.165 above and is relied upon by the OFT in relation to this tender.

IV.3241. During the interview with AT, he stated that this tender was *'... won by Paul Dodds'*.⁵³⁶⁸ AT stated that the handwritten notes belonged to Paul Dodds ('PD'), an ex-employee of Adam Eastwood, and that before PD left Adam Eastwood PD recalled that he gave cover prices on this tender.⁵³⁶⁹ In respect of the second page of notes AT stated *'That'd be one of the cover prices ... Yeah. That's the two'* and when asked what the percentages showed, stated *'I would surmise that what Paul's done is plucked a figure out of the air to make it look reasonable as opposed to being one's five percent, one's ten percent'*.⁵³⁷⁰

Evidence from leniency applicant Mansell

IV.3242. In its response to the Statement, Balfour Beatty/Mansell stated it and its subsidiaries *'do not dispute the occurrence of the Alleged Infringements'*.⁵³⁷¹

Witness evidence from leniency applicant Mansell

IV.3243. During interviews conducted in connection with its leniency application, an employee of Mansell and an ex-employee from the Nottingham office provided

⁵³⁶⁵ Leniency application, OFT Document Reference 3949.

⁵³⁶⁶ List of covers, OFT Document Reference 3952, page 2.

⁵³⁶⁷ Written representations of Adam Eastwood and the Eastwood Foundation, 26 June 2008, page 4.

⁵³⁶⁸ Interview transcript, OFT Document Reference 11095, page 5.

⁵³⁶⁹ Interview transcript, OFT Document Reference 11095, page 6.

⁵³⁷⁰ Interview transcript, OFT Document Reference 11095, page 6.

⁵³⁷¹ Written representations of Balfour Beatty, 27 June 2008, paragraph 1.2.

further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.490 to IV.496 above and is relied upon by the OFT in relation to this tender.

IV.3244. During an interview with the OFT on 18 April 2007, Kenneth Lockwood ('KL'), who was a Chief Estimator in the Nottingham office, was shown handwritten notes from Adam Eastwood and in respect of the third page he stated '*Well, I can see what they've done there ... they've given a figure plus provisional sums. They've highlighted that because danger is that we could not give that as [an] overall cover figure and then I could have filled it in ... not realising it was ... to have provisional sums added on, it could have been another 200, 300 thousand pound provisional sums ... that meant we would have won it and not had any provisional sums. So I can see why he's written that*'.⁵³⁷² When asked if it was fair to say from the information provided that Mansell took a cover price from Adam Eastwood on this tender, KL stated '*Oh, yes, I have no reason ... to believe it won't have been*'.⁵³⁷³

Evidence from other companies – Thomas Long

IV.3245. The OFT wrote to Thomas Long on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Thomas Long had participated in bid rigging on this tender. In response to this letter Thomas Long stated '*... we are unable to establish that cover prices were either given or received*'.⁵³⁷⁴

IV.3246. However, in its response to the Statement, Thomas Long stated '*...having considered the evidence contained in the [Statement] ... Thomas Long is satisfied that the Company [Thomas Long] did accept a cover price*'.⁵³⁷⁵

The OFT's analysis of the evidence and finding

IV.3247. From the evidence presented above, the OFT draws the following conclusions.

IV.3248. Adam Eastwood, Mansell and Thomas Long each accepted an invitation to tender for this contract.

IV.3249. All three companies submitted a tender. It appears that Adam Eastwood completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Adam Eastwood being the lowest received and the fact that it won the contract.

IV.3250. Mansell and Thomas Long were unable to submit a tender by the return date and/or did not want to win this contract.

IV.3251. In regard to Mansell, Adam Eastwood has confirmed that the handwritten notes '*1 5.65% ... Ken Lockwood Mansell [.....] [C]*' and '*Mansell 227676.24 + Provs (231000.00)*' show that it gave the company noted a

⁵³⁷² Interview transcript, OFT Document Reference 11511, page 32.

⁵³⁷³ Interview transcript, OFT Document Reference 11511, page 32.

⁵³⁷⁴ Response from Thomas Long, OFT Document Reference 10884.

⁵³⁷⁵ Written representations of Thomas Long, 26 June 2008, paragraph 3.9.

cover price. The telephone number [.....] [C] was Mansell's telephone number of its Nottingham office⁵³⁷⁶ and KL was Mansell's Chief Estimator at its Nottingham office.

IV.3252. In addition, Mansell has admitted on the basis of this document that it received a cover price from Adam Eastwood. Furthermore the figure noted by Adam Eastwood for Mansell, '£227,676.24 + Provs', was the same as the figure of £231,676.00 that Mansell submitted for the tender, once Adam Eastwood's figure of £4000 for 'Prov sums' is included.

IV.3253. In regard to Thomas Long, Adam Eastwood has confirmed that the handwritten notes 'Thos Long Mark Philips [...] [C]' and 'Tho... Long 232,660.76 + Provs. (236660.00)' show that it gave the company noted a cover price. The telephone number [.....] [C] was Thomas Long's telephone number.⁵³⁷⁷

IV.3254. Furthermore the figure noted by Adam Eastwood for Thomas Long, £236,660.00, was almost identical to the figure that Thomas Long submitted for the tender.

IV.3255. The OFT further notes that the tenders submitted by Mansell and Thomas Long were both higher than the tender submitted by Adam Eastwood, the pattern consistent with cover prices having been provided. The OFT considers that the admitted cover pricing between Adam Eastwood and Mansell and the fact that Adam Eastwood has confirmed that its notes show that it gave a cover price to Thomas Long strengthen the OFT's evidence against Thomas Long and reinforces the backdrop of collusion on this tender.

IV.3256. The OFT further notes that all three Parties have now admitted liability in respect of this Infringement.

IV.3257. The OFT therefore concludes that contact took place between Adam Eastwood and Mansell, and between Adam Eastwood and Thomas Long. The OFT also concludes that Adam Eastwood supplied figures to both Mansell and Thomas Long for cover bids.

IV.3258. The OFT is satisfied that the facts set out in paragraphs IV.3235 to IV.3257 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵³⁷⁸ In particular:

- (a) the provision of figures for cover bids from Adam Eastwood to each of Mansell and Thomas Long was not unilateral⁵³⁷⁹, and contravenes the principle against direct or indirect contact between competitors;⁵³⁸⁰
- (b) Mansell and Thomas Long can each be presumed to have taken account of the information received from Adam Eastwood (i.e. the respective cover prices) when determining their own conduct in the tendering process,⁵³⁸¹ and

⁵³⁷⁶ FAME Report, OFT Document Reference 11627, page 16.

⁵³⁷⁷ FAME Report, OFT Document Reference 12543, page 1.

⁵³⁷⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵³⁷⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵³⁸⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵³⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Adam Eastwood can be presumed to have taken account of the information it received from Mansell and Thomas Long (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁵³⁸²

IV.3259. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Adam Eastwood and Mansell, and between Adam Eastwood and Thomas Long in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for 45 modernisations, Highbury Vale, Nottingham, tender deadline 2 August 2002.

Immunity and leniency assessment

IV.3260. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3261. Adam Eastwood informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Adam Eastwood will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.3262. In respect of this tender, the OFT became aware of Mansell's involvement in bid rigging activities by virtue of the information provided by leniency party Adam Eastwood. Mansell will not therefore receive 100 per cent immunity in respect of this tender. However, Mansell will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 117: Not included in the Decision

Infringement 118: Internal Alterations to Workshops, Rooms 25 and 29, West Nottinghamshire College, Derby Road, Mansfield – 6 September 2002

Client: West Nottinghamshire College

Parties: Greenwood and Harold Adkin

IV.3263. In 2002, West Nottinghamshire College sought tenders for internal alterations to workshops, Rooms 25 and 29, West Nottinghamshire College, Derby Road, Mansfield. The return date for the tender was 12:00 noon on 6 September 2002 and four companies were invited to tender: Harold Adkin, Greenwood, ARG and an unknown company.⁵³⁸³

IV.3264. West Nottinghamshire College received the following tender returns by 12:00 noon on 6 September 2002:⁵³⁸⁴

⁵³⁸² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵³⁸³ Information from client, OFT Document Reference 9970.

⁵³⁸⁴ Information from client, OFT Document Reference 9970.

Company	Time & Date Tender Received	Amount of tender	Awarded contract
Harold Adkin	By 12:00 noon on 6 September 2002	£24,995	Yes
Greenwood	By 12:00 noon on 6 September 2002	£26,150	
ARG	By 12:00 noon on 6 September 2002	£27,495	
Unknown Company ⁵³⁸⁵	No details		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Greenwood – Two Post-it notes, Schedule of Works and Fax from Harold Adkin

IV.3265. During the OFT's search of Greenwood's premises on 15 June 2005, a number of tender documents with post-it notes attached were found. The first post-it note attached to the tender documents for internal alterations to workshops, Rooms 25 and 29 contained the following handwritten note:⁵³⁸⁶

*'PRICED SPEC TO BE
FAXED MONDAY!
WEST NOTTS COLLEGE
COVER FROM
HARROLD
[...] [C] ADKINS
OUR FIG IAN
£26,150-00 DOUGLAS'*

IV.3266. The second post-it note attached to the tender documents for internal alterations to workshops, Rooms 25 and 29 contained the following handwritten note:⁵³⁸⁷

*'ROB WILTON
IAN PRITCHARD'*

IV.3267. A blank copy of the schedule of works for this contract was also found at Greenwood.⁵³⁸⁸ Handwritten on the front page is:

*'4519 PAUL TURNER [...] [C]
[...] [C]
FAX [...] [C]'*

IV.3268. A fax from Ian Douglas of Harold Adkin to Robert Sharman, an ex-estimator at Greenwood, dated 9 September 2002 attaching a priced schedule of works for this contract was also found at Greenwood.⁵³⁸⁹ The fax reads:⁵³⁹⁰

'RE: WEST NOTTS COLLEGE, DERBY ROAD Page 1 of 3

⁵³⁸⁵ No details available from the client about the fourth company, which did not submit a tender by the return date.

⁵³⁸⁶ Handwritten note, OFT Document Reference 2621.

⁵³⁸⁷ Handwritten note, OFT Document Reference 2623.

⁵³⁸⁸ Schedule of works, OFT Document Reference 2622.

⁵³⁸⁹ Fax, OFT Document Reference 2624.

⁵³⁹⁰ Fax, OFT Document Reference 2624, page 1.

ROOMS 25 AND 29

Please receive a copy of YOUR priced schedule for the above'

Witness Evidence from Greenwood

IV.3269. During an interview conducted on 12 October 2006, Chris Stendall ('CS'), an ex-estimator for Greenwood, commented in general terms on Greenwood's participation in bid rigging activities. He asked the OFT *'Why don't you ask me if we've taken a cover or given a cover. ... of course I have done that and I believe that probably every other contractor in the country has probably done that on certain occasions'*.⁵³⁹¹ CS explained, *'... the only reason for doing that is to make sure you're tender ... a figure goes into the client and that you're kept in the loop for next time'*.⁵³⁹² CS confirmed that the exchange of cover prices was always carried out by telephone.⁵³⁹³ At Greenwood, the exchange of cover prices usually occurred *'towards the end, I suppose when I, you know they realize you couldn't do something or they wanted some help'*.⁵³⁹⁴ CS stated that if he received a cover price he would record it *'... in a notebook and then, it would go onto the tender sheet'*.⁵³⁹⁵ During interview CS confirmed that when referring to a 'notebook' he actually was referring to a post-it note.⁵³⁹⁶

IV.3270. CS was interviewed for a second time on 28 February 2007 and was shown the documents and post-it notes found during the OFT's search of Greenwood's premises in relation to this tender. CS confirmed that the handwritten notes on the first post-it note were written by Andrew Boam, an ex-estimator at Greenwood, and that it indicates *'That there was a cover from Howard Adkins [sic]'* and in relation to the handwritten *'OUR F IG £26,150-00'*, *'That was the figure that we were given [by Harold Adkin]'*.⁵³⁹⁷ CS could not explain the handwriting on the second post-it note.⁵³⁹⁸

IV.3271. On being shown by the OFT the fax from Harold Adkin, CS said in interview *'It would suggest that we either came second or third and the clients asked for a price schedule from the top three ... And obviously as we've not done the work on it we wouldn't know what to ...'*.⁵³⁹⁹ CS confirmed that this information was *'A follow up from the original cover yes that's right which occasionally used to happen yes they [the client] do that in case obviously the lowest made a big mistake'*.⁵⁴⁰⁰

Evidence from other companies – Greenwood/Crown Point

IV.3272. The OFT wrote to Greenwood on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greenwood had participated in bid rigging on this tender. A response was

⁵³⁹¹ Interview transcript, OFT Document Reference 6362, page 18.

⁵³⁹² Interview transcript, OFT Document Reference 6362, page 18.

⁵³⁹³ Interview transcript, OFT Document Reference 6362, page 19 and 20.

⁵³⁹⁴ Interview transcript, OFT Document Reference 6362, page 21.

⁵³⁹⁵ Interview transcript, OFT Document Reference 6362, page 21.

⁵³⁹⁶ Interview transcript, OFT Document Reference 6362, page 22.

⁵³⁹⁷ Interview transcript, OFT Document Reference 13423, page 20.

⁵³⁹⁸ Interview transcript, OFT Document Reference 13423, page 20.

⁵³⁹⁹ Interview transcript, OFT Document Reference 13423, page 20.

⁵⁴⁰⁰ Interview transcript, OFT Document Reference 13423, page 21.

received from Begbies Traynor informing the OFT that '*... we have now ceased to act as administrators pursuant to the provisions of paragraph 84 of schedule B1 of the Insolvency Act 1986 which facilitates the ending of an administration order by dissolution of the company. ... As we have ceased to act as administrators of the company we are not in a position to enter into any agreement on its behalf*'.⁵⁴⁰¹

IV.3273. The OFT subsequently wrote to Greenwood's ultimate parent company at the time of this Infringement, Crown Point, on 5 November 2007, asking it to comment on the letter sent to Greenwood on 22 March 2007, given that the OFT intended to hold Crown Point jointly and severally liable for any infringements committed by Greenwood in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Crown Point's legal representatives Keeble Hawson said '*...the offer is not accepted by Crown Point Maintenance Group Limited*'.⁵⁴⁰² The company has subsequently indicated that it was '*...without any documentary evidence such that it was simply unable to meet the conditions set out in the fast track offer letter*'.⁵⁴⁰³

IV.3274. In response to the Statement, Crown Point provided a witness statement from its Director, Andrew Goodwin, who stated that '*in the light of the evidence presented I cannot deny that the alleged incident took place*'.⁵⁴⁰⁴

IV.3275. Crown Point also stated in its response to the Statement that '*the OFT provisionally found that Harold Adkin was the 'instigator' of the process inasmuch that Harold Adkin provided a figure for a cover bid to Greenwood*'.⁵⁴⁰⁵ The OFT emphasises that it has not made any finding regarding which party instigated the cover pricing arrangement in this Infringement – indeed, as noted in section IV.C above, it was far more common for the party requesting the cover price (in this Infringement, Greenwood) to initiate the arrangement. It is not necessary for the OFT to conclude on this aspect for a finding of an infringement to be made.

Evidence from other companies – Harold Adkin

IV.3276. The OFT wrote to Harold Adkin on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Harold Adkin had participated in bid rigging on this tender. In response to this letter Harold Adkin admitted '*We engaged in bid rigging activities on this tender with the following: Greenwood Builders*'.⁵⁴⁰⁶

IV.3277. In its response to the Statement, Harold Adkin stated '*[a] competitive tender was received by the client, West Nottinghamshire College. No financial gain by Harold Adkin ... [and] [i]n none of these ... infringements do Adkins consider that there was any loss to the employer/client*'.⁵⁴⁰⁷ As explained in Section III (Legal Background) the OFT considers that cover pricing has the object of restricting, distorting or preventing competition and is therefore not required to

⁵⁴⁰¹ Response from Greenwood, OFT Document Reference 10358.

⁵⁴⁰² Response from Crown Point, OFT Document Reference 14184.

⁵⁴⁰³ Written representations of Crown Point, 27 June 2008, paragraph 4.4

⁵⁴⁰⁴ Witness statement of Andrew Goodwin, 26 June 2008, paragraph 20.

⁵⁴⁰⁵ Written representations of Crown Point, 27 June 2008, paragraph 3.3.

⁵⁴⁰⁶ Response from Harold Adkin, OFT Document Reference 10377, page 1.

⁵⁴⁰⁷ Written representations of Harold Adkin, 25 June 2008, page 2.

demonstrate an effect, whether in the form of direct loss to the client or otherwise, in order to establish an Infringement. The extent to which the alleged absence of financial gain or loss to the client should be treated as mitigation when assessing penalties is considered further in Section VI (Enforcement).

The OFT's analysis of the evidence and finding

IV.3278. From the evidence presented above, the OFT draws the following conclusions.

IV.3279. Greenwood and Harold Adkin each accepted an invitation to tender for this contract.

IV.3280. Greenwood was unable to submit a tender by the return date and/or did not want to win this tender. It appears that Harold Adkin completed the estimating process for this contract and that it submitted a tender with the hope of winning the work. This is shown by the fact that it submitted the lowest price and that it won the tender.

IV.3281. A post-it note found at Greenwood records *'PRICED SPEC TO BE FAXED MONDAY! WEST NOTTS COLLEGE COVER FROM HAROLD ADKINS [.....] [C] OUR FIG £26,150-00 IAN DOUGLAS'*. CS confirmed that this note records that Greenwood received a cover figure of £26,150 from Harold Adkin for the work for West Nottinghamshire College. The telephone number *'[.....] [C]'* is the telephone number of Harold Adkin as confirmed by the telephone contact number at the foot of the fax sent to Greenwood by Harold Adkin for this tender. *'IAN DOUGLAS'* refers to Ian Douglas, an employee of Harold Adkin, who sent that fax to Greenwood.

IV.3282. The post-it note also stated *'PRICED SPEC TO BE FAXED MONDAY!'*. CS explained that Greenwood had been asked by the client for a breakdown of its tender costs. CS explained that as Greenwood had not priced this tender, since it was taking a cover price, it was unable to produce breakdown figures of its own accord. Greenwood therefore went back to Harold Adkin, who had provided Greenwood with the cover price, and Harold Adkin sent the fax with an attached table which gave the requested breakdown of figures to Greenwood. CS further explained that the figures provided by Harold Adkin were costs based on the cover price given to Greenwood by Harold Adkin. The figures in the table add up to £26,150, the tender figure submitted by Greenwood for this work.

IV.3283. In addition to this, the total figure provided by Harold Adkin to Greenwood as its cover price *'£26,150-00'* and recorded by Greenwood on the first post-it note was identical to the tender that Greenwood submitted for the work.

IV.3284. Both CS of Greenwood and Harold Adkin have admitted to bid rigging in relation to this tender. In addition, Crown Point's Director confirmed in response to the Statement that he could not deny that the Infringement took place. The OFT also notes that Harold Adkin admitted that the party with whom it engaged in bid rigging was Greenwood, without being shown the OFT's evidence that Greenwood was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.3285. The OFT considers in the light of the contemporaneous evidence from Greenwood, CS's admissions and explanations of that contemporaneous evidence and Harold Adkin's independent corroboration of the OFT's evidence in respect of this tender, that Harold Adkin gave a cover price to Greenwood for this tender.

IV.3286. The OFT notes that the tender submitted by Greenwood was higher than the tender submitted by Harold Adkin, a pattern consistent with a cover price having been provided.

IV.3287. The OFT also notes that no other company submitted a bid lower than Harold Adkin's bid, and that only Harold Adkin could therefore have given Greenwood a cover in respect of this tender.

IV.3288. The OFT therefore concludes that contact took place between Harold Adkin and Greenwood. The OFT also concludes that Harold Adkin supplied a figure to Greenwood for a cover bid.

IV.3289. The OFT is satisfied that the facts set out in paragraphs IV.3265 to IV.3288 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁴⁰⁸ In particular:

- (a) the provision of a figure for a cover bid from Harold Adkin to Greenwood was not unilateral⁵⁴⁰⁹, and contravenes the principle against direct or indirect contact between competitors;⁵⁴¹⁰
- (b) Greenwood can be presumed to have taken account of the information received from Harold Adkin (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁴¹¹
- (c) Harold Adkin can be presumed to have taken account of the information it received from Greenwood (i.e. that Greenwood did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁴¹²

IV.3290. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Harold Adkin and Greenwood, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for internal alterations to workshops, Room 25 and 29, West Nottinghamshire College, Derby Road, Mansfield, tender deadline 6 September 2002.

⁵⁴⁰⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁴⁰⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁴¹⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁴¹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁴¹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 119: Critical Care Development, Queen Elizabeth Hospital,
Gayton Road, Kings Lynn, Norfolk – 16 September 2002
Client: Queen Elizabeth Hospital, Kings Lynn NHS Trust
Parties: Jackson⁵⁴¹³ and Haymills

IV.3291. In 2002, Queen Elizabeth Hospital sought tenders for the Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk. The return date for the tender was 16 September 2002 and four companies were invited to tender: Barnes Construction, Bluestone, Haymills and Jackson.⁵⁴¹⁴

IV.3292. Queen Elizabeth Hospital received the following tender returns prior to 12:00 noon on 16 September 2002:⁵⁴¹⁵

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Barnes Construction	16 September 2002	11:22 am	£2,513,870.16	
Bluestone	16 September 2002	11:18 am	£2,469,082.00	Yes
Haymills	16 September 2002	11:50 am	£2,507,458.00	
Jackson	16 September 2002	11:26 am	£2,599,473.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson Tender book

IV.3293. In Jackson's tender book, provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten:⁵⁴¹⁶

Enquiry Number	Date Received	Employer	Location	Description of Works
E3604	07.8.02	Queen Elizabeth Hospital	Kings Lynn	Critical Care, Services Development

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
		£2,599,473	C Cover from Haymills PC	Noon 16.9.02

IV.3294. On the tender sheet for this tender is handwritten in the section under '*Known Competition*', '*Barnes, Bluestone, Haymills*'. The estimator is recorded as '*P Cooper*'.⁵⁴¹⁷

⁵⁴¹³ Jackson is a subsidiary of Propensity.

⁵⁴¹⁴ Information from client, OFT Document Reference 9020.

⁵⁴¹⁵ Information from client, OFT Document Reference 9020.

⁵⁴¹⁶ Tender book, OFT Document Reference A0905, page 31.

⁵⁴¹⁷ Tender sheet, OFT Document Reference A0900.

Evidence from leniency applicant Propensity

IV.3295. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.3296. In particular, Propensity provided to the OFT an analysis of its Tender Records Book since 4 January 2000 and in respect of this tender, Propensity confirmed that it received a cover price from Haymills.⁵⁴¹⁸

IV.3297. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁵⁴¹⁹

Witness evidence from leniency applicant Propensity

IV.3298. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.3299. John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender book⁵⁴²⁰ and that in most instances it would be himself that arranged the cover price.⁵⁴²¹ JR said in respect of the entry for this tender in the tender book, '*it appears that a cover was taken from Haymills and the value entered would have been the figure that was included on the formal tender*'.⁵⁴²² JR also confirmed that 'PC' stood for the estimator Phil Cooper ('PC'), a senior estimator at Jackson, who was initially assigned this tender before it was decided to take a cover price.⁵⁴²³ JR explained that the 'C' stood for '*competitive tender*'.⁵⁴²⁴

IV.3300. PC could not recall this tender but confirmed that the writing on the tender sheet was JR's and not his.⁵⁴²⁵ In respect of the tender sheet JR said '*I would normally fill that sheet in almost immediately after the documents were received*', '*that's my handwriting*' and '*if he was doing some work on the project and for whatever reason as directed by the board that we were directed to cease work and organise a cover.... he would have been asked to stop and the situation [that Jackson was taking a cover] would have been explained to him*'.⁵⁴²⁶

Evidence from other companies – Haymills

IV.3301. The OFT wrote to Haymills on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that

⁵⁴¹⁸ Leniency application, OFT Document Reference A1274, page 4.

⁵⁴¹⁹ Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁵⁴²⁰ Interview transcript, OFT Document Reference 11347, page 10.

⁵⁴²¹ Interview transcript, OFT Document Reference 11347, page 11.

⁵⁴²² Interview transcript, OFT Document Reference 11347, page 19.

⁵⁴²³ Interview transcript, OFT Document Reference 11347, page 19.

⁵⁴²⁴ Interview transcript, OFT Document Reference 11347, page 13.

⁵⁴²⁵ Interview transcript, OFT Document Reference 11348, pages 12 and 13.

⁵⁴²⁶ Interview transcript, OFT Document Reference 11347, page 19.

Haymills had participated in bid rigging on this tender. In response to this letter, Haymills admitted *'We engaged in cover pricing (a form of bid rigging activities) on this tender but cannot recall details of the other party/parties involved'*.⁵⁴²⁷

IV.3302. In its response Haymills enclosed a copy of its Tender Analysis Form for this tender and under the section headed *'Competition'* is written *'Barnes, Jackson, Bluestone'*.⁵⁴²⁸ In addition, Haymills said in respect of this tender, that after its internal enquiries and interviews, *'To the extent that Haymills has participated in cover pricing in relation to those tenders, Haymills would, in all likelihood, have done so with Jacksons ...'*.⁵⁴²⁹

IV.3303. The OFT subsequently wrote to Haymills' ultimate parent company at the time of this Infringement, Corringway, on 6 November 2007, asking it to comment on Haymills' response to the OFT's Fast Track Offer, given that the OFT intended to hold Corringway jointly and severally liable for any infringements committed by Haymills in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Corringway said *'Corringway is prepared to confirm that it proposes to respect the terms of Haymills' acceptance of its participation in the alleged infringements, and that it does not propose to make representations denying Haymills' participation in the bid-rigging activities in relation to the suspect tenders which are set out in Annex 1 of the OFT's letter of 22 March 2007 to Haymills ...'*.⁵⁴³⁰

IV.3304. In its response to the Statement, Haymills stated that it *'...does not challenge its participation in cover pricing and its breach of the Chapter I prohibition in respect of ... [this Infringement]. Haymills Group regrets its participation in cover pricing and now operates a strict policy of competition law compliance.'*⁵⁴³¹

The OFT's analysis of the evidence and finding

IV.3305. From the evidence presented above, the OFT draws the following conclusions.

IV.3306. Jackson and Haymills each accepted an invitation to tender for this contract.

IV.3307. Haymills completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.3308. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.3309. In regard to Haymills, Jackson's tender book states, *'Cover from Haymills'*. Propensity has confirmed that this shows that it received a cover price from Haymills. Jackson recorded in the tender book the figure £2,599,473, as the tender figure and this was the figure that Jackson submitted.

⁵⁴²⁷ Response from Haymills, OFT Document Reference 11069, page 3.

⁵⁴²⁸ Tender Analysis Form, OFT Document Reference 11074.

⁵⁴²⁹ Response from Haymills, OFT Document Reference 10404, page 5.

⁵⁴³⁰ Response from Corringway, OFT Document Reference 14143.

⁵⁴³¹ Written representations of Haymills, 27 June 2008, paragraph 2.

- IV.3310. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by Haymills, a pattern consistent with a cover price having been provided.
- IV.3311. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Haymills admitted that the party with whom it engaged in bid rigging was, *'in all likelihood'*, Jackson without being shown the OFT's evidence that Jackson was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.3312. The OFT therefore concludes that contact took place between Haymills and Jackson. The OFT also concludes that Haymills supplied a figure to Jackson for a cover bid.
- IV.3313. The OFT is satisfied that the facts set out in paragraphs IV.3291 to IV.3312 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁴³² In particular:
- (a) the provision of a figure for a cover bid from Haymills to Jackson was not unilateral⁵⁴³³, and contravenes the principle against direct or indirect contact between competitors;⁵⁴³⁴
 - (b) Jackson can be presumed to have taken account of the information received from Haymills (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁴³⁵ and
 - (c) Haymills can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁴³⁶
- IV.3314. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and Haymills, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk, tender deadline 16 September 2002.

Immunity and leniency assessment

- IV.3315. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.3316. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁵⁴³² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁴³³ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁴³⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁴³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁴³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 120: Refurbishment of Changing Rooms, St Benedict School, Derby
– 20 September 2002
Client: St Benedict Catholic School and Performing Arts College
Parties: Derwent Valley and Milward

IV.3317. On 30 August 2002, St Benedict Catholic School and Performing Arts College ('St Benedict'), sought tenders for the refurbishment of boys and girls changing rooms, North Block, St Benedict School and Performing Arts College. The following five companies were invited to tender: Derwent Valley, Peter Baines, Davlyn, Milward and Greenhill Construction. The deadline for the receipt of tenders was 20 September 2002.⁵⁴³⁷

IV.3318. St Benedict received the following tender returns:⁵⁴³⁸

Company	Date tender received	Amount of tender	Awarded contract
Peter Baines	20 September 2002	£45,207.00	Yes
Davlyn	20 September 2002	£79,489.00	
Derwent Valley	20 September 2002	£63,455.00	
Greenhill Construction	20 September 2002	£55,603.00	
Milward	20 September 2002	£67,874.42	

IV.3319. St Benedict also provided a report on tenders which notes at paragraph 3.03 '*There is nothing to indicate any collusion and it is considered the tenders are genuine*'.⁵⁴³⁹ The report goes on to say that the lowest tender '*has been adjusted by reducing contingencies to £1,000. The lowest tender is £1,209.72 over budget*'.⁵⁴⁴⁰ This report concludes with the recommendation that '*the tender from Peter Baines Limited in the revised sum of £44,207.00 be accepted*'.⁵⁴⁴¹

IV.3320. Milward noted in its response to the Statement that St Benedict's report had considered the tenders to be genuine. Milward stated, '*This is a contemporaneous document and should be regarded as more evidentially robust...*'.⁵⁴⁴² The OFT does not accept this assertion. When including this comment in the report, St Benedict did not have access to the evidence relied on by the OFT. The OFT notes that one of the aims of cover pricing is to ensure that the submitted tenders appear to be genuine, and in this case any report attesting to such merely shows that the parties were successful in this aim.

⁵⁴³⁷ Information from client, OFT Document Reference 9540.

⁵⁴³⁸ Information from client, OFT Document Reference 9540.

⁵⁴³⁹ Information from client, OFT Document Reference 9541, page 1.

⁵⁴⁴⁰ Information from client, OFT Document Reference 9541, page 2.

⁵⁴⁴¹ Information from client, OFT Document Reference 9541, page 2.

⁵⁴⁴² Written representations of Milward, 26 June 2008, paragraph 3.2(l).

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.3321. During the OFT’s search of Derwent Valley’s premises, a tender schedule containing handwritten entries was discovered.⁵⁴⁴³ Within this tender schedule was the following entry:⁵⁴⁴⁴

TENDER NO.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	
07/08/02	20/09/02	REFURBISHMENT OF CHANGING ROOMS, NORTH BLOCK ST BENEDICTS SCHOOL	67876 Milward (C) Davlyn	63 455	3rd

Evidence from leniency applicant Derwent Valley

IV.3322. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3323. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as ‘DVC1 List of Covers Given’. The information in the summary was based on the tender book kept by Pat Tunncliffe (‘PT’), an ex-estimator at Derwent Valley, and contained the following extract:⁵⁴⁴⁵

Date	Contract	Company Involved
August 2002	Changing room refurbishment St Benedict Catholic School	Milward

IV.3324. In its response to the Statement, Milward asserted that one of the entries in this summary document was incorrect, as it indicated Milward had taken a cover in respect of another project whereas in fact Milward had been successful in obtaining the contract on that project.⁵⁴⁴⁶ The OFT notes Milward’s point. On balance, however, the OFT does not consider the credibility of the other entries in the document to be undermined where, as here, those entries are underpinned by a contemporaneous Tender Schedule. Moreover, the summary represents Derwent Valley’s assessment as to its participation in cover pricing on this tender and the OFT accordingly takes it into account when assessing the totality of the evidence.

IV.3325. Derwent Valley also provided to the OFT as part of its leniency application a ‘List of Contractors Exchanging Cover Prices’. The name ‘Milward Construction

⁵⁴⁴³ Tender schedule, OFT Document Reference 1912.

⁵⁴⁴⁴ Tender schedule, OFT Document Reference 1912, page 33.

⁵⁴⁴⁵ List of Covers Given, OFT Document Reference 3940, page 2.

⁵⁴⁴⁶ Written Representations of Milward, 26 June 2008, paragraph 4.2; affidavit of Stephen Milward, 24 June 2008, paragraph 12.

(Belper) appears on this list with the address *'30 Market Place Belper Derbyshire'* and the contact name *'Adrian Milward'*.⁵⁴⁴⁷

IV.3326. In its response to the Statement, Milward stated that Adrian Milward *'does not know any of the employees of Derwent Valley and did not know of them at the time of the Alleged Infringements'*.⁵⁴⁴⁸ However, the OFT notes the evidence of PT to the contrary; he stated in interview that *'...Milward were a contractor in Belper, the same as Derwent Valley were. They went back a long way, you know, before I joined. Adrian knew that if it wasn't David it would be myself that was pricing it and he would ask for one or the other and then we would give him a call back when we had a figure for him'*.⁵⁴⁴⁹

IV.3327. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.3328. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3329. In regard to this tender, a voluntary interview was conducted with PT, who dealt with this tender. PT confirmed that he kept and maintained the tender schedule referred to in paragraphs IV.309 to IV.317 above.⁵⁴⁵⁰ PT referred to the tender schedule and when asked if he recalled the tender he said, *'Yeah I remember going round there. It looks as though, I would say we came third on that...it looks as though I gave a cover to Milward, that'd be the Milward in Belper'*. When asked if he recalled dealing with anyone at Milward, PT said *'Yeah that would be Adrian'* and went on to clarify this as Adrian Milward. PT could not specifically recall having a conversation with Milward in regard to this tender and said that *'you just get a phone call, are you pricing it, can you help me out?'*. When asked how Milward would have known to contact Derwent Valley, PT responded *'Because Milward were a contractor in Belper, the same as Derwent Valley were. They went back a long way, you know, before I joined. Adrian knew that if it wasn't David it would be myself that was pricing it and he would ask for one or the other and then we would give him a call back when we had a figure for him'*.⁵⁴⁵¹

IV.3330. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender. DS recalled the tender and said *'Yeah, I, I priced that, I can remember'*.⁵⁴⁵² DS, examining the entry for this tender in the tender schedule and the figure of 67876, said that *'I'd suggest, not totally sure, but I'd suggest that may be the figure given to them'*. When asked whether he meant that the figure was given by Derwent Valley, he said *'Yeah'*.⁵⁴⁵³

⁵⁴⁴⁷ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 2.

⁵⁴⁴⁸ Written representations of Milward, 26 June 2008, paragraphs 4.8.

⁵⁴⁴⁹ Interview transcript, OFT Document reference 14237 page 19

⁵⁴⁵⁰ Interview transcript, OFT Document Reference 14237, page 6.

⁵⁴⁵¹ Interview transcript, OFT Document Reference 14237, page 19.

⁵⁴⁵² Interview transcript, OFT Document Reference 13478, page 23.

⁵⁴⁵³ Interview transcript, OFT Document Reference 13478, page 24.

IV.3331. Milward stated in its response to the Statement that ‘... *both PT and DS say that they priced the tender – they cannot both be correct ...*’.⁵⁴⁵⁴ The OFT does not accept Milward’s interpretation of the witness evidence (although the OFT does not see any inconsistency if the two individuals worked together to compile a single tender estimate). In this case the OFT considers the evidence shows that PT visited the site and DS priced the tender: PT said ‘*I remember going round there [to the St Benedict School]*’ and DS said ‘*I priced that*’. There is no inconsistency.

IV.3332. Milward also stated in its response to the Statement that ‘...*neither [PT or DS] is able to say with certainty (“not totally sure”) that they provided a cover price to Milward*’.⁵⁴⁵⁵ The OFT considers the interviews with PT and DS to be good corroborating evidence for the contemporaneous Tender Schedule document. Although neither PT nor DS could recall the exact circumstances in which the cover was provided to Milward, both did have a recollection of the job and explained that the entry in the contemporaneous Tender Schedule indicated that Milward took a cover price. The OFT relies primarily on the Tender Schedule in this regard, the witness evidence being supportive.

Evidence from other companies – Milward

IV.3333. The OFT wrote to Milward on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Milward had participated in bid rigging on this tender. Milward did not reply to this letter and subsequently on 9 May 2007 a call was made by the OFT to the Managing Director of Milward, who said the OFT would not be receiving a response as Milward ‘*have not done anything wrong*’.⁵⁴⁵⁶

IV.3334. Milward stated in its response to the Statement that it ‘...*did not give or receive a cover price for this tender...*’.⁵⁴⁵⁷ It also adduced an affidavit from Stephen Milward, indicating that he priced this job, and ‘*The Company did not take a cover price for the works*’.⁵⁴⁵⁸ The OFT notes Stephen Milward’s evidence, and has given it consideration. On balance, however, the OFT considers that greater weight may be attached to the contemporaneous Tender Schedule. Although the witness evidence of PT explaining the entries in this Schedule indicated that it was Adrian Milward with whom Derwent Valley usually dealt, he does not specifically state that it was Adrian with whom he dealt on this occasion, Stephen Milward has likewise confirmed that he does not know PT⁵⁴⁵⁹, and moreover both he and Adrian Milward have confirmed that he would not always be the person finalising and submitting the tender on the day⁵⁴⁶⁰ (and therefore the person who might make or take a telephone call in respect of provision of a cover). The OFT therefore does not consider the apparent inconsistency between the evidence of the respective parties’ witnesses to be irreconcilable in this instance. In any event the OFT considers

⁵⁴⁵⁴ Written representations of Milward, 26 June 2008, paragraph 3.2(i)(i).

⁵⁴⁵⁵ Written representations of Milward, 26 June 2008, paragraph 3.2(i)(ii).

⁵⁴⁵⁶ File note of telephone conversation, OFT Document Reference 10716.

⁵⁴⁵⁷ Written representations of Milward, 26 June 2008, paragraph 3.2(a).

⁵⁴⁵⁸ Affidavit of Stephen Milward, 24 June 2008, paragraph 6(a).

⁵⁴⁵⁹ Affidavit of Stephen Milward, 24 June 2008, paragraph 5(a).

⁵⁴⁶⁰ Affidavit of Stephen Milward, 24 June 2008, paragraph 9; affidavit of Adrian Milward, 22 May 2008, paragraph 11; written representations of Milward, 26 June 2008, paragraph 3.3(g) (in respect of Infringement 134, though the point has equal application in respect of this Infringement).

that the contemporaneous Tender Schedule would weigh in favour of preferring the evidence of PT to the extent that there is any inconsistency.

IV.3335. Milward also stated in its response to the Statement that it *'...was actively marketing its services to schools... [t]he targeted marketing which took place during the period in which the tender was submitted demonstrates that Milward was eager to expand its work in this area... [i]t would be contrary to this policy for Milward to have sought a cover price on this tender'*.⁵⁴⁶¹ The OFT does not accept that Milward's active marketing to schools means it would not have sought and obtained a cover price for this tender. On the contrary the OFT views Milward's active marketing as a possible incentive for it to obtain a cover price, rather than returning no bid at all and risk being viewed by the school as a company unable to supply the work for which it was marketing itself.

IV.3336. Milward further questioned whether the use of a 'C' entry in the Tender Schedule indicated that a cover price had been given/taken, suggesting in particular that DS had only *'assumed that [the giving of a cover price] was indicated by the use of the letter 'C''* and that the 'C' may denote 'competitor' as *'it is possible for contractors to note from where their main competition has arisen'*.⁵⁴⁶² The OFT does not consider this plausible. The witnesses from Derwent Valley did not indicate that it was a part of their practice in compiling the Tender Schedule to denote their competitors in this manner. Further, PT confirmed that a 'C' in brackets indicated that Derwent Valley had either given or taken a cover.⁵⁴⁶³ Moreover, similar entries in the Derwent Valley Tender Schedule have been confirmed to accurately record the giving of a cover price by the admissions of other Parties in relation to Infringements including 68, 93, 110 and 144.

The OFT's analysis of the evidence and finding

IV.3337. From the evidence presented above, the OFT draws the following conclusions.

IV.3338. Derwent Valley and Milward each accepted an invitation to tender for this contract. Derwent Valley completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.3339. Milward was unable to submit a tender by the return date and/or did not want to win this contract.

IV.3340. Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes a reference to competitor Milward with the letter 'C' in brackets next to it and a figure of 67876 written above it. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received. The figure in the tender schedule next to the reference for Milward of 67876 is marginally higher than the figure of £67,874.42 that Milward submitted as its bid for the tender. This is consistent with the acceptance of a cover price, and the recipient

⁵⁴⁶¹ Written representations of Milward, 26 June 2008, paragraph 3.2(c) to (d).

⁵⁴⁶² Written representations of Milward, 26 June 2008, paragraphs 4.3 to 4.7; affidavit of Keith Holmes, 24 June 2008, paragraphs 8 to 11.

⁵⁴⁶³ Interview transcript, OFT Document Reference 14237, page 8.

changing it slightly so as to present a less conspicuous figure, and/or one even less likely to win the contract.

IV.3341. The OFT notes that of the two companies mentioned in Derwent Valley's tender schedule, Milward and Davlyn, only Milward has a '(C)' and a figure against it. This handwritten entry shows that Derwent Valley made a conscious decision to differentiate Milward from the other competitor mentioned.

IV.3342. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover to Milward.

IV.3343. This was corroborated in interview by DS, who agreed that the entry in the tender schedule showed that Derwent Valley gave covers in respect of this tender to Milward.

IV.3344. Derwent Valley also included Milward in its list of companies who exchanged cover prices.

IV.3345. In addition, the OFT notes that St Benedict received a tendered amount of £63,455.00 from Derwent Valley, which is lower than the amount tendered by Milward. This fits into the pattern consistent with a cover price having been given to Milward from Derwent Valley.

IV.3346. The OFT therefore concludes that contact took place between Derwent Valley and Milward. The OFT also concludes that Derwent Valley supplied a figure to Milward for a cover bid.

IV.3347. The OFT is satisfied that the facts set out in paragraphs IV.3321 to IV.3346 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁴⁶⁴ In particular:

- (a) the provision of a figure for a cover bid from Derwent Valley to Milward was not unilateral⁵⁴⁶⁵, and contravenes the principle against direct or indirect contact between competitors;⁵⁴⁶⁶
- (b) Milward can be presumed to have taken account of the information received from Derwent Valley (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁴⁶⁷ and
- (c) Derwent Valley can be presumed to have taken account of the information it received from Milward (i.e. that Milward did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵⁴⁶⁸

IV.3348. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Milward, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment of changing rooms, St Benedict School, Derby, tender dated 20 September 2002.

⁵⁴⁶⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁴⁶⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁴⁶⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁴⁶⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁴⁶⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.3349. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3350. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

Infringement 121: Residential Development, Elmdale, Herefordshire – 23 September 2002

Client: St John Kemble Hereford Housing Association
Parties: Thomas Vale and J Harper

IV.3351. On 21 August 2002, St John Kemble Hereford Housing Association ('St John Kemble') sought tenders for the construction of 10 new homes at Elmdale, Ewyas Harold, Herefordshire. The following four companies were invited to tender: J Harper, C J Bayliss, Partnerships First (now known as Kier Partnership Homes) and Thomas Vale.⁵⁴⁶⁹ Tenders were invited for a contract period of 36 weeks (Alternative A) and within a contract period at the tenderer's discretion (Alternative B). The deadline for the receipt of tenders was noon on 23 September 2002.⁵⁴⁷⁰

IV.3352. St John Kemble received the following tender returns:⁵⁴⁷¹

Company	Time & Date tender received	Amount of tender	Awarded contract
J Harper	Not known	£856,600 (B) ⁵⁴⁷²	
C J Bayliss	Not known	£859,251 (A) £853,389 (B)	
Partnerships First	Not known	£835,830 (A)	Yes
Thomas Vale	Not known	£878,563 (B)	

IV.3353. Supporting tender documentation from J Harper and Thomas Vale was provided to the OFT by the client.⁵⁴⁷³ Thomas Vale's Form of Tender was signed by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, on 23 September 2002.⁵⁴⁷⁴

⁵⁴⁶⁹ Information from client, OFT Document Reference 13254.

⁵⁴⁷⁰ Information from client, OFT Document Reference 13254.

⁵⁴⁷¹ Information from client, OFT Document Reference 13254.

⁵⁴⁷² Information from client, OFT Document Reference 13254. Incorrectly recorded by the client in its information provided to the OFT as £856,000.

⁵⁴⁷³ Information from client, OFT Document Reference 13256.

⁵⁴⁷⁴ Form of Tender, OFT Document Reference 13256, page 18.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.3354. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁵⁴⁷⁵

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5202	B	St John Kemble Hereford HA	Residential Development, Elmdale, Hereford		CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	23/09/2002 Noon	878,563		Harper,	

IV.3355. The Tender Status spreadsheet was maintained at Thomas Vale’s head office by CKT, who kept a ‘*little black book*’⁵⁴⁷⁶ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for ‘*J. Harper*’ plus names and telephone numbers⁵⁴⁷⁷, which match those found on Harper plc’s website.⁵⁴⁷⁸

Evidence from leniency applicant Thomas Vale

IV.3356. At Annex 14⁵⁴⁷⁹ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 32 of the schedule under Annex 14 and within the section for 2002 tenders is the following entry:⁵⁴⁸⁰

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5202	23 September	St John Kemble Hereford HA	Residential Development, Elmdale, Hereford	Taken (Harper)	Yes (Tender Spreadsheet)

IV.3357. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above.

⁵⁴⁷⁵ Tender Status spreadsheet, OFT Document Reference 4522, page 29.

⁵⁴⁷⁶ Interview transcript, OFT Document Reference 11418, page 21.

⁵⁴⁷⁷ Contact list, OFT Document Reference 11086, page 10.

⁵⁴⁷⁸ Harper plc’s website, OFT Document Reference 12026, page 8.

⁵⁴⁷⁹ Leniency application, OFT Document Reference 4568.

⁵⁴⁸⁰ Leniency application, OFT Document Reference 4568, page 32.

IV.3358. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁵⁴⁸¹ and *'Harper'* appears on this list.

IV.3359. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.3360. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.3361. CKT admitted that the initials *'CKT'*, which appear in the estimator column for this tender, were his own and that the letter *'B'*, which appears in the column marked *'DIV'*, stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁵⁴⁸² In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: *'I'm the allocated estimator, category B which indicates a cover, tender return date 23rd of the 9th 2002. Thomas Vale's submitted tender £878,563, and the contractor's name Harper is in bold, which indicates we took a cover figure from Harper'*.⁵⁴⁸³

Evidence from other companies – J Harper

IV.3362. The OFT wrote to Harper Construction Group Limited, a sister company of J Harper, on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that J Harper had participated in bid rigging on this tender. In response to this letter, Harper plc wrote to the OFT through its legal representatives on 4 May 2007⁵⁴⁸⁴ and admitted that J Harper had *'engaged in bid rigging activities on this tender with Thomas Vale'*.⁵⁴⁸⁵

IV.3363. In their response to the Statement, J Harper confirmed that they had accepted the OFT's Fast Track Offer and that they were not making any representations in respect of the Infringements.⁵⁴⁸⁶

The OFT's analysis of the evidence and finding

IV.3364. From the evidence presented above, the OFT draws the following conclusions.

IV.3365. Thomas Vale and J Harper each accepted an invitation to tender for the construction of 10 new houses at Elmdale, Herefordshire.

⁵⁴⁸¹ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁵⁴⁸² Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁵⁴⁸³ Interview transcript, OFT Document Reference 13865, page 10.

⁵⁴⁸⁴ Response from Harper, OFT Document Reference 10387.

⁵⁴⁸⁵ Response from Harper, OFT Document Reference 10390, page 8.

⁵⁴⁸⁶ Written representations of J Harper, 27 June 2008, paragraph 4.

- IV.3366. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that this was a cover price.
- IV.3367. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records Harper as a competitor who was also invited to tender. Harper is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is £878,563 which matches the amount recorded by the client St John Kemble.
- IV.3368. St John Kemble also received a tendered amount of £856,600 from J Harper, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Harper to Thomas Vale.
- IV.3369. The OFT notes that the tender had been allocated to CKT, who was responsible for the maintenance of the Tender Status spreadsheet. This means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price at the time. It also indicates that CKT himself made contact with J Harper.
- IV.3370. Thomas Vale admitted that J Harper was one of the key competitors with whom it engaged in cover pricing activity. CKT had an entry for J Harper in a contact book he used to telephone other contractors for the purpose of obtaining cover prices. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price had been received by Thomas Vale from J Harper.
- IV.3371. Finally, both parties admit to bid rigging activities on this tender. The OFT notes that Harper plc admitted that the party with whom J Harper engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides additional corroboration of the OFT's evidence in respect of this tender.
- IV.3372. The OFT therefore concludes that contact took place between Thomas Vale and J Harper. The OFT also concludes that J Harper supplied a figure to Thomas Vale for a cover bid.
- IV.3373. The OFT is satisfied that the facts set out in paragraphs IV.3354 to IV.3372 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁴⁸⁷ In particular:
- (a) the provision of a figure for a cover bid from J Harper to Thomas Vale was not unilateral⁵⁴⁸⁸, and contravenes the principle against direct or indirect contact between competitors,⁵⁴⁸⁹

⁵⁴⁸⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁴⁸⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁴⁸⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Thomas Vale can be presumed to have taken account of the information received from J Harper (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁴⁹⁰ and
- (c) J Harper can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵⁴⁹¹

IV.3374. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and J Harper in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for a residential development at Elmdale, Herefordshire, tender deadline 23 September 2002.

Immunity and leniency assessment

IV.3375. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3376. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 122: Reception and Office Extension at St Anne's Community
Special School, Welton, Brough – 25 September 2002**
Client: WS Atkins plc
Parties: Hobson & Porter and Hall

IV.3377. On 3 September 2002, WS Atkins plc sought tenders for a reception and office extension at St Anne's Community Special School, Welton, Brough. The return date for the tender was 12:00 noon on 25 September 2002 and five companies were invited to tender: Hall, Stubbs Bros, Hobson & Porter, R Fallowfield & Sons and Wigglesworth & Gibbins Ltd.⁵⁴⁹²

IV.3378. WS Atkins plc received the following tender returns on 25 September 2002:⁵⁴⁹³

⁵⁴⁹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁴⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁴⁹² Information from client, OFT Document Reference 13181.

⁵⁴⁹³ Information from client, OFT Document Reference 13181.

Company	Date and time tender received	Amount of tender	Awarded the tender
Hall	25 September 2002	£43,192	Yes
Stubbs Bros	25 September 2002	£49,234	
Hobson & Porter	25 September 2002	£48,851	
R Fallowfield & Sons	25 September 2002	£53,968	
Wigglesworth & Gibbins Ltd	25 September 2002	£49,328	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter

IV.3379. The Form of Tender was completed on 25 September 2002 and Hobson & Porter's submitted price was £48,851.⁵⁴⁹⁴

IV.3380. In connection with its leniency application, Hobson & Porter provided to the OFT a handwritten note with the annotations '*Norman Halls Our Figure 45,851*'.⁵⁴⁹⁵

IV.3381. Also in connection with its leniency application, Hobson & Porter subsequently produced a sheet of type written text headed, 'INSTRUCTIONS FOR TENDERING', relating to this tender, with a handwritten note '*Norman [.....] [C]*'.⁵⁴⁹⁶

Evidence from leniency applicant Hobson & Porter

IV.3382. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.3383. In Hobson & Porter's Summary of Cover Pricing Activity (Minor Works), provided to the OFT as part of its leniency application, it is stated that Hobson & Porter received a cover from Hall on this tender and that the individual contact at Hall was Norman Abbott.⁵⁴⁹⁷

IV.3384. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁵⁴⁹⁸

Witness evidence from leniency applicant Hobson & Porter

IV.3385. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.3386. In respect of this tender, in interview Ian Gibbins ('IG'), Minor Works Director at Hobson & Porter, confirmed that the handwriting, '*Norman Our Figure*

⁵⁴⁹⁴ Form of Tender, OFT Document Reference A1396.

⁵⁴⁹⁵ Handwritten note, OFT Document Reference A1397.

⁵⁴⁹⁶ Instructions for Tendering, OFT Document Reference 13878.

⁵⁴⁹⁷ Leniency application, OFT Document Reference A1349, page 1.

⁵⁴⁹⁸ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

45,851', on the handwritten note was Julie Smee's ('JS'), an assistant in Minor Works.⁵⁴⁹⁹ IG said that 'Halls' was probably written in at a later date when documents were being prepared for Hobson & Porter's leniency application.⁵⁵⁰⁰ IG said that JS was an assistant in the estimating department and confirmed that JS was fully aware of the practice of cover pricing.⁵⁵⁰¹

IV.3387. IG said that he knew that Hobson & Porter had taken a cover price on this tender because, *'There is no pricing within our document, with our file. There is my handwriting on the top of one of the documents [Instructions for Tendering] that says Norman.....it says in there in my handwriting Norman and his telephone number.... the telephone number is definitely Halls Construction'*.⁵⁵⁰² IG confirmed that he would have made this note (at the time of the initial contact to seek the cover price) *'...a week to two or three days before the tender was due in. That's the note that says Norman and the telephone number'*.⁵⁵⁰³

IV.3388. IG said in respect of the note made by JS, *'Norman Our Figure 45,851', 'I was obviously out. I asked them if he [Norman] hadn't rung up with the figure, to chase him up for the figure and then Julie has then written our figure, Norman and a figure that we had to go in around'*.⁵⁵⁰⁴ IG noted that the figure written by JS did not match precisely with the figure that Hobson & Porter tendered for this contract, but confirmed that it was still above Hall's figure.⁵⁵⁰⁵

Evidence from other companies – Hall

IV.3389. The OFT wrote to Hall on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Hall had participated in bid rigging on this tender. In response to this letter, Hall admitted, *'We engaged in bid rigging activities on this tender with: 1. HOBSON & PORTER'*.⁵⁵⁰⁶

IV.3390. The company information for Hall gives its telephone number as [.....]
[C].⁵⁵⁰⁷

IV.3391. In its response to the Statement, Hall confirmed that *'[i]t is not disputed that Hall participated in cover pricing during the relevant period set out in the Statement'*.⁵⁵⁰⁸

The OFT's analysis of the evidence and finding

IV.3392. From the evidence presented above, the OFT draws the following conclusions.

⁵⁴⁹⁹ Interview transcript, OFT Document Reference 13882, page 2.

⁵⁵⁰⁰ Interview transcript, OFT Document Reference 13882, page 2.

⁵⁵⁰¹ Interview transcript, OFT Document Reference 13882, page 4.

⁵⁵⁰² Interview transcript, OFT Document Reference 13882, page 3.

⁵⁵⁰³ Interview transcript, OFT Document Reference 13882, page 3.

⁵⁵⁰⁴ Interview transcript, OFT Document Reference 13882, page 3.

⁵⁵⁰⁵ Interview transcript, OFT Document Reference 13882, page 3.

⁵⁵⁰⁶ Response from Hall, OFT Document Reference 10373, page 2.

⁵⁵⁰⁷ Hall's website, OFT Document Reference 12723, page 10.

⁵⁵⁰⁸ Written representations of Hall, 24 June 2008, paragraph 53.

- IV.3393. Hobson & Porter and Hall each accepted an invitation to tender for this contract.
- IV.3394. It appears that Hall completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Hall being the lowest received and the fact that it won the contract.
- IV.3395. Hobson & Porter was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.3396. In regard to Hall, and specifically the Hobson & Porter handwritten notes '*Norman Our Figure 45,851*' and '*Norman [.....] [C]*', Hobson & Porter has confirmed that these show that it received a cover price for this tender from Norman Abbott, an estimator at Hall. IG confirmed that he would have noted '*Norman [.....] [C]*' when making the initial request for a cover price, and that JS would have noted '*Norman Our Figure 45,851*' when making a subsequent chase up for the cover price, just prior to the tender deadline. In respect of the telephone number '*Norman [.....] [C]*', this is the number for Hall.
- IV.3397. Although the figure written by JS does not appear to match with the figure submitted by Hobson & Porter for this tender, the OFT considers that either the figure was transcribed incorrectly to Hobson & Porter's tender submission due to a lack of clarity in the note, or alternatively that Hobson & Porter added a further amount to the cover price, to ensure that it did not win the contract.
- IV.3398. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Hall admitted that the party with whom it engaged in bid rigging was Hobson & Porter, without being shown the OFT's evidence that Hobson & Porter was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.3399. The OFT notes that the tender submitted by Hobson & Porter was higher than the tender submitted by Hall, a pattern consistent with a cover price having been provided. In addition the OFT notes that Hall's tender figure is the only figure below Hobson & Porter's tender figure, and the OFT is therefore satisfied that Hobson & Porter could only have received a cover figure from Hall.
- IV.3400. The OFT therefore concludes that contact took place between Hall and Hobson & Porter. The OFT also concludes that Hall supplied a figure to Hobson & Porter for a cover bid.
- IV.3401. The OFT is satisfied that the facts set out in paragraphs IV.3379 to IV.3400 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁵⁰⁹ In particular:
- (a) the provision of a figure for a cover bid from Hall to Hobson & Porter was not unilateral⁵⁵¹⁰, and contravenes the principle against direct or indirect contact between competitors,⁵⁵¹¹

⁵⁵⁰⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁵¹⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁵¹¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Hobson & Porter can be presumed to have taken account of the information received from Hall (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁵¹² and
- (c) Hall can be presumed to have taken account of the information it received from Hobson & Porter (i.e. that Hobson & Porter did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁵¹³

IV.3402. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Hobson & Porter and Hall, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a reception and office extension at St Anne's Community Special School, Welton, Brough, tender deadline 25 September 2002.

Immunity and leniency assessment

IV.3403. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3404. Hobson & Porter informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Hobson & Porter will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 123: External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View – 11 October 2002
Client: Newcastle City Council
Parties: Frank Haslam Milan, Mansell and Connaught

IV.3405. On 10 September 2002, Newcastle City Council sought tenders for the external fabric overhaul of 194 dwellings at Ferguson Lane, Whickham View.⁵⁵¹⁴ The following four companies were invited to tender: Cityworks, Connaught, Frank Haslam Milan and Mansell. The date and time of tender return was 11 October 2002 at 2:00 pm.⁵⁵¹⁵

IV.3406. Newcastle City Council received the following tender returns:⁵⁵¹⁶

⁵⁵¹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁵¹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁵¹⁴ Information from client, OFT Document Reference 8893.

⁵⁵¹⁵ Information from client, OFT Document Reference 8893.

⁵⁵¹⁶ Information from client, OFT Document Reference 8893.

Company	Date & time tender received	Amount of tender	Awarded contract
Cityworks	11 October 2002 before deadline	£2,518,150	
Connaught	11 October 2002 before deadline	£2,175,484	
Frank Haslam Milan	11 October 2002 before deadline	£2,065,788	YES
Mansell	11 October 2002 before deadline	£2,189,244	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Frank Haslam Milan – Tender Summary

IV.3407. As part of its leniency application, Frank Haslam Milan’s legal representatives provided a Tender Summary⁵⁵¹⁷ in respect of this tender, at the bottom are some handwritten notes as follows:

*‘2,175 Connaught
2189 Mansell’*

Evidence from leniency applicant Frank Haslam Milan

IV.3408. As part of its leniency application, Frank Haslam Milan’s legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.326 to IV.334 above and is relied upon by the OFT in relation to this tender.

IV.3409. Frank Haslam Milan’s legal representatives also provided to the OFT a table headed *‘PART C – DEFINITE ASSISTANCE GIVEN’*, which included an entry for this tender. In the column headed *‘Stephen Francis’ (Manager of the Estimating Department) Comments’* is written *‘Definite assistance to Mansell and Connaught. Written evidence found’*.⁵⁵¹⁸

IV.3410. In its response to the Statement, Connaught suggested that Frank Haslam Milan’s table of definite assistance given was unreliable for a number of reasons, including that it was based solely on the contemporaneous document (the reliability of which it disputed; see below) and that Frank Haslam Milan had included possible instances of cover pricing as well as definite ones.⁵⁵¹⁹ While the OFT is not giving the Frank Haslam Milan leniency documents the same evidential weight as contemporaneous documents and witness testimony, the OFT does consider this document robust as it is a result of extensive investigation by Frank Haslam Milan. The OFT also notes that in its leniency application, Frank Haslam Milan submitted possible and definite instances of cover pricing separately, indicating a sensitivity on its part to whether the contemporaneous documents were strong evidence of a cover price having been taken/provided, or merely suggestive, and that this tender is included in the table of definite instances of cover pricing.

⁵⁵¹⁷ Tender Summary, OFT Document Reference B1498.

⁵⁵¹⁸ Leniency application, OFT Document Reference B1459, page 2.

⁵⁵¹⁹ Written representations of Connaught, 27 June 2008, paragraph 2.2(d) and 2.3(c).

Witness evidence from leniency applicant Frank Haslam Milan

IV.3411. During interviews conducted in connection with its leniency application, Frank Haslam Milan's current and ex-employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.326 to IV.334 above and is relied upon by the OFT in relation to this tender.

IV.3412. During an interview with the OFT on 23 April 2007, David Mellor ('DM'), Managing Director⁵⁵²⁰ of Frank Haslam Milan, stated, in relation to this tender '*... we definitely gave assistance out on that scheme to two organisations ... I was approached directly*'.⁵⁵²¹ DM explained '*... one of the organisations – Connaught – were looking to move into the area and were looking to work on partnerships schemes, so they were looking to be on the list. They got on the list on this scheme, but they weren't looking for traditional tenders, so they weren't looking to price that scheme. So they come to me for some assistance*'.⁵⁵²² DM stated '*... because the contact came to me, I gave them ... back the price ... as to what their bid should be*'.⁵⁵²³

IV.3413. In its response to the Statement, Connaught suggested that DM's statement in interview was inaccurate as '*Connaught was well established in the North East at that time...*' and '*Connaught was keen to win traditional tenders and...without winning traditional contracts, it was not possible to win partnership contracts...*'.⁵⁵²⁴ This is said to affect the weight that should be given to his evidence in respect of Connaught. The OFT considers that even if DM's perception as to the reason for Connaught taking a cover price was inaccurate (which the OFT does not necessarily accept), this is irrelevant to the finding of an infringement. There are many other reasons why Connaught might have taken a cover price on this tender, such as being too busy with other work. Even if DM's perception of Connaught's motivation for seeking a cover price were incorrect, that does not detract from the fact that he had a specific recollection of this tender, and a specific recollection of Connaught approaching him for a cover price (whatever their reason for doing so might have been).

IV.3414. In respect of contact with Mansell, DM stated '*Mansell approached ... me on this situation ... and Mansell had told us that this was the fifth phase Ferguson's Lane. All the first four phases had been won by City Build [sic Cityworks] which is Newcastle's DLO, so this isn't a job to win - no chance*'.⁵⁵²⁵

IV.3415. In respect of the handwritten notes at the bottom of the tender summary, DM stated '*Its my writing ... 2175 Connaught, 2189 Mansell*' and confirmed that this had been written before the tender was submitted.⁵⁵²⁶ When asked how the figure of 2175 had been reached, DM stated '*Just a certain percentage above them ... nothing scientific other than we're obviously giving Connaught and Mansell and just give them fairly close together but not too close to us because, again, as a business decision, you won't want somebody ... you know, our*

⁵⁵²⁰ David Mellor joined Frank Haslam Milan in 1988, and became Managing Director in April 2003.

⁵⁵²¹ Interview transcript, OFT Document Reference 12855, page 13.

⁵⁵²² Interview transcript, OFT Document Reference 12855, page 13.

⁵⁵²³ Interview transcript, OFT Document Reference 12855, page 14.

⁵⁵²⁴ Written representations of Connaught, 27 June 2008, paragraph 2.5.

⁵⁵²⁵ Interview transcript, OFT Document Reference 12855, page 16.

⁵⁵²⁶ Interview transcript, OFT Document Reference 12855, page 15.

price was a bloody good price so we want to be sure it's not that close to the price, that's all we do'.⁵⁵²⁷

IV.3416. In its response to the Statement, Connaught suggested that DM's testimony regarding this tender was unreliable for a number of reasons, including that he did not remember the identity of the person at Connaught with whom he had had contact, and that he was merely agreeing with or was being led by the interviewer.⁵⁵²⁸ The OFT does not accept Connaught's suggestions, for the following reasons.

IV.3417. First, the OFT would not expect DM necessarily to have complete recollection of every specific tender and in particular every detail of an exchange that occurred a number of years ago in relation to each tender. That he does not remember with whom he spoke at Connaught does not detract from his specific recollection of having had a conversation in which he was approached for a cover price by Connaught. Secondly, the quote cited by Connaught in its written representations as evidence that the interviewer was leading him⁵⁵²⁹ should be considered in the context of the rest of the interview. Even if DM did not volunteer that he had completed the Tender Summary prior to submitting his tender, he had nonetheless already confirmed that he specifically recalled providing a cover price on this tender. He went on to refer to this being '*carried out in a tender meeting*'. To the extent that he may have completed the Tender Summary after submitting the tender (which the OFT does not accept in view of DM's confirmation that he did so beforehand) this again does not undermine his evidence that a cover price had been given. Thirdly, it should be noted that Mansell's witness evidence and the contemporaneous documents from both Mansell and Frank Haslam Milan support DM's account of events.

Contemporaneous documentary evidence from leniency applicant Mansell – tender log

IV.3418. As part of its leniency application, Mansell's legal representatives provided the North East Region ('NER') tender log. Page five of the tender log contained the following entry:⁵⁵³⁰

Marketing System Nr	North East Ref. Nr	Date Received	Cat	Type	Approx Value
75626	E/NE/02/58	11-Sep-02	HPU	B.Q	£ 2,000,000.00

Project Title:	Submission Date
NEWCASTLE: External Fabric Overhaul Of 194 Dwellings At Ferguson Lane/Whickham View	11/10 2pm

C

Evidence from leniency applicant Mansell

IV.3419. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.⁵⁵³¹ This evidence

⁵⁵²⁷ Interview transcript, OFT Document Reference 12855, page 15.

⁵⁵²⁸ Written representations of Connaught, 27 June 2008, paragraph 2.3; and oral representations of Connaught, 21 July 2008, pages 12 to 14.

⁵⁵²⁹ Written representations of Connaught, 27 June 2008, paragraph 2.3(b).

⁵⁵³⁰ Leniency application, OFT Document Reference B0926, page 5.

is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.3420. Mansell's legal representatives provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the NER, which includes this tender. In respect of this tender the table shows that the project bid value was '*£2,189,244.00*' and that Mansell received a cover price from Frank Haslam Milan and that this cover price was taken due to '*Worktype issue*' at Mansell.⁵⁵³²

IV.3421. Mansell's legal representatives also provided to the OFT a schedule of covers for the NER, which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Frank Haslam Milan and includes the comment '*Omer Asir recollects that MSCL received a cover price from Frank Haslam Milan*'.⁵⁵³³

Witness evidence from leniency applicant Mansell

IV.3422. During interviews conducted in connection with its leniency application, a Mansell employee from the NER provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.478 to IV.480 above and is relied upon by the OFT in relation to this tender.

IV.3423. During an interview with the OFT on 1 May 2007, Omer Asir ('OA') a managing estimator⁵⁵³⁴ in the NER, advised how it would be recorded when Mansell had taken a cover as detailed in paragraphs IV.479 to IV.480 above. In relation to this tender, OA, when asked about the significance of the 'C' in the tender log, confirmed that it identified where a cover price was taken and that the tender figure submitted was £2,189,244.⁵⁵³⁵ In respect of his recollection that the cover was taken from Frank Haslam Milan, OA stated '*... on that particular one, the client has provided us with the information of the results of the tender and obviously from the names that appear on that, they have, sort of jogged my memory in terms of who it was so it's a strong recollection because the other contractors on there one being the local authority's own, is someone that you wouldn't seek assistance from, the other name is not one I'm familiar with*'.⁵⁵³⁶ OA confirmed that the other name with which he was not familiar was Connaught, and that from this he concluded that a cover price had been taken from Frank Haslam Milan.⁵⁵³⁷ When shown the Frank Haslam Milan Tender Summary, OA stated '*...so that really confirms my assumption*' and when asked whom he would have spoken to at Frank Haslam Milan, he stated '*well I recall the name because he was the only estimator at Frank Haslam at the time ... it was Steve Francis*'.⁵⁵³⁸

IV.3424. In its response to the Statement, Connaught suggested that it had not, as part of the disclosure process, been provided with a document that had been

⁵⁵³¹ Leniency application, OFT Document Reference B0734.

⁵⁵³² Leniency application, OFT Document Reference B0767, page 2.

⁵⁵³³ Schedule of covers, OFT Document Reference B3609, page 2.

⁵⁵³⁴ Omer Asir was a senior estimating in the NER from 2000 – 2006 and then became managing estimator.

⁵⁵³⁵ Interview transcript, OFT Document Reference 11509, pages 13 and 14.

⁵⁵³⁶ Interview transcript, OFT Document Reference 11509, page 15.

⁵⁵³⁷ Interview transcript, OFT Document Reference 11509, page 15.

⁵⁵³⁸ Interview transcript, OFT Document Reference 11509, page 16.

referred to by the OFT during its interview with OA.⁵⁵³⁹ The document referred to in the interview is document B0944, which was disclosed to Connaught as part of the OFT's file.

Evidence from other companies – Connaught plc

IV.3425. The OFT wrote to Connaught plc on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Connaught had participated in bid rigging on this tender. In response to this letter Connaught plc stated that it was unable to accept the OFT's Fast Track Offer.⁵⁵⁴⁰

IV.3426. In its response to the Statement, Connaught provided a statement from Peter Jones ('PJ'), Joint Managing Director of the Northern Division, in which he stated *'I do not have any particular recollection of this tender and in particular have no recollection of speaking to David Mellor or anyone else at FHM about this job or of Connaught having requested or obtained a cover price from FHM'*.⁵⁵⁴¹ PJ also stated, in respect of the OFT's allegation that Connaught obtained a cover price from Frank Haslam Milan, that *'This does not seem plausible to me, because Connaught has a clear policy across the group that when it does not have the resources to price a job or does not want to win a contract, it returns the tender...'*⁵⁵⁴²

IV.3427. The OFT accepts that Connaught has been transparent in its dealings with the OFT by not disputing liability in respect of Infringements 22 and 175⁵⁵⁴³, and that it is therefore likely that it is being honest in its statement that there is a policy across the group that it should return tenders which it was unable or unwilling to price. However, the OFT notes that individual staff members may on occasions have breached Connaught's policy to return tenders, since in Infringement 175 there is clear evidence that Connaught took a cover price from a different leniency applicant and Connaught is not disputing that Infringement.⁵⁵⁴⁴ The absence of a specific recollection by PJ of this tender, and a general policy that cover prices should not be taken, cannot exculpate Connaught from an Infringement where other evidence is available which the OFT considers implicates it, and indeed is sufficient to substantiate its involvement.

IV.3428. In its response to the Statement, Connaught suggested that the figures on Frank Haslam Milan's Tender Summary could have been provided by the client and recorded after the contract was awarded. Connaught quoted Stephen Francis ('SF') of Frank Haslam Milan who stated that *'we also used to log on there [the Competitive Tender Information Service or System ('CTIS')] any competitors that we found that were pricing it during the course of the tender erm and then following the bid we used to put on there, erm, the values that had been bid ... that was generally from information we used to get back post bid from the client...'*, and suggested either that the Tender Summary was that

⁵⁵³⁹ Written representations of Connaught, 27 June 2008, paragraph 2.2(b).

⁵⁵⁴⁰ Response from Connaught, OFT Document Reference 10975.

⁵⁵⁴¹ Witness statement of Peter Jones, 27 June 2008, paragraph 2.

⁵⁵⁴² Witness statement of Peter Jones, 27 June 2008, paragraph 7.

⁵⁵⁴³ Written representations of Connaught, 27 June 2008, paragraphs 1.4 and 3.1.

⁵⁵⁴⁴ Written representations of Connaught, 27 June 2008, paragraph 3.1.

log or that this demonstrated Frank Haslam Milan's general approach to the recording of information.⁵⁵⁴⁵

IV.3429. The OFT notes, however, that Frank Haslam Milan's leniency application clearly described the Tender Summary and the CTIS log as being two separate documents used during the tendering process. SF's comment was referring to entries in the CTIS log, not to entries on Tender Summaries.⁵⁵⁴⁶ In addition, the OFT notes that the other competitor for the contract, Cityworks, was not mentioned in the handwritten entries on the Tender Summary. If the Tender Summary were, like the CTIS log, intended to record post-tender information, then there is no credible reason why Frank Haslam Milan would have recorded only two of the three companies' bids. It is far more credible that, as Frank Haslam Milan has explained and as discussed above, this note shows the two companies to whom it gave a cover price, the third company to whom no cover price was provided (Cityworks) being omitted.

The OFT's analysis of the evidence and finding

IV.3430. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.3431. Frank Haslam Milan, Mansell and Connaught each accepted an invitation to tender for this contract.

IV.3432. All three companies submitted a tender. It appears that Frank Haslam Milan completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Frank Haslam Milan being the lowest received and the fact that it won the contract.

IV.3433. Mansell and Connaught were unable to submit a tender by the return date and/or did not want to win this contract.

IV.3434. Frank Haslam Milan's Tender Summary contains handwritten notes '*2,175 Connaught 2189 Mansell*'. Frank Haslam Milan confirmed that this shows that it gave cover prices to Mansell and to Connaught.

IV.3435. In respect of Mansell, Mansell's tender log records '*C*' next to the entry for this tender. Mansell confirmed that this shows that it took a cover price and in interview the Mansell estimator OA confirmed it was his recollection that he spoke to Frank Haslam Milan to obtain the cover price, and suggested that he spoke to Steve Francis. Steve Francis worked in the estimating department of Frank Haslam Milan from January 1999 to 2006.

IV.3436. DM of Frank Haslam Milan has admitted to providing both cover prices on this tender and given the strength and specific nature of DM's recollection, the OFT considers it likely that it was in fact DM at Frank Haslam Milan that OA of Mansell spoke to in respect of this tender, rather than Steve Francis.

⁵⁵⁴⁵ Written representations of Connaught, 27 June 2008, paragraph 2.2 to 2.2(a).

⁵⁵⁴⁶ Leniency application, OFT Document Reference B1445, page 6.

IV.3437. Both Frank Haslam Milan and Mansell have admitted to bid rigging in relation to this tender.

IV.3438. In respect of Connaught, the OFT notes that although Connaught does not admit to bid rigging in respect of this tender, there is contemporaneous evidence from Mansell which corroborates the contemporaneous evidence and witness recollection from Frank Haslam Milan. This reinforces the evidential strength of the Frank Haslam Milan document and the confirmation from DM at Frank Haslam Milan in interview that he gave a cover price to Connaught, as well as to Mansell.

IV.3439. The OFT further notes that the tenders submitted by Mansell and Connaught were higher than the tender submitted by Frank Haslam Milan, the pattern consistent with a cover price having been provided.

IV.3440. In its response to the Statement, Connaught argued that this *'in no way proves that Connaught did in fact take a cover price, which is the point at issue in this case'*.⁵⁵⁴⁷ The OFT notes that this analysis is not relied upon as evidence *per se*. It merely sets out that the pattern of the tender bids which was consistent with a cover price having been provided by Frank Haslam Milan to Connaught

IV.3441. The OFT therefore concludes that contact took place between Frank Haslam Milan and Mansell, and between Frank Haslam Milan and Connaught. The OFT also concludes that Frank Haslam Milan supplied figures to Mansell and Connaught for cover bids.

IV.3442. The OFT is satisfied that the facts set out in paragraphs IV.3407 to IV.3441 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵⁵⁴⁸ In particular:

- (a) the provision of figures for cover bids from Frank Haslam Milan to Mansell and from Frank Haslam Milan to Connaught was not unilateral⁵⁵⁴⁹, and contravenes the principle against direct or indirect contact between competitors;⁵⁵⁵⁰
- (b) Mansell and Connaught can each be presumed to have taken account of the information received from Frank Haslam Milan (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁵⁵⁵¹ and
- (c) Frank Haslam Milan can be presumed to have taken account of the information it received from Mansell and Connaught (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁵⁵⁵²

IV.3443. In its response to the Statement, Frank Haslam Milan stated in respect of this Infringement that *'The state of mind of FHM and therefore its conduct was also determined before having been contacted by Mansell and Connaught...No*

⁵⁵⁴⁷ Written representations of Connaught, 27 June 2008, paragraph 2.9.

⁵⁵⁴⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁵⁴⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁵⁵⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁵⁵¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁵⁵² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

*evidence has been put forward that the conduct of Mansell and Connaught in contacting FHM for a cover influenced FHM's (1) decision to bid competitively; or (ii) its cost estimate and actual price submitted'*⁵⁵⁵³ and '*...FHM did not know who else was bidding on this project'*.⁵⁵⁵⁴ In essence, Frank Haslam Milan argues that it should not be presumed to have acted in the market on the basis of the information that Connaught and Mansell would not be submitting competitive bids.

IV.3444. However, to the extent that the argument is advanced as a denial of one of the necessary elements of liability (which would be inconsistent with Frank Haslam Milan's application for leniency and consequent admission of liability), rather than a suggested mitigating factor, the OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁵⁵⁵⁵ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Frank Haslam Milan has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Frank Haslam Milan's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

IV.3445. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Frank Haslam Milan and Mansell, and between Frank Haslam Milan and Connaught, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for external fabric overhaul 194 dwellings, Ferguson Lane, tender deadline 11 October 2002.

Immunity and leniency assessment

IV.3446. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3447. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.3448. Frank Haslam Milan informed the OFT of further bid rigging activities (involving Connaught) in respect of this tender before the OFT became aware of these further activities from any other source. Frank Haslam Milan will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁵⁵⁵³ Written representations of Frank Haslam Milan, 27 June 2008 (as amended 30 March 2009), paragraph 2.16.3.

⁵⁵⁵⁴ Written representations of Frank Haslam Milan, 27 June 2008 (as amended 13 March 2009), paragraph 2.17.

⁵⁵⁵⁵ See paragraph III.58 of the Legal Background section.

Infringement 124: Dronfield Gorse Brigg Primary School Extension – 15 October 2002
Client: Derbyshire County Council
Parties: Sol and Ackroyd & Abbott

IV.3449. On 16 September 2002, Derbyshire County Council ('DCC') sought tenders for the construction of an extension to Dronfield Gorse Brigg Primary School. The following four companies were invited to tender: Head of Contract Services at Matlock, Ackroyd & Abbott, Sol and Weaver (now known as Strata). The closing date for return of tenders was 15 October 2002 by 11:00 am.⁵⁵⁵⁶

IV.3450. DCC received the following tender returns:⁵⁵⁵⁷

Company	Date Tender Received	Amount of Tender	Awarded Tender
Head of Contract Services at Matlock	15 October 2002	£967,533	Yes
Ackroyd & Abbott	15 October 2002	£983,276	
Sol	15 October 2002	£1,009,632	
Weaver	15 October 2002	£1,021,040	

Evidence of agreement and/or concerted practice

Contemporaneous evidence from leniency applicant Sol – Tender Register and Estimating Board Report, dated 15 October 2002

IV.3451. During the OFT visit to Sol's premises under section 27 on 18 January 2006 a copy of Sol's tender register was obtained. This contained the following entry for this tender:⁵⁵⁵⁸

DATE DUE & DATE RECD	JOB DESCRIPTION	CLIENT	ARCHITECT	QUANTITY SURVEYOR
15 OCT '02 700,000	DRONFIELD GORSEY BRIGG PRIMARY SCHOOL	DERBYSHIRE COUNTY COUNCIL	DERBYSHIRE COUNTY COUNCIL	SIR WM BAIRD & PARTS

TYPE	TENDER SUM	ESTIMATOR	COMPETITION	RESULTS/COMMENTS
B Q	1,009,632	-	'C' FROM ACK & ABB RICHARD ABBOTT STRATA	2 DEC '02 22 AUG '03 ACKROYD + ABBOTT STRATA

IV.3452. During the OFT visit to Sol's premises, a copy of Sol's Estimating Board Report ('EBR') for this contract was also taken, which contained the following entry:⁵⁵⁵⁹

⁵⁵⁵⁶ Information from client, OFT Document Reference 7641.

⁵⁵⁵⁷ Information from client, OFT Document Reference 7641.

⁵⁵⁵⁸ Tender register, OFT Document Reference 4169, page 32.

⁵⁵⁵⁹ Estimating Board Report, OFT Document Reference 4167, page 43.

<u>DATE SUBMITTED</u>	<u>PROJECT</u>	<u>CLIENT</u>	<u>ARCHITECT</u>	<u>QUANTITY SURVEYOR</u>	<u>JOB</u>
15 Oct 2002	Dronfield Gorsley Brigg Primary School	Derbyshire County Council	Derbyshire County Council	Sir Wm Baird & Parts	NB/Refurb

<u>LOCATION</u>	<u>TYPE</u>	<u>FUNDED</u>	<u>SECTOR</u>	<u>TENDER VALUE</u>	<u>MARGIN</u>	<u>ESTIMATOR</u>
Derbys	BQ	Public	Education	£800,000		'C'

Evidence from leniency applicant Sol

IV.3453. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.3454. In particular, Sol provided the OFT with an analysis of its tender sheets since March 2000. In respect of the tender for Dronfield Gorse Brigg Primary School Extension, dated 15 October 2002, Sol confirmed that it took a cover price from Richard Abbott at Ackroyd & Abbott, because it was *'unable to price the work but Client important to us and we did not wish to be seen to be refusing work'*.⁵⁵⁶⁰

IV.3455. In its response to the Statement, Sol acknowledged that it had *'... admitted engaging in the practice of cover pricing in the 7 tenders listed in the Statement of Objections'*.⁵⁵⁶¹

Witness evidence from leniency applicant Sol

IV.3456. During interviews conducted in connection with its leniency application, Sol's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.3457. When interviewed about this tender, John Cummings ('JC'), Chief Estimator at Sol, identified the writing in the Tender Register⁵⁵⁶² as his, with the exception of the name *'Strata'* in the *'COMPETITION'* column, which he identified as that of an estimator's assistant, Shirley Peters.⁵⁵⁶³ When asked what was the *'Tender Sum'* he said, *'One million and nine thousand six hundred and thirty two'*.⁵⁵⁶⁴ He added, *'That was ... [the] ... cover price that we then obviously got from*

⁵⁵⁶⁰ Leniency application, OFT Document Reference 4359, page 4.

⁵⁵⁶¹ Written representations of Sol, 27 June 2008, page 3.

⁵⁵⁶² Tender register, OFT Document Reference 4169, page 32.

⁵⁵⁶³ Interview transcript, OFT Document Reference 11369, page 9.

⁵⁵⁶⁴ Interview transcript, OFT Document Reference 11369, page 9.

Ackroyd & Abbott'.⁵⁵⁶⁵ This figure is the same as that in the tender received by DCC from Sol. When asked to explain the entry '*C*' FROM *ACK & ABB*' he replied '*Cover price from Ackroyd & Abbott*'.⁵⁵⁶⁶ When asked to explain who Ackroyd & Abbott were he answered, '*They're a Sheffield building company*'.⁵⁵⁶⁷ JC was asked to confirm that Ackroyd & Abbott were competitors of Sol. He said, '*Yeah*'.⁵⁵⁶⁸ JC confirmed that the entry '*C*' FROM *ACK & ABB*' would have been made probably at the time that the tender sum was entered.⁵⁵⁶⁹

IV.3458. When asked about the EBR for this tender⁵⁵⁷⁰, dated 15 October 2002, JC confirmed that the entry '*C*' in the '*ESTIMATOR*' column denoted a cover price. The figure of '*800,000*' in the '*Tender Value*' column he explained, '*... tender value is only approximate. That would appear on the following Board Report, you know, the accurate figure there. You know, the million...And that was just my approximation, the value of job there*'.⁵⁵⁷¹

Evidence from other companies – Ackroyd & Abbott

IV.3459. The OFT wrote to Ackroyd & Abbott on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Ackroyd & Abbott had participated in bid rigging on this tender. Ackroyd & Abbott replied to the OFT on 26 April 2007. Ackroyd & Abbott's Chairman and Managing Director, Peter Horsepool, made no admissions that Ackroyd & Abbott had engaged in bid rigging on this tender.⁵⁵⁷²

IV.3460. In its response to the Statement, Ackroyd & Abbott stated that it had '*...seen the evidence available and accept[ed] that Ackroyd & Abbott Construction participated in cover pricing in [respect of this Infringement]*'.⁵⁵⁷³ Further, Peter Horsepool of Ackroyd & Abbott stated in its oral representations '*...what I'm saying is yeah, contractors, Ackroyd & Abbott, they're guilty of cover pricing...*'.⁵⁵⁷⁴

The OFT's analysis of the evidence and finding

IV.3461. From the evidence presented above, the OFT draws the following conclusions.

IV.3462. Sol and Ackroyd & Abbott each accepted an invitation to tender for this contract. It appears that Ackroyd & Abbott completed the estimating process for the tender. Sol was unable to submit a tender by the return date and/or did not want to win this contract.

IV.3463. The Tender Register entry for this tender shows that Sol submitted the tender figure sum of £1,009,632 to DCC and entered a dash in the '*ESTIMATOR*'

⁵⁵⁶⁵ Interview transcript, OFT Document Reference 11369, page 9.

⁵⁵⁶⁶ Interview transcript, OFT Document Reference 11369, page 9.

⁵⁵⁶⁷ Interview transcript, OFT Document Reference 11369, page 9.

⁵⁵⁶⁸ Interview transcript, OFT Document Reference 11369, page 9.

⁵⁵⁶⁹ Interview transcript, OFT Document Reference 11369, page 10.

⁵⁵⁷⁰ Estimating Board Report, OFT Document Reference 4167, page 43.

⁵⁵⁷¹ Interview transcript, OFT Document Reference 11369, page 10.

⁵⁵⁷² Response from Ackroyd & Abbott, OFT Document Reference 10194, page 4.

⁵⁵⁷³ Written representations of Ackroyd & Abbott, 2 July 2008, paragraph 76.

⁵⁵⁷⁴ Oral representations of Ackroyd & Abbott, 21 July 2008, page 8.

column of the same document. This indicates that Sol did not appoint an estimator for this tender but instead sought a cover price. The *“C’ FROM ACK & ABB’* and the name *‘RICHARD ABBOTT’* in the *‘COMPETITION’* column of the document indicate that Ackroyd & Abbott supplied this cover price.

- IV.3464. JC of Sol, in interview, confirmed that Sol obtained a cover price from Ackroyd & Abbott, as indicated by the entry *“C’ FROM ACK & ABB’* in the *‘COMPETITION’* column of the Tender Register.⁵⁵⁷⁵ He explained that the £1,009,632 was the cover price that Sol obtained from Ackroyd & Abbott.
- IV.3465. Sol’s EBR for this tender has no entry in the *‘MARGIN’* [profits and overheads] column and a *‘C’* is entered in the *‘ESTIMATOR’* column. These indicate that JC reported the cover price from Ackroyd & Abbott to Sol’s Board as its tender submission price for this tender and that it was therefore unnecessary to appoint an estimator to produce any preliminary figures.
- IV.3466. Sol confirmed in leniency that it obtained a cover price from Ackroyd & Abbott in respect of this tender because Sol was unable to price the work, but the client was important to it and it did not wish to be seen to be refusing work.
- IV.3467. The OFT notes that both Parties have now admitted their involvement in cover pricing in respect of this Infringement. The OFT considers that the contemporaneous evidence, Sol’s explanation of the contemporaneous evidence, and both Parties’ admissions confirm that Ackroyd & Abbott engaged in bid rigging with Sol on this tender.
- IV.3468. The tender figure of £1,009,632 submitted by Sol is in keeping with a cover price being sufficiently higher than Ackroyd & Abbott’s bid to remain credible whilst also ensuring that Sol lost the tender.
- IV.3469. The OFT therefore concludes that contact took place between Sol and Ackroyd & Abbott. The OFT also concludes that Ackroyd & Abbott supplied a figure to Sol for a cover bid.
- IV.3470. The OFT is satisfied that the facts set out in paragraphs IV.3451 to IV.3469 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁵⁷⁶ In particular:
- (a) the provision of a figure for a cover bid from Ackroyd & Abbott to Sol was not unilateral⁵⁵⁷⁷, and contravenes the principle against direct or indirect contact between competitors;⁵⁵⁷⁸
 - (b) Sol can be presumed to have taken account of the information received from Ackroyd & Abbott (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁵⁷⁹ and
 - (c) Ackroyd & Abbott can be presumed to have taken account of the information it received from Sol (i.e. that Sol did not intend to submit a

⁵⁵⁷⁵ Interview transcript, OFT Document Reference 11369, page 9.

⁵⁵⁷⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁵⁷⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁵⁷⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁵⁷⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

competitive bid) when determining its conduct in the tendering process.⁵⁵⁸⁰

IV.3471. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Sol and Ackroyd & Abbott in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the extension to Dronfield Gorse Primary School, Gorse Brigg, Dronfield, Woodhouse, date of tender 15 October 2002.

Immunity and leniency assessment

IV.3472. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3473. In respect of this tender, the OFT became aware of Sol's involvement in bid rigging activities by virtue of the information obtained during the visit by the OFT under section 27 to Sol's premises on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Sol in respect of this Infringement.

**Infringement 125: New Office Block and Refurbishment of Warehouse, Doncaster
 – 28 October 2002**
Client: Trackwork Ltd
Parties: Irwins and Holroyd

IV.3474. On 1 October 2002, Trackwork Ltd sought tenders for the construction of a new office block and refurbishment of an existing warehouse, Doncaster.⁵⁵⁸¹ The following six companies were invited to tender: Admiral, Holroyd, Togel Contractors, BDB Design Build Ltd, Irwins and Hallamshire.⁵⁵⁸² The deadline for receipt of tenders was 12:00 noon on 28 October 2002.⁵⁵⁸³

IV.3475. Trackwork Ltd received the following tender returns:⁵⁵⁸⁴

⁵⁵⁸⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁵⁸¹ Information from client, OFT Document Reference 10104.

⁵⁵⁸² Information from client, OFT Document Reference 10104.

⁵⁵⁸³ Information from client, OFT Document Reference 10104.

⁵⁵⁸⁴ Information from client, OFT Document Reference 10104.

Company	Time & Date tender received	Amount of tender	Awarded contract
Admiral	30 October 2002	£840,172	
Holroyd	No Information available	£885,928	
Togel Contractors	Declined to tender 7 October 2002	N/A	
BDB Design Build Ltd	28 October 2002	£839,416	Yes
Irwins	No Information available	No Information available	
Hallamshire	No Information available	No Information available	

IV.3476. Trackwork Ltd stated that they could not find any correspondence in relation to the tenders submitted by Irwins or Hallamshire, although the architect did recall that Hallamshire submitted the highest tender.⁵⁵⁸⁵

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register

IV.3477. During the OFT's search of Irwins' premises a Tender Register was found. The tender register contained the following entries in respect of this tender:⁵⁵⁸⁶

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered	Date tender Due
0902061 26 Sept 689	New Office Block and Refurbishment of Warehouse	Trackwork Ltd Doncaster PCP Architects The Monaghan Partnership	P&S D&B C	1469069	Monday 21 28 October 2002

	Estimator	Notes
Hallamshire ???????????? BDB Sheffield	IPN	Cover Holroyd Andrew Waldren [.....] [C]

Evidence from leniency applicant – Irwins

IV.3478. As part of its leniency application, Irwins' legal representatives provided a general explanation of its participation in cover pricing.⁵⁵⁸⁷ This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

⁵⁵⁸⁵ Information from client, OFT Document Reference 10104.

⁵⁵⁸⁶ Tender register, OFT Document Reference A0339, page 46.

⁵⁵⁸⁷ Leniency application, OFT Document Reference A0714.

IV.3479. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for *'Covers Taken'* and *'Covers Given'*, which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson ('IPN'), Estimating Director at Irwins, into potential cover prices. At number 78 of the *'Covers Taken'* schedule is the following entry:⁵⁵⁸⁸

	Year	Tender Ref	Description	Client	Date	Value	Cover From
78		0902061	New Office Block/Refurb of Warehouse	Trackwork Ltd.	28.10.02	1469069	Holroyd

Individual Contact	Notes
Andrew Waldon	

IV.3480. Irwins also provided to the OFT a schedule listing their competitors' contact details. The name of Holroyd appears on the list and *'Andrew Waldon'* is named as the contact point.⁵⁵⁸⁹

IV.3481. Irwins further provided to the OFT its tender return for this contract.⁵⁵⁹⁰ The tender return states that it was for a new office block and refurbishment of existing warehouse to provide workshops for Trackwork Ltd. The tender return shows that the tender return date was changed from 12:00 noon on Monday 21 October 2002 to 28 October and the figure Irwins submitted was £1,469,069.00.⁵⁵⁹¹

IV.3482. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Irwins

IV.3483. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins' leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.3484. Also during this interview, IPN was shown the *'Tender Register'*⁵⁵⁹² and in particular the reference to the entry for a new office block and refurbishment of warehouse, Doncaster and was asked if he could recall anything about that contract. IPN replied *'Yeah, I thought we might just run short of time because this, this architect we work with quite well and the next phase that was, we*

⁵⁵⁸⁸ Leniency application, OFT Document Reference A0718, page 7.

⁵⁵⁸⁹ Directory, OFT Document Reference A0715, page 4.

⁵⁵⁹⁰ Form of Tender, OFT Document Reference A0775.

⁵⁵⁹¹ Form of Tender, OFT Document Reference A0775.

⁵⁵⁹² Tender register, OFT Document Reference A0339, page 46.

*actually did. We negotiated the second phase of that...'*⁵⁵⁹³ However IPN could not recall any specific contact with Irwins' competitors '*... other than just ringing up for it*'.⁵⁵⁹⁴ IPN confirmed that the presence of a 'C' in the fourth column on the tender register shows that Irwins took a cover in relation to that contract.⁵⁵⁹⁵ IPN further confirmed that Holroyd and more specifically Andrew Waldren gave Irwins a cover price due to the comment written in the last column of the tender register '*Cover Holroyd Andrew Waldren [.....]* [C]'.⁵⁵⁹⁶ IPN stated during interview that [.....] [C] was the telephone number of Andrew Waldren at Holroyd.⁵⁵⁹⁷ IPN also stated '*We actually really, really normally know the architect there and he'd probably know it was a cover, because we finished up doing the next phase, ...*'.⁵⁵⁹⁸

Evidence from other companies – Holroyd

IV.3485. The OFT wrote to Holroyd on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Holroyd had participated in bid rigging on this tender. Holroyd did not respond to this letter and on 8 May 2007 the OFT informed the Managing Director of Holroyd that a failure to respond to the fast track letter denoted a rejection. The Managing Director of Holroyd confirmed that Holroyd had rejected the OFT's Fast Track Offer.⁵⁵⁹⁹

IV.3486. The OFT subsequently wrote to Holroyd's ultimate parent company at the time of this Infringement, Holderness Investments Limited, on 6 November 2007, asking it to comment on Holroyd's response to the OFT's Fast Track Offer, given that the OFT intended to hold Holderness jointly and severally liable for any infringements committed by Holroyd in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Holderness stated '*the company is unable to comment*'.⁵⁶⁰⁰

IV.3487. Following the issue of the Statement, neither Holroyd nor Holderness submitted any written or oral representations.

The OFT's analysis of the evidence and finding

IV.3488. From the evidence presented above, the OFT draws the following conclusions.

IV.3489. Irwins and Holroyd each accepted an invitation to tender for the contract for a new office development and refurbishment of existing warehouse at Doncaster. Irwins was unable to submit a tender by the return date and/or did not want to win this contract.

⁵⁵⁹³ Interview transcript, OFT Document Reference 11255, page 11.

⁵⁵⁹⁴ Interview transcript, OFT Document Reference 11255, page 11.

⁵⁵⁹⁵ Interview transcript, OFT Document Reference 11255, page 11.

⁵⁵⁹⁶ Interview transcript, OFT Document Reference 11255, pages 11 and 12.

⁵⁵⁹⁷ Interview transcript, OFT Document Reference 11255, pages 11 and 12. Note that in interview IPN was asked to confirm that [.....] [C] was Andrew Waldon's phone number, however the document referred to during this part of the interview states [.....] [C] and the OFT is satisfied that IPN was confirming the latter number as being Holroyd's.

⁵⁵⁹⁸ Interview transcript, OFT Document Reference 11255, page 12.

⁵⁵⁹⁹ File note of telephone conversation, OFT Document Reference 10412.

⁵⁶⁰⁰ Response from Holderness, OFT Document Reference 14227.

IV.3490. Irwins' Tender Register records '*Cover Holroyd Andrew Waldren* [.....] [C]', typed in the final column. IPN confirmed that this handwritten note shows that the cover price was received from Holroyd and more specifically Andrew Waldren, an estimator at Holroyd. The OFT notes that '[.....] [C]' was a Holroyd telephone number. Also a 'C' is typed in the type of work/ percentage difference column. IPN confirmed that the C typed in this column shows that Irwins sought a cover price in relation to this contract. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN's admission and explanation of the contemporaneous evidence, that Holroyd supplied Irwins with a cover price for this tender.

IV.3491. The OFT further notes that the tender submitted by Irwins was higher than the tender submitted by Holroyd, the pattern consistent with a cover price having been provided.

IV.3492. The OFT therefore concludes that contact took place between Irwins and Holroyd. The OFT also concludes that Holroyd supplied a figure to Irwins for a cover bid.

IV.3493. The OFT is satisfied that the facts set out in paragraphs IV.3477 to IV.3492 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁶⁰¹ In particular:

- (a) the provision of a figure for a cover bid from Holroyd to Irwins was not unilateral⁵⁶⁰², and contravenes the principle against direct or indirect contact between competitors;⁵⁶⁰³
- (b) Irwins can be presumed to have taken account of the information received from Holroyd (i.e the cover price) when determining its own conduct in the tendering process;⁵⁶⁰⁴ and
- (c) Holroyd can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁶⁰⁵

IV.3494. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and Holroyd, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new office block and refurbishment of existing warehouse in Doncaster, tender deadline 28 October 2002.

Immunity and leniency assessment

IV.3495. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁵⁶⁰¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁶⁰² See paragraph IV.73 of the General comments on cover pricing section.

⁵⁶⁰³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁶⁰⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁶⁰⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3496. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 to Irwins on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this infringement.

Infringement 126: 25 Stoney Street, Nottingham – 4 November 2002
Client: New College Nottingham
Parties: Thomas Fish, Sol and William Woodsend

IV.3497. On 16 September 2002, New College Nottingham sought tenders for the refurbishment of a college building at 25 Stoney Street, Nottingham. The following four companies were invited to tender: Thomas Fish, Sol, William Woodsend and Morrison Construction. The deadline for the receipt of tenders was 12:00 noon on 04 November 2002.⁵⁶⁰⁶

IV.3498. New College Nottingham received the following tender returns:⁵⁶⁰⁷

Company	Date and time tender received	Amount of tender	Awarded contract
Sol	4 November 2002 12:00 noon	£2,242,650	Yes
Thomas Fish	4 November 2002 12:00 noon	£2,390,216	
William Woodsend	4 November 2002 12:00 noon	£2,434,800	
Morrison Construction		(Declined to submit tender 15 October 2002)	

IV.3499. New College Nottingham informed the OFT that *'because of budget issues, a value engineering exercise(s) was conducted with the lowest tenderer'*.⁵⁶⁰⁸ In the contemporaneous *'Examination of Tenders'* supplied by the project manager to New College Nottingham, it is stated that *'On receipt it was clear that all tenders exceeded the construction budget for the project of £1,755,000'* and that *'All three tenderers advised that they could not achieve the stated contract period of 40 weeks identified within tender documents. SOL Construction required 52 weeks to complete, Thomas Fish 56 weeks and William Woodsend 68 weeks'*.⁵⁶⁰⁹ In response to the Statement, Sol provided the OFT with further details of this value engineering exercise and asserted that procedures used and decisions made in order to arrive at its original tender bid had not been influenced by the cover pricing that took place in relation to this tender.⁵⁶¹⁰

⁵⁶⁰⁶ Information from client, OFT Document Reference 8864.

⁵⁶⁰⁷ Information from client, OFT Document Reference 8864.

⁵⁶⁰⁸ Information from client, OFT Document Reference 8864.

⁵⁶⁰⁹ Examination of Tenders, OFT Document Reference 8866, page 14.

⁵⁶¹⁰ Written representations of Sol, 8 July 2008, Annexes 10 to 13.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Sol – Tender Register

IV.3500. During the OFT’s visit to Sol, a handwritten tender register was obtained which contained the following entry in respect of this tender:⁵⁶¹¹

<u>DATE DUE & DATE RECD</u>	<u>JOB DESCRIPTION</u>	<u>CLIENT</u>	<u>ARCHITECT</u>	<u>QUANTITY SURVEYOR</u>
14 OCT '02 1.5 MILL 24 4 NOV	REFURBISHMENT OF 25 STONEY ST.	NEW COLLEGE NOTTINGHAM	CPMG ARCHITECTS	TURNER & TOWNSEND. C.M

<u>TYPE</u>	<u>TENDER SUM</u>	<u>ESTIMATOR</u>	<u>COMPETITION</u>
P&S	? 2,242,650 (9.8% - 700,000)	ADT	MORRISON T FISH 'C' 2,390,216 – 56 TOM Wks WOODSEND 'C' MR ~ SCOTHORNE 2,434,718 60 WKS

<u>RESULTS / COMMENTS</u>
4 NOV'02 START. 5 PHASES 22 AUG'03 COMP.

Evidence from leniency applicant Sol

IV.3501. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.3502. In particular, Sol provided to the OFT a ‘*List of contracts – cover prices given by SOL since January 2000*’. This list contains the following entry:⁵⁶¹²

<u>Date</u>	<u>Project</u>	<u>Value</u>
4 Nov 02	Refurbishment of 25 Stoney Street	£2.242m

<u>Tender Cover price/s given (CG) and some of the other Companies we understand were tendering</u>	<u>Comments</u>
T Fish (CG) [CP-Martin Lane] Woodsend (CG) [CP-Tom Scothern] Morrison	Reason for cover request unknown.

⁵⁶¹¹ Tender register, OFT Document Reference 4169, page 32.

⁵⁶¹² Leniency application, OFT Document Reference 4358, page 3.

IV.3503. Sol also provided a document titled *'Tender cover prices – company and contact person'* which contained the following entries:⁵⁶¹³

Company	Contact Person
T Fish	Martin Lane
Woodsend	Tom Scothern

IV.3504. In its response to the Statement, Sol acknowledged that it had *'... admitted engaging in the practice of cover pricing in the 7 tenders listed in the Statement of Objections.'*⁵⁶¹⁴

IV.3505. Sol's response also asserted that it *'...did not seek to obtain a tendering advantage or disadvantage the client by eliminating competition from this tender process. Sol only provided covers after direct requests from Thomas Fish and William Woodsend.'*⁵⁶¹⁵ The OFT notes that Sol's subjective intentions are not material to the finding of an infringement, as set out in paragraph III.111 of Section III (Legal Background).

Witness evidence from leniency applicant Sol

IV.3506. During interviews conducted in connection with its leniency application, Sol's estimators provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.3507. John Cummings ('JC'), Chief Estimator at Sol, was interviewed in regard to this tender. JC recalled the tender and referring to the Sol tender schedule he confirmed the handwriting on the entry for this tender was his.⁵⁶¹⁶ JC confirmed that the entries of 'C' next to 'T Fish' and 'Woodsend' meant 'cover' and when asked what the figures next to these were, JC said *'That's the figures I've given, you know, to them as our cover prices.'*⁵⁶¹⁷ In explaining how the cover price figures would have been calculated, JC said that, *'I would have taken 2,242,650 [the tender bid submitted by Sol] and added on between 5 and, what is it, yeah, it's about 7%.'*⁵⁶¹⁸ JC confirmed that he gave cover prices in respect of this tender to both Thomas Fish and William Woodsend and made the corresponding entries in the tender schedule.⁵⁶¹⁹

IV.3508. With regard to the entries '56 Wks' and '60 WKS' on Sol's tender schedule, JC confirmed that Sol was *'probably quoting 52 weeks'* and would have given these periods of 56 weeks and 60 weeks to Thomas Fish and William Woodsend because *'obviously you don't want them to win the job on the basis that they can do it quicker than you, even if the price is high.'*⁵⁶²⁰ JC identified Martin Lane as Chief Estimator at Thomas Fish and Tom Scothern ('TS') as being an employee of William Woodsend.⁵⁶²¹ JC also identified the initials 'ADT'

⁵⁶¹³ Cover Prices – Company and Contact Person, OFT Document Reference 4361, page 2.

⁵⁶¹⁴ Written representations of Sol, 27 June 2008, Page 3.

⁵⁶¹⁵ Written representations of Sol, 27 June 2008, Annex 4, Detailed Explanation, paragraph 1.

⁵⁶¹⁶ Interview transcript, OFT Document Reference 11368, page 17.

⁵⁶¹⁷ Interview transcript, OFT Document Reference 11368, pages 17 and 18.

⁵⁶¹⁸ Interview transcript, OFT Document Reference 11368, page 18.

⁵⁶¹⁹ Interview transcript, OFT Document Reference 11368, page 18.

⁵⁶²⁰ Interview transcript, OFT Document Reference 11368, pages 18 and 19.

⁵⁶²¹ Interview transcript, OFT Document Reference 11368, pages 19 and 20.

in the estimator column of the tender register as standing for Andy Turner ('AT'), Senior Estimator at Sol, one of his colleagues.⁵⁶²²

IV.3509. AT was also interviewed in regard to this tender. AT recalled the tender and said '*Yeah, I remember it being quite a difficult, quite a difficult tender*'.⁵⁶²³ AT confirmed the handwriting on the tender schedule as belonging to JC and when asked if he knew the circumstances surrounding cover prices being given in respect of this tender, he said '*I just assume that they, the job was so complicated and not very interesting to them that they, they wanted out*'.⁵⁶²⁴ AT agreed he would have been aware that Thomas Fish and William Woodsend had been given cover prices, commenting that, '*at the tender meeting, yeah, because there'd be a C put against the, the name of the competition*'.⁵⁶²⁵ AT said that it would have been JC who decided on the figures to give as cover prices, since it was JC's responsibility to deal with cover prices.⁵⁶²⁶

Contemporaneous documentary evidence from leniency applicant Thomas Fish – Form of Tender

IV.3510. During the OFT's initial visit to Thomas Fish's premises, a Form of Tender document was obtained in respect of this tender. The document includes the bid of '*£2,390,216*' and is signed by '*M W Lane*'.⁵⁶²⁷

Evidence from leniency applicant Thomas Fish

IV.3511. As part of its leniency application, Thomas Fish provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.650 to IV.688 above and is relied upon by the OFT in relation to this tender.

IV.3512. In its leniency application, Thomas Fish set out a summary of all tenders in respect of which Thomas Fish had exchanged fees with a competitor, marked as '*TENDER BIDDING INVOLVING THE EXCHANGE OF FEES*'. The information in the summary was based on the Thomas Fish accounts database and recollections of current and ex-employees. In respect of this tender the summary does not include any information and this tender was not admitted as part of Thomas Fish's application for leniency, although it was subsequently admitted by witnesses in interview (see next section).⁵⁶²⁸

IV.3513. Following the issue of the Statement, neither Thomas Fish nor Fish Holdings submitted any written or oral representations in respect of this Infringement.

Witness evidence from leniency applicant Thomas Fish

IV.3514. During interviews conducted in connection with its leniency application, Thomas Fish's directors and ex-employees provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.650 to IV.688 above and is applicable to this tender

⁵⁶²² Interview transcript, OFT Document Reference 11368, page 20.

⁵⁶²³ Interview transcript, OFT Document Reference 11367, page 4.

⁵⁶²⁴ Interview transcript, OFT Document Reference 11367, page 5.

⁵⁶²⁵ Interview transcript, OFT Document Reference 11367, page 5.

⁵⁶²⁶ Interview transcript, OFT Document Reference 11367, pages 5 and 6.

⁵⁶²⁷ Form of Tender, OFT Document Reference 0148.

⁵⁶²⁸ Leniency application, OFT Document Reference 3962.

IV.3515. In regard to this tender, a voluntary interview was conducted with Martin Lane ('ML'), a former associate Director at Thomas Fish, who dealt with this tender. ML recalled the contract and said *'I know we took some help on that, definitely'*.⁵⁶²⁹ ML went on to explain, *'I remember I did a visit to site and decided that it was too...too nasty a job...It's refurbishment. At that stage we weren't that good at refurbishment. Not big ones like that'*.⁵⁶³⁰ ML was shown the entry for this tender in the Sol tender register⁵⁶³¹ and was asked if he recalled the name of anyone at Sol with whom he would have spoken. ML recalled the names John Cummins and Andy Turner and said of AT, *'He used to work for us [Thomas Fish]'*.⁵⁶³²

Evidence from non-leniency applicant William Woodsend

IV.3516. The OFT wrote to William Woodsend on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that William Woodsend had participated in bid rigging on this tender. In response to this letter on 24 April 2007, William Woodsend stated *'... we have not been able to discover sufficient evidence to make any admissions at this stage'*.⁵⁶³³

IV.3517. In its response to the Statement, however, William Woodsend confirmed that *'William Woodsend acknowledges liability for this ... Infringement'*.⁵⁶³⁴ Further, it stated in respect of this Infringement *'...I am sure that the only reason we would not have priced the work would have been because we were physically not able to manage to do so'*.⁵⁶³⁵

The OFT's analysis of the evidence and finding

IV.3518. From the evidence presented above, the OFT draws the following conclusions.

IV.3519. Thomas Fish, Sol and William Woodsend each accepted an invitation to tender for this contract.

IV.3520. It appears that Sol completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Sol being the lowest received and the fact that it won the tender.

IV.3521. Thomas Fish and William Woodsend were each unable to submit a tender by the return date and/or did not want to win this contract.

IV.3522. In respect of Thomas Fish, Sol's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Thomas Fish with the letter 'C' next to it and a figure. Sol confirmed that a letter 'C' written in such a manner on its tender register refers to a cover price having been given to Thomas Fish.

⁵⁶²⁹ Interview transcript, OFT Document Reference 13315, page 24.

⁵⁶³⁰ Interview transcript, OFT Document Reference 13315, pages 24 and 25.

⁵⁶³¹ Tender register, OFT Document Reference 4169, page 32.

⁵⁶³² Interview transcript, OFT Document Reference 13315, page 25.

⁵⁶³³ Response from William Woodsend, OFT Document Reference 10903.

⁵⁶³⁴ Written representations of William Woodsend, 27 June 2008, paragraph 20.

⁵⁶³⁵ Written representations of William Woodsend, 27 June 2008, paragraph 21.

- IV.3523. The tender schedule has the figure '2,390,216' written next to the 'C' by the reference to Thomas Fish. This figure exactly matches the amount of £2,390,216 bid for this tender by Thomas Fish.
- IV.3524. JC, Chief Estimator at Sol, who dealt with this tender, said that he recalled the tender and that his handwritten entry in the schedule meant that he gave a cover price of the amount noted to Thomas Fish and that the contact at Thomas Fish was ML. He also confirmed that he would have given Thomas Fish the number of weeks in which the job could be done, to ensure that it did not win the contract.
- IV.3525. This was corroborated in interview by ML of Thomas Fish, who said that because the job was '*too nasty*' Thomas Fish '*took some help...definitely*' on this tender, an expression used to refer to the receiving of a cover price. ML also confirmed he would have dealt with JC at Sol.
- IV.3526. In respect of William Woodsend, Sol's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor William Woodsend with the letter 'C' next to it and a figure. Sol confirmed that a letter 'C' written in such a manner on its tender register refers to a cover price having been given to William Woodsend.
- IV.3527. The tender schedule has the figure '2,434,718' written next to the 'C' by the reference to William Woodsend. This figure almost exactly matches the amount of £2,434,800 bid for this tender by William Woodsend. The OFT notes that it was not unusual for companies to add an amount to a cover price given by a competitor, in order to ensure that they did not win the contract.
- IV.3528. JC, Chief Estimator at Sol, who dealt with this tender, said that he recalled the tender and that his handwritten entry in the schedule meant that he gave a cover price of the amount noted to William Woodsend and that the contact at William Woodsend was TS. He also confirmed that he would have given William Woodsend the number of weeks in which the job could be done, to ensure that it did not win the contract.
- IV.3529. The OFT notes that all three Parties have now admitted liability in respect of this Infringement.
- IV.3530. The OFT therefore concludes that contact took place between Thomas Fish and Sol, and between William Woodsend and Sol. The OFT also concludes that Sol supplied figures to each of Thomas Fish and William Woodsend for cover bids.
- IV.3531. The OFT is satisfied that the facts set out in paragraphs IV.3500 to IV.3530 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵⁶³⁶ In particular:
- (a) the provision of figures for cover bids from Sol to Thomas Fish, and from Sol to William Woodsend, was not unilateral⁵⁶³⁷, and contravenes the principle against direct or indirect contact between competitors;⁵⁶³⁸

⁵⁶³⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁶³⁷ See paragraph IV.73 of the General comments on cover pricing section.

- (b) Thomas Fish and William Woodsend can each be presumed to have taken account of the information received from Sol (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁵⁶³⁹ and
- (c) Sol can be presumed to have taken account of the information it received from Thomas Fish and William Woodsend (i.e. that neither Thomas Fish nor William Woodsend intended to submit competitive bids) when determining its own conduct in the tendering process.⁵⁶⁴⁰

IV.3532. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Sol and Thomas Fish and between Sol and William Woodsend, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the refurbishment of 25 Stoney Street, Nottingham, tender dated 4 November 2002.

Immunity and leniency assessment

IV.3533. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3534. In respect of this tender, the OFT became aware of Thomas Fish's involvement in bid rigging activities by virtue of the Sol tender schedule obtained during the visit under section 28 on 18 January 2006. Thomas Fish will not therefore receive 100 per cent immunity in respect of this tender. However, Thomas Fish will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.3535. In respect of this tender, the OFT became aware of Sol's involvement in bid rigging activities by virtue of the Sol tender schedule obtained during the visit under section 28 on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Sol in respect of this Infringement.

Infringement 127: Refurbishment of 27 Empty Council-Owned Properties, Major Works Phase 1, Citywide Properties, Nottingham – 13 November 2002
Client: Nottingham City Council
Parties: Bodill and Thomas Long

IV.3536. On 17 October 2002, Nottingham City Council ('Nottingham CC') sought tenders for the refurbishment of 27 empty council-owned properties, Major Works Phase 1, Citywide Properties, Nottingham. The return date for the tender was 12:00 noon on 13 November 2002 and five companies were invited to

⁵⁶³⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁶³⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁶⁴⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

tender: Bodill, Hallamshire Construction, Mansell, Nottingham City Building Works and Thomas Long.⁵⁶⁴¹

IV.3537. Nottingham CC received the following tender returns by 13 November 2002:⁵⁶⁴²

Company	Date & Time tender received	Amount of tender	Awarded the tender
Bodill	No information	£819,019.85	
Hallamshire Construction	No information	£811,749.40	
Mansell	No information	£836,214.50	
Nottingham City Building Works	No information but withdrew tender on 14 November 2002	£677,702.80	
Thomas Long	No information	£791,462.62	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.3538. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except for the entry for Bodill.⁵⁶⁴³

- '
1. *Bodill*
 - *2. *T. LONG MARK PHILLIPS
WILL RING US WED.*
 3. *MANSELL.*
 4. *HALLAMSHIRE. [...] [C] '*

IV.3539. The tender sheet for this tender also contains a ringed letter 'C' against the word '*ESTIMATOR*', and at the foot of the sheet it states that Bodill's submitted price was £819,019.85.⁵⁶⁴⁴

IV.3540. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2002 which contains an entry for this tender on 13 November which reads '*12.00 REPAIRS/ALTS. ALL NOTTM CITY (C) (NOTTM)*'.⁵⁶⁴⁵ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, '*It means we're looking for some help, a cover, a cover price*'.⁵⁶⁴⁶

⁵⁶⁴¹ Information from client, OFT Document Reference 9132.

⁵⁶⁴² Information from client, OFT Document Reference 9132.

⁵⁶⁴³ Tender sheet, OFT Document Reference 0645.

⁵⁶⁴⁴ Tender sheet, OFT Document Reference 0645.

⁵⁶⁴⁵ 2002 Diary, OFT Document Reference 0107, page 22, obtained during visit to Bodill's premises under section 27 on 19 November 2004.

⁵⁶⁴⁶ Interview transcript, OFT Document Reference 6337, page 4.

Evidence from leniency applicant Bodill

IV.3541. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.3542. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁵⁶⁴⁷ In respect of this tender, Bodill confirmed that it received a cover price from Thomas Long⁵⁶⁴⁸ and that it submitted a *'token tender'*.⁵⁶⁴⁹

IV.3543. [...] [C]

Witness evidence from leniency applicant Bodill

IV.3544. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Thomas Long

IV.3545. The OFT wrote to Thomas Long on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Thomas Long had participated in bid rigging on this tender. In response to this letter, Thomas Long admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁵⁶⁵⁰

IV.3546. The name, *'Mark Phillips'*, written next to *'T.LONG'*, set out in Bodill's tender sheet is the name of an estimator employed by Thomas Long at the time of the tender, providing further indication that Thomas Long contacted Bodill in respect of this tender. This is confirmed by information obtained from W R Bloodworth, a list of contacts for cover prices, which lists Mark Phillips at Thomas Long.⁵⁶⁵¹

IV.3547. In its response to the Statement, Thomas Long stated *'Thomas Long has confirmed that it gave a cover price in relation to this tender in response to a request from Bodill'*⁵⁶⁵² in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.3548. From the evidence presented above, the OFT draws the following conclusions.

⁵⁶⁴⁷ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁵⁶⁴⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 5.

⁵⁶⁴⁹ Tender Analysis, OFT Document Reference 0849, page 3.

⁵⁶⁵⁰ Response from Thomas Long, OFT Document Reference 10885, page 4.

⁵⁶⁵¹ Contacts for Cover Prices, OFT Document Reference 3915, page 1.

⁵⁶⁵² Written representations of Thomas Long, 26 June 2008, paragraph 3.15.

- IV.3549. Bodill and Thomas Long each accepted an invitation to tender for this contract.
- IV.3550. Thomas Long completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Thomas Long being the lowest received, after the withdrawal of Nottingham City Building Works, and the fact that it won the contract.
- IV.3551. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.3552. In regard to Thomas Long, as well as the ringed letter 'C' against the word '*ESTIMATOR*', Bodill's tender sheet records '*T. LONG MARK PHILLIPS WILL RING US WED.*'. Bodill has confirmed that this shows that it received a cover price from Thomas Long. Bodill recorded on the tender sheet the figure £819,019.85 as the tender figure and this was the figure that Bodill submitted. Mark Phillips is an estimator employed by Thomas Long, providing further indication that Thomas Long contacted Bodill in respect of this tender. This is corroborated by information obtained from W R Bloodworth, a list of contacts for cover prices, which names Mark Phillips at Thomas Long.
- IV.3553. The OFT notes in addition that the tender submitted by Bodill was higher than the tender submitted by Thomas Long, a pattern consistent with a cover price having been provided. Both companies have admitted to cover pricing in respect of this tender.
- IV.3554. The OFT therefore concludes that contact took place between Thomas Long and Bodill. The OFT also concludes that Thomas Long supplied a figure to Bodill for a cover bid.
- IV.3555. The OFT is satisfied that the facts set out in paragraphs IV.3538 to IV.3554 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁶⁵³ In particular:
- (a) the provision of a figure for a cover bid from Thomas Long to Bodill was not unilateral⁵⁶⁵⁴, and contravenes the principle against direct or indirect contact between competitors;⁵⁶⁵⁵
 - (b) Bodill can be presumed to have taken account of the information received from Thomas Long (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁶⁵⁶ and
 - (c) Thomas Long can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁶⁵⁷
- IV.3556. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place

⁵⁶⁵³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁶⁵⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁶⁵⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁶⁵⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁶⁵⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Bodill and Thomas Long, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment of 27 empty council-owned properties, Major Works Phase 1, Citywide Properties, Nottingham, tender deadline 13 November 2002.

Immunity and leniency assessment

IV.3557. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3558. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, Bodill will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.3559. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.⁵⁶⁵⁸ The OFT first became aware of this tender as a result of the entry in a document obtained during a section 27 visit to Bodill on 19 November 2004⁵⁶⁵⁹, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made. Bodill will therefore only receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 128: **Sports Hall Extension at Robert Atkinson Youth & Community Centre, Thornaby – 22 November 2002**
Client: **Stockton-on-Tees Borough Council**
Parties: **Mansell and F Parkinson**

IV.3560. On 23 October 2002, Stockton-on-Tees Borough Council sought tenders for new build sports hall extension at Robert Atkinson Youth & Community Centre, Thornaby.⁵⁶⁶⁰ The following six companies were invited to tender: PBS Construction (NE) Ltd, DH Potter & Co Ltd, F Parkinson, McCarrick Construction Ltd, Mansell and Reliance Building Ltd. The date and time of tender return was 22 November 2002 at 12:00 noon.⁵⁶⁶¹

IV.3561. Stockton-on-Tees Borough Council received the following tender returns:⁵⁶⁶²

⁵⁶⁵⁸ Written representations of Bodill, 26 June 2008, paragraph 3.5.

⁵⁶⁵⁹ 2002 Diary, OFT Document Reference 0107, as discussed in paragraph IV.3540.

⁵⁶⁶⁰ Information from client, OFT Document Reference 9620.

⁵⁶⁶¹ Information from client, OFT Document Reference 9620.

⁵⁶⁶² Information from client, OFT Document Reference 9620.

Company	Date tender received	Amount of tender	Awarded contract
Mansell	22 November 2002	£481,622	
PBS Construction (NE) Ltd	22 November 2002	£515,852	
F Parkinson	22 November 2002	£456,982	YES
DH Potter & Co Ltd	22 November 2002	£491,219	
McCarrick Construction Ltd	Not returned		
Reliance Building Ltd	Not returned		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender log

IV.3562. As part of its leniency application, Mansell’s legal representatives provided the North East Region (‘NER’) tender log. Page six of the tender log contained the following entry:⁵⁶⁶³

Marketing System Nr	North East Ref. Nr	Date Received	Cat	Type	Approx Value
74788	E/NE/02/75	31-Oct-02	PUB	B.Q	£ 550,000.00

Project Title:	Submission Date
THORNABY: Sports Hall Extension At Robert Atkinson Youth & Community Centre	22/11 noon

C

Evidence from leniency applicant Mansell

IV.3563. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁵⁶⁶⁴ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.3564. Mansell’s legal representatives provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the NER, which includes this tender. In respect of this tender the table shows that the project bid value was ‘£481,622.00’ and that Mansell received a cover price from F Parkinson and that this cover price was taken due to ‘*Estimating capacity issue*’ at Mansell.⁵⁶⁶⁵

IV.3565. Mansell’s legal representatives also provided to the OFT a schedule of covers for the NER, which includes this tender. In respect of this tender the table shows that Mansell received a cover price from F Parkinson and includes the comment ‘*Omer Asir recalls that F Parkinson provided the cover price*’.⁵⁶⁶⁶

IV.3566. In its response to the Statement, Mansell did not make any oral or written representations specifically in respect of this Infringement.

⁵⁶⁶³ Tender register, OFT Document Reference B0926, page 6.

⁵⁶⁶⁴ Leniency application, OFT Document Reference B0734.

⁵⁶⁶⁵ Leniency application, OFT Document Reference B0767, page 2.

⁵⁶⁶⁶ Leniency application, OFT Document Reference B3609, page 2.

Witness evidence from leniency applicant Mansell

IV.3567. During interviews conducted in connection with its leniency application, a Mansell employee from the NER provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.478 to IV.480 above and is relied upon by the OFT in relation to this tender.

IV.3568. During an interview with the OFT on 1 May 2007, Omer Asir ('OA'), a senior estimator in the NER of Mansell⁵⁶⁶⁷, advised how it would be recorded when Mansell had taken a cover as detailed in paragraphs IV.479 to IV.480 above. In relation to this tender OA, when asked the significance of the 'C' in the tender log stated '*which identifies ... that particular project we took assistance on*' and confirmed that the tender figure submitted was £481,622.⁵⁶⁶⁸ In respect of his recollection that the cover was taken from F Parkinson, OA stated '*that's just a recollection*' and '*one of the reasons why I was saying F Parkinson is because ... I know they are on that particular authority's tender selection and the recollection that I had at the time [when compiling the leniency material] was that I was, I was fairly certain it was them I'd spoke to ...*'.⁵⁶⁶⁹

Evidence from other companies – F Parkinson

IV.3569. The OFT wrote to F Parkinson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that F Parkinson had participated in bid rigging on this tender. In response to this letter F Parkinson admitted '*We engaged in bid rigging activities on this tender with Mansells*'.⁵⁶⁷⁰

IV.3570. The OFT subsequently wrote to F Parkinson's ultimate parent company at the time of this Infringement, Mowbray, on 5 November 2007, asking it to comment on F Parkinson's response to the OFT's Fast Track Offer, given that the OFT intended to hold Mowbray jointly and severally liable for any infringements committed by F Parkinson in respect of which the OFT ultimately decided to impose financial penalties. During a telephone call in response to this letter, Colin Oakley, a Director of Mowbray stated that he was aware of the original Fast Track letter and F Parkinson's response and fully supported the position of its subsidiary, F Parkinson.⁵⁶⁷¹

IV.3571. In their response to the Statement, F Parkinson and Mowbray stated '[F] Parkinson has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement'.⁵⁶⁷²

The OFT's analysis of the evidence and finding

IV.3572. From the evidence presented above, the OFT draws the following conclusions.

⁵⁶⁶⁷ Omer Asir was a senior estimator in the NER from 2000 to 2006 and then became managing estimator.

⁵⁶⁶⁸ Interview transcript, OFT Document Reference 11509, page 17.

⁵⁶⁶⁹ Interview transcript, OFT Document Reference 11509, pages 17 and 18.

⁵⁶⁷⁰ Response from F Parkinson, OFT Document Reference 10270, page 2.

⁵⁶⁷¹ Response from Mowbray, OFT Document Reference 13952.

⁵⁶⁷² Written representations of F Parkinson and Mowbray, 25 June 2008, paragraph 4.

- IV.3573. Mansell and F Parkinson each accepted an invitation to tender for this contract.
- IV.3574. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that F Parkinson completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by F Parkinson being the lowest received and the fact that it won the contract.
- IV.3575. Mansell's tender log records 'C', next to the entry for this tender. Mansell confirmed that this shows that it took a cover price and in interview the Mansell estimator confirmed it was his recollection that he spoke to F Parkinson to obtain the cover price.
- IV.3576. In addition, F Parkinson has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.
- IV.3577. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that F Parkinson admitted that the party with whom it engaged in bid rigging was Mansell, without being shown the OFT's evidence that Mansell was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.3578. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by F Parkinson, the pattern consistent with a cover price having been provided.
- IV.3579. In addition the OFT notes that F Parkinson's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from F Parkinson.
- IV.3580. The OFT therefore concludes that contact took place between Mansell and F Parkinson. The OFT also concludes that F Parkinson supplied a figure to Mansell for a cover bid.
- IV.3581. The OFT is satisfied that the facts set out in paragraphs IV.3562 to IV.3580 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁶⁷³ In particular:
- (a) the provision of a figure for a cover bid from F Parkinson to Mansell was not unilateral⁵⁶⁷⁴, and contravenes the principle against direct or indirect contact between competitors;⁵⁶⁷⁵
 - (b) Mansell can be presumed to have taken account of the information received from F Parkinson (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁶⁷⁶ and
 - (c) F Parkinson can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a

⁵⁶⁷³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁶⁷⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁶⁷⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁶⁷⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

competitive bid) when determining its conduct in the tendering process.⁵⁶⁷⁷

IV.3582. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and F Parkinson in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for sports hall extension Robert Atkinson Centre, Thornaby, tender deadline 22 November 2002.

Immunity and leniency assessment

IV.3583. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3584. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 129: **Re-Building of Eight Newland Properties, Bilborough, Nottingham – 25 November 2002**
Client: **Nottingham City Council**
Parties: **Bodill and William Woodsend**

IV.3585. On 11 September 2002, Haley Somerset Consulting Limited, on behalf of Nottingham City Council, sought tenders for the re-building of eight Newland Properties, Bilborough, Nottingham. The return date for the tender was 25 November 2002 and six companies were invited to tender: Bodill, William Woodsend, Thomas Long, Lovell, Herbert Baggaley and Nottingham City Building Work.⁵⁶⁷⁸

IV.3586. Haley Somerset Consulting Limited received the following tender returns prior to 12:00 noon on 25 November 2002:⁵⁶⁷⁹

Company	Date tender received	Amount of tender	Awarded the tender
Bodill	Prior to 12:00 noon on 25 November 2002	£595,295	
William Woodsend	Prior to 12:00 noon on 25 November 2002	£622,300	
Thomas Long	Prior to 12:00 noon on 25 November 2002	£552,957	Yes
Lovell	Prior to 12:00 noon on 25 November 2002	£587,700	
Herbert Baggaley	Prior to 12:00 noon on 25 November 2002	£577,263	
Nottingham City Building Work	Declined to tender		

⁵⁶⁷⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁶⁷⁸ Information from client, OFT Document Reference 13766.

⁵⁶⁷⁹ Information from client, OFT Document Reference 13766.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.3587. In Bodill's original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill:⁵⁶⁸⁰

- '
1. *Bodill*
 - £622260.00p. 2. *WOODSEND © FROM
US RING TOM MON. AM*
 3. *BAGGALEY*
 4. *T. LONG*
 5. *LOVELL'*

IV.3588. The tender sheet states that Bodill's submitted figure was £595,295.⁵⁶⁸¹

IV.3589. Andrew Bodill ('AB'), an estimator at Bodill, priced this tender and has indicated that the handwritten annotation '*£622260.00p.*', under the section headed '*Tenderers*' were made by him.⁵⁶⁸² AB also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.3590. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*WOODSEND © FROM US RING TOM MON. AM*', under the section headed '*Tenderers*' were made by him.⁵⁶⁸³ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.3591. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.3592. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁵⁶⁸⁴ In respect of this tender, Bodill confirmed that it gave a cover price to William Woodsend.⁵⁶⁸⁵

IV.3593. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

⁵⁶⁸⁰ Tender sheet, OFT Document Reference 0648.

⁵⁶⁸¹ Tender sheet, OFT Document Reference 0648.

⁵⁶⁸² Contracts document, OFT Document Reference 14312.

⁵⁶⁸³ Contracts document, OFT Document Reference 14311.

⁵⁶⁸⁴ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁵⁶⁸⁵ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 5.

Witness evidence from leniency applicant Bodill

IV.3594. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – William Woodsend

IV.3595. The OFT wrote to William Woodsend on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that William Woodsend had participated in bid rigging on this tender. In response to this letter on 27 April 2007, William Woodsend stated, '*we have not been able to discover sufficient evidence to make any admissions at this stage*'.⁵⁶⁸⁶

IV.3596. In its response to the Statement, however, William Woodsend stated '*Based on the evidence set out in the SO William Woodsend acknowledges [sic] liability for this Alleged Infringement*'.⁵⁶⁸⁷

The OFT's analysis of the evidence and finding

IV.3597. From the evidence presented above, the OFT draws the following conclusions.

IV.3598. Bodill and William Woodsend each accepted an invitation to tender for this contract.

IV.3599. Bodill completed the estimating process for the tender for this contract. It appears that Bodill wanted to win the tender for this contract and that it submitted a bid with the hope of winning the work.

IV.3600. William Woodsend was unable to submit a tender by the return date and/or did not want to win this tender.

IV.3601. In regard to William Woodsend, Bodill's tender sheet records '*£622260.00p WOODSEND® FROM US*'. Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £622,260, a figure that was only £40 different from the tender that William Woodsend submitted for the work.

IV.3602. Bodill's tender sheet also records '*RING TOM MON. AM*'. The OFT considers that this indicates more specifically that Bodill was to phone William Woodsend on the day for submitting the tender in order to provide William Woodsend with its cover price. This is consistent with the pattern of exchange of cover prices just prior to the deadline for submission of tenders.

IV.3603. Bodill's tender sheet records the name of a William Woodsend employee, '*Tom*', providing further evidence that contact was made between the two parties. This is corroborated by information obtained from W R Bloodworth, a

⁵⁶⁸⁶ Response from William Woodsend, OFT Document 10903.

⁵⁶⁸⁷ Written representations of William Woodsend, 27 June 2008, paragraph 24.

list of contacts for cover prices, which names 'Tom Scothern'⁵⁶⁸⁸ at William Woodsend. The OFT considers it likely that this refers to the same William Woodsend employee.

IV.3604. The OFT notes in addition that the tender submitted by William Woodsend was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.3605. Both Parties have now admitted liability in respect of this Infringement

IV.3606. The OFT therefore concludes that contact took place between William Woodsend and Bodill. The OFT also concludes that Bodill supplied a figure to William Woodsend for a cover bid.

IV.3607. The OFT is satisfied that the facts set out in paragraphs IV.3587 to IV.3606 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁶⁸⁹ In particular:

- (a) the provision of a figure for a cover bid from Bodill to William Woodsend was not unilateral⁵⁶⁹⁰, and contravenes the principle against direct or indirect contact between competitors;⁵⁶⁹¹
- (b) William Woodsend can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁶⁹² and
- (c) Bodill can be presumed to have taken account of the information it received from William Woodsend (i.e. that William Woodsend did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁶⁹³

IV.3608. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between William Woodsend and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the re-building of eight Newland Properties, Bilborough, Nottingham, tender deadline 25 November 2002.

Immunity and leniency assessment

IV.3609. As explained in paragraphs II.1475 to II.1476, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3610. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill

⁵⁶⁸⁸ Contacts For Cover Prices, OFT Document Reference 3915, page 1.

⁵⁶⁸⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁶⁹⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁶⁹¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁶⁹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁶⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 130: Not included in the Decision

Alleged Infringement 131: Not included in the Decision

Alleged Infringement 132: Not included in the Decision

Infringement 133: Hill Crescent Changing Block – 19 December 2002
Client: Ashfield District Council
Parties: ARG, Greenwood and K J Bryan

IV.3611. On 3 December 2002, Ashfield District Council sought tenders for Proposed Alterations at Hill Crescent changing block.⁵⁶⁹⁴ The following seven companies were invited to tender: Construction Services at Ashfield District Council, ARG, P J Lilley, Greenwood, K J Bryan, Eastwood Construction and D J Atkinson Ltd.⁵⁶⁹⁵ The tender deadline was 12:00 noon on 19 December 2002.⁵⁶⁹⁶

IV.3612. Ashfield District Council received the following tender returns:⁵⁶⁹⁷

Company	Time & Date Tender Received	Amount of tender	Awarded contract
Construction Services at Ashfield District Council	11:10 am on 19 December 2002	£26,392.00	Yes
ARG	10:50 am on 19 December 2002	£37,643.00	
P J Lilley	10:29 am on 19 December 2002	£35,289.00	
Greenwood	10:57 am on 19 December 2002	£35,189.00	
K J Bryan	11:14 am on 19 December 2002	£33,480.00	
Eastwood Construction	No tender received	N/A	
D J Atkinson Ltd	10:37 am on 19 December 2002	£38,144.33	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from other companies – Greenwood – Post-it note, Invitation to Tender, and Form of Tender

IV.3613. During the OFT's search of Greenwood's premises a number of tender documents with post-it notes attached were found. The post-it note attached to the tender documents for Hill Crescent changing block contained the following handwritten note:⁵⁶⁹⁸

⁵⁶⁹⁴ Information from client, OFT Document Reference 7073.

⁵⁶⁹⁵ Information from client, OFT Document Reference 7073.

⁵⁶⁹⁶ Information from client, OFT Document Reference 7073.

⁵⁶⁹⁷ Information from client, OFT Document Reference 7073.

⁵⁶⁹⁸ Post-it note, OFT Document Reference 2528.

JOHN Our
BRYAN £35189-00

K.J. BRYAN.

[.....] [C]

Cover to DARREN A.R.G
[.....] [C] £37643.00'

IV.3614. An invitation to tender for this contract was also found at Greenwood.⁵⁶⁹⁹ Handwritten on the front page of the invitation to tender is:

'£35189'

IV.3615. A completed Form of Tender for this contract was also found at Greenwood. The Form of Tender shows that Greenwood tendered £35,189.00 for this contract.⁵⁷⁰⁰ The Form of Tender was signed by Chris Stendall ('CS'), ex-estimator for Greenwood, on 18 December 2002.⁵⁷⁰¹

Evidence from leniency applicant ARG

IV.3616. In its response to the Statement, ARG confirmed that it had '*...admitted cover pricing in relation to this tender although they are unable to recollect any details. They [ARG] can only assume that they used a cover price due to the estimator getting part way through the tendering process and not having the time to complete it*'.⁵⁷⁰²

Witness evidence from leniency applicant ARG

IV.3617. During interviews conducted in connection with its leniency application, ARG's past and present employees provided general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.174 to IV.181 above and is relied upon by the OFT in relation to this tender.

IV.3618. During an interview conducted on 16 April 2007 in connection with its leniency application Darren Adkin ('DA'), ex-estimator and surveyor at ARG, was shown the post-it note found at Greenwood. The OFT pointed out the reference to '*Darren ARG [...] [C]*'. DA confirmed that [...] [C] was ARG's telephone number and that he was the only Darren who worked at ARG at that time.⁵⁷⁰³ The OFT next pointed out the reference to the figure 37643 to which DA replied, '*Well to the best of my knowledge, that'll be a cover then*'.⁵⁷⁰⁴ DA stated '*If I had to pick one I'd say yea that's a cover from Greenwoods ... I know Chris well ... Chris Stendle ... so I'd speak to them daily anyway ... it's such a small figure that ... probably did take a cover on that one*'.⁵⁷⁰⁵

⁵⁶⁹⁹ Invitation to tender, OFT Document Reference 2527.

⁵⁷⁰⁰ Form of Tender, OFT Document Reference 2529, page 1.

⁵⁷⁰¹ Form of Tender, OFT Document Reference 2529, page 2.

⁵⁷⁰² Written representations of ARG, 25 June 2008, paragraph 2.4.

⁵⁷⁰³ Interview transcript, OFT Reference 13125, page 10.

⁵⁷⁰⁴ Interview transcript, OFT Reference 13125, page 10.

⁵⁷⁰⁵ Interview transcript, OFT Reference 13125, page 11.

Witness evidence from other companies – Greenwood

IV.3619. During an interview conducted on 12 October 2006, CS commented in general terms on Greenwood's participation in bid rigging activities. He asked the OFT *'Why don't you ask me if we've taken a cover or given a cover. ... of course I have done that and I believe that probably every other contractor in the country has probably done that on certain occasions'*.⁵⁷⁰⁶ CS explained, *'... the only reason for doing that is to make sure you're tender... a figure goes into the client and that you're kept in the loop for next time'*.⁵⁷⁰⁷ CS confirmed that the exchange of cover prices was always carried out by telephone.⁵⁷⁰⁸ At Greenwood the exchange of cover prices usually occurred *'towards the end, I suppose when I, you know they realize you couldn't do something or they wanted help'*.⁵⁷⁰⁹ CS stated that if he received a cover price he would record it *'... in a notebook and then, it would go onto the tender sheet'*.⁵⁷¹⁰ During interview CS confirmed that when referring to a 'notebook' he actually was referring to a post-it note.⁵⁷¹¹

IV.3620. CS was interviewed for a second time on 28 February 2007 and was shown the tender documents and post-it note found during the OFT's search of Greenwood's premises in relation to Hill Crescent changing block. CS confirmed that the handwritten notes on the post-it note were written by himself and that the note shows *'that KJ Bryan gave us a cover' and 'a cover was also given to ARG but by whom [at Greenwood] I don't know'*.⁵⁷¹² CS stated that *'... so what happened possibly there was that we got a cover from Bryan then at the end of the day ARG rang us and asked us for a cover. Which we obviously obliged in that instance'*.⁵⁷¹³

Evidence from other companies – Greenwood/Crown Point

IV.3621. The OFT wrote to Greenwood on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greenwood had participated in bid rigging on this tender. A response was received from Begbies Traynor informing the OFT that *'... we have now ceased to act as administrators pursuant to the provisions of paragraph 84 of schedule B1 of the Insolvency Act 1986 which facilitates the ending of an administration order by dissolution of the company. ... As we have ceased to act as administrators of the company we are not in a position to enter into any agreement on its behalf'*.⁵⁷¹⁴

IV.3622. The OFT subsequently wrote to Greenwood's ultimate parent company at the time of this Infringement, Crown Point, on 5 November 2007, asking it to comment on the letter sent to Greenwood on 22 March 2007, as the OFT intended to hold Crown Point jointly and severally liable for any infringements committed by Greenwood in respect of which the OFT ultimately decided to

⁵⁷⁰⁶ Interview transcript, OFT Document Reference 6362, page 18.

⁵⁷⁰⁷ Interview transcript, OFT Document Reference 6362, page 18.

⁵⁷⁰⁸ Interview transcript, OFT Document Reference 6362, pages 19 and 20.

⁵⁷⁰⁹ Interview transcript, OFT Document Reference 6362, page 21.

⁵⁷¹⁰ Interview transcript, OFT Document Reference 6362, page 21.

⁵⁷¹¹ Interview transcript, OFT Document Reference 6362, page 22.

⁵⁷¹² Interview transcript, OFT Document Reference 13423, pages 21 and 22.

⁵⁷¹³ Interview transcript, OFT Document Reference 13423, page 22.

⁵⁷¹⁴ Response from Begbies Traynor, OFT Document Reference 10358.

impose financial penalties. In response to this letter, Crown Point stated '*... the offer [the OFT's Fast Track Offer] is not accepted by Crown Point Maintenance Group Limited*'.⁵⁷¹⁵ The company has subsequently indicated that it was '*...without any documentary evidence such that it was simply unable to meet the conditions set out in the fast track offer letter*'.⁵⁷¹⁶

IV.3623. In its response to the Statement, Crown Point attached a witness statement from Andrew Goodwin ('AG'), Director of Crown Point and former Director of Greenwood. Crown Point stated in its response that '*it is clear from Mr Goodwin's evidence that he does not seek to oppose or deny Greenwood's involvement and admits the same*'.⁵⁷¹⁷ In his witness statement, AG stated '*having now seen the evidence I cannot deny that the incident took place...*'.⁵⁷¹⁸

IV.3624. Crown Point also stated in its written representations on the Statement that '*the OFT provisionally found that K J Bryan... was the 'instigator' of the process inasmuch that K J Bryan provided a figure for a cover bid to Greenwood...*'.⁵⁷¹⁹ The OFT emphasises that it has not made any finding regarding which party instigated the cover pricing arrangement in this Infringement – indeed, as noted in section IV.C above, it was far more common for the party requesting the cover price (in this Infringement, Greenwood) to initiate the arrangement. It is not necessary for the OFT to conclude on this aspect for a finding of an infringement to be made.

Evidence from other companies – K J Bryan

IV.3625. The OFT wrote to K J Bryan on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that K J Bryan had participated in bid rigging on this tender. In response to this letter, K J Bryan's legal representatives stated '*In view of the lack of physical records to refresh memories and the significant period of time that has passed since the events in question our client's officers and members of staff have difficulty in trying to recollect the circumstances concerning the contracts in question...our client does not feel it appropriate to accept the offer...*'.⁵⁷²⁰ The OFT notes that K J Bryan's officers and staff were able to recollect, and respond in respect of, two of the five contracts covered by the OFT's Fast Track Offer.

IV.3626. In its response to the Statement, K J Bryan neither expressly admitted, nor contested its involvement in this Infringement, stating '*There was only a very small and limited number of infringements*'⁵⁷²¹ and '*KJB accepts that the Cover Scheme is illegal... KJB in mitigation submits that it when historically using the Scheme was not aware that it was illegal... and on finding out the scheme was illegal took immediate action to ensure it was not and has not been involved in*

⁵⁷¹⁵ Response from Crown Point, OFT Document Reference 14184.

⁵⁷¹⁶ Written representations of Crown Point, 27 June 2008, paragraph 4.4

⁵⁷¹⁷ Written representations of Crown Point, 27 June 2008, paragraph 6.38.

⁵⁷¹⁸ Witness statement of Andrew Goodwin, 26 June 2008, paragraph 21.

⁵⁷¹⁹ Written representations of Crown Point, 27 June 2008, paragraph 3.6.

⁵⁷²⁰ Response from K J Bryan, OFT Document Reference 10462, page 2.

⁵⁷²¹ Written representations of K J Bryan, 24 June 2008, page 4.

*use of the same again.*⁵⁷²² The response further stated that *'the evidence is that Greenwoods requested a cover from KJB – KJB were not the instigator.'*⁵⁷²³

The OFT's analysis of the evidence and finding

IV.3627. From the evidence presented above, the OFT draws the following conclusions.

IV.3628. ARG, Greenwood and K J Bryan each accepted an invitation to tender for proposed alterations at Hill Crescent changing block.

IV.3629. All three companies submitted a tender. Greenwood and ARG were unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.3630. A post-it note found at Greenwood records *'JOHN BRYAN our £35189.00 K.J BRYAN [...] [C] Cover to DARREN A.R.G [...] [C], £37643.00'*. CS confirmed that he made the handwritten note and that the note records that Greenwood received a cover figure of £35189.00 from [John Bryan at] K J Bryan, and that CS subsequently gave [DA from] ARG a cover price of £37643.00. The telephone number *'[...] [C]'* was confirmed by ARG as being its telephone number, while the telephone number *'[...] [C]'* belongs to K J Bryan.⁵⁷²⁴

IV.3631. In addition to this, DA also confirmed that the documentary evidence shows that ARG received a cover price from CS of Greenwood. Both figures are consistent with the tender figures submitted by Greenwood and ARG for the contract.

IV.3632. The OFT considers in the light of the contemporaneous evidence from Greenwood and both CS and DA's admissions and explanations of that contemporaneous evidence, that K J Bryan gave a cover price to Greenwood, and Greenwood in turn gave a cover figure to ARG, for this tender.

IV.3633. ARG has admitted to bid rigging in relation to this tender. Although Greenwood and Crown Point did not initially admit to bid rigging in relation to this tender, once Crown Point had seen the evidence it confirmed that its witness, Director of Crown Point and former Director of Greenwood, admitted Greenwood's involvement.

IV.3634. The OFT notes that whilst K J Bryan has not admitted engaging in cover pricing in relation to this specific Infringement, it has accepted that it engaged in cover pricing more generally, and did not put forward any evidence that calls into question the OFT's analysis of the evidence in relation to this Infringement.

IV.3635. The OFT further notes that the tender submitted by Greenwood was higher than the tender submitted by K J Bryan. In addition, the tender submitted by ARG was higher than both tenders submitted by Greenwood and K J Bryan, the pattern consistent with cover prices having been provided.

IV.3636. The OFT therefore concludes that contact took place between K J Bryan and Greenwood and between Greenwood and ARG. The OFT also concludes that K

⁵⁷²² Written representations of K J Bryan, 24 June 2008, page 5.

⁵⁷²³ Written representations of K J Bryan's, 24 June 2008, page 4.

⁵⁷²⁴ FAME report, OFT Document Reference 12165.

J Bryan supplied a figure to Greenwood for a cover bid, and that Greenwood subsequently went on to supply ARG with a figure for a cover bid.

IV.3637. The OFT is satisfied that the facts set out in paragraphs IV.3613 to IV.3636 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁷²⁵ In particular:

- (a) the provision of figures for cover bids from K J Bryan to Greenwood and from Greenwood to ARG was not unilateral⁵⁷²⁶, and contravenes the principle against direct or indirect contact between competitors;⁵⁷²⁷
- (b) Greenwood can be presumed to have taken account of the information received from K J Bryan (i.e. the cover price) when determining its own conduct in the tendering process. Also ARG can be presumed to have taken account of the information received from Greenwood (i.e. the cover price) when determining its own conduct in the tendering process,⁵⁷²⁸
- (c) K J Bryan can be presumed to have taken account of the information it received from Greenwood (i.e. that Greenwood did not intend to submit a competitive bid) when determining its conduct in the tendering process. Also Greenwood can be presumed to have taken account of the information it received from ARG (i.e. that ARG did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁷²⁹

IV.3638. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between K J Bryan and Greenwood and between Greenwood and ARG, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for proposed alterations, Hill Crescent changing block, tender deadline 19 December 2002.

Immunity and leniency assessment

IV.3639. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3640. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Greenwood under section 28 on 15 June 2005. ARG will not therefore receive 100 per cent immunity in respect of this tender. However, ARG will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁵⁷²⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁷²⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁷²⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁷²⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁷²⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 134: Classroom Extension and Interior Alterations, Crich
Fritchley Primary School – 24 January 2003
Client: Derbyshire County Council
Parties: Derwent Valley, Milward and BKPS⁵⁷³⁰

IV.3641. In December 2002 or early January 2003, Derbyshire County Council sought tenders for classroom extension and interior alterations at the Crich Fritchley Primary School. The following five companies were invited to tender: Derwent Valley, Gerald Swift & Sons, Warfe Construction Limited, Milward and BKPS. The deadline for the receipt of tenders was 12:00 noon on 24 January 2003.⁵⁷³¹

IV.3642. Derbyshire County Council received the following tender returns:⁵⁷³²

Company	Date tender received	Amount of tender	Awarded contract
Gerald Swift & Sons	24 January 2003	£99,940*	
Derwent Valley	24 January 2003	£96,093	Yes
Warfe Construction Limited	24 January 2003	£100,448	
Milward	24 January 2003	£103,126	
BKPS	24 January 2003	£104,705	
*Errors were found in the tender submitted by Gerald Swift & Sons Limited who, as a result, withdrew their bid.			

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule and Telephone Note

IV.3643. During the OFT’s search of Derwent Valley’s premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁵⁷³³

TENDER NO.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	
02/01/03	24/01/03	CLASSROOM EXTENSION AND INTERNAL ALTERATIONS CRICH FRITCHLEY PRIMARY SCHOOL	WHARF 101 MILWARD (C)103126 B&K (C) 104705 SWIFT	96,093	2ND

IV.3644. As part of its leniency application, Derwent Valley provided a handwritten telephone note in relation to this tender. On the note was written ‘*Peter Hawkins @ B.K Property Services [.....] [C]*’. Below this

⁵⁷³⁰ In the Statement, the OFT noted that the client’s response recorded Bowmer & Kirkland as tendering for this contract. In its response to the Statement, Bowmer & Kirkland confirmed that it was BKPS that tendered for this project: ‘*This educational project was undertaken by BKPS ...*’ (written representations of Bowmer & Kirkland, 4 July 2008, paragraph 67) and the OFT has therefore amended the references to Bowmer & Kirkland as appropriate.

⁵⁷³¹ Information from client, OFT Document Reference 7643.

⁵⁷³² Information from client, OFT Document Reference 7643.

⁵⁷³³ Tender schedule, OFT Document Reference 1912, page 36.

was written *'REQUIRES COVER FOR CRICH SCHOOL'* and the figure *'104705'*. Below this was written what appears to be *'Steven Hall 287'*.⁵⁷³⁴

Evidence from leniency applicant Derwent Valley

IV.3645. Also as part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3646. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as *'DVC1 List of Covers Given'*. The information in the summary was based on the tender schedule kept by Pat Tunncliffe ('PT'), an ex-estimator at Derwent Valley, and contained the following extract:⁵⁷³⁵

Date	Contract	Company Involved
January 2003	Classroom Extension Crich Fritchley Primary school	Milward, B&K Building Services

IV.3647. In its response to the Statement, Milward asserted that one of the entries in this summary document was incorrect, as it indicated Milward had taken a cover in respect of another project whereas in fact Milward had been successful in obtaining the contract on that project.⁵⁷³⁶ The OFT notes Milward's point. On balance, however, the OFT does not consider the credibility of the other entries in the document to be undermined where, as here, those entries are underpinned by a contemporaneous tender schedule. Moreover, the summary represents Derwent Valley's assessment as to its participation in cover pricing on this tender and the OFT accordingly takes it into account when assessing the totality of the evidence.

IV.3648. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Milward'* appears on this list with the address *'30 Market Place Belper Derbyshire'* and as a contact the name *'Adrian Milward'*. Also on this list is the name *'B&K Building Services'* with the address *'Peveiril House Alfreton Road Derby'* and as a contact name *'Peter Hawkins'*.⁵⁷³⁷

IV.3649. In its response to the Statement, Milward stated that Adrian Milward *'does not know any of the employees of Derwent Valley and did not know of them at the time of the Alleged Infringements'*.⁵⁷³⁸ However, the OFT notes the evidence of PT to the contrary; he stated in interview that *'...Milward were a contractor in Belper, the same as Derwent Valley were. They went back a long way, you know, before I joined. Adrian knew that if it wasn't David it would be myself'*

⁵⁷³⁴ Handwritten note, OFT Document Reference 3945.

⁵⁷³⁵ List of Covers Given, OFT Document Reference 3940, page 3.

⁵⁷³⁶ Written representations of Milward, 26 June 2008, paragraph 4.2; and affidavit of Stephen Milward, 24 June 2008, paragraph 12.

⁵⁷³⁷ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 3.

⁵⁷³⁸ Written representations of Milward, 26 June 2008, paragraphs 4.8 to 4.9; and affidavit of Adrian Milward, 22 May 2008, paragraph 15.

*that was pricing it and he would ask for one or the other and then we would give him a call back when we had a figure for him.*⁵⁷³⁹

IV.3650. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.3651. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3652. In regards to this tender, a voluntary interview was conducted with PT who dealt with this tender. PT confirmed that he kept and maintained the tender schedule referred to in paragraphs IV.309 to IV.317 above. PT went on to refer to the tender schedule in respect of this tender saying that he recalled it as in his first employment he worked on the original buildings as a quantity surveyor. PT referred to the tender schedule and said, *'Millward was given a cover, B and K were given a cover'*. When asked if he recalled dealing with anyone at these companies PT said *'Millwards got a C and he's 103, that would have been, again that would have been Adrian. B and K, B and K had a number of estimators, they were quite a, well, they're a big outfit'*. PT could not recall who he dealt with at BKPS and noted that the entry *'Wharf'* had a figure next to it but there was no letter *'C'*.⁵⁷⁴⁰

IV.3653. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender. Although he could not recall dealing with it, he identified some of the handwriting on the telephone note described in paragraph IV.3644 above as being his, with the exception of the figure *'104705'* and *'Steve Hall 287'*, which may have belonged to a secretary.⁵⁷⁴¹ DS, examining the entry for this tender in the tender schedule, said that it looked to him as though it was *'... Millwoods [sic] who was given a cover of 103126, B and K who was given a cover of 104715 ...'*.⁵⁷⁴²

Evidence from other companies – Bowmer & Kirkland

IV.3654. The OFT wrote to Bowmer & Kirkland on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Bowmer & Kirkland had participated in bid rigging on this tender. Bowmer & Kirkland, represented by Geldards LLP, indicated via emailed letter on 25 April 2007 that it was willing to make admissions to involvement in cover pricing in relation to a number of suspect contracts.⁵⁷⁴³ The response included a completed suspect tender schedule in respect of this tender. The entry noted that the subsidiary involved was *'B & K Property Services'*, and the name of the tender *'Classroom Extension & Interior Alterations Crich Fritchley*

⁵⁷³⁹ Interview transcript, OFT Document Reference 14237, page 19.

⁵⁷⁴⁰ Interview transcript, OFT Document Reference 14237, pages 30 and 31.

⁵⁷⁴¹ Interview transcript, OFT Document Reference 13478, pages 34 and 35.

⁵⁷⁴² Interview transcript, OFT Document Reference 13478, page 38.

⁵⁷⁴³ Response from Bowmer & Kirkland, OFT Document Reference 10252.

Primary School'. For this tender, Melvin Sheldon ('MS'), Group Finance Director of Bowmer & Kirkland, admitted to Bowmer & Kirkland having participated in bid rigging activities and wrote *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁵⁷⁴⁴

IV.3655. Bowmer & Kirkland confirmed in its response to the Statement that *'... Infringements 18 and 134 are admitted. Save for those matters discussed in the Dickinson Dees letter of 6 June 2008 (Annex) B&K has nothing further to add'*.⁵⁷⁴⁵ It also confirmed that the Bowmer & Kirkland subsidiary involved in this Infringement was BKPS.⁵⁷⁴⁶

Evidence from other companies – Milward

IV.3656. The OFT wrote to Milward on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Milward had participated in bid rigging on this tender. Milward did not reply to this letter and subsequently on 9 May 2007 a call was made by the OFT to the Managing Director of Milward, who said that the OFT would not be receiving a response as Milward *'had not done anything wrong'*.⁵⁷⁴⁷

IV.3657. Milward stated in its response to the Statement that it *'...did not give or receive a cover price for this tender...'* and that *'Adrian Milward was not responsible for putting this tender together so it is highly unlikely that PT would have dealt with Adrian on it'*.⁵⁷⁴⁸ It also adduced an affidavit from Stephen Milward, indicating that he priced this job, and *'The Company did not take a cover price for the works'*.⁵⁷⁴⁹ The OFT notes Stephen Milward's evidence, and has given it consideration. On balance, however, the OFT considers that greater weight may be attached to the contemporaneous tender schedule. Although the witness evidence of PT explaining the entries in this schedule indicated that it was Adrian Milward with whom Derwent Valley usually dealt, he does not specifically state that it was with Adrian with whom he dealt on this occasion, Stephen Milward has likewise confirmed that he does not know PT⁵⁷⁵⁰, and moreover both he and Adrian Milward have confirmed that he would not always be the person finalising and submitting the tender on the day⁵⁷⁵¹ (and therefore the person who might make or take a telephone call in respect of provision of a cover). The OFT therefore does not consider the apparent inconsistency between the evidence of the respective parties' witnesses to be irreconcilable in this instance. In any event the OFT considers that the contemporaneous tender schedule would weigh in favour of preferring the evidence of PT to the extent that there is any inconsistency.

IV.3658. Milward, in its response to the Statement, questioned whether the use of 'C' entry in the tender schedule indicated that a cover price had been given/taken, suggesting in particular that DS had only *'assumed that* [the giving of a cover

⁵⁷⁴⁴ Response from Bowmer & Kirkland, OFT Document Reference 10253, page 6.

⁵⁷⁴⁵ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 31.

⁵⁷⁴⁶ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 67.

⁵⁷⁴⁷ File note of telephone conversation, OFT Document Reference 10716.

⁵⁷⁴⁸ Written representations of Milward, 26 June 2008, paragraphs 3.3(a) and (g).

⁵⁷⁴⁹ Affidavit of Stephen Milward, 24 June 2008, paragraph 6(b).

⁵⁷⁵⁰ Affidavit of Stephen Milward, 24 June 2008, paragraph 5(a).

⁵⁷⁵¹ Affidavit of Stephen Milward, 24 June 2008, paragraph 9; affidavit of Adrian Milward, 22 May 2008, paragraph 11; and written representations of Milward, 26 June 2008, paragraph 3.3(g).

price] was indicated by the use of the letter 'C' and that the 'C' may denote 'competitor' as 'it is possible for contractors to note from where their main competition has arisen'.⁵⁷⁵² The OFT does not consider this plausible. The witnesses from Derwent Valley did not indicate that it was a part of their practice in compiling the tender schedule to denote their competitors in this manner. Further, PT confirmed that a 'C' in brackets indicated that Derwent Valley had either given or taken a cover.⁵⁷⁵³ Moreover, similar entries in the Derwent Valley Tender Schedule have been confirmed to accurately record the giving of a cover price by the admissions of other Parties in relation to Infringements including 68, 93, 110 and 144.

IV.3659. Milward stated further in its response to the Statement that '*...[e]ven if one accepts Derwent Valley's position that it was aware of Milward and B&K's prices due to a cover price having been provided, this does not explain why Derwent Valley was aware of the price submitted by Warfe Construction. Milward considers that it is more likely that Derwent Valley in fact completed this pricing information in the Tender Schedule following completion of the tender process...*'.⁵⁷⁵⁴ The OFT considers that, even if it were the case, as Milward suggests, that the entry in respect of this tender was completed post-tender, there is nonetheless no 'C' next to the entry in respect of Wharf Construction. Thus, any awareness which Derwent Valley may or may not have had of their price submission is not reflected in the schedule as having stemmed from the provision of a cover, as is the case in respect of Milward and BKPS. Even if the entry were completed post-tender, this does not negate the provision of a cover during the tender process or undermine the evidence to that effect. The OFT has no information to indicate the source of Derwent Valley's information about Warfe's price. The OFT considers in light of the absence of a 'C' and the lower level of detail on the price that this materially different record of Warfe's bid does not undermine its assessment of the evidence in relation to Milward and BKPS.

IV.3660. Milward also stated in its response to the Statement it '*...was actively marketing its services to schools... [t]he targeted marketing which took place during the period in which the tender was submitted demonstrates that Milward was eager to expand its work in this area... [i]t would be contrary to this policy for Milward to have sought a cover price on this tender*'.⁵⁷⁵⁵ The OFT does not accept that Milward's active marketing to schools means it would not have sought and obtained a cover price for this tender. On the contrary, the OFT views Milward's active marketing as a possible incentive for it to obtain a cover price on this tender, rather than returning no bid at all, and risk being viewed by the school as a company unable to supply the work for which it was marketing itself.

The OFT's analysis of the evidence and finding

IV.3661. From the evidence presented above, the OFT draws the following conclusions.

⁵⁷⁵² Written representations of Milward, 26 June 2008, paragraphs 4.3 to 4.7; and affidavit of Keith Holmes, 24 June 2008, paragraphs 8 to 11.

⁵⁷⁵³ Interview transcript, OFT Document Reference 14237, page 8.

⁵⁷⁵⁴ Written representations of Milward, 26 June 2008, paragraph 3.3(i).

⁵⁷⁵⁵ Written representations of Milward, 26 June 2008, paragraph 3.3(c) to (d).

IV.3662. Derwent Valley, BKPS and Milward each accepted an invitation to tender for this contract. Derwent Valley completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Derwent Valley being the lowest received and the fact that it won the contract.

IV.3663. BKPS and Milward were each unable to submit a tender by the return date and/or did not want to win this contract.

IV.3664. In respect of BKPS, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor BKPS with the letter 'C' in brackets next to it and a figure. Derwent Valley stated that a letter 'C' written in such a manner refers to a cover price being taken or received. The figure in the tender schedule next to the reference for BKPS of '104705' directly corresponds to the bid of £104,705 BKPS submitted as its bid for the tender.

IV.3665. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover to BKPS.

IV.3666. This was supported in interview by DS, who also explained that the entry in the tender schedule indicated that Derwent Valley gave a cover price in respect of this tender to BKPS.

IV.3667. The OFT also notes that the telephone note referred to in paragraph IV.3644 above identifies an individual at BKPS who contacted Derwent Valley seeking a cover price for this tender. This note specifies the call coming from '*B.K Property Services*' and Bowmer & Kirkland confirmed in its admission of bid rigging in this tender that the subsidiary involved was '*B & K Property Services*'. The telephone number '[.....] [C]' on this note is the same as that listed publicly for BKPS.⁵⁷⁵⁶

IV.3668. Bowmer & Kirkland has admitted BKPS engaged bid rigging activity in respect of this tender, although it cannot recall the identity of the party with whom it engaged in bid rigging.

IV.3669. In respect of Milward, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to Milward with the letter 'C' in brackets next to it and a figure. Derwent Valley stated that a letter 'C' written in such a manner refers to a cover price being taken or received. The figure in the tender schedule next to the reference for Milward of '103126' directly corresponds to the bid of £103,126 Milward submitted as its bid for the tender.

IV.3670. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover to Milward.

IV.3671. This was supported in interview by DS, who also explained that the entry in the tender schedule indicated that Derwent Valley gave a cover price in respect of this tender to Milward.

⁵⁷⁵⁶ Bowmer & Kirkland's website, OFT Document Reference 11711, page 1.

- IV.3672. Derwent Valley also included in its list of companies who exchange cover prices, the name of Milward.
- IV.3673. In addition, the OFT notes that Derbyshire County Council received a tendered amount of £96,093 from Derwent Valley, which is lower than the amounts tendered by BKPS and Milward. This fits into the pattern consistent with cover prices having been given to BKPS and Milward by Derwent Valley.
- IV.3674. Although other tendering companies are mentioned on Derwent Valley's contemporaneous tender schedule document, the OFT notes that only BKPS and Milward have a '(C)' and the precise tender figure submitted respectively by these companies, written against them.
- IV.3675. The OFT therefore concludes that contact took place between Derwent Valley and BKPS, and between Derwent Valley and Milward. The OFT also concludes that Derwent Valley supplied figures to each of BKPS and Milward for cover bids.
- IV.3676. The OFT is satisfied that the facts set out in paragraphs IV.3643 to IV.3675 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵⁷⁵⁷ In particular:
- (a) the provision of figures for cover bids from Derwent Valley to BKPS and from Derwent Valley to Milward was not unilateral⁵⁷⁵⁸, and contravenes the principle against direct or indirect contact between competitors;⁵⁷⁵⁹
 - (b) BKPS and Milward can each be presumed to have taken account of the information received from Derwent Valley (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁵⁷⁶⁰ and
 - (c) Derwent Valley can be presumed to have taken account of the information it received from BKPS and Milward (i.e. that neither BKPS nor Milward intended to submit competitive bids) when determining its own conduct in the tendering process.⁵⁷⁶¹
- IV.3677. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Derwent Valley and BKPS, and between Derwent Valley and Milward, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for classroom extension and interior alterations, Crich Fritchley Primary School tender dated 24 January 2003.

Immunity and leniency assessment

- IV.3678. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁵⁷⁵⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁷⁵⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁷⁵⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁷⁶⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁷⁶¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3679. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

Infringement 135: 17/18 Dover Street, London – 27 January 2003
Client: Amsprop Investments Ltd
Parties: Mansell and Durkan

IV.3680. On 29 November 2002, Amsprop Investments Ltd, sought ‘Stage 2’ tenders for new build offices at 17/18 Dover Street.⁵⁷⁶² The following three companies were invited to tender: Durkan, Higgins City and Mansell. The date of tender return was, according to Amsprop Investments Ltd, 28 April 2003.⁵⁷⁶³

IV.3681. Durkan submitted in its response to the Statement that it was contacted by Amsprop Investments Ltd in January 2003, rather than November 2002.⁵⁷⁶⁴ Durkan did not provide any evidence in support of this submission and the OFT considers that the date put forward by Amsprop Investments Ltd is more consistent with the other evidence before the OFT. In any event, however, the date that tenders were sought is immaterial to the OFT’s finding of an infringement.

IV.3682. Amsprop Investments Ltd received the following tender returns:⁵⁷⁶⁵

Company	Date tender received	Amount of tender	Awarded contract
Mansell	27 January 2003	£2,884,286	YES
Durkan	27 January 2003	£2,892,208	
Higgins City	27 January 2003	£3,150,212	

IV.3683. Amsprop Investments Ltd had originally sought tenders from six contractors, including those noted, in June 2002 (‘Stage 1’), however those tenders were allowed to lapse and no contractor was appointed.⁵⁷⁶⁶ The work was then re-tendered due to a delay in obtaining planning approval for the works, with only the three contractors noted being put forward to ‘Stage 2’.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – emails and invoice

IV.3684. As part of its leniency application, Mansell’s legal representatives provided emails between Mansell and Durkan, in relation to this tender. On 30 March 2004, Clive Perceval (‘CP’), ex-Regional Managing Director⁵⁷⁶⁷ for the Enfield

⁵⁷⁶² Information from client, OFT Document Reference 7045.

⁵⁷⁶³ Information from client, OFT Document Reference 7045. The OFT notes that all tenders were actually returned on 27 January 2003.

⁵⁷⁶⁴ Written representations of Durkan, 27 June 2008, paragraph 61.

⁵⁷⁶⁵ Information from client, OFT Document Reference 7045.

⁵⁷⁶⁶ Information from client, OFT Document Reference 7043.

⁵⁷⁶⁷ Clive Perceval left Mansell in July 2005.

region of Mansell, received an email from Alan Fraher ('AF'), Company Secretary of Durkan. In this email AF stated *'We are extremely disappointed that you have failed to respond to our earlier communications and, more importantly, that you have not fulfilled your financial commitment [sic]. Unless we hear from you by close of business today, we shall have no option but to seek recovery by alternate means'*.⁵⁷⁶⁸

IV.3685. This appears to have followed on from previous emails from AF requesting payment, as follows: (prior to 31 January 2004) *'I refer to our previous conversations and would respectfully request that you let me have the appropriate documentation by return. If there is a problem please let me know. Our financial year end is 31st January and I should appreciate payment by that date, at the very latest'* and (apparently on 4 March 2004) *'I refer to my email below and to your meeting with both Colin Simmons and myself and regret to note that absolutely no progress whatsoever has been made in relation to this matter. In view of the above, I would respectfully request that [you] contact me, with a proposal for payment, by close of business tomorrow Friday 5th March 2004'*.⁵⁷⁶⁹

IV.3686. In his reply to AF, on 30 March 2004, CP stated *'I am sure you are aware of our recent change in our corporate status which has caused the delay in clearing the financial commitment ... My colleague, Colin [Gilbert, ('CG'), Commercial Director at Mansell⁵⁷⁷⁰ for the Enfield region] will forward details to you & what is required to enable payment to be made'*.⁵⁷⁷¹

IV.3687. On 1 April 2004 CG of Mansell sent an email to AF⁵⁷⁷² at Durkan stating *'Please raise invoice on the above Order Number for "Fit Out Works" on a project at "83 to 87 Southwark Street, London SE1" ... You will receive quality questionnaires via our QA system but I don't need to receive them back'*.⁵⁷⁷³

IV.3688. In his reply to CG, on 26 April 2004, AF stated *'Colin, I complied with you (sic) request ... Unfortunately, I have not received payment. Please investigate and revert'*.⁵⁷⁷⁴

IV.3689. Mansell's legal representatives provided an invoice from Durkan, numbered SL007930 and dated 2 April 2004. The invoice is shown to be in respect of *'FIT OUT WORK AT THE ABOVE ADDRESS AS PER YOUR ORDER NO. ZE0056/365205'* for the amount of £60,000 plus VAT, totalling £70,500.00 inclusive of VAT.⁵⁷⁷⁵ Mansell's legal representatives also provided a document headed *'Supply & Fix Memo Payments Enquiry'* which shows:⁵⁷⁷⁶

⁵⁷⁶⁸ Email correspondence, OFT Document Reference B4036.

⁵⁷⁶⁹ Email correspondence, OFT Document Reference B4036.

⁵⁷⁷⁰ Colin Gilbert became Commercial Director in July 2005, prior to this he was Commercial Manager.

⁵⁷⁷¹ Email correspondence, OFT Document Reference B4036.

⁵⁷⁷² The OFT notes that the email was sent to AF from OFT Document Reference 6141.

⁵⁷⁷³ Email correspondence, OFT Document Reference B4038.

⁵⁷⁷⁴ Email correspondence, OFT Document Reference B4038.

⁵⁷⁷⁵ Invoice, OFT Document Reference B0863.

⁵⁷⁷⁶ Invoice, OFT Document Reference B0864.

Job Number **ZE0056** SOUTHWARK STREET SE1

Subcontractor **365205** DURKAN PUDELEK LIMITED

<i>Gross</i> <i>/</i> <i>Amount</i>	<i>Retention</i> <i>% or amt</i>	<i>Disc</i>	<i>Ch S</i> <i>Appr</i>	<i>Dir</i> <i>Appr</i>	<i>Pay on</i> <i>Date</i>	<i>Amount to</i> <i>Pay</i>	<i>Date</i> <i>Paid</i>
60000.00			YES	PAID	30/04/04	60000.00	4/05/04

IV.3690. Durkan submitted in its response to the Statement that, whilst AF chased Mansell for payment, he was unaware that the money was in any way illegitimate. Durkan argued that AF's emailed threat to Mansell to '*seek recovery by alternative means*' (which Durkan characterised as a letter before action) demonstrates AF's belief that the money owed was legitimate. Durkan also argued that AF's communications with Mansell were open and transparent and were consistent with the type of correspondence one would expect to see from a firm legitimately chasing a debt.⁵⁷⁷⁷

IV.3691. First, the OFT does not agree that the chain of correspondence between AF and Mansell is consistent with a firm chasing a legitimate debt. In particular, where a firm is chasing monies legitimately owed, the OFT would expect to see a reference to the sum of money owed and to the services supplied (or, indeed, for a copy of an invoice to be attached setting out these details). Conversely, AF made no reference to these details in his emails to CP and does not even mention the amount of money owed, referring instead in generic terms to Mansell's '*financial commitment*'.⁵⁷⁷⁸

IV.3692. Following a request from Mansell, AF then raised a false invoice on 2 April 2004 for £60,000 plus VAT for fit out work at 83 – 87 Southwark Street. Both Parties have confirmed that Durkan had no involvement in this job and carried out no work at this site (see paragraphs IV.3707 and IV.3710). The OFT considers that raising a false invoice in order to facilitate payment is not consistent with monies legitimately owed.

IV.3693. The OFT also notes CP's statement to AF that a change in Mansell's corporate status had '*caused the delay in clearing the financial commitment, but now we have found the appropriate approach to regularise the situation*'.⁵⁷⁷⁹ Again, the OFT does not consider this statement to be consistent with the type of correspondence one would expect to see if the monies had been legitimately owed. The OFT questions what the reference to 'regularising the situation' could mean in the context of a legitimate debt.

IV.3694. Whilst Durkan Holdings characterised AF's involvement as merely recouping monies '*that he was told were owed to [Durkan]*'⁵⁷⁸⁰, the OFT finds it difficult to reconcile this with the correspondence. AF refers in one email (prior to 31 January 2004) to a previous conversation with CP and, in a subsequent email (apparently on 4 March 2004) to an earlier meeting with CP.⁵⁷⁸¹ The OFT

⁵⁷⁷⁷ Written representations of Durkan, 27 June 2008, paragraphs 75 to 78.

⁵⁷⁷⁸ Email correspondence, OFT Document Reference B4036.

⁵⁷⁷⁹ Email correspondence, OFT Document Reference B4036.

⁵⁷⁸⁰ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 52(c).

⁵⁷⁸¹ Email correspondence, OFT Document Reference B4036.

considers it implausible that AF could have conducted a conversation and a meeting with CP in relation to the monies owed without being made aware of the background to the payment.

IV.3695. Finally, the OFT rejects Durkan's suggestion that AF's email of 30 March 2004⁵⁷⁸² constituted a letter before action – it has none of the characteristics of such a letter (for example, it fails to state the amount owed or what the debt relates to, and does not mention court proceedings at all).

IV.3696. On balance, the OFT concludes from the evidence that AF would have been aware that the payment he was chasing was not merely monies owed for services legitimately supplied. The OFT therefore remains of the view that AF was involved in the Infringement and that his involvement is an aggravating factor relevant to the OFT's penalty calculation (see Annex C).

Contemporaneous documentary evidence from other companies – Durkan – emails, letter and invoice

IV.3697. During a section 27 inspection of Durkan's premises on 24 January 2007, a number of documents relating to this tender were produced. Emails dated 1 April and 26 April 2004⁵⁷⁸³, as discussed in paragraphs IV.3687 and IV.3688 above, were produced.

IV.3698. A letter, dated 2 April 2004, from Michael Lawlor of Durkan to CG at Mansell, was also produced during the section 27 inspection. The letter was in respect of '83 – 87 SOUTHWARK STREET, LONDON SE1' and advised '*Please find enclosed our invoice no. SL007930 for £70,500.00 for works on the above site as per your order no. ZE0056/365205 ... We look forward to receiving your payment by 9th April 2004*'.⁵⁷⁸⁴

IV.3699. Two invoices were produced during the section 27 inspection: an invoice, numbered SL007930 and dated 2 April 2004, from Durkan to Mansell for '*Project: 5000 OVERHEADS*' and '*FIT OUT WORK AT THE ABOVE ADDRESS AS PER YOUR ORDER NO. ZE0056/365205*' for the amount of £60,000 plus VAT, totalling £70,500.00 inclusive of VAT⁵⁷⁸⁵ and another invoice, also numbered SL007930 and dated 2 April 2004, from Durkan to Mansell for '*Project: 5000 83 TO 87 SOUTHWARK STREET, SE1*' and '*FIT OUT WORK AT THE ABOVE ADDRESS AS PER YOUR ORDER NO. ZE0056/365205*' for the amount of £60,000 plus VAT, totalling £70,500.00 inclusive of VAT, showing an itemised breakdown of '0.00'.⁵⁷⁸⁶ These invoices are almost identical to the one produced by Mansell's legal representatives as discussed at paragraph IV.3689 above, with the first showing the same project name and the second showing the same itemised breakdown as in the invoice received by Mansell.

Witness evidence from leniency applicant Mansell

IV.3700. During an interview with the OFT on 1 May 2007, CP, when asked what his recollection of this tender was, stated '*... it was a spec. and drawings job, two*

⁵⁷⁸² Email correspondence, OFT Document Reference B4036.

⁵⁷⁸³ Email correspondence, OFT Document Reference 6140 and 6141.

⁵⁷⁸⁴ Letter from Durkan to Mansell, OFT Document Reference 6116.

⁵⁷⁸⁵ Invoice, OFT Document Reference 6114.

⁵⁷⁸⁶ Invoice, OFT Document Reference 6115.

stage tender, which we were invited to price in competition, which we did. We went through the first stage and we were led to believe ... they would select one contractor from the first stage process to take it through [to] the second stage'.⁵⁷⁸⁷ CP explained that the job required extensive work and stated 'We went through the process and we were then told that they were going to proceed with two contractors ... But we still wished to go ahead with the job ... and then I was contacted by Durkans who were in a similar position and, they suggested to us that because of this, one or other party was going to incur costs that we couldn't recover because we weren't going to secure the job. Now this is contrary to the original intent and therefore they [Durkan] put forward the proposal that those costs were reimbursed through the other contractor. I spoke to Steve Waite [Divisional Managing Director at the time] about it, and subsequently we agreed that's what we'd do'.⁵⁷⁸⁸

IV.3701. In its response to the Statement, Mansell stated its belief that Stephen Waite ('SW') was not involved at this stage of the Infringement. Mansell stated that SW did not recall speaking to CP, or any other Mansell employee, about this tender at the time the agreement was reached with Durkan. SW did, however, recall that he was later contacted by CP (after the submission of tender bids) in order to discuss the method of making the agreed compensation payment to Durkan. Mansell did not seek to argue that SW believed the payment to be for a legitimate purpose.⁵⁷⁸⁹

IV.3702. The OFT has no evidence to confirm whether CP's or SW's version of events is correct. In any event, the timing and scope of SW's involvement is immaterial to the OFT's finding of an infringement.

IV.3703. Even if SW was not involved until after Mansell's tender was submitted (which the OFT does not necessarily accept was the case), the OFT remains of the view that SW was involved in the Infringement and that his involvement is an aggravating factor relevant to the OFT's penalty calculation (see Annex C). By Mansell's own admission, SW was involved in discussions about how to make the agreed compensation payment. At the very least, he was therefore aware of the arrangement prior to the payment to Durkan being affected, and did nothing to prevent the payment being made or otherwise to address this illegal activity.

IV.3704. When asked why a figure of £60,000 for reimbursement was agreed upon, CP stated '*...I think [it was] a reasonable figure at the time for the costs you're likely to incur because this was a particularly expensive process you had to go through, for a comparatively small job'.⁵⁷⁹⁰*

IV.3705. In respect of the email from AF dated 30 March 2004, CP stated '*They chased me for payment'* and when asked what CG's involvement was, stated '*he managed through the payment'*. CP also explained that the payment of £60,000 had been made through another project, at Southwark Street.⁵⁷⁹¹ When asked where the £60,000 would have come from, CP stated '*we would have been conscious of it when we did the tender settlement but it wouldn't*

⁵⁷⁸⁷ Interview transcript, OFT Document Reference 11515, page 6.

⁵⁷⁸⁸ Interview transcript, OFT Document Reference 11515, page 7.

⁵⁷⁸⁹ Written representations of Balfour Beatty Group, 27 June 2008, paragraph 8.35 and Annex 1, points 9 and 30.

⁵⁷⁹⁰ Interview transcript, OFT Document Reference 11515, page 9.

⁵⁷⁹¹ Interview transcript, OFT Document Reference 11515, page 12.

necessarily have been added as a specific figure, it would have been part of an overall figure for a tender settlement' and confirmed that some of the payment would have come out of Mansell's profit on this tender.⁵⁷⁹²

IV.3706. During an interview with the OFT on 3 May 2007, CG, when asked how he became aware of this tender, stated *'... I was aware of the project from an initial lead ... so when we did finally secure the job, I was involved in sorting out the terms and conditions'*.⁵⁷⁹³ When asked if he was aware of the arrangement made between Mansell and Durkan, CG stated *'I was aware that the discussions were taking place and I knew there were some discussions about costs that were being incurred'* and in terms of the arrangement CG stated *'I understand that an arrangement had been made ...that the successful party would pay costs to the unsuccessful party'* and clarified this would be the costs of preparing the second stage tender.⁵⁷⁹⁴ CG explained what his role was in the arrangement, *'I was asked to facilitate the payment of the costs'*.⁵⁷⁹⁵

IV.3707. When asked why he requested that AF raise an invoice in respect of 83 – 87 Southwark Street, CG stated *'that was what I was asked to do'* and when asked who had instructed him to do so, stated *'Clive [Perceval] would have done that'*.⁵⁷⁹⁶ In respect of 83 - 87 Southwark Street, CG stated *'It was another contract we had, I think we'd recently completed it'* and when asked if Durkan was a competitor on that project CP stated *'No, it had nothing to do with Durkan, but there were fit-out works on that and, well, I was asked to put the payment through on that project'*.⁵⁷⁹⁷ In respect of the payment of £60,000 to Durkan, CG advised it had nothing to do with 83 – 87 Southwark Street and that Durkan did no work for Mansell on that project.⁵⁷⁹⁸

Evidence from other companies – Durkan

IV.3708. The OFT wrote to Durkan on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Durkan had participated in bid rigging on this tender. In response to this letter Durkan admitted *'we engaged in bid rigging activities on this tender with Mansell Plc. Contact: C. Percival'*.⁵⁷⁹⁹

IV.3709. The OFT subsequently wrote to Durkan's ultimate parent company at the time of this Infringement, Durkan Holdings, on 5 November 2007, asking it to comment on Durkan's response to the OFT's Fast Track Offer, given that the OFT intended to hold Durkan Holdings jointly and severally liable for any infringements committed by Durkan in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Durkan Holdings stated *'Durkan Holdings will respect the terms of the acceptance made by Durkan Pudelek ...'*.⁵⁸⁰⁰

⁵⁷⁹² Interview transcript, OFT Document Reference 11515, page 11.

⁵⁷⁹³ Interview transcript, OFT Document Reference 11514, page 5.

⁵⁷⁹⁴ Interview transcript, OFT Document Reference 11514, page 6.

⁵⁷⁹⁵ Interview transcript, OFT Document Reference 11514, page 6.

⁵⁷⁹⁶ Interview transcript, OFT Document Reference 11514, page 7.

⁵⁷⁹⁷ Interview transcript, OFT Document Reference 11514, page 7.

⁵⁷⁹⁸ Interview transcript, OFT Document Reference 11514, page 8.

⁵⁷⁹⁹ Response from Durkan, OFT Document Reference 10992, page 2.

⁵⁸⁰⁰ Response from Durkan Holdings, OFT Document Reference 13945.

IV.3710. In respect of this tender Durkan's solicitors have advised that Durkan did not supply fit out work to Mansell in respect of 83 – 87 Southwark Street as indicated by an invoice dated 2 April 2004, obtained on a section 27 visit to Durkan, which is detailed above. Durkan's solicitors have stated that no work was carried out as, *'There was no work to be done'* and have confirmed that Durkan did receive the invoiced amount of £70,500.⁵⁸⁰¹

IV.3711. Durkan submitted in its response to the Statement that it had no agreement or understanding with Mansell that the compensation payment would be added to the tender, that it did not in fact add the compensation payment to its tender price, and that its tender was not above the competitive level.⁵⁸⁰²

The OFT's analysis of the evidence and finding

IV.3712. From the evidence presented above, the OFT draws the following conclusions.

IV.3713. Mansell and Durkan each accepted an invitation to tender for this contract.

IV.3714. Both companies submitted a tender. It appears that at the first stage both Mansell and Durkan completed the estimating process for this tender and that they each submitted a bid with the hope of winning the work.

IV.3715. This was a two stage tender. Of the six companies invited to tender for the first stage, only three companies, Mansell, Durkan and Higgins City, were invited on to the shortlist for the second tender and all three companies submitted tenders at the second stage.

IV.3716. It appears that the bidders were initially informed that only one of them would go forward to a second tender process. However, Mansell advised that it was then informed that the client wanted to proceed to the second tender process with two contractors.⁵⁸⁰³ In order to prepare for the second tender process, the companies had to undertake a degree of work, which according to Mansell would have resulted in irrecoverable costs if its tender bid had been unsuccessful and which CP of Mansell considered would be a *'particularly expensive process ... for a comparatively small job'*.

IV.3717. Mansell has stated that as a result, Durkan suggested that the unsuccessful tenderer should be compensated by the successful tenderer for the irrecoverable cost of work undertaken. Mansell agreed to this suggestion and an amount of £60,000 plus VAT was agreed between the parties. CP of Mansell suggested in interview that the amount of agreed compensation *'...would have been part of an overall figure for a tender settlement'* rather than being added as a specific figure. Durkan has also confirmed that it engaged in bid rigging in relation to this tender. The OFT notes that it is not necessary for it to conclude as to whether the initial approach came from Durkan, as Mansell suggests.

IV.3718. Durkan disputed in its response to the Statement that this was a two stage tender. Rather, Durkan submitted that it started as a two stage tender, but the client then changed it into an arrangement comprising two individual tender

⁵⁸⁰¹ Response from Durkan, OFT Document Reference 13379b.

⁵⁸⁰² Written representations of Durkan, 27 June 2008, paragraphs 68 to 69, 70 to 73 and 80.

⁵⁸⁰³ Information from client, OFT Document Reference 7045. The OFT notes three contractors were taken forward to the second-stage tender.

invitations.⁵⁸⁰⁴ The OFT notes that both the client⁵⁸⁰⁵ and CP of Mansell⁵⁸⁰⁶ refer to a two stage tender but that, in any event, the OFT has described the relevant elements of the tender process at paragraphs IV.3680 to IV.3683 and IV.3713 to IV.3716 and the precise terminology used to describe the process has no bearing on the OFT's finding of an infringement.

IV.3719. Durkan also submitted that, in a two stage tender process, the '*unwritten rules of engagement*' are that the client will reimburse the tenderer for its 'stage two' costs if negotiations fail. Durkan argued that, in the ordinary course, Mansell and itself would have expected reimbursement in the event they were selected for stage two and subsequently not awarded the contract. Durkan therefore concluded that the compensation payment was to reflect this expectation and there was '*no intention for anyone to receive a payment that they would not have been entitled to in the ordinary course.*'⁵⁸⁰⁷

IV.3720. Notwithstanding Durkan's description of standard industry practice in a two-stage tender process (which the OFT does not necessarily accept), the OFT in any event considers this justification to be without merit. First, an undertaking's subjective intent is immaterial where the object of an arrangement is anti-competitive.⁵⁸⁰⁸ Furthermore, an otherwise anti-competitive arrangement cannot be saved by virtue of its authors' intent to obtain money to which they considered they would be entitled '*in the ordinary course*'. The client was entitled to conduct a tender process which required bidders to take the risk of incurring potentially irrecoverable tender costs. If a bidder did not wish to accept that risk, it could decline to participate in the tender. The ability of a buyer to play potential suppliers off against each other in order to obtain a better price or better terms forms the very essence of a competitive process. Concertation between bidders to undermine this process cannot be justified by reference to '*unwritten rules of engagement*' or the level of remuneration that a supplier would expect to achieve '*in the ordinary course*'.

IV.3721. CP confirmed that although the compensation sum would not be added to Mansell's tender as a 'specific sum', the person preparing the tender would be conscious of the amount of the agreed payment when putting together the tender. Durkan denied adding the compensation payment to its tender price. On the evidence available, the OFT is unable to conclude as to whether Mansell and Durkan expressly agreed that each would add the agreed £60,000 plus VAT compensation payment to their respective tender costs or whether they in fact did so, but notes in any event that it is not necessary for the OFT to make any finding that the Parties agreed to include a specific sum in their respective tender bids, or that they in fact did so, in order to find an infringement.⁵⁸⁰⁹

IV.3722. Mansell won the tender and subsequently carried out the work. Around a year later, it seems that Mansell had still not paid to Durkan the agreed amount of £60,000 plus VAT. Emails were sent from Durkan to Mansell chasing payment of this amount.

⁵⁸⁰⁴ Written representations of Durkan, 27 June 2008, paragraphs 57 to 59.

⁵⁸⁰⁵ Information from client, OFT Document Reference 7045,

⁵⁸⁰⁶ Interview transcript, OFT Document Reference 11515, page 6.

⁵⁸⁰⁷ Written representations of Durkan, 27 June 2008, paragraphs 58, 62 and 90.

⁵⁸⁰⁸ See paragraphs III.68 to III.69 of the Legal Background section.

⁵⁸⁰⁹ See paragraphs III.149 to III.155 of the Legal Background section.

- IV.3723. Eventually, in response to an email from Durkan dated 30 March 2004, CP at Mansell expedited matters by asking CG to arrange for the payment to go through. Two days later CG sent an email to Durkan asking for a false invoice to be raised for 'fit out works' in the sum of £60,000 plus VAT at 83-87 Southwark Street, London SE1. Mansell has confirmed that Durkan was not in fact involved in that project.
- IV.3724. The following day, 2 April 2004, an invoice for £60,000 plus VAT was raised in respect of 'fit out works'. This invoice was sent from Durkan to Mansell under cover of a letter headed '*83-87 SOUTHWARK STREET, LONDON SE1*' on that date.
- IV.3725. The final correspondence between the parties in respect of this matter was an email from Durkan to Mansell dated 26 April 2004 stating that the request for an invoice had been complied with and repeating the request for payment of this false invoice.
- IV.3726. Subsequently, Mansell raised a payment of £60,000 to Durkan, apparently on 30 April 2004, and this amount was apparently paid to Durkan on 4 May 2004.
- IV.3727. Durkan has admitted engaging in bid rigging activities on this tender with Mansell, in response to the OFT's letter of 22 March 2007. The OFT notes that Durkan named '*Mansell*' and the contact '*C Percival*'⁵⁸¹⁰, without sight of the OFT's evidence that Mansell and CP were involved in bid rigging on this tender. This provides additional corroboration of the contemporaneous evidence and Mansell's explanation of that evidence.
- IV.3728. Durkan has also confirmed that it did not supply the fit out work for which it invoiced Mansell on 2 April 2004, stating that there was no work to be done. This confirms that the invoice received by Mansell was false and further corroborates the contemporaneous evidence and Mansell's explanation of that evidence. Durkan has also confirmed that it received the invoiced amount.
- IV.3729. The OFT therefore concludes that contact took place between Mansell and Durkan, resulting in an agreement between them that the successful tenderer would pay the unsuccessful tenderer a sum of £60,000 plus VAT. Mansell after some delay eventually made a compensation payment to Durkan which was facilitated by the production of a false invoice relating to another contract that Mansell had won.
- IV.3730. The OFT is satisfied that the facts set out in paragraphs IV.3684 to IV.3729 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁸¹¹ In particular:
- (a) the discussion of the respective intentions to bid and provision of a compensation payment from Mansell to Durkan was not unilateral, and contravenes the principle against direct or indirect contact between competitors;⁵⁸¹²
 - (b) the agreement between Mansell and Durkan that the successful tenderer would pay an agreed level of compensation of £60,000 plus

⁵⁸¹⁰ The OFT believes this to be Clive Perceval of Mansell.

⁵⁸¹¹ See paragraph III.3 and III.136 to III.157 of the Legal Background section.

⁵⁸¹² See paragraphs III.48 to III.51 and III.139 to III.140 of the Legal Background section.

VAT to the unsuccessful tenderer had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁵⁸¹³ and

- (c) each of Mansell and Durkan can be presumed to have taken account of the information they each received from each other (i.e. the agreement to pay compensation and the agreed level of compensation) when determining its own conduct in the tendering process.⁵⁸¹⁴

IV.3731. In response to the Statement, Durkan submitted that the contact between itself and Mansell did not infringe the principle against direct or indirect contact between competitors.⁵⁸¹⁵ The OFT recalls that, in order to prove a concerted practice, it is required to demonstrate reciprocal contact between competitors leading to an alteration of their course of conduct on the market.⁵⁸¹⁶ The OFT is not required to demonstrate these elements, however, where an agreement has been concluded between competitors. In this respect, the OFT notes that Durkan does not contest that there was an agreement between itself and Mansell to make a compensation payment in relation to this tender.⁵⁸¹⁷

IV.3732. Notwithstanding Durkan's acceptance that it concluded an agreement with Mansell, the OFT considers that in any event, the evidence above proves the existence of a concerted practice between Durkan and Mansell. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁵⁸¹⁸ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Durkan has rebutted the application of the presumption in this case.

IV.3733. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Durkan's submission that the contact between itself and Mansell did not influence either company's desire to win the tender⁵⁸¹⁹ (which is not necessarily the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. In any event, the OFT notes CP's evidence that the person preparing Mansell's tender would have been conscious of the amount of the agreed payment when putting together the tender.⁵⁸²⁰ The OFT concludes from this evidence that Mansell's conduct was affected, even if its desire to win the tender was not.

IV.3734. Durkan also submitted that neither itself nor Mansell disclosed the course of conduct they would be taking, or were contemplating taking, in respect of the tender. In particular, Durkan claimed that neither company knew whether the other company was going to bid for the tender.⁵⁸²¹ At the same time, however, Durkan does not contest that it entered into an agreement with Mansell whereby the winning bidder would compensate the losing bidder for its tender

⁵⁸¹³ See paragraphs III.150 to III.152 of the Legal Background section.

⁵⁸¹⁴ See paragraphs III.58, III.142, and III.156 to III.157 of the Legal Background section.

⁵⁸¹⁵ Written representations of Durkan, 27 June 2008, paragraph 82.

⁵⁸¹⁶ See paragraph III.47 to III.59 of the Legal Background section.

⁵⁸¹⁷ Written representations of Durkan, 27 June 2008, paragraph 56.

⁵⁸¹⁸ See paragraph III.58 of the Legal Background section.

⁵⁸¹⁹ Written representations of Durkan, 27 June 2008, paragraph 82 and 93.

⁵⁸²⁰ Interview transcript, OFT Document Reference 11515, page 11.

⁵⁸²¹ Written representations of Durkan, 27 June 2008, paragraphs 83 to 84.

costs.⁵⁸²² The OFT finds it impossible to reconcile these two statements – indeed an agreement to make a compensation payment would be nonsensical unless both parties (either explicitly or implicitly) indicate to each other that they are intending to bid for the tender in question.

IV.3735. Furthermore, in addition to disclosing that they were intending to bid for the particular tender, the OFT considers that Mansell and Durkan also disclosed to each other their intended course of conduct upon award of the tender (either to make a compensation payment to the other, or to receive such a payment) and the amount of that payment.

IV.3736. Durkan also submitted that the contact between itself and Mansell did not have the object or effect of creating conditions of competition that were abnormal.⁵⁸²³ The OFT does not accept this argument. Under normal conditions of competition a tenderer will not indicate that it is intending to submit a bid to a competing tenderer, and will not enter into an agreement with a competing tenderer to make or receive a payment conditional upon its success in that tender. For the same reasons, the OFT also rejects Durkan's argument that it did not disclose any commercially sensitive information to Mansell, or receive any such information from Mansell relative to the tender.⁵⁸²⁴ The OFT considers the information described in this paragraph to be commercially sensitive.

IV.3737. Finally, Durkan argued that the compensation payment did not result in a tender price above the competitive level or otherwise influence the tender price, that it was not made at the expense of a potentially lower tender price and did not fix the price or a component of the price. Durkan asserted that the OFT had adduced no evidence to the contrary in the Statement.⁵⁸²⁵

IV.3738. The OFT refutes these arguments in their entirety. Regardless of whether there was an agreement to add the amount of the compensation payment to the tender price, or whether the amount was in fact added (in respect of which the OFT makes no finding), CP has confirmed that he would have been conscious of the payment when preparing the tender settlement, and that part of the payment would have come out of Mansell's profit on this tender (see paragraph IV.3705). As such, Mansell effectively accepted a lower profit margin on the project, but rather than applying that reduced margin to the benefit of the customer in the form of a lower price (which would be commercially rational behaviour for a tenderer competing on price), a monetary amount reflecting the reduction in margin was instead paid to its competitor, Durkan. As set out in paragraphs III.150 to III.151 such an arrangement has the obvious consequence of suppressing price competition and hence has the object of restricting or distorting competition.

IV.3739. The evidence supporting this analysis was, contrary to Durkan's assertions, included in the Statement. The OFT does not view as material the fact that the third tenderer, Higgins City, submitted a bid higher than that of Durkan or Mansell.⁵⁸²⁶

⁵⁸²² Written representations of Durkan, 27 June 2008, paragraph 56.

⁵⁸²³ Written representations of Durkan, 27 June 2008, paragraphs 84.

⁵⁸²⁴ Written representations of Durkan, 27 June 2008, paragraph 67.

⁵⁸²⁵ Written representations of Durkan, 27 June 2008, paragraphs 70 to 73, 80, 85 to 89, 91 to 92 and 94.

⁵⁸²⁶ Written representations of Durkan, 27 June 2008, paragraphs 71 to 73.

IV.3740. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Durkan in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment to 17/18 Dover Street, tender deadline 27 January 2003.

IV.3741. Mansell suggested in its response to the Statement that CP's evidence demonstrates that the compensation payment had little effect on the competitive process in this tender.⁵⁸²⁷ As the OFT has concluded, however, that the arrangement between Mansell and Durkan had the object of restricting competition, it is not required to examine the effects of the arrangement.⁵⁸²⁸

IV.3742. To the extent that Mansell and/or Durkan submit that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

Immunity and leniency assessment

IV.3743. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3744. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 136: Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross – 5 February 2003
Client: North East Derbyshire District Council
Parties: Derwent Valley, Admiral, Wildgoose and Milward

IV.3745. On 20 January 2003, North East Derbyshire District Council sought tenders for the conversion of a flat to pitched roof at 1-15 Pankhurst Place, Clay Cross, Derbyshire. The following seven companies were invited to tender: Derwent Valley, Milward, Allenbuild, Admiral, J S Seddon Building, Wildgoose and Baggaley & Jenkins. The deadline for the receipt of tenders was 12:00 noon on 5 February 2003.⁵⁸²⁹

IV.3746. North East Derbyshire District Council received the following tender returns:⁵⁸³⁰

⁵⁸²⁷ Written representations of Balfour Beatty Group, 27 June 2008, Annex 8, point 5.

⁵⁸²⁸ See paragraphs III.60 to III.67 of the Legal Background section.

⁵⁸²⁹ Information from client, OFT Document Reference 9045.

⁵⁸³⁰ Information from client, OFT Document Reference 9045.

Company	Date tender received	Amount of tender	Awarded contract
Milward	5 February 2003	£141,175.00	
Allenbuild	5 February 2003	£105,071.00	
Derwent Valley	5 February 2003	£128,113.28	
Admiral	5 February 2003	£147,610.00	
J S Seddon Building	5 February 2003	£110,727.00	
Wildgoose	5 February 2003	£144,562.00	
Baggaley & Jenkins	4 February 2003	£93,033.00 REVISED (£97,383.45)	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.3747. During the OFT's search of Derwent Valley's premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁵⁸³¹

TENDER NO.	RETURN DATE	DETAILS	OPPOSITION	TENDER	
09/01/03	5/2/03	PITCH ROOF CONVERSION AT 1-15 PANKHURST PLACE CLAY CROSS FOR NEDDC	Milward (C) Admiral (C) Wildgoose (C) Seddon B & Jenkins	128113	4 th (93k)

Evidence from leniency applicant Derwent Valley

IV.3748. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3749. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as '*DVC1 List of Covers Given*'. The information in the summary was based on the tender book kept by Pat Tunnicliffe ('PT'), an ex-estimator at Derwent Valley, and contained the following extract. The summary contains an error where based on the handwriting in the contemporaneous evidence, Derwent Valley listed one of the companies involved as being '*Almond*' when it was actually '*Admiral*'.⁵⁸³²

Date	Contract	Company Involved
January 2003	Pitch roof conversion Clay Cross	Milward, Almond, Wildgoose

IV.3750. In its response to the Statement, Milward highlighted that one of the entries in this summary document was incorrect, as it indicated Milward had taken a cover in respect of another project whereas in fact Milward had been successful

⁵⁸³¹ Tender schedule, OFT Document Reference 1912, page 36.

⁵⁸³² List of Covers Given, OFT Document Reference 3940.

in obtaining the contract on that project.⁵⁸³³ The OFT notes Milward's point. On balance, however, the OFT does not consider the credibility of the other entries in the document to be undermined where, as here, those entries are underpinned by a contemporaneous tender schedule. Moreover, the summary represents Derwent Valley's assessment as to its participation in cover pricing on this tender and the OFT accordingly takes it into account when assessing the totality of the evidence.

IV.3751. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Milward Construction (Belper)'* appears on this list with the address *'30 Market Place Belper Derbyshire'* and the name, *'Adrian Milward'* as a contact. Also on this list is the name, *'Wildgoose Construction Ltd'* with the address *'Fallgate Milltown Ashover Derbyshire'* and the name, *'Paul Taylor'* as a contact. There is also reference to the name *'Almond'* on this list with no other details. The reason for this is outlined in the above paragraph.⁵⁸³⁴

IV.3752. In its response to the Statement, Milward stated that Adrian Milward *'does not know any of the employees of Derwent Valley and did not know of them at the time of the Alleged Infringements'*.⁵⁸³⁵ However, the OFT notes the evidence of PT to the contrary; he stated in interview that *'...Milward were a contractor in Belper, the same as Derwent Valley were. They went back a long way, you know, before I joined. Adrian knew that if it wasn't David it would be myself that was pricing it and he would ask for one or the other and then we would give him a call back when we had a figure for him'*.⁵⁸³⁶

IV.3753. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.3754. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.3755. In regard to this tender, a voluntary interview was conducted with PT, who dealt with this tender. PT confirmed that he kept and maintained the tender schedule referred to in paragraph IV.309 to IV.317 above.

IV.3756. PT was asked if he recalled the tender and he referred to the tender schedule, confirmed he recalled it and said, *'It looks as though we came fourth and got beaten out of sight, because according to that we came fourth with a tender of 128,000. And I would guess that 93,000 in brackets was the amount that it was won for'*.⁵⁸³⁷ PT went on to refer to Seddon and he said, *'I don't ever*

⁵⁸³³ Written representations of Milward, 26 June 2008, paragraph 4.2; affidavit of Stephen Milward, 24 June 2008, paragraph 12.

⁵⁸³⁴ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942.

⁵⁸³⁵ Written representations of Milward, 26 June 2008, paragraphs 4.8 to 4.9, affidavit of Adrian Milward, 22 May 2008, paragraph 15.

⁵⁸³⁶ Interview transcript, OFT Document reference 14237, page 19.

⁵⁸³⁷ Interview transcript, OFT Document Reference 14237, page 25.

remember him giving or taking covers'.⁵⁸³⁸ PT commented on Baggaley & Jenkins to the effect that *'if they were pricing a job and going for it I could never get anywhere near their figures*'. PT also noted that *'it looks as though Milward took a cover*'.⁵⁸³⁹ PT said *'I seem to remember pricing the job so it's a good chance it could have been me that gave them the figure*'.⁵⁸⁴⁰

IV.3757. PT confirmed on closer inspection of his handwriting that the name which Derwent Valley had thought was written as *'Almond'* was actually the word *'Admiral'* and recalled tendering against them on a couple of occasions but could not remember who he would have spoken to. He said *'I think it's my bad writing...it does say Admiral, look*'.⁵⁸⁴¹ In regard to the other companies listed on the tender schedule PT was asked if he recalled who he would have dealt with when discussing prices and covers for this tender. PT said, *'No, I mean when they ring up for a cover you give them a cover. Again Milwards, it would have been Adrian, Wildgoose, I would think by then it was Graham Bennett...And Admiral, I can't remember at all*'.⁵⁸⁴²

IV.3758. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender. He recalled the tender, saying *'Oh I did the estimate for that, I can remember... I was the one who priced this*'. DS, examining the entry for this tender in the tender schedule, said that it was in PT's handwriting and *'Milwards looks as though they took a cover, Admiral looks as though they took a cover, and Wildgoose looks as though they took a cover*'. DS was asked whether, as he dealt with the tender, he would have been contacted by the other companies to give assistance and responded, *'No, it would probably come to Pat, even though I'd be pricing it, he'd know I'd be pricing it and he'd write it there*'. DS could not recall whether it would have been him or PT who would have made return telephone calls to competitors.⁵⁸⁴³

IV.3759. Milward stated in its response to the Statement that PT's evidence at interview is *'very vague'* and suggested that *'he cannot say with any certainty that Milward did take a cover price*'.⁵⁸⁴⁴ However, as indicated below, the OFT notes PT's evidence that the inclusion of a 'C' next to an entry in the tender schedule denoted Derwent Valley's understanding that a cover had either been given or taken. PT stated in interview, *'...you don't remember people phoning up saying can you give me help [a cover], you just make a note of it in your book...'*⁵⁸⁴⁵ The OFT considers the inclusion of that entry in the tender schedule to be sufficiently specific to indicate that a cover price was given or taken.

IV.3760. Milward also noted in its response that PT and DS's evidence appears inconsistent in that both claim to recall having priced for this job. The OFT does not accept Milward's interpretation of the witness evidence and notes that only DS claimed definitely to recall it. In any event, the OFT notes that it would not have been inconsistent for both DS and PT to be involved in pricing tenders as in Infringement 120. In respect of who provided the cover prices to competitors, the witnesses are in agreement that it would have been PT. PT

⁵⁸³⁸ Interview transcript, OFT Document Reference 14237, page 25.

⁵⁸³⁹ Interview transcript, OFT Document Reference 14237, page 25.

⁵⁸⁴⁰ Interview transcript, OFT Document Reference 14237, page 26.

⁵⁸⁴¹ Interview transcript, OFT Document Reference 14237, page 26.

⁵⁸⁴² Interview transcript, OFT Document Reference 14237, page 26.

⁵⁸⁴³ Interview transcript, OFT Document Reference 13478, page 32.

⁵⁸⁴⁴ Written representations of Milward, 26 June 2008, paragraph 3.4(g).

⁵⁸⁴⁵ Interview transcript, OFT Document Reference 14237, page 16.

states that '...it's a good chance it could have been me that gave them the figure'⁵⁸⁴⁶ and DS states that it 'would probably have come from Pat' even if he had been pricing the job.⁵⁸⁴⁷

Contemporaneous documentary evidence from leniency applicant Admiral – Tender enquiry list and BT Phone Disc sheet with handwritten notes

IV.3761. During the OFT's visit to Admiral's premises, a tender enquiry list containing handwritten entries was obtained. Within this tender enquiry list was the following entry:⁵⁸⁴⁸

2003					
7/03	24.1.03	X	PITCH ROOF CONVERSION CLAY CROSS	5.2.03	147610

IV.3762. In its leniency application, Admiral provided a contemporaneous document headed 'BT Phone Disc' which is a printed page with Derwent Valley contact details and handwritten notes as outlined below:⁵⁸⁴⁹

BT Phone Disc

ESTIMATE No. 7/03

Pitch Roof, Clay Cross

Name:	Derwent Valley Construction Limited
Street:	29 Bridge St.
PostTown:	Belper
County:	Derbyshire
Post Code:	DE56 1AY
Phone Number:	[...] [C]
	827151

Mr. Tunnicliffe

DERWENT VALLEY Const'n
BELPER
PHONE No:

David
Stones

£147,610 our figure.

Copyright British Telecommunications plc – 01/01/2003, V 4.10 – 10:06 03/02/2003

Evidence from leniency applicant Admiral

IV.3763. As part of its leniency application, Admiral provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

⁵⁸⁴⁶ Interview transcript, OFT Document Reference 14237, page 26.

⁵⁸⁴⁷ Interview transcript, OFT Document Reference 13478, page 32

⁵⁸⁴⁸ Tender enquiry list, OFT Document Reference 4258, page 15.

⁵⁸⁴⁹ BT Phone Disc, OFT Document Reference 5195.

IV.3764. Admiral also provided to the OFT as part of its leniency application a schedule of projects since January 2003 on which Admiral Construction were given a figure by another company to incorporate onto a tender submission or where Admiral Construction gave a figure to another company to incorporate into a tender submission. In this schedule is the following entry:⁵⁸⁵⁰

TENDER NR	TENDER DATE	2003	GIVEN	TAKEN
7/03	5/2	PITCH ROOF CONVERSION CLAY CROSS		✓DERWENT VALLEY CONSTRUCTION

Witness evidence from leniency applicant Admiral

IV.3765. During interviews conducted in connection with its leniency application, Admiral's directors provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

IV.3766. In regard to this tender, a voluntary interview was conducted with Andrew Clarkson ('AC'), Estimating Director at Admiral, who dealt with this tender. AC recalled the tender and said *'it was a job that we weren't interested in, because of the nature of the work. And that again, because we didn't want to upset the Northeast Derbyshire County Council, by sending it back and refusing to quote, I think we decided to take a cover'. AC went on to say 'It was the fact that it was all sub-contract work. There was none of our own work in it; it was the overlaying of an existing roof, and not really our cup of tea'.*⁵⁸⁵¹

IV.3767. AC said that he recalled taking a cover price from Derwent Valley and commented, *'I think, this particular scheme, we actually had trouble finding anybody else that was pricing it, or at least any tenderers, and I think we came across Derwent Valley, who again is a company that I'd never spoken to before, until this particular contract...and obviously I rang them and said are you pricing it? They said, yes, so I said, can you fix me up with a price on it?'*⁵⁸⁵²

IV.3768. AC was asked about the BT Phone Disc entry and identified the handwritten entries *'ESTIMATE No 7/03'* and *'Pitch Roof, Clay Cross'* as being Steve Savage's ('SS'), Managing Director of Admiral, and said that these entries were written at the time of Admiral's leniency application in order to show the tender to which this document related.⁵⁸⁵³ He said that SS had been able to identify this because the figure of £147,610 matched Admiral's bid for this tender. The remainder of the information on this contemporaneous document was, however, written at the time of the tender and was in AC's handwriting.⁵⁸⁵⁴

IV.3769. AC said the document led him to believe that *'we'd obviously contacted Derwent Valley Construction, who... we didn't know where they were, or what the phone number was, and so we needed the BT phone disc to find out where they were and what the phone number was. So, I suspect I was given the name*

⁵⁸⁵⁰ Schedule of projects, OFT Document Reference 5189, page 5.

⁵⁸⁵¹ Interview transcript, OFT Document Reference 13299, page 21.

⁵⁸⁵² Interview transcript, OFT Document Reference 13299, pages 22 and 23.

⁵⁸⁵³ Interview transcript, OFT Document Reference 13299, pages 23 and 24.

⁵⁸⁵⁴ Interview transcript, OFT Document Reference 13299, page 25.

of Derwent Valley by one of... a subcontractor, or material supplier, as someone that had approached them for a price on this particular scheme, and then I rang Derwent Valley and said, are you pricing this job, and if so can you fix me up with a price?'. AC said that he could not recall which of PT or DS he spoke to. AC commented on the writing, '£147,610 our figure' and said that 'Our figure means that is a figure that they [Derwent Valley] gave me, which I then used in our tender'.⁵⁸⁵⁵

IV.3770. SS was also interviewed in regard to this tender. SS recalled little about the tender and commented *'we may not have even had a formal meeting on that, and we would have just agreed that we were going to take a cover on it, rather than send it back, because it was North East Derbyshire District Council. We didn't want to upset them and we would just leave Andy [AC] to deal with the cover'.⁵⁸⁵⁶*

IV.3771. In its response to the Statement, Admiral stated *'AC [Admiral] accepts that it has infringed the provisions of the Competition Act 1998'⁵⁸⁵⁷ and in respect of this infringement *'...this was a contract which AC did not wish to win for perfectly sound commercial reasons, namely that the job was by its nature unattractive and rather than offend an historically important client by refusing to bid AC decided to discover ... from another bidder what was the safe level to bid which was anti-competitive...'.⁵⁸⁵⁸**

Contemporaneous documentary evidence from leniency applicant Wildgoose – Tender Enquiry Register

IV.3772. During the OFT's visit to Wildgoose's premises, a Tender Enquiry Register containing handwritten entries was obtained. Within this Tender Enquiry Register was the following entry:⁵⁸⁵⁹

E No	RCVD	RTN	PROJECT	CLIENT
03/70	21/1	31/1 5/2	Pitch roof conversion at 1-15 Pankhurst Place, Clay Cross	North East Derbyshire District Council

Q/S	ARCHITECT	TENDER SUM/TENDER DELIVERY	DIFF	EST	RST
N.E.D.D.C.	Lindale Design [.....] [C]	Chesterfield £144562		DR/RC	

Witness evidence from leniency applicant Wildgoose

IV.3773. During interviews conducted in connection with its leniency application, Wildgoose's directors and former employees provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.726 to IV.742 above and is relied upon by the OFT in relation to this tender.

⁵⁸⁵⁵ Interview transcript, OFT Document Reference 13299, pages 25 and 26.

⁵⁸⁵⁶ Interview transcript, OFT Document Reference 13298, page 9.

⁵⁸⁵⁷ Written representations of Admiral, 26 June 2008, paragraph 7.

⁵⁸⁵⁸ Written representations of Admiral, 26 June 2008, paragraph 21.2

⁵⁸⁵⁹ Tender Enquiry Register, OFT Document Reference 0094, page 18.

IV.3774. In regard to this tender a voluntary interview was conducted with Ross Cooper ('RC'), an ex-trainee estimator at Wildgoose. RC recalled the tender and said, *'that was actually one of the first jobs that I priced, with Dave Rollinson at the time, who's one of the senior estimators. Wildgoose did price the job competitively. I believe we came second at the time. To the best of my knowledge, I'm unaware of any covers were given out'*.⁵⁸⁶⁰ RC agreed that Derwent Valley was a company with which Wildgoose would have exchanged cover prices but did not recall receiving a cover price for this tender and went on to say *'Whether the director submitted it as a competitive tender I'm unaware of but I, I priced it as a competitive tender'*.⁵⁸⁶¹

IV.3775. In regard to this tender, a voluntary interview was conducted with Wildgoose's former senior estimator, David Rollinson ('DR'). When asked if he recalled this tender, DR said, *'I remember that one, yes. We took a cover on that one'*. Referring to the entry in the tender enquiry register DR went on to say *'It was quite an awkward contract and Ross was looking after it, that is Ross Cooper, with me looking over his shoulder, so to speak, guiding him. But, I think perhaps something more lucrative came in and we decided to take a cover on it'*. DR said that he was 'sure' that £144,562 was a cover price given by Derwent Valley.⁵⁸⁶²

IV.3776. It was put to DR that RC recalled doing a competitive tender for this job to which DR replied *'He would have recalled doing a competitive tender because we were doing it, but I'm sure we took a cover at the end'*.⁵⁸⁶³ DR was shown the Derwent Valley tender register with an entry for this tender, and was informed by the OFT that Derwent Valley had stated that it gave Wildgoose a cover price for this tender. DR was asked if he could recall any contact with Derwent Valley in relation to this tender and said *'Yeah, I think I can now, certainly. Yes I remember it now. I knew we'd taken the cover but I couldn't honestly [say] who from. I remember it now you've said Derwent Valley'*. DR was unable to recall the name of anyone at Derwent Valley with whom he would have spoken. DR went on to confirm that Derwent Valley was a company with whom Wildgoose would have exchanged cover prices.⁵⁸⁶⁴

IV.3777. A voluntary interview was also conducted with Malcolm Clarke ('MC'), General Manager of Minor Works at Wildgoose. When asked if he recalled this tender, MC said that he had helped RC put together the tender and was unaware of a cover price being received from Derwent Valley and being submitted by Wildgoose. MC referring to RC said *'I gave him a hand and guided him in pricing it as well as other people'*⁵⁸⁶⁵ but also commented *'We went to a lot of trouble to price it; I'm very surprised [that a cover price was submitted], unless they thought it were last minute. It could have happened. I wouldn't know'*.⁵⁸⁶⁶ When told that DR had said that Wildgoose took a cover price in

⁵⁸⁶⁰ Interview transcript, OFT Document Reference 11447, page 12.

⁵⁸⁶¹ Interview transcript, OFT Document Reference 11447, pages 13 and 14.

⁵⁸⁶² Interview transcript, OFT Document Reference 11446, page 9. Interview refers to the tender enquiry list as OFT Document Reference 0095 when it is in fact 0094.

⁵⁸⁶³ Interview transcript, OFT Document Reference 11446, page 9.

⁵⁸⁶⁴ Interview transcript, OFT Document Reference 11446, page 10.

⁵⁸⁶⁵ Interview transcript, OFT Document Reference 11456, page 8. Interview refers to the tender enquiry list as OFT Document Reference 0095 when it is in fact 0094.

⁵⁸⁶⁶ Interview transcript, OFT Document Reference 11456, page 9.

respect of this tender, MC replied *'It was an awkward job, Ok, but I'm very surprised that that happened'*.⁵⁸⁶⁷

IV.3778. Wildgoose stated in its response to the Statement in respect of this Infringement, *'It is accepted that Wildgoose may have accepted a cover from Derwent Valley in respect of this tender'*⁵⁸⁶⁸ and *'[o]nly one of its estimators, David Rollinson, appeared to be aware that Wildgoose had taken a cover on this project'*.⁵⁸⁶⁹

Evidence from other companies – Milward

IV.3779. The OFT wrote to Milward on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Milward had participated in bid rigging on this tender. Milward did not reply to this letter and subsequently on 9 May 2007 a call was made by the OFT to the Managing Director of Milward, who said the OFT would not be receiving a response as Milward *'had not done anything wrong'*.⁵⁸⁷⁰

IV.3780. Milward stated in its response to the Statement that *'The works to which this tender related were mainly roofing, which Milward would sub-contract. It was therefore relatively straight-forward to price...Adrian Milward contacted Malcolm Males and requested details of Roofcraft Services' rates, which he could apply to the tender for this project. Malcolm Males provided rates and Adrian Milward prepared and submitted the tender on the basis of these proposed rates. A fully priced tender was submitted'*.⁵⁸⁷¹ Milward adduced the affidavit of Adrian Milward ('AM') which stated that *'A genuine tender was submitted'*⁵⁸⁷² and the affidavit of Malcolm Males which stated that *'I specifically recall this tender as Adrian, as he often does, telephoned me to discuss rates based on the quantities which he had estimated. This was one of the larger schemes on which I have discussed rates with Adrian, and after speaking to Adrian, I drove past the site so that I could take a look at it'*.⁵⁸⁷³

IV.3781. The OFT has given this evidence full and careful consideration and notes the conflicting witness evidence. Whilst the OFT does not dispute that Milward may have contacted Malcolm Males in order to obtain sub-contractor rates for the provision of roofing, the OFT notes that a decision to take a cover price may have been taken after work had begun to seek prices from sub-contractors, for example because the firm in question had won other tenders and would have been unable to take on the tendered works but did not wish to offend the client by returning the tender (see for example the evidence of DR at paragraph IV.3775), or because the sub-contractor prices or other research led the firm to conclude late in the process that the job was unattractive. It is not the OFT's case that either of these or any other particular reason for deciding to take cover applied in the case of Milward, it only notes that there are a number of plausible explanations for this scenario. This initial pricing work does not

⁵⁸⁶⁷ Interview transcript, OFT Document Reference 11456, page 10.

⁵⁸⁶⁸ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.62.

⁵⁸⁶⁹ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.65.3.

⁵⁸⁷⁰ File note of telephone conversation, OFT Document Reference 10716.

⁵⁸⁷¹ Written representations of Milward, 26 June 2008, paragraph 3.4(b) and (c).

⁵⁸⁷² Affidavit of Adrian Milward, 22 May 2008, paragraph 4(c).

⁵⁸⁷³ Affidavit of Malcolm Males, 24 June 2008, paragraph 5.

therefore prove that no cover pricing took place, although it does corroborate in some respects the evidence of AM.

IV.3782. In light of the contradictions between the evidence of AM, on the one hand, and PT and DS on the other hand, the OFT has given very careful consideration to the strength of the documentary evidence implicating Milward for this Infringement. The OFT notes that the marking '(C)' in respect of Milward in the Derwent Valley tender schedule described at paragraph IV.3747 is identical to markings by the names of Admiral and Wildgoose, both of whom have accepted that they engaged in cover pricing with Derwent Valley in respect of this Infringement, on the basis of documentary and/or witness evidence available independently of the Derwent Valley tender schedule.

IV.3783. Moreover, similar entries in the Derwent Valley tender schedule have been confirmed to accurately record the giving of a cover price by the admissions of other Parties in relation to Infringements including 68, 93, 110 and 144.

IV.3784. Therefore, on balance, the OFT remains unpersuaded that the evidence of Malcolm Males and AM is sufficient to undermine the conclusions reached by the OFT based on the contemporaneous documentary evidence and witness evidence of PT and DS, which all indicate that a cover price was taken by Milward in respect of this tender.

IV.3785. Milward stated in its response to the Statement that '*...[t]he tender submitted by Milward on this contract was 10.2% greater than that submitted by Derwent Valley. If Milward's price was a cover, as alleged by the OFT, then this would seem to be exceptionally high compared with the 4 to 5% which appears, from the statements provided to the OFT, to be the "usual" percentage increase employed by those involved in the practice of cover pricing*'.⁵⁸⁷⁴ The OFT is not persuaded by this submission. It is consistent with Derwent Valley providing an enhanced figure by way of cover price, and Milwards themselves enhancing it further before onward transmission to the client. Further, the OFT notes that PT observed in interview that '*...I suppose he [a client] might think it was odd if something [a cover price] was exactly 5% dearer [?] or 10% dearer, but that's not to say it couldn't happen...*'.⁵⁸⁷⁵ The OFT regards this as evidence that it would not be 'unusual' for a client to receive a tender that was based on a cover price and which was in the range of 10 per cent higher than the tender provided as a cover price. The OFT further notes that the cover prices provided by Derwent Valley to Admiral and Wildgoose are even higher than the price provided to Milward. Therefore the OFT cannot therefore accept Milward's assertion that a figure 10.2 per cent higher than Derwent Valley's own bid is inconsistent with a cover price, even if it is beyond the usual range used by Derwent Valley.

IV.3786. Milward in its response to the Statement questioned whether the use of a 'C' entry in the tender schedule indicated that a cover price had been given/taken, suggesting in particular that DS had only '*assumed that [the giving of a cover price] was indicated by the use of the letter 'C''* and that the 'C' may denote 'competitor' as '*it is possible for contractors to note from where their main*

⁵⁸⁷⁴ Written representations of Milward, 26 June 2008, paragraph 3.4(f).

⁵⁸⁷⁵ Interview transcript, OFT Document Reference 14237, page 21.

competition has arisen'.⁵⁸⁷⁶ The OFT does not consider this plausible. The witnesses from Derwent Valley did not indicate that it was a part of their practice in compiling the tender schedule to denote their competitors in this manner. Further, PT confirmed that a 'C' in brackets indicated that Derwent Valley had either given or taken a cover.⁵⁸⁷⁷

The OFT's analysis of the evidence and finding

- IV.3787. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.
- IV.3788. Derwent Valley, Admiral, Wildgoose and Milward each accepted an invitation to tender for this contract. Derwent Valley completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.
- IV.3789. Admiral, Wildgoose and Milward were each unable to submit a tender by the return date and/or did not want to win this contract.
- IV.3790. In respect of Admiral, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, PT, includes reference to its competitor Admiral, with the letter 'C' in brackets next to Admiral's name. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received. In this case Derwent Valley included this tender in its list of cover prices given to competitors and confirmed that it gave a cover price to '*Almond*', later corrected to Admiral by PT whose handwriting had been misinterpreted by Derwent Valley at the time of its leniency application.
- IV.3791. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover price to Admiral. This was supported in interview by DS, who also explained that the entry in the tender schedule indicated that Derwent Valley gave a cover price in respect of this tender to Admiral.
- IV.3792. Providing corroborating documentary evidence is Admiral's contemporaneous BT Phone Disc sheet with handwritten notes by the estimator dealing with this tender, including reference to competitor Derwent Valley with references to DS and PT at Derwent Valley and the note of '*£147,610 our figure*', which matches Admiral's bid for this tender.
- IV.3793. The OFT also notes that this document contains the printed footnote of '*Copyright British Telecommunications plc – 01/01/2003, V 4.10 – 10:06 03/02/2003*', indicating that the document was printed two days prior to the tender deadline of 5 February 2003.
- IV.3794. Admiral has also admitted engaging in bid rigging activity in respect of this tender and identified the party with whom it engaged in bid rigging as Derwent

⁵⁸⁷⁶ Written representations of Milward, 26 June 2008, paragraphs 4.3 to 4.7; affidavit of Keith Holmes, 24 June 2008, paragraphs 8 to 11.

⁵⁸⁷⁷ Interview transcript, OFT Document Reference 14237, page 8.

Valley. This provides further independent corroboration of a cover price having been given by Derwent Valley to Admiral in respect of this tender.

IV.3795. AC at Admiral, who dealt with this tender, confirmed that Admiral had not been interested in this job because of the nature of the work, but did not want to upset the client so decided to take a cover price. He confirmed that he recalled taking a cover price from Derwent Valley because Admiral had found it difficult to locate someone else who was tendering for the contract, so used Derwent Valley, a company with whom AC had not previously spoken, to obtain a cover price. As he had not previously used Derwent Valley for cover pricing, AC used the BT phone disc facility to obtain Derwent Valley's contact details. AC said that he would probably have been alerted to the fact that Derwent Valley was tendering, by a subcontractor.

IV.3796. Both Derwent Valley and Admiral have admitted to engaging in bid rigging activity (cover pricing) in respect of this tender.

IV.3797. In respect of Wildgoose, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, PT, includes reference to its competitor Wildgoose, with the letter 'C' in brackets next to Wildgoose's name. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.3798. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover price to Wildgoose. This was supported in interview by DS, who also explained that the entry in the tender schedule indicated that Derwent Valley gave a cover price in respect of this tender to Wildgoose.

IV.3799. Although Wildgoose did not admit engaging in bid rigging activity in respect of this tender as part of its leniency application to the OFT, in interview DR, a senior estimator at Wildgoose who was overseeing RC (a trainee estimator dealing with the tender), specifically recalled obtaining a cover price and confirmed the party with whom Wildgoose engaged in bid rigging as being Derwent Valley. DR suggested that Wildgoose decided at the last minute to obtain a cover price as *'perhaps something more lucrative came in'* and said he was *'sure'* that £144,562, Wildgoose's tender figure, was a cover price given by Derwent Valley. This provides further independent corroboration of a cover price having been given by Derwent Valley to Wildgoose in respect of this tender.

IV.3800. Wildgoose has now accepted that it may have taken a cover price from Derwent Valley in respect of this tender and acknowledges that one of its estimators appeared to be aware that Wildgoose had taken a cover price on this project.

IV.3801. Both Derwent Valley and Wildgoose's former senior estimator, DR, have admitted to having engaged in bid rigging activities in respect of this tender.

IV.3802. In respect of Milward, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, PT, includes reference to Milward, with the letter 'C' in brackets next to Milward's name. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.3803. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover price to Milward. This was supported in interview by DS, who also explained that the entry in the tender schedule indicated that Derwent Valley gave a cover price in respect of this tender to Milward.

IV.3804. The OFT notes that of the five companies mentioned in Derwent Valley's tender schedule, only Admiral, Wildgoose and Milward have a '(C)' recorded against them. These handwritten entries show that Derwent Valley specifically made notes of cover prices being given to these three competitors. Two of those three competitors, Admiral and Wildgoose, have accepted that they received a cover price from Derwent Valley, reinforcing the interpretation of that entry in relation to the third competitor, Milward.

IV.3805. Derwent Valley also included in its list of companies who exchange cover prices, the names of Admiral, Wildgoose and Milward.

IV.3806. In addition, the OFT notes that North East Derbyshire District Council received a tendered amount of £128,113.28 from Derwent Valley, which is lower than the amounts tendered by Admiral, Wildgoose and Milward. This fits into the pattern consistent with cover prices having been given to Admiral, Wildgoose and Milward by Derwent Valley.

IV.3807. The OFT therefore concludes that contact took place between Derwent Valley and Admiral, between Derwent Valley and Wildgoose, and between Derwent Valley and Milward. The OFT also concludes that Derwent Valley supplied figures to each of Admiral, Wildgoose and Milward for cover bids.

IV.3808. The OFT is satisfied that the facts set out in paragraphs IV.3747 to IV.3807 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵⁸⁷⁸ In particular:

- (a) the provision of figures for cover bids from Derwent Valley to Admiral, from Derwent Valley to Wildgoose and from Derwent Valley to Milward was not unilateral⁵⁸⁷⁹, and contravenes the principle against direct or indirect contact between competitors;⁵⁸⁸⁰
- (b) Admiral, Wildgoose and Milward can each be presumed to have taken account of the information received from Derwent Valley (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁵⁸⁸¹ and
- (c) Derwent Valley can be presumed to have taken account of the information it received from Admiral, Wildgoose and Milward (i.e. that neither Admiral, Wildgoose nor Milward intended to submit competitive bids) when determining its own conduct in the tendering process.⁵⁸⁸²

IV.3809. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place

⁵⁸⁷⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁸⁷⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁸⁸⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁸⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁸⁸² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Derwent Valley and Admiral, between Derwent Valley and Wildgoose and between Derwent Valley and Milward, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for pitched roof conversion, 1-15 Pankhurst Place, Clay Cross, tender dated 5 February 2003.

Immunity and leniency assessment

IV.3810. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3811. In respect of this tender, the OFT became aware of Derwent Valley's involvement in bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Derwent Valley in respect of this Infringement.

IV.3812. In respect of this tender, the OFT became aware of Admiral's involvement in bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Admiral will not therefore receive 100 per cent immunity in respect of this tender. However, Admiral will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.3813. In respect of this tender, the OFT became aware of Wildgoose's involvement in bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Wildgoose will not therefore receive 100 per cent immunity in respect of this tender. However, Wildgoose will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender. The OFT does not accept Wildgoose's assertions in its representations on the Statement, that it should receive a greater leniency percentage reduction for this tender.⁵⁸⁸³

Infringement 137: Flats Refurbishment, 110 and 124 Sycamore Road, Burton-on-Trent – 7 February 2003

Client: Trent and Dove Housing

Parties: Thomas Vale and Allenbuild

IV.3814. On 4 December 2002, Trent and Dove Housing sought tenders for the refurbishment of 60 flats at blocks 110 and 124 Sycamore Road, Stapenhill, Burton-on-Trent. The following five companies were invited to tender: Allenbuild, Bullock, Frank Haslam Milan, Seddon and Thomas Vale. The deadline for the receipt of tenders was 12:00 noon on 7 February 2003.⁵⁸⁸⁴

⁵⁸⁸³ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.62 to 5.66.

⁵⁸⁸⁴ Information from client, OFT Document Reference 10113.

IV.3815. Trent and Dove Housing received the following tender returns:⁵⁸⁸⁵

Company	Time & Date tender received	Amount of tender	Awarded contract
Allenbuild	11:05 am on 7 February 2003	£2,133,092	Yes
Bullock	10:30 am on 7 February 2003	£2,233,117	
Frank Haslam Milan	11:55 am on 7 February 2003	£2,534,000	
Seddon	11:40 am on 7 February 2003	£2,424,050	
Thomas Vale	11:15 am on 7 February 2003	£2,190,886	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.3816. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁵⁸⁸⁶

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5286	B	Trent and Dove Housing	Flats Refurbishment, 100 and 124 Sycamore Road, Burton-on-Trent		CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	07/02/2003 Noon	£2,247,366		Bullock, Allenbuild, FHM	

IV.3817. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a '*little black book*'⁵⁸⁸⁷ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there are entries for Allenbuild at Derby and Birmingham, plus names and telephone numbers. Included amongst the contact names for Allenbuild (Derby) is an entry for Roger Hayes.⁵⁸⁸⁸

IV.3818. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided a tender list referring to this tender, for the week commencing 3 February 2003, shown below:⁵⁸⁸⁹

⁵⁸⁸⁵ Information from client, OFT Document Reference 10113.

⁵⁸⁸⁶ Tender Status spreadsheet, OFT Document Reference 4522, page 31.

⁵⁸⁸⁷ Interview transcript, OFT Document Reference 11418, page 21.

⁵⁸⁸⁸ Contact list, OFT Document Reference 11086, page 1.

⁵⁸⁸⁹ Tender list, OFT Document Reference 4657, page 1.

TENDER LISTS			
W.C		03-Feb-03	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5286	B	Trent & Dove Housing	Flat refurb – 110 & 124 Sycamore Road, Burton upon Trent
APPROX £	EST	CAT	DUE
		B	07/02/2003 noon

Contemporaneous documentary evidence from Allenbuild – Tender Notification, Tender Adjudication Summary and Form of Tender

IV.3819. During the OFT’s search of Allenbuild’s premises, documentation was found for this tender, including a Tender Adjudication Summary.⁵⁸⁹⁰ Under the heading ‘KNOWN COMPETITORS’, is the following handwritten entry:

*‘Thos Vale – Chris Trickett – [...] [C] – Cover Required - £2,190,
Frank Haslam Milan
Bullock
Seddon’*

IV.3820. In addition, the OFT found a Tender Notification, with the details of the tender⁵⁸⁹¹ plus a completed Form of Tender, for the amount of £2,133,092.00 dated 7 February 2003 and signed by ‘R. Hayes’.⁵⁸⁹²

Evidence from leniency applicant Thomas Vale

IV.3821. At Annex 14⁵⁸⁹³ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 23 of the schedule under Annex 14 and within the section for 2003 tenders is the following entry:⁵⁸⁹⁴

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5286	07 February	Trent and Dove Housing	Flats Refurbishment, 110 and 124 Sycamore Road, Burton-on-Trent	Taken (Allenbuild)	Yes (Tender Spreadsheet; Tender List)

IV.3822. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to

⁵⁸⁹⁰ Tender Adjudication Summary, OFT Document Reference B0016.

⁵⁸⁹¹ Tender Notification, OFT Document Reference B0015.

⁵⁸⁹² Form of Tender, OFT Document Reference B0017.

⁵⁸⁹³ Leniency application, OFT Document Reference 4568.

⁵⁸⁹⁴ Leniency application, OFT Document Reference 4568, page 23.

IV.717 above and the Tender List is the internal tender list referred to in that explanation.

IV.3823. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁵⁸⁹⁵ and Allenbuild appears on this list.

IV.3824. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.3825. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.3826. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letter 'B', which appears in the column marked 'DIV', stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁵⁸⁹⁶ In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: *'Flat refurbishment, 110, 124 Sycamore Road, Burton-on-Trent. No approximate figure, I dealt with it. It's category B, which says it was a cover, due in the seventh of the second 2003. A figure has been put in as 2,247,366, and along the list of known competition, Allenbuild is in bold, which means to me that I got...obtained a cover from Allenbuild'*.⁵⁸⁹⁷

IV.3827. CKT admitted that the handwritten entry of '[.....] [C]' on Allenbuild's Tender Adjudication matched Thomas Vale's telephone number. CKT also commented on the difference between Allenbuild's handwritten figure of '£2,190' and the figure of £2,247,366, recorded on Thomas Vale's Tender status spreadsheet and stated *'It may well be that when they rang me, they felt, well, we'd better put it up a bit, it isn't far enough away...So it may well be that that's [the figure recorded by Allenbuild] the figure they actually gave me'*.⁵⁸⁹⁸ CKT could not recall the identity of the person at Allenbuild who he contacted for a cover price for this tender, but confirmed that he would have obtained a name from his contact book. He said *'I've got, Roger Hayes and Steve Wisler...I may well have spoken to either one of them'*.⁵⁸⁹⁹

Evidence from other companies – Allenbuild

IV.3828. The OFT wrote to Allenbuild on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Allenbuild had participated in bid rigging on this tender. In response, Allenbuild

⁵⁸⁹⁵ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁵⁸⁹⁶ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁵⁸⁹⁷ Interview transcript, OFT Document Reference 11419, page 15.

⁵⁸⁹⁸ Interview transcript, OFT Document Reference 11419, pages 15 and 16.

⁵⁸⁹⁹ Interview transcript, OFT Document Reference 11419, pages 16 and 17.

wrote to the OFT through its legal representatives on 2 May 2007⁵⁹⁰⁰ and admitted that it *'engaged in bid rigging activities on this tender with Thomas Vale'*.⁵⁹⁰¹

IV.3829. The OFT subsequently wrote to Allenbuild's ultimate parent company at the time of this Infringement, Renew, on 6 November 2007, asking it to comment on Allenbuild's response to the OFT's Fast Track Offer, given that the OFT intended to hold Renew jointly and severally liable for any infringements committed by Allenbuild in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Renew's legal representatives DLA Piper said, *'Renew is not in a position to make any comment on the agreement entered into with you by either Allenbuild or Bullock, because both businesses are and have been managed quite separately from the holding company'*.⁵⁹⁰²

IV.3830. In their response to the Statement, Allenbuild and Renew stated *'Allenbuild gave a cover price to a competitor for this contract, namely Thomas Vale following a request by Christopher Trickett'* in respect of this Infringement.⁵⁹⁰³

The OFT's analysis of the evidence and finding

IV.3831. From the evidence presented above, the OFT draws the following conclusions.

IV.3832. Thomas Vale and Allenbuild each accepted an invitation to tender for the refurbishment to flats at 110 and 124 Sycamore Road, Burton-on-Trent.

IV.3833. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that this was a cover price. Allenbuild completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Allenbuild being the lowest received and the fact that it won the contract. It appears that Allenbuild's designated estimator for this tender was Roger Hayes.

IV.3834. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records three competitors who were also invited to tender, namely *'Bullock, **Allenbuild** [and] FHM'*. Allenbuild is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT.

IV.3835. Allenbuild's contemporaneous Tender Adjudication Summary records four known competitors who were also invited to tender, namely *'Thomas Vale, Frank Haslam Milan, Bullock [and] Seddon'*. Next to the entry for Thomas Vale appear the words *'Chris Trickett – [.....] [C] – Cover Required – £2,190'*. This entry corroborates the evidence from Thomas Vale that CKT sought and received a cover price from Allenbuild.

⁵⁹⁰⁰ Response from Allenbuild, OFT Document Reference 10214.

⁵⁹⁰¹ Response from Allenbuild, OFT Document Reference 10212, page 2.

⁵⁹⁰² Response from Renew, OFT Document Reference 14129.

⁵⁹⁰³ Written representations of Allenbuild and Renew, 4 July 2008, paragraph 5.8.1.

- IV.3836. It is also noted that the abbreviated figure of '£2,190' on Allenbuild's Tender Adjudication Summary matches Thomas Vale's tender amount of £2,190,886, recorded by the client from Thomas Vale. Thomas Vale's own record of its bid to the client on the Tender Status spreadsheet is slightly higher at £2,247,366. The OFT considers that it is likely that the figure may have been incorrectly recorded by Thomas Vale on its Tender Status spreadsheet.
- IV.3837. Trent and Dove Housing also received a tendered amount of £2,133,092 from Allenbuild, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Allenbuild to Thomas Vale.
- IV.3838. The OFT notes that although three competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Allenbuild. This indicates that a conscious decision was made to differentiate Allenbuild from the other two competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price and make contact with Allenbuild at the time. It also indicates that CKT himself made contact with Allenbuild.
- IV.3839. Thomas Vale admitted that Allenbuild was one of the key competitors with whom it engaged in cover pricing activity. CKT had an entry for Allenbuild in a contact book he used to telephone other contractors for the purpose of obtaining cover prices. Within this contact book, there is an entry under '*Allenbuild (Derby)*' for Roger Hayes. In interview, CKT confirmed that the evidence from Thomas Vale's Tender Status spreadsheet and Allenbuild's Tender Adjudication Summary, shows that a cover price had been received by Thomas Vale from Allenbuild.
- IV.3840. Finally, both parties admit to bid rigging activities on this tender. The OFT notes that Allenbuild admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the evidence from Thomas Vale. This provides additional corroboration of the OFT's evidence in respect of this tender.
- IV.3841. Whilst a discrepancy remains between Thomas Vale's recorded bid and the amount recorded by the client, the OFT considers it significant that Allenbuild's contemporaneous record of Thomas Vale's bid (i.e. the cover price it gave to Thomas Vale) matches that of the Thomas Vale bid received by the client and is therefore likely to be correct.
- IV.3842. The OFT therefore concludes that contact took place between Thomas Vale and Allenbuild. The OFT also concludes that Allenbuild supplied a figure to Thomas Vale for a cover bid.
- IV.3843. The OFT is satisfied that the facts set out in paragraphs IV.3816 to IV.3842 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁹⁰⁴ In particular:

⁵⁹⁰⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from Allenbuild to Thomas Vale was not unilateral⁵⁹⁰⁵, and contravenes the principle against direct or indirect contact between competitors;⁵⁹⁰⁶
- (b) Thomas Vale can be presumed to have taken account of the information received from Allenbuild (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁹⁰⁷ and
- (c) Allenbuild can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁵⁹⁰⁸

IV.3844. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Allenbuild in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the refurbishment to flats at 110 and 124 Sycamore Road, Burton-on-Trent, tender deadline 7 February 2003.

Immunity and leniency assessment

IV.3845. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3846. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 138: Chapelton Partnership Office Refurbishment, Sheffield – 12 February 2003
Client: Sheffield City Council
Parties: Totty Building⁵⁹⁰⁹, Harlow & Milner and Lemmeleg

IV.3847. On 8 January 2003, Sheffield City Council ('Sheffield CC') sought tenders for Chapelton Partnership office refurbishment, Sheffield. The return date for the tender was 12:00 noon on 12 February 2003 and five companies were invited to tender: Harlow & Milner, Lemmeleg, Sheffield Direct Services, Totty Building, and Wildgoose.⁵⁹¹⁰

IV.3848. Sheffield CC received the following tender returns by 12:00 noon on 12 February 2003:⁵⁹¹¹

⁵⁹⁰⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁹⁰⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁹⁰⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁹⁰⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁹⁰⁹ Totty Building is a subsidiary of Propensity.

⁵⁹¹⁰ Information from client, OFT Document Reference 9341.

⁵⁹¹¹ Information from client, OFT Document Reference 9341.

Company	Date and time tender received	Amount of tender	Awarded the tender
Harlow & Milner	Prior to 12:00 noon 12 February 2003	£604,874	
Lemmeleg	Prior to 12:00 noon 12 February 2003	£665,903	
Sheffield Direct Services	Prior to 12:00 noon 12 February 2003	£575,056	
Totty Building	Prior to 12:00 noon 12 February 2003	£650,182	
Wildgoose	Prior to 12:00 noon 12 February 2003	£554,617	

IV.3849. Sheffield CC said that the lowest tender sum received exceeded the budget available. This scheme was revised and re-tendered at a later date.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Harlow & Milner

IV.3850. On Harlow & Milner's Enquiry Record for this tender under the section headed '*Estimators Comments*' is written '*Cover, Totty, Lemmeleg, Opposition, Direct Works, Wild Goose*'.⁵⁹¹²

Evidence from leniency applicant Harlow & Milner

IV.3851. As part of its leniency application, Harlow & Milner provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.352 to IV.362 above and is relied upon by the OFT in relation to this tender.

IV.3852. In Harlow & Milner's list of projects it is stated that Harlow & Milner provided cover prices to Totty Building and Lemmeleg.⁵⁹¹³

IV.3853. In its response to the Statement, Harlow & Milner confirmed that in respect of this Infringement it '*...provided cover prices to Totty Building and Lemmeleg*'.⁵⁹¹⁴

Witness evidence from Harlow & Milner

IV.3854. During interviews conducted in connection with its leniency application, Harlow & Milner's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.352 to IV.362 above and is relied upon by the OFT in relation to this tender.

IV.3855. In respect of this tender in interview with the OFT, Chris Smithson ('CS'), an estimator at Harlow & Milner, said with regard to the '*Estimators Comments*' on the Enquiry Record, '*Yes, we've shown that we're giving a cover price to Totty's and Lemmeleg's and as far as we know the other opposition on the contract was Sheffield Council's direct works and Wild Goose construction*'.⁵⁹¹⁵

IV.3856. Also, in respect of this tender in interview with the OFT, Graham Pearce ('GP'), an ex-estimator at Harlow & Milner, said with regard to the '*Estimators*

⁵⁹¹² Enquiry Record, OFT Document Reference A0572.

⁵⁹¹³ Project list, OFT Document Reference A0565, page 4.

⁵⁹¹⁴ Written representation of Harlow & Milner, 27 June 2008, paragraph 3.9(b).

⁵⁹¹⁵ Interview transcript, OFT Document Reference 13469, page 3.

Comments' on the Enquiry Record, 'Well it's not exactly clear, but reading between the lines, I would say that we'd given cover to Totty and Lemmeleg and I'm guessing by opposition we mean direct works - Sheffield Council must have a direct works department. Wildgoose were pricing it and that's who we were up against'.⁵⁹¹⁶

Evidence from leniency applicant Propensity

IV.3857. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.3858. In its response to the Statement, Propensity confirmed that it *'...has admitted its involvement in the Alleged Infringements ... [and] has no comments on the OFT's descriptions or conclusions in relation of [sic] the Alleged Infringements'.⁵⁹¹⁷*

Witness evidence from leniency applicant Propensity

IV.3859. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.3860. In respect of this tender in interview with the OFT, Alan Loveday ('AL'), Commercial Manager at Totty Building, said that it had taken a cover price and that, *'I do remember the job in quite a bit of detail. It was I think Sheffield Direct Works Department won the job. The documentation was quite poor, incomplete and because Sheffield City Council weren't able to award more time to a proper right considered tender that was the cause of our reason to take the cover'.⁵⁹¹⁸*

Evidence from other companies – Lemmeleg

IV.3861. The OFT wrote to Lemmeleg on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lemmeleg had participated in bid rigging on this tender. In response to this letter, Lemmeleg admitted that *'We engaged in bid rigging activities on this tender. Although the position is not entirely clear, it appears that Lemmeleg received a cover price from Harlow & Milner Limited'.⁵⁹¹⁹*

IV.3862. In its response to the Statement, Lemmeleg confirmed that it has *'...acknowledged involvement in cover pricing in relation to the Relevant Infringements [including this Infringement]'.⁵⁹²⁰*

⁵⁹¹⁶ Interview transcript, OFT Document Reference 13468, pages 7 and 8.

⁵⁹¹⁷ Written representations of Propensity, 27 June 2008 (as amended on 30 March 2009), paragraphs 6.15 and 6.16.

⁵⁹¹⁸ Interview transcript, OFT Document Reference 11349, page 10.

⁵⁹¹⁹ Response from Lemmeleg, OFT Document Reference 10505, page 3.

⁵⁹²⁰ Written representations of Lemmeleg, 26 June 2008, paragraph 4.1.

The OFT's analysis of the evidence and finding

IV.3863. From the evidence presented above, the OFT draws the following conclusions.

IV.3864. Totty Building, Harlow & Milner and Lemmeleg each accepted an invitation to tender for this contract.

IV.3865. Totty Building and Lemmeleg were unable to submit a tender by the return date and/or did not want to win this tender.

IV.3866. In regard to Totty Building, Harlow & Milner has confirmed that it provided a cover price to Totty Building. CS and GP confirmed that the typed entry '*Cover, Totty*' in the '*Estimators Comments*' on the Enquiry Record, means that it gave a cover price to Totty Building.

IV.3867. Propensity has confirmed that it received a cover price on this tender. AL said that the reasons why it took a cover price on this tender were that '*The documentation was quite poor, incomplete and because Sheffield City Council weren't able to award more time*'.

IV.3868. In regard to Lemmeleg, Harlow & Milner has confirmed that it provided a cover price to Lemmeleg. CS and GP confirmed that the typed entry '*Cover ...Lemmeleg*' in the '*Estimators Comments*' on the Enquiry Record means that it gave a cover price to Lemmeleg.

IV.3869. Lemmeleg has admitted engaging in bid rigging activities with Harlow & Milner on this tender, in response to the OFT's letter of 22 March 2007. The OFT notes that that Lemmeleg admitted that the party with whom it engaged in bid rigging was Harlow & Milner, without being shown the OFT's evidence that Harlow & Milner was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.3870. The OFT notes in addition that the tenders submitted by Totty Building and Lemmeleg were both higher than the tender submitted by Harlow & Milner, a pattern consistent with cover prices having been provided by Harlow & Milner.

IV.3871. The OFT therefore concludes that contact took place between Harlow & Milner and Totty Building, and between Harlow & Milner and Lemmeleg. The OFT also concludes that Harlow & Milner supplied figures to each of Totty Building and Lemmeleg for cover bids.

IV.3872. The OFT is satisfied that the facts set out in paragraphs IV.3850 to IV.3871 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵⁹²¹ In particular:

- (a) the provision of figures for cover bids from Harlow & Milner to each of Totty Building and Lemmeleg was not unilateral⁵⁹²², and contravenes the principle against direct or indirect contact between competitors;⁵⁹²³
- (b) Totty Building and Lemmeleg can each be presumed to have taken account of the information received from Harlow & Milner (i.e. the

⁵⁹²¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁹²² See paragraph IV.73 of the General comments on cover pricing section.

⁵⁹²³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- respective cover prices) when determining their own respective conduct in the tendering process;⁵⁹²⁴ and
- (c) Harlow & Milner can be presumed to have taken account of the information it received from Totty Building and Lemmeleg (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁵⁹²⁵

IV.3873. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Harlow & Milner and Totty Building and between Harlow & Milner and Lemmeleg, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for Chapeltown Partnership office refurbishment, Sheffield, tender deadline 12 February 2003.

Immunity and leniency assessment

IV.3874. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3875. Harlow & Milner informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Harlow & Milner will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.3876. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information provided by Harlow & Milner. Propensity will not therefore receive 100 per cent immunity in respect of this tender. However, Propensity will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 139: Factory and Offices, Haydock – 28 February 2003
Client: CCL Interchem Limited
Parties: Clegg and F Parkinson

IV.3877. On 13 January 2003, CCL Interchem Limited ('Interchem') sought tenders for a factory and office development in Haydock, involving the construction of a new build manufacturing facility with integral office development. The following six companies were invited to tender: Clegg, Russells Limited, Marshalls Limited, F Parkinson, John Sisk and G & J Seddon. The deadline for the receipt of tenders was 12:00 noon on 28 February 2003.⁵⁹²⁶

IV.3878. CCL Interchem Limited received the following tender returns:⁵⁹²⁷

⁵⁹²⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁹²⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁹²⁶ Information from client, OFT Document Reference 7350.

⁵⁹²⁷ Information from client, OFT Document Reference 7350.

Company	Date tender received	Amount of tender	Awarded contract
Clegg	28 February 2003	£1,293,264	
Russells Limited	28 February 2003	£1,060,595	Yes
Marshalls Limited	28 February 2003	£1,065,270	
F Parkinson	28 February 2003	£1,209,006	
John Sisk	28 February 2003	£1,162,508	
G & J Seddon	28 February 2003	£1,498,629	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Clegg – Internal Email and Estimating Workload Sheets

IV.3879. As part of its leniency application, Clegg provided a contemporaneous printout of an internal email with handwritten notes on it regarding this tender.⁵⁹²⁸ This email, dated 31 January 2003 from David Short ('DS') to Jonathan Mark King ('JMK') with the subject 'RE: CCL', is in reply to an email from JMK dated 30 January 2003 asking 'Did you manage to find out who is pricing this??'.

IV.3880. Typed on the reply email from DS is a list of undertakings, against which handwritten notes and markings have been made as follows:

'Jon
 [...] [C]Sisk Manchester
 Bosco Stockport
 [...] [C]Marshalls
 Russells Manchester
 [...] [C]Sedden M'cstr [.....] [C] John Hirst.
 Parkinsons Blackpool – T. [...] [C]'

To the right of this is another handwritten entry:

'Chris Mitchell | by 10-30
 ↓
MR. HOLLICK Nigel Seddon.'
 ALAN.

At the bottom of the document there is further handwriting which shows:

'Marshalls [.....] [C] Not main works
Mr. Walvin
Small works – Steve Hep install
 16-10pm spoke to Ken Hollingworth & can fax thro'.

- 1) lead – in; 4wk
- 2) Commence on TBA
- 3) Period will not exceed 26 wk
- 4) Figure £1 293 264. 00 from Parkinson'

⁵⁹²⁸ Email, OFT Document Reference 4480.

IV.3881. During the OFT's visit to Clegg's premises an estimating workload sheet dated '27th January 2003' was obtained.⁵⁹²⁹ The information in this sheet is set out in the table below and the word 'COVER' in the final column was handwritten onto the printed document.

Projects	Project Manager/QS	Design Team	Notes	Start on Site
Shed at Haydock		Cox Freeman	D&B	

CM	Est.	Est Value	
	PD	0.63	Submit 17/2 COVER

IV.3882. Another estimating workload sheet dated '17th February 2003' was also obtained during this visit.⁵⁹³⁰ This contained the same details set out in the above paragraph, however in this instance the entry has a handwritten 'C' after it as shown below.

Projects	Project Manager/QS	Design Team	Notes	Start on Site
Shed at Haydock		Cox Freeman	D&B	

CM	Est.	Est Value	
	PD	0.63	Submit 17/2 C

Evidence from leniency applicant Clegg

IV.3883. As part of its leniency application, Clegg provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.274 to IV.292 above and is relied upon by the OFT in relation to this tender.

IV.3884. In Schedule A of its leniency application, Clegg set out a summary of all tenders from March 2000 to July 2005 that were '*Definites – projects where cover pricing has taken place and evidence is available together with estimator's corroboration of evidence*'.⁵⁹³¹ The information in the summary was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page two of the summary within Schedule A and within the section for 2004 tenders is the following entry extract:⁵⁹³²

⁵⁹²⁹ Estimating Workload, OFT Document Reference 4082.

⁵⁹³⁰ Estimating Workload, OFT Document Reference 4083.

⁵⁹³¹ Cover Price Activity, OFT Document Reference 4460, page 2.

⁵⁹³² Schedule A – Definites, OFT Document Reference 4461, page 2.

Year	T No.	Description	Client	Date	Value
2003	T541	Factory and Offices - Haydock	CCL Interchem Ltd	28-02	1,293,264

Cover From	Cover To	Contact
Parkinsons 50 Mowbray Drive Blackpool	-	Alan Hollick [.....] [C]
Evidence enclosed OFT/14 – email dated 31.01.03 with list of tenderers and estimators handwritten notes detailing period and price '4) figure £1,293,264 from Parkinson'.		

IV.3885. In the above table '*OFT/14 – email dated 31.01.03*' refers to the internal email discussed in paragraphs IV.3879 and IV.3880 above.

IV.3886. Clegg also provided to the OFT, as part of an Executive Summary, a list of key competitors with whom Clegg exchanged information. The name '*Parkinsons Limited*' appears on this list.⁵⁹³³

IV.3887. In its response to the Statement, Clegg stated '*[i]t is not disputed that Clegg participated in cover pricing during the relevant period set out in the Statement.*'⁵⁹³⁴

Witness evidence from leniency applicant Clegg

IV.3888. During interviews conducted in connection with its leniency application, Clegg's employees provided general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.274 to IV.292 above and is relied upon by the OFT in relation to this tender.

IV.3889. In regard to this tender a voluntary interview was conducted with David Clarke ('DC'), an estimator at Clegg, who dealt with this tender. DC stated during interview that the handwriting on the internal email described in paragraphs IV.3879 and IV.3880 above was his. Commenting on these notes, DC said '*one to four at the bottom are where we need to fill in items on the form of tender and therefore they were bullet points for me to ask the question of the person giving me the cover, so as that if we were to submit a period of 24 weeks, and they were at 26, we could be therefore more competitive, by default.*'⁵⁹³⁵

IV.3890. DC believed that Clegg did not have the resources to undertake the tender due to its workload at that time. DC had done work in the Blackpool area before and knew of F Parkinson. Referring to the list of companies on the internal email DC commented '*they [F Parkinson] were one of them out of that list that I'd heard of before, and for no other reason, spoke to them.*'⁵⁹³⁶ DC confirmed he spoke

⁵⁹³³ Executive Summary, OFT Document Reference 4458.

⁵⁹³⁴ Written representations of Clegg, 27 June 2008, paragraph 51.

⁵⁹³⁵ Interview transcript, OFT Document Reference 13276, page 15. DC's comment referred, in the OFT's view, to the fact that he wanted to be careful that some of the terms and conditions of his submitted tender bid (such as contract length) did not end up being more competitive than F Parkinson's tender bid, in order to be sure that he did not accidentally win the contract.

⁵⁹³⁶ Interview transcript, OFT Document Reference 13276, page 15.

to Alan Hollick at F Parkinson and went on to say *'having...found the telephone number for Parkinson's I asked to speak to someone in estimating, he was the guy dealing with that tender in estimating'*.⁵⁹³⁷

IV.3891. Referring to the estimating workload sheets⁵⁹³⁸, DC explained the initials PD as referring to Phil Dallison, Group Manager and said that *'it could have been that PD, Phil Dallison, was going to be pulled in to price it, and subsequently other commitments, it didn't happen'*. DC did not know who made the handwritten notes on the workload sheets but believed it would have been done during a directors' meeting.⁵⁹³⁹

IV.3892. Simon Blackburn ('SB'), Managing Director of Clegg, during interview recalled the tender. SB said that the architects were a company by the name of Cox Freeman who they regularly worked with on the food side of the Clegg business and commented *'it was a scheme that we'd obviously expressed some interest at some point when it came in. It is clearly out of our patch and I suspect it probably looked attractive at some point and later on didn't look so. So, we found out who was pricing it and took cover on that'*.⁵⁹⁴⁰ SB said at that time the estimators worked for JMK and DS was Managing Director of food projects. SB indicated the reason Clegg knew that F Parkinson was tendering for this contract stating, *'I would infer the information came from, Cox Freeman. So David would have contacted the architect, and he's given us the name there'*.⁵⁹⁴¹

IV.3893. SB recalled that a cover price was taken from F Parkinson before he was shown the email containing F Parkinson's name. He said *'I think it was Parkinson's. I only remember purely because it's a name that sticks in my memory because we didn't... it's out of our patch'*.⁵⁹⁴²

Evidence from other companies – F Parkinson

IV.3894. The OFT wrote to F Parkinson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that F Parkinson had participated in bid rigging on this tender. F Parkinson, represented by Pannone LLP, stated via emailed letter on 23 April 2007 that it was accepting this offer.⁵⁹⁴³ As part of this response F Parkinson completed an annex schedule of suspect tenders. This schedule included *'Factory and Offices Haydock'*, against which Colin Oakley ('CO'), a Director of F Parkinson wrote *'We engaged in bid rigging activities on this tender with Clegg'*.⁵⁹⁴⁴

IV.3895. The OFT subsequently wrote to F Parkinson's ultimate parent company at the time of this Infringement, Mowbray, on 5 November 2007, asking it to comment on F Parkinson's response to the OFT's Fast Track Offer, given that the OFT intended to hold Mowbray jointly and severally liable for any infringements committed by F Parkinson in respect of which the OFT ultimately

⁵⁹³⁷ Interview transcript, OFT Document Reference 13276, page 16.

⁵⁹³⁸ Estimating Workload, OFT Document References 4082 and 4083.

⁵⁹³⁹ Interview transcript, OFT Document Reference 13276, page 18.

⁵⁹⁴⁰ Interview transcript, OFT Document Reference 13278, page 14.

⁵⁹⁴¹ Interview transcript, OFT Document Reference 13278, page 14.

⁵⁹⁴² Interview transcript, OFT Document Reference 13278, page 14.

⁵⁹⁴³ Response from F Parkinson, OFT Document Reference 10269.

⁵⁹⁴⁴ Response from F Parkinson, OFT Document Reference 10270, page 2.

decided to impose financial penalties. During a telephone call in response to this letter, CO, also a Director of Mowbray, stated that he was aware of the original Fast Track letter and F Parkinson's response and fully supported the position of its subsidiary, F Parkinson.⁵⁹⁴⁵

IV.3896. In its response to the Statement, F Parkinson stated '*it is not disputed that Parkinson participated in cover pricing during the relevant period set out in the Statement.*'⁵⁹⁴⁶

The OFT's analysis of the evidence and finding

IV.3897. From the evidence presented above, the OFT draws the following conclusions.

IV.3898. Clegg and F Parkinson each accepted an invitation to tender for this contract. Clegg was unable to submit a tender by the return date and/or did not want to win this tender due to current workload and its location.

IV.3899. Clegg's contemporaneous internal email, a document printed out and written on by hand by an estimator, DC (the estimator for the tender), records six competitors, five of whom were known to have also been invited to tender for this contract, namely John Sisk, Marshalls Limited, Russells Limited, Seddon and F Parkinson. Where F Parkinson has been written, next to it is 'T. [.....] [C]' which is the telephone number for the head office of F Parkinson as confirmed on the F Parkinson website.⁵⁹⁴⁷ Clegg has confirmed that Alan Hollick, whose name also appears here, was contacted at F Parkinson in order to obtain a cover price. Alan Hollick is or was a director of F Parkinson.⁵⁹⁴⁸ The details written at the foot of the email were those that Clegg confirmed it obtained from F Parkinson in order to complete the tender return form.

IV.3900. The OFT notes that although six competitors have been recorded on the internal email, only one of these has a price figure attributed to it, i.e. F Parkinson. This indicates that Clegg specifically recorded that an exchange of information took place with that company out of all those that submitted a tender bid. The OFT further notes that the price figure noted as '*from Parkinson*' on Clegg's document is identical to the bid submitted by Clegg.

IV.3901. Although details relating to the other companies, such as names and telephone numbers, and a note of a telephone conversation with a Ken Hollingworth, were recorded on the email, the OFT does not have sufficient evidence to suggest that Clegg engaged in bid rigging with any company other than F Parkinson in respect of this tender.

IV.3902. Clegg admitted that F Parkinson was one of the competitors with whom it engaged in the exchange of information. DC had knowledge of F Parkinson and in interview SB noted they were likely to have obtained details of other tenderers from the architect. In its leniency application Clegg admitted in respect of this particular tender that the estimator recollected obtaining a cover price from F Parkinson. DC confirmed this recollection during interview.

⁵⁹⁴⁵ File note of telephone conversation, OFT Document Reference 13952.

⁵⁹⁴⁶ Written representations of F Parkinson, 25 June 2008, paragraph 51.

⁵⁹⁴⁷ F Parkinson's website, OFT Document Reference 11867, page 42.

⁵⁹⁴⁸ Annual Report, OFT Document Reference 11853, page 2.

- IV.3903. The printed estimator workload sheets have handwritten notes of 'COVER' and 'C' respectively. The OFT notes from interviews with Clegg's employees that notes such as these refer to cover prices having been exchanged when written next to references to tenders.
- IV.3904. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that F Parkinson admitted that the party with whom it engaged in bid rigging was Clegg, without being shown the OFT's evidence that Clegg was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.3905. In addition, the OFT notes that Interchem received a tendered amount of £1,293,264 from Clegg, which is higher than the amount tendered by F Parkinson. This fits into the pattern consistent with a cover price having been given from F Parkinson to Clegg.
- IV.3906. The OFT therefore concludes that contact took place between Clegg and F Parkinson. The OFT also concludes that F Parkinson supplied a figure to Clegg for a cover bid.
- IV.3907. The OFT is satisfied that the facts set out in paragraphs IV.3879 to IV.3906 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁵⁹⁴⁹ In particular:
- (a) the provision of a figure for a cover bid from F Parkinson to Clegg was not unilateral⁵⁹⁵⁰, and contravenes the principle against direct or indirect contact between competitors;⁵⁹⁵¹
 - (b) Clegg can be presumed to have taken account of the information received from F Parkinson (i.e. the cover price) when determining its own conduct in the tendering process;⁵⁹⁵² and
 - (c) F Parkinson can be presumed to have taken account of the information it received from Clegg (i.e. that Clegg did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁵⁹⁵³
- IV.3908. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Clegg and F Parkinson in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for construction of factory and offices, Haydock, date of tender 28 February 2003.

Immunity and leniency assessment

- IV.3909. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁵⁹⁴⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁹⁵⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁹⁵¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁹⁵² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁹⁵³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.3910. In respect of this tender, the OFT became aware of bid rigging activities by virtue of two estimating workload sheets obtained during the visit under section 27 on 18 January 2006. Clegg will not therefore receive 100 per cent immunity in respect of this tender. However, Clegg will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 140: Alterations to Newhall Methodist Church, Swadlincote, Derbyshire – 3 March 2003
Client: Howitt Partnership
Parties: Herbert Baggaley, W R Bloodworth and Wiggett

IV.3911. On 23 January 2003, the Howitt Partnership ('Howitt'), on behalf of the Newhall Methodist Church, sought tenders for alterations to the chapel and meeting room block to provide disability access and toilet facilities at Newhall Methodist Church, Swadlincote, Derbyshire.⁵⁹⁵⁴ The following five companies were invited to tender: Herbert Baggaley, W R Bloodworth, Wiggett, Davlyn and Manor Construction.⁵⁹⁵⁵ The deadline for the receipt of tenders was 12:00 noon on Monday 3 March 2003.

IV.3912. Howitt received the following tender returns:⁵⁹⁵⁶

Company	Date tender received	Amount of tender	Awarded contract
Manor Construction	3 March 2003	£308,281.00	Yes
Davlyn	3 March 2003	£319,913.00	
Herbert Baggaley	3 March 2003	£355,437.55	
W R Bloodworth	3 March 2003	£373,428.00	
Wiggett	3 March 2003	£381,009.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley – Pre-tender Quality Plan

IV.3913. Herbert Baggaley's 'Pre-tender Quality Plan'⁵⁹⁵⁷ relating to this tender, provided to the OFT as part of its leniency application, has under the section headed 'Known Competitors', the following entries, all of which are handwritten:

' *Bloodworth - R: Michael Campbell [.....] [C] CR - £373428*
 Wiggett Bros - Paul Wiggett [.....] [C] CR - £381009'

IV.3914. The 'Pre-tender Quality Plan' states that Herbert Baggaley's tender sum was £355432.55.

⁵⁹⁵⁴ Information from client, OFT Document Reference 8419.

⁵⁹⁵⁵ Information from client, OFT Document Reference 8419.

⁵⁹⁵⁶ Information from client, OFT Document Reference 8419.

⁵⁹⁵⁷ Pre-tender Quality Plan, OFT Document Reference 3905, page 47.

IV.3922. W R Bloodworth also provided to the OFT a *'Schedule of Tender [sic] Enquiries where Cover prices Provided/Requested March 2000 to Date'*⁵⁹⁶¹, which shows under Entry 4, that W R Bloodworth did receive a cover on this tender, *'Cover taken from Baggaleys – Roger Hase'*.

IV.3923. W R Bloodworth also provided to the OFT a copy of its *'Tender enquiries Register 2000 – July 2003'*. On the page headed *'January 03 Continued'*, there is an entry in respect of this tender which was marked by W R Bloodworth following its leniency application, *'got cover think off Baggaley'*.⁵⁹⁶²

IV.3924. W R Bloodworth also produced a list *'Contacts for Cover Prices'*⁵⁹⁶³ which included the following entries.

	Name of Company	Name of Contact	Telephone Number
10.	Baggaleys of Mansfield	Roger Hays Jamie Braybrook	[.....] [C]
27.	Wiggett Brothers	Paul Wiggett	[.....] [C]

IV.3925. In its response to the Statement, W R Bloodworth confirmed that *'[i]t is not disputed that Bloodworth participated in cover pricing during the relevant period set out in the Statement.'*⁵⁹⁶⁴

Witness evidence from leniency applicant – W R Bloodworth

IV.3926. During interviews conducted in connection with its leniency application, W R Bloodworth's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.718 to IV.725 above and is relied upon by the OFT in relation to this tender.

IV.3927. Michael Campbell ('MC'), an estimator at W R Bloodworth, was asked specifically about this tender in interview on 16 November 2006, and in particular on what W R Bloodworth had based its admission that a cover had been received from Herbert Baggaley. MC said, *'Because we went to have a look around – went to have a look at the job, decided that it wasn't for us, and found out they were pricing it – I can't remember there was something in the job that was specialist and we found out from them that they were pricing it.'*⁵⁹⁶⁵

IV.3928. When asked if he recalled contacting Herbert Baggaley, MC said, *'Yes, I rang him [Roger Hayes of Herbert Baggaley], yeah'.* MC was asked if Roger Hayes gave him a cover price and he confirmed, *'Yeah ... The reason, I think the actual reasoning being was that it was nearer him than us and it's a bit too far out for us.'*⁵⁹⁶⁶

⁵⁹⁶¹ Schedule of Tender Enquiries, OFT Document Reference 3912, page 1.

⁵⁹⁶² Tender Enquiries, OFT Document Reference 3913, page 39.

⁵⁹⁶³ Contacts For Cover Prices, OFT Document Reference 3915.

⁵⁹⁶⁴ Written representations of W R Bloodworth, 27 June 2008, paragraph 49.

⁵⁹⁶⁵ Interview transcript, OFT Document Reference 6347, page 11.

⁵⁹⁶⁶ Interview transcript, OFT Document Reference 6347, page 11.

Evidence from other companies – Wiggett

IV.3929. The OFT wrote to Wiggett on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wiggett had participated in bid rigging on this tender. Wiggett failed to respond to the letter. On 15 May 2007 the OFT contacted Wiggett by telephone to clarify the position. Wiggett confirmed receipt of the OFT's letter and informed the OFT that it had not responded as it was rejecting the OFT's Fast Track Offer.⁵⁹⁶⁷

IV.3930. In its response to the Statement, Wiggett stated in respect of this Infringement that it '*...must accept that in light of the evidence ... [outlined in the Statement] that a cover price must have been taken from Herbert Baggaley.*'⁵⁹⁶⁸ Wiggett also accepted '*... that the practice of cover pricing does constitute an agreement or concerted practice between undertakings which may have the effect of restricting or distorting competition contrary to the prohibition contained in Chapter 2 [sic] Competition Act 1998...*'⁵⁹⁶⁹

The OFT's analysis of the evidence and finding

IV.3931. From the evidence presented above, the OFT draws the following conclusions.

IV.3932. Herbert Baggaley, W R Bloodworth and Wiggett each accepted an invitation to tender for this contract.

IV.3933. W R Bloodworth and Wiggett were unable to submit a tender by the return date and/or did not want to win this tender.

IV.3934. With regard to W R Bloodworth, Herbert Baggaley's '*Pre-tender Quality Plan*' shows that a cover was given to W R Bloodworth by Herbert Baggaley and this was confirmed by AN of Herbert Baggaley in his interview.⁵⁹⁷⁰ The '*Pre-tender Quality Plan*'⁵⁹⁷¹ records '*Bloodworth - R; Michael Campbell [.....] [C] CR - £373428*'. The telephone number recorded was that of W R Bloodworth and Michael Campbell was employed by W R Bloodworth⁵⁹⁷² as an estimator. W R Bloodworth's submission was £373,428, an amount identical to that recorded on Herbert Baggaley's '*Pre-tender Quality Plan*'.

IV.3935. W R Bloodworth admitted that it took a cover price from Roger Hayes at Herbert Baggaley, without sight of the contemporaneous evidence from Herbert Baggaley.⁵⁹⁷³ MC of W R Bloodworth confirmed in his interview that he recalled phoning Roger Hayes for a cover price and was given one.

IV.3936. In the light of the contemporaneous evidence and Herbert Baggaley's and W R Bloodworth's admissions, the OFT considers that Herbert Baggaley supplied W R Bloodworth with a cover price for this tender.

⁵⁹⁶⁷ Response from Wiggett, OFT Document Reference 10895.

⁵⁹⁶⁸ Written representations of Wiggett, 25 June 2008, paragraph 3.2.

⁵⁹⁶⁹ Written representations of Wiggett, 25 June 2008, paragraph 2.1.

⁵⁹⁷⁰ Interview transcript, OFT Document Reference 11317, pages 25 and 26.

⁵⁹⁷¹ Pre-tender Quality Plan, OFT Document Reference 3905, page 47.

⁵⁹⁷² Interview transcript, OFT Document Reference 6347, pages 1 and 2.

⁵⁹⁷³ Schedule of Tender Enquiries, OFT Document Reference 3912.

IV.3937. With regard to Wiggett, Herbert Baggaley's *'Pre-tender Quality Plan'* shows that a cover was given to Wiggett by Herbert Baggaley and this was confirmed by AN of Herbert Baggaley in his interview.⁵⁹⁷⁴ The *'Pre-tender Quality Plan'* records *'Wiggett Bros – Paul Wiggett [.....] [C] CR - £381009'*.⁵⁹⁷⁵ Wiggett's submission was £381,009, an amount identical to that recorded on Herbert Baggaley's *'Pre-tender Quality Plan'*.

IV.3938. The telephone number recorded on Herbert Baggaley's *'Pre-tender Quality Plan'* was that of Wiggett and Paul Wiggett was employed by Wiggett, corroborated by the *'Contacts for Cover Prices'*⁵⁹⁷⁶ submitted in W R Bloodworth's leniency application.

IV.3939. In the light of the contemporaneous evidence and Herbert Baggaley's admission and explanation of that evidence, the OFT considers that Herbert Baggaley gave a cover price to Wiggett for this tender.

IV.3940. The OFT also notes that both W R Bloodworth and Wiggett submitted tenders higher than that submitted by Herbert Baggaley, the pattern consistent with cover prices having been provided.

IV.3941. The OFT notes that all Parties have now admitted liability in respect of this Infringement.

IV.3942. The OFT therefore concludes that contact took place between Herbert Baggaley and W R Bloodworth, and between Herbert Baggaley and Wiggett. The OFT also conclude that Herbert Baggaley supplied figures to both W R Bloodworth and Wiggett for their respective cover bids.

IV.3943. The OFT is satisfied that the facts set out in paragraphs IV.3913 to IV.3942 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁵⁹⁷⁷ In particular:

- (a) the provision of figures for cover bids from Herbert Baggaley to each of W R Bloodworth and Wiggett was not unilateral⁵⁹⁷⁸, and contravenes the principle against direct or indirect contact between competitors;⁵⁹⁷⁹
- (b) W R Bloodworth and Wiggett can each be presumed to have taken account of the information received from Herbert Baggaley (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁵⁹⁸⁰ and
- (c) Herbert Baggaley can be presumed to have taken account of the information it received from W R Bloodworth and Wiggett (i.e. that neither of them intended to submit a competitive bid) when determining its conduct in the tendering process.⁵⁹⁸¹

IV.3944. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place

⁵⁹⁷⁴ Interview transcript, OFT Document Reference 11317, pages 25 and 26.

⁵⁹⁷⁵ Pre-tender Quality Plan, OFT Document Reference 3905, page 47.

⁵⁹⁷⁶ Contacts For Cover Prices, OFT Document Reference 3915.

⁵⁹⁷⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁵⁹⁷⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁵⁹⁷⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁵⁹⁸⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁵⁹⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Herbert Baggaley and W R Bloodworth and between Herbert Baggaley and Wiggett, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for alterations to the chapel and meeting room block to provide disability access and toilet facilities at Newhall Methodist Church, Swadlincote, Derbyshire, tender deadline 3 March 2003.

Immunity and leniency assessment

IV.3945. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3946. Herbert Baggaley informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Herbert Baggaley will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.3947. In respect of this tender, the OFT became aware of W R Bloodworth's involvement in bid rigging activities by virtue of the information provided by Herbert Baggaley. W R Bloodworth will not therefore receive 100 per cent immunity in respect of this tender. However, W R Bloodworth will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 141: Refurbishment & Extensions to St Catherine's Cottages, London Road, Newark, Nottinghamshire – 3 March 2003
Client: Macarthy Hughes International
Parties: Bodill, Wrights (Lincoln)⁵⁹⁸² and E Taylor (trading as Carmalor)

IV.3948. On 21 January 2003, Macarthy Hughes International sought tenders on behalf of the Hospital of St Leonard's Trust for refurbishment & extensions to St Catherine's Cottages, London Road, Newark. The return date for the tender was 3 March 2003 and four companies were invited to tender: Bodill, E Taylor (trading as Carmalor)⁵⁹⁸³, J L Roberts & Son and Wrights (Lincoln).⁵⁹⁸⁴

IV.3949. Macarthy Hughes International received the following tender returns:⁵⁹⁸⁵

Company	Date tender received	Amount of tender	Awarded the tender
Bodill	3 March 2003	£908,866	
Carmalor [E Taylor]	3 March 2003	£971,995	
J L Roberts & Son	Declined to tender		
Wright's (Lincoln)	3 March 2003	£956,450	

⁵⁹⁸² Wrights (Lincoln) is a subsidiary of Simons.

⁵⁹⁸³ In its description and analysis of this Infringement, for consistency with the available documentary and witness evidence, the OFT has referred to 'Carmalor' but notes that this is a trading name for E Taylor, which is accordingly the responsible legal entity.

⁵⁹⁸⁴ Information from client, OFT Document Reference 8677.

⁵⁹⁸⁵ Information from client, OFT Document Reference 8677.

IV.3950. Macarthy Hughes International abandoned this tender exercise because it considered the tenders to be over budget. The project was therefore re-tendered for Block A only, on 28 March 2003.⁵⁹⁸⁶

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.3951. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill.⁵⁹⁸⁷

1. *Bodill*

2. *ROBERTS (RETURNING)*

£956450 ✓ 3. *WRIGHTS - LINCOLN*
SHEILA WOODHAM
ARTHUR FOX [...] [C]

£971990 4. *CARMALOR C FROM US*
STEVE FAULKS [...] [C] [...] [C]
[...] [C]'

IV.3952. The tender sheet states that Bodill's submitted figure was £908,866.⁵⁹⁸⁸

IV.3953. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has confirmed that the handwritten annotations '*ROBERTS (RETURNING)*', '*£956450 ✓*', '*WRIGHTS – LINCOLN*', '*SHEILA WOODHAM*', '*ARTHUR FOX [.....] [C]*', '*£971990*', '*CARMALOR C FROM US*' and '*STEVE FAULKS [.....] [C]*' under the section headed '*Tenderers*' were made by him.⁵⁹⁸⁹ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.3954. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.3955. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁵⁹⁹⁰ In respect of this tender, Bodill confirmed that it gave two cover prices, to Wrights (Lincoln) and Carmalor.⁵⁹⁹¹ Bodill also stated that £40,000 profit was added to its tender figure, apparently because it did not like the client.⁵⁹⁹²

⁵⁹⁸⁶ Information from client, OFT Document Reference 8677.

⁵⁹⁸⁷ Tender sheet, OFT Document Reference 0666.

⁵⁹⁸⁸ Tender sheet, OFT Document Reference 0666.

⁵⁹⁸⁹ Contracts document, OFT Document Reference 6426, pages 86 and 118.

⁵⁹⁹⁰ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁵⁹⁹¹ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 5.

⁵⁹⁹² Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 5.

IV.3956. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.3957. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from leniency applicant Wrights (Lincoln) – invitation to tender letter from Macarthy Hughes International

IV.3958. On the invitation to tender letter sent to Wrights (Lincoln), provided to the OFT as part of its leniency application, is handwritten '*EO2-01-03 Bodill*'.⁵⁹⁹³

Evidence from leniency applicant Wrights (Lincoln)

IV.3959. As part of its leniency application, Wrights (Lincoln) provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.567 to IV.592 above and is relied upon by the OFT in relation to this tender.

IV.3960. Wrights (Lincoln) and Arthur Fox ('AF'), an ex-estimator at Wrights (Lincoln), who was the estimator for this tender, have provided an explanation of the handwritten entry '*EO2-01-03 Bodill*' on the invitation to tender letter. Langleys Solicitors, acting for AF, confirmed after speaking with AF that the handwriting is his, that '*EO2-01-03*' was his reference and meant that this was the second tender enquiry of January 2003, and that the reference to '*Bodill*' was noted by AF as he was aware that it was also pricing the job.⁵⁹⁹⁴ Eversheds, acting for Wrights (Lincoln), further confirmed that '*it seems that whoever wrote Bodill on the document was aware that Bodill was tendering for the work and ... took a cover [price] from them [Bodill]*'.⁵⁹⁹⁵

IV.3961. In their response to the Statement, Simons stated '*Simons Group acknowledges the participation of...Wrights in Alleged Infringement 141*'.⁵⁹⁹⁶

Witness evidence from leniency applicant Wrights (Lincoln)

IV.3962. During interviews conducted in connection with its leniency application, Wrights (Lincoln) employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.567 to IV.592 above and is relied upon by the OFT in relation to this tender.

IV.3963. In respect of this tender Andy Rowe ('AR'), Managing Director from April 2002 to April 2003 at Wrights (Lincoln), could not recall anything about this tender other than that he signed the tender and submitted it. AR explained that AF did the calculations for the job and said '*I signed this* [the tender

⁵⁹⁹³ Invitation to tender, OFT Document Reference B3876.

⁵⁹⁹⁴ Email from Langleys, OFT Document Reference 13406.

⁵⁹⁹⁵ Email from Eversheds, OFT Document Reference B4278, page 1.

⁵⁹⁹⁶ Written representations of Simons, 26 June 2008, paragraph 4.1.1.

submission], *I wrote it but I didn't calculate it*'.⁵⁹⁹⁷ On being shown by the OFT the Bodill tender sheet for this tender he said that in respect of the figure against Wrights (Lincoln), £956,450, *'that is a cover price yes'*.⁵⁹⁹⁸

IV.3964. Although AF could not recall this tender, on being shown by the OFT the Bodill tender sheet for this tender he said, *'Sheila Woodham. She was the estimating admin lady, and there's my name there, with a telephone numberit's Wright's number, [.....] [C]'*.⁵⁹⁹⁹ AF also said that, *'it looks likely that, that the company took a cover from them [Bodill], but I had no contact with this one'*.⁶⁰⁰⁰ AR explained that Sheila Woodham ('SW') was AF's assistant and that *'She did a lot of the donkey work...sending out enquiries to sub contractors and chasing up sub contractors'*.⁶⁰⁰¹

Evidence from other companies – E Taylor

IV.3965. The OFT wrote to E Taylor on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that E Taylor had participated in bid rigging on this tender. In response to this letter, E Taylor said that after consideration it felt unable to accept the OFT's Fast Track Offer.⁶⁰⁰²

IV.3966. In its response to the Statement, E Taylor stated *'Having reviewed the relevant sections of the SO that relate to ourselves, and most particularly the 3rd party evidence referred to, we have a degree of empathy with the OFT as to why they have reached the conclusion that Carmalor were involved in cover pricing. Unfortunately, as a result of the death of [the former Managing Director]... and the departure of [former Estimating Director] Steve Fowkes... our ability to defend our position is significantly prejudiced by the fact that we have no access to contemporaneous documentary evidence. Nor can we offer any meaningful personal testimony from those allegedly involved in the practice, that would act as a legally adequate defence. Thus, we find ourselves in "no man's land" neither able to admit, nor adequately defend the allegations levelled at us.*'⁶⁰⁰³

IV.3967. However, E Taylor submitted a statement from Wayne Creed ('WC'), the only person named in the Statement still employed by E Taylor, with its response to the Statement. However, WC confirmed that he was not at all involved with this particular tender.⁶⁰⁰⁴ He stated that Steve Fowkes was an estimating director for the company from 1987, and that estimating work *'was controlled entirely'* by him.⁶⁰⁰⁵

IV.3968. The OFT appreciates that a company would not often keep a record of giving a cover price, and may no longer employ the persons alleged to have given that cover, and in that instance recognises the need to assess the quality of

⁵⁹⁹⁷ Interview transcript, OFT Document Reference 12793, page 11.

⁵⁹⁹⁸ Interview transcript, OFT Document Reference 12793, page 11.

⁵⁹⁹⁹ Interview transcript, OFT Document Reference 13131, page 19.

⁶⁰⁰⁰ Interview transcript, OFT Document Reference 13131, page 21.

⁶⁰⁰¹ Interview transcript, OFT Document Reference 12793, page 12.

⁶⁰⁰² Response from E Taylor, OFT Document Reference 11006.

⁶⁰⁰³ Written representations of E Taylor, 27 June 2008, page 4.

⁶⁰⁰⁴ Witness statement of Wayne Creed, 25 June 2008, paragraph 7.

⁶⁰⁰⁵ Witness statement of Wayne Creed, 25 June 2008, paragraphs 3 and 8.

evidence implicating the accused party. The OFT also recognises that where a cover price was given by a sole employee, other employees or directors of that company may not be aware whether or not such conduct took place. It is therefore sensitive to the need to review the available evidence critically, and is satisfied that the contemporaneous documentary evidence and witness evidence set out above is sufficient to demonstrate an Infringement in relation to this tender.

The OFT's analysis of the evidence and finding

IV.3969. From the evidence presented above, the OFT draws the following conclusions.

IV.3970. Bodill, Wrights (Lincoln) and Carmalor each accepted an invitation to tender for this contract.

IV.3971. Bodill completed the estimating process for the tender for this contract. Wrights (Lincoln) and Carmalor were unable to submit a tender by the return date and/or did not want to win this tender.

IV.3972. In regard to Wrights (Lincoln), Bodill's tender sheet records '*£956450 ✓ 3. WRIGHTS - LINCOLN SHEILA WOODHAM ARTHUR FOX [.....] [C]*' against Wrights (Lincoln). Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £956,450 against Wrights (Lincoln), a figure that was identical to the tender that Wrights (Lincoln) submitted for the work.

IV.3973. Bodill's tender sheet also recorded the names of two of the estimating staff at Wrights (Lincoln), '*Sheila Woodham*' and '*Arthur Fox*' and the telephone number of Wrights (Lincoln), a number confirmed as the telephone number of Wrights (Lincoln) by AF of Wrights (Lincoln), providing further evidence that contact was made between the two parties. Furthermore, on being shown Bodill's tender sheet, both AF and AR accepted that it was likely that Wrights (Lincoln) was provided with a cover price by Bodill.

IV.3974. In addition, the OFT notes that the word '*Bodill*' is written on the invitation to tender letter provided by Wrights (Lincoln). No other competitors are mentioned on this letter and the OFT considers it most likely, given the weight of the contemporaneous evidence from Bodill and the fact that Wrights (Lincoln) has confirmed that this handwritten note was made during the tender process and that it shows that it took a cover price from Bodill, that this was Wrights (Lincoln)'s record of the company from whom it took a cover price for this tender. No other company apart from Bodill submitted a figure below Wrights (Lincoln) and it could not therefore have obtained a cover price from anyone else.

IV.3975. In regard to Carmalor, Bodill's tender sheet records '*£971990 4. CARMALOR C FROM US STEVE FAULKS [.....] [C]*'. Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £971,990, a figure that was only £5 different from the tender that Carmalor submitted for the work, which was £971,995.

IV.3976. Bodill's tender sheet also recorded the name of a Carmalor estimator, '*Steve Faulks*' and the telephone number '*[.....] [C]*', providing further evidence

that contact was made between the two parties. This is corroborated by information obtained from W R Bloodworth, a list of contacts for cover prices, which names 'Steve' at 'Carmalor Southwell' with a telephone contact number of '[.....] [C]'⁶⁰⁰⁶ and by the evidence of E Taylor that Steve Fowkes was an estimating director of the company from 1987 until August 2007.⁶⁰⁰⁷

IV.3977. Although E Taylor has not admitted engaging in this bid rigging activity, the OFT considers that the strong and compelling evidence in respect of the other parties involved in bid rigging activities for this tender, and both parties' admissions of engaging in bid rigging activities for this tender, support the OFT's interpretation of Bodill's tender sheet as indicating that E Taylor too was provided with a cover price

IV.3978. The OFT notes in addition that the tenders submitted by Wrights (Lincoln) and Carmalor were both higher than the tender submitted by Bodill, even though Bodill's tender had been inflated beyond a normal level of profit margin. The relative position of the submitted tenders is consistent with the pattern consistent with cover prices having been provided by Bodill.

IV.3979. Bodill's tender sheet also records '*ROBERTS (RETURNING)*'. This action is confirmed by the information provided by Macarthy Hughes International, which shows that J L Roberts & Son declined to tender. The OFT notes in addition that the use of the present tense, '*(RETURNING)*', indicates that this annotation was made before the tender deadline.

IV.3980. The OFT therefore concludes that contact took place between Wrights (Lincoln) and Bodill, and between Carmalor and Bodill. The OFT also concludes that Bodill supplied figures to each of Wrights (Lincoln) and Carmalor for cover bids. The OFT notes that these were the only tenders submitted for this work for the Hospital of St Leonard's Trust, and that no genuine tenders were therefore submitted for this work. The OFT further notes that the work was subsequently re-tendered because the tenders were considered to be over budget and that Bodill, which submitted the lowest price and gave cover prices to the only other bidders, Wrights (Lincoln) and Carmalor, has admitted to adding an additional amount for profit.

IV.3981. The OFT is satisfied that the facts set out in paragraphs IV.3951 to IV.3980 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁰⁰⁸ In particular:

- (a) the provision of figures for cover bids from Bodill to each of Wrights (Lincoln) and Carmalor was not unilateral⁶⁰⁰⁹, and contravenes the principle against direct or indirect contact between competitors;⁶⁰¹⁰
- (b) Wrights (Lincoln) and Carmalor can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process,⁶⁰¹¹ and

⁶⁰⁰⁶ Contacts For Cover Prices, OFT Document Reference 3915.

⁶⁰⁰⁷ Witness statement of Wayne Creed, 25 June 2008, paragraph 3.

⁶⁰⁰⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁰⁰⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁰¹⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁰¹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Bodill can be presumed to have taken account of the information it received from Wrights (Lincoln) and Carmalor (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁶⁰¹²

IV.3982. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Wrights (Lincoln) and Bodill, and between Carmalor and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for refurbishment & extensions to St Catherine's Cottages, London Road, Newark, tender deadline 3 March 2003.

Immunity and leniency assessment

IV.3983. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.3984. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.3985. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information provided by Bodill. Wrights (Lincoln) will not therefore receive 100 per cent immunity in respect of this tender. However, Wrights (Lincoln) will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 142: New Judo Hall Walsall Campus – 7 March 2003
Client: University of Wolverhampton
Parties: Sol and Galliford Construction

IV.3986. On 24 January 2003, the University of Wolverhampton ('UoW') sought tenders for the construction of a new sports hall with specialist facilities for judo, gymnasium, exterior sports changing rooms, synthetic pitch and track and improvements to the grass pitches at its Walsall Campus. The following six companies were invited to tender: Bluestone, Galliford Construction⁶⁰¹³, Linford, Mowlem, Thomas Vale and Sol. The closing date for return of tenders was 7 March 2003 by 5:00 pm.⁶⁰¹⁴

IV.3987. UoW received the following tender returns:⁶⁰¹⁵

⁶⁰¹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁰¹³ The OFT notes that the client's response records 'Galliford Midlands' as a tendering party. It has been confirmed in the written representations of Galliford Try, 27 June 2008, paragraph 1.4 that Galliford Midland was the trading name of Galliford Try's subsidiary, Galliford Construction, at the time of the Infringement.

⁶⁰¹⁴ Information from client, OFT Document Reference 9887.

⁶⁰¹⁵ Information from client, OFT Document Reference 9887.

Company	Date and Time Tender Received	Amount of Tender	Awarded Contract
Bluestone	Not Recorded	£4,252,716	
Galliford Construction	Not Recorded	£4,702,340	
Linford	Not Recorded	£4,254,498	Yes
Mowlem	Not Recorded	£4,527,671	
Thomas Vale	Not Recorded	£4,684,642	
Sol	Not Recorded	£4,384,221	

Evidence of agreement and/or concerted practice

Contemporaneous evidence from leniency applicant Sol – Tender Register

IV.3988. During the OFT's visit to Sol's premises under section 27 on 18 January 2006, a copy of its Tender Register was produced. This contained the following entry for this contract:⁶⁰¹⁶

DATE DUE	JOB DESCRIPTION	CLIENT	ARCHITECT	QUANTITY SURVEYOR
7 MARCH '03 003-007 4K	NEW JUDO HALL WALSALL CAMPUS	UNIVERSITY OF WOLVERHAMPTON	TACP	EC HARRIS

TYPE	TENDER SUM	ESTIMATOR	COMPETITION	RESULTS/ COMMENTS
B.Q.	4,384,221 (3%. 125,905)	M.W.	GALLIFORD C 4,702,340 THOS VALE MOWLEM BLUESTONE LINFORD LICHFIELD	START 21 APRIL '03 COMP 30 JAN '04

Evidence from leniency applicant Sol

IV.3989. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.3990. In particular, Sol provided to the OFT an analysis of its tender sheets since March 2000.⁶⁰¹⁷ In respect of the tender for a new judo hall at Walsall Campus due 7 March 2003, Sol confirmed that it provided a cover price to 'Galliford'.

IV.3991. In its response to the Statement, Sol acknowledged that it had '*... admitted engaging in the practice of cover pricing in the 7 tenders listed in the Statement of Objections.*'⁶⁰¹⁸

Witness evidence from leniency applicant Sol

IV.3992. During interviews conducted in connection with its leniency application, Sol's employees provided further general explanation of its participation in cover

⁶⁰¹⁶ Tender Register, OFT Document Reference 4170, page 3.

⁶⁰¹⁷ Cover Prices Given, OFT Document Reference 4358, page 3.

⁶⁰¹⁸ Written representations of Sol, 27 June 2008, page 3.

pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.3993. When interviewed about this tender, John Cummings ('JC'), Chief Estimator at Sol, identified the writing in the Tender Register⁶⁰¹⁹ as his, with the exception of the names in the '*Competition*' column, which he identified as having been written by an estimator's assistant, Shirley Peters.⁶⁰²⁰ When asked if the Tender Sum was the figure Sol tendered for this contract he said, '*Yep*'.⁶⁰²¹ This figure, £4,384,221, is the same as that in the tender reply received by UoW. When asked to explain the entry '*3% 125,905*' he replied '*That's the profit and overhead margin that we applied*'.⁶⁰²² He further explained the entries in the '*Competition*' column as being the names of Sol's competitors for the tender. JC was asked to identify the initials '*MW*' in the '*Estimator*' column. He said, '*That's Mike Whittington who's again left, a couple of years ago*'. He confirmed that Mike Whittington had dealt with this tender on a day to day basis. JC further identified as his writing the '*C*' before the entry '*4,702,340*' next to '*Galliford*'.⁶⁰²³ When asked to explain the entry he said, '*That would mean, as far as I can remember and I'd be amazed if it wasn't, us giving a cover to Gallifords, and that's the figure that I gave them*'.⁶⁰²⁴

IV.3994. JC was asked to explain the entry in the '*Tender Cover Prices Given*' column of the Tender Sheet Analysis for this particular tender and especially the '*CG*' in brackets next to '*Galliford*'. He confirmed that this meant that Sol gave a cover price to Galliford Construction for this tender. He also confirmed that Sol was not awarded the contract.⁶⁰²⁵

Evidence from other companies – Galliford Try

IV.3995. The OFT wrote to Galliford Try on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Galliford Try had participated in bid rigging on this tender. In response to the OFT's letter G P Fitzgerald, Chief Executive of Galliford Try, admitted that the company did engage in bid rigging activities on this particular tender but was unable to recall details of the other party or parties involved.⁶⁰²⁶

The OFT's analysis of the evidence and finding

IV.3996. From the evidence presented above, the OFT draws the following conclusions.

IV.3997. Sol and Galliford Construction each accepted an invitation to tender for this contract. Galliford Construction was unable to submit a tender by the return date and/or did not want to win this contract.

IV.3998. The contemporaneous Tender Register entry for this tender shows a tender figure sum of £4,384,221, which is the same as Sol submitted to UoW. The '*C*'

⁶⁰¹⁹ Tender Register, OFT Document Reference 4170, page 3.

⁶⁰²⁰ Interview transcript, OFT Document Reference 13474, pages 3 and 4.

⁶⁰²¹ Interview transcript, OFT Document Reference 13474, page 3.

⁶⁰²² Interview transcript, OFT Document Reference 13474, page 3.

⁶⁰²³ Interview transcript, OFT Document Reference 13474, page 3.

⁶⁰²⁴ Interview transcript, OFT Document Reference 13474, page 4.

⁶⁰²⁵ Interview transcript, OFT Document Reference 13474, page 4.

⁶⁰²⁶ Response from Galliford Try, OFT Document Reference 10318, page 5.

and the '4,702,340' after 'Galliford' in the 'Competition' column indicate that Sol provided a cover price to Galliford Construction for this tender.⁶⁰²⁷

IV.3999. JC of Sol, in his interview, confirmed that he supplied a cover price to Galliford Construction as indicated by the 'C' and the '4,702,340' after 'Galliford' in the 'Competition' column of the Tender Register.⁶⁰²⁸ The OFT notes that the figure noted by Sol in its Tender Register, £4,702,340, is identical to the tender submitted by Galliford Construction in respect of this tender.

IV.4000. Sol admitted under leniency that it gave a cover price to Galliford Construction in respect of this tender.⁶⁰²⁹ In interview JC confirmed that 'CG' in parentheses after 'Galliford' in the 'Tender Prices given' column of the 'Tender Cover Price Analysis' document⁶⁰³⁰, submitted by Sol as part of its leniency submission, meant that Sol provided a cover price to Galliford Construction in respect of this tender.⁶⁰³¹

IV.4001. Galliford Try admitted in its reply to the OFT's letter of 22 March 2007 that it had engaged in bid rigging activities on this tender, but was unable to recall with whom.

IV.4002. Both companies have therefore admitted to engaging in bid rigging in respect of this tender. The OFT notes that the tender figure of £4,702,340 submitted by Galliford Construction is in keeping with a cover price being sufficiently higher than the bid submitted by Sol to remain credible whilst also ensuring that the undertaking lost the tender.

IV.4003. The OFT therefore concludes that contact took place between Sol and Galliford Construction. The OFT also concludes that Sol supplied a figure to Galliford Construction for a cover bid.

IV.4004. The OFT is satisfied that the facts set out in paragraphs IV.3988 to IV.4003 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁰³² In particular:

- (a) the provision of a figure for a cover bid from Sol to Galliford Construction was not unilateral⁶⁰³³, and contravenes the principle against direct or indirect contact between competitors;⁶⁰³⁴
- (b) Galliford Construction can be presumed to have taken account of the information received from Sol (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁰³⁵ and
- (c) Sol can be presumed to have taken account of the information it received from Galliford Construction (i.e. that Galliford Construction did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁰³⁶

⁶⁰²⁷ Tender Register, OFT Document Reference 4170, page 3.

⁶⁰²⁸ Interview transcript, OFT Document Reference 13474, pages 3 and 4.

⁶⁰²⁹ Cover Prices Given, OFT Document Reference 4358, page 3.

⁶⁰³⁰ Cover Prices Given, OFT Document Reference 4358, page 3.

⁶⁰³¹ Interview transcript, OFT Document Reference 13474, page 4.

⁶⁰³² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁰³³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁰³⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁰³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁰³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.4005. In its response to the Statement, Sol asserted that it ‘... *provided a cover price to Galliford Try at its request and did not consider for one moment that in doing so it would be able to obtain a competitive advantage for itself. Sol refutes the OFT’s assumption that its knowledge of Galliford Try’s uncompetitive bid [affected] in anyway its tender conduct.*’⁶⁰³⁷ Similarly, in its response to the Statement, Galliford Try asserted ‘[t]here is no evidence adduced in the [Statement] to indicate that any over price [sic] from Sol to Galliford Try would have had any impact on Sol’s tender amount or the client’s choice of tenderer.’⁶⁰³⁸

IV.4006. The OFT notes that the presumption that an undertaking takes account of information received from a competitor when determining its own conduct is a legal presumption⁶⁰³⁹, which neither Sol nor Galliford Try has adduced any evidence to rebut. To the extent that Sol and Galliford Try submit that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in paragraphs VI.135 to VI.142 of Section VI (Enforcement) below.

IV.4007. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Sol and Galliford Construction in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for a new judo hall at Walsall Campus, University of Wolverhampton, date of tender 7 March 2003.

Immunity and leniency assessment

IV.4008. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4009. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Sol on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, Sol will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 143: Refurbishment Work and an Extension to 144 Sneinton Dale, Sneinton, Nottingham – 14 April 2003
Client: Allan Joyce Architects
Parties: Loach and W R Bloodworth

IV.4010. On 14 March 2003, Alan Joyce Architects sought tenders for refurbishment work and an extension to 144 Sneinton Dale, Sneinton, Nottingham. The return date for the tender was 14 April 2003 and six companies were invited to

⁶⁰³⁷ Written representations of Sol, 27 June 2008, Annex 5, Detailed Explanation, paragraphs 2 and 3.

⁶⁰³⁸ Written representations of Galliford Try, 27 June 2008, paragraph 6.17.9.

⁶⁰³⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

tender: W R Bloodworth, Loach, I H Moore & Co, Herbert Baggaley, Beaufort and NCBW.⁶⁰⁴⁰

IV.4011. The tender was sent out by Davis Langdon Everest on behalf of Allan Joyce Architects and the following tender returns were opened on 15 April 2003.⁶⁰⁴¹

Company	Date tender received	Amount of tender	Awarded contract
W R Bloodworth	Details not known	£140,950	Yes
Loach	Details not known	£149,811	
I H Moore & Co	Details not known	£153,895	
Herbert Baggaley	Details not known	£159,998	
Beaufort	Details not known	£173,397	
NCBW	Declined to tender		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Loach – tender spreadsheets

IV.4012. During the OFT's search of Loach's premises on 28 June 2005, two printed spreadsheets were found. The first spreadsheet⁶⁰⁴² contained the following entry:

	<i>Contract</i>	<i>Sum</i>	<i>Margin</i>	<i>%</i>	<i>Note</i>	<i>Opposition</i>
14-Apr	<i>Refurbishment & extension, 144 Sneinton Road, Sneinton, Nottingham</i>				<i>Cover</i>	<i>Bloodworth®/ Beaufort</i>

IV.4013. A second spreadsheet, headed 'Small Works Tenders' and marked 2003, contained the following entry:⁶⁰⁴³

	Contract	Sum	Margin	%	Note	Winner	Var %	Job No.	Opposition
14-Apr	Refurbishment & extension, 144 Sneinton Road, Sneinton, Nottingham	149,811	20,000	13.35%					Bloodworth/ Beaufort

Evidence from leniency applicant Loach

IV.4014. As part of its leniency application, Loach's legal representatives provided a general explanation of its participation in cover pricing.⁶⁰⁴⁴ This evidence is set out in paragraphs IV.453 to IV.469 above and is relied upon by the OFT in relation to this tender.

⁶⁰⁴⁰ Information from client, OFT Document Reference 7032.

⁶⁰⁴¹ Information from client, OFT Document Reference 7032.

⁶⁰⁴² Contract spreadsheet, OFT Document Reference 2976.

⁶⁰⁴³ Small Works Tenders, OFT Document Reference 2946, page 3.

⁶⁰⁴⁴ Leniency application, OFT Document Reference 4017.

IV.4015. In its response to the Statement, Loach confirmed that it *'...took a cover from W R Bloodworth on this tender due to a lack of estimating resources and the inability to return the tender for future marketing considerations.'*⁶⁰⁴⁵

Witness evidence from leniency applicant Loach

IV.4016. In interview Andrew Arbon-Davies ('AA'), Director responsible for the estimating department of Loach, explained that John Rowe ('JR'), an estimator at Loach, dealt with all small works tenders.⁶⁰⁴⁶ AA explained why there were two separate tender spreadsheets obtained from Loach containing similar information in respect of this tender. The first spreadsheet which was headed 'CONTRACT', in respect of this tender recorded under the column 'Note' the word 'Cover' and under the column 'Opposition' records 'Bloodworth[©]'. The second spreadsheet, headed 'SMALL WORKS TENDERS', in respect of this tender recorded the price at which Loach tendered, but made no reference to cover pricing or '©'.

IV.4017. AA said that prior to the OFT's visit, he had seen the spreadsheets that JR had been compiling with the entries 'Cover' and '©' recorded and said he *'didn't think it was the right thing to do. I just didn't think we should be putting "cover" on a list. And then, as obviously the sort of panic set in when we heard about raids elsewhere I asked John to remove any "Cs" that he'd put on the forms. So that's what he did, so that's why there's one version of one and another.'*⁶⁰⁴⁷ AA confirmed that this was done under his instruction, and that *'the first instruction was to remove the covers purely because I didn't think we should be putting covers on there. The second instruction was to remove the reference to "Cs" down the side as a sort of, if you like, a panic reaction to the investigation that we heard was going on.'*⁶⁰⁴⁸

IV.4018. In interview JR confirmed that he was asked by AA to stop recording references to 'Cover' or '©' on tender spreadsheets: *'Mr Arbon-Davis said that we ought to preclude – stop doing it.....he told us you [the OFT] were due to visit us and that it would really be inappropriate if, you know, it became known that we did that practice.'*⁶⁰⁴⁹ JR confirmed that, acting on AA's instructions, he removed any references to cover pricing and produced a new tender spreadsheet.⁶⁰⁵⁰

IV.4019. In respect of this tender, AA said, *'we've definitely taken a cover on it. Whether that cover was taken from Bloodworth with the, '©' reference there or whether it was from Beaufort's and Bloodworth also took a cover, I don't know.'*⁶⁰⁵¹ On being told by the OFT that W R Bloodworth had indicated that it provided Loach with a cover price AA said *'Yes, I'd be happy to accept that. Yes.'*⁶⁰⁵²

⁶⁰⁴⁵ Written representations of Loach, 26 June 2008, page 21.

⁶⁰⁴⁶ Interview transcript, OFT Document Reference 11312, page 3.

⁶⁰⁴⁷ Interview transcript, OFT Document Reference 11312, page 5.

⁶⁰⁴⁸ Interview transcript, OFT Document Reference 11312, page 5.

⁶⁰⁴⁹ Interview transcript, OFT Document Reference 11313, page 5.

⁶⁰⁵⁰ Interview transcript, OFT Document Reference 11313, page 5.

⁶⁰⁵¹ Interview transcript, OFT Document Reference 11321, page 13.

⁶⁰⁵² Interview transcript, OFT Document Reference 11321, page 13.

Contemporaneous documentary evidence from leniency applicant W R Bloodworth – Tender register

IV.4020. During the OFT’s search of W R Bloodworth’s premises on 28 June 2005, a tender register was found. This contained the following entry in the page for March 2003.⁶⁰⁵³

Date recd	Architects	Client	Descript	Return	BEC
24th	Allan Joyce	N City Council	Alt 144 Sneinton Dale	14.04	350

Evidence from leniency applicant W R Bloodworth

IV.4021. As part of its leniency application, W R Bloodworth compiled a schedule setting out all tenders from January 2000 in respect of which W R Bloodworth had either requested or provided a cover price. At number six on the schedule is the following entry:⁶⁰⁵⁴

Date	Architects	Client	Descript	Cover
24-Mar-2003	Allan Joyce Associates ("AJA")	Nottingham City Council	144 Sneeton Dale - alterations	Cover given to Loach (John Rowe). Job won

IV.4022. W R Bloodworth also provided to the OFT a schedule listing all the companies and individuals within those companies with whom W R Bloodworth had engaged in cover pricing. The name of Loach appears on this list with John Rowe named as the contact point with the telephone number [.....] [C].⁶⁰⁵⁵

IV.4023. W R Bloodworth further provided to the OFT its tender return for this contract. The tender return states that it was for work required to be executed at 144 Sneinton Dale for Nottingham City Council. The person who signed the tender on behalf of W R Bloodworth was Michael Campbell ('MC'), an estimator at W R Bloodworth, and the amount tendered was £140,950.⁶⁰⁵⁶

IV.4024. In its response to the Statement, W R Bloodworth confirmed that '*[i]t is not disputed that Bloodworth participated in cover pricing during the relevant period set out in the Statement.*'⁶⁰⁵⁷

Witness evidence from leniency applicant W R Bloodworth

IV.4025. In respect of this tender, in interview MC explained that the schedule provided under leniency of tenders where W R Bloodworth had given or taken cover prices was compiled from his recollection of events. MC also had a clear recollection of JR from Loach contacting him and asking him for a cover price

⁶⁰⁵³ Tender register, OFT Document Reference 1881, page 41.

⁶⁰⁵⁴ Schedule of Tender Enquiries, OFT Document Reference 3912, page 1.

⁶⁰⁵⁵ Contacts For Cover Prices, OFT Document Reference 3915.

⁶⁰⁵⁶ Tender return, OFT Document Reference 6257, pages 2 to 4.

⁶⁰⁵⁷ Written representations of W R Bloodworth, 27 June 2008, paragraph 49.

as it was *'too small for him [to price] and he approached us for a cover price'*.
MC confirmed that JR telephoned him to request a cover price.⁶⁰⁵⁸

The OFT's analysis of the evidence and finding

IV.4026. From the evidence presented above, the OFT draws the following conclusions.

IV.4027. Loach and W R Bloodworth each accepted an invitation to tender for this contract.

IV.4028. Loach was unable to submit a tender by the return date and/or did not want to win this tender. It appears that W R Bloodworth completed the estimating process for this contract and that it submitted a tender with the hope of winning the work. This is shown by the fact that it submitted the lowest price and that it won the tender.

IV.4029. In regard to W R Bloodworth, one of Loach's contemporaneous tender spreadsheets records the word *'Cover'* against this tender and a *'C'* against W R Bloodworth. AA of Loach initially said that this evidence shows that both Loach and W R Bloodworth were involved in cover pricing on this tender, but not necessarily with each other. On being told by the OFT that W R Bloodworth had indicated that it provided Loach with a cover price, AA accepted that Loach did indeed approach W R Bloodworth for a cover price.

IV.4030. MC of W R Bloodworth had a clear recollection that JR of Loach approached W R Bloodworth and said that this tender was *'too small for him [to price] and he approached us for a cover price'*. Additionally JR is named by W R Bloodworth in its list of contacts for cover prices as a specific contact for cover prices at Loach.

IV.4031. The OFT notes that both companies have admitted to bid rigging in relation to this tender. Furthermore the OFT considers it significant that Loach drew up a second version of its spreadsheet with all reference to cover pricing removed as a *'panic reaction'* to the OFT's visits to other companies involved in this investigation. This demonstrates that Loach was aware that its conduct of engaging in cover pricing was wrong and that it made a decision to attempt to remove evidence that Loach was involved in such conduct.

IV.4032. The OFT also notes that the tender submitted by Loach was higher than the tender submitted by W R Bloodworth, a pattern consistent with a cover price having been provided.

IV.4033. The OFT further notes that no other company submitted a bid lower than W R Bloodworth's bid, and that only W R Bloodworth could therefore have given Loach a cover price in respect of this tender.

IV.4034. The OFT therefore concludes that contact took place between W R Bloodworth and Loach. The OFT also concludes that W R Bloodworth supplied a figure to Loach for a cover bid.

⁶⁰⁵⁸ Interview transcript, OFT Document Reference 6347, page 12.

IV.4035. The OFT is satisfied that the facts set out in paragraphs IV.4012 to IV.4034 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁰⁵⁹ In particular:

- (a) the provision of a figure for a cover bid from W R Bloodworth to Loach was not unilateral⁶⁰⁶⁰, and contravenes the principle against direct or indirect contact between competitors;⁶⁰⁶¹
- (b) Loach can be presumed to have taken account of the information received from W R Bloodworth (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁰⁶² and
- (c) W R Bloodworth can be presumed to have taken account of the information it received from Loach (i.e. that Loach did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁰⁶³

IV.4036. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between W R Bloodworth and Loach in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment work and an extension to 144 Sneinton Dale, Sneinton, Nottingham, tender deadline 14 April 2003.

Immunity and leniency assessment

IV.4037. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4038. In respect of this tender, the OFT became aware of Loach's involvement in bid rigging activities by virtue of the information obtained during the visit under section 28 to Loach on 28 June 2005. Loach will not therefore receive 100 per cent immunity in respect of this tender. However, Loach will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.4039. In respect of this tender, the OFT also became aware of W R Bloodworth's involvement in bid rigging activities by virtue of the information obtained during the visit under section 28 to Loach on 28 June 2005. W R Bloodworth will not therefore receive 100 per cent immunity in respect of this tender. However, W R Bloodworth will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁶⁰⁵⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁰⁶⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁰⁶¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁰⁶² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁰⁶³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 144: Two Wheelchair Bungalows, Howden Road, Leicester – 14 April 2003
Client: Tuntum Housing Association
Parties: Derwent Valley and Dukeries

IV.4040. On 17 March 2003, Tuntum Housing Association sought tenders for the demolition of existing buildings and erection of a pair of semi-detached bungalows with provision and site access for disabled persons at Howden Road, Leicester. The following three companies were invited to tender: Derwent Valley, Dukeries and B & A. The deadline for the receipt of tenders was 12:00 noon on 14 April 2003.⁶⁰⁶⁴

IV.4041. Tuntum Housing Association received the following tender returns:⁶⁰⁶⁵

Company	Date and time tender received	Amount of tender	Awarded contract
Dukeries	14 April 2003 Prior to 12:00 noon	£166,957	Yes
Derwent Valley	14 April 2003 Prior to 12:00 noon	£174,620	
B & A	14 April 2003 Prior to 12:00 noon	£179,594	

IV.4042. EC Harris, who dealt with the tendering process on behalf of Tuntum Housing Association, stated in a report to Tuntum Housing Association dated 15 April 2003 that, even allowing for an upward adjustment to the initial budget for additional works, the lowest tender of £166,957 received from Dukeries was £8,746 or 5.47 per cent in excess of the anticipated cost of the project. Dukeries has noted in its response to the Statement that this bid included provisional sums for two items it had omitted to include in its bid.⁶⁰⁶⁶

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.4043. During the OFT's search of Derwent Valley's premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁶⁰⁶⁷

TENDER NO.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	
04/03/03	14/04/03	DESIGN & BUILD 2NR WHEELCHAIR BUNGALOWS, HOWDEN ROAD LEICESTER FOR TUNTUM H.A.	Dukeries B & A	174620	Cover from Dukeries 2nd

Evidence from leniency applicant Derwent Valley

IV.4044. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in

⁶⁰⁶⁴ Information from client, OFT Document Reference 10155.

⁶⁰⁶⁵ Information from client, OFT Document Reference 10155.

⁶⁰⁶⁶ Written representations of Dukeries, 27 June 2008, paragraphs 36 to 37.

⁶⁰⁶⁷ Tender schedule, OFT Document Reference 1912, page 38.

paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.4045. In its leniency application, Derwent Valley set out a summary of all tenders from April 2000 to July 2004 where Derwent Valley had taken a cover price from a competitor for that tender, marked as *'DVC2 List of Covers Taken'*. The information in the summary was based on the tender book kept by Pat Tunnicliffe ('PT'), an ex-estimator at Derwent Valley, and contained the following extract:⁶⁰⁶⁸

Date	Contract	Company Involved
March 2003	Design & build 2 Bungalows Leicester Tuntum Hsg Assn	Dukeries Building Services

IV.4046. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Dukeries Building Co'* appears on this list with the address *'21a Ratcliffe Gate Mansfield'*.⁶⁰⁶⁹

IV.4047. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.4048. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.4049. In regard to this tender, a voluntary interview was conducted with PT, who dealt with this tender. PT confirmed that he kept and maintained the tender schedule referred to in paragraphs IV.309 to IV.317 above. PT was told the name of the tender and said *'Yeah, I think that was, again not wanting to upset a client that you wanted to work for but you didn't want to work in that area...I remember, I even went to, I think I even went to site and had a look at the site and it was not good'*. PT referred to the tender schedule and said, *'according to that I found Dukeries, a B and B and A... it looks as though Derwent Valley took the cover from Dukeries and came second, so presumably Dukeries won it'*.⁶⁰⁷⁰

IV.4050. PT was asked if he knew of any reason why Derwent Valley would not have been interested in this tender and responded that, *'it was geographical as much as anything. Two bungalows on the other side of Leicester didn't turn out to be as attractive as you possibly thought. If you had a contract on the north side of Leicester it was still bad enough to travel to but... no, two bungalows down there for 170 odd thousand it wasn't really worth it. But Tuntum were based in Nottingham and, you know, we wanted to work with Tuntum in*

⁶⁰⁶⁸ List of Covers Taken, OFT Document Reference 3941.

⁶⁰⁶⁹ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 2.

⁶⁰⁷⁰ Interview transcript, OFT Document Reference 14237, page 22.

Nottingham'.⁶⁰⁷¹ PT could not recall the names of anyone at Dukeries he may have spoken with.⁶⁰⁷²

IV.4051. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender and although he did not recall it, from examining the entry in the tender schedule he said *'we were second with a cover from Dukeries*'.⁶⁰⁷³ DS could not recall ever dealing with anyone at Dukeries but commented that it may not have been an attractive tender to Derwent Valley due to *'it being a little bit out of our range, Leicester*'.⁶⁰⁷⁴

Evidence from other companies – Dukeries

IV.4052. During the OFT's visit to Dukeries's premises, an electronic tender schedule containing an entry for this tender was obtained.⁶⁰⁷⁵

IV.4053. The OFT wrote to Dukeries on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Dukeries had participated in bid rigging on this tender. Dukeries, represented by Geldards LLP, indicated via letter on 25 April 2007 that it was willing to make admissions to involvement in cover pricing in relation to one suspect contract only.⁶⁰⁷⁶ The response included a completed suspect tender schedule and in respect of this tender Glenn Manners, Managing Director of Dukeries, made no admission of Dukeries having engaged in bid rigging activities.⁶⁰⁷⁷

IV.4054. The OFT subsequently wrote to Dukeries' ultimate parent company at the time of this Infringement, Gavco, on 5 November 2007, asking it to comment on Dukeries' response to the OFT's Fast Track Offer, given that the OFT intended to hold Gavco jointly and severally liable for any infringements committed by Dukeries in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Gavco 159 Limited's legal representatives Geldards LLP said, *'Gavco has nothing to add to the previous responses made by Dukeries*'.⁶⁰⁷⁸

IV.4055. However, in their response to the Statement, Dukeries and Gavco stated *'...on the basis of the evidence presented by the OFT in the Statement of Objections, Dukeries admits to providing a cover price to Derwent Valley in respect of this tender*'.⁶⁰⁷⁹

The OFT's analysis of the evidence and finding

IV.4056. From the evidence presented above, the OFT draws the following conclusions.

⁶⁰⁷¹ Interview transcript, OFT Document Reference 14237, page 22.

⁶⁰⁷² Interview transcript, OFT Document Reference 14237, page 23.

⁶⁰⁷³ Interview transcript, OFT Document Reference 13478, page 26.

⁶⁰⁷⁴ Interview transcript, OFT Document Reference 13478, page 27.

⁶⁰⁷⁵ Electronic tender schedule, OFT Document Reference 4265, page 50.

⁶⁰⁷⁶ Response from Dukeries, OFT Document Reference 10986.

⁶⁰⁷⁷ Response from Dukeries, OFT Document Reference 10987, page 3.

⁶⁰⁷⁸ Response from Gavco, OFT Document Reference 13934, page 2.

⁶⁰⁷⁹ Written representations of Dukeries and Gavco, 27 June 2008, paragraph 27.

- IV.4057. Derwent Valley and Dukeries each accepted an invitation to tender for this contract. Derwent Valley did not want to win this contract as the location of the site was outside of the area it wished to work in.
- IV.4058. It appears that Dukeries completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Dukeries being the lowest received and the fact that it won the contract.
- IV.4059. Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Dukeries with the entry '*Cover from Dukeries*' in the final column where this tender has been entered. Derwent Valley confirmed that the word '*Cover*' written in such a manner refers to a cover price being taken.
- IV.4060. PT, the estimator for this tender, confirmed that although he did not recall the tender, his entry in the schedule meant that he took a cover price from Dukeries.
- IV.4061. This was corroborated in interview by DS, who agreed that the entry in the tender schedule showed that Derwent Valley took a cover price in respect of this tender from Dukeries.
- IV.4062. The OFT notes Dukeries' tender figure was below that submitted by Derwent Valley, a pattern consistent with a cover price having been provided and accepted, and indeed that Dukeries is the only company whose figure was below that of Derwent Valley, such that the cover price received by Derwent Valley could only have been provided by Dukeries.
- IV.4063. Derwent Valley also included in its list of companies who exchange cover prices, the name of Dukeries.
- IV.4064. In addition, the OFT notes that Tuntum Housing Association received a tendered amount of £166,957.00 from Dukeries, which is lower than the amount tendered by Derwent Valley. This fits into the pattern consistent with a cover price having been given to Derwent Valley by Dukeries.
- IV.4065. Both Parties have now admitted liability in respect of this tender.
- IV.4066. The OFT therefore concludes that contact took place between Derwent Valley and Dukeries. The OFT also concludes that Dukeries supplied a figure to Derwent Valley for a cover bid. The OFT also notes that the price submitted by Dukeries, although the lowest tender for the project, was 5.47 per cent in excess of the anticipated cost of the project.
- IV.4067. The OFT is satisfied that the facts set out in paragraphs IV.4043 to IV.4066 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁰⁸⁰ In particular:
- (a) the provision of a figure for a cover bid from Dukeries to Derwent Valley was not unilateral⁶⁰⁸¹, and contravenes the principle against direct or indirect contact between competitors;⁶⁰⁸²

⁶⁰⁸⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (b) Derwent Valley can be presumed to have taken account of the information received from Dukeries (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁰⁸³ and
- (c) Dukeries can be presumed to have taken account of the information it received from Derwent Valley (i.e. that Derwent Valley did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁰⁸⁴

IV.4068. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Dukeries, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the demolition of existing buildings and erection of a pair of semi-detached bungalows with provision and site access for disabled persons at Howden Road, Leicester, tender date 14 April 2003.

Immunity and leniency assessment

IV.4069. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4070. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, Derwent Valley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 145: Not included in the Decision

Infringement 146: Construction of Four-Storey Lift Tower, Burton College – 12 May 2003

Client: Burton College

Parties: Wildgoose and Herbert Baggaley

IV.4071. On 7 April 2003, Burton College sought tenders for the construction of a four-storey lift tower at Burton College, Lichfield Street, Burton on Trent.⁶⁰⁸⁵ The following five companies were invited to tender: Herbert Baggaley, G F Tomlinson, Mansell, Wildgoose and Greswolde. The deadline for the receipt of tenders was 12:00 noon on 12 May 2003.⁶⁰⁸⁶

⁶⁰⁸¹ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁰⁸² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁰⁸³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁰⁸⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁰⁸⁵ Information from client, OFT Document Reference 7310.

⁶⁰⁸⁶ Information from client, OFT Document Reference 7310.

IV.4072. Burton College received the following tender returns:⁶⁰⁸⁷

Company	Date tender received	Amount of tender	Awarded contract
Herbert Baggaley	12 May 2003	£640,461	
G F Tomlinson	12 May 2003	£648,120	
Mansell	12 May 2003	£651,315	
Wildgoose	12 May 2003	£616,669	Yes
Greswolde	12 May 2003	£654,815	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Wildgoose – Enquiry Register, Tender Finance Statement, Form of Tender and Invoice

IV.4073. During the OFT’s search of Wildgoose’s premises, an Enquiry Register was found.⁶⁰⁸⁸ The Enquiry Register contained the following entry:⁶⁰⁸⁹

E.NO	DATES RECEIVED	RETURN	PROJECT	CLIENT
03/117	8/4	5/5	Main Building Lift Tower Town Centre Campus.	Burton College

Q/S	ARCHITECT	TENDER DELIVERY – TENDER SUM	DIFF.	EST.	RST
Edmond Shipway [...] [C]	Hall Gray [...] [C]	Burton on Trent		DR	

IV.4074. As part of its leniency application, Wildgoose provided a copy of the Tender Finance Statement for this tender. The Tender Finance Statement shows that Wildgoose intended to submit a tender of ‘£616,669’ for this contract.⁶⁰⁹⁰ In the final box on the first page is the following information:

⁶⁰⁸⁷ Information from client, OFT Document Reference 7310.

⁶⁰⁸⁸ Tender Enquiry Register, OFT Document Reference 0094. The OFT notes the discrepancy with the tender return date, however the OFT concludes that at some point the tender return date was extended by the client until 12 May 2003.

⁶⁰⁸⁹ Tender Enquiry Register, OFT Document Reference 0094, page 21.

⁶⁰⁹⁰ Tender Finance Statement, OFT Document Reference 6386, page 1.

'DEDUCT PROVISIONAL SUMS

ADD PROFIT 12 ½ 47358
+ 5,000 B. BI????
+ 2000

ADD PROVISIONAL SUMS

ADD BOND 10% BOND . OPTION

TENDER SUM TO FORM OF TENDER TOILETS 190217.00
LIFT 426452-00
+ 2000
426459.01'

IV.4075. Wildgoose also provided a copy of its Form of Tender, which shows that Wildgoose submitted a tender on 9 May 2003 for £616,669.00. The Form of Tender is signed by 'Mr. M Clarke ... Manager'.⁶⁰⁹¹

IV.4076. In addition, Wildgoose provided an invoice received from Herbert Baggaley. The invoice was numbered '9749' and headed 'BAGGALEY CONSTRUCTION' and was made out to 'Wildgoose Construction Ltd', dated '24th October 2003' and contained the following information:⁶⁰⁹²

'Supply only of Joinery 6.912.00

C257

MS31844
OK TO PAY

VAT @17½ % 1,209.60
TOTAL DUE £8.121.60'

IV.4077. Across the invoice is handwritten, 'P'. The initials 'BB' are also handwritten. Bryan Bennett ('BB') was the Estimating Director at Wildgoose.

Contemporaneous Documentary Evidence from leniency applicant Herbert Baggaley – Form of Tender and Invoice

IV.4078. During the OFT's search of Herbert Baggaley's premises, the Form of Tender for this contract was found. The Form of Tender shows that Herbert Baggaley submitted a tender on 9 May 2003 for £640,461.00. The Form of Tender was signed by Anton Newell, Chief Estimator at Herbert Baggaley ('AN').⁶⁰⁹³

IV.4079. As part of its leniency application, Herbert Baggaley provided an invoice submitted to Wildgoose. The invoice was numbered '9749' and headed 'BAGGALEY CONSTRUCTION' and was made out to 'Wildgoose Construction Ltd', dated '24th October 2003' and contained the following information:⁶⁰⁹⁴

⁶⁰⁹¹ Form of Tender, OFT Document Reference 6387.

⁶⁰⁹² Invoice, OFT Document Reference 0367.

⁶⁰⁹³ Form of Tender, OFT Document Reference 1714, page 2.

⁶⁰⁹⁴ Invoice, OFT Document Reference 3895, page 5.

'Supply only of Joinery	6.912.00	
	VAT @17½ %	1,209.60
	TOTAL DUE	£8,
121.60'		

IV.4080. This invoice is identical to the one produced by Wildgoose, apart from the handwritten endorsements made by Wildgoose.

Evidence from leniency applicant – Herbert Baggaley

IV.4081. As part of its leniency application, Herbert Baggaley also produced a 'SCHEDULE OF POTENTIAL PAYMENTS & RECEIPTS [AND] COPY INVOICES AS LISTED'. The schedule contained amongst others the following entries:⁶⁰⁹⁵

'Receipts

<i>Doc. No.</i>	<i>Invoice</i>	<i>Date</i>	<i>Contractor</i>	<i>Amount</i>
1.4	9749	24.10.03	Wildgoose Construction Ltd	£6,912.00

Comment

<i>Doc. No.</i>	<i>Job/Tender No.</i>	<i>Invoice</i>	<i>Comment (From recollection)</i>
1.4		9749	No recollection or record of any undisclosed dealing but no sales records yet traced from Joinery Division.

IV.4082. A report prepared by Herbert Baggaley's legal representatives [Actons], sent on 18 January 2006, provided additional information with regard to 'Inter Contractor Invoicing'. Herbert Baggaley stated 'It is commonplace for Contractors to buy and sell goods and services to and from each other. In the period between January 2000 and November 2005, HBC [Herbert Baggaley Construction] estimates that there were approximately between 800 and 1,000 inter-Contractor invoices to which HBC was a party ...'.⁶⁰⁹⁶

IV.4083. 'Each Invoice was investigated and an audit trail carried out to confirm it represented a genuine transaction. From these Invoices HBC has uncovered payments made or received for which there was no accompanying paper trail or internal stock or service records. Upon further investigation, a Schedule of Payments and Invoices was extracted which could constitute payments made in respect of covers given or received between 2000 and 2003...'.⁶⁰⁹⁷

IV.4084. 'HBC has no evidence and, therefore, no certainty that any of its current employees has instigated any of the transactions reflected in these Invoices. The payment to it by third parties has been taken as a useful recompense for

⁶⁰⁹⁵ Schedule of Potential Payments and Receipts, OFT Document Reference 3895, page 2.

⁶⁰⁹⁶ Leniency application, OFT Document Reference 3899 page 8.

⁶⁰⁹⁷ Leniency application, OFT Document Reference 3899 page 8.

*costs being incurred. Even in the provision of a cover, routine costs are incurred by HBC. On other occasions a job might initially be seen as of high interest but on review of the further details and job specifications might be discarded as of no interest and therefore worthy of a cover. If on such occasions costs had already been incurred and a third party had offered an estimator a payment to offset those, then such a payment had occasionally been accepted’.*⁶⁰⁹⁸

IV.4085. Herbert Baggaley also provided a list of ‘Third Party Contractors’. Herbert Baggaley stated that ‘*This list contains details of other Contractors with whom HBC has dealt in the use of cover pricing ... Given the lack of written records of individual covers, it is not always possible for HBC’s estimators to say for certain as to which individual within another contract[or] dealt with that cover. However, the OFT is to take it that where a Contractor is listed as being party to a cover under the Schedule of Tenders, then the individual contact listed within Document 2 [3] is to be the person involved. Where there are more than one name given for a Contractor, then the first name is to be taken as the probable contact’.*⁶⁰⁹⁹ On page five of the ‘List of Third Party Contractors’ is entered.⁶¹⁰⁰

<i>Contractor</i>	<i>Contact</i>	<i>Telephone number</i>
<i>Wildgoose Construction</i>	<i>Richard Hubble, Graham Barber, Phil Stiff, Brian Bennett, Malcolm Clark</i>	<i>[.....] [C]</i>

Witness evidence from leniency applicant Wildgoose

IV.4086. As part of its leniency application, Wildgoose’s legal representatives provided witness evidence which gave a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.726 to IV.742 above and is relied upon by the OFT in relation to this tender.

IV.4087. BB provided a witness statement to the OFT, in which he provided details in relation to this tender. BB stated, ‘*I am able to recall a further instance where we entered into discussions with a competitor about estimating costs. This was on file C257 Burton College, 4th floor lift installation and toilet refurbishment on which we won the work ... Malcolm Clarke, the Manager of our Building Services Department, completed the enquiry and submitted the tender form on 9 May 2003 in the sum on £616,669.00 ... I recall that either Baggaleys spoke to Malcolm Clarke who referred it to myself, or they spoke with me directly. I believe that initially both companies were to price the project and the loser would be paid £5,000 to cover the cost of the estimate’.*⁶¹⁰¹

‘During the tender period approval was obtained for this proposal from the executive Directors. After the tender adjudication meeting, I rang Baggaleys, with Malcolm Clarke present, possibly to give them a figure, but I am unable to recall the precise details of the conversation. I do remember that they asked if we had included the sum of money to cover their tender costs and I recall £7,000 was mentioned. I confirmed we had but that £7,000 was more than my

⁶⁰⁹⁸ Leniency application, OFT Document Reference 3899 page 9.

⁶⁰⁹⁹ Leniency application, OFT Document Reference 3899, page 7.

⁶¹⁰⁰ List of Third Party Contractors, OFT Document Reference 3897, page 5.

⁶¹⁰¹ Witness statement, OFT Document Reference 14263, page 14.

recollection. They explained that the increase was due to the nature and size of the project. Therefore, I subsequently added £2,000 to the tender allowances. We subsequently won the project which was reduced in size. The £7,000 appears on the revised tender finance statement as "other payments". Subsequently, we received an invoice dated 23 October 2003 from Baggaleys in the sum of £6,912.00 plus VAT ostensibly for the supply of joinery.⁶¹⁰²

IV.4088. During an interview with the OFT on 1 November 2006, BB stated *'This was a job that was priced by our builders and services department, at Burton College ... Malcolm Clarke had priced it. And I believe Malcolm possibly had some contact from them, or I did ... and it's apparent ... that an agreement was struck. ... We actually won that project. And I do recall coming out of the adjudication meeting and we spoke with Baggaley's ... What I do recall specifically about the conversation was that Baggaley's said to us that the project was more involved than they thought. It was a higher value than they thought, more complex. And, 'Can you increase the cost to £7,000?' And I think on the tender form you'll see that there was the £5,000 that was added in the adjudication meeting. And then a subsequent £2,000 following our discussions with them*'.⁶¹⁰³ BB confirmed that the agreement would have been made with either AN, or Roger Hayes, Chief Estimator at Herbert Baggaley.⁶¹⁰⁴ The OFT notes that RH left Herbert Baggaley's in October 2002 and it is therefore likely that BB spoke with AN.

IV.4089. BB added that his recollection was that the compensation payment for estimating costs was suggested by Herbert Baggaley, but that both parties would have agreed to it.⁶¹⁰⁵ He explained that it was *'... a compensation ... a loser's prize*'⁶¹⁰⁶, and that the loser would still get something out of the contract. He suggested that Herbert Baggaley and Wildgoose may have been under the impression that they were the only two parties tendering for the contract⁶¹⁰⁷ and that they would have said *'We're the last two in, let's include £5,000 for each other*'.⁶¹⁰⁸ He confirmed that he would probably have personally made the subsequent decision to accept the £2,000 increase to £7,000.⁶¹⁰⁹ BB also confirmed that his signature was on the invoice for joinery works, but that someone else wrote *'OK TO PAY*'.⁶¹¹⁰

IV.4090. Malcolm Clarke ('MC'), General Manager of Small Works at Wildgoose, provided a *'Witness Statement'* to the OFT, in which he provided details in relation to this tender. MC stated *'I am aware that an agreement was reached between Wildgoose and Herbert Baggaley Limited ("Baggaleys") on the project at Burton College, 4th floor lift installation and toilet refurbishment (file C257) on which we won the work ... I am unable to recall whether myself or Bryan Bennett was first informed by Baggaleys that they were interested in pricing for the work but I understand that it was later agreed, subject to the Directors' approval, to add the amount of £5,000 estimating costs to cover the costs of the unsuccessful bidder. This would be payable if any of our tenders was*

⁶¹⁰² Witness statement, OFT Document Reference 14263, page 14.

⁶¹⁰³ Interview transcript, OFT Document Reference 6330, pages 64 and 65.

⁶¹⁰⁴ Interview transcript, OFT Document Reference 6330, page 64.

⁶¹⁰⁵ Interview transcript, OFT Document Reference 6330, page 66.

⁶¹⁰⁶ Interview transcript, OFT Document Reference 6330, page 66.

⁶¹⁰⁷ Interview transcript, OFT Document Reference 6330, page 66.

⁶¹⁰⁸ Interview transcript, OFT Document Reference 6330, page 68.

⁶¹⁰⁹ Interview transcript, OFT Document Reference 6330, page 69.

⁶¹¹⁰ Interview transcript, OFT Document Reference 6330, page 70.

*successful. The net cost estimate was prepared and I was instructed at a tender meeting with Bryan Bennett to add the amount of £5,000 as an additional cost. I believe that the other Directors had been made aware of the situation’.*⁶¹¹¹

*‘Baggaleys were then contacted by Bryan Bennett in my presence and the tender prices were exchanged and we were informed that our price was substantially lower than Baggaleys. However, as far as I am aware, Baggaleys still intended to submit the tender figure they had calculated and would add the additional sum to cover estimating costs to their tender figure too. Baggaleys then considered that the amount of £5,000 was insufficient to cover the estimating costs considering the extent of the work and time involved and I understand a further amount of £2,000 was agreed. This was indicated on the tender finance statements. ... On being successful, the amount of approximately £7,000 was invoiced by Baggaleys and paid to them at a later date’.*⁶¹¹²

IV.4091. During an interview with the OFT on 1 November 2006, MC provided additional details regarding the contact with Herbert Baggaley. MC stated *‘I can’t remember if we contacted them or they contacted us I can’t recall that at all, and I think that Bryan dealt with that section of it ... But I remember this one quite well because I thought it quite a strange scenario at that time, something I hadn’t really come across before and I prepared the tender and I’d been told to add £5,000 in estimating costs [by Bryan Bennett]. I added that in and I took all the statement, tender file and statement up to him and we sat down to look at what we wanted profit and overheads wise, and there was a call ... made to Baggaley’s either they rang up or we rang them, and Bryan actually exchanged prices with them, which I though[t] was very trusting and decided that we were the lowest by quite a substantial way ... and then the conversation went something, what I picked up was that Baggaley’s said that we’d obviously get the job at the price we was putting in and that they thought that they wanted another £2,000 for estimating fees additional to the £5,000, could that be added in because it was a very involved job and they had spent a lot of time on it’.*⁶¹¹³

IV.4092. In response to the question, *‘would it [that agreement] have worked if there were another four competitive ... tenderers?’*, MC added *‘It’s a risk, isn’t it. You never know ... we were aware that there was other covers too. You were giving other covers out as well ... I don’t even know if on that lift, if such as Baggaley’s were giving covers out ... they might have intimated that they were giving covers out, but I can’t remember’.*⁶¹¹⁴

IV.4093. Eric Alan Clarke, (‘EAC’) Finance Director at Wildgoose, provided a ‘Witness Statement’ to the OFT, in which he provided details in relation to this tender. EAC stated, *‘On 24 October 2003 Baggaleys sent us a further invoice for the supply of joinery in the sum of £8,121.60 which had been authorised by Bryan Bennett for payment ... I understood that the payment to Baggaleys was in respect of settlement of tendering costs but I am unable to provide precise details ... I was aware at the time that these invoices were not for joinery*

⁶¹¹¹ Witness statement, OFT Document Reference 14271, page 2.

⁶¹¹² Witness statement, OFT Document Reference 14271, pages 2 and 3.

⁶¹¹³ Interview transcript, OFT Document Reference 6313, pages 11 and 12.

⁶¹¹⁴ Interview transcript, OFT Document Reference 6313, page 14.

*works but were for settling tenders between Wildgoose and Baggaleys. The invoices were paid by BACS transfer. It is part of my role as Finance Director to authorise BACS payments’.*⁶¹¹⁵

Witness evidence from leniency applicant Herbert Baggaley

IV.4094. During an interview with the OFT on 2 November 2006, conducted in connection with Herbert Baggaley’s leniency application, AN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.4095. During the interview AN was asked if he could recall anything about this contract. AN confirmed his recollection of this tender, *‘That was down at Burton College ... started the enquiry, went down there had a look at it, it was an awkward job, and I think this is probably an instance where we tried somebody else first and they were already taking cover off of Wildgoose, and in some way we either rung Wildgoose up [Herbert Baggaley:] “are you keen for this?” [Wildgoose:] “yes” [Herbert Baggaley:], we’re not so bothered, but we’ll take help off you for paying, helping to contribute towards our costs so far’.*⁶¹¹⁶ AN stated this was because *‘We’d either got some more work to come up, but this one wasn’t for us’.*⁶¹¹⁷ AN confirmed that it would have been himself who contacted BB at Wildgoose and initiated the agreement. AN thought that BB *‘may then have put me in touch with Malcolm Clarke, because I believe it was him at their small works sort of division’.*⁶¹¹⁸ AN confirmed that he would have needed the approval of (Richard) Ian Baggaley, Director, before entering into such agreements with competitors.⁶¹¹⁹

IV.4096. During an interview on 2 November 2006, Richard Ian Baggaley (‘RIB’), Managing Director of Herbert Baggaley, was asked if he would have been aware of the arrangement of a compensation payment before any agreement had been made. RIB replied *‘... yes I probably would have, certainly have been made aware of it’.* RIB explained *‘... if the opportunity had been put to them [Roger Hayes and Anton Newell], they would have a very strong judgment on the opportunity, but they would have said well ‘yes we just need to make the directors aware of that issue’.*⁶¹²⁰

The OFT’s analysis of the evidence and finding

IV.4097. From the evidence presented above, the OFT draws the following conclusions.

IV.4098. Wildgoose and Herbert Baggaley each accepted an invitation to tender for this contract.

IV.4099. Herbert Baggaley explained *‘We’d either got some more work to come up, but this one wasn’t for us’*, and Herbert Baggaley therefore did not want to win this tender.⁶¹²¹ It appears that Wildgoose completed the estimating process for this

⁶¹¹⁵ Witness statement, OFT Document Reference 14270, page 4.

⁶¹¹⁶ Interview transcript, OFT Document Reference 6372, page 19.

⁶¹¹⁷ Interview transcript, OFT Document Reference 6372, page 19.

⁶¹¹⁸ Interview transcript, OFT Document Reference 6372, page 20.

⁶¹¹⁹ Interview transcript, OFT Document Reference 6372, page 20.

⁶¹²⁰ Interview transcript, OFT Document Reference 6371, page 6.

⁶¹²¹ Interview transcript, OFT Document Reference 6372, page 19.

tender and submitted a bid with the hope of winning the work. This is shown by the facts that Wildgoose submitted the lowest tender and that it won the contract.

IV.4100. MC of Wildgoose suggested that either Wildgoose or Herbert Baggaley may have been giving cover prices to the other competitors for this tender. BB suggested that Herbert Baggaley and Wildgoose may have been under the impression that they were the only two parties tendering for the contract. However, neither BB nor MC of Wildgoose recalled giving any cover prices out to competitors in relation to this tender. Certainly, there is no documentary evidence to suggest that any cover prices were given to competitors by Wildgoose. Neither is there any documentary evidence to suggest that any cover prices were given to competitors by Herbert Baggaley. The OFT makes no finding as to whether Wildgoose and/or Herbert Baggaley gave cover prices to other competitors in respect of this tender.

IV.4101. AN of Herbert Baggaley said that he started the estimating process for this tender but found that it was an *'awkward job'*. He thought that Herbert Baggaley tried to obtain a cover price from another competitor but found that the competitor was already taking a cover price from Wildgoose. AN said that he would then have contacted Wildgoose for a cover price, and given that Herbert Baggaley had already carried out some work on estimating, suggested that if Herbert Baggaley submitted a cover price then Wildgoose should compensate Herbert Baggaley for the work already carried out.

IV.4102. Wildgoose had a different recollection of the basis for the compensation agreement. It believed that *'initially both companies were to price the project and the loser would be paid £5,000 to cover the cost of the estimate'*. Subsequently further contact was made with Herbert Baggaley following Wildgoose's tender adjudication meeting. MC of Wildgoose confirmed that during this call the two companies exchanged tender figures and it was established that Wildgoose intended to submit a figure much lower than Herbert Baggaley's tender figure, and it was therefore likely that Wildgoose would win the tender. Herbert Baggaley then asked for the previously agreed compensation payment, to be included in Wildgoose's tender, to be increased from £5,000 to £7,000. Wildgoose confirmed that it increased its tender bid by a further £2,000 in addition to the £5,000 already included in it.

IV.4103. Both companies agree that a compensation payment arrangement was eventually agreed upon, under which Wildgoose and Herbert Baggaley agreed that, on either account at least, Wildgoose would include in its final tender bid an additional £7,000, which was to be paid to Herbert Baggaley if Wildgoose's tender was successful. The OFT notes the differences between the companies' accounts as to whether Herbert Baggaley also agreed to include an additional sum in its tender bid to be paid to Wildgoose if Herbert Baggaley's tender was successful, but considers that it is not necessary to reach any finding as to whether this was in fact agreed by them.

IV.4104. Wildgoose and Herbert Baggaley both submitted that the compensation payment was intended as a genuine reimbursement of their tender costs.⁶¹²² The OFT recalls, however, that the 'object' of an agreement or concerted

⁶¹²² Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.70; written answer further to oral hearing with Herbert Baggaley, 14 October 2008.

practice is determined by an objective analysis of its aims, and the parties' subjective intent is therefore not determinative.⁶¹²³ Nevertheless, the OFT notes that the amount of the compensation payment was initially agreed at £5,000 and Wildgoose had added this to its tender figure. It was only late in the process that Herbert Baggaley asked for this to be increased to £7,000. If £5,000 was sufficient to cover Wildgoose's tender costs, then the increase to £7,000 must have included an additional element over and above Wildgoose's tender expenses. Equally, AN of Herbert Baggaley stated in evidence that he started the estimating process but realised the job was awkward and approached a competitor for a cover price, before arranging a compensation payment with Wildgoose to compensate for the estimating work he had already carried out. This is inconsistent with Herbert Baggaley's request to Wildgoose late in the tender process that the amount of compensation be increased because Herbert Baggaley had expended a lot of time on the tender. Whilst it is not material to a finding of an infringement, the OFT does not necessarily accept, therefore, that the amount of compensation was genuinely intended to recompense for the Parties' tender costs.

IV.4105. Subsequently, Herbert Baggaley raised an invoice for '*Supply only of Joinery*' for a total value of £6,912.00 plus VAT, with an invoice total of £8,121.60. Wildgoose has confirmed that this invoice was false and that no such '*Joinery Works*' were carried out. Wildgoose's Finance Director has confirmed that the invoice was subsequently paid by BACS transfer.

IV.4106. The OFT therefore concludes that contact took place between Wildgoose and Herbert Baggaley which resulted at least in Herbert Baggaley and Wildgoose agreeing that Wildgoose would inflate its final tender price by £7,000, which amount would be paid to Herbert Baggaley if Wildgoose's bid was successful. The OFT also concludes that Wildgoose made a compensation payment to Herbert Baggaley and that this payment was facilitated by the production of a false invoice in relation to '*Supply only of Joinery*'. The OFT finds that Wildgoose included in its tender bid the amounts of compensation agreed between the parties, i.e. initially £5,000 which was subsequently increased to £7,000 prior to submission of the final tender.

IV.4107. The OFT is satisfied that the facts set out in paragraphs IV.4073 to IV.4106 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶¹²⁴ This is notwithstanding the fact that the Parties have provided different accounts of what was agreed between the Parties, namely as to whether in addition to the agreement on a compensation payment a cover price was also agreed or tender price information was also exchanged prior to final tenders being submitted. On either account, at the very least, an unlawful compensation payment agreement was reached. In particular, on the basis of the evidence provided by Wildgoose:

- (a) the exchange of information between Wildgoose and Herbert Baggaley on their respective tender bids prior to submission of final bids and the provision of a compensation payment from Wildgoose to Herbert Baggaley were not unilateral, and contravene the principle against direct or indirect contact between competitors;⁶¹²⁵

⁶¹²³ See paragraphs III.68 to III.69 of the Legal Background section.

⁶¹²⁴ See paragraphs III.3 and III.136 to III.157 of the Legal Background section.

⁶¹²⁵ See paragraphs III.48 to III.51, and III.139 to III.140 of the Legal Background section.

- (b) the agreement between Wildgoose and Herbert Baggaley that at least Wildgoose would include £7,000 in its final tender bid and that the successful tenderer would pay compensation to the unsuccessful tenderer had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁶¹²⁶ and
- (c) each of Wildgoose and Herbert Baggaley can be presumed to have taken account of the information they received from each other (i.e. the details of their respective tender bids, the agreement to pay compensation, and the agreed level of compensation) when determining their own conduct in the tendering process.⁶¹²⁷

IV.4108. In the alternative, on the basis of the evidence provided by Herbert Baggaley:

- (a) the provision of a figure for a cover bid, and a compensation payment from Wildgoose to Herbert Baggaley were not unilateral⁶¹²⁸, and contravene the principle against direct or indirect contact between competitors;⁶¹²⁹
- (b) the agreement between Wildgoose and Herbert Baggaley that Wildgoose would include £7,000 in its tender bid and would pay that amount to Herbert Baggaley in return for Herbert Baggaley submitting a cover price or a tender which it knew would not be successful, had the obvious consequence of restricting or distorting competition and was capable of an effect on price;⁶¹³⁰
- (c) Wildgoose can be presumed to have taken account of the information received from Herbert Baggaley (i.e. the details of Herbert Baggaley's tender bid, the agreement to pay compensation, the agreed level of compensation, and that Herbert Baggaley did not intend to submit a competitive bid) when determining its own conduct in the tendering process;⁶¹³¹ and
- (d) Herbert Baggaley can be presumed to have taken account of the information it received from Wildgoose (i.e., the cover price, the agreement to pay compensation, and the agreed level of compensation) when determining its conduct in the tendering process.⁶¹³²

IV.4109. Wildgoose submitted that the exchange of information with Herbert Baggaley was not intended to change their behaviour on the market, and it did not take into account the information it received from Herbert Baggaley when determining its own conduct in the tender process.⁶¹³³ As noted above, the Parties subjective intent is not determinative in finding an 'object' infringement.⁶¹³⁴ Furthermore, the OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal

⁶¹²⁶ See paragraphs III.150 to III.152 of the Legal Background section.

⁶¹²⁷ See paragraphs III.58, III.142, and III.156 to III.157 of the Legal Background section.

⁶¹²⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁶¹²⁹ See paragraphs III.48 to III.51, III.93 to III.94, and III.139 to III.140 of the Legal Background section.

⁶¹³⁰ See paragraphs III.150 to III.152 of the Legal Background section.

⁶¹³¹ See paragraphs III.58 to III.95 to III.96, III.125, III.142, and III.156 to III.157 of the Legal Background section.

⁶¹³² See paragraphs III.58 to III.95 to III.96, III.125, III.142, and III.156 to III.157 of the Legal Background section.

⁶¹³³ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.77.1 and 5.77.4.

⁶¹³⁴ See paragraphs III.68 to III.69 of the Legal Background section.

presumption⁶¹³⁵, and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Wildgoose has rebutted the application of the presumption in this case. In particular, the OFT notes Wildgoose's admission that it added £7,000 to its tender price to account for the compensation payment, and considers that this completely undermines Wildgoose's assertion that its conduct in the tender process was unaffected.

IV.4110. Wildgoose also submitted that its conduct had no, or at worst only a minor, effect on competition.⁶¹³⁶ As noted above, however, the OFT considers that Wildgoose entered into an agreement or concerted practice which had the object of restricting competition. As such, the OFT is not required to demonstrate the effect of the arrangements in order to find an infringement. Furthermore, Wildgoose has accepted that its conduct constitutes an object infringement.⁶¹³⁷ To the extent that Wildgoose submits this Infringement should not be treated as serious because no effects have been shown, this point is addressed in Step 1 of Section VI (Enforcement) below.

IV.4111. Finally, Wildgoose stated that, whilst it added £7,000 to its tender price, it subsequently reduced the tender price and its tendered margin and overheads as a result of a *'value reengineering exercise'* with the client's quantity surveyor.⁶¹³⁸ The OFT also recalls BB's evidence that the project was *'reduced in size'* (see paragraph IV.4087). Subsequent renegotiation of the job specifications and tender price does not alter the OFT's conclusion that Wildgoose and Herbert Baggaley engaged in an anti-competitive agreement and/or concerted practice. It is also irrelevant that, at £7,000, the compensation payment represented a small percentage of the tender value⁶¹³⁹ (although the OFT notes that it does not consider £7,000 to be a small amount in absolute terms).

IV.4112. Wildgoose also disputed that it gave a cover price to Herbert Baggaley, and submitted that its own version of events was more credible than Herbert Baggaley's.⁶¹⁴⁰ As noted above, the accounts of Wildgoose and Herbert Baggaley differ in this respect and the OFT reaches no conclusion as to whether a cover price was given by Wildgoose to Herbert Baggaley (although the OFT notes that elsewhere in Wildgoose's representations it stated that a cover price *'may have been provided'* in this tender⁶¹⁴¹).

IV.4113. Accordingly, although the OFT is not in a position to reach a conclusion on all the elements of the agreement between Herbert Baggaley and Wildgoose, on either account there is an infringement which at a minimum, was an agreement to fix part of the tender price of the successful tenderer and that the successful tenderer would pay an agreed level of compensation to the unsuccessful tenderer. The OFT therefore concludes that the totality of the evidence as set

⁶¹³⁵ See paragraph III.58 of the Legal Background section.

⁶¹³⁶ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.77.1, 5.76 and 4.70-4.84.

⁶¹³⁷ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.70.

⁶¹³⁸ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.76 and 5.77.2.

⁶¹³⁹ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.77.4; and written representations of Herbert Baggaley, 27 June 2008, paragraph 46.

⁶¹⁴⁰ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.71 to 5.75 and 5.77.3 to 5.77.4.

⁶¹⁴¹ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 4.82.

out above establishes that an agreement and/or concerted practice was in place between Wildgoose and Herbert Baggaley, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the construction of a four-storey lift tower at Burton College, tender deadline 12 May 2003.

Immunity and leniency assessment

IV.4114. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4115. Wildgoose informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Wildgoose will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.4116. In respect of this tender, the OFT became aware of Herbert Baggaley’s involvement in bid rigging activities by virtue of the information provided by Wildgoose. Herbert Baggaley will not therefore receive 100 per cent immunity in respect of this tender. However, Herbert Baggaley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 147: New Extension and Alterations to Building to Form a Veterinary Surgery, 36 Clipstone Road West, Mansfield – 13 May 2003
Client: Saxondale Properties Ltd
Parties: P Waller and G Carter

IV.4117. In 2003, Saxondale Properties Ltd sought tenders for a new extension and alterations to building to form a veterinary surgery, 36 Clipstone Road West, Mansfield. The original return date for the tender was 30 April 2003, subsequently extended to 13 May 2003, and four companies were invited to tender: Peter Clegg & Sons (Builders) Ltd, Milward, G Carter and P Waller.⁶¹⁴²

IV.4118. Saxondale Properties Ltd received the following tender returns:⁶¹⁴³

Company	Date and time tender received	Amount of tender	Awarded the tender
Peter Clegg & Sons (Builders) Ltd	15:30 on 1 May 2003	£110,029.00	Yes
Milward	12:00 noon on 12 May 2003	£117,886.12	
G Carter	12:00 noon on 13 May 2003	£119,776.00	
P Waller	12:00 noon on 13 May 2003	£124,216.07	

⁶¹⁴² Information from client, OFT Document Reference 9297.

⁶¹⁴³ Information from client, OFT Document Reference 9297.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant P Waller – Diary Entry

IV.4119. Jane Waller ('JW'), Director and Company Secretary of P Waller, kept a diary for 2003 which was obtained during the section 28 visit to P Waller's premises on 6 July 2005 and which contains an entry for this tender on 13 May 2003 which reads, *'obtain cover from Ray Lockett at ✓ Carter Construction for 36 Clipstone Rd West for P.Hill'*.⁶¹⁴⁴

Evidence from leniency applicant P Waller

IV.4120. As part of its leniency application, P Waller provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.517 to IV.526 above and is relied upon by the OFT in relation to this tender.

IV.4121. On a list of cover prices received, provided by P Waller to the OFT as part of its leniency application, is typewritten:⁶¹⁴⁵

<i>TITLE</i>	<i>DATE</i>	<i>CONTACT</i>	<i>COMPANY</i>	<i>WON</i> <i>LOST</i>	
<i>36 Clipstone Rd West</i>	<i>13/05/2003</i>	<i>Ray Lockett</i>	<i>Carter Construction</i>		<i>Yes</i>

IV.4122. Following the issue of the Statement, P Waller did not submit any written or oral representations.

Witness evidence from leniency applicant P Waller

IV.4123. During interviews conducted in connection with its leniency application, P Waller's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.517 to IV.526 above and is relied upon by the OFT in relation to this tender.

IV.4124. In response to a question about the significance of a '✓' in her diary, JW confirmed that this tick shows that an action had been achieved (i.e. in this case that Ray Lockett of G Carter had provided P Waller with a cover price).⁶¹⁴⁶

IV.4125. Philip Waller ('PW'), Managing Director of P Waller, said in respect of this tender *'A cover from Ray Locket[t] at Carter Construction. So we obtained a cover for this Clipstone Road project, from memory we do know it's a medical centre, Clipstone Road West is a postcode of NG19. The architect was Peter Hill, Jane [Waller] in her tender notes did keep a list of different contractors ...that tendered for different architects...she had a list for Peter Hill and Carter Construction is on that, that's why she would have given them a ring to ask them [for a cover price]'*.⁶¹⁴⁷

⁶¹⁴⁴ Jane Waller's diary, OFT Document Reference 3624, page 74.

⁶¹⁴⁵ Cover prices received, OFT Document Reference 4507.

⁶¹⁴⁶ Interview transcript, OFT Document Reference 6366, page 4.

⁶¹⁴⁷ Interview transcript, OFT Document Reference 13285, page 9.

Evidence from other companies – G Carter

IV.4126. The OFT wrote to G Carter on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that G Carter had participated in bid rigging on this tender.

IV.4127. G Carter confirmed on 19 April 2007 that Ray Lockett had worked as an estimator for G Carter but that he was no longer employed by them.⁶¹⁴⁸

IV.4128. However, the OFT did not receive a response to its offer by the date for acceptance of 26 April 2007.⁶¹⁴⁹ The OFT informed G Carter's legal representatives, Berryman Shacklock LLP, on 18 May 2007 that as a reply had not been received by the deadline the OFT would treat this as a rejection of OFT's Fast Track Offer. Berryman Shacklock LLP confirmed that it understood the situation.⁶¹⁵⁰

IV.4129. The OFT subsequently received a letter dated 2 August 2007 from Berryman Shacklock LLP which said *'Our client is well aware that the practice of "giving and taking covers/help" has been endemic in the construction industry for many years. It accepts that it is possible, if not likely that against that background, it has engaged in that activity itself.*

However, having made detailed enquires as to the contracts to which you refer in the annex of your penalty offer letter, it cannot find evidence that it engaged in such activity on those specific matters and it is against that background that it did not apply for the reduction of penalty'.⁶¹⁵¹

IV.4130. Following the issue of the Statement, G Carter did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.4131. From the evidence presented above, the OFT draws the following conclusions.

IV.4132. G Carter and P Waller each accepted an invitation to tender for this contract.

IV.4133. P Waller was unable to submit a tender by the return date and/or did not want to win this tender.

IV.4134. In regard to G Carter, JW's diary entry for this tender for 13 May 2003 records *'obtain cover from Ray Lockett at ✓ Carter Construction for 36 Clipstone Rd West for P.Hill.'*, which shows that P Waller was expecting that G Carter would provide it with a cover price on the day that the tender was due to be submitted. JW has confirmed that the '✓' shows that the action was successfully completed, i.e. in this case that a cover price was successfully obtained from Ray Lockett at G Carter. G Carter has confirmed that Ray Lockett was one of its estimators. Both P Waller and PW, its Managing Director, have confirmed that a cover price was obtained from G Carter for this tender.

⁶¹⁴⁸ File note of telephone conversation, OFT Document Reference 10294.

⁶¹⁴⁹ File note of telephone conversation, OFT Document Reference 10297.

⁶¹⁵⁰ File note of telephone conversation, OFT Document Reference 10297.

⁶¹⁵¹ Response from G Carter, OFT Document Reference 13017.

- IV.4135. The OFT notes in addition that the tender submitted by P Waller was higher than the tender submitted by G Carter, a pattern consistent with a cover price having been provided by G Carter.
- IV.4136. The OFT further notes that although G Carter has not admitted to bid rigging specifically in relation to this tender, it has accepted that it is '*probable, if not likely*' that it has engaged in cover pricing activities more generally.
- IV.4137. The OFT considers that the contemporaneous evidence from P Waller, and both JW's and PW's admissions and explanations of that contemporaneous evidence, are sufficient for it to be satisfied that G Carter gave a cover price to P Waller.
- IV.4138. The OFT therefore concludes that contact took place between P Waller and G Carter. The OFT also concludes that G Carter supplied a figure to P Waller for a cover bid.
- IV.4139. The OFT is satisfied that the facts set out in paragraphs IV.4119 to IV.4138 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶¹⁵² In particular:
- (a) the provision of a figure for a cover bid from G Carter to P Waller was not unilateral⁶¹⁵³, and contravenes the principle against direct or indirect contact between competitors;⁶¹⁵⁴
 - (b) P Waller can be presumed to have taken account of the information received from G Carter (i.e. the cover price) when determining its own conduct in the tendering process,⁶¹⁵⁵ and
 - (c) G Carter can be presumed to have taken account of the information it received from P Waller (i.e. that P Waller did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶¹⁵⁶
- IV.4140. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between P Waller and G Carter, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for new extension and alterations to building to form a veterinary surgery, 36 Clipstone Road West, Mansfield, tender deadline 13 May 2003.

Immunity and leniency assessment

- IV.4141. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁶¹⁵² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶¹⁵³ See paragraph IV.73 of the General comments on cover pricing section.

⁶¹⁵⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶¹⁵⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶¹⁵⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.4142. In respect of this tender, the OFT became aware of the bid rigging activities of P Waller by virtue of the information obtained during the visit under section 28 to P Waller on 6 July 2005. P Waller will not therefore receive 100 per cent immunity in respect of this tender. However, P Waller will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 148: Not included in the Decision

Infringement 149: Ward Refurbishment, Calow – 23 June 2003
Client: Chesterfield Royal Hospital NHS Foundation Trust
Parties: Henry Boot and G G Middleton

IV.4143. On 23 May 2003 and 25 May 2003, Chesterfield Royal Hospital NHS Foundation Trust sought tenders for refurbishment of a ward.⁶¹⁵⁷ The following six companies were invited to tender: CRL Refurb, G G Middleton, Henry Boot, Marriott, P-Kay Builders and Totty. The date and time of tender return was 23 June 2003 at 12:00 noon.⁶¹⁵⁸

IV.4144. Chesterfield Royal Hospital NHS Foundation Trust received the following tender returns:⁶¹⁵⁹

Company	Date tender received	Amount of tender	Awarded contract
Henry Boot	23 June 2003	£642,394	
P-Kay Builders	23 June 2003	£603,644	YES
Totty	23 June 2003	£670,025	
CRL Refurb	23 June 2003	£687,166	
G G Middleton	23 June 2003	£690,832	
Marriott	23 June 2003	£712,483	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Henry Boot – ‘sheet 28’ and Estimate summary Listing

IV.4145. As part of its leniency application, Henry Boot’s legal representatives provided a ‘Sheet 28’ (tender build-up) for this tender, on which under the section headed ‘Competition’, the following handwritten entries have been made:⁶¹⁶⁰

‘MIDDLETON (C)
TOTTY
MARRIOTT
PK BUILDERS
WILDGOOSE ?’

⁶¹⁵⁷ Information from client, OFT Document Reference 7357d.

⁶¹⁵⁸ Information from client, OFT Document Reference 7357d.

⁶¹⁵⁹ Information from client, OFT Document Reference 7357d.

⁶¹⁶⁰ Tender build-up, OFT Document Reference B1930.

IV.4146. Henry Boot's legal representatives also provided a printout headed '*Estimate Summary Listing*' in respect of this tender and handwritten at the bottom is '*COVER TO MIDDLETONS. £690830 (£48436 addition)*'.⁶¹⁶¹

Evidence from leniency applicant Henry Boot

IV.4147. As part of its leniency application, Henry Boot's legal representatives provided a general explanation of its part in the process of cover pricing. This evidence is set out in paragraphs IV.363 to IV.374 above and is relied upon by the OFT in relation to this tender.

IV.4148. Henry Boot's legal representatives also provided to the OFT a table headed '*Overall Schedule for the Main Estimating Department*', which includes this tender. In respect of this tender the table contains comments made by those involved with the tender which show that a cover price given was given to G G Middleton, as follows:

'I know that we did not win this tender. The competitors I would have probably obtained from a subcontractor which is the usual way, particularly with NHS tenders because they specify the subcontractors to be used, so they get everyone asking them for quotes and they don't feel obliged to stay silent about it. I would say that looking at the notes on teh [sic] Sheet 28, we were not sure whether Wildgoose actually priced it and it's as clear as day that I gave Middleton a cover price – it's in my handwriting. I don't recall it though'.⁶¹⁶²

Witness evidence from leniency applicant Henry Boot

IV.4149. During interviews conducted in connection with its leniency application, Henry Boot employees and ex-employees provided general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.363 to IV.374 above and is relied upon by the OFT in relation to this tender.

IV.4150. During an interview with the OFT on 22 March 2007, Malcolm Welsby ('MW'), an estimator at Henry Boot, advised how he would record when Henry Boot had given a cover as detailed in paragraph IV.374 above. In relation to this tender MW confirmed that he completed the '*Sheet 28*' for this tender and when asked what the '(C)' meant, stated '*That means that we have ... given a cover price to a contractor called Middleton*'.⁶¹⁶³ When asked about the '*Estimate Summary Listing*', MW confirmed that the handwritten note was in his handwriting and stated '*so that is an example of how we've arrived at the price to give Middleton which would mean that ... if we were first on that job for instance ... then there would've been a gap of £48,436 between ourselves and Middleton*'.⁶¹⁶⁴

Evidence from other companies – G G Middleton

IV.4151. The OFT wrote to G G Middleton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of

⁶¹⁶¹ Estimate Summary Listing, OFT Document Reference B1931.

⁶¹⁶² Overall Schedule for the Main Estimating Department, OFT Document Reference B1595, page 20.

⁶¹⁶³ Interview transcript, OFT Document Reference 11210, page 12.

⁶¹⁶⁴ Interview transcript, OFT Document Reference 11210, page 12.

its alleged participation in bid rigging on this tender, in return for an admission that G G Middleton had participated in bid rigging on this tender. In response to this letter G G Middleton admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁶¹⁶⁵

IV.4152. In its response to the Statement, G G Middleton confirmed its position stating *'...[w]e admit that we undertook cover pricing on some projects during the period of time indicated...'*.⁶¹⁶⁶

The OFT's analysis of the evidence and finding

IV.4153. From the evidence presented above, the OFT draws the following conclusions.

IV.4154. Henry Boot and G G Middleton each accepted an invitation to tender for this contract.

IV.4155. Both companies submitted a tender. G G Middleton was unable to submit a tender by the return date and/or did not want to win this contract. Henry Boot completed the estimating process for this tender and submitted a bid with the hope of winning the work.

IV.4156. Henry Boot's *'Sheet 28'* for this tender records *'MIDDLETON (C)'*, under the heading *'Competition'*. Henry Boot confirmed that this shows that it gave a cover price to the company noted. In addition, Henry Boot's Estimate Summary Listing for this tender shows *'COVER TO MIDDLETONS. £690830 (£48436 addition)'* and MW has confirmed that this means that Henry Boot gave a cover price of this amount to the company noted, stating *'it's as clear as day that I gave Middleton a cover price – it's in my handwriting'*.

IV.4157. In addition, G G Middleton has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.4158. The OFT notes that the tender figure submitted by G G Middleton of £690,832 is almost identical to the cover price Henry Boot confirmed it provided to G G Middleton.

IV.4159. The OFT further notes that the tender submitted by G G Middleton was higher than the tender submitted by Middleton, the pattern consistent with a cover price having been provided.

IV.4160. The OFT therefore concludes that contact took place between Henry Boot and G G Middleton. The OFT also concludes that Henry Boot supplied a figure to G G Middleton for a cover bid.

IV.4161. The OFT is satisfied that the facts set out in paragraphs IV.4145 to IV.4160 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶¹⁶⁷ In particular:

⁶¹⁶⁵ Response from G G Middleton, OFT Document Reference 10351b, page 2.

⁶¹⁶⁶ Written representations of G G Middleton, 20 June 2008, page 1.

⁶¹⁶⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from Henry Boot to G G Middleton was not unilateral⁶¹⁶⁸, and contravenes the principle against direct or indirect contact between competitors;⁶¹⁶⁹
- (b) G G Middleton can be presumed to have taken account of the information received from Henry Boot (i.e. the cover price) when determining its own conduct in the tendering process;⁶¹⁷⁰ and
- (c) Henry Boot can be presumed to have taken account of the information it received from G G Middleton (i.e. that G G Middleton did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶¹⁷¹

IV.4162. In its response to the Statement, Henry Boot stated in respect of this Infringement that '*...the intentions of other parties taking covers was not a factor taken into account by Henry Boot in calculating its tender prices...*'⁶¹⁷² and '*In this particular tender, there were six tenderers. Henry Boot had no knowledge of the actions of four of these tenderers and, therefore, clearly needed to submit a competitive bid...*'⁶¹⁷³ The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶¹⁷⁴ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Henry Boot has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Henry Boot's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

IV.4163. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Henry Boot and G G Middleton in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment of a ward, tender deadline 23 June 2003.

Immunity and leniency assessment

IV.4164. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4165. Henry Boot informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Henry Boot will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁶¹⁶⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁶¹⁶⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶¹⁷⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶¹⁷¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶¹⁷² Written representations of Henry Boot, 27 June 2008, paragraph 8.3.

⁶¹⁷³ Written representations of Henry Boot, 27 June 2008, paragraph 8.3.

⁶¹⁷⁴ See paragraph III.58 of the Legal Background section.

Infringement 150: Two Gates Primary School, Tamworth – 25 June 2003
Client: Staffordshire County Council
Parties: Thomas Vale and Interclass

IV.4166. On 29 May 2003, Staffordshire County Council ('Staffordshire CC') sought tenders for extensions and alterations at Two Gates Primary School, Tamworth. The following six companies were invited to tender: Arthur M Griffiths, Interclass, Adonis, Kendrick Construction Ltd, Thomas Vale and Wygar.⁶¹⁷⁵ The deadline for the receipt of tenders was 25 June 2003.⁶¹⁷⁶

IV.4167. Staffordshire CC received the following tender returns:⁶¹⁷⁷

Company	Date tender received	Amount of tender	Awarded contract
Arthur M Griffiths	25 June 2003	£1,257,987	
Interclass	25 June 2003	£1,133,800	Yes
Adonis	25 June 2003	£1,374,316	
Kendrick Construction Ltd	25 June 2003	£1,243,641	
Thomas Vale	25 June 2003	£1,338,677	
Wygar	25 June 2003	£1,207,467	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.4168. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁶¹⁷⁸

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5390	B	Staffordshire CC	Two Gates Primary School, Tamworth		REP

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	25/06/2003 10.00am	£1,338,677		Kendrick, Wygar, Interclass Adonis	

IV.4169. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided four tender lists, with identical entries referring to this tender for weeks commencing 2, 9, 16 and 23 June 2003. The tender list for week commencing 23 June 2003 contains the following entry:⁶¹⁷⁹

⁶¹⁷⁵ Information from client, OFT Document Reference 9575.

⁶¹⁷⁶ Information from client, OFT Document Reference 9575. The OFT notes that the tender return date is incorrectly recorded as 17 September 2003.

⁶¹⁷⁷ Information from client, OFT Document Reference 9575.

⁶¹⁷⁸ Tender Status spreadsheet, OFT Document Reference 4522, page 35.

⁶¹⁷⁹ Tender lists, OFT Document Reference 4655, pages 5, 6, 7 and 9.

TENDER LISTS			
W.C		23-Jun-2003	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5390	B	Staffordshire C. Council	Two Gates Primary School, Tamworth

APPROX £	EST	CAT	DUE
			25/06/2003 10.00 am

Evidence from leniency applicant Thomas Vale

IV.4170. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.4171. At Annex 14⁶¹⁸⁰ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 21 of the schedule under Annex 14 and within the section for 2003 tenders is the following entry:⁶¹⁸¹

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5390	25 June	Staffordshire CC	Two Gates Primary School, Tamworth	Taken (Interclass)	Yes (Tender Spreadsheet)

IV.4172. The Tender Spreadsheet in the last column is the Tender Status spreadsheet and the Tender List is the internal tender list referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717.

IV.4173. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁶¹⁸² and Interclass appears on this list.

IV.4174. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

⁶¹⁸⁰ Leniency application, OFT Document Reference 4568.

⁶¹⁸¹ Leniency application, OFT Document Reference 4568, page 21.

⁶¹⁸² Cover pricing activity: Key competitors, OFT Document Reference 4524.

Witness evidence from leniency applicant Thomas Vale

- IV.4175. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.
- IV.4176. CKT said that the initials 'REP', which appear in the estimator column for this tender, were for Robin Perks, who was an estimator in Building Division (also known as Traditional), for which CKT was the estimating manager. Thomas Vale categorised this as a B tender which indicated that it was a cover price. CKT referred to the relevant entry in the Tender Status spreadsheet as follows: *'Category B indicates that it was a cover figure, tender return date 25th of June 2003, tender figure £1,338,677, Interclass involved indicating that the cover was received from Interclass'*.⁶¹⁸³ CKT could not recall the tender but suggested *'that I probably set it up [the cover price] with Interclass...and Robin actually made the final call to them, I would guess'*.⁶¹⁸⁴
- IV.4177. In interview, REP also could not recall the tender but confirmed that the entry in the Tender Status spreadsheet indicated that Thomas Vale had received a cover price. He said *'I would suggest that originally we were going to tender for it and he's [CKT] obviously sort of pencilled me in...to sort of do that job...and then for some reason we decided we're not...he's [again referring to CKT] called it a B...Interclass is in bold'*.⁶¹⁸⁵

Evidence from other companies – Interclass

- IV.4178. The OFT wrote to Interclass on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Interclass had participated in bid rigging on this tender. In response to this letter, Interclass admitted that it gave a cover price on this tender and that it *'engaged in bid rigging (cover pricing) activities on this tender, but cannot recall details of the other party/parties involved'*.⁶¹⁸⁶ In its response to the OFT's Fast Track Offer, Interclass divided its admissions into three categories: tenders where a cover price was given; tenders where a cover price was taken; and tenders where it had no evidence available. This tender was included in the cover prices given category, indicating that Interclass's admission was based on some evidence available to it.⁶¹⁸⁷
- IV.4179. The OFT subsequently wrote to Interclass's ultimate parent company at the time of this Infringement, Interclass Holdings, on 5 November 2007, asking it to comment on Interclass's response to the OFT's Fast Track Offer, given that the OFT intended to hold Interclass Holdings jointly and severally liable for any infringements committed by Interclass in respect of which the OFT ultimately decided to impose financial penalties. The OFT spoke to a representative of

⁶¹⁸³ Interview transcript, OFT Document Reference 13855, page 35.

⁶¹⁸⁴ Interview transcript, OFT Document Reference 13855, page 36.

⁶¹⁸⁵ Interview transcript, OFT Document Reference 11424, page 10.

⁶¹⁸⁶ Response from Interclass, OFT Document Reference 10418, page 5.

⁶¹⁸⁷ Interclass response, OFT Document Reference 10417, page 1.

Interclass Holdings on 6 December 2007 who stated that Interclass Holdings *'does not intend to make any comments regarding the second fast track letter'*.⁶¹⁸⁸

IV.4180. In their response to the Statement, Interclass and Interclass Holdings confirmed that *'Interclass has accepted the OFT's Fast Track Offer and does not contest the OFT's finding of infringement'*⁶¹⁸⁹ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.4181. From the evidence presented above, the OFT draws the following conclusions.

IV.4182. Thomas Vale and Interclass each accepted an invitation to tender for extensions and alterations at Two Gates Primary School, Tamworth.

IV.4183. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought. It appears that Interclass completed the estimating process for the tender for this contract and that it wanted to win the work. This is shown by the price submitted by Interclass being the lowest received by the client, and the fact that it won the contract.

IV.4184. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records four competitors who were also invited to tender for this contract, namely Kendrick, Wygar, Interclass and Adonis. Interclass is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is recorded as £1,338,677, matching that recorded by the client.

IV.4185. The OFT notes that although four competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Interclass. This indicates that a conscious decision was made to differentiate Interclass from the other three competitors. In addition, the fact that the tender had been allocated to the Building Division, for which CKT was the manager, means that it is likely that the entry in the Tender Status spreadsheet was accurate and that CKT had personal knowledge of the decision to receive a cover price from Interclass at the time. Both CKT and REP confirm that the entry in the Tender Status spreadsheet indicates a cover price was received from Interclass.

IV.4186. Thomas Vale admitted that Interclass was one of the *'key competitors'* with whom it engaged in cover pricing activity.

IV.4187. Interclass's own bid of £1,133,800 is lower than that tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Interclass to Thomas Vale.

⁶¹⁸⁸ File note of telephone conversation, OFT Document Reference 13997.

⁶¹⁸⁹ Written representations of Interclass and Interclass Holdings, 27 June 2008, paragraph 4.

IV.4188. Finally, both parties admitted engaging in bid rigging activities on this tender. However, Interclass could not recall with whom it engaged in bid rigging, in response to the OFT's letter of 22 March 2007.

IV.4189. The OFT therefore concludes that contact took place between Thomas Vale and Interclass. The OFT also concludes that Interclass supplied a figure to Thomas Vale for a cover bid.

IV.4190. The OFT is satisfied that the facts set out in paragraphs IV.4168 to IV.4189 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶¹⁹⁰ In particular:

- (a) the provision of a figure for a cover bid from Interclass to Thomas Vale was not unilateral⁶¹⁹¹, and contravenes the principle against direct or indirect contact between competitors;⁶¹⁹²
- (b) Thomas Vale can be presumed to have taken account of the information received from Interclass (i.e. the cover price) when determining its own conduct in the tendering process;⁶¹⁹³ and
- (c) Interclass can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶¹⁹⁴

IV.4191. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Interclass and Thomas Vale in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for extensions and alterations at Two Gates Primary School, Tamworth, tender deadline 25 June 2003.

Immunity and leniency assessment

IV.4192. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4193. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 151: Not included in the Decision

⁶¹⁹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶¹⁹¹ See paragraph IV.73 of the General comments on cover pricing section.

⁶¹⁹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶¹⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶¹⁹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 152: Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield – 27 June 2003
Client: Ashfield District Council
Parties: Derwent Valley, Harold Adkin and Beaufort

IV.4194. On 11 June 2003, Ashfield District Council sought tenders for the demolition and redevelopment of 57 and 59 Mayfield Street, Kirkby-In-Ashfield. The following five companies were invited to tender: Derwent Valley, Beaufort, Greenwood, Harold Adkin and Peter Burton Builder & Contractor. The deadline for the receipt of tenders was 12:00 noon on 27 June 2003.⁶¹⁹⁵

IV.4195. Ashfield District Council received the following tender returns:⁶¹⁹⁶

Company	Date and time tender received	Amount of tender	Awarded contract
Beaufort	27 June 2003 10:46	£73,642.00	
Greenwood	27 June 2003 11:45	£80,899.00	
Harold Adkin	27 June 2003 11:49	£72,209.00	
Derwent Valley	27 June 2003 10:50	£67,785.00	Yes
Peter Burton Builder & Contractor	No tender received	£ -	

IV.4196. Ashfield District Council also provided a document with the contact details of each of the undertakings invited to bid for this tender. This named Darren Ailward as the contact at Beaufort, Ian Douglas as the contact at Harold Adkin and Pat Tunnicliffe as the contact at Derwent Valley.⁶¹⁹⁷

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Schedule

IV.4197. During the OFT's search of Derwent Valley's premises, a tender schedule containing handwritten entries was discovered. Within this tender schedule was the following entry:⁶¹⁹⁸

TENDER NO.	RETURN DATE	TENDER DETAILS	OPPOSITION	TENDER	
05/06/03	27/06/03	DEMOLITION AND REDEVELOPMENT OF 57 & 59 MAYFIELD STREET, KIRKBY, FOR ASHFIELD DC	Adkin (C) Beaufort (C)	67785	1st

Evidence from leniency applicant Derwent Valley

IV.4198. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

⁶¹⁹⁵ Information from client, OFT Document Reference 7071.

⁶¹⁹⁶ Information from client, OFT Document Reference 7071.

⁶¹⁹⁷ Information from client, OFT Document Reference 7072, page 2.

⁶¹⁹⁸ Tender schedule, OFT Document Reference 1912, page 39.

IV.4199. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as *'DVC1 List of Covers Given'*. The information in the summary was based on the tender book kept by Pat Tunnicliffe ('PT'), an ex-estimator at Derwent Valley, and contained the following extract:⁶¹⁹⁹

Date	Contract	Company Involved
June 2003	Demolish & redevelop at Mayfield St. Kirkby in Ashfield	Adkin, Beaufort

IV.4200. Derwent Valley also provided to the OFT as part of its leniency application a *'List of Contractors Exchanging Cover Prices'*. The name *'Harold Adkin & Sons'* appears on this list with the address *'Oxford Street Sutton in Ashfield'*. Also on this list is the name *'Beaufort Construction (SiA) Ltd'* with the address *'Beaufort House Brierley Park Close Sutton in Ashfield'* and as contacts, *'Jeff Long, Darren'*.⁶²⁰⁰

IV.4201. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.4202. During interviews conducted in connection with its leniency application, Derwent Valley directors and an ex-employee provided a general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.4203. In regard to this tender, a voluntary interview was conducted with PT who dealt with this tender. PT confirmed that he kept and maintained the tender schedule referred to in paragraphs IV.309 to IV.317 above. PT was asked if he recalled the tender and he referred to the tender schedule and said, *'I do... We tendered for it, we won it and we did it'*. PT went on to say *'I know that the job was done and it looks as though Beaufort and Adkins took covers off us'*. PT was asked if he recalled who at Beaufort or Harold Adkin he would have dealt with in regard to this tender and said, *'not specifically over the contract. Yes, I've spoken to Beaufort and Adkins in the past, obviously they wanted help, obviously they didn't fancy it, it wasn't the most tasty of contracts admittedly'*. When asked if he could remember who he would have spoken to at Harold Adkin, PT said he believed it was someone by the name of Ian Douglas. When asked if he would have spoken to a *'Darren'* at Beaufort, PT said he thought so.⁶²⁰¹

IV.4204. David Stone ('DS'), Managing Director of Derwent Valley, was also interviewed in regard to this tender. He recalled the tender saying *'I remember us doing the work, because I know we did this job, a nightmare of a job'*. DS, examining the entry for this tender in the tender schedule where it was written

⁶¹⁹⁹ List of Covers Given, OFT Document Reference 3940, page 3.

⁶²⁰⁰ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942.

⁶²⁰¹ Interview transcript, OFT Document Reference 14237, pages 23 and 24.

*'Adkin (C)' and 'Beaufort (C)', said, 'That would indicate that we gave covers there'.*⁶²⁰²

Evidence from other companies – Harold Adkin

IV.4205. The OFT wrote to Harold Adkin on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Harold Adkin had participated in bid rigging on this tender. Harold Adkin responded to this with an admission that it had engaged in bid rigging for this tender. This admission was signed on 24 April 2007 by Ian Douglas ('ID'), Managing Director of Harold Adkin.⁶²⁰³ The response included a further document headed '*APPENDIX B*' which included an entry stating that Harold Adkin engaged in bid rigging activities on this tender with Derwent Valley.⁶²⁰⁴

IV.4206. In its response to the Statement in respect of this Infringement, Harold Adkin stated *'Harold Adkin took a cover price at a late stage when they realised it was unable to rice [sic] the job in the time available for a much valued client with the sole intention of not getting the work'.*⁶²⁰⁵

Evidence from other companies – Beaufort

IV.4207. The OFT wrote to Beaufort on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Beaufort had participated in bid rigging on this tender. Beaufort, represented by Elliot Mather LLP, indicated via letter on 18 April 2007 that it was willing to make admissions to involvement in cover pricing in relation to a number of suspect contracts.⁶²⁰⁶ The response included a completed suspect tender schedule and in respect of this tender Darren Ailward ('DA'), Director of Beaufort, admitted to Beaufort having participated in bid rigging activities and stated *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'.*⁶²⁰⁷

IV.4208. The OFT subsequently wrote to Beaufort's ultimate parent company at the time of this Infringement, Beaufort Holdings, on 5 November 2007, asking it to comment on Beaufort's response to the OFT's Fast Track Offer, given that the OFT intended to hold Beaufort Holdings jointly and severally liable for any infringements committed by Beaufort in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Beaufort Holdings' legal representatives, Elliott Mather LLP, said *'The company confirms that it shall not be making any comments on either its subsidiary, Beaufort Construction (S-IN-A) Limited's response to the reduced penalty offer, nor your proposed actions'.*⁶²⁰⁸

⁶²⁰² Interview transcript, OFT Document Reference 13478, pages 27 and 28.

⁶²⁰³ Response from Harold Adkin, OFT Document Reference 10376, page 3.

⁶²⁰⁴ Response from Harold Adkin, OFT Document Reference 10377, page 2.

⁶²⁰⁵ Written representations of Harold Adkin, 25 June 2008, page 2.

⁶²⁰⁶ Response from Beaufort, OFT Document Reference 10244.

⁶²⁰⁷ Response from Beaufort, OFT Document Reference 10245, page 5.

⁶²⁰⁸ Response from Beaufort Holdings, OFT Document Reference 13915.

IV.4209. Following the issue of the Statement, neither Beaufort nor Beaufort Holdings submitted any written or oral representations specifically in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.4210. From the evidence presented above, the OFT draws the following conclusions.

IV.4211. Derwent Valley, Harold Adkin and Beaufort each accepted an invitation to tender for this contract. Derwent Valley completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Derwent Valley being the lowest received and the fact that it won the contract.

IV.4212. Harold Adkin and Beaufort were each unable to submit a tender by the return date and/or did not want to win this contract.

IV.4213. In respect of Harold Adkin, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Harold Adkin with the letter 'C' in brackets next to it. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.4214. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover price to Harold Adkin.

IV.4215. This was corroborated in interview by DS, who agreed that the entry in the tender schedule showed that Derwent Valley gave a cover price in respect of this tender to Harold Adkin.

IV.4216. The OFT also notes that the tender document referred to in paragraph IV.4196 identifies an individual by the name of Ian Douglas at Harold Adkin who submitted its bid for this tender. PT, the estimator at Derwent Valley recalled the name Ian Douglas as someone at Harold Adkin with whom he would have spoken.

IV.4217. Harold Adkin has also admitted engaging in bid rigging activity in respect of this tender and identified the party with whom it engaged in bid rigging as Derwent Valley. This admission was signed by ID. The OFT notes that Harold Adkin named the party with whom it engaged in bid rigging as being Derwent Valley, without sight of the OFT's evidence that Derwent Valley was involved. This provides further independent corroboration of a cover price having been given by Derwent Valley to Harold Adkin in respect of this tender.

IV.4218. In respect of Beaufort, Derwent Valley's contemporaneous tender schedule, a document completed by hand by the estimator dealing with this tender, includes reference to competitor Beaufort with the letter 'C' in brackets next to it. Derwent Valley confirmed that a letter 'C' written in such a manner refers to a cover price being taken or received.

IV.4219. PT, the estimator for this tender, said that he recalled the tender and that his entry in the schedule meant that he gave a cover price to Beaufort.

- IV.4220. This was corroborated in interview by DS, who agreed that the entry in the tender schedule showed that Derwent Valley gave a cover price in respect of this tender to Beaufort.
- IV.4221. The OFT also notes that the tender document referred to in paragraph IV.4196 identifies an individual by the name of Darren Ailward at Beaufort who submitted its bid for this tender. PT, the estimator at Derwent Valley agreed that '*Darren*' may have been the person at Beaufort to whom he would have spoken.
- IV.4222. Beaufort has admitted engaging in bid rigging activity in respect of this contract and although it could not recall the identity of the other party/parties this admission was signed by DA.
- IV.4223. Derwent Valley also included in its list of companies who exchange cover prices the names of Harold Adkin and Beaufort.
- IV.4224. In addition, the OFT notes that Ashfield District Council received a tendered amount of £67,785.00 from Derwent Valley, which is lower than the amounts tendered by Harold Adkin and Beaufort. This fits into the pattern consistent with cover prices having been given to Harold Adkin and Beaufort by Derwent Valley.
- IV.4225. The OFT therefore concludes that contact took place between Derwent Valley and Harold Adkin, and between Derwent Valley and Beaufort. The OFT also concludes that Derwent Valley supplied figures to each of Harold Adkin and Beaufort for cover bids.
- IV.4226. The OFT is satisfied that the facts set out in paragraphs IV.4197 to IV.4225 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶²⁰⁹ In particular:
- (a) the provision of figures for cover bids from Derwent Valley to Harold Adkin and from Derwent Valley to Beaufort was not unilateral⁶²¹⁰, and contravenes the principle against direct or indirect contact between competitors;⁶²¹¹
 - (b) Harold Adkin and Beaufort can each be presumed to have taken account of the information received from Derwent Valley (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁶²¹² and
 - (c) Derwent Valley can be presumed to have taken account of the information it received from Harold Adkin and Beaufort (i.e. that neither Harold Adkin nor Beaufort intended to submit competitive bids) when determining its own conduct in the tendering process.⁶²¹³
- IV.4227. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Derwent Valley and Harold Adkin, and between Derwent Valley and

⁶²⁰⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶²¹⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁶²¹¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶²¹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶²¹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Beaufort, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the demolition and redevelopment, 57 and 59 Mayfield Street, Kirby-In-Ashfield tender dated 27 June 2003.

Immunity and leniency assessment

IV.4228. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4229. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the Derwent Valley tender schedule obtained during the visit under section 28 on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, Derwent Valley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 153: Not included in the Decision

Infringement 154: **Re-roofing and External Repairs, 242 – 254 Banbury Road, Oxford – 8 July 2003**

Client: **UK Estates Ltd**

Parties: **Mansell and Apollo**

IV.4230. On 16 June 2003, UK Estates Ltd sought tenders for re-roofing, external repairs and decorations to 242-254 Banbury Road, Oxford.⁶²¹⁴ The following four companies were invited to tender: Apollo, Letchworth Roofing Company Ltd, Makers UK Ltd and Mansell. The date and time of tender return was 8 July 2003 at noon.⁶²¹⁵

IV.4231. UK Estates Ltd received the following tender returns:⁶²¹⁶

Company	Date & Time tender received	Amount of tender	Awarded contract
Apollo	By 8 July 2003 12:00	£173,574.00	YES
Mansell	By 8 July 2003 12:00	£208,755.00	
Makers UK Ltd	By 8 July 2003 12:00	£256,355.54	
Letchworth Roofing Company Ltd	By 8 July 2003 12:00	£266,204.45	

⁶²¹⁴ Information from client, OFT Document Reference 9817.

⁶²¹⁵ Information from client, OFT Document Reference 9817.

⁶²¹⁶ Information from client, OFT Document Reference 9817.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.4232. As part of its leniency application, Mansell’s legal representatives provided Barry Russ’s (‘BR’), a Mansell managing estimator, workload reports. The 2003 workload report for special projects contained the following entry:⁶²¹⁷

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
02-00063	Oxford – ReRoofing & ext. Repairs – 242-254 Banbury Road		208755	188699		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
					(Apllo Roofing) – priced schedules called !

IV.4233. In its response to the Statement, Apollo suggested that Apollo being recorded on the workload reports in the Remarks column could merely be a record that it was the company that won this contract.⁶²¹⁸ However, the words ‘*Apllo Roofing*’ are in brackets on this document and as discussed in Mansell’s general leniency section, BR stated in interview that he used brackets to indicate a cover was received from that company.⁶²¹⁹ Furthermore, in this particular case, while that part of the entry is in brackets, the other part of the entry, ‘*- priced schedules called!*’ is not, indicating that Apollo’s name was put in brackets specifically to differentiate it in the manner described by BR.

IV.4234. In addition Mansell’s legal representatives provided, after interview, a price schedule for this tender attached to which is a document containing figures headed ‘*APOLLO*’ and ‘*MANSELL*’. At the bottom of the Apollo column is a figure ‘*approx Apollo £175,534.00*’ and at the bottom of the Mansell column is a figure ‘*208,755.00*’ which is the tender figure submitted by Mansell.⁶²²⁰

IV.4235. Under the heading ‘*APOLLO*’ is a breakdown of figures, which appears to be Apollo price schedule figures. Under the heading ‘*MANSELL*’ it appears the Apollo figures have been adjusted in order to arrive at the cover price figure provided to Mansell. At the bottom of the Mansell column is a box titled ‘*balance to find*’. This suggests that Mansell, having the cover price figure to work to, inputted this figure and then entered the breakdown figures, adjusting them until the balance to find equalled zero.

Evidence from leniency applicant Mansell

IV.4236. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁶²²¹ This evidence

⁶²¹⁷ Special works spreadsheet, OFT Document Reference B3539, page 3.

⁶²¹⁸ Written representations of Apollo, 27 June 2008, paragraph 7.5(i).

⁶²¹⁹ Interview transcript, OFT Document Reference 11516, page14.

⁶²²⁰ Document G, OFT Document Reference B4123, page 18.

⁶²²¹ Leniency application, OFT Document Reference B0734.

is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.4237. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Apollo and that this cover price was taken due to *'insufficient tender period: resource'* at Mansell.⁶²²²

IV.4238. In its response to the Statement, Apollo listed a number of issues with Mansell's TVR table, principally that it could not be considered a separate document because it was only restating the contents of BR's workload reports⁶²²³, and that Mansell itself had admitted that it could not be excluded that some of the tenders identified in the leniency application might not have involved cover pricing.⁶²²⁴

IV.4239. Whilst the OFT is not according the same evidential weight to Mansell's table provided under leniency as it is to contemporaneous documents and witness testimony, the OFT does consider this document to be robust where the underpinning contemporaneous documents and witness testimony indicate that a cover price was taken, and Mansell's internal investigations have yielded an assessment that confirms that indication. Although some tenders included in this table may not be supported by sufficient evidence, none of these were included in the Statement. The OFT considers that the evidence for the present Infringement does meet the strong and compelling standard as it consists of two contemporaneous documents supported by witness testimony.

Witness evidence from leniency applicant Mansell

IV.4240. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.4241. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *'Apollo Roofing, we would have gone to them, they are in brackets here, and got a figure from them. We've also got a note there that we had a price schedule called for'*.⁶²²⁵ BR explained that this probably meant Mansell were one of the lowest three tenders received and therefore had been requested by the client to provide a price schedule. When asked what would have happened next BR stated *'in this particular case it's possible that we went back to Apollo and said, "look, we've got a situation here, and can you give us anything which we could submit?"'*⁶²²⁶ In its response to the Statement, Mansell clarified that BR's admission was

⁶²²² Leniency application, OFT Document Reference B1351, page 1.

⁶²²³ Written representations of Apollo, 27 June 2008, paragraph 7.4.

⁶²²⁴ Written representations of Apollo, 27 June 2008, paragraph 7.5(i).

⁶²²⁵ Interview transcript, OFT Document Reference 11516, page 32.

⁶²²⁶ Interview transcript, OFT Document Reference 11516, page 32.

based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁶²²⁷

IV.4242. In its response to the Statement, Apollo pointed out that BR has no specific recollection of contact with Apollo for this contract, and in particular has no recollection of any individual at Apollo with whom he had contact⁶²²⁸, and that neither of the Apollo estimators working on this tender had any knowledge of BR.⁶²²⁹

IV.4243. The OFT accepts that BR's evidence does not constitute independent recollection of the events surrounding this tender. However, it does not consider that that undermines his evidence. Given the number of tenders BR dealt with, as indicated on his personal workload reports, the OFT accepts that it is unlikely that he would remember any single tender in detail, particularly one that had been pre-determined not to be of high priority and therefore on which the least possible amount of effort had been expended. This does not preclude him being able to provide an explanation of the contemporaneous documentation. The weight placed by the OFT on BR's evidence is commensurate with its explanatory nature.

IV.4244. In its response to the Statement, Apollo also suggested that it could not have given a cover to Mansell because neither BR of Mansell, nor any of the relevant estimators at Apollo, knew any employees of the other party involved in this tender. Apollo quoted Kenneth Lockwood ('KL') of Mansell as stating that Mansell's estimators knew the opposition and an estimator would know his opposite numbers by name.⁶²³⁰

IV.4245. The OFT notes that although KL stated that Mansell's estimators knew the opposition by name, it was BR's evidence (who works at a different office to KL) that he did not know estimators in other companies by name.⁶²³¹ Though it may generally have been the case that Mansell's estimators knew their opposite numbers, in this particular instance the estimator has confirmed that he did not, and there is no inconsistency therefore between his evidence and Apollo's in this regard. The OFT also notes that the workload reports that provide the contemporaneous documentary evidence for this Infringement were BR's, not KL's, and therefore in relation to this Infringement it is BR's views that should be given greater weight.

Evidence from other companies – Apollo

IV.4246. The OFT wrote to Apollo on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Apollo had participated in bid rigging on this tender. In response to this letter Apollo stated that it was unable to accept the OFT's Fast Track Offer as it *'had not found any indication that [it] has been involved in any anti-competitive conduct in relation to the tenders identified'*.⁶²³²

⁶²²⁷ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁶²²⁸ Written representations of Apollo, 27 June 2008, paragraphs 8.10(ii), 8.10(iii), and 8.11.

⁶²²⁹ Written representations of Apollo, 27 June 2008, paragraphs 8.15 to 8.16.

⁶²³⁰ Written representations of Apollo, 27 June 2008, paragraph 7.5(iv).

⁶²³¹ Interview transcript, OFT Document Reference 11516, page 13.

⁶²³² Response from Apollo, OFT Document Reference 10221.

IV.4247. The OFT subsequently wrote to Apollo's ultimate parent company at the time of this Infringement, Apollo Group, on 6 November 2007, asking it to comment on Apollo's response to the OFT's Fast Track Offer, given that the OFT intended to hold Apollo Group jointly and severally liable for any infringements committed by Apollo in respect of which the OFT ultimately decided to impose financial penalties. The OFT received a phone call in response to this letter on 6 December 2007, which confirmed that Apollo Group *'had no comments to make regarding its subsidiary's reply...'*.⁶²³³

IV.4248. In its response to the Statement, Apollo made general representations as to how, as a business, it has ensured that it generally only receives appropriate invitations to tender, how it returns unsuitable tenders, and as to its prequalification success rate in invitations to tender.⁶²³⁴ The OFT notes that the present Infringement relates to the provision of a cover price, not the acceptance of one. Though the OFT has found, in paragraph IV.73 above, that a common motive for providing cover prices was reciprocity, it notes that the undertaking concerned may have other motives, such as facilitating the reduction in competitive bids for a tender which it wishes to win. Moreover, and as set out in Section III (Legal Background), the subjective motives of a party are irrelevant where an anti-competitive object is established.

IV.4249. In its response to the Statement, Apollo included a copy of its price schedule for this tender.⁶²³⁵ A consideration of the figures in this document, compared with those recorded under Apollo's name on the contemporaneous document provided by Mansell, discussed in paragraphs IV.4233 to IV.4235 above, shows that the two sets of figures are broadly comparable. Many of the figures are an exact match and the majority of the remaining figures have generally been rounded up in the document provided by Mansell, from those contained in Apollo's price schedule. Additionally, the total figure for Apollo on Mansell's document is slightly higher than that recorded on Apollo's actual pricing schedule. The OFT considers this constitutes further evidence that Mansell was provided with Apollo's price breakdown for this tender. The differences between these two documents are consistent with the general practice for a party not to disclose its actual bid price when providing a cover price, but to round it up.

IV.4250. In its response to the Statement, Apollo argued that it did not provide its price schedule for this tender to Mansell, citing the absence of any documentary record of the transfer of the price schedule⁶²³⁶, and suggesting that Mansell could have either produced a price schedule on its own⁶²³⁷ or received Apollo's price schedule from another source, such as the contracting authority or via suppliers or subcontractors.⁶²³⁸ The OFT does not consider these alternative suggestions to be credible.

IV.4251. The OFT does not consider the absence of any documentary record of the transfer to be at all indicative of whether there was a transfer or not. As the

⁶²³³ File note of telephone conversation, OFT Document Reference 14210.

⁶²³⁴ Written representations of Apollo, 27 June 2008, paragraphs 5.4; and oral representations of Apollo, 22 July 2008, page 4.

⁶²³⁵ Written representations of Apollo, 27 June 2008, Annex 5.

⁶²³⁶ Written representations of Apollo, 27 June 2008, paragraph 7.5(iii).

⁶²³⁷ Written representations of Apollo, 27 June 2008, paragraph 7.5(ii).

⁶²³⁸ Written representations of Apollo, 27 June 2008, paragraph 7.7.

OFT has noted in particular in paragraphs IV.122 to IV.127, it was not uncommon for companies not to retain documentary records, particularly when they did not succeed in obtaining a contract. That there are now no records is not, in the OFT's view, evidence that they never existed.

IV.4252. The OFT considers it unlikely that Mansell would have composed its own price schedule. There is no evidence that Mansell conducted any such work (and particularly to compose a schedule that was so similar to Apollo's), and one might expect BR to have some recollection of the tender had he been required to do this. The OFT accepts that BR did indicate in his interview that *'we may well have priced something quickly ourselves because that's another possible scenario'*⁶²³⁹, but notes that he went on to say, in respect of this tender, that *'I would have thought, ... if we had been pressed, we would have gone back to Apollo and said can you help us out with a schedule'*. The OFT therefore does not consider this a credible alternative explanation of the document in question.

IV.4253. Neither does the OFT consider it plausible that a sub-contractor or supplier might request the full details of a bidder's quotation, or that a contracting authority would disclose another competitor's price schedule prior to receiving price schedules from all parties. The OFT can see no reason why either sub-contractors, suppliers or contracting authorities, would have any incentive to do this. Apollo provided, by way of example, a copy of an email from a contracting authority to Apollo, to which the price schedules of both Apollo and its competitor were attached.⁶²⁴⁰ However, the OFT notes that in that example both parties' price schedules had already been submitted to the contracting authority before the authority forwarded them to the tenderer. This is not therefore an example of a client providing details to a competitor prior to that competitor providing its own price schedule. Further, the inclusion of both Parties' price schedules was clearly an inadvertent error rather than an authority assisting in the passing on of competitors' sensitive pricing information.

IV.4254. In its response to the Statement, Apollo provided a witness statement from Steve Dean ('SD')⁶²⁴¹, who stated in respect of this tender *'I was the estimator responsible for preparing Apollo's costs estimate...'* and *'I was not approached for a cover price by any company in relation to this tender'*. SD also stated *'I have never sought a cover price from a competitor, nor have I given a cover price to a competitor, on Apollo's behalf'*. Similarly, Ian Timms ('IT'), Apollo's Estimating Director stated in his witness statement that he had not been approached for a cover price in relation to this tender.

IV.4255. The OFT notes the direct contradiction between this witness evidence on the one hand, and on the other hand the contemporaneous evidence and overall explanation provided by BR in respect of the workload report together with his specific explanation of the entry relating to this tender. On balance, the OFT considers the latter to be more compelling. BR's evidence is consistent with the markings on the contemporaneous workload report. Further, in relation to other Infringements described in this Decision⁶²⁴², similar markings on BR's workload reports indicating that cover prices have been obtained, have been confirmed to

⁶²³⁹ Interview transcript, OFT Document Reference 11516, page 33; and written representations of Apollo, 27 June 2008, paragraph 7.5(ii).

⁶²⁴⁰ Written representations of Apollo, 27 June 2008, paragraph 6.15 and Annex 2.

⁶²⁴¹ Written representations of Apollo, 27 June 2008, Annex 6.

⁶²⁴² See Infringements 42, 43, 91 and 97.

be correct by evidence or admissions from other Parties. The OFT further notes the possibility that the cover price may have been provided by someone at Apollo other than the estimator for the tender in question, SD, and without the knowledge of the estimating director, IT. In light of these factors, the OFT considers that the contemporaneous evidence and explanation of BR should be preferred to that of SD and IT.

IV.4256. In its response to the Statement, Apollo noted that the Statement indicated that cover prices were generally four to five per cent higher than the price submitted by the person providing the cover price and that in this tender Mansell's bid was approximately 10 per cent higher.⁶²⁴³ The OFT is unable to comment on the cover price calculation methodology of a non-leniency party, such as Apollo. In any event, although it was often the practice for companies to provide a cover price and for the recipient to add on four to five per cent, there were in fact many instances where the figure submitted on the basis of a cover price was 10 per cent or more above the figure submitted by the provider of the cover price.

The OFT's analysis of the evidence and finding

IV.4257. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.4258. Mansell and Apollo each accepted an invitation to tender for this contract.

IV.4259. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Apollo completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Apollo being the lowest received and the fact that it won the contract.

IV.4260. Mansell's 2003 workload report records '*(Apollo Roofing) – priced schedules called !*', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.4261. It appears that Mansell created a price schedule for this job after it was called for by the client. The OFT notes that Mansell's price schedule shows a breakdown of figures for Apollo. In conjunction with the witness evidence provided, the OFT considers that the only plausible explanation for Mansell having full details of Apollo's calculations is that Apollo supplied Mansell with details of its price schedule in order that Mansell could provide the client with the requested information.

IV.4262. In its response to the Statement, Apollo provided a copy of its price schedule for this tender. The OFT notes that this schedule is broadly comparable to that provided by Mansell and considers that it provides further evidence that Mansell was given Apollo's price breakdown for this tender by Apollo.

⁶²⁴³ Written representations of Apollo, 27 June 2008, paragraphs 7.12 and 8.17(ii).

IV.4263. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Apollo, the pattern consistent with a cover price having been provided.

IV.4264. In addition the OFT notes that Apollo's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from Apollo.

IV.4265. In its response to the Statement Apollo suggested that the OFT was *'attempt[ing] to rely on the competitive pricing of the Apollo bid as evidence against Apollo'*.⁶²⁴⁴ The OFT notes that this analysis is not relied upon as evidence, and merely sets out that the pattern of the tender bids was consistent with a cover price having been provided by Apollo to Mansell.

IV.4266. The OFT therefore concludes that contact took place between Mansell and Apollo. The OFT also concludes that Apollo supplied a figure to Mansell for a cover bid.

IV.4267. The OFT is satisfied that the facts set out in paragraphs IV.4232 to IV.4266 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶²⁴⁵ In particular:

- (a) the provision of a figure for a cover bid from Apollo to Mansell was not unilateral⁶²⁴⁶, and contravenes the principle against direct or indirect contact between competitors;⁶²⁴⁷
- (b) Mansell can be presumed to have taken account of the information received from Apollo (i.e. the cover price) when determining its own conduct in the tendering process,⁶²⁴⁸ and
- (c) Apollo can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶²⁴⁹

IV.4268. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Apollo in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for re-roofing, external repairs 242-254 Banbury Road, Oxford, tender deadline 8 July 2003.

Immunity and leniency assessment

IV.4269. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁶²⁴⁴ Written representations of Apollo, 27 June 2008, paragraph 8.17.

⁶²⁴⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶²⁴⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁶²⁴⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶²⁴⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶²⁴⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.4270. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 155: Mount Pleasant, Greenford, External Remedial Work (Phase 2)
 – 11 July 2003**
Client: London Borough of Ealing
Parties: Mansell and R Durtnell

IV.4271. On 4 June 2003, London Borough of Ealing sought tenders for housing work at Mount Pleasant, Greenford, external remedial work (Phase 2).⁶²⁵⁰ The following seven companies were invited to tender: Apollo, Chas Berger, Dray Building, Ian Williams, J. P. Kennedy, Mansell and R Durtnell, the date of tender return was 11 July 2003.⁶²⁵¹

IV.4272. London Borough of Ealing received the following tender returns:⁶²⁵²

Company	Date tender received	Amount of tender	Awarded contract
Chas Berger	Information not provided	£1,390,067.00	
Apollo	Information not provided	£1,136,622.00	
Dray Building	Information not provided	£1,257,080.00	
J. P. Kennedy	Information not provided	£1,055,816.00	YES
R Durtnell	Information not provided	£1,681,426.00	
Mansell	Information not provided	£1,547,111.00	
Ian Williams	Information not provided	£1,258,795.40	

IV.4273. London Borough of Ealing has advised that the work subject of the tender was not carried out but that it decided *'to substantially increase the scope of works'*.⁶²⁵³ The work was re-tendered and the tender was awarded to Dray Building, Mansell declined to tender for the re-tender.⁶²⁵⁴

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender summary

IV.4274. As part of its leniency application, Mansell's legal representatives provided a tender summary sheet for this tender, which shows the tender figure Mansell submitted for this tender '1,547,111' and at the bottom is handwritten '© Durtnell £1,675,000'.⁶²⁵⁵

⁶²⁵⁰ Information from client, OFT Document Reference 8631, page 1.

⁶²⁵¹ Information from client, OFT Document Reference 8631, page 1.

⁶²⁵² Information from client, OFT Document Reference 8631, page 1.

⁶²⁵³ Information from client, OFT Document Reference 8631, page 1.

⁶²⁵⁴ Information from client, OFT Document Reference 8631 page 2.

⁶²⁵⁵ Tender summary, OFT Document Reference B1359.

Evidence from leniency applicant Mansell

IV.4275. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.⁶²⁵⁶ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.4276. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell gave a cover price to R Durnell.⁶²⁵⁷

Witness evidence from leniency applicant Mansell

IV.4277. During interviews conducted in connection with its leniency application, a Mansell employee from the TVR provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.4278. During an interview with the OFT on 1 May 2007, Barry Russ ('BR'), a Mansell managing estimator, advised what would happen when a competitor asked for a cover price from Mansell as detailed in paragraphs IV.486 to IV.488 above. In relation to this tender BR stated *'a note at the bottom there that we actually gave out a cover on that instance, to Durnell, and that would have been the figure'*. BR explained that Mansell would have provided that figure or above to R Durnell.⁶²⁵⁸ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁶²⁵⁹

Evidence from other companies – R Durnell

IV.4279. The OFT wrote to R Durnell on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that R Durnell had participated in bid rigging on this tender. In response to this letter R Durnell admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁶²⁶⁰ R Durnell also stated that they had *'categorised [this tender] as "covers taken" as we do not have such records [pricing notes]; indicating that the schemes were not priced'*.⁶²⁶¹

IV.4280. The OFT subsequently wrote to R Durnell's ultimate parent company at the time of this Infringement, Durnell Holdings, on 5 November 2007, asking it to comment on R Durnell's response to the OFT's Fast Track Offer, given that the OFT intended to hold Durnell Holdings jointly and severally liable for any infringements committed by R Durnell in respect of which the OFT ultimately

⁶²⁵⁶ Leniency application, OFT Document Reference B0734.

⁶²⁵⁷ Leniency application, OFT Document Reference B1351, page 1.

⁶²⁵⁸ Interview transcript, OFT Document Reference 11516, page 33.

⁶²⁵⁹ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁶²⁶⁰ Response from R Durnell, OFT Document Reference 10780, page 2.

⁶²⁶¹ Response from R Durnell, OFT Document Reference 10779, page 1.

decided to impose financial penalties. In response to this letter, Durtnell Holdings said *'We confirm that the holding company adopts the operating company's position'*.⁶²⁶²

IV.4281. In its response to the Statement, R Durtnell and Durtnell Holdings stated *'Durtnell has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement ...'*.⁶²⁶³

The OFT's analysis of the evidence and finding

IV.4282. From the evidence presented above, the OFT draws the following conclusions.

IV.4283. Mansell and R Durtnell each accepted an invitation to tender for this contract.

IV.4284. Both companies submitted a tender. R Durtnell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Mansell completed the estimating process for this tender and that they submitted a bid with the hope of winning the work.

IV.4285. Mansell's tender summary for this tender shows *'© Durtnell £1,675,000'*. Mansell confirmed that this shows that it gave a cover price to the company noted of the amount shown or higher. The OFT notes that R Durtnell's bid was close to, and higher than, this figure.

IV.4286. The OFT further notes that the tender submitted by R Durtnell was higher than the tender submitted by Mansell, the pattern consistent with a cover price having been provided.

IV.4287. In addition, R Durtnell has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.4288. The OFT notes that R Durtnell's tender figure was the only one above that of Mansell, and that Mansell could not therefore have provided cover to anyone other than R Durtnell, for this tender.

IV.4289. The OFT therefore concludes that contact took place between Mansell and R Durtnell. The OFT also concludes that Mansell supplied a figure to R Durtnell for a cover bid.

IV.4290. The OFT is satisfied that the facts set out in paragraphs IV.4274 to IV.4289 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶²⁶⁴ In particular:

- (a) the provision of a figure for a cover bid from Mansell to R Durtnell was not unilateral⁶²⁶⁵, and contravenes the principle against direct or indirect contact between competitors;⁶²⁶⁶

⁶²⁶² Response from Durtnell Holdings, OFT Document Reference 14020.

⁶²⁶³ Written representations of R Durtnell and Durtnell Holdings, 27 June 2008, paragraph 4.

⁶²⁶⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶²⁶⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁶²⁶⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) R Durtnell can be presumed to have taken account of the information received from Mansell (i.e. the cover price) when determining its own conduct in the tendering process;⁶²⁶⁷ and
- (c) Mansell can be presumed to have taken account of the information it received from R Durtnell (i.e. that R Durtnell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶²⁶⁸

IV.4291. In its response to the Statement, Balfour Beatty / Mansell stated '*The OFT has adduced no evidence that the giving of a cover was taken into account by Balfour Beatty and Mansell when pricing its tenders nor is there any evidence that the giving of a cover had any effect on these parties' pricing of the tender*'.⁶²⁶⁹ The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶²⁷⁰ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Mansell / Balfour Beatty has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Balfour Beatty / Mansell's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that Balfour Beatty Group submits that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

IV.4292. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and R Durtnell in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Mount Pleasant Greenford, external remedial work (Phase 2), tender deadline 11 July 2003.

Immunity and leniency assessment

IV.4293. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4294. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁶²⁶⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶²⁶⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶²⁶⁹ Written representations of Balfour Beatty, 27 June 2008, paragraph 10.8.

⁶²⁷⁰ See paragraph III.58 of the Legal Background section.

Infringement 156: Redhill Comprehensive – New Sixth Form Block – 15 July 2003
Client: Nottinghamshire County Council
Parties: Sol and G G Middleton

IV.4295. On 16 June 2003, Nottinghamshire County Council ('NCC') sought tenders for the construction of a new, single-storey sixth form block, with links to and alteration of the existing school building at Redhill Comprehensive School. The following six companies were invited to tender: G F Tomlinson, G G Middleton, Linford, Sol, Wrights (Lincoln) and North Midland. The closing date for return of tenders was 15 July 2003 by 10:00 am.⁶²⁷¹

IV.4296. NCC received the following tender returns:⁶²⁷²

Company	Date and Time Tender Received	Amount of Tender	Awarded Contract
G F Tomlinson	15 July 2003 by 10:00 am	£568,433	
G G Middleton	15 July 2003 by 10:00 am	£473,262	Yes
Linford	15 July 2003 by 10:00 am	£543,800	
Sol	15 July 2003 by 10:00 am	£527,648	
Wrights (Lincoln)		No Tender Received	
North Midland	15 July 2003 by 10:00 am	£546,828	

Evidence of agreement and/or concerted practice

Contemporaneous evidence from leniency applicant Sol – Tender Register and Estimating Board Report, dated 11 August 2003

IV.4297. During the OFT's visit to Sol's premises under section 27 on 18 January 2006, a copy of its Tender Register was produced. This contained the following entry for this contract:⁶²⁷³

DATE DUE	JOB DESCRIPTION	CLIENT	ARCHITECT	QUANTITY SURVEYOR
15 JULY '03 £400,000	REDHILL COMP SCHOOL NEW 6 TH FORM BUILDING (PHASE 1)	NOTTS CC	NOTTS CC	NOTTS CC

TYPE	TENDER SUM	ESTIMATOR	COMPETITION	RESULTS/COMMENTS
B.Q.	527,648	'C'	(JOHN STOTT [...] [C]) GG MIDDLETON & SON LTD WORKSOP TOMLINSON DERBY LINFORD NORTH MIDLANDS	START AUG '03 FINISH JAN '04 18 WKS

⁶²⁷¹ Information from client, OFT Document Reference 9486.

⁶²⁷² Information from client, OFT Document Reference 9486.

⁶²⁷³ Tender Register, OFT Document Reference 4170, page 6.

IV.4298. During the OFT's visit to Sol's premises under section 27 on 18 January 2006, a copy of its Estimating Board Report ('EBR') for this contract was produced which contains the following entry:⁶²⁷⁴

<u>DATE</u>	<u>PROJECT</u>	<u>CLIENT</u>	<u>ARCHITECT</u>	<u>QUANTITY SURVEYOR</u>
15-Jul-03	Redhill Comp New 6 th Form Block	Notts County Council	Notts County Council	Notts County Council

<u>JOB</u>	<u>LOCATION</u>	<u>TYPE</u>	<u>FUNDED</u>	<u>SECTOR</u>
NB	Notts	BQ	Public	Education

<u>TENDER VALUE</u>	<u>MARGIN</u>	<u>ESTIMATOR</u>		
£527,648		'C'		

Evidence from leniency applicant Sol

IV.4299. As part of its leniency application, Sol provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.4300. In particular, Sol provided to the OFT an analysis of its tender sheets since March 2000. In respect of the tender for Redhill Comprehensive School's new sixth form building, dated 15 July 2003, Sol confirmed that it received a cover price from G G Middleton because *'Project too small but Client one we did not wish to refuse work from'*.⁶²⁷⁵

IV.4301. In its response to the Statement, Sol acknowledged that it had *'... admitted engaging in the practice of cover pricing in the 7 tenders listed in the Statement of Objections.'*⁶²⁷⁶

IV.4302. Also in its response to the Statement, Sol asserted that *'G G Middleton, who provided Sol with the cover price, obtained no advantage from this process as it was still involved in a competitive situation with 4 other contractors.'*⁶²⁷⁷ Whilst not accepting that GG Middleton obtained no advantage in circumstances where it knew it had fewer legitimate tenderers to compete with in the tender process, the OFT notes in any event that it is not necessary for a finding of infringement that any party received a competitive advantage, as the restriction, prevention or distortion of competition which is the object of the arrangement may arise in other ways, see the Legal Background section.

Witness evidence from leniency applicant Sol

IV.4303. During interviews conducted in connection with its leniency application, Sol's employees provided further general explanation of its participation in cover

⁶²⁷⁴ Estimating Board Report, OFT Document Reference 4167, page 32.

⁶²⁷⁵ Tender Cover Price Analysis, OFT Document Reference 4359, page 5.

⁶²⁷⁶ Written representations of Sol, 27 June 2008, page 3.

⁶²⁷⁷ Written representations of Sol, 27 June 2008, Annex 6, Key Submissions, paragraph 3.

pricing. This evidence is set out in paragraphs IV.593 to IV.616 above and is relied upon by the OFT in relation to this tender.

IV.4304. When interviewed about this tender, John Cummings ('JC'), Chief Estimator at Sol, identified the writing in the Tender Register⁶²⁷⁸ as his, with the exception of the names relating to G G Middleton and G F Tomlinson in the '*Competition*' column, which he identified as that of a clerical assistant.⁶²⁷⁹ When asked about the '*Tender Sum*' he said, '*That's the, the cover I'd have got from... Middleton's. 527,648*'.⁶²⁸⁰ This figure is the same as that in the tender reply received by NCC from Sol. When asked to explain the entry 'C' in the '*Estimator*' box he said, '*Cover*' [taken]. He further explained the entries in the '*Competition*' column as the names of competing companies for the tender.⁶²⁸¹ JC further identified as his writing the entry '*John Stott*' and the telephone number '[...] [C]' above the entry '*G G Middleton & Sons Ltd., Worksop*'. He said he had chosen G G Middleton as the company from whom to obtain a cover price because he suspected that he knew it would be competitive.⁶²⁸²

IV.4305. When asked about the entry in the EBR dated 11 August 2003 for this tender, JC confirmed that the entry 'C' in the '*Estimator*' column denoted a cover price. He also confirmed that the 'C's in the '*Estimator*' columns of the contemporaneous documents showed that no estimator was allocated to this job because it was considered too small and Sol decided early on to obtain a cover price.⁶²⁸³

Evidence from other companies – G G Middleton

IV.4306. The OFT wrote to G G Middleton on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that G G Middleton had participated in bid rigging on this tender. G G Middleton replied to the OFT on 17 April 2007. Stephen Stott, Managing Director, stated that the company did engage in bid rigging activities on this particular tender but was unable to recall details of the other party or parties involved.⁶²⁸⁴

IV.4307. In its response to the Statement, G G Middleton confirmed its position stating '*...[w]e admit that we undertook cover pricing on some projects during the period of time indicated...*'.⁶²⁸⁵

The OFT's analysis of the evidence and finding

IV.4308. From the evidence presented above, the OFT draws the following conclusions.

IV.4309. Sol and G G Middleton each accepted an invitation to tender for this contract. It appears that G G Middleton completed the estimating process for its tender and that it wanted to win the contract. This is shown by the price submitted by G G Middleton being the lowest received and the fact that it won the contract.

⁶²⁷⁸ Tender Register, OFT Document Reference 4170, page 6.

⁶²⁷⁹ Interview transcript, OFT Document Reference 11368, page 12.

⁶²⁸⁰ Interview transcript, OFT Document Reference 11368, page 13.

⁶²⁸¹ Interview transcript, OFT Document Reference 11368, page 13.

⁶²⁸² Interview transcript, OFT Document Reference 11368, pages 13 and 14.

⁶²⁸³ Interview transcript, OFT Document Reference 11368, pages 16 and 17.

⁶²⁸⁴ Response from G G Middleton, OFT Document Reference 10351b, page 2.

⁶²⁸⁵ Written representations of G G Middleton, 20 June 2008, page 1.

- IV.4310. Sol was unable to submit a tender by the return date and/or did not want to win this contract.
- IV.4311. The Tender Register entry for this tender shows that Sol submitted the tender figure sum of £527,648 to NCC and entered 'C' in the 'Estimator' column of the same document. This indicates that Sol did not appoint an estimator for this tender but instead sought a cover price. The telephone number and the name 'John Stott' next to G G Middleton's name in the 'Competition' column of the document indicate that G G Middleton supplied this cover price.
- IV.4312. In connection with its application for leniency, Sol provided the OFT with a list of undertakings with whom it had exchanged cover prices. Among these was the name of Stephen Stott at G G Middleton. Stephen Stott signed G G Middleton's response to the OFT's letter of 22 March 2007. It should be noted that in interview JC admitted to some confusion over the name as he had entered John Stott in his Tender Register for this tender and he was unable to remember whether it was Stephen or John Stott.⁶²⁸⁶
- IV.4313. Further, the telephone number, '[.....] [C]', written next to the name 'John Stott' in Sol's Tender Register, and identified by JC as being in his handwriting, is the same number as appears next to 'Middleton' in the 'Competitors Book' found at the premises of Loach during visits made by the OFT under section 28 to their premises on 28 June 2005.⁶²⁸⁷
- IV.4314. JC, in interview, confirmed that he obtained a cover price from Mr Stott at G G Middleton as indicated by the name and telephone number next to G G Middleton's name and furthermore by the 'C' in the 'Estimator' column of the Tender Register. He said that he chose G G Middleton as the company from whom to obtain a cover price, because he suspected that it would be competitive for this tender.⁶²⁸⁸
- IV.4315. Sol's EBR for this tender shows that the figure £527,648 in the 'Tender Sum' column was the same as recorded in the 'Tender Register'. There is no entry in the 'Margin' column, and a 'C' is entered in the 'Estimator' column of the EBR. These indicate that JC reported the figure of £527,648 to the Board of Sol as its tender submission price for this tender and that this figure was a cover price. It was unnecessary, therefore, to appoint an estimator to produce any preliminary figures.
- IV.4316. JC in interview explained that the figure of £527,648 on the EBR was the cover price he obtained from G G Middleton and that as this was a cover price no estimator would have been appointed, resulting in no other figures being produced to calculate an entry for the 'Margin' column [profits and overheads].⁶²⁸⁹
- IV.4317. Sol confirmed as part of its leniency application that it obtained a cover price from G G Middleton in respect of this tender because the project was too small but it did not wish to upset the client.

⁶²⁸⁶ Interview transcript, OFT Document Reference 11368, page 15.

⁶²⁸⁷ Competitors Book, OFT Document Reference 2954, page 9.

⁶²⁸⁸ Interview transcript, OFT Document Reference 11368, page 14.

⁶²⁸⁹ Interview transcript, OFT Document Reference 11368, pages 13 to 15.

IV.4318. G G Middleton admitted in its reply to the OFT's letter of 22 March 2007 that it had engaged in bid rigging activities on this tender but was unable to recall with whom or any other details. Both companies involved in this infringement have therefore admitted to bid rigging.

IV.4319. The tender figure of £527,648 submitted by Sol was higher than the tender submitted by G G Middleton, the pattern consistent with a cover price having been provided.

IV.4320. Further, the sum of £527,648 submitted by Sol to NCC for this tender is second lowest only to that of G G Middleton, showing that Sol could not have obtained a cover price from any other of the bidders.

IV.4321. The OFT therefore concludes that contact took place between Sol and G G Middleton. The OFT also concludes that G G Middleton supplied a figure to Sol for a cover bid.

IV.4322. The OFT is satisfied that the facts set out in paragraphs IV.4297 to IV.4321 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶²⁹⁰ In particular:

- (a) the provision of a figure for a cover bid from G G Middleton to Sol was not unilateral⁶²⁹¹, and contravenes the principle against direct or indirect contact between competitors;⁶²⁹²
- (b) Sol can be presumed to have taken account of the information received from G G Middleton (i.e. the cover price) when determining its own conduct in the tendering process;⁶²⁹³ and
- (c) G G Middleton can be presumed to have taken account of the information it received from Sol (i.e. that Sol did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶²⁹⁴

IV.4323. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between G G Middleton and Sol in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the construction of a new, single-storey sixth form block, with links to and alteration of the existing school building Redhill Comprehensive School, Arnold Rd, Nottingham, Nottinghamshire, date of tender 15 July 2003.

Immunity and leniency assessment

IV.4324. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁶²⁹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶²⁹¹ See paragraph IV.73 of the General comments on cover pricing section.

⁶²⁹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶²⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶²⁹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.4325. In respect of this tender, the OFT became aware of Sol's involvement in bid rigging activities by virtue of the information obtained during the visit by the OFT under section 27 to Sol's premises on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, Sol will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 157: Refurbishment to Allerton Bywater, Miners' Welfare Centre – 21 July 2003
Client: English Partnerships
Parties: Irwins and Lotus

IV.4326. On 17 June 2003, English Partnerships sought tenders for the refurbishment of Allerton Bywater, Miners' Welfare Centre.⁶²⁹⁵ The following five companies were invited to tender: Irwins, Lotus, Lemmeleg, Construction Skills Learning Centre, Marshalls plc. The deadline for receipt of tenders was 21 July 2003.⁶²⁹⁶

IV.4327. English Partnerships received the following tender returns:⁶²⁹⁷

Company	Time & Date tender received	Amount of tender	Awarded contract
Irwins	9:29 am on 21 June 2003	£469,469.00	
Lotus	9:29 am on 21 June 2003	£455,724.00	
Lemmeleg	9:29 am on 21 June 2003	£443,955.29	Yes
Construction Skills Learning Centre	Declined to tender		
Marshalls Plc	12:10 pm on 21 June 2003	£460,261.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register

IV.4328. During the OFT's search of Irwins' premises a Tender Register was found. The tender register contained the following entries in respect of this tender:⁶²⁹⁸

⁶²⁹⁵ Information from client, OFT Document Reference 7843.

⁶²⁹⁶ Information from client, OFT Document Reference 7843.

⁶²⁹⁷ Information from client, OFT Document Reference 7843.

⁶²⁹⁸ Tender register, OFT Document Reference A0339, page 54.

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered	Date tender Due
0603043 17 June 708	Alterations & Refurbishment Allerton Bywater Miners Welfare Centre	English Partnerships Gardinier & Theobald London	B of Q C	496469	Monday 21 July 2003

Estimator	Notes
PL	Marshall Lemelleg Tolent * Lotus

Evidence from leniency applicant – Irwins

IV.4329. As part of its leniency application, Irwins' legal representatives provided a general explanation of its participation in cover pricing.⁶²⁹⁹ This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.4330. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for '*Covers Taken*' and '*Covers Given*', which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson ('IPN'), Estimating Director into potential cover prices.⁶³⁰⁰ At number 90 of the '*Covers Taken*' schedule is the following entry:⁶³⁰¹

	Year	Tender Ref	Description	Client	Date	Value	Cover From
90		0603043	Alt/Refurb Allerton Bywater Miners Welfare Centre	English Partnerships	21.07.03	496469	Lotus

Individual Contact	Notes
Malcolm White	

IV.4331. Irwins also provided to the OFT a schedule listing their competitors' contact details. The name of Lotus appears on the list and '*Malcolm White*' is named as the contact person.⁶³⁰²

⁶²⁹⁹ Leniency application, OFT Document Reference A0714.

⁶³⁰⁰ Leniency application, OFT Document Reference A0714, page 7.

⁶³⁰¹ Covers Taken, OFT Document Reference A0718, page 8.

⁶³⁰² Directory, OFT Document Reference A0715, page 4.

IV.4332. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Irwins

IV.4333. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins' leniency application, IPN provided further general explanation of Irwins' participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.4334. Also during this interview, IPN was shown the '*Tender Register*'⁶³⁰³ and in particular the reference to the entry for alterations and refurbishment at Allerton Bywater Miners Welfare Centre and was asked if he could recall anything about that contract. IPN replied '*No more than what it says on there, Lotus, looks like people we dealt with on that one*'.⁶³⁰⁴ IPN confirmed that the presence of a 'C' in the fourth column on the tender register shows that Irwins took a cover in relation to that contract.⁶³⁰⁵ IPN further confirmed that although other competitors were listed in the final column of the tender register he could tell who he received the cover price from by the asterisk being inserted next to Lotus, '*I'd think the little asterix really*'.⁶³⁰⁶

Evidence from other companies – Lotus

IV.4335. The OFT wrote to Lotus on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lotus had participated in bid rigging on this tender. In response to this letter Lotus admitted that '*we engaged in bid rigging activities on this tender but cannot recall details of the other parties involved*'.⁶³⁰⁷ However, Lotus also stated that '*Despite careful internal investigation into the issue, in relation to the five tenders listed in the annex to your letter, Lotus is unable to conclude whether it did in fact participate in bid rigging activities. The present owner of Lotus is Lotus Construction (Yorkshire) Limited and it acquired Lotus in September 2006. The tenders listed in the annex to your letter all predate this acquisition and the present owners of Lotus have no knowledge of bid rigging in any form having occurred involving Lotus*'.⁶³⁰⁸

IV.4336. Lotus confirmed in their response to the Statement that '*...Lotus is compelled... to accept its participation in the Alleged Infringements...*'.⁶³⁰⁹

The OFT's analysis of the evidence and finding

IV.4337. From the evidence presented above, the OFT draws the following conclusions.

⁶³⁰³ Tender register, OFT Document Reference A0339, page 54.

⁶³⁰⁴ Interview transcript, OFT Document Reference 11254, page 15.

⁶³⁰⁵ Interview transcript, OFT Document Reference 11254, page 16.

⁶³⁰⁶ Interview transcript, OFT Document Reference 11254, page 16.

⁶³⁰⁷ Response from Lotus, OFT Document Reference 10528, page 3.

⁶³⁰⁸ Response from Lotus, OFT Document Reference 10527.

⁶³⁰⁹ Written representations of Lotus, 26 June 2008, paragraph 7.3.

IV.4338. Irwins and Lotus each accepted an invitation to tender for the refurbishment to Allerton Bywater Miners Welfare Centre. Irwins was unable to submit a tender by the return date and/or did not want to win this contract.

IV.4339. Lotus appears to have completed the estimating process for the tender for this contract. English Partnerships stated '*Lotus Construction Ltd pricing levels were again generally consistent and very competitive...*'.⁶³¹⁰

IV.4340. Irwins' Tender Register records '*Marshalls Lemelleg Tolent *Lotus*', typed in the final column. IPN confirmed that the '**' handwritten next to Lotus shows that the cover price was received from Lotus. Also a 'C' is typed in the type of work/ percentage difference column. IPN confirmed that the C typed in this column shows that Irwins sought a cover price in relation to this contract. Both companies have accepted that they participated in this Infringement. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN's admission and explanation of that contemporaneous evidence and the admission by Lotus, that Lotus supplied Irwins with a cover price for this tender.

IV.4341. The OFT further notes that the tender submitted by Irwins was higher than the tender submitted by Lotus, the pattern consistent with a cover price having been provided.

IV.4342. The OFT therefore concludes that contact took place between Irwins and Lotus. The OFT also concludes that Lotus supplied a figure to Irwins for a cover bid.

IV.4343. The OFT is satisfied that the facts set out in paragraphs IV.4328 to IV.4342 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶³¹¹ In particular:

- (a) the provision of a figure for a cover bid from Lotus to Irwins was not unilateral⁶³¹², and contravenes the principle against direct or indirect contact between competitors;⁶³¹³
- (b) Irwins can be presumed to have taken account of the information received from Lotus (i.e. the cover price) when determining its own conduct in the tendering process;⁶³¹⁴ and
- (c) Lotus can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶³¹⁵

IV.4344. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and Lotus, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment to Allerton Bywater, Miners' Welfare Centre, tender deadline 21 July 2003.

⁶³¹⁰ Information from client, OFT Document Reference 7849, page 10.

⁶³¹¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶³¹² See paragraph IV.73 of the General comments on cover pricing section.

⁶³¹³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶³¹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶³¹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.4345. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4346. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this Infringement.

Infringement 158: **North Lodge and Cricket Pavilion, Queen’s Park, Chesterfield – 25 and 30 July 2003**
Client: **Chesterfield Borough Council**
Parties: **Wildgoose, Greenwood and Herbert Baggaley**

IV.4347. On 4 November 2002, Chesterfield Borough Council (‘Chesterfield BC’) sought tenders for the role of managing agent in relation to the re-development of Queen’s Park, a public park on the edge of Chesterfield town centre. This was a large project consisting of a number of specialised and general works contracts, including refurbishments and extensions to North Lodge and Cricket Pavilion. The task of the managing agent was to procure and oversee the execution of these works. Wildgoose was one of the companies invited to tender and was successful in its bid. As a consequence, Wildgoose was appointed as Chesterfield BC’s managing agent for Queen’s Park, pursuant to a management contract.⁶³¹⁶

IV.4348. The management contract was overseen by Wildgoose’s Commercial Manager Simon Meredith (‘SM’) and director Mike Storey. As managing agent, Wildgoose was responsible for procuring several competitive tenders for various works packages although the appraisal of these tenders was undertaken by Chesterfield BC’s appointed quantity surveyors, Sir William Baird and Partners (‘William Baird’). Wildgoose expressed an interest in carrying out the general works packages and was permitted to tender by Chesterfield BC. On 1 July 2003, SM of Wildgoose sent invitations to tender for North Lodge, Queen’s Park, Chesterfield (works contract reference WC70). Three companies were initially invited to tender: Herbert Baggaley, Allenbuild and Wildgoose. The letter of invitation for Wildgoose to tender was addressed by SM at Wildgoose for ‘*the attention of Mr B. Bennett*’⁶³¹⁷ at Wildgoose. Letters of invitation to tender were also sent and addressed for ‘*the attention of Mr R. Hayes*’⁶³¹⁸ at Allenbuild and for ‘*the attention of Mr A. Newhall*’⁶³¹⁹ at Herbert Baggaley. Completed tenders were to be returned to William Baird by a deadline of noon on 25 July 2003.

⁶³¹⁶ Contract information, OFT Document References 11040 and 12860.

⁶³¹⁷ Invitation to tender, OFT Document Reference 7369, page 5.

⁶³¹⁸ Invitation to tender, OFT Document Reference 7369, page 2.

⁶³¹⁹ Invitation to tender, OFT Document Reference 7369, page 4.

IV.4349. The following day, on 2 July 2003, SM and Mark Winstanley of Wildgoose attended a Queen’s Park project team meeting. The minutes from this meeting show that additional companies were required to tender for the North Lodge and Cricket Pavilion packages.⁶³²⁰ The next day, on 3 July 2003, SM sent invitations to tender for the Cricket Pavilion, Queen’s Park, Chesterfield (works contract reference WC80). Again, only three companies, namely Herbert Baggaley, Allenbuild and Wildgoose were initially invited to tender and letters of invitation were sent by SM for the attention of the same names as for the North Lodge tender above.⁶³²¹ Completed tenders for the Cricket Pavilion contract were to be returned to William Baird by a deadline of 30 July 2003. On 4 July 2003⁶³²², a further invitation to tender was sent by Wildgoose to Greenwood for both of the North Lodge⁶³²³ and Cricket Pavilion⁶³²⁴ contracts.

IV.4350. Quantity surveyors William Baird, on behalf of Chesterfield BC, received the following tender returns for North Lodge:⁶³²⁵

Company	Date tender received	Amount of tender	Awarded contract
Allenbuild	25 July 2003	£389,575.00	
Greenwood	25 July 2003	£382,160.00	
Herbert Baggaley	25 July 2003	£383,651.45	
Wildgoose	25 July 2003	£378,315.00	Yes

IV.4351. William Baird also received the following tender returns for the Cricket Pavilion.⁶³²⁶

Company	Date tender received	Amount of tender	Awarded contract
Allenbuild	30 July 2003	£347,430.00	
Greenwood	30 July 2003	£341,682.00	
Herbert Baggaley	30 July 2003	£348,760.20	
Wildgoose	30 July 2003	£336,310.00	Yes

IV.4352. Following receipt of the tender returns for both works packages, William Baird requested further information, in the form of priced ‘Bills of Quantities’ from the two lowest bidders, namely Wildgoose and Greenwood. These were provided to and checked by William Baird.⁶³²⁷

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Wildgoose – Tender Enquiry Register, Tender Finance Statements, Analysis of Domestic Sub-Contractor spreadsheets, Invoice, Transaction Printout and Cheque

⁶³²⁰ Minutes from meeting, OFT Document Reference 11046, pages 140 to 142.

⁶³²¹ Invitation to tender, OFT Document Reference 7371, pages 2 to 7.

⁶³²² Information from client, OFT Document Reference 7368. The OFT notes that the tender return date has been incorrectly recorded as 1 July 2003.

⁶³²³ Invitation to tender, OFT Document Reference 7369, page 7.

⁶³²⁴ Invitation to tender, OFT Document Reference 7371, pages 8 and 9.

⁶³²⁵ Information from client, OFT Document Reference 7368.

⁶³²⁶ Information from client, OFT Document Reference 7370.

⁶³²⁷ Information from client, OFT Document Reference 7367.

IV.4353. During the OFT's inspection of Wildgoose's premises, a Tender Enquiry Register was found. The Tender Enquiry Register contained the following two entries:⁶³²⁸

<i>E.NO</i>	<i>DATES</i>		<i>PROJECT</i>	<i>CLIENT</i>
	<i>RCVD</i>	<i>RTN</i>		
<i>03/164</i>		<i>25/7</i>	<i>Refurb & Exts. to North Lodge Queens Park Chesterfield</i>	<i>Chesterfield Borough Council</i>

<i>Q/S</i>	<i>ARCHITECT</i>	<i>TENDER SUM/TENDER DELIVERY</i>	<i>DIFF.</i>	<i>EST.</i>	<i>RST</i>
<i>Sir William Baird [...] [C]</i>		<i>Derby</i>		<i>IR</i>	

<i>E.NO</i>	<i>DATES</i>		<i>PROJECT</i>	<i>CLIENT</i>
	<i>RCVD</i>	<i>RTN</i>		
<i>03/167</i>	<i>3/7</i>	<i>30/7</i>	<i>Cricket Pavilion, Queens Park, Chesterfield</i>	<i>Chesterfield Borough Council</i>

<i>Q/S</i>	<i>ARCHITECT</i>	<i>TENDER SUM/TENDER DELIVERY</i>	<i>DIFF.</i>	<i>EST.</i>	<i>RST</i>
<i>Sir William Baird [...] [C]</i>		<i>Derby</i>		<i>IR</i>	

IV.4354. As part of its leniency application, Wildgoose provided a Tender Finance Statement for the North Lodge tender. The front page of the Tender Finance Statement is undated and struck through by hand with the letters 'S/S' and shows that Wildgoose intended to submit a tender of '**£378,315**' for this contract.⁶³²⁹ In the final box on the first page is the following information (printed entries are denoted in bold and manuscript entries in italics):

⁶³²⁸ Tender Enquiry Register, OFT Document Reference 0094, page 24.

⁶³²⁹ Tender Finance Statement, OFT Document Reference 12866.

Pavilion.⁶³³⁶ These spreadsheets list quotations from sub-contractors and by the entry entitled 'PAINTING' are the handwritten words 'Taylor Bros' and amounts under the column marked 'Quotation Value' of '2660.00' for North Lodge and '4867.00' for Cricket Pavilion.

IV.4360. In addition, Wildgoose provided a faxed invoice dated 8 June 2004 from Kenneth Taylor to Wildgoose.⁶³³⁷ The invoice is reproduced below (typed entries are denoted in bold, handwritten entries are denoted in italics):

'09/06/2004 08:27 [...] [C]

PAGE 01/01

M540

CL JLS
ACCOUNTS.

KENNETH TAYLOR

5 TANYARD

EGMANTON

NEWARK

NOTTS NG22 0FB

Tel: [...] [C]

FAX [...] [C]

EMAIL: [.....] [C]

Wildgoose Construction Ltd
Milltown
Ashover
Derbyshire S45 0EY

8th June 2004

For the attention of Mr Simon Meredith

INVOICE No. 129/04

To carry out consultancy works as agreed.

January to June 04

£1,000.00

North Lodge £500.00

Pavillion £500.00

As agreed between

GB/SRM/KT.'

IV.4361. A cheque was raised as a result of the above invoice and Wildgoose provided a 'J/C Transaction Listing' printout for Queen's Park, which lists payments

⁶³³⁵ Analysis of Domestic Sub-Contractors, OFT Document Reference 13329, page 2.

⁶³³⁶ Analysis of Domestic Sub-Contractors, OFT Document Reference 13330, page 4.

⁶³³⁷ Faxed invoice, OFT Document Reference 13332.

made under 'Cost Code 0607 – Architects Engineers Fees'.⁶³³⁸ This printout lists a payment of £1000.00 to 'K Taylor' on 10 June 2004. Finally, Wildgoose provided a copy of the cheque dated 10 June 2004 for the amount of £1000 made payable to K Taylor.⁶³³⁹

Contemporaneous documentary evidence from Greenwood – Tender register

IV.4362. During the OFT's inspection of Greenwood's premises, a tender register was found with the following consecutive entries.⁶³⁴⁰

EST NO.	CLIENT	PROJECT REF	DELIVERY			REVIEW		ESTIMATE VALUE
			DATE	TIME	AREA	SIGN	DATE	
4677	WILDGOOSE CONSTRUCTION LTD	QUEENS PARK RESTORATION CHESTERFIELD WC70 REFURB & EXT. TO NORTH LODGE	25/7/03	NOON	DERBY	CS	11/7	382160.00
4678	WILDGOOSE CONSTRUCTION LTD.	QUEENS PARK RESTORATION CHESTERFIELD WC80 REFURB & EXT. TO CRICKET PAVILION	30/7/03	NOON	DERBY	CS	13/7	341,682.00

Contemporaneous Documentary Evidence from leniency applicant Herbert Baggaley – Manual Tendering Schedule, Electronic Tenders Schedule, Exception Report Register

IV.4363. During the OFT's search of Herbert Baggaley's premises, an extract from a tendering schedule dated 'July '03' was found with manuscript entries thereon. The schedule contained two consecutive entries as shown below:⁶³⁴¹

⁶³³⁸ J/C Transaction Listing, OFT Document Reference 7317.

⁶³³⁹ Copy of cheque, OFT Document Reference 14253, page 2.

⁶³⁴⁰ Tender register, OFT Document Reference 0034, page 8.

⁶³⁴¹ Tendering schedule, OFT Document Reference 1623, page 1.

DATE	PROJECT DETAILS	CLIENT	PROFESSIONALS	APPROX VALUE
7/07/03	Refurbishment of North Lodge Queens Park, Chesterfield	Chesterfield Borough Council	Wildgoose	£200th

DUE	TENDER TYPE	EST	BID	REF	POSITION	% DIFF
25/7/03	PS	/	£383651	03/086	Cover Price	4

DATE	PROJECT DETAILS	CLIENT	PROFESSIONALS	APPROX VALUE
7/07/03	Refurbishment of Cricket Pavillion Queens Park, Chesterfield	Chesterfield Borough Council	Wildgoose	£200th

DUE	TENDER TYPE	EST	BID	REF	POSITION	% DIFF
30/7/03	PS	/	£348760	03/087	Cover Price	4

IV.4364. Another tender schedule, in printed format, was found by the OFT at the premises of Herbert Baggaley, entitled 'TENDERS SCHEDULE' and contained two consecutive entries as below:⁶³⁴²

DATE	PROJ NO	TENDER NO	CONTRACT NO	JOB DESCRIPTION	CLIENT
07/03	03/129P	T03/086		Refurb & Extensions to North Lodge, Queens Park, Chesterfield	Chesterfield Borough Council

BoQ/D&B/P&S	APPROX £000'S	BOND	MW/PS	ABCR	DUE	BID £000'S	RESULT	POS %
P & S	200		PS		25/07/2003	383,651	C	

⁶³⁴² Tender schedule, OFT Document Reference 1656, page 5.

DATE	PROJ NO	TENDER NO	CONTRACT NO	JOB DESCRIPTION	CLIENT
07/03	03/130P	T03/087		Refurb & Extensions to Cricket Pavilion, Queens Pk, Chesterfield	Chesterfield Borough Council

BoQ/D&B/P&S	APPROX £000'S	BOND	MW/PS	ABCR	DUE	BID £000'S	RESULT	POSITIVE %
P & S	200		PS		30/07/2003	348,760	C	

IV.4365. A further schedule was found by the OFT entitled '*ESTIMATING – EXCEPTION REPORT BIDS SUBMITTED DURING JULY 2003*'⁶³⁴³, which contains the following entries:

Tender No	Project	AB CR	Bid	<i>Expected</i>	
				Margin	
				£	%
03-086	North Lodge, Chesterfield	C	£383,651	-	-
03-087	Cricket Pavilion, Chesterfield	C	£348,760	-	-

Evidence from leniency applicant – Wildgoose

IV.4366. As part of its leniency application, Wildgoose's legal representatives provided a report as to the circumstances surrounding the Queen's Park management contract.⁶³⁴⁴ In its report, Wildgoose stated that '*Simon Meredith approached several local builders recommended by CBC [Chesterfield BC], to ask them informally whether they would be interested in submitting tenders for the General Works Contracts. Mr Meredith recalls that none of these companies expressed any interest in tendering for the works*'.⁶³⁴⁵ The report continued as follows: '*Simon Meredith recalls that he spoke briefly with Graham Barber [Wildgoose's managing director at that time] about the lack of interest in the General Works Contracts and how Wildgoose could procure the work itself. Mr Meredith recalls that he was advised by Mr Barber to speak with Bryan Bennett [Wildgoose's Chief Estimator] to obtain the names of four local contractors who may be willing to submit tenders using cover bids (to be provided by Wildgoose)*'.⁶³⁴⁶ Wildgoose confirmed that Bryan Bennett ('BB'), Estimating Director of Wildgoose, then provided the names of estimators from three building contractors, namely '*K Stone*' of Stone Construction Ltd, '*Roger Hays*' of Allenbuild and '*Anton Newell*' of Herbert Baggaley, which SM wrote on the back of a tender finance statement for another Queen's Park contract (see paragraph IV.4358 above).⁶³⁴⁷

⁶³⁴³ Estimating – Exception Report, OFT Document Reference 1700.

⁶³⁴⁴ Leniency application, OFT Document Reference 12860.

⁶³⁴⁵ Leniency application, OFT Document Reference 12860, page 4.

⁶³⁴⁶ Leniency application, OFT Document Reference 12860, page 4.

⁶³⁴⁷ Leniency application, OFT Document Reference 12860, page 5 and 12864, page 15.

IV.4367. In respect of the North Lodge and Cricket Pavilion contracts, Wildgoose explained that SM made telephone calls to Herbert Baggaley and Allenbuild⁶³⁴⁸ to establish whether they were interested in tendering for these contracts. Wildgoose confirmed that there was no interest from Herbert Baggaley, Allenbuild or Greenwood (a contractor recommended by Chesterfield BC and also contacted by SM) in tendering for these two contracts. Each company was therefore asked to submit cover bids for these contracts by Wildgoose.⁶³⁴⁹

IV.4368. Wildgoose stated *'In the course of discussions with Greenwood about this tender [North Lodge], Mr Meredith recalls that Ken Taylor, who was also a director of Greenwood⁶³⁵⁰, requested a sum of money to cover their "costs" of submitting the tender...Mr Meredith recalls that there was a need for one of the contractors providing a cover bid to complete a priced bill in case CBC requested this from the two lowest bidders. It is understood that Ian Redhead [employed by Wildgoose as a freelance estimator for the Queen's Park tenders] provided Greenwood with the relevant figures for the priced bill and Greenwood had to enter this onto their own documentation... On page 7 of Wildgoose's tender finance statement for the North Lodge, reference is made to an "agreed fee" of £500'.⁶³⁵¹ The Tender Finance Statement for the Cricket Pavilion has an amount of £500 allocated to Greenwood.⁶³⁵²*

IV.4369. Wildgoose continued in its report as follows: *'Mr Meredith recalls that he referred this request [from Ken Taylor] to Graham Barber who subsequently indicated that he had spoken with Mr Taylor and authorised Mr Meredith to make such payments. It is Mr Barber's recollection that this payment was to be of £1000 for consultancy services relating to painting works required by Wildgoose during the course of the Management Contract, rather than payments towards tendering costs...'.⁶³⁵³ Footnote 3 of the report states, 'In the end, the payment to Mr Taylor was split into two separate payments of £500 applied to the project costs of the North Lodge and the Cricket Pavilion work packages'.⁶³⁵⁴ Wildgoose's tenders for these two tenders were successful and it was later awarded the contracts 'as all other tenderers had submitted cover bids'.⁶³⁵⁵*

IV.4370. In its report, Wildgoose explained that an invoice for £1000 was received from Ken Taylor ('KT') and after reference by SM to Graham Barber ('GB') and Alan Clarke ('AC'), Wildgoose's Finance Director, an amount of £1000 was

⁶³⁴⁸ Stone Construction was not contacted by SM in respect of the North Lodge and Cricket Pavilion contracts since it had not been invited to tender for these contracts.

⁶³⁴⁹ Leniency application, OFT Document Reference 12860, page 5. In its report, Wildgoose implied that for each General Works contract, separate telephone calls were made by SM to Herbert Baggaley and Allenbuild to establish whether they were interested in tendering for the work. When interviewed by the OFT, SM explained that one telephone call was sufficient to establish that these contractors had no interest in any of the works packages and would be willing to submit a cover price, provided by Wildgoose.

⁶³⁵⁰ In interview, Greenwood's former estimator Chris Stendall stated that Ken Taylor was also the former owner of Greenwood's painting and decorating arm, Taylor Brothers. Mr Stendall understood that by the time of this tender he was no longer director of Greenwood and Taylor Brothers but employed on a consultancy basis by the new owners of Greenwood.

⁶³⁵¹ Leniency application, OFT Document Reference 12860, page 6.

⁶³⁵² Tender Finance Statement, OFT Document Reference 12870, page 1.

⁶³⁵³ Leniency application, OFT Document Reference 12860, pages 6 and 7.

⁶³⁵⁴ Leniency application, OFT Document Reference 12860, page 6.

⁶³⁵⁵ Leniency application, OFT Document Reference 12860, page 8.

subsequently paid to KT who collected the cheque in person at Wildgoose's offices.⁶³⁵⁶

IV.4371. In its response to the Statement, Wildgoose submitted that it did not enter the tender process with the intention of arranging cover bids in order to win the work itself, but rather that it felt obliged to request that Greenwood and Herbert Baggaley submit cover prices due to the reluctance of contractors to tender for the project. Wildgoose stated that it wished to attract the requisite number of tenders to satisfy the client, rather than delay the tender process by identifying alternative contractors when they would also be likely to refuse to tender.⁶³⁵⁷

Evidence from leniency applicant – Herbert Baggaley

IV.4372. A report prepared by Herbert Baggaley's legal representatives to the OFT, stated the following: *'We understand from personal recollection with regard to the job tendered for Chesterfield's Queen Park for Chesterfield Borough Council (TP 03/086 or 087) that HBC [Herbert Baggaley] took a cover from Wildgoose. No benefit was received by HBC in respect of taking this cover but the Estimating Department believes that a further party, Greenwoods, had agreed to take a cover on the same job from Wildgoose on the basis that Greenwoods painting sub-Contractor, Taylor, was given work'*.⁶³⁵⁸

IV.4373. Herbert Baggaley provided an interim leniency report dated 21 July 2005⁶³⁵⁹, which attached a list of tenders entitled *'Document 2'*. Based on the electronic *'TENDERS SCHEDULE'* referred in paragraph IV.4364 above, Herbert Baggaley highlighted all tenders from January 2000 which had been the subject of cover pricing, in red, and added comments in the words of its Estimating Department. *'Document 2'* includes two consecutive entries as follows:⁶³⁶⁰

⁶³⁵⁶ Leniency application, OFT Document Reference 12860, page 9.

⁶³⁵⁷ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.79.2, 5.82 to 5.83 and 5.95.3.

⁶³⁵⁸ Leniency application, OFT Document Reference 3899, page 9.

⁶³⁵⁹ Interim report, OFT Document Reference 3894.

⁶³⁶⁰ List of Tenders, OFT Document Reference 3896, page 9.

DATE	PROJ NO	TENDER NO	CONTRACT NO	JOB DESCRIPTION/ESTIMATOR'S COMMENTS
07/07/2003	03/130P	T03/087		Refurb & Extensions to Cricket Pavilion, Queens Pk, Chesterfield WILDGOOSE

CLIENT	APPROX £000'S	ABCR	DUE	BID £000'S	RESULT
Chesterfield Borough Council	200	C C	30/07/2003	348,760	Missed

DATE	PROJ NO	TENDER NO	CONTRACT NO	JOB DESCRIPTION/ESTIMATOR'S COMMENTS
07/07/2003	03/129P	T03/086		Refurb & Extensions to North Lodge, Queens Park, Chesterfield WILDGOOSE

CLIENT	APPROX £000'S	ABCR	DUE	BID £000'S	RESULT
Chesterfield Borough Council	200	C C	25/07/2003	383,851	Missed

IV.4374. Herbert Baggaley provided a final leniency report⁶³⁶¹ to the OFT, in which it referred to the same list of tenders in which cover pricing featured, entitled 'Document 1'. 'Document 1' contained the same information on the tenders for North Lodge and Cricket Pavilion as shown in the paragraph above.⁶³⁶²

IV.4375. Herbert Baggaley also provided a list of 'Third Party Contractors'. Herbert Baggaley stated that 'This list contains details of other Contractors with whom HBC has dealt in the use of cover pricing ... Given the lack of written records of individual covers, it is not always possible for HBC's estimators to say for certain as to which individual within another contract[or] dealt with that cover. However, the OFT is to take it that where a Contractor is listed as being party to a cover under the Schedule of Tenders, then the individual contact listed within Document 2 [3] is to be the person involved. Where there are more than one name given for a Contractor, then the first name is to be taken as the probable contact'.⁶³⁶³ On page five of the 'List of Third Party Contractors' is entered.⁶³⁶⁴

⁶³⁶¹ Leniency application, OFT Document Reference 3899.

⁶³⁶² List of Tenders, OFT Document Reference 3901, page 10.

⁶³⁶³ Leniency application, OFT Document Reference 3899, page 7.

⁶³⁶⁴ List of Third Party Contractors, OFT Document Reference 3897, page 5.

<i>Contractor</i>	<i>Contact</i>	<i>Telephone number</i>
<i>Wildgoose Construction</i>	<i>Richard Hubble, Graham Barber, Phil Stiff, Brian Bennett, Malcolm Clark</i>	[.....] [C]

Additional Evidence from the Quantity Surveyor – William Baird

IV.4376. The OFT conducted a visit and meeting with David Simpson of William Baird on 5 June 2007 and a note of this meeting was made.⁶³⁶⁵ The minutes from the Queen’s Park project team meeting 8 dated 29 May 2003 were obtained by the OFT from the quantity surveyor William Baird. Under paragraph 3.0 of these minutes, there is the following entry:⁶³⁶⁶

‘WC70 North Lodge, WC 80 Cricket Pavilion...are being worked on at present...Tenderers for these packages have now been agreed’

Witness evidence from leniency applicant Wildgoose

IV.4377. As part of its leniency application, current and former employees/directors of Wildgoose were interviewed by the OFT. Commercial manager SM, commercial manager, BB, AC, and former Managing Director GB gave their account of the circumstances and documents raised in connection with the North Lodge and Cricket Pavilion.

IV.4378. During an interview with the OFT on 19 September 2007, SM explained that he made one set of telephone calls to senior management or chief estimators of building contractors to establish their interest in tendering for the Queen’s Park General Works contracts. These included the tenders for North Lodge and Cricket Pavilion. He said *‘they weren’t interested. Several of the packages were obviously of low value, Wildgoose construction were already on site...I do recall being asked if Wildgoose construction were also priced on working, and I had to say yes, because we were...so again that was obviously a contributing factor in their decision not to price the work’*.⁶³⁶⁷ SM confirmed that these approaches were made prior to the project team meeting with Chesterfield BC on 29 May 2003 which referred to the fact that *‘tenderers of these packages have now been agreed’*.⁶³⁶⁸

IV.4379. SM explained that due to the problems encountered by Wildgoose in attracting companies to tender, he spoke to his managing director GB. SM said *‘his advice was to speak to Bryan [Bennett], to contact some of our competitors...He implied to me that it was for the purpose of...giving, cover prices’*.⁶³⁶⁹ SM confirmed that he knew that this suggestion from GB meant that Wildgoose would face no competition and would win the contracts. SM said that he then spoke to Chief Estimator BB and *‘asked him if there was anyone who could help us’*.⁶³⁷⁰ Referring to the handwritten note of names and companies on the

⁶³⁶⁵ Meeting notes, OFT Document Reference 11044.

⁶³⁶⁶ Minutes from meeting, OFT Document Reference 11062, page 3.

⁶³⁶⁷ Interview transcript, OFT Document Reference 13442, page 6.

⁶³⁶⁸ Minutes from meeting, OFT Document Reference 11062, page 3.

⁶³⁶⁹ Interview transcript, OFT Document Reference 13442, page 10.

⁶³⁷⁰ Interview transcript, OFT Document Reference 13442, page 12.

reverse of the Tender Finance Statement⁶³⁷¹ for another contract (see paragraph IV.4358 above), SM said *'those are the names he gave me to try'*.⁶³⁷²

IV.4380. SM said he then contacted the listed individuals from Herbert Baggaley and Allenbuild, and explained *'Initially, I approached them on the basis of would they be interested in pricing the scheme? I went through al [sic] the project details, the fact that we were there...Initial response back was, no we're not interested, because obviously, you know, Wildgoose would get the work. So then, I'd already got it in mind to ask them if they'd be prepared to submit a cover, and I did ask them and they said they'd be prepared to do that'*.⁶³⁷³ SM explained that the telephone conversations related to all the works packages for which Herbert Baggaley and Allenbuild were subsequently invited to tender, including North Lodge and Cricket Pavilion. The tender invitations were then sent out by SM for the attention of those names he had already spoken to by telephone, *'they were the people that I'd contacted, and I wanted to make sure the package went to them and obviously no-one else in the company'*.⁶³⁷⁴

IV.4381. SM recalled that Greenwood was suggested by Chesterfield BC as an additional company to approach for the North Lodge and Cricket Pavilion contracts. SM said that he spoke to KT *'who I understood to be a director of Greenwood at that time...I basically explained the situation to him, I had these packages out to tender, and I asked Greenwoods whether they'd be interested in putting a cover price in...And he said he would do that, but obviously he'd want something in return'*.⁶³⁷⁵ SM referred this telephone conversation to GB who agreed to speak to KT. SM said that he was told by GB *'that it was agreed that Ken Taylor on behalf of Greenwood building contractors would submit cover prices in return for a payment of a sum of money...it would be £500 a price'*.⁶³⁷⁶ SM explained that this money would be a contribution for Greenwood towards *'tendering costs'*. SM added *'I recall he asked for the opportunity of being able...to price the...painting and decorating sub-contract works...I wasn't aware of this at the time but Ken Taylor also owned a painting and decorating company'*.⁶³⁷⁷

IV.4382. SM confirmed that Taylor Brothers, the painting and decorating company owned by KT, was permitted to submit quotations for the painting and decorating work on the general works contracts, including North Lodge and Cricket Pavilion. In a competitive tender exercise, Taylor Brothers provided the lowest quotations and was subsequently awarded the sub-contract work.

IV.4383. SM explained that the main tenders for North Lodge and Cricket Pavilion were priced by him in conjunction with freelance estimator Ian Redhead ('IR'). SM referred to the letters 'S/S' which are written on the front sheet of tender finance statements for North Lodge and Cricket Pavilion as meaning *'superseded'*.⁶³⁷⁸ He explained that the superseded tender finance statements showed Wildgoose's final sum to the client by the tender deadline, however,

⁶³⁷¹ Tender Finance Statement, OFT Document Reference 12864, page 15.

⁶³⁷² Interview transcript, OFT Document Reference 13442, page 12.

⁶³⁷³ Interview transcript, OFT Document Reference 13442, page 13.

⁶³⁷⁴ Interview transcript, OFT Document Reference 13442, page 17.

⁶³⁷⁵ Interview transcript, OFT Document Reference 13442, page 28.

⁶³⁷⁶ Interview transcript, OFT Document Reference 13442, page 29.

⁶³⁷⁷ Interview transcript, OFT Document Reference 13442, pages 30 and 31.

⁶³⁷⁸ Interview transcript, OFT Document Reference 13442, page 31.

*'following the submission of our tender, there was one or two negotiations' and the final agreed tender sum was amended.*⁶³⁷⁹

IV.4384. SM referred to the entry of the words *'agreed fee'* on the tender finance statement for North Lodge⁶³⁸⁰ as follows: *'I would think that's in connection with the payment that was agreed with Greenwood building contractors'*.⁶³⁸¹ SM also agreed that the entry of the words *'Greenwood £500'* on the tender finance statement for Cricket Pavilion⁶³⁸² was similarly linked to the agreement made with KT of Greenwood.⁶³⁸³ SM recalled that the company providing the second lowest tender to the client would be required to submit a priced *'Bill of Quantities'* and the prospect of this was discussed in SM's original telephone conversation with KT. Greenwood provided the second lowest amounts on both tenders and SM said *'I believe Ian Redhead gave them figures to work to'*.⁶³⁸⁴

IV.4385. SM also referred to the handwritten annotations on the front sheet of the superseded tender finance statements, including that for North Lodge and agreed that he had conversations with Mike Storey about profit margins on the Queen's Park contracts, which were revised downwards on tender settlement. He said *'I just thought the percentage was too high. Mike obviously agreed with me cause he allowed me to reduce it'*.⁶³⁸⁵ SM confirmed that he provided cover figures to Allenbuild, Herbert Baggaley and Greenwood two or three days before the tender deadline.

IV.4386. Finally, SM confirmed that an invoice was sent from KT to Wildgoose⁶³⁸⁶ and said *'That was initially put on my desk...as I recall, Graham Barber spoke to Ken Taylor...and Graham Barber asked me to authorise the invoice of payment'*. SM agreed that the handwriting on the invoice was his and explained *'obviously further to Graham's conversations with Ken Taylor, I just made a note on there, that invoice is agreed between Graham Barber, myself and Ken Taylor...I would have passed it to accounts, for payment'*.⁶³⁸⁷

IV.4387. Chief Estimator BB was also interviewed about his recall of these tenders. BB said he understood, given the circumstances, the reluctance of competitors to tender for the works packages and said it was quite possible that he provided names for SM to approach about cover pricing. He said *'This may be the situation we talked about earlier...while I was asked for some names of people that we'd given covers to or that we've tendered against in the past and are active in this particular area where the works were'*.⁶³⁸⁸ He admitted that his handwriting appeared on the reverse of the tender finance statement listing contact names for Allenbuild, Herbert Baggaley and Stone Construction Ltd. BB also confirmed that he must have provided these names to SM to contact for cover pricing purposes. BB was not responsible for Wildgoose's tender, although towards the tender deadline, he said *'I would have gone through it just*

⁶³⁷⁹ Interview transcript, OFT Document Reference 13442, page 32.

⁶³⁸⁰ Tender Finance Statement, OFT Document Reference 12866, page 12.

⁶³⁸¹ Interview transcript, OFT Document Reference 13442, page 33.

⁶³⁸² Tender Finance Statement, OFT Document Reference 12870.

⁶³⁸³ Interview transcript, OFT Document Reference 13442, page 33.

⁶³⁸⁴ Interview transcript, OFT Document Reference 13442, page 36.

⁶³⁸⁵ Interview transcript, OFT Document Reference 13442, pages 38 and 39.

⁶³⁸⁶ Faxed invoice, OFT Document Reference 13332.

⁶³⁸⁷ Interview transcript, OFT Document Reference 13442, pages 43 and 44.

⁶³⁸⁸ Interview transcript, OFT Document Reference 13450, page 6.

to make certain that the estimate – there wasn't any glaring errors in it'.⁶³⁸⁹ BB also confirmed he would have made suggestions as to how much profit was to be added. He confirmed that he would have known at the time that none of the competition were interested in the work and were receiving cover prices.⁶³⁹⁰

IV.4388. GB was managing director of Wildgoose at the time of the Queen's Park tender exercise in 2003 and has since retired. When interviewed, GB said that he understood why it would have been difficult for Wildgoose to attract bidders for the work packages but had no knowledge or recall of any collusion on the tenders. He also could not recall having a conversation with SM, referred to in both Wildgoose's leniency report and the OFT's interview with SM. However, GB remembered that he spoke to KT and agreed to pay him a fee of £1000. GB understood that the fee was *'to cover his tendering costs'⁶³⁹¹ but he also believed that it was to be *'a consultancy fee for his expert knowledge'⁶³⁹² GB denied any knowledge of the fee being connected with an agreement for Greenwood to submit a cover price.⁶³⁹³**

IV.4389. AC was also interviewed by the OFT. With regard to the suggestion that GB asked SM to approach BB to find out the names of some competitors who might be able to provide covers, he said *'I have no recollection of that at all but it doesn't surprise me in that Graham [Barber] wouldn't know who we've got relationships with, in terms of other estimators that we could approach, whereas Brian, who at that stage was dealing with other estimators on these other things, knew who the people would be'.⁶³⁹⁴ AC said that at the time the invoice was received, he recalled that KT visited Wildgoose's office in person. AC said *'My recollection was that he was in Graham's [Barber] office with him...He gave me the invoice and I went and drew a cheque for him...I suspect the two signatures on the cheque will be Graham and myself...I was just told it was just some consultancy work done in relation to some painting of the railings that they were doing down there'.⁶³⁹⁵ AC admitted that this was unusual.**

Witness evidence from Ian Redhead – freelance estimator

IV.4390. IR was interviewed on two occasions by the OFT about the circumstances of the Queen's Park tenders, including those for North Lodge and Cricket Pavilion. During the first interview, IR said that he was working from home as a freelance estimator for both Wildgoose and Herbert Baggaley at the time and had been employed by Wildgoose to produce both tenders. He said that he was aware that Herbert Baggaley and Greenwood were not interested in the work and submitted cover prices for the tenders, provided by Wildgoose. He also believed that an agreement had been struck between Wildgoose and Greenwood that in return for submitting a cover price, Greenwood was promised the painting and decorating sub-contract work at Queen's Park.⁶³⁹⁶

⁶³⁸⁹ Interview transcript, OFT Document Reference 13450, page 11.

⁶³⁹⁰ Interview transcript, OFT Document Reference 13450, page 12.

⁶³⁹¹ Interview transcript, OFT Document Reference 13446, page 12.

⁶³⁹² Interview transcript, OFT Document Reference 13446, page 7.

⁶³⁹³ Interview transcript, OFT Document Reference 13446, page 12.

⁶³⁹⁴ Interview transcript, OFT Document Reference 13443, page 4.

⁶³⁹⁵ Interview transcript, OFT Document Reference 13443, page 5.

⁶³⁹⁶ Interview transcript, OFT Document Reference 13399, pages 11 to 22.

IV.4391. By the time of IR's second interview on 25 October 2007, the OFT had obtained further tender documentation and paperwork from Wildgoose, William Baird and Chesterfield BC and showed these to IR. IR agreed that the vast majority of the handwritten entries on the tender finance statements for North Lodge and Cricket Pavilion were his own.⁶³⁹⁷ IR also admitted that he wrote the entry '*Agreed Fee 500.00*' on the tender finance statement for North Lodge⁶³⁹⁸ and the words '*Greenwood £500*' on the tender finance statement for Cricket Pavilion.⁶³⁹⁹

IV.4392. IR said that he hadn't recalled making such entries during his first interview but he was able to explain the words '*Greenwood £500*' as follows: '*they're gonna pay Greenwood £500...Because it says Greenwood, and it's a 500 pound addition to the contract figure...Greenwood's had the enquiry but were never going to price it, but I always thought it was on the basis that they were gonna do the decorating works*'.⁶⁴⁰⁰ Referring to the words '*Agreed fee 500*', IR explained that this was '*for them not pricing the work*'.⁶⁴⁰¹ IR said that he did not deal with the provision of a cover price to Greenwood or Herbert Baggaley but was aware that both companies submitted cover prices.⁶⁴⁰²

IV.4393. IR could recall, however, that he provided a copy of priced 'Bill of Quantities' for either North Lodge or Cricket Pavilion in person to KT, who visited his home address to collect the documents from him, in a brown envelope.⁶⁴⁰³ IR said '*I would have thought we would have given them Wildgoose's figures*'. He added that Greenwood would '*do the recalculation to make it look like their own...If I was doing it myself I'd just adjust some of the rates by a certain amount, either up some rates and lower some rates, provided you make sure that if any of the rates duplicate you've got the same figure in. You could do it fairly quickly*'.⁶⁴⁰⁴ IR said that he had not been aware that Allenbuild had also been invited to tender for these tenders.

Witness evidence from leniency applicant Herbert Baggaley

IV.4394. During interviews with the OFT on 2 November 2006 and 19 April 2007, conducted in connection with Herbert Baggaley's leniency application, Anton Newell ('AN'), Chief Estimator for Herbert Baggaley, provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.4395. During the interview dated 19 April 2007, AN was asked if he could recall anything about this contract. AN said '*This is the one where I believe Wildgoose...were project managing the scheme for Chesterfield Borough Council. And they needed to go out and get three quotes for various elements of work: the north lodge, the cricket pavilion, and we were approached to see whether we'd effectively put a dummy...price in, taking a cover off them...which we...did...It [the original approach] was certainly from them to us,*

⁶³⁹⁷ Interview transcript, OFT Document Reference 13420, page 2.

⁶³⁹⁸ Interview transcript, OFT Document Reference 13420, page 7.

⁶³⁹⁹ Interview transcript, OFT Document Reference 13420, page 5.

⁶⁴⁰⁰ Interview transcript, OFT Document Reference 13420, pages 5 and 6.

⁶⁴⁰¹ Interview transcript, OFT Document Reference 13420, page 7.

⁶⁴⁰² Interview transcript, OFT Document Reference 13420, pages 5 to 8.

⁶⁴⁰³ Interview transcript, OFT Document Reference 13420, page 14.

⁶⁴⁰⁴ Interview transcript, OFT Document Reference 13420, page 13.

and then we said, okay, we'll do that'. AN also confirmed that the appearance of the letter 'C' on Herbert Baggaley's tender schedules for North Lodge and Cricket Pavilion was 'an indication of a cover'.⁶⁴⁰⁵

Witness evidence from Allenbuild

IV.4396. Roger Hayes, Chief Estimator of Allenbuild was also interviewed briefly about the Queen's Park tenders and said *'I recall Queen's Park jobs. I recall Wildgoose being some kind of client's agent. I do believe they sent us an enquiry and I do believe we sent it back saying we are not going to work for another builder'.⁶⁴⁰⁶*

Witness evidence from Greenwood/Crown Point

IV.4397. Chris Stendall ('CS'), an ex-estimator at Greenwood, was interviewed by the OFT and asked about the North Lodge and Cricket Pavilion tenders. He admitted that tendering for a competitor was unusual and Greenwood *'wouldn't normally entertain it'.⁶⁴⁰⁷* He could not recall any decisions or agreements to submit a cover price on these tenders, however, he referred to the entries in Greenwood's tender register⁶⁴⁰⁸ and said that *'to be perfectly honest with you I can't imagine them being genuine but I could be wrong'.⁶⁴⁰⁹* CS said that KT used to be a director at Greenwood but sold his interest in about 2002. He continued working for Greenwood for some time in a consultant capacity.

IV.4398. KT wrote to the OFT on 9 October 2007 and declined the request for an interview.⁶⁴¹⁰ The OFT wrote again to KT in November 2007, outlining in detail the nature of the evidence collected by the OFT in relation to these contracts, including providing him with certain of the documents, and asking if he wished to provide an account of his involvement.⁶⁴¹¹ In response, in a further letter to the OFT, KT declined the opportunity to give his account of events.⁶⁴¹²

Evidence from Greenwood

IV.4399. The OFT wrote to the joint administrators of Greenwood on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Greenwood had participated in bid rigging on this tender. In response, the former joint administrator stated that Greenwood was dissolved on 28 March 2007 and therefore the joint administrator would not be in a position to enter into any agreement on its behalf.⁶⁴¹³

IV.4400. The OFT subsequently wrote to Crown Point, the former parent company of Greenwood, on 5 November 2007, asking it to consider the offer made by the OFT, given that the OFT intended to hold Crown Point liable for any infringements committed by Greenwood during the period following its acquisition by Crown Point in respect of which the OFT ultimately decided to

⁶⁴⁰⁵ Interview transcript, OFT Document Reference 11317, pages 28 and 29.

⁶⁴⁰⁶ Interview transcript, OFT Document Reference 13391, page 18.

⁶⁴⁰⁷ Interview transcript, OFT Document Reference 13423, page 36.

⁶⁴⁰⁸ Tender register, OFT Document Reference 0034, page 8.

⁶⁴⁰⁹ Interview transcript, OFT Document Reference 13423, page 37.

⁶⁴¹⁰ Response from Ken Taylor, OFT Document Reference 13380.

⁶⁴¹¹ Letter to Ken Taylor, OFT Document Reference 13381.

⁶⁴¹² Response from Ken Taylor, OFT Document Reference 13385.

⁶⁴¹³ Response from Begbies Traynor, OFT Document Reference 10358.

impose financial penalties. In response to this letter, Crown Point stated '*... the offer is not accepted by Crown Point Maintenance Group Limited*'.⁶⁴¹⁴

IV.4401. In its response to the Statement, Crown Point did not dispute liability for KT's actions in respect of the cover pricing arrangement (although Crown Point did dispute liability for KT's actions in taking a payment from Wildgoose). Whilst Crown Point stated that KT was an independent contractor acting in a consulting capacity for Greenwood at the relevant time⁶⁴¹⁵, Crown Point accepted that KT was '*the managing body of Greenwood*' and that: '*KT's role was akin to a de facto Director and he continued to be regarded as the Director and controlling mind of Greenwood to third parties...*'⁶⁴¹⁶

IV.4402. Crown Point submitted that neither it, nor Greenwood, is liable for KT's actions in respect of the compensation payment as, on the basis of the evidence, KT '*was clearly acting on a frolic of his own*'.⁶⁴¹⁷

The OFT's analysis of the evidence and finding

IV.4403. From the evidence presented above, the OFT draws the following conclusions.

IV.4404. Wildgoose won a competitive tender exercise to act as project manager for a number of general and specialised works contracts at Queen's Park, Chesterfield, on behalf of Chesterfield BC. Wildgoose was responsible for identifying potential bidders and sending tender invitations to a number of companies for (amongst others) the contracts for North Lodge and Cricket Pavilion at Queen's Park. Tenders were issued by Wildgoose during the period June/July 2003 with staggered deadlines and each tender had to be returned to the allocated quantity surveyor, William Baird, for independent scrutiny. Greenwood and Herbert Baggaley each accepted an invitation to tender for the North Lodge and Cricket Pavilion contracts. Wildgoose was also permitted by the client to tender for these contracts, and did so by inviting itself to tender and then sending completed tender returns to William Baird. It is significant that in its role of project manager, Wildgoose was in a unique situation in knowing the extent of its competition for both tenders.

IV.4405. It appears that Wildgoose completed the estimating process for both North Lodge and Cricket Pavilion and submitted bids with the hope of winning the work. This is shown by the facts that Wildgoose submitted the lowest tenders and that it won the contracts. Herbert Baggaley did not want to win these contracts and recorded the words '*Cover Price*' on its contemporaneous manual tendering schedules against both tenders. Greenwood also did not want to win these contracts and estimator CS stated that it would not '*normally entertain*' working for another builder.

IV.4406. It is clear that Wildgoose had problems in attracting interest from anyone in tendering for North Lodge and Cricket Pavilion. However, as part of the procurement process, the client had to be assured that each contract was subject to a genuinely open and competitive process and it was partly Wildgoose's responsibility that this was carried out.

⁶⁴¹⁴ Response from Crown Point Maintenance Group, OFT Document Reference 14184.

⁶⁴¹⁵ Written representations of Crown Point, 27 June 2008, paragraph 6.4.

⁶⁴¹⁶ Written representations of Crown Point, 27 June 2008, paragraph 5.4.

⁶⁴¹⁷ Written representations of Crown Point, 27 June 2008, paragraphs 6.3 to 6.6.

- IV.4407. Wildgoose stated as part of its leniency application that commercial manager SM spoke to Managing Director GB about the lack of interest from Wildgoose's competitors in the works contracts, and they discussed *'how Wildgoose could procure the work itself'*.⁶⁴¹⁸ GB denied that there was any manipulation by Wildgoose of the tender process but SM recalled that he was told by GB to approach Chief Estimator BB for names of contractors who would be willing to provide cover prices. SM recalled that such a conversation with BB took place and BB agreed that it was quite possible that he furnished some names to SM.
- IV.4408. BB provided SM with a handwritten note of contact names for three companies, namely *'Stone, Alan [and] Bags'* on a tender finance statement. Wildgoose confirmed that these were references to building contractors Stone Construction Ltd, Allenbuild and Herbert Baggaley.⁶⁴¹⁹ SM stated that he made telephone calls to Herbert Baggaley and Allenbuild and that they agreed to submit cover prices for the North Lodge and Cricket Pavilion contracts. Senior estimator AN of Herbert Baggaley was one of the listed contact names and he agreed in interview that he was called by Wildgoose to *'put a dummy...price in'*, to which he agreed. Herbert Baggaley has admitted taking cover prices from Wildgoose for North Lodge and Cricket Pavilion.
- IV.4409. On 1 July 2003, tender invitations for North Lodge were sent by SM to Herbert Baggaley and Allenbuild for the attention of the individuals noted on the tender finance statement. On 2 July 2003, at a project meeting, the minutes show that Chesterfield BC told SM that additional contractors would be required to be invited to tender for both North Lodge and Cricket Pavilion. The following day, on 3 July 2003, SM again sent invitations to only two contractors, namely Herbert Baggaley and Allenbuild for the Cricket Pavilion contract. On 4 July 2003, Wildgoose complied with the request made by Chesterfield BC two days earlier and issued a further tender invitation to Greenwood for both North Lodge and Cricket Pavilion.
- IV.4410. In interview SM explained that Greenwood had been suggested by Chesterfield BC as a contractor to invite for the North Lodge and Cricket Pavilion tenders. SM said he contacted Greenwood and spoke to KT and asked him to provide a cover bid. KT agreed to do so but only in return for a sum of money and an opportunity for Taylor Brothers, (KT's painting and decorating company), to quote for the painting and decorating elements of the work to be carried out at Queen's Park. SM agreed that Taylor Brothers could quote for sub-contracting work but referred the request for money to GB. GB confirmed that he spoke to KT and a figure of £1000 was agreed *'for tendering costs'*. This is corroborated by the amounts of £500 which were recorded and attributed on the respective tender finance statements for North Lodge and Cricket Pavilion and the use of the words *'Agreed fee'* and *'Greenwood £500'*.
- IV.4411. The OFT finds that these contacts between Wildgoose and KT took place in the period between the request by Chesterfield BC for additional bidders to be invited to tender for North Lodge and Cricket Pavilion on 2 July 2003 and the letters of invitation sent by SM to Greenwood on 4 July 2003.

⁶⁴¹⁸ Leniency application, OFT Document Reference 12860, page 4.

⁶⁴¹⁹ Stone Construction Limited was not invited to tender for North Lodge or Cricket Pavilion. For the avoidance of doubt, the OFT makes no finding that Stone Construction Ltd was party to any infringement of the Act.

- IV.4412. Wildgoose's tender finance statements show that it submitted tender sums of £378,315 for North Lodge and £336,310 for Cricket Pavilion, matching the amounts recorded by the client. The client also received bids of £382,160 and £341,682 for these tenders from Greenwood, which are higher than the amounts tendered by Wildgoose. This fits into the pattern consistent with cover prices having been provided from Wildgoose to Greenwood. The client also received bids of £383,651.45 and £348,760.20 respectively from Herbert Baggaley for these tenders. Again, these figures are higher than those of Wildgoose, which is consistent with cover prices having also been provided from Wildgoose to Herbert Baggaley.
- IV.4413. The OFT notes that Taylor Brothers was allowed to quote for painting and decorating works on these contracts and from the entries in Wildgoose's sub-contract analysis, provided the lowest tenders and won the work. Wildgoose's freelance estimator IR recalled that Greenwood was promised decorating work by Wildgoose in return for submitting a cover price. Despite the fact that Taylor Brothers' quotations appear to have been added to the analysis documents at the end of the tender process, there is no evidence to suggest that there was bid rigging between Wildgoose and Greenwood in the tender for the painting and decorating works. The OFT therefore finds that an element of the arrangement between Wildgoose and KT was that in return for KT submitting a cover price on behalf of Greenwood, Wildgoose gave Taylor Brothers the opportunity to bid for the painting and decorating sub-contract (which it seems it did not otherwise have), as well as making £1,000 payment to KT.
- IV.4414. Wildgoose submitted in its response to the Statement that Chesterfield BC was not put to any greater expense as a result of Taylor Brothers being allowed to tender for the painting work, and this only served to make the process more competitive.⁶⁴²⁰ As noted above, the OFT has no evidence to suggest that the tender for the painting and decorating works was rigged, and the OFT makes no finding as to the impact on Chesterfield BC of Wildgoose allowing Taylor Brothers to tender for the work.
- IV.4415. Wildgoose included the amount of the payment to KT in Wildgoose's two tender prices, splitting the amount between the two relevant tenders.
- IV.4416. Greenwood provided the second lowest bid for both tenders and was required to submit a priced bill of quantities to the Quantity Surveyor. IR recalls that the necessary figures to enable Greenwood to do this were provided by him, acting on behalf of Wildgoose, to KT, who collected them in person from the freelance estimator's house.
- IV.4417. Subsequently, KT raised an invoice to Wildgoose '*to carry out consultancy works as agreed. January to June 04 £1000*'. SM confirmed that he noted on the invoice that this was as a result of an agreement between him, GB and KT and that the £1,000 was split into two amounts each of £500 for North Lodge and Cricket Pavilion. Wildgoose confirmed that KT visited its premises in person to collect the cheque which he required to be made payable to himself, not Greenwood. Wildgoose has confirmed that this invoice was false and that no such consultancy works were carried out. AC of Wildgoose has confirmed that

⁶⁴²⁰ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraphs 5.90 to 5.91.

the invoice was subsequently paid by cheque to KT, a copy of which has been provided.

IV.4418. The OFT has provided KT with detailed disclosure of the evidence in its possession relating to these contracts and he has been given the opportunity to put his account of the circumstances surrounding them on record. However, he has declined to do so.

IV.4419. The OFT considers that, in taking cover prices from Wildgoose and submitting these in Greenwood tenders to Chesterfield BC, KT acted as agent on behalf of Greenwood and formed part of the same undertaking as Greenwood. As such, the OFT considers Greenwood to be liable for KT's actions, even if Greenwood was unaware of the cover pricing arrangement, or if Greenwood did not authorise or approve KT's actions.⁶⁴²¹ References to Greenwood in paragraphs IV.4419 to IV.4435 below, insofar as they relate to the cover pricing arrangement, are therefore in Greenwood's capacity as principal of KT, and reflect Greenwood's liability for KT's actions in this respect.

IV.4420. The OFT therefore concludes that contact took place between Wildgoose and Greenwood and between Wildgoose and Herbert Baggaley. The OFT also concludes that Wildgoose supplied figures to both Greenwood and Herbert Baggaley for cover bids.

IV.4421. The OFT notes that the 'object' of an agreement and/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.⁶⁴²² Nevertheless, the OFT notes that Wildgoose's own evidence reports that SM spoke with GB about the lack of interest from tenderers and '*how Wildgoose could procure the work itself*', with GB advising SM to obtain the names of contractors who might be willing to submit cover bids (see paragraph IV.4366). The OFT does not accept that Wildgoose's sole motive for entering into cover bidding arrangements was to benefit Chesterfield BC, rather than to secure the tenders itself. Moreover, having chosen not to widen its search for potential tenderers, Wildgoose's statement that others would also likely refuse to tender is supposition. Indeed, Wildgoose notes in its representations that part of its duties as managing agent was to procure competitive tenders⁶⁴²³, which it failed to do.

IV.4422. The OFT also concludes that Wildgoose made a payment of £1000 to KT in return for KT submitting cover prices on behalf of Greenwood and that this payment was facilitated by the production of a false invoice by KT in relation to '*consultancy works*'. The OFT notes that Wildgoose included in its tender bids the amounts of the payments agreed with KT, i.e. £500 for each of the two tenders. The OFT also concludes that Wildgoose also agreed to enable KT's company tender for a painting and decorating sub-contract.

IV.4423. The OFT accepts Crown Point's submission that KT was acting in his own right in requesting and receiving a payment from Wildgoose. In particular, KT issued an invoice to Wildgoose in his own name and using what appears to be his own personal address and contact details. Payment was made by Wildgoose

⁶⁴²¹ See paragraphs III.28 to III.36 of the Legal Background section.

⁶⁴²² See paragraphs III.68 to III.69 of the Legal Background section.

⁶⁴²³ Written representations of Wildgoose, 3 July 2008 (amended 1 April 2009), paragraph 5.81.

in the form of a cheque which KT requested be made payable to him personally (see paragraphs IV.4360 and IV.4361), and which he collected in person from Wildgoose's premises. The OFT therefore concludes that Greenwood was not a party to a compensation payment arrangement with Wildgoose, but rather that KT was acting on his own behalf in seeking and collecting a payment from Wildgoose.

IV.4424. As noted in Section VI⁶⁴²⁴, the OFT considers that Wildgoose acted as the instigator in relation to this Infringement. In addition to the provision of cover prices to Greenwood and Herbert Baggaley, the OFT considers that Wildgoose agreed with KT that it would make a payment of £1,000 to KT, and enable KT's company Taylor Brothers to quote for the painting and decorating work at Queens Park, in return for KT submitting a cover bid on behalf of Greenwood. For the avoidance of doubt, the OFT has not taken the payment arrangement with KT into account in setting the starting point for Wildgoose's penalty in relation to this Infringement as, unlike for certain other Infringements in this Decision, the payment is not a 'compensation' arrangement between undertakings, but instead took the form of a pay-off to an individual. The starting point is therefore based on the cover pricing arrangement alone. The OFT considers, however, that the agreement to make a payment to KT is a further aggravating factor to be taken into account at step 4 of the penalty calculation for Wildgoose.

IV.4425. Wildgoose accepted in its response to the Statement that the payment to KT was inappropriate, but that the sum involved was '*miniscule*' in comparison to the value of the total tender. Whilst the payment to KT may represent only a small percentage of the tender value⁶⁴²⁵, in absolute terms the OFT does not consider that £1,000 can properly be described as '*miniscule*'. Moreover, any financial incentive offered and/or paid to an individual in return for the individual entering into anti-competitive arrangements on behalf of his principal/employer undertaking, must be regarded as a very serious matter, irrespective of the sums involved.

IV.4426. Wildgoose also submitted that Chesterfield BC was not overcharged for the work undertaken, highlighting its tendered margins of 6.5% and 7% on the two work packages (and achieved margin of 4.9%). By way of comparison, Wildgoose submitted that Chesterfield BC had allowed it to achieve 10% gross margin on previous projects, and that it had undertaken the work at a discount to its standard margin. Wildgoose also noted that, whilst Chesterfield BC had indicated that the costs tendered for the Cricket Pavilion were higher than the initial budget, these were '*deemed acceptable*'.⁶⁴²⁶

IV.4427. The OFT considers that the client was overcharged by at least £1000 (leaving aside any potential effect on the tender prices as a result of the cover pricing), as demonstrated by the addition of £500 to each tender finance statement. Whilst the OFT does not consider profit levels to be a reliable indicator of anti-competitive behaviour, it notes that SM of Wildgoose considered that, in general, a margin of 2% to 4% would be the norm (although it would vary

⁶⁴²⁴ See paragraph VI.297 of the Enforcement section.

⁶⁴²⁵ The OFT considers the value of the tenders submitted by Wildgoose for the two work packages to total approximately £715,000 and not £3 million, as Wildgoose suggested at paragraph 5.92 of its representations.

⁶⁴²⁶ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.79.4, 5.92 to 5.93, 5.94.2, 5.94.4, 5.95.4 and Annex K.

depending on the size of the job and timescales involved).⁶⁴²⁷ The OFT therefore does not necessarily accept Wildgoose's representation that it achieved a low profit margin on these tenders. Equally, the fact that the tender costs were '*deemed acceptable*' by Chesterfield BC does not prove that it was not overcharged, particularly given that it also noted that the costs had come in higher than the initial budget for the works.

IV.4428. SM stated in addition that contact also took place between Wildgoose and Allenbuild on these tenders, and that Wildgoose supplied figures to Allenbuild for cover bids. However, the OFT notes that RH of Allenbuild, who was named by BB as the relevant person at this company, does not recall cover pricing on these tenders. The OFT also notes the absence of any contemporaneous documentation relating to cover pricing by Allenbuild on these tenders, and therefore the OFT makes no finding as to Allenbuild's involvement in any infringement in relation to these tenders.

IV.4429. The OFT considers that it is not possible to identify separate agreements and/or concerted practices in relation to each of the North Lodge and Cricket Pavilion tenders, but instead is dealing with these two tenders together, given that overall cover pricing arrangements were apparently made between Wildgoose and Herbert Baggaley and between Wildgoose and Greenwood that covered North Lodge and Cricket Pavilion.

IV.4430. The OFT notes that Herbert Baggaley's leniency application made reference to contacts having taken place between Greenwood and Wildgoose in relation to these tenders. As the OFT has no documentary or witness evidence to suggest that Herbert Baggaley had contact with Greenwood in relation to this tender or that either Herbert Baggaley or Greenwood was aware of Wildgoose's contacts with the other Party at the time of its own contacts with Wildgoose, the OFT does not propose to find that the relevant parties were party to a multilateral agreement as opposed to a series of bilateral arrangements.

IV.4431. The OFT is satisfied that the facts set out in paragraphs IV.4353 to IV.4430 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁴²⁸ In particular:

- (a) the provision of a figure for a cover bid from Wildgoose to Greenwood and the provision of a figure for a cover bid from Wildgoose to Herbert Baggaley was not unilateral⁶⁴²⁹, and contravenes the principle against direct or indirect contact between competitors;⁶⁴³⁰
- (b) Greenwood and Herbert Baggaley can each be presumed to have taken account of the information it received from Wildgoose (i.e. the cover prices) when determining their own conduct in the tendering process;⁶⁴³¹ and
- (c) Wildgoose can be presumed to have taken account of the information it received from each of Greenwood and Herbert Baggaley (i.e. that

⁶⁴²⁷ Interview transcript, OFT Document Reference 13442, page 24.

⁶⁴²⁸ See paragraph III.3 and III.89 to III.126 of the Legal Background section.

⁶⁴²⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁴³⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁴³¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Greenwood and Herbert Baggaley did not intend to submit competitive bids) when determining its own conduct in the tendering process.⁶⁴³²

IV.4432. Wildgoose disputed that it had taken into account the information it received from Herbert Baggaley and Greenwood when determining its own conduct in the tender process, rather it had continued to price the projects as competitively as it could.⁶⁴³³

IV.4433. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶⁴³⁴ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Wildgoose has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept that Wildgoose did not increase its tender sum to account for the compensation payment, that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. In any event, Wildgoose has accepted that its conduct amounted to an infringement and by implication, therefore, that it was a party to either an anti-competitive agreement or concerted practice.

IV.4434. To the extent that Wildgoose submits this Infringement should not be treated as serious because no effects have been shown, this point is addressed in Step 1 of Section VI (Enforcement) below.

IV.4435. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Wildgoose and Greenwood and between Wildgoose and Herbert Baggaley, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tenders for North Lodge and Cricket Pavilion at Queen's Park, Chesterfield, tender deadlines 25 and 30 July 2003 respectively.

Immunity and leniency assessment

IV.4436. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4437. In respect of these tenders, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 14 June 2005 to Herbert Baggaley and from third parties. None of the Parties therefore will receive 100 per cent immunity in respect of this tender. However, both Wildgoose and Herbert Baggaley will receive their respective normal leniency percentage reduction from any fine that the OFT may eventually impose in respect of this tender.

⁶⁴³² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁴³³ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.94.3.

⁶⁴³⁴ See paragraph III.58 of the Legal Background section.

IV.4438. Wildgoose submitted that it should receive a higher leniency percentage reduction in respect of this Infringement because of the amount of information and assistance it provided to the OFT, and because it was the first party to inform the OFT of the compensation payment arrangement.⁶⁴³⁵

IV.4439. The OFT has applied immunity and leniency reductions in this case in line with its published guidance. Wildgoose will receive a reduction in penalty, which has been calculated taking into account the stage at which it came forward, the evidence in the OFT's possession and the evidence provided by Wildgoose. It should be noted that the award of any such reduction in penalty is within the OFT's discretion, taking into account these factors.⁶⁴³⁶

Infringement 159: Norfolk Heritage Park, Bowls Pavilion, Sheffield – 28 July 2003
Client: Sheffield City Council
Parties: Bodill, Wildgoose, Lemmeleg and Quarmby (Special Projects)

IV.4440. On 26 June 2003, Sheffield City Council ('Sheffield CC') sought tenders for the demolition of existing buildings and construction of a bowls pavilion at Norfolk Heritage Park, Sheffield. The return date for the tender was 12:00 noon on 28 July 2003 and five companies were invited to tender: Bodill, Wildgoose, Lemmeleg, Quarmby (Special Projects) and Watfords of Wombwell Ltd.⁶⁴³⁷

IV.4441. Sheffield CC received the following tender returns by 12:00 noon on 28 July 2003:⁶⁴³⁸

Company	Date and time tender received	Amount of tender	Awarded the tender
Bodill	Prior to 12:00 noon 28 July 2003	£533,772	
Lemmeleg	Prior to 12:00 noon 28 July 2003	£598,776	
Quarmby (Special Projects)	Prior to 12:00 noon 28 July 2003	£579,975	
Watfords of Wombwell Ltd	Prior to 12:00 noon 28 July 2003	£469,520	
Wildgoose	Prior to 12:00 noon 28 July 2003	£588,120	

IV.4442. Sheffield CC said that the lowest tender sum received exceeded the budget available. This scheme was revised and re-tendered at a later date.

IV.4443. Lemmeleg noted this fact in its response to the Statement asserting there was *'no impact on the eventual cost of each project and the contracting party ... was unaffected'*.⁶⁴³⁹ The OFT considers that the fact the tender was not awarded is irrelevant to the finding of an infringement for the reasons set out in paragraph III.14 above. Further, and in any event, the OFT disagrees with Lemmeleg's suggestion that the client was unaffected, as it received four bids which it considered to be genuine but were in fact the subject of cover pricing and was thereby denied the opportunity to seek replacement tenderers for this tender process which may have been within its available budget.

⁶⁴³⁵ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraphs 5.79.1, 5.80, 5.84 and 5.95.1 to 5.95.2.

⁶⁴³⁶ OFT *Guidance as to the appropriate amount of a penalty* (OFT423, December 2004), at paragraphs 3.13 to 3.15.

⁶⁴³⁷ Information from client, OFT Document Reference 9342.

⁶⁴³⁸ Information from client, OFT Document Reference 9342.

⁶⁴³⁹ Written representations of Lemmeleg, 26 June 2008, paragraph 4.2.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.4444. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill.⁶⁴⁴⁰

'	1. <i>Bodill</i>
<i>£587450 ✓②</i>	2. <i>WILDGOOSE</i> © <i>ROSS COOPER</i>
	3. <i>WATFORDS – PETER WOODS NON PRICING</i> <i>[.....] [C] (WOMBWELL BARNESLEY)</i>
	4. <i>DLO?</i>
<i>£579901 ✓①</i>	5. <i>QSP CONSTRUCTION</i> © <i>FROM</i> <i>MARTIN SENYK [...] [C]</i>
<i>£598995 ✓③</i>	6. <i>LEMELEC (HUDDERSFIELD)</i> © <i>FROM WILDGOOSE</i> <i>TIM LAVIN [...] [C]'</i>

IV.4445. The tender sheet states that Bodill's submitted figure was £533,772.⁶⁴⁴¹

IV.4446. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has confirmed that the handwritten annotations '*£587450 ✓②, ROSS COOPER, WATFORDS – PETER WOODS NON PRICING [...] [C] (WOMBWELL BARNESLEY), DLO?, £579901 ✓①*' and '*£598995 ✓③ LEMELEC (HUDDERSFIELD) © FROM WILDGOOSE*' under the section headed '*Tenderers*' were made by him.⁶⁴⁴² JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.4447. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has confirmed that the handwritten annotations '*©, © FROM MARTIN SENYK [...] [C]'* and '*TIM LAVIN [...] [C]'* under the section headed '*Tenderers*' were made by him.⁶⁴⁴³ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.4448. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

⁶⁴⁴⁰ Tender sheet, OFT Document Reference 0691.

⁶⁴⁴¹ Tender sheet, OFT Document Reference 0691.

⁶⁴⁴² Contracts document, OFT Document Reference 6426, pages 86 and 120.

⁶⁴⁴³ Contracts document, OFT Document Reference 6426, pages 1 and 34.

IV.4449. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁶⁴⁴⁴ In respect of this tender, Bodill confirmed that it gave two cover prices, to Wildgoose and Quarmby (Special Projects), and that Lemmeleg *'seems to have taken a cover from Wildgoose'*.⁶⁴⁴⁵

IV.4450. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.4451. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from leniency applicant Wildgoose – Tender Enquiry Register

IV.4452. In the Tender Enquiry Register, obtained from Wildgoose during the OFT's section 27 inspection of Wildgoose's premises on 18 November 2004, is handwritten:⁶⁴⁴⁶

E.No	RCD	RTN	PROJECT	CLIENT
03/160	27/6	28/7	Norfolk Heritage Park Bowls Pavilion	Sheffield City Council

QS	ARCHITECT	TENDER SUM/ TENDER DELIVERY	DIFF	EST	RS
Sheffield City Council [.....] [C]	[.....] [C]	Sheffield £588120		HR	

Witness evidence from leniency applicant Wildgoose

IV.4453. During interviews conducted in connection with its leniency application, Wildgoose employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.726 to IV.742 above and is relied upon by the OFT in relation to this tender.

IV.4454. In respect of this tender, Ross Cooper ('RC'), an ex-trainee estimator at Wildgoose could not recall anything about this tender, but on being asked by the OFT to explain the handwritten entries in the Wildgoose Tender Enquiry Register he confirmed that the entry 'HR' under the column 'EST' shows that Wildgoose took a cover on this tender.⁶⁴⁴⁷ RC also said in respect of the entry under the column 'TENDER SUM/TENDER DELIVERY' that, *'I would believe that will be the cover price that was submitted on the form of tender. Whether the price that was received from the competitor was adjusted before it was added on the tender, I'm unaware'*.⁶⁴⁴⁸

⁶⁴⁴⁴ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁶⁴⁴⁵ Tender Analysis – Tender Sheets, OFT Document Reference 0465.

⁶⁴⁴⁶ Tender Enquiry Register, OFT Document Reference 0094, page 23.

⁶⁴⁴⁷ Interview transcript, OFT Document Reference 11447, page 15.

⁶⁴⁴⁸ Interview transcript, OFT Document Reference 11447, page 15.

IV.4455. RC was then shown the Bodill tender sheet for this tender and in respect of the entry '£587450 ✓Ⓢ, © ROSS COOPER', he said, 'Yes, I accept that I would have spoken to Bodill's to arrange for a figure to be given for the job'.⁶⁴⁴⁹ The OFT asked RC to explain the slight difference in the cover price provided by Bodill and the actual tender figure submitted by Wildgoose. RC explained that, 'That was quite normal. Occasionally, if we felt that..... the competitor price was a bit tight, we'd add a little more money, just to make sure that we didn't pick the job up'.⁶⁴⁵⁰

IV.4456. In response to a question from the OFT asking if Wildgoose would have also given a cover price in relation to this contract, RC said 'if another company had approached us, it had been known to, to give another cover price off the, the back of the cover price that we had or to refer them back to Bodill's to speak to Bodill's'.⁶⁴⁵¹

Evidence from leniency applicant Wildgoose

IV.4457. As part of its leniency application, Wildgoose provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.726 to IV.742 above and is relied upon by the OFT in relation to this tender.

IV.4458. In particular, Wildgoose provided to the OFT a 'Schedule of covers' and this tender appears on page four of the schedule.⁶⁴⁵²

IV.4459. In its response to the Statement, Wildgoose stated that '*neither the witness evidence provided by Ross Cooper nor the documentary evidence of Lemmeleg is sufficient to support the allegation that Wildgoose had provided a cover to Lemmeleg, even when considered together*',⁶⁴⁵³ although they did acknowledge elsewhere in their representations that '*the evidence suggests that Wildgoose provided Lemmeleg with a cover price for this tender*'.⁶⁴⁵⁴ The OFT notes that Wildgoose fails specifically to deal with the contemporaneous documentary evidence obtained from Bodill, which the OFT considers to be strong and which shows '£598995 ✓Ⓢ LEMELEC (HUDDERSFIELD) © FROM WILDGOOSE'.

Taken together with the witness explanations provided and with Lemmeleg's Fast Track admission which, without sight of the OFT's evidence, confirmed that it appeared that it had received a cover price from Bodills and/or possibly from Wildgoose (see below), the OFT considers its case that Wildgoose provided cover to Lemmeleg to be strong and compelling. The OFT further considers it possible either that Wildgoose indicated to Lemmeleg at the time of providing the cover price, that Bodill had also supplied Wildgoose with a cover price, or alternatively that Bodill may have informed Lemmeleg that it had given a cover price to Wildgoose and suggested that Lemmeleg obtain its cover price from Wildgoose.

⁶⁴⁴⁹ Interview transcript, OFT Document Reference 11447, page 16.

⁶⁴⁵⁰ Interview transcript, OFT Document Reference 11447, page 16.

⁶⁴⁵¹ Interview transcript, OFT Document Reference 11447, page 17.

⁶⁴⁵² Schedule of Covers, OFT Document Reference 0352, page 4.

⁶⁴⁵³ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.97.5.

⁶⁴⁵⁴ Written representations of Wildgoose, 3 July 2008 (as amended on 1 April 2009), paragraph 5.99.5.

Evidence from other companies – Lemmeleg

IV.4460. The OFT emailed Maclay Murray & Spens, legal representatives of Lemmeleg, on 12 June 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lemmeleg had participated in bid rigging on this tender. In response to this email, Lemmeleg admitted that, *'We engaged in bid rigging activities on this tender. Although the position and documentation is not entirely clear, it appears that Lemmeleg received a cover price from Bodills and/or possible from Wildgoose'*.⁶⁴⁵⁵

IV.4461. In their response to the Statement, Lemmeleg reiterated Lemmeleg's acceptance of the OFT's Fast Track Offer in respect of this Infringement.⁶⁴⁵⁶

Evidence from other companies – Quarmby (Special Projects)

IV.4462. The OFT wrote to Quarmby (Special Projects) on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Quarmby (Special Projects) had participated in bid rigging on this tender. The OFT received a letter dated 1 May explaining *'...we did not feel comfortable signing a declaration that we had been involved in bid rigging, when the reason contractors request cover prices, is that severe pressure of work can make it impossible to submit a tender for work where willingness had previously been expressed for inclusion on a specific tender list'*.⁶⁴⁵⁷ Quarmby (Special Projects) therefore did not accept the OFT's Fast Track Offer.

IV.4463. The OFT subsequently wrote to Quarmby (Special Projects)'s ultimate parent company at the time of this Infringement, Justgrade, on 6 November 2007, asking it to comment on Quarmby (Special Projects)'s response to the OFT's Fast Track Offer, given that the OFT intended to hold Justgrade jointly and severally liable for any infringements committed by Quarmby (Special Projects) in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Justgrade confirmed the position of its subsidiary, Quarmby (Special Projects) in its rejection of the OFT's Fast Track Offer.⁶⁴⁵⁸

IV.4464. In its response to the Statement, Quarmby (Special Projects) stated *'...we would again confirm that your original correspondence was taken very seriously within our company structure. We also again confirm in that any conduct by our staff, that may have constituted an infringement or a breach of the Companies Act 1998 [sic] happened due to a genuine lack of knowledge and naivety of the Act. We trust you will accept our sincere apologies in this instance and we confirm that adequate steps have been taken within the company to ensure compliance with the law'*.⁶⁴⁵⁹

The OFT's analysis of the evidence and finding

IV.4465. From the evidence presented above, the OFT draws the following conclusions.

⁶⁴⁵⁵ Response from Lemmeleg, OFT Document Reference 12981, page 2.

⁶⁴⁵⁶ Written representations of Lemmeleg, 26 June 2008, paragraph 4.1.

⁶⁴⁵⁷ Response from Quarmby (Special Projects), OFT Document Reference 10768.

⁶⁴⁵⁸ Response from Justgrade, OFT Document Reference 14089.

⁶⁴⁵⁹ Written representations of Quarmby (Special Projects), 12 June 2008, page 2.

- IV.4466. Bodill, Wildgoose, Lemmeleg and Quarmby (Special Projects) each accepted an invitation to tender for this contract.
- IV.4467. Bodill completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.
- IV.4468. Wildgoose, Lemmeleg and Quarmby (Special Projects) were unable to submit a tender by the return date and/or did not want to win this tender.
- IV.4469. In regard to Wildgoose, Bodill's tender sheet records '*£587450 ✓ ② WILDGOOSE © ROSS COOPER*' against Wildgoose. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ② recorded against Wildgoose to show that Wildgoose was the second company to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Wildgoose submitted a higher tender figure than the first company to be given a cover price, Quarmby (Special Projects).
- IV.4470. In addition, in Wildgoose's tender register, '*HR*' is written in the '*EST*' column for this particular tender. Wildgoose provided an explanation of the use of the initials '*HR*' in its Tender Enquiry Register. This evidence is set out in paragraph IV.732 above and is relied upon by the OFT in relation to this tender. Wildgoose explained that if it decides to take a cover, it will insert '*C*' (for 'cover') or '*HR*' (meaning 'Help Required') against that particular enquiry in the Tender Enquiry Register. '*HR*' reflects the fact that a cover will be obtained unless the initial decision is reviewed and Wildgoose decides instead to seek assistance from a freelance estimator or possibly another department within the company.
- IV.4471. Bodill's tender sheet also recorded the name of a Wildgoose employee, '*ROSS COOPER*' (RC), providing further evidence that contact was made between the two parties. RC confirmed in interview that Wildgoose obtained a cover price for this tender and, on being shown Bodill's tender sheet for this contract, accepted that he would have spoken with Bodill to obtain the cover price. Bodill recorded on the tender sheet the figure '*£587450*' against Wildgoose, whereas the actual figure submitted by Wildgoose was £588,120. RC explained that this slight discrepancy was quite normal and to make sure that Wildgoose did not win a job, it would sometimes add an extra figure onto a cover price provided.
- IV.4472. In regard to Lemmeleg, Bodill's tender sheet records '*£598995 ✓ ③ LEMELEC (HUDDERSFIELD) © FROM WILDGOOSE TIM LAVIN [.....] [C]*' against Lemmeleg. Bodill has confirmed that Lemmeleg has taken a cover price, apparently from Wildgoose. RC of Wildgoose said that if a company approached Wildgoose for a cover price, it was possible for Wildgoose to give another cover price off the back of the cover price already provided. The tender sheet also has the number ③ recorded against Lemmeleg to show that Lemmeleg was the third party to be given cover by or to request cover, whether from Bodill or from someone else, in this case Wildgoose. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on.

- IV.4473. The OFT notes that Lemmeleg submitted a higher tender figure than the second company to be given a cover price, Wildgoose. Furthermore, Bodill recorded on the tender sheet the figure £598995 against Lemmeleg, a figure that was only £219 higher than the tender that Lemmeleg submitted for the work. Taken together with the witness explanations provided and with Lemmeleg's Fast Track admission which independently confirmed that it appeared that it had received a cover price from Bodills and/or possibly from Wildgoose, the OFT considers its case that Wildgoose provided cover to Lemmeleg to be strong and compelling.
- IV.4474. Bodill's tender sheet also recorded the name of a Lemmeleg employee, 'TIM LAVIN' and the telephone number '[.....] [C]', providing further evidence that contact was made between the two parties. This is corroborated by company information for Lemmeleg, which gives contains the telephone number [...] [C].⁶⁴⁶⁰
- IV.4475. The OFT notes that Lemmeleg has admitted that it obtained a cover price from either Bodill and/or Wildgoose on this tender.
- IV.4476. In regard to Quarmby (Special Projects), Bodill's tender sheet records '£579901 ✓① QSP CONSTRUCTION © FROM ' and 'MARTIN SENYK [.....] [C]' against Quarmby (Special Projects). Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ① recorded against Quarmby (Special Projects) to show that Quarmby (Special Projects) was the first company to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Quarmby (Special Projects) submitted a lower tender figure than the second company to be given a cover price, Wildgoose. Furthermore, Bodill recorded on the tender sheet the figure '£579901' against Quarmby (Special Projects), a figure that was only £74 lower than the tender that Quarmby (Special Projects) submitted for the work.
- IV.4477. Bodill's tender sheet also recorded the name of a Quarmby (Special Projects) employee, 'MARTIN SENYK' and the telephone number '[.....] [C]', providing further evidence that contact was made between the two parties. This is corroborated by company information for Quarmby (Special Projects), which gives contains the telephone number [...] [C].⁶⁴⁶¹
- IV.4478. Bodill, Wildgoose and Lemmeleg have all admitted to bid rigging in relation to this tender. The OFT notes that Lemmeleg admitted that it obtained a cover from either Bodill or Wildgoose, without being shown the OFT's evidence that Lemmeleg took a cover price from Wildgoose. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.4479. Although Quarmby (Special Projects) has not admitted engaging in this bid rigging activity, the OFT considers the admissions by Wildgoose and Lemmeleg of engaging in bid rigging activities for this tender, support the OFT's

⁶⁴⁶⁰ FAME report, OFT Document Reference 12199, page 15.

⁶⁴⁶¹ FAME report, OFT Document Reference 12396, page 1.

interpretation of Bodill's tender sheet as indicating that Quarmby (Special Projects) too was provided with a cover price.

IV.4480. The OFT notes in addition that the tenders submitted by Wildgoose, Lemmeleg and Quarmby (Special Projects) were higher than the tender submitted by Bodill, a pattern consistent with cover prices having been provided by Bodill.

IV.4481. The OFT further notes that the tender received by Sheffield CC from Watfords of Wombwell Ltd is the only tender which appears to have been a genuine bid not subject to bid rigging, and furthermore that this bid was significantly lower than the bids received from the other four tenderers who were engaging in cover pricing on this contract and were therefore likely to have been inflating their submitted prices.

IV.4482. The OFT therefore concludes that contact took place between Wildgoose and Bodill, between Quarmby (Special Projects) and Bodill, and between Lemmeleg and Wildgoose. The OFT also concludes that Bodill supplied figures to each of Wildgoose and Quarmby (Special Projects) for cover bids. The OFT further concludes that Wildgoose supplied a figure to Lemmeleg for a cover bid.

IV.4483. The OFT is satisfied that the facts set out in paragraphs IV.4444 to IV.4482 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁴⁶² In particular:

- (a) the provision of figures for cover bids from Bodill to each of Wildgoose and Quarmby (Special Projects), and from Wildgoose to Lemmeleg, was not unilateral⁶⁴⁶³, and contravenes the principle against direct or indirect contact between competitors;⁶⁴⁶⁴
- (b) Wildgoose and Quarmby (Special Projects) can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process;⁶⁴⁶⁵
- (c) Lemmeleg can be presumed to have taken account of the information received from Wildgoose (i.e. the cover price) when determining its own respective conduct in the tendering process;⁶⁴⁶⁶
- (d) Bodill can be presumed to have taken account of the information it received from Wildgoose and Quarmby (Special Projects) (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process; and⁶⁴⁶⁷
- (e) Wildgoose can be presumed to have taken account of the information it received from Lemmeleg (i.e. that Lemmeleg did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁴⁶⁸

IV.4484. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Wildgoose and Bodill, between Quarmby (Special Projects) and Bodill,

⁶⁴⁶² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁴⁶³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁴⁶⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁴⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁴⁶⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁴⁶⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁴⁶⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

and between Lemmeleg and Wildgoose, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the demolition of existing buildings and construction of a bowls pavilion at Norfolk Heritage Park, Sheffield, tender deadline 28 July 2003.

Immunity and leniency assessment

IV.4485. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4486. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.4487. In respect of this tender, the OFT became aware of Wildgoose's involvement in bid rigging activities by virtue of the information obtained during the section 27 inspection which took place at Wildgoose's premises on 18 November 2004. Wildgoose will not therefore receive 100 per cent immunity in respect of this tender. However, Wildgoose will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.4488. In its response to the Statement, Wildgoose stated that *'it provided the OFT with an explanation of the meaning of the abbreviations for "HR" ... found in its Enquiry Register, which assisted the OFT with its analysis of the evidence pertaining to this Alleged Infringement and sees no rational reason why this Alleged Infringement has been singled out for different treatment'*.⁶⁴⁶⁹ The OFT first became aware of this tender as a result of the entry in a document found during a section 27 visit to Wildgoose on 18 November 2004, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Wildgoose's leniency application being made. The OFT therefore confirms that Wildgoose is not entitled to immunity for this Infringement but instead will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 160: **Refurbishments at Sneinton Corporate Properties, Nottingham City Council – 1 August 2003**
Client: **Nottingham City Council**
Parties: **Bodill and Dukeries**

IV.4489. On 11 July 2003, Nottingham City Council ('Nottingham CC') sought tenders for refurbishment at Sneinton Corporate Properties. The return date for the tender was 12:00 noon on 1 August 2003 and six companies were invited to tender: Dukeries, GPS Construction (Nottingham) Limited ('GPS'), P Waller, Bodill, Thomas Long and W R Bloodworth.⁶⁴⁷⁰

⁶⁴⁶⁹ Written representations of Wildgoose, 3 July 2008 as amended on 1 April 2009, paragraph 5.97.3.

⁶⁴⁷⁰ Information from client, OFT Document Reference 9138.

IV.4490. Nottingham CC received the following tender returns by 1 August 2003:⁶⁴⁷¹

Company	Date tender received	Amount of tender	Awarded the tender
Dukeries	1 August 2003	£94,750	Yes
GPS	1 August 2003	£96,980	
P Waller	1 August 2003	£98,802.58	
Bodill	1 August 2003	£96,831	
Thomas Long	1 August 2003	£101,929	
W R Bloodworth	No tender returned		

IV.4491. In their response to the Statement, Dukeries and Gavco stated *'Although Dukeries won this tender, the job did not proceed. Six months after the tender, a revised package of work which included on the properties in this tender was procured by Dukeries by negotiation with the Client.'*⁶⁴⁷²

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.4492. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed *'Tenderers'*, the following entries have been made, all of which are handwritten except the entry for Bodill:⁶⁴⁷³

- '
1. Bodill
 2. DUKERIES BUILDING WILL RING U(S)
THURS pm
A. STOKES TEL [...] [C]'

IV.4493. The tender sheet for this tender also contains a ringed letter 'C' against the word *'ESTIMATOR'*, and at the foot of the sheet it states that Bodill's submitted price was £96,831.⁶⁴⁷⁴

IV.4494. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2003 which contains an entry for this tender on 1 August which reads *'PROP REFURBS NOTTMCC (C) (NOTTM)'*.⁶⁴⁷⁵ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, *'It means we're looking for some help, a cover, a cover price'*.⁶⁴⁷⁶ JR further confirmed that the entry on that page of the diary was for this tender.⁶⁴⁷⁷

Evidence from leniency applicant Bodill

IV.4495. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

⁶⁴⁷¹ Information from client, OFT Document Reference 9138.

⁶⁴⁷² Written representations of Dukeries and Gavco, 27 June 2008, paragraph 45.

⁶⁴⁷³ Tender sheet, OFT Document Reference 0692.

⁶⁴⁷⁴ Tender sheet, OFT Document Reference 0692.

⁶⁴⁷⁵ 2003 Diary, OFT Document Reference 0108, page 18, obtained during visit to Bodill's premises under section 27 on 19 November 2004.

⁶⁴⁷⁶ Interview transcript, OFT Document Reference 6337, page 4.

⁶⁴⁷⁷ Interview transcript, OFT Document Reference 6337, page 13.

IV.4496. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁶⁴⁷⁸ In respect of this tender, Bodill confirmed that it received a cover price from Dukeries and that it submitted a *'token tender'*.⁶⁴⁷⁹

Witness evidence from leniency applicant Bodill

IV.4497. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Dukeries

IV.4498. The OFT wrote to Dukeries on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Dukeries had participated in bid rigging on this tender. In response to this letter, Dukeries did not admit bid rigging on this tender.⁶⁴⁸⁰

IV.4499. The telephone number set out in Bodill's tender sheet, [.....] [C], is the Dukeries telephone number⁶⁴⁸¹, indicating that Bodill contacted Dukeries in respect of this tender.

IV.4500. The OFT subsequently wrote to Dukeries' ultimate parent company at the time of this Infringement, Gavco, on 5 November 2007, asking it to comment on Dukeries' response to the OFT's Fast Track Offer, given that the OFT intended to hold Gavco jointly and severally liable for any infringements committed by Dukeries in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Gavco's legal representatives Geldards LLP said, *'Gavco has nothing to add to the previous responses made by Dukeries'*.⁶⁴⁸²

IV.4501. In their response to the Statement, however, Dukeries and Gavco stated *'on the basis of the evidence presented by the OFT in the Statement of Objections Dukeries admits to providing a cover price to Bodill in respect of this tender'*⁶⁴⁸³ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.4502. From the evidence presented above, the OFT draws the following conclusions.

IV.4503. Bodill and Dukeries each accepted an invitation to tender for this contract.

IV.4504. Dukeries completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work. This is

⁶⁴⁷⁸ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁶⁴⁷⁹ Tender Analysis, OFT Document Reference 0849, page 4.

⁶⁴⁸⁰ Response from Dukeries, OFT Document Reference 10987, page 3.

⁶⁴⁸¹ FAME report, OFT Document Reference 12684, page 1.

⁶⁴⁸² Response from Gavco, OFT Document Reference 13934, page 2.

⁶⁴⁸³ Written representations of Dukeries and Gavco, 27 June 2008, paragraph 40.

shown by the price submitted by Dukeries being the lowest received and that they won the contract.

IV.4505. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.

IV.4506. In regard to Dukeries, as well as the ringed letter 'C' against the word '*ESTIMATOR*', Bodill's tender sheet shows the entry '*DUKERIES BUILDING WILL RING U(S) THURS pm A. STOKES TEL [.....] [C]*'. Bodill has confirmed that this shows that it received a cover price from Dukeries. Bodill recorded on the tender sheet the figure £96,831 as the tender figure and this was the figure that Bodill submitted. Furthermore, the telephone number set out in Bodill's tender sheet, [.....] [C], is the Dukeries telephone number, indicating that Bodill contacted Dukeries in respect of this tender. The OFT also refers to the entry of a '(C)' against this tender in JR's diary for 1 August 2003 as described above, and his explanation of that entry.

IV.4507. The OFT notes in addition that the tender submitted by Bodill was higher than the tender submitted by Dukeries, a pattern consistent with a cover price having been provided and accepted, and indeed that Dukeries is the only company whose figure was below that of Bodill, such that the cover price received by Bodill could only have been provided by Dukeries.

IV.4508. The OFT therefore concludes that contact took place between Dukeries and Bodill. The OFT also concludes that Dukeries supplied a figure to Bodill for a cover bid.

IV.4509. The OFT is satisfied that the facts set out in paragraphs IV.4491 to IV.4508 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁴⁸⁴ In particular:

- (a) the provision of a figure for a cover bid from Dukeries to Bodill was not unilateral⁶⁴⁸⁵, and contravenes the principle against direct or indirect contact between competitors;⁶⁴⁸⁶
- (b) Bodill can be presumed to have taken account of the information received from Dukeries (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁴⁸⁷ and
- (c) Dukeries can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁴⁸⁸

IV.4510. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and Dukeries, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishments at Sneinton Corporate Properties, tender deadline 1 August 2003.

⁶⁴⁸⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁴⁸⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁴⁸⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁴⁸⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁴⁸⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.4511. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4512. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, Bodill will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.4513. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.⁶⁴⁸⁹ The OFT first became aware of this tender as a result of the entry in a document obtained during a section 27 visit to Bodill on 19 November 2004⁶⁴⁹⁰, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made. Bodill will therefore only receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 161: Not included in the Decision

Infringement 162: Nursery at Westfield Primary School, York – 8 August 2003
Client: City of York Council
Parties: Strata, Hobson & Porter, Lemmeleg, Kier Northern⁶⁴⁹¹ and P Casey

IV.4514. On 9 July 2003, City of York Council sought tenders for a proposed nursery unit at Westfield Primary School, York. The following seven companies were invited to tender: Hobson & Porter, Kier Northern, P Casey, Hall Construction, Strata, Medlock Construction Ltd and Lemmeleg. The tender deadline was 12:00 noon on 8 August 2003.⁶⁴⁹²

IV.4515. City of York Council received the following tender returns:⁶⁴⁹³

⁶⁴⁸⁹ Written representations of Bodill, 26 June 2008, paragraph 3.5.

⁶⁴⁹⁰ 2003 Diary, OFT Document Reference 0108, as discussed in paragraph IV.4494.

⁶⁴⁹¹ Kier Northern is a trading division of Kier.

⁶⁴⁹² Information from client, OFT Document Reference 7402.

⁶⁴⁹³ Information from client, OFT Document Reference 7402.

Company	Date Tender Received	Amount of tender	Awarded contract
Hobson & Porter	8 August 2003	£1,167,052	
Kier Northern	8 August 2003	£1,261,115	
P Casey	8 August 2003	£1,202,196	
Hall Construction	No Tender Returned	N/A	
Strata	8 August 2003	£1,159,762	
Medlock Construction Ltd	8 August 2003	£1,069,470	Yes
Lemmeleg	8 August 2003 at 8:30	£1,209,337 ⁶⁴⁹⁴	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Contract Information Sheet

IV.4516. During the OFT’s search of Strata’s premises a contract information sheet, or BOB sheet, was found. The BOB sheet contained the following entries typed in the tender results box:⁶⁴⁹⁵

TENDER RESULTS		
% DIFF	CONTRACTOR	VALUE
	STRATA	1159762
	PARKINSONS N.Q	
	GILFORDS (YORK) N.Q	
	WM.BIRCH N.Q	
	SIMPSONS (YORK) N.Q	
	HOBSON & PORTER	
3.6588743	CASEY (C)	1202196
	MEDLOCK (OLDHAM)	
	LLEMELEG (C)	

Contemporaneous documentary evidence from Hobson & Porter – Tender Summary Sheet

IV.4517. During the OFT’s search of Hobson & Porter’s premises a Tender Information Sheet was found.⁶⁴⁹⁶ The Tender Information Sheet states that Hobson & Porter’s submitted figure was £1,167,052 and the entries in the ‘Competition’ box state:

⁶⁴⁹⁴ Information from client, OFT Document Reference 7402. From the information supplied by York City Council it appears that Lemmeleg declined to submit a tender for this contract at 8:30am on 8 August 2003. However Lemmeleg did submit a tender of £1,209,337 for this contract.

⁶⁴⁹⁵ Contract Information Sheet, OFT Document Reference 3268.

⁶⁴⁹⁶ Tender Information Sheet, OFT Document Reference A0120, page 1.

Competition	5 LEMMELEG 'C' £1,208,000
1 P CASEY (Rochdale)	6 KEIR NORTHERN 'C' £1,260,000
2 STRATA	7
3 MEDLOCK (Oldham)	8
4 WOODHOUSE BARRY (York)	9

Evidence from leniency applicant - Strata

IV.4518. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 to Dec 2001' and 'contracts in hand' documents. This list included the following entry:⁶⁴⁹⁷

Date	Project	Strata ref no	Cover to
08/08/2003	Nursery Unit, Westfield Primary School, York	T37/03	✓

Cover from	Company Name	Company Address
	Casey	Bacup

IV.4519. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Evidence from leniency applicant – Hobson & Porter

IV.4520. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.4521. In addition to its written leniency application, Hobson & Porter provided to the OFT a Summary of Cover Pricing Activity (Major Works).⁶⁴⁹⁸ The entry for this contract states:

⁶⁴⁹⁷ Leniency application, OFT Document Reference 4056, page 1.

⁶⁴⁹⁸ Summary of Cover Pricing Activity, OFT Document Reference A1347, page 1.

YEAR	TENDER REF	DESCRIPTION	CLIENT	DATE	VALUE	COVER FROM
2003	0440	NURSERY WESTFIELD SCHOOL	YORK CITY COUNCIL	08-Aug-03	1,167,052.00	N/A

COVER TO	POSSIBLE COVER TO/FROM	INDIVIDUAL CONTACT	OFT/H&P REF	NOTES
LEMMELEG KIER	NOT KNOWN	NOT KNOWN NOT KNOWN	ABR/241	

IV.4522. In its response to the Statement, Hobson & Porter stated that it *'...does not contest the OFT's findings of infringement'*.⁶⁴⁹⁹

Witness evidence from leniency applicant Strata

IV.4523. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.4524. During an interview conducted on 28 March 2007 in connection with its leniency application, Paul Throssell ('PT'), an estimator at Strata, was asked how covers given to competitors were generally recorded. PT explained *'The only way we would record that would be on the contract analysis sheet, the bob sheet, we would list down on that sheet the competition, and if we were giving them a cover, I would put a C against their name and a figure, that we'd given them'*.⁶⁵⁰⁰

Witness evidence from leniency applicant – Hobson & Porter

IV.4525. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.4526. In respect of this tender, in interview Russell Horner ('RH'), Minor Works Estimating Director at Hobson & Porter, stated that he was unable to tell which estimator priced this contract, *'On this one I cannot honestly remember – it would either have been myself or Mick [Michael Haywood, Estimator at Hobson & Porter]'*.⁶⁵⁰¹ RH confirmed however, that on the basis of the documentary evidence Hobson & Porter gave cover prices to Lemmeleg and Kier Northern.⁶⁵⁰²

Evidence from other companies – P Casey

IV.4527. The OFT wrote to P Casey on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that P Casey had participated in bid rigging on this tender. In response to this letter P

⁶⁴⁹⁹ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁶⁵⁰⁰ Interview transcript, OFT Document Reference 11380, page 11.

⁶⁵⁰¹ Interview transcript, OFT Document Reference 11229, page 13.

⁶⁵⁰² Interview transcript, OFT Document Reference 11229, page 13.

Casey admitted *'We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party/parties involved'*.⁶⁵⁰³ P Casey added that *'The Company has few hard copy documents relating to the suspect tenders and does not maintain electronic tender documents. The estimator employed during the period of the suspect tenders emigrated to New Zealand in 2005 and has been unable to provide any reliable recollections of the tenders in question. For these reasons, the Company has only been able to consider incomplete records and it neither has evidence to indicate that cover pricing activity occurred nor an evidential basis upon which to challenge the allegations...'*.⁶⁵⁰⁴

IV.4528. The OFT subsequently wrote to P Casey's ultimate parent company at the time of this Infringement, The Casey Group, on 6 November 2007, asking it to comment on P Casey's response to the OFT's Fast Track Offer, given that the OFT intended to hold The Casey Group jointly and severally liable for any infringements committed by P Casey in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter The Casey Group admitted *'We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party/parties involved. We have no actual knowledge nor evidence of cover pricing having occurred in relation to this tender ...'*.⁶⁵⁰⁵ The Casey Group also stated *'We also submit that all of the tenders should fall to be dealt with by The Casey Group Limited as the relevant parent company'*.⁶⁵⁰⁶

IV.4529. In its response to the Statement, P Casey stated that it *'...has not been able to establish any further facts concerning the alleged infringements referred to in the [Statement (including this Infringement)] and consequently can provide no additional assistance...'*.⁶⁵⁰⁷

Evidence from other companies – Lemmeleg

IV.4530. The OFT wrote to Lemmeleg on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lemmeleg had participated in bid rigging on this tender. In response to this letter Lemmeleg stated, *'We engaged in bid rigging activities on this tender. Although the position is not entirely clear, it appears that Lemmeleg received a cover price from Hobson & Porter'*.⁶⁵⁰⁸

IV.4531. In their response to the Statement, Lemmeleg acknowledged its involvement in cover pricing in respect of this Infringement.⁶⁵⁰⁹

Evidence from other companies – Kier

IV.4532. The OFT wrote to Kier on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Kier

⁶⁵⁰³ Response from P Casey, OFT Document Reference 10729, page 4.

⁶⁵⁰⁴ Response from P Casey, OFT Document Reference 10731, page 1.

⁶⁵⁰⁵ Response from The Casey Group, OFT Document Reference 14202, page 4.

⁶⁵⁰⁶ Response from The Casey Group, OFT Document Reference 14201.

⁶⁵⁰⁷ Written representations of P Casey, 27 June 2008, page 2.

⁶⁵⁰⁸ Response from Lemmeleg, OFT Document Reference 10505, page 4.

⁶⁵⁰⁹ Written representations of Lemmeleg, 26 June 2008, paragraph 4.1.

had participated in bid rigging on this tender. In response to this letter Kier Group stated that it was unable to accept the OFT's Fast Track Offer.⁶⁵¹⁰

IV.4533. Kier stated in its response to the Statement that it did not wish to comment on the Infringements other than to make comments and observations which should be taken into account when calculating any penalty.⁶⁵¹¹ Such points are addressed in Section VI (Enforcement) below.

The OFT's analysis of the evidence and finding

IV.4534. From the evidence presented above, the OFT draws the following conclusions.

IV.4535. Strata, Hobson & Porter, Lemmeleg, Kier Northern and P Casey each accepted an invitation to tender for a proposed nursery unit at Westfield Primary School, York.

IV.4536. All five companies submitted a tender. Lemmeleg, Kier Northern and P Casey were unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.4537. In relation to the cover price provided to P Casey the OFT notes that, Strata's contract information sheet records '3.6588743 CASEY (C) 1202196' typed in the tender results box. PT of Strata confirmed that a '(C)' written next to a competitor's name alongside a figure shows that Strata gave a cover price to the company noted, as in this case. Strata confirmed in its leniency application that it gave a cover price to P Casey on this tender.

IV.4538. P Casey admitted that it engaged in bid rigging on this tender in response to the OFT's letter of 22 March 2007.

IV.4539. The OFT considers in the light of the contemporaneous evidence from Strata and PT's admission and explanation of that contemporaneous evidence, as well as P Casey's admission that it engaged in cover pricing, that Strata supplied P Casey with a cover figure for this tender.

IV.4540. In addition the OFT notes that the tender submitted by P Casey was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided.

IV.4541. In relation to the cover prices provided to Lemmeleg and Kier Northern, the OFT notes that Hobson & Porter's tender information sheet shows '*LEMMELEG 'C' £1,208,000 KEIR NORTHERN 'C' £1,260,000,*' typed in the competition box. Hobson & Porter has admitted that it provided cover prices to Lemmeleg and Kier Northern on this tender.

IV.4542. Lemmeleg also admitted that it engaged in bid rigging on this tender in response to the OFT's letter of 22 March 2007.

IV.4543. The OFT considers in the light of the contemporaneous evidence from Hobson & Porter and RH's admission and explanation of that contemporaneous evidence, as well as Lemmeleg's admission that it engaged in cover pricing,

⁶⁵¹⁰ Response from Kier, OFT Document Reference 10478, page 1.

⁶⁵¹¹ Written representations of Kier, 27 June 2008, paragraphs 1.1 and 2.1.

that Hobson & Porter supplied each of Lemmeleg and Kier Northern with cover figures for this tender.

IV.4544. In addition the OFT notes that the tender prices submitted by Lemmeleg and Kier Northern were higher than the tender submitted by Hobson & Porter, the pattern consistent with cover prices having been provided.

IV.4545. Strata, Hobson & Porter, Lemmeleg and P Casey have all admitted to bid rigging in relation to this tender. The OFT notes that Lemmeleg admitted that the party with whom it engaged in bid rigging was Hobson & Porter, without being shown the OFT's evidence that Hobson & Porter was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.4546. The OFT therefore concludes that contact took place between Strata and P Casey, between Hobson & Porter and Lemmeleg, and between Hobson & Porter and Kier Northern. The OFT also concludes that Strata supplied a figure to P Casey for a cover bid and that Hobson & Porter supplied figures to both Kier Northern and Lemmeleg for cover bids. The OFT notes that five of the six bids for this tender were the subject of bid rigging.

IV.4547. The OFT is satisfied that the facts set out in paragraphs IV.4516 to IV.4546 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁵¹² In particular:

- (a) the provision of figures for cover bids from Strata to P Casey and from Hobson & Porter to each of Kier Northern and Lemmeleg was not unilateral⁶⁵¹³, and contravenes the principle against direct or indirect contact between competitors;⁶⁵¹⁴
- (b) P Casey can be presumed to have taken account of the information received from Strata (i.e the cover price) when determining its own conduct in the tendering process;⁶⁵¹⁵
- (c) Lemmeleg and Kier Northern can each be presumed to have taken account of the information received from Hobson & Porter (i.e the respective cover prices) when determining their own conduct in the tendering process;⁶⁵¹⁶
- (d) Strata can be presumed to have taken account of the information it received from P Casey (i.e. that P Casey did not intend to submit a competitive bid) when determining its own conduct in the tendering process;⁶⁵¹⁷ and
- (e) Hobson & Porter can be presumed to have taken account of the information it received from Lemmeleg and Kier Northern, (i.e. that neither Lemmeleg nor Kier Northern intended to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁵¹⁸

IV.4548. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place

⁶⁵¹² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁵¹³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁵¹⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁵¹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵¹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵¹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵¹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Strata and P Casey, between Hobson & Porter and Lemmeleg, and between Hobson & Porter and Kier Northern, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a proposed nursery unit at Westfield Primary School York, tender deadline 8 August 2003.

Immunity and leniency assessment

IV.4549. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4550. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during visits under section 28 on 6 and 7 July 2005 and 28 March 2006. Therefore Hobson & Porter will not receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Hobson & Porter in respect of this Infringement.

IV.4551. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during visits under section 28 on 6 and 7 July 2005 and 28 March 2006. Therefore Strata will not receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

Infringement 163: Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham – 5 September 2003
Client: Nottingham City Council
Parties: Bodill, P Waller and Frudd

IV.4552. In 2003, Nottingham City Council sought tenders for environmental improvements to 26 houses, Pearmain Drive Estate, Nottingham. The return date for the tender was 5 September 2003 and five companies were invited to tender: T Denman, Nottingham City Building Works, Frudd, Bodill and P Waller.⁶⁵¹⁹

IV.4553. Nottingham City Council received the following tender returns prior to 12:00 noon on 5 September 2003:⁶⁵²⁰

⁶⁵¹⁹ Information from client, OFT Document Reference 13767.

⁶⁵²⁰ Information from client, OFT Document Reference 13767.

Company	Date and time tender received	Amount of tender	Awarded the tender
T Denman	Declined to tender		
Nottingham City Building Works	Prior to 12:00 noon on 5 September 2003	£249,448.00	
Frudd	Prior to 12:00 noon on 5 September 2003	£227,995.00	
Bodill	Prior to 12:00 noon on 5 September 2003	£205,642.00	Yes
P Waller	Prior to 12:00 noon on 5 September 2003	£221,880.42	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.4554. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill.⁶⁵²¹

- '
1. *Bodill*
 - £221880 ✓ ① 2. *P. WALLER © FROM US*
RING JANE WALLER
 - £227995 ✓ ② 3. *FRUDD © FROM US*
RING MICK ROBINS
 4. ?
 5. ?'

IV.4555. The tender sheet states that Bodill's submitted figure was £205,642.⁶⁵²²

IV.4556. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has confirmed that the handwritten annotations '£221880 ✓' and '£227995 ✓' under the section headed '*Tenderers*' were made by him.⁶⁵²³ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.4557. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has confirmed that the handwritten annotations '① *P. WALLER © FROM US RING JANE WALLER*' and '② *FRUDD © FROM US RING MICK ROBINS*' under the section headed '*Tenderers*' were made by him.⁶⁵²⁴ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

⁶⁵²¹ Tender sheet, OFT Document Reference 0700.

⁶⁵²² Tender sheet, OFT Document Reference 0700.

⁶⁵²³ Contracts document, OFT Document Reference 14310, pages 1 and 4.

⁶⁵²⁴ Contracts document, OFT Document Reference 14311, pages 1 and 4.

Evidence from leniency applicant Bodill

IV.4558. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.4559. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁶⁵²⁵ In respect of this tender, Bodill confirmed that it gave two cover prices, to P Waller and Frudd.⁶⁵²⁶

IV.4560. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.4561. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from leniency applicant P Waller – Diary Entry

IV.4562. Jane Waller ('JW'), Director and Company Secretary of P Waller, kept a diary for 2003 which was obtained during the section 28 visit to P Waller's premises on 6 July 2005 and which contains an entry for this tender on 5 September 2003 which reads '*David Wraith, Bodills – cover for Pearmain Dr. [...] [C] tender at 12 noon. today ✓.*'⁶⁵²⁷

Evidence from leniency applicant P Waller

IV.4563. As part of its leniency application, P Waller provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.517 to IV.526 above and is relied upon by the OFT in relation to this tender.

IV.4564. On a list of cover prices received, provided by P Waller to the OFT as part of its leniency application, is typewritten:⁶⁵²⁸

<i>TITLE</i>	<i>DATE</i>	<i>CONTACT</i>	<i>COMPANY</i>	<i>WON</i>	<i>LOST</i>
<i>Pearmain Drive Estate</i>	<i>05/09/2003</i>	<i>David Wraith</i>	<i>Bloodworths</i> ⁶⁵²⁹		<i>Yes</i>

IV.4565. Following the issue of the Statement, P Waller did not submit any written or oral representations.

⁶⁵²⁵ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁶⁵²⁶ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 6.

⁶⁵²⁷ Jane Waller's diary, OFT Document Reference 3624, page 131.

⁶⁵²⁸ Cover prices received, OFT Document Reference 4507.

⁶⁵²⁹ P Waller named '*David Wraith*' of '*Bloodworths*'. David Wraith was clearly working at Bodill at the time of this tender and the OFT believes that this was an error in the information provided by P Waller. W R Bloodworth was not invited to tender for this contract.

Witness evidence from leniency applicant P Waller

IV.4566. During interviews conducted in connection with its leniency application, P Waller's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.517 to IV.526 above and is relied upon by the OFT in relation to this tender.

IV.4567. In response to a question about the significance of a '✓' in her diary, JW confirmed that this tick shows that an action (i.e. in this case that DW of Bodill had provided P Waller with a cover price) had been achieved.⁶⁵³⁰

Contemporaneous documentary evidence from leniency applicant Frudd – Enquiries Received Spreadsheet

IV.4568. A spreadsheet dated 26 August 2003 was obtained during the section 28 visit to Frudd's premises on 29 June 2005 and contains an entry for this tender which reads:⁶⁵³¹

Project Title	Decision	Tenders Returned By:
Proposed external improvements @ Pearmain Drive Estate, St Anns, Nottingham Nottingham City Council	C	5/9/2003 12 Noon

Start Dates	Competition	Estimated Project Value	Enquiries Sent	Estimator
	Bodill Waller	200k	Yes	

Evidence from leniency applicant Frudd

IV.4569. As part of its leniency application, Frudd provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.335 to IV.351 above and is relied upon by the OFT in relation to this tender.

IV.4570. On a list of cover prices received, provided by Frudd to the OFT as part of its leniency application, is typewritten:⁶⁵³²

Date	Contract	Client
2003	Improvements Pearmain Drive Est St Anns	Nottm City Council Unknown who gave us the cover

Contractors	Amount	Result
Bodill Waller	200000	

IV.4571. Following the issue of the Statement, Frudd did not submit any written or oral representations.

⁶⁵³⁰ Interview transcript, OFT Document Reference 6366, page 4.

⁶⁵³¹ Enquiries Received, OFT Document Reference 2049.

⁶⁵³² Cover prices received, OFT Document Reference 3985, page 4.

The OFT's analysis of the evidence and finding

IV.4572. From the evidence presented above, the OFT draws the following conclusions.

IV.4573. Bodill, P Waller and Frudd each accepted an invitation to tender for this contract.

IV.4574. Bodill completed the estimating process for the tender for this contract. This is shown by the facts that it submitted the lowest price and that it won the tender.

IV.4575. P Waller and Frudd were unable to submit a tender by the return date and/or did not want to win this tender.

IV.4576. In regard to P Waller, Bodill's tender sheet records '£221880 ✓ ① P. WALLER © FROM US RING JANE WALLER' against P Waller. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ① recorded against P Waller to show that P Waller was the first party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that P Waller submitted a lower tender figure than the second company to be given a cover price, Frudd. Furthermore, Bodill recorded on the tender sheet the figure £221,880 against P Waller, a figure that was identical, albeit with the addition of 42p, to the tender that P Waller submitted for the work.

IV.4577. Bodill's tender sheet records '*P WALLER* © FROM US RING JANE WALLER' and the OFT notes more specifically that this shows that Bodill was to phone JW of P Waller in order to provide P Waller a cover price, providing further evidence that contact was made between the two parties. This is further corroborated by the entry in JW's diary for this tender for 5 September 2003 which records '*David Wraith, Bodills – cover for Pearmain Dr. [.....] [C] tender at 12 noon. today ✓*' which shows that P Waller was expecting that Bodill would provide it with a cover price by 12:00 noon on the day that the tender was due to be submitted. JW has confirmed that the '*✓*' shows that the cover price was successfully obtained from DW at Bodill.

IV.4578. In respect of the entry in JW's diary '*David Wraith, Bodills..... [.....] [C]*', these details are independently corroborated by information obtained from W R Bloodworth, a list of contacts for cover prices, which names '*David Wraith*' with the telephone contact number '[...] [C]' at Bodill.⁶⁵³³

IV.4579. In regard to Frudd, Bodill's tender sheet records '£227995 ✓ ② FRUDD © FROM US RING MICK ROBINS' against Frudd. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number ② recorded against Frudd to show that Frudd was the second company to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached

⁶⁵³³ Contacts for Cover Prices, OFT Document Reference 3915.

by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Frudd submitted a higher tender figure than the first company to be given a cover price, P Waller. Furthermore, Bodill recorded on the tender sheet the figure £227,995 against Frudd, a figure that was identical to the tender that Frudd submitted for the work.

IV.4580. In respect of the contemporaneous Enquiries Received spreadsheet obtained from Frudd, the OFT notes that a 'C' was entered and that no estimator was allocated for this tender. This 'C' shows that Frudd received a cover price on this tender and this is further confirmed by the fact that it had not allocated an estimator, which shows that it had decided not to complete the estimating process and that it would instead obtain a cover price on this tender. Frudd confirmed that it received a cover price on this tender but could not recall the identity of the company from whom it received the cover price. The OFT considers that the contemporaneous evidence from Bodill, together with Bodill's admission and explanation of that evidence, demonstrates that Frudd did in fact receive a cover price from Bodill on this tender.

IV.4581. Bodill's tender sheet also recorded the name of a Frudd employee, 'Mick Robins', providing further evidence that contact was made between the two parties. Michael Robins was one of the Frudd employees who were interviewed by the OFT as part of its investigation.⁶⁵³⁴

IV.4582. The OFT notes in addition that the tenders submitted by P Waller and Frudd were both higher than the tender submitted by Bodill, a pattern consistent with cover prices having been provided by Bodill.

IV.4583. The OFT also notes that no other company submitted a bid lower than Bodill's bid, and that only Bodill could therefore have given P Waller a cover price in respect of this tender. All three companies have admitted to engaging in bid rigging in respect of this tender.

IV.4584. The OFT therefore concludes that contact took place between P Waller and Bodill, and between Frudd and Bodill. The OFT also concludes that Bodill supplied figures to each of P Waller and Frudd for cover bids.

IV.4585. The OFT is satisfied that the facts set out in paragraphs IV.4554 to IV.4584 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁵³⁵ In particular:

- (a) the provision of figures for cover bids from Bodill to each of P Waller and Frudd was not unilateral⁶⁵³⁶, and contravenes the principle against direct or indirect contact between competitors;⁶⁵³⁷
- (b) P Waller and Frudd can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process,⁶⁵³⁸ and

⁶⁵³⁴ Interview transcript, OFT Reference 13115.

⁶⁵³⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁵³⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁵³⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁵³⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Bodill can be presumed to have taken account of the information it received from P Waller and Frudd (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁶⁵³⁹

IV.4586. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between P Waller and Bodill, and between Frudd and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for environmental improvements to 26 houses, Pearmain Drive Estate, Nottingham, tender deadline 5 September 2003.

Immunity and leniency assessment

IV.4587. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4588. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.4589. In respect of this tender, the OFT became aware of P Waller's involvement in bid rigging activities by virtue of the information provided by Bodill. P Waller will not therefore receive 100 per cent immunity in respect of this tender. However, P Waller will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.4590. In respect of this tender, the OFT became aware of Frudd's involvement in bid rigging activities by virtue of the information provided by Bodill. Frudd will not therefore receive 100 per cent immunity in respect of this tender. However, Frudd will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 164: **Fire Damage, Stenson Fields, Derby – 22 September 2003**
Client: **Andy Whyman Quantity Surveyors**
Parties: **Derwent Valley and Davlyn**

IV.4591. On 8 August 2003, Andy Whyman, Quantity Surveyors sought tenders for fire damage rebuilding works on an industrial unit at Stenson Fields, Derby. The following four companies were originally invited to tender: A & S Enterprises Ltd, Derwent Valley, Bailey Construction Ltd and Davlyn. The deadline for the receipt of tenders was 12:00 noon on 22 September 2003.⁶⁵⁴⁰

IV.4592. Andy Whyman, Quantity Surveyors received the following tender returns:⁶⁵⁴¹

⁶⁵³⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵⁴⁰ Information from client, OFT Document Reference 7050.

⁶⁵⁴¹ Information from client, OFT Document Reference 7050.

Company	Time & Date tender received	Amount of tender	Awarded contract
A & S Enterprises Ltd	11:20 am on 22 September 2003	£168,724	
Derwent Valley	11:42 am on 22 September 2003	£170,252	
Bailey Construction Ltd	Declined to tender on 8 August 2003	N/A	
Davlyn	11:55 am on 22 September 2003	£187,781	

IV.4593. It appears that a further invitation to tender was subsequently sent to D & S Smalley Ltd, who provided a winning tender of £163,025 on 28 November 2003.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Derwent Valley – Tender Register

IV.4594. During the search of Derwent Valley's premises a Tender Register was found. The Tender Register contained the following entry in respect of this tender:⁶⁵⁴²

TENDER NR	RETURN DATE	DETAILS	OPPOSITION	TENDER	✓
9/9/03	22/9/03	Fire damage. Industrial Unit. Stenson Fields, Derby Andy Whyman - QS	Davlyn (C) AS Enterprise	170,252.00	2nd

Evidence from leniency applicant Derwent Valley

IV.4595. As part of its leniency application, Derwent Valley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.4596. In its leniency application, Derwent Valley set out a summary of all tenders from April 2001 to January 2005 where Derwent Valley had given a cover price to a competitor for that tender, marked as '*DVC1 List of Covers Given*'. The information in the summary contains the following extract:⁶⁵⁴³

Date	Contract	Company Involved
September 2003	Fire damage to industrial unit Stenson Fields Derby	Davlyn

IV.4597. Derwent Valley also provided to the OFT as part of its leniency application a '*List of Contractors Exchanging Cover Prices*'. The name '*Davlyn Construction Ltd*' appears on this list with the address '*Unit 5B Sir Francis Ley Ind Park Shaftesbury St. Derby*' and a contact named, '*Dave*'.⁶⁵⁴⁴

⁶⁵⁴² Tender schedule, OFT Document Reference 1912, page 41.

⁶⁵⁴³ List of Covers Given, OFT Document Reference 3940, page 3.

⁶⁵⁴⁴ List of Contractors Exchanging Cover Prices, OFT Document Reference 3942, page 2.

IV.4598. Following the issue of the Statement, Derwent Valley did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Derwent Valley

IV.4599. During interviews conducted in connection with its leniency application, Derwent Valley directors provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.303 to IV.325 above and is relied upon by the OFT in relation to this tender.

IV.4600. In regard to this tender, a voluntary interview was conducted with Andrew Stone ('AS'), Managing Director of Derwent Valley. AS did recall the tender, and stated that *'I remember it was ... an insurance job. An industrial unit got burned down. I priced it, and the QS was Andy Whyman and we didn't get the job'*.⁶⁵⁴⁵ AS confirmed that he made the entries in the Tender Register and stated that the 'C' written next to Davlyn *'would have meant cover'*. He said, *'Davlyn will have approached me via the telephone and asked for a cover on this job'*.⁶⁵⁴⁶

Evidence from leniency applicant Davlyn

IV.4601. As part of its leniency application, Davlyn provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.293 to IV.302 above and is relied upon by the OFT in relation to this tender.

IV.4602. In its response to the Statement, Davlyn did not contest its involvement in this Infringement.

Witness evidence from leniency applicant Davlyn

IV.4603. During interviews conducted in connection with its leniency application, Davlyn's employees provided general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.293 to IV.302 above and is relied upon by the OFT in relation to this tender.

IV.4604. In regard to this tender, a voluntary interview was conducted with David Goodhead ('DG'), estimator for Davlyn. DG confirmed that Davlyn have tendered and completed projects for Andy Whyman Architects in the past.⁶⁵⁴⁷ Although DG could not specifically recall taking a cover from Derwent Valley in relation to this contract, he did confirm that Derwent Valley was a company with whom Davlyn exchanged cover prices, and stated that it was therefore *'definitely feasible'* that Davlyn did indeed take a cover price from Derwent Valley in relation to this tender.⁶⁵⁴⁸

The OFT's analysis of the evidence and finding

IV.4605. From the evidence presented above, the OFT draws the following conclusions.

⁶⁵⁴⁵ Interview transcript, OFT Document Reference 13479, page 7.

⁶⁵⁴⁶ Interview transcript, OFT Document Reference 13479, page 8.

⁶⁵⁴⁷ Interview transcript, OFT Document Reference 11180, page 9.

⁶⁵⁴⁸ Interview transcript, OFT Document Reference 11180, page 10.

- IV.4606. Derwent Valley and Davlyn each accepted an invitation to tender for this contract.
- IV.4607. Davlyn was unable to submit a tender by the return date and/or did not want to win this contract.
- IV.4608. Derwent Valley's Tender Register shows '*Davlyn (C)*' handwritten in the '*Opposition*' column. AS of Derwent Valley confirmed that this shows that a cover price was given to Davlyn. Also, Derwent Valley confirmed in its leniency application that it gave a cover price to Davlyn for this tender, and that Davlyn was a company with whom it exchanged cover prices more generally.
- IV.4609. Although DG of Davlyn did not recall taking a cover price in relation to this tender, he confirmed that Derwent Valley was a company with whom Davlyn had engaged in cover pricing, and stated that it was '*definitely feasible*' that Davlyn took a cover price from Derwent Valley in relation to this tender. The OFT considers in the light of the contemporaneous evidence from Derwent Valley and AS's admission and explanation of the contemporaneous evidence, that it supplied Davlyn with a cover price for this tender.
- IV.4610. The OFT notes that the tender submitted by Davlyn was higher than the tender submitted by Derwent Valley, the pattern consistent with a cover price having been provided.
- IV.4611. The OFT therefore concludes that contact took place between Derwent Valley and Davlyn. The OFT also concludes that Derwent Valley supplied a figure to Davlyn for a cover bid.
- IV.4612. The OFT is satisfied that the facts set out in paragraphs IV.4594 to IV.4611 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁵⁴⁹ In particular:
- (a) the provision of a figure for a cover bid from Derwent Valley to Davlyn was not unilateral⁶⁵⁵⁰, and contravenes the principle against direct or indirect contact between competitors;⁶⁵⁵¹
 - (b) Davlyn can be presumed to have taken account of the information received from Derwent Valley (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁵⁵² and
 - (c) Derwent Valley can be presumed to have taken account of the information it received from Davlyn (i.e. that Davlyn did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁵⁵³
- IV.4613. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Derwent Valley and Davlyn in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for fire damage re-building works, Stenson Fields, Derby, tender deadline 22 September 2003.

⁶⁵⁴⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁵⁵⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁵⁵¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁵⁵² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵⁵³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.4614. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4615. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 to Derwent Valley on 5 July 2005. Derwent Valley will not therefore receive 100 per cent immunity in respect of this tender. However, Derwent Valley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.4616. In respect of this tender, the OFT became aware of Davlyn's involvement in bid rigging activities by virtue of the information provided by Derwent Valley. Davlyn will not therefore receive 100 per cent immunity in respect of this tender. However, Davlyn will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 165: Residential Development, Stanningley Road, Leeds – 24 September 2003

Client: Grangecourt Developments Ltd
Parties: Irwins and Stainforth

IV.4617. On or around 20 August 2003, Grangecourt Developments Ltd sought tenders for a residential development, Stanningley Road, Leeds.⁶⁵⁵⁴ The following three companies were invited to tender: Stainforth⁶⁵⁵⁵, Irwins⁶⁵⁵⁶ and Mansell.⁶⁵⁵⁷ The deadline for receipt of tenders was on or before 24 September 2003.⁶⁵⁵⁸

IV.4618. Grangecourt Developments Ltd received the following tender returns:⁶⁵⁵⁹

Company	Date tender received	Amount of tender	Awarded contract
Stainforth	On or before 24 September 2003	£1,049,767.69	Yes ⁶⁵⁶⁰
Irwins	On or before 24 September 2003	£1,101,569.00	
Mansell	On or before 24 September 2003	£1,146,949.00	

⁶⁵⁵⁴ Information from client, OFT Document Reference 8178. It appears that the invitations to tender were sent out to Irwins, Stainforth and Mansell in the first instance on 20 August 2003. A second invitation to tender was later sent out to Topp & Holmes, Thistle and Caddick with a tender return date of 18 December 2003.

⁶⁵⁵⁵ Form of Tender, OFT Document Reference 13686, pages 2 and 3.

⁶⁵⁵⁶ Form of Tender, OFT Document Reference 13686, pages 7 and 8.

⁶⁵⁵⁷ Form of Tender, OFT Document Reference 13686, pages 9 and 10.

⁶⁵⁵⁸ Information from client, OFT Document Reference 8178. This shows the tender return date as 1 November 2003, however, a fax from Martin Collier to Grangecourt Developments Ltd shows that all three tenders were received by 24 September 2003, OFT Document Reference 13686, page 1.

⁶⁵⁵⁹ Information from client, OFT Document Reference 8178. Irwins' price has been entered incorrectly as £1,001,569.00, however Irwins' Form of Tender shows correct price submitted as £1,101,569.

⁶⁵⁶⁰ Letter to Stainforth, OFT Document Reference 13680.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register and Form of Tender

IV.4619. During the OFT's search of Irwins' premises a Tender Register was found.⁶⁵⁶¹
The tender register contained the following entries in respect of this tender:

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered
0803056 27 aug 713	Residential Developments Stanningley Road Leeds	Grangecourt Developments Ltd WPL Leeds Kilmart Plowman & Partners.	P&S C.	1101569

Date tender Due		Estimator	Competition
Weds 17 Sept 2003 ⁶⁵⁶²	PN.	AW.	Stainforth

Evidence from leniency applicant – Irwins

IV.4620. As part of its leniency application, Irwins' legal representatives provided a general explanation of its participation in cover pricing.⁶⁵⁶³ This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.4621. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for '*Covers Taken*' and '*Covers Given*', which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson ('IPN'), Estimating Director, into potential cover prices. At number 92 of the '*Covers Taken*' schedule is the following entry:⁶⁵⁶⁴

⁶⁵⁶¹ Tender Register, OFT Document Reference A0339, page 55.

⁶⁵⁶² The OFT notes the discrepancy between this date and the date of Stainforth's bid (22 September 2003) and considers that either Stainforth's bid may have been dated incorrectly or that the client may have given a week's extension for bids.

⁶⁵⁶³ Leniency application, OFT Document Reference A0714.

⁶⁵⁶⁴ Covers Taken, OFT Document Reference A0718, page 8.

	Year	Tender Ref	Description	Client	Date	Value	Cover From
92		0803056	Residential Development Stanningley Road Leeds	Grangecourt Developments	17.09.03	1101569	Stainforth

Individual Contact	Notes
Alan Wrightson Danny Wilson	

IV.4622. Irwins also provided to the OFT a schedule listing its competitors' contact details.⁶⁵⁶⁵ The name of Stainforth appears on the list and '*Alan Wrightson*' and '*Danny Wilson*' are named as the contacts, with a telephone number of [.....] [C].

IV.4623. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Irwins

IV.4624. During an interview with the OFT on 8 March 2007, conducted in connection with Irwins' leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.4625. Also during this interview, IPN was shown the '*Tender Register*'⁶⁵⁶⁶ and in particular the reference to the entry for a residential development at Stanningley Road, Leeds and was asked if he could recall anything about that contract. IPN replied '*I don't really, actually ... I can see why I wouldn't do it because at the time we weren't into residential developments, really, and I'm not quite sure why we had that enquiry*'.⁶⁵⁶⁷ IPN confirmed that the presence of the handwritten letter 'C' in the fourth column on the tender register shows that Irwins took a cover in relation to this contract.⁶⁵⁶⁸ IPN also confirmed that the handwritten entry '*Stainforth*' in the final column on the tender register shows that Irwins obtained a cover price from Stainforth.⁶⁵⁶⁹

Evidence from other companies – Stainforth

IV.4626. The OFT wrote to Stainforth on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Stainforth had participated in bid rigging on this tender. The OFT received an email from Gordons LLP who were representing Stainforth on 26 April 2007,

⁶⁵⁶⁵ Directory, OFT Document Reference A0715, page 6.

⁶⁵⁶⁶ Tender Register, OFT Document Reference A0339, page 55.

⁶⁵⁶⁷ Interview transcript, OFT Document Reference 11254, page 9.

⁶⁵⁶⁸ Interview transcript, OFT Document Reference 11254, page 9.

⁶⁵⁶⁹ Interview transcript, OFT Document Reference 11254, page 9.

stating that ‘... we formally confirm that our Client will not be accepting your offer in advance of the deadline of 26 April 2007’.⁶⁵⁷⁰

IV.4627. However, in its response to the Statement, Stainforth accepted ‘... it provided a cover price to Irwins [in respect of this Infringement]’.⁶⁵⁷¹

The OFT’s analysis of the evidence and finding

IV.4628. From the evidence presented above, the OFT draws the following conclusions.

IV.4629. Irwins and Stainforth each accepted an invitation to tender for the contract for a residential development at Stanningley Road, Leeds. Irwins was unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.4630. Stainforth appears to have completed the estimating process for the tender for this contract and came lowest in the tender process.

IV.4631. Irwins’ ‘*Tender Register*’ records ‘*Stainforth*’ handwritten in the final column. IPN confirmed that he received a cover price from Stainforth. In addition ‘*C*’ was handwritten in the type of work/ percentage difference column. IPN confirmed that ‘*C*’ handwritten in this column indicates that Irwins sought a cover price in relation to this contract. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN’s admission and explanation of the contemporaneous evidence, that Stainforth supplied Irwins with a cover price for this tender.

IV.4632. The OFT further notes that the tender submitted by Irwins was higher than the tender submitted by Stainforth, the pattern consistent with a cover price having been provided. Furthermore, the OFT notes that Stainforth was the only company to submit a tender bid below that of Irwins, and is therefore satisfied that Irwins could only have obtained a cover price from Stainforth in respect of this tender.

IV.4633. Both companies have now admitted their involvement in cover pricing in respect of this Infringement.

IV.4634. The OFT therefore concludes that contact took place between Irwins and Stainforth. The OFT also concludes that Stainforth supplied a figure to Irwins for a cover bid.

IV.4635. The OFT is satisfied that the facts set out in paragraphs IV.4619 to IV.4634 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁵⁷² In particular:

- (a) the provision of a figure for a cover bid from Stainforth to Irwins was not unilateral⁶⁵⁷³, and contravenes the principle against direct or indirect contact between competitors;⁶⁵⁷⁴

⁶⁵⁷⁰ Response from Stainforth, OFT Document Reference 10862.

⁶⁵⁷¹ Written representations of Stainforth, 27 June 2008, paragraph 2.36(b).

⁶⁵⁷² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁵⁷³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁵⁷⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Irwins can be presumed to have taken account of the information received from Stainforth (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁵⁷⁵ and
- (c) Stainforth can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁵⁷⁶

IV.4636. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and Stainforth, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a residential development, Stanningley Road, Leeds, tender deadline on or before 24 September 2003.

Immunity and leniency assessment

IV.4637. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4638. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Irwins in respect of this Infringement.

Infringement 166: Waterfront Business Park, Merry Hill – 1 October 2003
Client: Kingsyard Management Ltd
Parties: Thomas Vale and John Sisk

IV.4639. On 18 August 2003, Kingsyard Management Ltd sought tenders for the conversion of an industrial unit into offices at Unit 3, Waterfront Business Park, Merry Hill. The following five companies were invited to tender: Thomas Vale, Weavers⁶⁵⁷⁷, A & H Construction, Mowlem and John Sisk. The deadline for the receipt of tenders was 12:00 noon on 1 October 2003 (extended from 19 September 2003).⁶⁵⁷⁸

IV.4640. Kingsyard Management Ltd received the following tender returns:⁶⁵⁷⁹

⁶⁵⁷⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵⁷⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵⁷⁷ Information from client, OFT Document Reference 8073. An invitation to tender to Weavers was sent by the client on 1 September 2003.

⁶⁵⁷⁸ Information from client, OFT Document Reference 8073.

⁶⁵⁷⁹ Information from client, OFT Document Reference 8073.

Company	Date tender received	Amount of tender	Awarded contract
Thomas Vale	By 1 October 2003	£2,809,886	
Weavers	By 1 October 2003	£,2,769,394	
A & H Construction	By 1 October 2003	£2,841,000	
Mowlem	By 1 October 2003	£2,891,915	
John Sisk	By 1 October 2003	£2,742,805	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.4641. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁶⁵⁸⁰

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5460	B	Kingsyard Management Ltd	Alterations and Fit-out Works, Unit 3, Waterfront Business Park, Merry Hill		CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	19/09/2003 Noon	£2,809,886		A & H, Sisk, Mowlem, Weaver,	

IV.4642. The Tender Status spreadsheet was maintained at Thomas Vale’s head office by Christopher Keith Trickett (‘CKT’), Chief Estimator at Thomas Vale, who kept a *‘little black book’*⁶⁵⁸¹ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for John Sisk, plus names and a telephone number.⁶⁵⁸²

IV.4643. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided a tender list referring to this tender, for the week commencing 29 September 2003, which is shown below.⁶⁵⁸³

⁶⁵⁸⁰ Tender Status spreadsheet, OFT Document Reference 4522, page 37.

⁶⁵⁸¹ Interview transcript, OFT Document Reference 11418, page 21.

⁶⁵⁸² Contact list, OFT Document Reference 11086, page 22.

⁶⁵⁸³ Tender list, OFT Document Reference 4648, page 7.

TENDER LISTS			
W.C		29 Sep 03	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5460	B	Kingsyard Manage Ltd	Alteration and fit out works Unit 3 Waterfront Business Park, Merry Hill
APPROX £	EST	CAT	DUE
2,000,000		B	01/10/2003 noon

Evidence from leniency applicant Thomas Vale

IV.4644. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.4645. At Annex 14⁶⁵⁸⁴ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 19 of the schedule under Annex 14 and within the section for 2003 tenders is the following entry:⁶⁵⁸⁵

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5460	19 September	Kingsyard Management Ltd	Alterations and Fit-out Works, Unit 3, Waterfront Business Park, Merry Hill	Taken (Sisk)	Yes (Tender Spreadsheet; Tender List)

IV.4646. The Tender Spreadsheet in the last column is the Tender Status spreadsheet and the Tender List is the internal tender list referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717.

IV.4647. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application.⁶⁵⁸⁶ ‘Sisk’ appears on this list.

IV.4648. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

⁶⁵⁸⁴ Leniency application, OFT Document Reference 4568.

⁶⁵⁸⁵ Leniency application, OFT Document Reference 4568, page 19.

⁶⁵⁸⁶ Cover pricing activity: Key competitors, OFT Document Reference 4524.

Witness evidence from leniency applicant Thomas Vale

IV.4649. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.4650. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letter 'B', which appears in the column marked 'DIV', stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁶⁵⁸⁷ Thomas Vale categorised this as a Category B tender which indicated that it was a cover price. Although CKT did not recall this tender, he referred to the relevant entry in the Tender Status spreadsheet as follows: '*CKT my name was the estimator, category B indicating a cover, tender return 19th of September 2003, Thomas Vale tender £2,809,886, Sisk in bold indicating that Sisk gave us a cover figure*'.⁶⁵⁸⁸

Evidence from other companies – John Sisk

IV.4651. The OFT wrote to John Sisk on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that John Sisk had participated in bid rigging on this tender. In response, John Sisk wrote to the OFT on 25 April 2007⁶⁵⁸⁹ and admitted '*We engaged in bid rigging activities on this tender with Thomas Vale*'.⁶⁵⁹⁰

IV.4652. The OFT subsequently wrote to John Sisk's ultimate parent company at the time of this Infringement, Sicon, on 5 November 2007, asking it to comment on John Sisk's response to the OFT's Fast Track Offer, given that the OFT intended to hold Sicon jointly and severally liable for any infringements committed by John Sisk in respect of which the OFT ultimately decided to impose financial penalties. The OFT spoke to a representative of Sicon on 6 December 2007 who stated that Sicon '*does not intend to make any comments at this stage regarding the second fast track letter*'.⁶⁵⁹¹

IV.4653. In their response to the Statement, John Sisk and Sicon stated '[John] Sisk does not contest [...] [C]'.⁶⁵⁹²

The OFT's analysis of the evidence and finding

IV.4654. From the evidence presented above, the OFT draws the following conclusions.

IV.4655. Thomas Vale and John Sisk each accepted an invitation to tender for alterations to Unit 3, Waterfront Business Park, Merry Hill.

⁶⁵⁸⁷ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁶⁵⁸⁸ Interview transcript, OFT Document Reference 13855, page 38.

⁶⁵⁸⁹ Response from John Sisk, OFT Document Reference 10457.

⁶⁵⁹⁰ Response from John Sisk, OFT Document Reference 10458, page 3.

⁶⁵⁹¹ File note of telephone conversation, OFT Document Reference 14000.

⁶⁵⁹² Written representations of John Sisk and Sicon, 27 June 2008, paragraph 6.

- IV.4656. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.
- IV.4657. John Sisk completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by John Sisk being the lowest received and the fact that it won the contract.
- IV.4658. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records that four competitors, namely 'A & H, **Sisk**, *Mowlem* [and] *Weaver*', were also invited to tender for this contract. '**Sisk**' is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as a cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is £2,809,886 which matches the amount recorded by the client.
- IV.4659. Kingsyard Management Ltd also received a tendered amount of £2,742,805 from John Sisk, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from John Sisk to Thomas Vale.
- IV.4660. The OFT notes that although four competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one company is highlighted in bold, i.e. John Sisk. This indicates that a conscious decision was made to differentiate John Sisk from the other competitors. In addition, the fact that the tender had been allocated to the Building Division, for which CKT was the manager, means that it is likely that the entry in the Tender Status spreadsheet was accurate and that CKT had personal knowledge of the decision to receive a cover price from John Sisk at the time. It also indicates that CKT himself made contact with John Sisk.
- IV.4661. Thomas Vale admitted that John Sisk was one of the '*key competitors*' with whom it engaged in cover pricing activity. CKT had an entry for John Sisk in a contact book he used to telephone other contractors for the purpose of obtaining cover prices. In interview, CKT admitted that the entry in the Tender Status spreadsheet indicated a cover price had been sought and obtained by Thomas Vale from John Sisk.
- IV.4662. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that John Sisk admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides additional independent corroboration of the OFT's evidence in respect of this Infringement.
- IV.4663. The OFT therefore concludes that contact took place between Thomas Vale and John Sisk. The OFT also concludes that John Sisk supplied a figure to Thomas Vale for a cover bid.

IV.4664. The OFT is satisfied that the facts set out in paragraphs IV.4641 to IV.4663 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁵⁹³ In particular:

- (a) the provision of a figure for a cover bid from John Sisk to Thomas Vale was not unilateral⁶⁵⁹⁴, and contravenes the principle against direct or indirect contact between competitors;⁶⁵⁹⁵
- (b) Thomas Vale can be presumed to have taken account of the information received from John Sisk (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁵⁹⁶ and
- (c) John Sisk can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁵⁹⁷

IV.4665. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and John Sisk in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the alterations to Unit 3, Waterfront Business Park, Merry Hill, tender deadline 1 October 2003.

Immunity and leniency assessment

IV.4666. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4667. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 167: Not included in the Decision

Infringement 168: Ashgate Hospice, Old Brampton, Chesterfield – 21 October 2003
Client: Ashgate Hospice
Parties: Clegg and Herbert Baggaley

IV.4668. On 21 August 2003, Ashgate Hospice sought tenders for the construction of a new build extension to provide additional in-patient facilities, day centre and consulting rooms. The following seven companies were invited to tender: Clegg, Herbert Baggaley, Wildgoose, T & C Williams, Sol, Hallamshire

⁶⁵⁹³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁵⁹⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁵⁹⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁵⁹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁵⁹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Construction and G F Tomlinson.⁶⁵⁹⁸ The deadline for the receipt of tenders was 21 October 2003.

IV.4669. Ashgate Hospice received the following tender returns:⁶⁵⁹⁹

Company	Date company declined to submit tender	Time & Date tender received	Amount of tender	Awarded contract
Clegg	N/A	21 October 2003	£1,855,610.00	Yes
Herbert Baggaley	Not known	Not known	£1,987,814.23	
Wildgoose	24 August 2003	N/A	N/A	
T & C Williams	28 August 2003	N/A	N/A	
Sol	1 November 2003 ⁶⁶⁰⁰	N/A	N/A	
Hallamshire Construction	11 September 2003	N/A	N/A	
GF Tomlinson	28 August 2003	N/A	N/A	

IV.4670. The contemporaneous documentation received from Ashgate Hospice confirmed that both *'Cleggs and Baggaley visited the Hospice in October 2003'* and that there were (separate) *'presentations from three of the parties tendering. Baggaley Construction Limited, Clegg Construction Limited and Sol Construction on Wednesday 22 October 2003'*.⁶⁶⁰¹ Contemporaneous documentation also stated that Clegg's and Herbert Baggaley's *'two prices when compared have a number of similarities'*⁶⁶⁰² and that Clegg's winning tender was £11,291.50 in excess of the budget figure.⁶⁶⁰³ Clegg has noted in its response to the Statement that this difference was explained in the contemporaneous documentation by the *'buoyant market'* that existed at the time.⁶⁶⁰⁴

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Clegg – Tender documentation

IV.4671. As part of its leniency application, Clegg provided a contemporaneous faxed bundle of documents associated with this tender.⁶⁶⁰⁵ The documents comprise copies of estimator's handwritten notes, tender summary sheets with handwritten notes and suggested qualifications. The first page of handwritten notes has a post-it note attached to it with *'Ashgate Faxed to Baggaley'* written

⁶⁵⁹⁸ Information from client, OFT Document Reference 7081.

⁶⁵⁹⁹ Information from client, OFT Document Reference 7081.

⁶⁶⁰⁰ Although the contemporaneous documentation is not entirely clear regarding the date that Sol withdrew from the tender process, with some indications it may have been in October 2003, there is no dispute that it did so at some point prior to the client's consideration of the tender bids from Clegg and Herbert Baggaley, and there is no evidence that Sol engaged in any anticompetitive activity in relation to this tender.

⁶⁶⁰¹ Information from client, OFT Document Reference 7080, pages 2 and 3

⁶⁶⁰² Information from client, OFT Document Reference 7083, page 18.

⁶⁶⁰³ Information from client, OFT Document Reference 7083, page 23.

⁶⁶⁰⁴ Written representations of Clegg, 27 June 2008, paragraph 72.

⁶⁶⁰⁵ Tender documentation, OFT Document Reference 4483.

on it and each subsequent page has a diagonal line drawn across it with 'Baggaley' written along it. The first page of estimator notes has a breakdown of figures for the tender with a number of figures circled on the right hand side of the page. These figures are at 'Option 1', '1864150', 'Bus drop off prelims', '35600' and 'Add'l Prelims - ML', '47940'. The information is set out as below.⁶⁶⁰⁶

	T1574 Ashgate Tender Sum	1755 417		
	Option 1	(29 354)		BD = Margin
		<u>1 726 063</u>	✓	1864150
			150	
	Bus drop off prelims	24 354 <u>5000</u>		35600
		<u>29 354</u>	✓	
<u>1755 417</u>			5	
	Option 2 (add'l fit -out)	32 834		
		+ 5000k		margin
	Add'l Prelims - ML	37 834 ✓		
	Add'l Fees ?? etc	1000		
38 834		<u>38 834</u>	✓	47940
			9	
			164	
	Ashgate			
	Faxed to			
	Baggaley			

IV.4672. The final page of this bundle of documents is a fax transmission headed 'MESSAGE CONFIRMATION REPORT'. The following details are written onto that report:⁶⁶⁰⁷

⁶⁶⁰⁶ Tender documentation, OFT Document Reference 4483, page 1.

⁶⁶⁰⁷ Tender documentation, OFT Document Reference 4483, page 11.

MESSAGE CONFIRMATION REPORT

DATE: 30-OCT-2003 14:55

NAME:

TEL:

PHONE	: [.....] [C]
PAGES	: 9
START TIME	:30-10 14:51
ELAPSED TIME	:03'46"
MODE	: G3
RESULTS	: OK
MODEM SPEED	:14.4 KBPS

Evidence from leniency applicant Clegg

IV.4673. As part of its leniency application, Clegg provided a general explanation of its participation in cover pricing. This evidence is outlined in paragraphs IV.274 to IV.292 above and is relied upon by the OFT in relation to this tender.

IV.4674. In Schedule A of its leniency application, Clegg set out a summary of all tenders from March 2000 to July 2005 that were *'Definites – projects where cover pricing has taken place and evidence is available together with estimator's corroboration of evidence'*.⁶⁶⁰⁸ The information in the summary was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page two of the summary within Schedule A and within the section for 2003 tenders is the following entry extract:⁶⁶⁰⁹

Year	T No.	Description	Client	Date	Value
2003	T574	Extensions to Ashgate Hospice, Chesterfield, Derbyshire	Ashgate Hospice	21-10	1,947,690

Cover From	Cover To	Contact
-	Herbert Baggaley Construction Baums Lane Mansfield Nottinghamshire	Anton Newell

Evidence enclosed OFT/17 – estimators handwritten notes and suggested qualifications, completed tender summary, programme and fax transmission slip to Baggaley 30.01.03

IV.4675. In the above table *'OFT/17 – estimators handwritten notes...'* refers to the copy of faxed estimator notes discussed in paragraphs IV.4671 and IV.4672 above.

⁶⁶⁰⁸ Cover Price Activity, OFT Document Reference 4460, page 2.

⁶⁶⁰⁹ Schedule A – Definites, OFT Document Reference 4461, page 2.

IV.4676. Clegg also provided to the OFT as part of an Executive Summary a list of key competitors with whom Clegg exchanged information. The name '*Herbert Baggaley Limited*' appears on this list.⁶⁶¹⁰

IV.4677. In its response to the Statement, Clegg stated in respect of this Infringement that it '*...does not dispute the OFT's finding of infringement.*

Witness evidence from leniency applicant Clegg

IV.4678. During interviews conducted in connection with its leniency application, Clegg's employees provided general explanation of its participation in and recording of cover pricing. This evidence is outlined in paragraphs IV.274 to IV.292 above and is relied upon by the OFT in relation to this tender.

IV.4679. David Clarke ('DC'), Senior Estimator at Clegg, was interviewed in regard to this tender. DC recalled the tender and said '*It was one that we priced competitively; we were keen to win. I live, personally I live in Chesterfield, so I know of Ashgate Hospice. And it was design and build tender. We picked up that the tender list was ourselves, Baggaley, Sol and possibly another.*'⁶⁶¹¹ DC went on to say, '*We continued with that process of pricing it, and towards the end of the tender process, were approached by Baggaley for a cover price.*' DC stated that it was Anton Newell ('AN'), Chief Estimator at Herbert Baggaley, who approached him.⁶⁶¹²

IV.4680. Referring to the faxed estimator notes, DC confirmed that the figures on the documents were primarily written by him and that those circled belonged to Leslie Hunt ('LH') another estimator at Clegg. DC said of LH, '*me being busy completing the tender, due in at 12 o'clock, he was then...I believe he spoke to Anton...whilst I was completing my tender. Which is why the figures are put in, in Les's writing. For him to take that piece of paper and give the figures. But in the first instance Anton had spoken to myself, I believe.*' DC was asked what AN had asked for and replied '*Asked for a cover price...Purely, again, nice job, but couldn't fit it in. They've got the same work commitment problems.*'⁶⁶¹³ DC explained that the tender included pricing for the main works along with other works, and that figures for each of these had to be included on a submitted Form of Tender and subsequently a summary of tender.⁶⁶¹⁴

IV.4681. LH was also interviewed in regard to this tender. LH recalled the tender, saying, '*the reason I know about that is that at some point I was asked by David [DH] to check some information.*'⁶⁶¹⁵ LH identified this information as being what was written on the faxed estimator notes. LH identified the pieces of handwriting on the documents that were his and said '*these are essentially figures that David Clarke has put together but circled on the right hand side, they're my figures.*'⁶⁶¹⁶

IV.4682. LH went into detail of what these figures meant and explained their purpose saying, '*I think these are the figures that he [DC] wanted me to relate to*

⁶⁶¹⁰ Executive Summary, OFT Document reference 4458, page 2.

⁶⁶¹¹ Interview transcript, OFT Document Reference 13276, page 18.

⁶⁶¹² Interview transcript, OFT Document Reference 13276, page 19.

⁶⁶¹³ Interview transcript, OFT Document Reference 13276, page 19.

⁶⁶¹⁴ Interview transcript, OFT Document Reference 13276, page 20.

⁶⁶¹⁵ Interview transcript, OFT Document Reference 13277, page 38.

⁶⁶¹⁶ Interview transcript, OFT Document Reference 13277, pages 38 and 39.

Baggaleys. I think I may have even made the phone call on this occasion even though David...it was David's tender and he was involved in....it was a bit, this seems to indicate, it was a bit of a complex situation, various options and this, that and the other, so it wasn't just straightforward one figure and I think it was design and build and very often when you're given a cover for design and build, it's more complicated because very often you have to try and give more information other than just a single figure. Very often it is a single figure but sometimes they want a break down or something like that, option for doing this, what if we do that type of thing. So I think this falls in to that category, I'm pretty sure I may have been asked to make the call'.⁶⁶¹⁷ LH could not recall who actually sent the fax to Herbert Baggaley but when asked whom at Herbert Baggaley he would have contacted, LH replied 'It was probably Roger Hayes or Anton Newell'.⁶⁶¹⁸

IV.4683. Simon Blackburn ('SB'), Managing Director of Clegg, was also interviewed in regard to this tender. SB was asked if he recalled the tender and said '*I do. I think we gave Baggaleys a cover on that*'.⁶⁶¹⁹ SB was shown the figure of '1864150' on page one of the faxed estimator notes, along with a Herbert Baggaley tender report⁶⁶²⁰ which had an entry of '£1,864,150' next to this tender. SB believed that Clegg might have made a calculation mistake and given a figure of '1,947,690' for a cover price to Herbert Baggaley.⁶⁶²¹

IV.4684. SB spoke about the decision process in relation to this tender saying that '*We were presumably asked to give a cover, to Baggaleys by them. I'm not sure by whom, which we did, and we bid the scheme, we won the scheme, and we actually carried out the scheme*'. SB went on to explain the events in more detail. He said '*the amount of information we did give on that is far in excess of what we would normally give on a cover. Subsequent to us actually giving the cover and bidding it, I did find out why we had to give that information, because the client did interview Baggaleys for the scheme, and at the interview for the scheme, the client did tell me that he'd only received two prices, albeit they'd gone out to six tenderers. And on the day of the tender returns, they'd only got two prices come back in. That was with Baggaleys. So it was quite a shock to actually see, I think it was Chris Collison and their [Herbert Baggaley's] marketing guy sat in the reception outside when we left the interview. So yeah, the client told me in the interview they'd only had two tenders returned, and hence, obviously Baggaleys had asked for a fair amount of information because the client had pursued that, because they were intending to interview them and consider them for the project*'.⁶⁶²²

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley – Ashgate Hospice Tender, Tendering Schedule, Printed Tender Schedule and Estimating Exception Report

IV.4685. As part of its leniency application, Herbert Baggaley provided a copy of its submitted bid documents for this tender. Included in this is a two-page Form of

⁶⁶¹⁷ Interview transcript, OFT Document Reference 13277, page 39.

⁶⁶¹⁸ Interview transcript, OFT Document Reference 13277, page 39.

⁶⁶¹⁹ Interview transcript, OFT Document Reference 13278, page 14.

⁶⁶²⁰ Estimating – Exception Report, OFT Document Reference 1678.

⁶⁶²¹ Interview transcript, OFT Document Reference 13278, pages 14 and 15.

⁶⁶²² Interview transcript, OFT Document Reference 13278, page 15.

Tender submitting a bid of '£1864150.23'. The submission is signed 'A Newell', dated 21 October 2003 and has a handwritten note as follows:⁶⁶²³

Other Option Costs

Bus Drop Off -Extra £ 35,672.00

Fit Out -Extra £ 47,947.00

IV.4686. The cover sheet to these documents contains the handwritten note 'May have been Clegg' which was written subsequent to Herbert Baggaley making its leniency application.

IV.4687. During the OFT's visit to Herbert Baggaley's premises a tendering schedule was found which contains a handwritten entry in respect of this tender. The information in the relevant entry is as follows:⁶⁶²⁴

DATE	PROJECT DETAILS	CLIENT	PROFESSIONALS
22/8/03	NEW ENTRANCE FOR ASHGATE HOSPICE OLD BRAMPTON	ASHGATE HOSPICE OLD BRAMPTON CHESTERFIELD	DEREK ALLEN

APPROX VALUE	DUE	TENDER TYPE	EST	BID	REF	POSITION	%DIFF
£1.30M	21/10/03	D & B	/	/	03/110	CP	

IV.4688. A printout of an electronic tender schedule was also found during the OFT's visit to Herbert Baggaley's premises. This schedule contains numerous similar entries in respect of this tender. The entry for this tender which appears on the page marked 'UPDATED: 01 October 20[03]' contains information as follows:⁶⁶²⁵

DATE	PROJ NO	TENDER NO	JOB DESCRIPTION	CLIENT
21/08/2003	03/117P	T03/110	Extensions to Hospice, Chesterfield	Ashgate Hospice

BoQ/ D&B/ P&S	APPROX £000'S	B O N D	MW/ PS	A B C R	DUE	BID £000'S	RESULT	POSN %
D&B	1,300		MW		21/10/2003		C	

IV.4689. A printout of an 'ESTIMATING – EXCEPTION REPORT' was also found during the OFT's visit to Herbert Baggaley's premises. This report is headed 'BIDS SUBMITTED DURING OCTOBER 2003' and contains the following entry in respect of this tender:⁶⁶²⁶

⁶⁶²³ Form of Tender, OFT Document Reference 6406, pages 7 and 8.

⁶⁶²⁴ Tender schedule, OFT Document Reference 1621.

⁶⁶²⁵ Tender schedule, OFT Document Reference 1655, page 8.

⁶⁶²⁶ Estimating – Exception Report, OFT Document Reference 1678.

Tender No	Project	AB CR	Bid	Margin	
T03-110	Hospice, Chesterfield	C	£1,864,150	-	-

Evidence from leniency applicant Herbert Baggaley

IV.4690. As part of its leniency application, Herbert Baggaley provided a general explanation of its participation in cover pricing. This evidence is outlined in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.4691. In particular, Herbert Baggaley provided a list of tenders with commentary. On this list is an entry in respect of this tender which contains the following information:⁶⁶²⁷

DATE	PROJ NO	TENDER NO	JOB DESCRIPTION/ESTIMATORS COMMENTS	CLIENT
21/08/2003	03/117P	T03/110	Extensions to Hospice, Chesterfield MAY HAVE BEEN CLEGG	Ashgate Hospice

APPROX £000'S	A B C R	DUE	BID £000'S	RESULT
1,300	C	21/10/2003	1,864,150	Missed

IV.4692. In its response to the Statement, Herbert Baggaley stated in respect of this Infringement:

'i. The infringement only included two out of the seven companies invited to tender for the contract and although no other party did in fact bid, there is no evidence that Baggaleys (or Clegg) was aware of this and at least one party – Sol – was still involved in the tender process after Clegg's bid had been submitted – there is no information on when Baggaleys' bid was submitted.

ii. Baggaleys independently decided that it did not wish to win this tender and that the price it submitted would not be designed to win.

iii. Although the OFT refers to the fact that the winning bid was in excess of the budget price – in fact the winning bid was only £11,291.50 in excess of the budget price in relation to a tender price of £1,855,610.

iv. The agreement related to only a single tender rather than being part of any wider agreement affecting tenders generally'.⁶⁶²⁸

⁶⁶²⁷ List of Tenders, OFT Document Reference 3896, page 8.

⁶⁶²⁸ Written representations of Herbert Baggaley, 27 June 2008, paragraph 46(c).

IV.4693. The OFT notes that none of the points raised by Herbert Baggaley undermines the OFT's finding of an infringement. To the extent the points are relevant to assessing the seriousness of the Infringement, they are considered further in Section VI (Enforcement).

Witness evidence from leniency applicant Herbert Baggaley

IV.4694. During interviews conducted in connection with its leniency application, Herbert Baggaley's employees provided general explanation of its participation in and recording of cover pricing. This evidence is outlined in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.4695. AN was interviewed in regard to this tender. AN said that internal Herbert Baggaley documents did not indicate who else was involved, but said that *'it may have been Clegg's'*.⁶⁶²⁹ Referring to the Herbert Baggaley tendering schedule, described at paragraph IV.4687 above, AN said *'Yes, with 'CP' in the position, as a shortened version of cover price'*. Referring to the faxed estimator notes obtained from Clegg and described at paragraph IV.4671 above, AN said *'A summary of tender is information that we all try and get away with submitting, particularly if we've not priced the job. It looks like that would have... they would have probably sent whoever we took the cover from... Sorry, the client would have requested the contract sub analysis to be broken down, so we then would have had to ring who we took a cover from, to see whether they would furnish us with one that we could then submit, to back up our tender'*.⁶⁶³⁰

IV.4696. AN also looked at the fax message confirmation report attached to this bundle, and referring to the number '[.....] [C]' he said *'That is our fax number'*. Noting the date of '30-10' on the fax confirmation being beyond the tender submission date, AN said, *'Within a week afterwards they would have...the client, or the employer's agent would have asked us for a breakdown, we've gone back to whoever it was that we got that information from, and we then put it on to a copy of that and sent it off to them'*. AN, upon learning that the estimator notes and fax message confirmation were documents from Clegg, said *'It was Clegg, all right'*.⁶⁶³¹

The OFT's analysis of the evidence and finding

IV.4697. From the evidence presented above, the OFT draws the following conclusions.

IV.4698. Clegg and Herbert Baggaley each accepted an invitation to tender for this contract. Herbert Baggaley was unable to submit a tender by the return date and/or did not want to win this tender.

IV.4699. Clegg's contemporaneous fax of estimator notes, a document completed by hand by estimators, in this case noting the estimator for the tender as being DC, with handwritten entries also by estimator LH, shows figures that were calculated, by Clegg's admission, for the sole purpose of providing a cover price to a competitor. Each of the pages of this fax has a diagonal line drawn across it with *'Baggaley'* written along it.

⁶⁶²⁹ Interview transcript, OFT Document Reference 11317, page 32.

⁶⁶³⁰ Interview transcript, OFT Document Reference 11317, page 32.

⁶⁶³¹ Interview transcript, OFT Document Reference 11317, pages 32 and 33.

- IV.4700. The OFT notes that the circled figure of '1864150' on these faxed documents is almost identical to the bid for this tender recorded by Herbert Baggaley, of '£1,864,150.23'. Furthermore, the circled figures on the same fax for 'Bus drop off prelims' at '35600' and 'Add'l Prelims' at '47940' are almost identical to those figures handwritten on the Form of Tender submitted by Herbert Baggaley. The figures for each of these two items on that Form of Tender are '£35,672.00' and '£47,947.00'.
- IV.4701. The OFT notes that the figure of '1864150' on the faxed documents from Clegg also appears on a contemporaneous estimating exception report at Herbert Baggaley as the bid figure for this tender.
- IV.4702. The OFT also notes that the number on the fax message confirmation report in respect of the estimator notes was identified by AN, the estimator at Herbert Baggaley who dealt with this tender, as being a fax number for Herbert Baggaley.
- IV.4703. In addition, the OFT notes that the Estimating - Exception Report and the printed tender schedule, found at Herbert Baggaley, contain the letter 'C' next to the entries for this tender. The OFT notes from interviews with Herbert Baggaley's employees that notes such as these refer to cover prices having been exchanged when written next to references to tenders. The OFT further notes the entry 'CP' marked on the Herbert Baggaley tendering schedule in an entry for this tender was described by AN as being a shortened form of the words 'Cover Price'.
- IV.4704. The estimators at both Clegg and Herbert Baggaley described this tender as one where the bid needed to be presented then broken down into various options. AN of Herbert Baggaley explained that following receipt of the tenders, the client requested a breakdown of the figures. Since Herbert Baggaley had not calculated its own tender figure, it had to contact Clegg, from whom it had taken a cover price, in order to obtain a breakdown to back up its tender. Both parties admit to engaging in cover pricing in respect of this tender.
- IV.4705. The OFT therefore concludes that contact took place between Clegg and Herbert Baggaley. The OFT also concludes that Clegg supplied a figure to Herbert Baggaley for a cover bid, along with tender breakdown figures that were faxed from Clegg to Herbert Baggaley. The OFT notes that the client only received two tenders for this work at a hospice, and that both tenders were the subject of bid rigging. The OFT further notes that the client's agent had noticed similarities in the tender breakdown figures and that the winning tender from Clegg was in excess of the client's budget figure.
- IV.4706. The OFT is satisfied that the facts set out in paragraphs IV.4671 to IV.4705 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁶³² In particular:
- (a) the provision of a figure for a cover bid from Clegg to Herbert Baggaley was not unilateral⁶⁶³³, and contravenes the principle against direct or indirect contact between competitors,⁶⁶³⁴

⁶⁶³² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁶³³ See paragraph IV.73 of the General comments on cover pricing section.

- (b) Herbert Baggaley can be presumed to have taken account of the information received from Clegg (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁶³⁵ and
- (c) Clegg can be presumed to have taken account of the information it received from Herbert Baggaley (i.e. that Herbert Baggaley did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁶³⁶

IV.4707. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Clegg and Herbert Baggaley in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Ashgate Hospice, Old Brampton, Chesterfield, date of tender 21 October 2003.

Immunity and leniency assessment

IV.4708. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender

IV.4709. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 14 June 2005. Herbert Baggaley will not therefore receive 100 per cent immunity in respect of this tender. However, Herbert Baggaley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.4710. In respect of this tender, the OFT became aware of Clegg's involvement in bid rigging activities by virtue of the information provided by Herbert Baggaley. Clegg will not therefore receive 100 per cent immunity in respect of this tender. However, Clegg will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 169: Assessment Centre HMYOI Glen Parva Leicester – 28 October 2003

Client: Custodial Property Unit, Home Office

Parties: G Carter and Herbert Baggaley

IV.4711. On 24 September 2003, the Custodial Property Unit of the Home Office sought tenders for refurbishment and alterations to the South Area Block at HMYOI Glen Parva, 10 Tigers Road, Wigston, Leicester, LE18 4TN.⁶⁶³⁷ The deadline for the receipt of tenders was 10:00 am on 28 October 2003, and five companies were invited to tender: F Stimpson Ltd, G Carter, Herbert Baggaley, Sandycroft Ltd, and J H Hallam.⁶⁶³⁸

⁶⁶³⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁶³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁶³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁶³⁷ Information from client, OFT Document Reference 8402.

⁶⁶³⁸ Information from client, OFT Document Reference 8402.

IV.4712. The Home Office received the following tender returns:⁶⁶³⁹

Company	Date and time tender received	Amount of tender	Awarded contract
F Stimpson Ltd	28 October 2003 10:00 am	£227,231.45	Yes
G Carter	28 October 2003 10:00 am	£272,843.00	
Herbert Baggaley	28 October 2003 10:00 am	£254,933.55	
Sandycroft Ltd	28 October 2003 10:00 am	£272,243.00	
J H Hallam	24 September 2003	Declined to tender	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley – Pre-Tender Quality Plan

IV.4713. Herbert Baggaley's 'Pre-tender Quality Plan' relating to 'HMYOI Glen Parva Assessment Centre' provided to the OFT as part of its leniency application, has under the section headed 'Known Competitors', the following entries, all of which are handwritten:⁶⁶⁴⁰

*'Hallam
- Stimpsons
- Sandycroft
Carter – CR – [...] [C] – Ray Lockett - £ 272,843.00.'*

Evidence from leniency applicant Herbert Baggaley

IV.4714. As part of its leniency application, Herbert Baggaley's legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.4715. Following the issue of the Statement, Herbert Baggaley did not submit any specific written or oral representations in respect of this Infringement.

Witness evidence from leniency applicant Herbert Baggaley

IV.4716. During interviews conducted in connection with its leniency application, Herbert Baggaley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.4717. During interview Anton Newell ('AN'), Chief Estimator at Herbert Baggaley, was specifically asked about this tender and reference was made to the pre-tender quality plan⁶⁶⁴¹, discussed in paragraph IV.4713 above. AN said, '*Which suggests quite strongly that we gave a cover to Carter's, Ray Lockett, a figure of about £18,000 above ours. We priced the job to try and win, but I believe we were unsuccessful*' and '*the competition of Hallam, Stimpson's, and*

⁶⁶³⁹ Information from client, OFT Document Reference 8402.

⁶⁶⁴⁰ Pre-tender Quality Plan, OFT Document Reference 3905, page 33.

⁶⁶⁴¹ Pre-tender Quality Plan, OFT Document Reference 3905, page 33.

Sandycroft, and Carter's from Derby another company that we would regularly have been giving and receiving covers from'.⁶⁶⁴²

Evidence from other companies – G Carter

IV.4718. The OFT wrote to G Carter on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that G Carter had participated in bid rigging on this tender. G Carter did not respond to the OFT's offer by the date for acceptance of 26 April 2007.

IV.4719. G Carter confirmed on 19 April 2007 that Ray Lockett had worked as an estimator for G Carter but that he was no longer employed by them.⁶⁶⁴³

IV.4720. However, the OFT did not receive a response to its offer by the date for acceptance of 26 April 2007.⁶⁶⁴⁴ The OFT informed G Carter's legal representatives, Berryman Shacklock LLP, on 18 May 2007, that as a reply had not been received by the deadline the OFT would treat this as a rejection of the OFT's Fast Track Offer. Berryman Shacklock LLP confirmed that it understood the situation.⁶⁶⁴⁵

IV.4721. The OFT subsequently received a letter dated 2 August 2007 from Berryman Shacklock LLP, which said *'Our client is well aware that the practice of "giving and taking covers/help" has been endemic in the construction industry for many years. It accepts that it is possible, if not likely that against that background, it has engaged in that activity itself.*

IV.4722. *However, having made detailed enquires as to the contracts to which you refer in the annex of your penalty offer letter, it cannot find evidence that it engaged in such activity on those specific matters and it is against that background that it did not apply for the reduction of penalty'.⁶⁶⁴⁶*

IV.4723. Following the issue of the Statement, G Carter did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.4724. From the evidence presented above, the OFT draws the following conclusions.

IV.4725. G Carter and Herbert Baggaley each accepted an invitation to tender for the contract to carry out refurbishment and alterations to the South Area Block at HMYOI Glen Parva, Leicester.

IV.4726. AN has confirmed that Herbert Baggaley submitted a bid in the hope of winning this tender.

IV.4727. G Carter was unable to submit a tender by the return date and/or did not want to win this tender.

⁶⁶⁴² Interview transcript, OFT Document Reference 11317, page 33.

⁶⁶⁴³ File note of telephone conversation, OFT Document Reference 10294.

⁶⁶⁴⁴ File note of telephone conversation, OFT Document Reference 10297.

⁶⁶⁴⁵ File note of telephone conversation, OFT Document Reference 10297.

⁶⁶⁴⁶ Response from G Carter, OFT Document Reference 13017.

- IV.4728. In regard to G Carter, Herbert Baggaley's *'Pre-tender Quality Plan'* contains the following entry *'Carter – CR – [.....] [C] – Ray Lockett - £ 272,843.00'*. The figure recorded matches that submitted by G Carter for this tender and Herbert Baggaley has confirmed that a cover price was given to G Carter.⁶⁶⁴⁷
- IV.4729. The telephone number is shown as a contact number for G Carter in the *'Contact for Cover Prices'*,⁶⁶⁴⁸ provided in W R Bloodworth's leniency application. Ray Lockett is referred to by P Waller as a contact at G Carter⁶⁶⁴⁹ and G Carter has confirmed that Ray Lockett worked as an estimator at that company.
- IV.4730. Herbert Baggaley subsequently confirmed its admission to engaging in bid rigging activities on this tender, in a letter dated 26 January 2009.⁶⁶⁵⁰
- IV.4731. The OFT notes that G Carter submitted a price of £272,843.00, a figure above that of Herbert Baggaley, the pattern consistent with a cover having been taken from Herbert Baggaley. The OFT also notes that Herbert Baggaley confirmed that *'Carter's from Derby [was] another company that we would regularly have been giving and receiving covers from'*.⁶⁶⁵¹
- IV.4732. The OFT further notes that although G Carter has not admitted to bid rigging specifically in relation to this tender, it has accepted that it is *'probable, if not likely'* that it has engaged in cover pricing activities more generally.
- IV.4733. The OFT considers that the contemporaneous evidence from Herbert Baggaley, and AN's admissions and explanations of that contemporaneous evidence, are sufficient for it to be satisfied that G Carter accepted a cover price from Herbert Baggaley.
- IV.4734. The OFT therefore concludes that contact took place between Herbert Baggaley and G Carter and that Herbert Baggaley supplied G Carter with a figure for a cover bid.
- IV.4735. The OFT is satisfied that the facts set out in paragraph IV.4713 to IV.4734 above amount in law to an agreement and/or concerted practice contrary to the Chapter 1 prohibition.⁶⁶⁵² In particular:
- (a) the provision of a figure for a cover bid from Herbert Baggaley to G Carter was not unilateral⁶⁶⁵³, and contravenes the principle against direct or indirect contact between competitors;⁶⁶⁵⁴
 - (b) G Carter can be presumed to have taken account of the information received from Herbert Baggaley (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁶⁵⁵ and

⁶⁶⁴⁷ Interview transcript, OFT Document Reference 11317, page 33.

⁶⁶⁴⁸ Contacts For Cover Prices, OFT Document Reference 3915, page 1.

⁶⁶⁴⁹ Interview transcript, OFT Document Reference 13285, page 9.

⁶⁶⁵⁰ Letter from Herbert Baggaley, 26 January 2009.

⁶⁶⁵¹ Interview transcript, OFT Document Reference 11317, page 33.

⁶⁶⁵² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁶⁵³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁶⁵⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁶⁵⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Herbert Baggaley can be presumed to have taken account of the information it received from G Carter (i.e. that G Carter did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁶⁵⁶

IV.4736. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Herbert Baggaley and G Carter in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the refurbishment and alterations to the South Area Block at HMYOI Glen Parva, Leicester, tender deadline 28 October 2003.

Immunity and leniency assessment

IV.4737. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4738. Herbert Baggaley informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Herbert Baggaley will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 170: Not included in the Decision

Infringement 171: Alterations to Ward C31 and C32 to Form a Women's Centre, Queens Medical Centre, Nottingham – 12 November 2003
Client: Queen's Medical Centre University Hospital NHS Trust
Parties: Bodill, John Cawley and Wiggett

IV.4739. On 27 October 2003, Queen's Medical Centre University Hospital NHS Trust ('QMC'), now known as Nottingham University Hospitals NHS Trust, sought tenders for alterations to Ward C31 and C32 to form a women's centre. The return date for the tender was 12 November 2003 and six companies were invited to tender: G F Tomlinson, Bodill, John Cawley, Wiggett, Baggaley & Jenkins and Thomas Fish.⁶⁶⁵⁷

IV.4740. QMC received the following tender returns:⁶⁶⁵⁸

⁶⁶⁵⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁶⁵⁷ Information from client, OFT Document Reference 9431, page 2.

⁶⁶⁵⁸ Information from client, OFT Document Reference 9431, page 2.

Company	Date and time tender received	Amount of tender	Awarded the tender
G F Tomlinson	11:00 a.m. 12 November 2003	£74,880	Yes
Bodill	11:00 a.m. 12 November 2003	£110,884	
John Cawley	11:00 a.m. 12 November 2003	£125,971	
Wiggett	11:00 a.m. 12 November 2003	£122,630	
Baggaley & Jenkins	10:30 a.m. 12 November 2003	£83,997	
Thomas Fish	No formal notification, not returned		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.4741. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill.⁶⁶⁵⁹

1. *Bodill*

2. *TOMLINSON*

3. *FISH*

4. *B & J*

£125971.00p ② 5. *CAWLEY © FROM US
WILL RING US WED AM*

£122638.00p ① 6. *WIGGETT © FROM US
RING PAUL Tel:- [...] [C]'*

IV.4742. The tender sheet states that Bodill's submitted figure was £110,084.⁶⁶⁶⁰

IV.4743. Andrew Bodill ('AB'), an estimator at Bodill, priced this tender and has confirmed that the handwritten annotations '*£125971.00p*' and '*£122638.00p*' under the section headed '*Tenderers*' were made by him.⁶⁶⁶¹ AB also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.4744. During an inspection of AB's personal copies of the tender sheets on 26 April 2007, another copy of this tender sheet was found with the additional handwritten annotations '*Lowest £75K*' and '*2nd £95K*' under the section headed '*Tenderers*'.⁶⁶⁶²

IV.4745. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has confirmed that the handwritten annotations '*② © FROM US WILL RING US WED AM*' and '*① © FROM US RING PAUL Tel:- [...] [C]'* under the section

⁶⁶⁵⁹ Tender sheet, OFT Document Reference 0708.

⁶⁶⁶⁰ Tender sheet, OFT Document Reference 0708.

⁶⁶⁶¹ Contracts document, OFT Document Reference 6426, pages 41 and 77.

⁶⁶⁶² Contracts document, OFT Document Reference 6426, pages 41 and 85.

headed 'Tenderers' were made by him.⁶⁶⁶³ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.4746. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.4747. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁶⁶⁶⁴ In respect of this tender, Bodill confirmed that it gave two cover prices, to John Cawley and Wiggett.⁶⁶⁶⁵

IV.4748. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.4749. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.4750. In respect of the additional handwritten annotations 'Lowest £75K' and '2nd £95K' on his own personal copy of the tender sheet, AB confirmed in interview with the OFT on 26 April 2007, 'Yeah, I've put lowest approximate... well, I might not have put approximately but I've rounded it up to £75K next to tenderer number two, which was Tomlinson and I've put second £95K next to tenderer number three, which was Fish. And that, again, would be information which we would have received after the tender had gone in, direct from the Queens Medical Centre when we've rang up chasing where that figure was'.⁶⁶⁶⁶

Contemporaneous documentary evidence from leniency applicant John Cawley – Project list

IV.4751. On a project list, provided by John Cawley to the OFT as part of its leniency application, is typewritten.⁶⁶⁶⁷

200	14.11.03	NG	Q.M.C		Returned		
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Evidence from leniency applicant John Cawley

IV.4752. As part of its leniency application, John Cawley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.441 to IV.452 above and is relied upon by the OFT in relation to this tender.

⁶⁶⁶³ Contracts document, OFT Document Reference 6426, pages 1 and 35.

⁶⁶⁶⁴ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁶⁶⁶⁵ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 6.

⁶⁶⁶⁶ Interview transcript, OFT Document Reference 11153, page 13.

⁶⁶⁶⁷ Project list, OFT Document Reference 6077, page 6.

IV.4753. Following the issue of the Statement, John Cawley did not submit any written or oral representations.

Witness evidence from leniency applicant John Cawley

IV.4754. During interviews conducted in connection with its leniency application, John Cawley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.441 to IV.452 above and is relied upon by the OFT in relation to this tender.

IV.4755. In respect of this tender Nicholas Greene ('NG'), Director of John Cawley, could not recall anything specifically, but on being asked by the OFT if it would be unusual for a tender to be returned, he said, *'Would have been, yes...because that's the whole idea of covers is literally so you didn't lose face with a client, nothing more, nothing less'*.⁶⁶⁶⁸

IV.4756. On being shown by the OFT the Bodill tender sheet for this tender, NG said in respect of the entry *'£125971.00p @ CAWLEY © FROM US WILL RING US WED AM'*, that *'It may be that that's the figure they were going to give us and we never phoned them or we phoned them but it was too late or, I don't know'*.⁶⁶⁶⁹

IV.4757. Richard Greene ('RG'), Co-Director of John Cawley, on being shown by the OFT the Bodill tender sheet for this tender, said in respect of the entry *'£125971.00p @ CAWLEY © FROM US WILL RING US WED AM'*, *'we obviously did get some help...maybe I couldn't find anybody until the last minute...Find anybody to give me any help to give me a cover. So, I might have decided to return it and then at the last minute found out somebody else was in'*.⁶⁶⁷⁰ RG added that, *'...in those days, its far preferable to put something in than send it back, because they [the client] didn't like it if you sent them back'*.⁶⁶⁷¹

Evidence from other companies – Wiggett

IV.4758. The OFT wrote to Wiggett on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wiggett had participated in bid rigging on this tender. Wiggett did not respond to the letter. On 15 May 2007 the OFT contacted Wiggett by telephone and it said that after consideration it was rejecting the OFT's Fast Track Offer.⁶⁶⁷²

IV.4759. In its response to the Statement, Wiggett stated in respect of this Infringement that it *'...must accept that in light of the evidence ... [outlined in the Statement] that a cover price must have been taken from Bodill'*.⁶⁶⁷³ They

⁶⁶⁶⁸ Interview transcript, OFT Document Reference 11305, page 15.

⁶⁶⁶⁹ Interview transcript, OFT Document Reference 11305, page 15.

⁶⁶⁷⁰ Interview transcript, OFT Document Reference 11304, page 16.

⁶⁶⁷¹ Interview transcript, OFT Document Reference 11304, page 16.

⁶⁶⁷² File note of telephone conversation, OFT Document Reference 10895.

⁶⁶⁷³ Written representations of Wiggett, 25 June 2008, paragraph 3.8.

further stated, '[Paul]⁶⁶⁷⁴ *Wiggett believes that he lacked the resources to prepare a tender for this work*'.⁶⁶⁷⁵

The OFT's analysis of the evidence and finding

IV.4760. From the evidence presented above, the OFT draws the following conclusions.

IV.4761. Bodill, John Cawley and Wiggett each accepted an invitation to tender for this contract.

IV.4762. Bodill completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.4763. John Cawley and Wiggett were unable to submit a tender by the return date and/or did not want to win this tender.

IV.4764. In regard to John Cawley, Bodill's tender sheet records '*£125971.00p* ② *CAWLEY* © *FROM US WILL RING US WED AM*' against John Cawley. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number '2' recorded against John Cawley to show that John Cawley was the second company to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that John Cawley submitted a higher tender figure than the first company to be given a cover price, Wiggett. Furthermore, Bodill recorded on the tender sheet the figure £125,971 against John Cawley, a figure that was identical to the tender that John Cawley submitted for the work.

IV.4765. Bodill's tender sheet records '*CAWLEY* © *FROM US WILL RING US WED AM*' and the OFT notes more specifically that this shows that John Cawley was to phone Bodill on the morning of the day for submitting the tender, in order to receive a cover price, providing further evidence that contact was made between the two parties. Furthermore, on being shown Bodill's tender sheet, both NG and RG of John Cawley accepted that it was likely that John Cawley was provided with a cover price by Bodill.

IV.4766. In regard to Wiggett, Bodill's tender sheet records '*£122638.00p* ① *WIGGETT* © *FROM US RING PAUL Tel:- [...] [C]*' against Wiggett. Bodill has confirmed that this shows that it gave the company in question a cover price. The tender sheet also has the number '1' recorded against Wiggett to show that Wiggett was the first party to be given cover by or to request cover from Bodill. Bodill has confirmed that these numbers show the order in which Bodill was approached by other companies for a cover price and that the first to approach would get the lowest price and so on. The OFT notes that Wiggett submitted a lower tender figure than the second company to be given a cover price, John Cawley. Furthermore, Bodill recorded on the tender sheet the figure £122,638 against Wiggett, a figure that was identical to the tender that Wiggett submitted for the work.

⁶⁶⁷⁴ As clarified by Wiggett in email dated 29 May 2009.

⁶⁶⁷⁵ Written representations of Wiggett, 25 June 2008, paragraph 3.10.

IV.4767. Bodill's tender sheet also recorded the name of a Wiggett employee, 'Paul' and the telephone number [...] [C], providing further evidence that contact was made between the two parties. This is corroborated by information obtained from W R Bloodworth, a list of contacts for cover prices, which names 'Paul Wiggett' at Wiggett with a telephone contact number of [...] [C].⁶⁶⁷⁶

IV.4768. The OFT notes in addition that the tenders submitted by John Cawley and Wiggett were both higher than the tender submitted by Bodill, a pattern consistent with cover prices having been provided by Bodill.

IV.4769. All three Parties have now admitted liability in respect of this Infringement.

IV.4770. The OFT therefore concludes that contact took place between John Cawley and Bodill, and between Wiggett and Bodill. The OFT also concludes that Bodill supplied figures to each of John Cawley and Wiggett for cover bids.

IV.4771. The OFT is satisfied that the facts set out in paragraphs IV.4741 to IV.4770 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁶⁷⁷ In particular:

- (a) the provision of figures for cover bids from Bodill to each of John Cawley and Wiggett was not unilateral⁶⁶⁷⁸, and contravenes the principle against direct or indirect contact between competitors;⁶⁶⁷⁹
- (b) John Cawley and Wiggett can each be presumed to have taken account of the information received from Bodill (i.e. the respective cover prices) when determining their own respective conduct in the tendering process,⁶⁶⁸⁰ and
- (c) Bodill can be presumed to have taken account of the information it received from John Cawley and Wiggett (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁶⁶⁸¹

IV.4772. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between John Cawley and Bodill, and between Wiggett and Bodill, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for alterations to Ward C31 and C32 to form a Women's Centre, Queens Medical Centre, Nottingham, tender deadline 12 November 2003.

Immunity and leniency assessment

IV.4773. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁶⁶⁷⁶ Contacts For Cover Prices, OFT Document Reference 3915.

⁶⁶⁷⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁶⁷⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁶⁷⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁶⁸⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁶⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.4774. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.4775. In respect of this tender, the OFT became aware of John Cawley's involvement in bid rigging activities by virtue of the information provided by Bodill. John Cawley will not therefore receive 100 per cent immunity in respect of this tender. However, John Cawley will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 172: Alterations to Building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull – 5 December 2003
Client: Gowers Bell Ltd
Parties: Hobson & Porter and Hall

IV.4776. On 21 November 2003, Gowers Bell Ltd sought tenders for alterations to building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull. The return date for the tender was 12:00 noon on 5 December 2003 and four companies were invited to tender: Hobson & Porter, Geo Houlton, Hall and Robinson & Sawdon.⁶⁶⁸²

IV.4777. Gowers Bell Ltd received the following four tender returns by 12:00 noon on 5 December 2003:⁶⁶⁸³

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Hobson & Porter	5 December 2003	Prior to Noon	£46,490.81	
Geo Houlton	5 December 2003	Prior to Noon	£46,595.00	
Hall	5 December 2003	Prior to Noon	£49,880.00	
Robinson & Sawdon	5 December 2003	Prior to Noon	£51,786.00	

IV.4778. The tender exercise did not proceed. Gowers Bell Ltd then made further enquiries of the two lowest tenderers, Hobson & Porter and Geo Houlton, with an alternative specification. Following revised tenders received from Hobson & Porter and Geo Houlton, the job was awarded to Geo Houlton.⁶⁶⁸⁴

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender Summary Sheet

IV.4779. The Minor Works Tender Summary sheet for this tender states that Hobson & Porter's submitted figure was £46,490.81 and in the known competition section is written, '*Halls @ £49,883.00*'.⁶⁶⁸⁵

⁶⁶⁸² Information from client, OFT Document Reference 8173.

⁶⁶⁸³ Information from client, OFT Document Reference 8173.

⁶⁶⁸⁴ Information from client, OFT Document Reference 8172.

⁶⁶⁸⁵ Minor Works Tender Summary, OFT Document Reference A0094.

Evidence from leniency applicant Hobson & Porter

IV.4780. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.4781. In Hobson & Porter's Summary of Cover Pricing Activity (Minor Works) it is stated that Hobson & Porter provided a cover to Hall.⁶⁶⁸⁶

IV.4782. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁶⁶⁸⁷

Witness evidence from leniency applicant Hobson & Porter

IV.4783. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.4784. In respect of this tender, in interview Ian Gibbins ('IG'), Minor Works Director at Hobson & Porter, confirmed that this tender was priced by Andrew Scott ('AS'), an ex-employee of Hobson & Porter, who left in 2005. IG confirmed that the signature at the foot of the Minor Works Tender Summary sheet was AS's handwriting. IG confirmed that, '*almost definitely we would have given a cover price of about £3,000 more than ours*'.⁶⁶⁸⁸ IG confirmed that he managed AS and that AS was involved in cover pricing, '*I would have been aware at the time he would have given a cover to Hall's yes*'.⁶⁶⁸⁹

Evidence from other companies – Hall

IV.4785. The OFT wrote to Hall on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Hall had participated in bid rigging on this tender. In response to this letter, Hall admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved*'.⁶⁶⁹⁰

IV.4786. In its response to the Statement, Hall confirmed that '*[i]t is not disputed that Hall participated in cover pricing during the relevant period set out in the Statement*'.⁶⁶⁹¹

The OFT's analysis of the evidence and finding

IV.4787. From the evidence presented above, the OFT draws the following conclusions.

⁶⁶⁸⁶ Summary of Cover Pricing, OFT Document Reference A1349, page 1.

⁶⁶⁸⁷ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁶⁶⁸⁸ Interview transcript, OFT Document Reference 11231, page 11.

⁶⁶⁸⁹ Interview transcript, OFT Document Reference 11231, pages 11 and 12.

⁶⁶⁹⁰ Response from Hall, OFT Document Reference 10373, page 6.

⁶⁶⁹¹ Written representations of Hall, 24 June 2008, paragraph 53.

- IV.4788. Hobson & Porter and Hall each accepted an invitation to tender for this contract.
- IV.4789. Hobson & Porter completed the estimating process for the tender for this contract. Hobson & Porter wanted to win the tender for this contract and submitted a bid with the hope of winning the work.
- IV.4790. Hall was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.4791. In regard to Hall, Hobson & Porter's Minor Works Tender Summary sheet records '*Halls @ £49,883.00*'. Hobson & Porter has confirmed that this shows that it gave the company in question a cover price. The OFT notes that the figure Hobson & Porter recorded on the tender sheet, £49,883.00, is identical other than the reduction of £3, to the tender price that Hall submitted, which was £49,880.00.
- IV.4792. The OFT notes in addition that the tender submitted by Hall was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, both Hobson & Porter and Hall have admitted engaging in bid rigging on this tender.
- IV.4793. The OFT therefore concludes that contact took place between Hall and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied a figure to Hall for a cover bid.
- IV.4794. The OFT is satisfied that the facts set out in paragraphs IV.4779 to IV.4793 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁶⁹² In particular:
- (a) the provision of a figure for a cover bid from Hobson & Porter to Hall was not unilateral⁶⁶⁹³, and contravenes the principle against direct or indirect contact between competitors;⁶⁶⁹⁴
 - (b) Hall can be presumed to have taken account of the information received from Hobson & Porter (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁶⁹⁵ and
 - (c) Hobson & Porter can be presumed to have taken account of the information it received from Hall (i.e. that Hall did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁶⁹⁶
- IV.4795. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Hall and Hobson & Porter, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations to building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull, tender deadline 5 December 2003.

⁶⁶⁹² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁶⁹³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁶⁹⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁶⁹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁶⁹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.4796. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4797. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Hobson & Porter in respect of this Infringement.

Infringement 173: 18-bed Ward Extension, Beynon Centre, New Cross Hospital – 11 December 2003

Client: Royal Wolverhampton Hospital NHS Trust

Parties: Thomas Vale and Shaylor

IV.4798. On 4 November 2003, The Royal Wolverhampton Hospital NHS Trust ('Royal Wolverhampton Hospital') sought tenders for an 18-bed ward extension at the Beynon Centre, New Cross Hospital. The following six companies were invited to tender: W Gough & Sons Ltd, Shaylor, Arthur M Griffiths, Thomas Vale, Weaver plc and G F Tomlinson.⁶⁶⁹⁷ The deadline for the receipt of tenders was 10:00 on 11 December 2003.

IV.4799. Royal Wolverhampton Hospital received the following tender returns:⁶⁶⁹⁸

Company	Time & Date tender received	Amount of tender	Awarded contract
W Gough & Sons Ltd	11 December 2003 at 10:00am	£688,298.00	
Shaylor	11 December 2003 at 10:00am	£603,036.40	Yes
Arthur M Griffiths	11 December 2003 at 10:00am	£671,273.00	
Thomas Vale	11 December 2003 at 10:00am	£654,983.00	
Weaver plc	11 December 2003 at 10:00am	£646,888.00	
G F Tomlinson	11 December 2003 at 10:00am	£631,510.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet

IV.4800. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁶⁶⁹⁹

⁶⁶⁹⁷ Information from client, OFT Document Reference 10676.

⁶⁶⁹⁸ Information from client, OFT Document Reference 10676.

⁶⁶⁹⁹ Tender Status spreadsheet, OFT Document Reference 4522, page 38.

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5506	B	Royal Wolverhampton Hospital NHS Trust	18 Bed Ward Extension, Beynon Centre, New Cross Hosp		CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	11/12/2003 10.00am	£654,983		Weaver, Shaylor, Tomlinson, Wm Gough, A M Griffiths	

IV.4801. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁶⁷⁰⁰ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Shaylor plus names and a telephone number.⁶⁷⁰¹

IV.4802. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided three tender lists referring to this tender, for weeks commencing 10 November 2003, 24 November 2003 and 1 December 2003. They are identical except the entry for 10 November 2003 has no entry in the Category column whereas the letter 'B' appears in this column for the entries dated 24 November 2003 and 1 December 2003. The tender list for week commencing 1 December 2003 is shown below:⁶⁷⁰²

TENDER LISTS			
W.C		01 Dec 03	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5506	B	Royal Wolverhampton Hospital NHS Trust	18 bedroom ward extension, Beynon Centre, New Cross Hospital, Wolverhampton

APPROX £	EST	CAT	DUE
600,000		B	11/12/2003 10.00am

Evidence from leniency applicant Thomas Vale

IV.4803. At Annex 14⁶⁷⁰³ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had

⁶⁷⁰⁰ Interview transcript, OFT Document Reference 11418, page 21.

⁶⁷⁰¹ Contact list, OFT Document Reference 11086, page 22.

⁶⁷⁰² Tender list, OFT Document Reference 4648, page 1.

⁶⁷⁰³ Leniency application, OFT Document Reference 4568.

been given or received, plus the recollections of staff. At page 18 of the schedule under Annex 14 and within the section for 2003 tenders is the following entry:⁶⁷⁰⁴

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5506	11 December	Royal Wolverhampton Hospital NHS Trust	18 Bed Ward Extension, Beynon Centre, New Cross Hospital	Taken (Shaylor)	Yes (Tender Spreadsheet; Tender List)

IV.4804. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above and the Tender List is the internal tender list referred to in that explanation.

IV.4805. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁶⁷⁰⁵ and Shaylor appears on this list.

IV.4806. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.4807. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.4808. CKT admitted that the initials 'CKT', which appear in the estimator column for this tender, were his own and that the letter 'B', which appears in the column marked 'DIV', stands for Building Division (also known as Traditional), for which CKT was the estimating manager.⁶⁷⁰⁶ In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: '*CKT the estimator, category B is the cover, tender return date 11th of December 2003, Thomas Vale tender £654,983, Shaylor in bold indicating that Shaylor gave us a cover*'.⁶⁷⁰⁷

Evidence from other companies – Shaylor

IV.4809. The OFT wrote to Shaylor on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Shaylor had participated in bid rigging on this tender. In response, Shaylor wrote to the

⁶⁷⁰⁴ Leniency application, OFT Document Reference 4568, page 18.

⁶⁷⁰⁵ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁶⁷⁰⁶ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁶⁷⁰⁷ Interview transcript, OFT Document Reference 13855, page 39.

OFT on 27 April 2007 and admitted that it gave a cover price on this tender but *'cannot recall details of the other party/parties involved'*.⁶⁷⁰⁸ In its response to the OFT's Fast Track Offer, Shaylor stated it had not made admissions where it believed no cover had been given or taken or where there was a lack of information.⁶⁷⁰⁹ The OFT infers from this that where an admission was made, Shaylor had some form of information or evidential support for that admission.

IV.4810. In its response to the Statement, Shaylor stated *'Shaylor is not withdrawing any of these admissions or proposing to challenge the evidence in relation to any of the three alleged infringements'*.⁶⁷¹⁰

The OFT's analysis of the evidence and finding

IV.4811. From the evidence presented above, the OFT draws the following conclusions.

IV.4812. Thomas Vale and Shaylor each accepted an invitation to tender for the 18-bed ward extension at Beynon Centre, New Cross Hospital.

IV.4813. It appears that Shaylor completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Shaylor being the lowest received and the fact that it won the contract.

IV.4814. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that this was a cover price. Thomas Vale had not allocated the category of this tender by the week commencing 10 November 2003. However, by the week commencing 24 November 2003, the letter 'B' had been inserted into the category column. This indicates that a conscious decision was made in the time leading up to the tender deadline to register this as a tender for which Thomas Vale would not be submitting a competitive bid.

IV.4815. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records five competitors who were also invited to tender for this contract, namely *'Weaver, Shaylor, Tomlinson, Wm Gough [and] A M Griffiths'*. Shaylor is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet is £654,983 which matches the amount recorded by the client Royal Wolverhampton Hospital.

IV.4816. Royal Wolverhampton Hospital also received a tendered amount of £603,036.40 from Shaylor, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Shaylor to Thomas Vale.

IV.4817. The OFT notes that although five competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Shaylor. This indicates that a conscious decision was made to differentiate Shaylor from

⁶⁷⁰⁸ Response from Shaylor, OFT Document Reference 10839, page 3.

⁶⁷⁰⁹ Response from Shaylor, OFT Document Reference 10837, page 3.

⁶⁷¹⁰ Oral representations of Shaylor, 29 July 2008, pages 2 and 3.

the other known competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price at the time. It also indicates that CKT himself made contact with Shaylor. The OFT also notes that there is no indication or evidence that Thomas Vale received a cover price on this tender from anyone other than Shaylor.

IV.4818. Thomas Vale admitted that Shaylor was one of the key competitors with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price had been received by Thomas Vale from Shaylor.

IV.4819. Finally, both parties admit to bid rigging activities on this tender. In response to the OFT's letter of 22 March 2007, Shaylor admitted to giving a cover price on this tender, without sight of the OFT's evidence that it had given rather than received a cover price. The OFT concludes from the terms of Shaylor's admission that it was based on some form of supporting information or evidence. Having reviewed the evidence in the Statement, Shaylor also confirmed that it would not challenge that evidence or withdraw its earlier admission.

IV.4820. The OFT therefore concludes that contact took place between Thomas Vale and Shaylor. The OFT also concludes that Shaylor supplied a figure to Thomas Vale for a cover bid.

IV.4821. The OFT is satisfied that the facts set out in paragraphs IV.4800 to IV.4820 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁷¹¹ In particular:

- (a) the provision of a figure for a cover bid from Shaylor to Thomas Vale was not unilateral⁶⁷¹², and contravenes the principle against direct or indirect contact between competitors;⁶⁷¹³
- (b) Thomas Vale can be presumed to have taken account of the information received from Shaylor (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁷¹⁴ and
- (c) Shaylor can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁷¹⁵

IV.4822. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Shaylor in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the 18-bed ward extension at Beynon Centre, New Cross Hospital, tender deadline 11 December 2003.

⁶⁷¹¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁷¹² See paragraph IV.73 of the General comments on cover pricing section.

⁶⁷¹³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁷¹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷¹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.4823. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4824. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 174: **Unit 1, Dutton Road, Alderman's Green Industrial Estate,
Coventry – 22 December 2003**
Client: **Rhombus Properties**
Parties: **Thomas Vale and GAJ**

IV.4825. On 28 November 2003, Rhombus Properties sought tenders for refurbishment and modification of an industrial unit at Unit 1, Dutton Road, Alderman's Green Industrial Estate, Coventry. The following four companies were invited to tender: GAJ, MJ Green, R Pittaway and Thomas Vale. The deadline for the receipt of tenders was 12:00 noon on 22 December 2003.⁶⁷¹⁶

IV.4826. Rhombus Properties received the following tender returns:⁶⁷¹⁷

Company	Time & Date tender received	Amount of tender	Awarded contract
GAJ	12:00 noon on 22 December 2003	£450,210	
MJ Green	Withdrew 12 December 2003	n/a	
R Pittaway	12:00 noon on 22 December 2003	£397,900	Yes
Thomas Vale	12:00 noon on 22 December 2003	£427,243	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale

IV.4827. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Summary sheet for this tender, also known as the QA EST6 form.⁶⁷¹⁸ Under the section headed '*COMPETITION*' is the following entry:

⁶⁷¹⁶ Information from client, OFT Document Reference 10580.

⁶⁷¹⁷ Information from client, OFT Document Reference 10580.

⁶⁷¹⁸ Tender Summary, OFT Document Reference 4543.

'1 Thomas Vale Construction

2 GAJ

Terry Fell

[...] [C]

[...] [C]

3 Pitaway – Coventry

4'

IV.4828. During the OFT's inspection of Thomas Vale's East Midlands office, a tender enquiry book for the period 2002 onwards was found.⁶⁷¹⁹ This contained the following entry:

Tender	Received	Due	Time	Client	Architect/QS/Engineer
K1072	15.12.03	22.12.03	Noon	Rhombus Properties	Coggan Assoc

EST	Comments	Result
PAK	£427,243.00	2nd

IV.4829. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a '*little black book*'⁶⁷²⁰ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this list, there is an entry for GAJ plus contact names, including that of Terry Fell and a telephone number of [...] [C].⁶⁷²¹

Evidence from leniency applicant Thomas Vale

IV.4830. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Summary sheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.4831. At Annex 13⁶⁷²² of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price at the East Midlands (Leicester) office. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page four of the schedule under Annex 13 and within the section for 2003 tenders is the following entry:⁶⁷²³

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
K1072	22 December	Rhombus Properties	Refurbishment of Unit 1, Dutton Road, Aldermans Green Industrial Estate, Coventry	Given (GAJ, Terry Fell, [...] [C])	Yes (Tender Summary Sheet)

⁶⁷¹⁹ Tender Enquiry Book, OFT Document Reference 4244, page 4.

⁶⁷²⁰ Interview transcript, OFT Document Reference 11418, page 21.

⁶⁷²¹ Contact list, OFT Document Reference 11086, page 9.

⁶⁷²² Leniency application, OFT Document Reference 4532.

⁶⁷²³ Leniency application, OFT Document Reference 4532, page 4.

IV.4832. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁶⁷²⁴ and GAJ appears on this list.

IV.4833. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.4834. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave an explanation of the use of the Tender Summary sheet to record cover prices to its competitors.

IV.4835. In interview CKT also gave his explanation of the entry on the Tender Summary sheet. He said *'the fact that...the tender number is prefixed with a K immediately told me that it was an East Midlands tender for reasons as I've described before - Paul Kirk was the estimator over there and we just used K as a prefix...the fact that this is our QA EST6 sheet - tender summary sheet...which...the fact that is actually filled in indicates that it was a bona fide tender by Thomas Vale Construction, so we did actually price it...however, when you look at the competition at the bottom of that same sheet, there's a number two there which says GAJ with the name of Terry Fell and the telephone number...Now that says to me that we actually gave GAJ via Terry Fell a cover figure...there'd be no other reason to put GAJ's phone number on that sheet with a contact name unless we were required to make contact with them'*.⁶⁷²⁵

IV.4836. Although CKT had no personal recollection of the tender he knew that Terry Fell was an estimator at GAJ and following internal enquiries made within Thomas Vale could confirm that *'Paul Kirk...was very efficient in recording and archiving information electronically'* and *'K1072 was a genuine category A tender and was priced by Paul Kirk'*.⁶⁷²⁶

IV.4837. Thomas Vale identified Paul Kirk ('PAK') as the estimator responsible for this tender. In interview, PAK recalled conducting a site visit to the premises and believed that Thomas Vale had submitted a genuine tender. He confirmed the amount of Thomas Vale's bid and explained that he was the only estimator for the East Midlands division at the time.⁶⁷²⁷ He said that the entry of a name and telephone number alongside GAJ showed that the giving of a cover price by Thomas Vale was *'likely'* and added *'It certainly went the other way because as I say I remember doing the site visits, and I can't say why I was doing the site visit if I wasn't pricing it so I certainly feel that I priced it. Whether we gave assistance I can't say for definite but yeah, there's a chance there yeah'*.⁶⁷²⁸

⁶⁷²⁴ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁶⁷²⁵ Interview transcript, OFT Document Reference 13855, pages 31 and 32.

⁶⁷²⁶ Interview transcript, OFT Document Reference 13855, page 33.

⁶⁷²⁷ Interview transcript, OFT Document Reference 13557, pages 16 and 17.

⁶⁷²⁸ Interview transcript, OFT Document Reference 13557, pages 18 and 19.

Evidence from other companies – GAJ

IV.4838. The OFT wrote to GAJ on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender (incorrectly dated as 22 December 2002), in return for an admission that GAJ had participated in bid rigging on this tender. In response to this letter, GAJ admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁶⁷²⁹ GAJ's legal representatives explained *'Generally, where 'bids' have been submitted and rejected the papers are not retained by the Company beyond a short period after the contract has been awarded to someone else'*.⁶⁷³⁰

IV.4839. The OFT subsequently wrote to GAJ's ultimate parent company at the time of this Infringement, GAJ Holdings, on 5 November 2007, asking it to comment on GAJ's response to the OFT's Fast Track Offer, given that the OFT intended to hold GAJ Holdings jointly and severally liable for any infringements committed by GAJ in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, GAJ Holdings said that it had no further comments to make.⁶⁷³¹

IV.4840. In its response to the Statement, GAJ stated that Terry Fell worked for GAJ on a freelance basis and could have been working on his own initiative.⁶⁷³² The OFT notes that GAJ has nonetheless admitted liability for its part in this Infringement and that this liability is consistent with the laws and precedent relating to agency relationships, as discussed in Section III (Legal Background) above.

The OFT's analysis of the evidence and finding

IV.4841. From the evidence presented above, the OFT draws the following conclusions.

IV.4842. Thomas Vale and GAJ each accepted an invitation to tender for this contract.

IV.4843. Thomas Vale completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work. GAJ was unable to submit a tender by the return date and/or did not want to win this contract.

IV.4844. Thomas Vale's contemporaneous Tender Summary sheet maintained in electronic format by estimator PAK within the East Midlands Division, records two competitors who were also invited to tender for this contract, namely GAJ and *'Pitaway – Coventry'*. The entry for GAJ has the contact name of Terry Fell and a telephone number for GAJ which matches the number recorded by CKT in his *'little black book'* of contacts.

IV.4845. In interview, CKT stated that the only possible reason such an entry was made on the Tender Summary sheet was to record contact with GAJ and that it shows that a cover price was given by Thomas Vale to GAJ. Thomas Vale's designated estimator for this tender also thought that it likely that a cover price was provided to GAJ by Thomas Vale. Thomas Vale's bid to the client, as

⁶⁷²⁹ Response from GAJ, OFT Document Reference 10309, page 3.

⁶⁷³⁰ Response from GAJ, OFT Document Reference 10308.

⁶⁷³¹ Response from GAJ Holdings, OFT Document Reference 13961.

⁶⁷³² Written representations of GAJ, 26 June 2008, Appendix E, paragraph 8.

recorded in the handwritten tender enquiry book is £427,243 which matches the amount recorded by the client Rhombus Properties.

IV.4846. Rhombus Properties also received a tendered amount of £450,210 from GAJ, which is higher than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Thomas Vale to GAJ. GAJ was the only company to submit a bid above Thomas Vale's bid, and therefore Thomas Vale could not have given cover to any other company on this tender.

IV.4847. The OFT notes that although two competitors have been recorded on the Tender Summary sheet, only one of them has a contact name and telephone number, which suggests a conscious decision was made to differentiate GAJ from the other competitor. The OFT notes that Thomas Vale's designated estimator PAK was said to be very efficient in recording information electronically.

IV.4848. Thomas Vale admitted that GAJ was one of the 'key competitors' with whom it engaged in cover pricing activity and it admits giving a cover price to GAJ on this tender.

IV.4849. Finally both companies have admitted engaging in bid rigging activities on this tender.

IV.4850. The OFT therefore concludes that contact took place between GAJ and Thomas Vale and that Thomas Vale supplied a figure to GAJ in order that it could submit a bid to the client that was not intended to win the contract.

IV.4851. The OFT is satisfied that the facts set out in paragraphs IV.4827 to IV.4850 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁷³³ In particular:

- (a) the provision of a figure for a cover bid from Thomas Vale to GAJ was not unilateral⁶⁷³⁴, and contravenes the principle against direct or indirect contact between competitors;⁶⁷³⁵
- (b) GAJ can be presumed to have taken account of the information received from Thomas Vale (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁷³⁶ and
- (c) Thomas Vale can be presumed to have taken account of the information it received from GAJ (i.e. that GAJ did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁷³⁷

IV.4852. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and GAJ in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the alterations to Unit

⁶⁷³³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁷³⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁷³⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁷³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷³⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

1, Dutton Road, Alderman's Green Industrial Estate, Coventry, tender deadline 22 December 2003.

Immunity and leniency assessment

IV.4853. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4854. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 175: Refurbishment of Silverwood Flats – 22 December 2003
Client: Doncaster Metropolitan Borough Council
Parties: Henry Boot and Connaught

IV.4855. On 17 November 2003, Doncaster Metropolitan Borough Council sought tenders for Silverwood House Flats Refurbishment.⁶⁷³⁸ The following five companies were invited to tender: Bramall, Connaught, Hall Construction Ltd, Henry Boot and Hobson & Porter. The date and time of tender return was 22 December 2003 at noon.⁶⁷³⁹

IV.4856. Doncaster Metropolitan Borough Council received the following tender returns:⁶⁷⁴⁰

Company	Date tender received	Amount of tender	Awarded contract
Henry Boot	22 December 2003	£1,699,652.84	YES
Connaught	22 December 2003	£1,775,170.00	
Bramall	22 December 2003	£1,924,343.00	
Hall Construction Ltd	22 December 2003	£1,967,613.00	
Hobson & Porter	22 December 2003	£2,211,743.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Henry Boot – Sheet 28, Sheet 25 and handwritten notes

IV.4857. As part of its leniency application, Henry Boot's legal representatives provided a 'Sheet 28' (tender build-up) for this tender, on which under the section headed 'Competition', the following handwritten entries have been made:⁶⁷⁴¹

⁶⁷³⁸ Information from client, OFT Document Reference 7714.

⁶⁷³⁹ Information from client, OFT Document Reference 7714.

⁶⁷⁴⁰ Information from client, OFT Document Reference 7714.

⁶⁷⁴¹ Sheet 28, OFT Document Reference B1945.

'CONNAUGHT (C)
BRAMMALL
F HALL'

IV.4858. Henry Boot's legal representatives also provided a 'Sheet 25' (tender summary) in respect of this tender and handwritten at the bottom is:⁶⁷⁴²

*'connaught figure
1731873 + 2½ = £1775170
(75297)'*

IV.4859. Henry Boot's legal representatives also provided some handwritten notes relating to this tender showing:⁶⁷⁴³

*'Bramalls
Brian Ingham
Connaught Prop Services*

** [...] [C]
Fax [...] [C]
F Hall * chris Jackson'*

Evidence from leniency applicant Henry Boot

IV.4860. As part of its leniency application, Henry Boot's legal representatives provided a general explanation of its part in the process of cover pricing. This evidence is set out in paragraphs IV.363 to IV.374 above and is relied upon by the OFT in relation to this tender.

IV.4861. Henry Boot's legal representatives also provided to the OFT a table headed '*Overall Schedule for the Main Estimating Department*', which includes this tender. In respect of this tender the table contains comments made by those involved with the tender which show that a cover price was given to Connaught, as follows: '*I knew which companies were tendering for the project and someone from Connaught rang me to ask for a cover price as they were struggling due to a shortage of resource in the run up to Christmas. We did resist initially but in the end complied. To be able to give a cover price, I needed to know what my own figure was going to be so that I could ensure that the cover was higher. I cannot recall the name of the individual who called me. To my knowledge, the contact book kept by the estimating department does not contain the name, at least looking at it has not prompted my memory. The client called for a priced bill of quantities from the first and second tenderers which were HBC (UK) [Henry Boot] and Connaught. We therefore had to help them draft their priced bill because we had the information but they did not*'.⁶⁷⁴⁴

Witness evidence from leniency applicant Henry Boot

IV.4862. During interviews conducted in connection with its leniency application, Henry Boot employees and ex-employees provided general explanation of its

⁶⁷⁴² Sheet 25, OFT Document Reference B1946A.

⁶⁷⁴³ Handwritten note, OFT Document Reference B1944.

⁶⁷⁴⁴ Overall Schedule for the Main Estimating Department, OFT Document Reference B1595, page 23.

participation in cover pricing. This evidence is set out in paragraphs IV.363 to IV.374 above and is relied upon by the OFT in relation to this tender.

IV.4863. During an interview with the OFT on 22 March 2007, Malcolm Welsby ('MW'), an estimator at Henry Boot, advised how he would record when Henry Boot had given a cover as detailed in paragraph IV.374 above. In relation to this tender MW confirmed that he completed the 'Sheet 28' for this tender and when asked what the '(C)' meant, stated *'the annotation "c" means that we have given Connaught a cover price'*.⁶⁷⁴⁵ When asked about the 'Sheet 25', MW confirmed that the handwritten note was in his handwriting and stated *'we've given a 2½ % cover price to Connaught on this particular project'*.⁶⁷⁴⁶ When asked who he dealt with at Connaughts MW stated *'I think Chris Jackson, who used to work for us many many years ago, I think he works for Connaught but I can't guarantee that that's the particular case, I can't specifically say who I spoke to'*.⁶⁷⁴⁷

Evidence from other companies – Connaught plc

IV.4864. The OFT wrote to Connaught plc on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Connaught had participated in bid rigging on this tender. In response to this letter Connaught plc advised that it was unable to accept the OFT's Fast Track Offer.⁶⁷⁴⁸

IV.4865. However, in its response to the Statement, Connaught stated that it *'... does not dispute the facts alleged against it'*⁶⁷⁴⁹ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.4866. From the evidence presented above, the OFT draws the following conclusions.

IV.4867. Henry Boot and Connaught each accepted an invitation to tender for this contract.

IV.4868. Both companies submitted a tender. Connaught was unable to submit a tender by the return date and/or did not want to win this contract. Henry Boot completed the estimating process for this tender and submitted a bid with the hope of winning the work.

IV.4869. Henry Boot's 'Sheet 28' for this tender records 'CONNAUGHT (C)', under the heading 'Competition'. Henry Boot confirmed that this shows that it gave a cover price to the company noted. In addition, Henry Boot's 'Sheet 25' for this tender shows 'Connaught figure' and a figure of '£1775170', and MW has confirmed that this means that Henry Boot gave a cover price of this amount to the company noted. MW's specific recollection included the facts that he gave a cover price to an individual at Connaught, and that subsequently he helped Connaught to draft a priced bill of quantities when it was requested by the

⁶⁷⁴⁵ Interview transcript, OFT Document Reference 11210, page 13.

⁶⁷⁴⁶ Interview transcript OFT Document Reference 11210, page 14.

⁶⁷⁴⁷ Interview transcript OFT Document Reference 11210, page 14.

⁶⁷⁴⁸ Response from Connaught, OFT Document Reference 10975.

⁶⁷⁴⁹ Written representations of Connaught, 27 June 2008, paragraphs 1.4 and 3.1.

client. In respect of the handwritten notes on a separate sheet, the numbers '[.....] [C] Fax [.....] [C]' are numbers associated with Connaught Property Services Ltd, located in Leeds.⁶⁷⁵⁰

IV.4870. The OFT notes that the tender figure submitted by Connaught of £1,775,170 is identical to the cover price Henry Boot confirmed it provided to Connaught.

IV.4871. The OFT further notes that the tender submitted by Connaught was higher than the tender submitted by Henry Boot, a pattern consistent with a cover price having been provided.

IV.4872. Connaught has stated that it does not dispute the facts alleged against it, and confirmed that it *'has no material to set against the evidence obtained by the OFT'*.⁶⁷⁵¹

IV.4873. The OFT therefore concludes that contact took place between Henry Boot and Connaught. The OFT also concludes that Henry Boot supplied a figure to Connaught for a cover bid.

IV.4874. The OFT is satisfied that the facts set out in paragraphs IV.4857 to IV.4873 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁷⁵² In particular:

- (a) the provision of a figure for a cover bid from Henry Boot to Connaught was not unilateral⁶⁷⁵³, and contravenes the principle against direct or indirect contact between competitors;⁶⁷⁵⁴
- (b) Connaught can be presumed to have taken account of the information received from Henry Boot (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁷⁵⁵ and
- (c) Henry Boot can be presumed to have taken account of the information it received from Connaught (i.e. that Connaught did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁷⁵⁶

IV.4875. In its response to the Statement, Henry Boot stated in respect of this Infringement that *'...the intentions of parties taking covers was not a factor taken into account by Henry Boot in calculating its tender prices...'*⁶⁷⁵⁷ and *'Henry Boot had no knowledge of the intentions of the three other tenderers to this tender. Henry Boot genuinely wanted to be awarded this tender and submitted a tender price significantly lower than any of the other tenderers with whom it had no contact during the tendering process'*.⁶⁷⁵⁸ The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶⁷⁵⁹ and that therefore the OFT is not required to

⁶⁷⁵⁰ Google search results, OFT Document References 5961a.

⁶⁷⁵¹ Written representations of Connaught, 27 June 2008, paragraph 3.1.

⁶⁷⁵² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁷⁵³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁷⁵⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁷⁵⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷⁵⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷⁵⁷ Written representations of Henry Boot, 27 June 2008, paragraph 9.3.

⁶⁷⁵⁸ Written representations of Henry Boot, 27 June 2008, paragraph 9.4.

⁶⁷⁵⁹ See paragraph III.58 of the Legal Background section.

adduce evidence in support of this. The OFT does not consider that Henry Boot has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Henry Boot's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. The OFT also notes that Henry Boot has admitted that its conduct infringed the Act and, by implication, that it was party either to an anti-competitive agreement, or to a concerted practice including taking into account information received.

IV.4876. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Henry Boot and Connaught in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment of Silverwood Flats, tender deadline 22 December 2003.

Immunity and leniency assessment

IV.4877. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4878. Henry Boot informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Henry Boot will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 176: **Group Repair Scheme, Phase 29, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley – 28 January 2004**
Client: **Bradford Metropolitan District Council**
Parties: **Richardson Projects and G & J Seddon**

IV.4879. On 9 October 2003, Bradford Metropolitan District Council ('Bradford MDC') sought tenders for the Group Repair Scheme, Phase 29, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley. The return date for the tender was 28 January 2004 and seven companies were invited to tender: In House Contractor, Butler & Hargreaves Ltd, Richardson Projects, G & J Seddon, West Yorkshire Maintenance, Torpoint Ltd and A Baldwin & Co (Builders) Ltd.

IV.4880. Bradford MDC received the following tender returns by 28 January 2004:⁶⁷⁶⁰

⁶⁷⁶⁰ Information from client, OFT Document Reference 13188.

Company	Date Tender Received	Amount of tender	Awarded contract
In House Contractor	Declined to tender		
Butler & Hargreaves Ltd	No tender received		
Richardson Projects	28 January 2004	£115,623	
G & J Seddon	28 January 2004	£129,842	
West Yorkshire Maintenance	28 January 2004	£93,440	Yes
Torpoint Ltd	No tender received		
A Baldwin & Co (Builders) Ltd	28 January 2004	£100,102	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Richardson Projects – Tender Register

IV.4881. During the OFT's visit to Richardson Projects premises under section 28 on 21 March 2006, a Tender Register was obtained, and under the sections headed 'Others' and 'Price', the following entries have been made:⁶⁷⁶¹

	Others	Price
1	A Baldwin & Co	
2	Seddon > 'C'	119,842.00

IV.4882. The Tender Register states that Richardson Projects' submitted figure was £115,623.⁶⁷⁶²

Evidence from Richardson Projects

IV.4883. The OFT wrote to Richardson Projects on 16 July 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Richardson Projects had participated in bid rigging on this tender. In response to this letter, Richardson Projects admitted bid rigging on this tender and that it gave a cover price to G & J Seddon.⁶⁷⁶³

IV.4884. In its response to the Statement, Richardson Projects confirmed that '[i]t is not disputed that Richardson Projects participated in cover pricing during the period set out in the Statement.'⁶⁷⁶⁴

Evidence from Seddon

IV.4885. The OFT wrote to Seddon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Seddon had participated in bid rigging on this tender. In response to this letter, G & J Seddon responded, admitting 'We engaged in bid rigging activities on this tender with Richardson Projects Limited'.⁶⁷⁶⁵

⁶⁷⁶¹ Tender Register, OFT Document Reference A0027, page 110.

⁶⁷⁶² Tender Register, OFT Document Reference A0027, page 110.

⁶⁷⁶³ Response from Richardson Projects, OFT Document Reference A2739.

⁶⁷⁶⁴ Written representations of Richardson Projects, 27 June 2008, paragraph 49.

⁶⁷⁶⁵ Response from Seddon, OFT Document Reference 10826, page 4.

IV.4886. The OFT subsequently wrote again to G & J Seddon's ultimate parent company at the time of this Infringement, Seddon, on 5 November 2007, asking it to comment on G & J Seddon's response to the OFT's Fast Track Offer, given that the OFT intended to hold Seddon jointly and severally liable for any infringements committed by G & J Seddon in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Seddon said *'We confirm that Seddon Group Limited ("SGL") support and adopt G&J Seddon Limited ("G&JS") acceptance of the reduction of penalty offer and that SGL does not intend to comment upon matters ... or to make any submissions on this case at the present time'*.⁶⁷⁶⁶

IV.4887. In its response to the Statement, G & J Seddon confirmed that *'[i]t is not disputed that Seddon participated in cover pricing in respect of the alleged infringements during the period set out in the Statement.'*⁶⁷⁶⁷

The OFT's analysis of the evidence and finding

IV.4888. From the evidence presented above, the OFT draws the following conclusions.

IV.4889. G & J Seddon and Richardson Projects each accepted an invitation to tender for this contract.

IV.4890. G & J Seddon was unable to submit a tender by the return date and/or did not want to win this tender.

IV.4891. The contemporaneous Tender Register obtained at Richardson Projects records *'Seddon > 'C' 119,842'*. Richardson Projects has confirmed that it gave G & J Seddon a cover price for this tender.

IV.4892. The OFT notes that G & J Seddon's submitted price for this tender was £129,842, exactly £10,000 above the cover price provided by Richardson Projects to G & J Seddon. The OFT considers it likely that G & J Seddon added a further £10,000 to the figure supplied by Richardson Projects in order to ensure that it did not win the contract.

IV.4893. The OFT further notes that the tender submitted by G & J Seddon was higher than the tender submitted by Richardson Projects, a pattern consistent with a cover price having been provided.

IV.4894. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that G & J Seddon admitted that the party with whom it engaged in bid rigging was Richardson Projects, without being shown the OFT's evidence that Richardson Projects was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.4895. The OFT therefore concludes that contact took place between Richardson Projects and G & J Seddon. The OFT also concludes that Richardson Projects supplied a figure to G & J Seddon for a cover bid.

⁶⁷⁶⁶ Response from Seddon, OFT Document Reference 14027.

⁶⁷⁶⁷ Written representations of G & J Seddon, 27 June 2008, paragraph 51.

IV.4896. The OFT is satisfied that the facts set out in paragraphs IV.4881 to IV.4895 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁷⁶⁸ In particular:

- (a) the provision of a figure for a cover bid from Richardson Projects to G & J Seddon was not unilateral⁶⁷⁶⁹, and contravenes the principle against direct or indirect contact between competitors;⁶⁷⁷⁰
- (b) G & J Seddon can be presumed to have taken account of the information received from Richardson Projects (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁷⁷¹
- (c) Richardson Projects can be presumed to have taken account of the information it received from G & J Seddon (i.e. that G & J Seddon did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁷⁷²

IV.4897. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Richardson Projects and G & J Seddon, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the Group Repair Scheme, Phase 29, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley, tender deadline 28 January 2004.

Alleged Infringement 177: Not included in the Decision

**Infringement 178: William Sharp Comprehensive School, Bilborough, Nottingham
– 30 January 2004**
Client: Nottingham City Council
Parties: Frudd and Robert Woodhead

IV.4898. On 16 December 2003, Nottingham City Council sought tenders for the new build of classrooms, toilets and staff room at William Sharp Comprehensive School, Bilborough, Nottingham.⁶⁷⁷³ The following six companies were invited to tender: Frudd, Thomas Long, Nottingham City Building Works, Wates Construction Ltd, Robert Woodhead and Allenbuild. The deadline for the receipt of tenders was 12:00 noon on 30 January 2004.

IV.4899. Nottingham City Council received the following tender returns:⁶⁷⁷⁴

⁶⁷⁶⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁷⁶⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁷⁷⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁷⁷¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷⁷² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷⁷³ Information from client, OFT Document Reference 9140.

⁶⁷⁷⁴ Information from client, OFT Document Reference 9140.

Company	Date tender received	Amount of tender	Awarded contract
Frudd	Not recorded but prior to tender expiry date and time	£631,946	
Thomas Long	Not recorded but prior to tender expiry date and time	£579,991	Yes
Nottingham City Building Works	Not recorded but prior to tender expiry date and time	£641,225	
Wates Construction Ltd	Declined to tender 8 January 2004	n/a	
Robert Woodhead	Not recorded but prior to tender expiry date and time	£669,753	
Allenbuild	Not recorded but prior to tender expiry date and time	£598,737	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Frudd – Tender register, Enquiries Received spreadsheets and diary extract

IV.4900. During the OFT's inspection at Frudd, a tender register was found with the following entry:⁶⁷⁷⁵

ESTIMATE DETAILS	REF NO	DATE RECEIVED	DATE RETURN	T.WESSEX REF	ARCH	ENQ Sent
PROPOSED YEAR 7 BASE, WILLIAM SHARP COMPREHENSIVE SCH, BRAMHALL ROAD, BILBOROUGH, NOTTINGHAM. NOTTS CITY COUNCIL	ED/03/255	19/12/03	23/01/04 12-00 Noon		Notts CC	✓

Est Check	ADJ DIR	RESULT	Competition	£	Y %L	N %H
✓	ANS		FBS.			

IV.4901. Also found at Frudd's premises during the OFT's inspection were two spreadsheets entitled Enquiries Received, listing tenders in progress at Frudd, dated 13 January 2004 and 25 January 2004.

⁶⁷⁷⁵ Tender register, OFT Document Reference 2019, page 23.

IV.4902. The Enquiries Received spreadsheet dated 13 January 2004⁶⁷⁷⁶, contained the following entry:

Project Title	Decision	Tender return Date	Estimate Ref	Competition
Proposed Year Seven Base, William Sharp Comprehensive School Bramhall Road, Bilborough, Nottingham Nottingham City Council	Accept	23/01/2004 12.00 Noon	ED/03/255	Woodhead

Value	Enq's Sent	Estimator	
500k	Yes	PP	205

IV.4903. The Enquiries Received spreadsheet dated 25 January 2004⁶⁷⁷⁷, contained the following entry:

Project Title	Decision	Tender return Date	Estimate Ref	Competition
Proposed Year Seven Base, ✓ William Sharp Comprehensive School Bramhall Road, Bilborough, Nottingham Nottingham City Council	Accept	30/01/2004 12.00 Noon	ED/03/255	Woodhead (NP) Allenbuild [...] [C] Thomas Long

Value	Enq's Sent	Estimator	
500k	Yes	PP	199

IV.4904. During the OFT's inspection, Director Jenna Frudd's ('JF') 2004 diary was found. Attached to the diary entry dated 2 February 2004⁶⁷⁷⁸ was a post-it note, which contained the following handwritten entry:

*'William Sharpe.
Competition: _____
Robert Woodhead (C) we gave cover
Allen Build [...] [C]
Tomas Long*

⁶⁷⁷⁶ Enquiries Received spreadsheet, OFT Document Reference 2039.

⁶⁷⁷⁷ Enquiries Received spreadsheet, OFT Document Reference 2042.

⁶⁷⁷⁸ Jenna Frudd's diary, OFT Document Reference 2113, page 18.

Probably another 2!!'

Evidence from leniency applicant Frudd

IV.4905. As part of its leniency application, Frudd provided a general explanation of its participation in cover pricing. This evidence and in particular, the use of the tender register is set out in paragraphs IV.335 to IV.351 above and is relied upon by the OFT in relation to this tender.

IV.4906. Frudd also compiled a spreadsheet, setting out all tenders from 2000 to 2004 in respect of which Frudd had either given or taken a cover price. Under the section marked 'Cover prices given', is the following entry:⁶⁷⁷⁹

Date	Contract	Client	Contractors	Amount	Result
003	William Sharp	Nottm City Council	Frudd Woodhead We gave cover Allan Build [...] [C] Thomas Long no cover given Another 2 unknown pricing		?

IV.4907. Frudd also provided a contact list of competitors entitled 'MIC'S LIKELY LADS', which belonged to Michael Robins ('MR'), former Chief Estimator at Frudd. In this list, there is an entry for 'Woodhead Bilsthorpe' with a contact name of Adrian Robb and telephone number.⁶⁷⁸⁰ Robert Woodhead is based in Bilsthorpe, Nottinghamshire.

IV.4908. Following the issue of the Statement, Frudd did not submit any written or oral representations.

Witness evidence from leniency applicant Frudd

IV.4909. During interviews conducted in connection with its leniency application, Frudd employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.335 to IV.351 above and is relied upon by the OFT in relation to this tender.

IV.4910. In interview, JF referred to the post-it note found within her diary and believed that it was Paul Platts's ('PP'), an estimator at Frudd, handwriting. She said 'it says Robert Woodhead C we gave cover...I would imagine that I asked for an update on that job, and that's what I received back...I'd want to know specifically if there was a hole in the order book or if there was, or if I was looking at cash flow or I was preparing something for the bank, I might want to know...we might have been getting a bit more desperate for a job here'.⁶⁷⁸¹

IV.4911. JF confirmed that PP was the allocated estimator for the tender and referred to the Enquiries Received spreadsheet, dated 25 January 2004, as follows: 'I would imagine that we found out that Woodhead [.....] [C], weren't pricing or didn't want it, but then Woodhead's would have phoned us, we wouldn't phone them, they would have phoned us, because it's Nottingham City Council...they wouldn't want to be turfed off the tender list, so they'd

⁶⁷⁷⁹ Cover Prices received and given, OFT Document Reference 3985, page 8.

⁶⁷⁸⁰ Contact list, OFT Document Reference 3988, page 4.

⁶⁷⁸¹ Interview transcript, OFT Document Reference 13104, page 18.

phone and say, can you give us a cover...And we would have given a cover to them'.⁶⁷⁸²

IV.4912. PP recalled the tender and confirmed that it was his handwriting on the post-it note and that he would have had first-hand knowledge at the time of the fact that Frudd had provided a cover price to Robert Woodhead. He said *'I mean we obviously gave the cover to, Woodhead's [...]*

[...] [C].⁶⁷⁸³ He confirmed that either he or MR would have given a cover price to Robert Woodhead.

IV.4913. MR was also interviewed and although he could not recall the tender, he confirmed that the entry shows that a cover price was provided by Frudd to Robert Woodhead.⁶⁷⁸⁴

IV.4914. Finally, Martin Ledingham ('ML'), an ex-estimator at Frudd, gave his account of the spreadsheet entries. He said that the letters 'NP' could either indicate that companies were not pricing the tender or *'alternatively take a cover price'.⁶⁷⁸⁵*

Evidence from other companies – Robert Woodhead

IV.4915. The OFT wrote to Robert Woodhead on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Robert Woodhead had participated in bid rigging on this tender. In response, Robert Woodhead admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'.⁶⁷⁸⁶*

IV.4916. The OFT subsequently wrote to Robert Woodhead's ultimate parent company at the time of this Infringement, Woodhead Holdings, on 4 March 2008, asking it to comment on Robert Woodhead's response to the OFT's Fast Track Offer, given that the OFT intended to hold Woodhead Holdings jointly and severally liable for any infringements committed by Robert Woodhead in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Woodhead Holdings stated *'Whilst not accepting that Robert Woodhead Holdings Ltd could have any liability in this case, the company is aware of the agreement reached between Robert Woodhead Ltd and the OFT, and would adopt the same position as Robert Woodhead Ltd'.⁶⁷⁸⁷*

IV.4917. In its response to the Statement, Robert Woodhead confirmed that *it '...stands by the admissions made in respect of [the Infringements] in its Response ("Response") to the OFT's "Fast Track Offer"...'.⁶⁷⁸⁸*

The OFT's analysis of the evidence and finding

IV.4918. From the evidence presented above, the OFT draws the following conclusions.

⁶⁷⁸² Interview transcript, OFT Document Reference 13104, page 23.

⁶⁷⁸³ Interview transcript, OFT Document Reference 13145, page 19.

⁶⁷⁸⁴ Interview transcript, OFT Document Reference 13115, page 26.

⁶⁷⁸⁵ Interview transcript, OFT Document Reference 13120, page 8.

⁶⁷⁸⁶ Response from Robert Woodhead, OFT Document Reference 10810, page 3.

⁶⁷⁸⁷ Response from Woodhead Holdings, OFT Document Reference 14442.

⁶⁷⁸⁸ Written representations of Robert Woodhead, 2 July 2008, paragraph 2.1.

- IV.4919. Frudd and Robert Woodhead each accepted an invitation to tender for William Sharp Comprehensive School, Bilborough, Nottingham.
- IV.4920. Robert Woodhead was unable to submit a tender by the return date and/or did not want to win this contract. Frudd completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the word *'Accept'* in the decision column of Frudd's *'Enquiries Received'* spreadsheets.
- IV.4921. A post-it note found inside JF's diary for 2 February 2004, records three competitors who were also invited to tender for this contract, namely Robert Woodhead, Allenbuild and Thomas Long. The letter 'C' in brackets and the words *'We gave cover'* are noted next to Robert Woodhead. Frudd has confirmed that this shows that a cover price was given to that company by Frudd.
- IV.4922. The OFT notes that although three competitors have been recorded on the post-it note, the letter 'C' in brackets is only noted alongside the entry for Robert Woodhead. PP was the author of the note and confirmed that he would have had personal knowledge of the arrangement to give cover to Robert Woodhead at the time, and may have given Robert Woodhead a cover price himself or it would have been dealt with by Chief Estimator MR. MR had an entry for Robert Woodhead in a schedule of contacts, used for the purpose of exchanging cover prices.
- IV.4923. The OFT also considers it significant that the post-it note was placed within the diary entry for 2 February 2004, just three days after the tender deadline date of 30 January 2004. Therefore, the knowledge of the cover price would have been fresh in the mind of PP who was the allocated estimator for the tender and the author of the note. JF, PP and MR, when interviewed by the OFT, confirmed that the post-it note shows that Frudd gave Robert Woodhead a cover price for this tender.
- IV.4924. The OFT notes that there is an entry of the letters *'NP'* but no record of a cover price to Robert Woodhead on Frudd's *Enquiries Received* spreadsheet dated 25 January 2004. However, in interview, senior estimator ML explained that the letters *'NP'* could indicate either that a company had taken a decision to decline to submit a bid to the client, or that it would be seeking a cover price. The OFT notes that Robert Woodhead did not decline to submit a tender. [...] [C]
- IV.4925. According to the client Nottingham City Council, Frudd submitted a bid of £631,946. Nottingham City Council also received a tendered amount of £669,753 from Robert Woodhead, which is higher than the amount tendered by Frudd. This fits into the pattern consistent with a cover price having been provided from Frudd to Robert Woodhead.
- IV.4926. Finally, Robert Woodhead has also admitted to bid rigging on this tender.
- IV.4927. The OFT therefore concludes that contact took place between Frudd and Robert Woodhead and that Frudd supplied a figure to Robert Woodhead in order

that it could submit a bid to the client that was not intended to win the contract.

IV.4928. The OFT is satisfied that the facts set out in paragraphs IV.4900 to IV.4927 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁷⁸⁹ In particular:

- (a) the provision of a figure for a cover bid from Frudd to Robert Woodhead was not unilateral⁶⁷⁹⁰, and contravenes the principle against direct or indirect contact between competitors;⁶⁷⁹¹
- (b) Robert Woodhead can be presumed to have taken account of the information received from Frudd (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁷⁹² and
- (c) Frudd can be presumed to have taken account of the information it received from Robert Woodhead (i.e. that Robert Woodhead did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁶⁷⁹³

IV.4929. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Frudd and Robert Woodhead in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for William Sharp comprehensive school, Bilborough, Nottingham, tender deadline 30 January 2004.

Immunity and leniency assessment

IV.4930. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4931. In respect of this tender, the OFT became aware of bid rigging activities by virtue of information obtained during the visit under section 28 on 29 June 2005. Frudd will not therefore receive 100 per cent immunity in respect of this tender. However, Frudd will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

**Infringement 179: Beacon Resource Centre, Cromwell Road, Charlestown, Salford
– 9 February 2004**
Client: City of Salford Council
Parties: Bramall and Richardson Projects

IV.4932. On 5 December 2003, the City of Salford Council ('CSC') sought tenders for the construction of a leisure centre at the Beacon Resource Centre Cromwell Road Charlestown, Salford. The following four companies were invited to

⁶⁷⁸⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁷⁹⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁷⁹¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁷⁹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁷⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

tender: BAAS Construction Ltd, Richardson Projects, Bramall and William Hargreaves Ltd. The closing date for return of tenders was 9 February 2004 by 2:00 pm.⁶⁷⁹⁴

IV.4933. CSC received the following tender returns:⁶⁷⁹⁵

Company	Date Tender Received	Amount of Tender	Awarded Tender
BAAS Construction Ltd	Declined to tender 12 December 2003		
Richardson Projects	9 February 2004	£1,478,161	Yes
Bramall	9 February 2004	£1,624,798	
William Hargreaves Ltd	Declined to Tender 16 December 2003		

Evidence of agreement and/or concerted practice

Contemporaneous evidence from leniency applicant Bramall – Tender Register

IV.4934. As part of its leniency application, Bramall provided a copy of its Tender Register. This contained the following entry for this tender:⁶⁷⁹⁶

DATE RECEIVED	CLIENT/PROJECT	Nº	TENDER RETURN DATE	TENDER SUM
8-12-2003	CITY OF SALFORD THE BEACON RESOURCE CENTRE CROMWELL ROAD, CHARLESTOWN, SALFORD	1233	2.2.2004 2pm	1,624,798

CONTRIBUTION	APPROX VALUE	COMPETITION		ARCHITECT	QS.	
	1,000		B			D&B

Contemporaneous evidence from Richardson Projects – Summary of Tender Documents

IV.4935. During the OFT's visit to Richardson Projects' premises under section 28 on 21 March 2006, a copy of a Richardson Projects Summary of Tender document was taken. This contained the following entry for this tender:⁶⁷⁹⁷

⁶⁷⁹⁴ Information from client, OFT Document Reference 9255. Incorrectly noted by the client in its reply to the OFT as 7 June 2004.

⁶⁷⁹⁵ Information from client, OFT Document Reference 9255.

⁶⁷⁹⁶ Tender register, OFT Document Reference B1434, page 60.

⁶⁷⁹⁷ Tender summary, OFT Document Reference A0033.

Richardson Projects Ltd.

Tender No
Tender Date
Tender Time

RP1178
09-Feb-04
12 noon

Project:- **New Youth Centre Facility**
Cromwell Rd/London St Salford
Salford City Council

Summary of Tender

Notes

TENDER FIGURE £1,478,161.00

	<u>Amount</u>	<u>%</u>	<u>Difference</u>
1 Bramhall 'C'	1,625,000.00	-9.93%	-146,839.00
2 Gleeson	Returned		
3 Baas	Returned		
4			
5			
	Price per m2	1,100.00 m2	1,342.87
	Price/Dwelling	1 nr	1,477,161.05
Blockwork GF	21,412.00		

IV.4936. During the OFT's visit to Richardson Projects' premises under section 28 on 21 March 2006, another copy of a Richardson Projects Summary of Tender document was taken.⁶⁷⁹⁸ This document contains the same information as the previous document, with the addition of links to other spreadsheet pages.

Evidence from leniency applicant Bramall

IV.4937. As part of its leniency application, Bramall provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.243 to IV.273 above and is relied upon by the OFT in relation to this tender.

IV.4938. In particular, Bramall provided the OFT with an analysis of its tender sheets under the heading '*LIKELY COVERS TAKEN FROM THIRD PARTIES*' since March 2000. This analysis included the following entry:⁶⁷⁹⁹

⁶⁷⁹⁸ Tender summary, OFT Document Reference A2047.

⁶⁷⁹⁹ Likely covers taken from third parties, OFT Document Reference B1432, page 18

DATE RECEIVED	CLIENT/PROJECT	NO.	TENDER RETURN DATE	TENDER SUM	CONTRIBUTION
8/12/2003	City of Salford The Beacon Resource Centre Cromwell Road Charlestown, Salford	1233	2/2/2004 2pm	1,624,796	

APPROX VALUE	COMPETITION		ARCHITECT	QS		BASIS FOR CONCLUSION
1000		B			D&B	Likely cover taken from Richardsons. Personal recollection of John Pagett

IV.4939. As part of its leniency application, Bramall also provided the OFT with an analysis of its tender sheets under the heading '*DEFINITE COVERS TAKEN FROM THIRD PARTIES*' since March 2000.⁶⁸⁰⁰ This analysis included the following entry:

DATE RECEIVED	CLIENT/PROJECT	NO.	TENDER RETURN DATE	TENDER SUM	CONTRIBUTION
8/12/2003	City of Salford The Beacon Resource Centre Cromwell Road Charlestown, Salford	1233	2/2/2004 2pm	1,624,796	

APPROX VALUE	COMPETITION		ARCHITECT	QS		BASIS FOR CONCLUSION
1000		B			D&B	MH took cover from Richardson (Clive Walker)

Witness evidence from leniency applicant Bramall

IV.4940. During interviews conducted in connection with its leniency application, Bramall's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.243 to IV.273 above and is relied upon by the OFT in relation to this tender.

IV.4941. When interviewed about this tender, John Pagett ('JP'), Bid Manager at Bramall, identified the writing in the Tender Register⁶⁸⁰¹ as Mike Hardwick's ('MH'), an estimator no longer with Bramall⁶⁸⁰², and confirmed that this was a tender which Bramall did not want because '*...the conditions were*

⁶⁸⁰⁰ Definite covers taken from third parties, OFT Document Reference B1442e, page 2.

⁶⁸⁰¹ Tender register, OFT Document Reference B1434, page 60.

⁶⁸⁰² Interview transcript, OFT Document Reference 11168, page 14.

horrendous...we were asked to take on all kinds of unacceptable things...I've seldom seen such risky contract'.⁶⁸⁰³

IV.4942. JP was shown Bramall's Leniency Document *'Likely Covers Taken From Third Parties'*.⁶⁸⁰⁴ When asked to explain the document he said, *'City of Salford, Beacon Centre... tender return date, tender sum, approximate value, likely cover taken from Richardsons, personal recollection of John Pagett'*.⁶⁸⁰⁵ When asked to confirm that a cover price was obtained from Richardsons he said, *'Yea. It was taken from Richardsons'*.⁶⁸⁰⁶ He added, *'... the reason I have personal recollection is because Mike [Hardwick] took it...and I'd discussed it with Mike and that's where the recollection came in'*.⁶⁸⁰⁷ JP was asked if he or MH had sought authority to obtain a cover price from Richardson Projects. He replied, *'We sought authority from Dave [Prescott ('DP'), Managing Director] basically'*.⁶⁸⁰⁸

IV.4943. JP was shown a copy of the Richardson Projects Summary of Tender.⁶⁸⁰⁹ He was specifically asked to comment on the entry in the document under the heading *'Notes', 'Bramhall 'C' £1,625,000.00'*. He said this showed that *'... Bramall took cover'*.⁶⁸¹⁰

IV.4944. JP was asked to explain the second Richardson Projects Summary of Tender for this contract.⁶⁸¹¹ He noted that the figure in *'Notes', 'Bramhall 'C' £1,625,000.00'*, was different from the figure of £1,624,798 in Bramall's Tender Register entry for this tender. He said, *'Basically I would think that Richardsons said go around 1625 [£1,625,000] to...brought down the figure just to tidy it up, there's a few hundred quid knocked off there'*.⁶⁸¹²

IV.4945. DP was asked about the Bramall Tender Register entry for this tender⁶⁸¹³, dated 8 December 2003. He said, *'I recall the job because I did give authority to take a cover'*, and regarding the entry in the Tender Register, *'... booked in on the date that we received it, brief details of the client, the project, allocated a tender number which were in rotation....we'd entered the return date time, tender sum column is the amount of our offer that we bid, the contribution column is the amount of overhead and profit we would've added to it, no entry would suggest one of 3 things, we put nothing on it, unlikely; we've...we did tender it, we put contribution on it and the estimator forgot to fill the column in; or latterly it were a cover taken then entry of no contribution. Approximate value was the figure that we'd inserted when we'd received it based on probably the client's advice, competition column was who we'd list, column b or t: b would indicate that it's a budget tender which may mean that we were doing an approximate estimate or taking a cover...'*.⁶⁸¹⁴

⁶⁸⁰³ Interview transcript, OFT Document Reference 11168, page 15.

⁶⁸⁰⁴ Likely covers taken from third parties, OFT Document Reference B1432, page 18.

⁶⁸⁰⁵ Interview transcript, OFT Document Reference 11168, page 14.

⁶⁸⁰⁶ Interview transcript, OFT Document Reference 11168, page 15.

⁶⁸⁰⁷ Interview transcript, OFT Document Reference 11168, page 15.

⁶⁸⁰⁸ Interview transcript, OFT Document Reference 11168, page 15.

⁶⁸⁰⁹ Tender summary, OFT Document Reference A0033.

⁶⁸¹⁰ Interview transcript, OFT Document Reference 11168, page 15.

⁶⁸¹¹ Tender summary, OFT Document Reference A2047.

⁶⁸¹² Interview transcript, OFT Document Reference 11168, page 16.

⁶⁸¹³ Tender register, OFT Document Reference B1434, page 60.

⁶⁸¹⁴ Interview transcript, OFT Document Reference 11167, page 12.

IV.4946. DP was also shown the Summary of Tender from Richardson Projects.⁶⁸¹⁵ He was asked to comment specifically on the entry 'Notes', the word 'Bramhall' and 'C' and what they meant. He replied, '*... this looks like Richardson Project's tender adjudication front sheet...denoting that they've given Bramalls a cover, 1.625million, and that it was 9.93% higher than their bid level*'.⁶⁸¹⁶

Evidence from other companies – Richardson Projects

IV.4947. The OFT wrote to Richardson Projects on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Richardson Projects had participated in bid rigging on this tender. Richardson Projects replied to the OFT on 23 April 2007. Richardson Projects' Managing Director, Alan Richardson admitted that Richardson Projects had engaged in bid rigging with Bramall on this tender.

IV.4948. With its response, Richardson Projects provided the OFT with a further copy of its Summary of Tender document for this tender. This read as follows.⁶⁸¹⁷

<u>Tender No.</u> RP1778	<u>Tender Return</u> 09-Feb-04	<u>Tender Description</u> Tender Type	<u>The Beacon Resource Centre</u> Completion of Youth Centre	<u>Others</u>
	02-Feb-04	<u>Received</u>	D & B	1
	2.00 PM Salford	<u>Budget</u>	08-Dec-03	2 Bramall
<u>1st</u>		<u>Period</u>	1 M	3
		<u>Start</u>	28 Week's	4
		<u>Completion</u>	04-May-04	5
		<u>Client</u>	12-Nov-04	6
		<u>Architect</u>	Salford City Council	Gleeson (Returned)
		<u>Q.S. / E.A.</u>	Salford City Council	
		<u>Strut. Eng.</u>	Salford City Council	
		<u>Margin</u>	Salford City Council	BAAS (Returned)
		<u>RP Price</u>	10.00%	Wm. Hargreaves (Returned)
			1,478,161.00	

IV.4949. In its response to the Statement, Richardson Projects confirmed in respect of this Infringement that it '*...has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement*'.⁶⁸¹⁸

The OFT's analysis of the evidence and finding

IV.4950. From the evidence presented above, the OFT draws the following conclusions.

IV.4951. Bramall and Richardson Projects each accepted an invitation to tender for this contract. It appears that Richardson Projects completed the estimating process for the tender and indeed won the contract. Bramall was unable to submit a tender by the return date and/or did not want to win this contract.

IV.4952. Bramall's Tender Register entry for this tender, in MH's handwriting, shows that Bramall submitted the tender figure sum of £1,624,798 to CSC. Bramall made no entries in the 'CONTRIBUTION' [margins & profits] column, or in the

⁶⁸¹⁵ Tender summary, OFT Document Reference A0033.

⁶⁸¹⁶ Interview transcript, OFT Document Reference 11167, page 13.

⁶⁸¹⁷ Response from Richardson Projects, OFT Document Reference 10790, page 14.

⁶⁸¹⁸ Written representations of Richardson Projects, 27 June 2008, paragraph 4.

'ARCHITECT' or 'QS' [Quantity Surveyor] columns of the document. This indicates that Bramall did not appoint anyone to calculate the figures necessary for this tender but instead sought a cover price.

- IV.4953. A contemporaneous document from Richardson Projects provides corroboration of this. It shows '*Bramhall 'C' 1,625,000.00*'. The letter '*C*' was commonly used in the industry to indicate that a cover price had been given or taken. The figure of £1,625,000 is similar to Bramall's submitted tender figure of £1,624,798. Again, it was sometimes the case that an approximate cover price would be given to a competitor and that the competitor would amend that figure to a less rounded figure in order to make it look more genuine. JP confirmed that this was his view of events in this case.
- IV.4954. Bramall confirmed in leniency that it obtained a cover price from Richardson Projects in respect of this tender. JP of Bramall stated in interview that this was a Design and Build project and very difficult with great business risks involved, and confirmed his personal recollection that MH of Bramall obtained a cover price from Richardson Projects, as confirmed by the entry '*Bramhall 'C'*' in the '*Notes*' section of Richardson Projects Summary of Tender documents.⁶⁸¹⁹ He also confirmed that DP authorised the taking of a cover price from Richardson Projects.
- IV.4955. DP of Bramall confirmed that he recalled this tender because he gave '*authority to take a cover*' from Richardson Projects. He also stated that the entry '*Bramhall 'C'*' in the '*Notes*' section of Richardson Projects tender documents⁶⁸²⁰ showed that Bramall took a cover price for this tender from Richardson Projects.
- IV.4956. Richardson Projects has also admitted that it gave a cover price to Bramall for this tender. The OFT notes that Richardson Projects named Bramall as the competitor with whom it engaged in bid rigging, without sight of the OFT's evidence that Bramall was involved. This provides additional corroboration of the OFT's evidence in respect of this tender.
- IV.4957. The tender figure of £1,624,798 submitted by Bramall is in keeping with a cover price being sufficiently higher than Richardson Projects' winning bid to remain credible whilst also ensuring that Bramall lost the tender.
- IV.4958. The tender figure of £1,624,798 submitted by Bramall to CSC for this tender is second lowest after that of Richardson Projects. Since the other two bidders, BAAS and William Hargreaves, did not submit bids, Bramall could not have obtained a cover price from anyone other than Richardson Projects.
- IV.4959. The OFT also notes that the only tenders received by the client for this contract were the subject of bid rigging. The OFT also notes that Richardson Projects was apparently aware that neither BAAS Construction Ltd nor William Hargreaves Ltd, intended to submit a tender.
- IV.4960. The OFT therefore concludes that contact took place between Bramall and Richardson Projects. The OFT also concludes that Richardson Projects supplied a figure to Bramall for a cover bid.

⁶⁸¹⁹ Tender summaries, OFT Document References A0033 and A2047.

⁶⁸²⁰ Tender summaries, OFT Document References A0033 and A2047.

IV.4961. The OFT is satisfied that the facts set out in paragraphs IV.4934 to IV.4960 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁸²¹ In particular:

- (a) the provision of a figure for a cover bid from Richardson Projects to Bramall was not unilateral⁶⁸²², and contravenes the principle against direct or indirect contact between competitors;⁶⁸²³
- (b) Bramall can be presumed to have taken account of the information received from Richardson Projects (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁸²⁴ and
- (c) Richardson Projects can be presumed to have taken account of the information it received from Bramall (i.e. that Bramall did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁸²⁵

IV.4962. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bramall and Richardson Projects in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for Beacon Resource Centre, Cromwell Road, Charlestown Salford date of tender 9 February 2004.

IV.4963. In its response to the Statement, Bramall disputed the OFT's finding that Bramall took into account the information it received from Richardson Projects when determining its conduct, asserting instead that '*...[i]t is clear that the conduct of Bramall was not to win the contract, and that this decision has been made much before any possible exchange with other possible competitors. Accordingly, the OFT cannot maintain that "Bramall can be presumed to have taken account of the information it received from Richardson Projects (i.e. cover price) when determining its own conduct in the tendering process"*'.⁶⁸²⁶ Bramall also disputed the OFT's finding that Richardson Projects would have taken account of Bramall's receipt of its cover price when determining its conduct. Bramall asserted that '*...it is very time consuming to complete a tender, and therefore one would expect a company to decide whether to estimate and submit a competitive tender to be made at an early stage. It is therefore very likely that Richardson Projects determined its own conduct in the tendering process before knowing what Bramall's intentions were.*'⁶⁸²⁷

IV.4964. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶⁸²⁸ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Bramall has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this

⁶⁸²¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁸²² See paragraph IV.73 of the General comments on cover pricing section.

⁶⁸²³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁸²⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁸²⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁸²⁶ Written representations of Bramall, 27 June 2008 (as amended on 30 March 2009), paragraph 2.19.1.

⁶⁸²⁷ Written representations of Bramall, 27 June 2008 (as amended on 30 March 2009), paragraph 2.19.2.

⁶⁸²⁸ See paragraph III.58 of the Legal Background section.

or future tenders, so even if the OFT were to accept Bramall's assertion that the cover pricing did not affect the actual price submitted by Richardson Projects (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. Moreover, in the case of Bramall, it submitted a bid at or around the level indicated by Richardson Projects and as such the information was clearly taken into account in this aspect of its conduct.

Immunity and leniency assessment

IV.4965. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4966. Bramall informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bramall will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 180: Construction of a New Two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield – 9 February 2004

Client: Manor & Castle Development Trust
Parties: Admiral and T & C Williams

IV.4967. In 2004, Manor and Castle Development Trust ('Manor & Castle') sought tenders for the construction of a new two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield. The return date for the tender was 12:00 noon on 9 February 2004 and four companies were invited to tender: Ackroyd & Abbott, Admiral, T & C Williams and Wildgoose.

IV.4968. Manor & Castle received the following tender returns by 12:00 noon on 9 February 2004:⁶⁸²⁹

Company	Time and Date tender received	Amount of tender	Awarded the contract
Ackroyd & Abbott	12:00 noon 9 February 2004	£1,037,830	
Admiral	12:00 noon 9 February 2004	£1,131,169 £1,105,494 (34 weeks)	
T & C Williams	12:00 noon 9 February 2004	£1,101,432 £1,076,456 (34 weeks)	
Wildgoose	12:00 noon 9 February 2004	£1,145,874 £1,119,866 (36 weeks)	

IV.4969. Manor & Castle specified 28 weeks in the tender and contractors were also asked to quote their preferred times. Manor & Castle informed the OFT that it abandoned the tender exercise as the tenders quoted were over budget and value management techniques could not close the gap.

⁶⁸²⁹ Information from client, OFT Document Reference 8695.

IV.4977. Andrew Clarkson ('AC'), Estimating Director at Admiral, confirmed in interview in respect of this tender, '*... I remember we didn't price, although we did submit a tender*'.⁶⁸³⁵ AC also said '*So again I can only reiterate that I, I suspect we were too busy at the time it came in, and that we took a cover*'.⁶⁸³⁶

IV.4978. AC confirmed that it was his handwriting on the telephone message⁶⁸³⁷ and that '*It indicates to me that we took the cover from T & C Williams*'.⁶⁸³⁸ AC confirmed that, '*...he [John Hardy] obviously gave me those figures, as our cover price for this particular job*'.⁶⁸³⁹ AC also confirmed that JH of T & C Williams was someone with whom he engaged in cover pricing on more than one occasion.⁶⁸⁴⁰

Evidence from leniency applicant T & C Williams

IV.4979. As part of its leniency application, T & C Williams provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.635 to IV.649 above and is relied upon by the OFT in relation to this tender.

Witness evidence from leniency applicant T & C Williams

IV.4980. During interviews conducted in connection with its leniency application, T & C Williams' employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.635 to IV.649 above and is relied upon by the OFT in relation to this tender.

IV.4981. In respect of this tender, in interview JH confirmed that T & C Williams tendered for this contract but the client did not proceed with this job.⁶⁸⁴¹ On being shown by the OFT the telephone message provided by Admiral as part of its leniency application he said, '*....they obviously asked for a cover and I must have given them some figures. We didn't get the job; I think... we were second on the project*'.⁶⁸⁴²

The OFT's analysis of the evidence and finding

IV.4982. From the evidence presented above, the OFT draws the following conclusions.

IV.4983. T & C Williams and Admiral each accepted an invitation to tender for this contract.

IV.4984. It appears that T & C Williams completed the estimating process for the tender for the contract and that it wanted to win the tender for this contract and submitted a bid with the hope of winning the work.

IV.4985. Admiral was unable to submit a tender by the return date and/or did not want to win this contract.

⁶⁸³⁵ Interview transcript, OFT Document Reference 13299, page 33.

⁶⁸³⁶ Interview transcript, OFT Document Reference 13299, page 34.

⁶⁸³⁷ Interview transcript, OFT Document Reference 13299, page 35.

⁶⁸³⁸ Interview transcript, OFT Document Reference 13299, page 36.

⁶⁸³⁹ Interview transcript, OFT Document Reference 13299, page 36.

⁶⁸⁴⁰ Interview transcript, OFT Document Reference 13299, page 37.

⁶⁸⁴¹ Interview transcript, OFT Document Reference 12763, page 18.

⁶⁸⁴² Interview transcript, OFT Document Reference 12763, page 18.

IV.4986. In regard to T & C Williams, Admiral provided as part of its leniency application a copy of a telephone message received from JH at T & C Williams which records '28 WKS £1,113,169 our figure (1101)' and '37 WKS £1,105,494 our figure (1076?)'. Admiral has confirmed that this shows that it received a cover price from JH at T & C Williams. The figures recorded in full on the telephone message are identical to the tender figures, one for 28 weeks and the other for 36/37 weeks, which Admiral submitted for the work. The figures 1101 and 1076 match with the figures that T & C Williams submitted as its tenders, indicating that when T & C Williams gave cover prices to Admiral it also informed Admiral of the prices that it would be submitting for this contract.

IV.4987. The OFT notes that the telephone message also records the name of a T & C Williams employee, JH, providing further evidence that contact was made between the two parties. AC of Admiral confirmed in interview that he took a cover from T & C Williams for this tender and that it was his handwriting on the telephone message note.

IV.4988. When the specific evidence from Admiral was put to JH of T & C Williams in interview, he admitted that T & C Williams supplied a cover price to Admiral, as described in paragraph IV.4981 above.

IV.4989. The OFT notes in addition that the tender submitted by Admiral was higher than the tender submitted by T & C Williams, a pattern consistent with a cover price having been provided by T & C Williams.

IV.4990. The OFT therefore concludes that contact took place between Admiral and T & C Williams. The OFT also concludes that T & C Williams supplied a figure to Admiral for a cover bid.

IV.4991. The OFT is satisfied that the facts set out in paragraphs IV.4970 to IV.4990 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁸⁴³ In particular:

- (a) the provision of a figure for a cover bid from T & C Williams to Admiral was not unilateral⁶⁸⁴⁴, and contravenes the principle against direct or indirect contact between competitors;⁶⁸⁴⁵
- (b) Admiral can be presumed to have taken account of the information received from T & C Williams (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁸⁴⁶ and
- (c) T & C Williams can be presumed to have taken account of the information it received from Admiral (i.e. that Admiral did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁸⁴⁷

IV.4992. In its response to the Statement, T & C Williams stated in respect of this Infringement '*...[w]ithout knowledge or contact with the other tenderers, and given T & C Williams' undisputed desire to win the tender, it cannot be safely*

⁶⁸⁴³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁸⁴⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁸⁴⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁸⁴⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁸⁴⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

presumed that T & C Williams would have modified its conduct in any way on the basis of having given a cover to one other tenderer (Admiral).⁶⁸⁴⁸

IV.4993. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶⁸⁴⁹ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that T & C Williams has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept T & C Williams' assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that T & C Williams submits that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in Step 1 of Section VI (Enforcement).

IV.4994. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Admiral and T & C Williams, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the construction of a new two-storey medical centre at Harborough Avenue Medical Centre, Sheffield, tender deadline 9 February 2004.

Immunity and leniency assessment

IV.4995. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.4996. Admiral informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Admiral will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.4997. In respect of this tender, the OFT became aware of T & C Williams's involvement in bid rigging activities by virtue of the information provided by Admiral. T & C Williams will not therefore receive 100 per cent immunity in respect of this tender. However, T & C Williams will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁶⁸⁴⁸ Written representations of T & C Williams, 27 June 2008, paragraph 5(c).

⁶⁸⁴⁹ See paragraph III.58 of the Legal Background section.

Infringement 181: **New Sports Centre, Jubilee Campus, Nottingham – 20 February 2004**
Client: **University of Nottingham**
Parties: **Mansell and Willmott Dixon**

IV.4998. On 19 December 2003, University of Nottingham sought tenders for a new sports centre, Jubilee Campus, Nottingham.⁶⁸⁵⁰ The following five companies were invited to tender: Loach, Mansell, Mowlem, Thomas Fish and Willmott Dixon. The date and time of tender return was 20 February 2004 at 12:00 noon.⁶⁸⁵¹

IV.4999. University of Nottingham received the following tender returns:⁶⁸⁵²

Company	Date and time tender received	Amount of tender	Awarded contract
Mowlem	20 February 2004 at 9:50	£1,915,229.60	YES
Willmott Dixon	20 February 2004 at 11:15	£2,215,029.00	
Mansell	20 February 2004 at 11:07	£1,959,816.00	
Thomas Fish	20 February 2004 at 10:42	£2,099,841.00	
Loach	20 February 2004 at 11:52	£2,089,950.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – emails

IV.5000. As part of its leniency application, Mansell’s legal representatives provided an email dated 19 February 2004, from Paul Winson (‘PW’), a senior estimator⁶⁸⁵³ in the Nottingham office, to Mark Holland at Willmott Dixon. The subject of the email is ‘*New Sports Hall, Jubilee Campus*’ and states ‘*Mark, Please find attached contract sum analysis for the above, as discussed the figures all need shuffling to avoid suspicion*’.⁶⁸⁵⁴ Attached within the email is an Excel spreadsheet called ‘*jubilee csa.xls*’. This contains a breakdown of figures for various parts of the project.

IV.5001. Mansell’s legal representatives also provided the OFT with two emails in an email string dated 20 February 2004.⁶⁸⁵⁵ The bottom email in the string is from Phil George at Willmott Dixon to PW at 10:16, the subject is ‘*JUBILEE CAMPUS SPORTS CENTRE*’ and the email states ‘*Paul, I have just been asked to double check one last thing with you – Can you please confirm that the figure you have given us of £2,164,815 includes a figure for the Design Contingency*’. The reply from PW at 10:52, at the top of the string, states, ‘*Phil, Yes it does*’.

IV.5002. Mansell’s legal representatives also provided an email dated 2 March 2004, from Tony Osbond (‘TO’), Business Development Manager for the Eastern Region of Mansell to Tim Spencer and others at Mansell. The subject of the email is ‘*Re University of Nottingham Sports Centre*’ and the email states ‘*Tender submission £1,989,816.00 ... put us in 2nd place behind Mowlem*’.

⁶⁸⁵⁰ Information from client, OFT Document Reference 9406.

⁶⁸⁵¹ Information from client, OFT Document Reference 9406.

⁶⁸⁵² Information from client, OFT Document Reference 9406.

⁶⁸⁵³ Paul Winson joined Mansell, as a senior estimator, in November 2003.

⁶⁸⁵⁴ Leniency application, OFT Document References B0853 and B4117, page 2.

⁶⁸⁵⁵ Email, OFT Document Reference B0854.

Mowlem's price is not known, other submissions from Loach, Willmott Dixon (c), SOL, Thos Fish [...] [C].⁶⁸⁵⁶

Evidence from leniency applicant Mansell

IV.5003. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.⁶⁸⁵⁷ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.5004. Mansell's legal representatives also provided to the OFT a schedule of covers for the Eastern Region, which includes this tender. In respect of this tender the table shows that Mansell gave a cover price to Willmott Dixon.⁶⁸⁵⁸ Under the heading '*Estimator Recollection*' it states '*Paul Winson (Senior Estimator) recalls that MCSL [Mansell Construction Services Ltd] gave a cover price and a tender build-up to Willmot [sic] Dixon*'. Under the heading '*Documentary evidence of cover*' it states, in relation to the emails provided '*These documents give a strong indication that MCSL gave a cover to Willmott Dixon. [...] [C]*'.

IV.5005. Further information has been provided by Mansell's legal representatives in respect of the email dated 2 March 2004. They state '*... Tony Osbond had no direct knowledge of the references to Willmott Dixon [.....] [C], although he believes that the reference (c) denotes that a cover was exchanged. Tony Osbond stated that he would have obtained this information about other bidders from the estimating team ...*'.⁶⁸⁵⁹

Witness evidence from leniency applicant Mansell

IV.5006. During interviews conducted in connection with its leniency application, an employee of Mansell and an ex-employee from the Nottingham office provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.5007. During an interview with the OFT on 17 April 2007, PW stated '*... while I was pricing the job, we had a call, to our chief estimator from ... Willmott Dixon, who said that basically they were doing lots of work for the client, but they can't do this one and they didn't want to lose face. Could we provide them with a cover price? And the chief estimator obviously took the decision and saw his managing director and yes, we would provide them with a ... cover price, and just before the tender was about to go in, he required a contracts analysis, which is basically just a build-up for the tender figure, so I gave him, a list of numbers ... it's the attachment there Jubilee CSA, and asked him to*

⁶⁸⁵⁶ Email, OFT Document Reference B0851.

⁶⁸⁵⁷ Leniency application, OFT Document Reference B0734.

⁶⁸⁵⁸ Schedule of covers, OFT Document Reference B3601, page 1.

⁶⁸⁵⁹ Information points following interviews, OFT Document Reference B4116, page 4.

shuffle the ... numbers a little bit, basically so it didn't look like ours. Although those numbers in that spreadsheet wouldn't be the same as ours'.⁶⁸⁶⁰

IV.5008. In respect of the email exchange with Phil George of 20 February 2004, PW stated *'Yes, he was somebody who worked at Willmott Dixon and ... they'd had the price which we ... gave to them, and their chief estimator had got a question as to whether we'd included the same amount of money for a design contingency and I just replied to them ... yeah, it does*'.⁶⁸⁶¹ In respect of the people with whom he had contact at Willmott Dixon, PW stated *'It was ... Mark Collin [sic – Holland] ... I believe he's chief estimator. The other lad [Phil George] is actually somebody, I used to work with ... and they'd asked him to ... ring me basically because he knew me*'.⁶⁸⁶²

IV.5009. [...] [C]⁶⁸⁶³

Evidence from other companies – Willmott Dixon

IV.5010. The OFT wrote to Willmott Dixon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Willmott Dixon had participated in bid rigging on this tender. In response to this letter Willmott Dixon stated that it was unable to accept the OFT's Fast Track Offer.⁶⁸⁶⁴

IV.5011. The OFT subsequently wrote to Willmott Dixon's ultimate parent company at the time of this Infringement, Willmott Dixon Limited, on 6 November 2007, asking it to comment on Willmott Dixon's response to the OFT's Fast Track Offer, given that the OFT intended to hold Willmott Dixon Limited jointly and severally liable for any infringements committed by Willmott Dixon in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Willmott Dixon Limited stated *'... the decision was taken by the subsidiary, and is now confirmed by the parent, not to accept the reduction in penalty offer ...*'.⁶⁸⁶⁵

IV.5012. In their response to the Statement, however, Willmott Dixon's legal representatives, McDermott Will & Emery UK LLP, stated *'[we] accept that, in this case, there does appear to be evidence of the existence of cover-pricing*'⁶⁸⁶⁶, *'our client does not contest that the OFT has satisfied the requisite evidentiary standard in this case*'⁶⁸⁶⁷, and *'In summary, our client believes that, in this case, a cover-price was taken ...*'⁶⁸⁶⁸ in respect of this Infringement. They further stated that *'a considerable amount of preparatory work had been*

⁶⁸⁶⁰ Interview transcript, OFT Document Reference 11508, pages 9 and 10.

⁶⁸⁶¹ Interview transcript, OFT Document Reference 11508, page 10.

⁶⁸⁶² Interview transcript, OFT Document Reference 11508, page 11.

⁶⁸⁶³ [...] [C]

⁶⁸⁶⁴ Response from Willmott Dixon, OFT Document Reference 10908.

⁶⁸⁶⁵ Response from Willmott Dixon Limited, OFT Document Reference 14120, page 1.

⁶⁸⁶⁶ Written representations of Willmott Dixon, 27 June 2008, paragraph 17.

⁶⁸⁶⁷ Written representations of Willmott Dixon, 27 June 2008, paragraph 18.

⁶⁸⁶⁸ Written representations of Willmott Dixon, 27 June 2008, paragraph 24.

*undertaken in relation to the tender but ... our client was ultimately unable to complete the contract analysis*⁶⁸⁶⁹ and took a cover price.

The OFT's analysis of the evidence and finding

IV.5013. From the evidence presented above, the OFT draws the following conclusions.

IV.5014. Mansell and Willmott Dixon each accepted an invitation to tender for this contract.

IV.5015. Both companies submitted a tender. Willmott Dixon was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Mansell completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.

IV.5016. Mansell's email of 19 February 2004 regarding this tender shows *'Mark, Please find attached contract sum analysis for the above, as discussed the figures all need shuffling to avoid suspicion'*. Mansell confirmed that it gave Willmott Dixon a tender build-up for the tender figure it had provided.

IV.5017. Willmott Dixon's email of 20 February 2004 to Mansell regarding this tender shows *'Paul, I have just been asked to double check one last thing with you – Can you please confirm that the figure you have given us of £2,164,815 includes a figure for the Design Contingency'*. Mansell confirmed that this shows that it gave a cover price to the company noted of the amount shown. The OFT notes that Willmott Dixon's bid was close to and higher than, this figure. As described in paragraphs IV.110 to IV.112 above, on occasions companies would further inflate the figures that had been given to them as cover prices.

IV.5018. Mansell's estimator for this tender, PW, confirmed specific recollection of giving a cover price and tender build-up to Willmott Dixon for this tender. Mansell's email of 2 March 2004 regarding this tender shows *'Tender submission £1,989,816.00 ... put us in 2nd place behind Mowlem. Mowlem's price is not known, other submissions from Loach, Willmott Dixon (c), SOL, Thos Fish [...] [C]'*. Mansell has confirmed that '(c)' indicates that a cover price was given, [...] [C].

IV.5019. [...] [C]

IV.5020. The OFT further notes that the tender submitted by Willmott Dixon was higher than the tender submitted by Mansell, the pattern consistent with a cover price having been provided.

IV.5021. Both Parties have now admitted their involvement in cover pricing in respect of this Infringement.

⁶⁸⁶⁹ Written representations of Willmott Dixon, 27 June 2008, paragraph 24.

IV.5022. The OFT therefore concludes that contact took place between Mansell and Willmott Dixon. The OFT also concludes that Mansell supplied a figure to Willmott Dixon for a cover bid, and a breakdown of that figure.

IV.5023. The OFT is satisfied that the facts set out in paragraphs IV.5000 to IV.5022 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁸⁷⁰ In particular:

- (a) the provision of a figure for a cover bid from Mansell to Willmott Dixon was not unilateral⁶⁸⁷¹, and contravenes the principle against direct or indirect contact between competitors;⁶⁸⁷²
- (b) Willmott Dixon can be presumed to have taken account of the information received from Mansell (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁸⁷³ and
- (c) Mansell can be presumed to have taken account of the information it received from Willmott Dixon (i.e. that Willmott Dixon did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁸⁷⁴

IV.5024. In its response to the Statement, Balfour Beatty stated '*The OFT has adduced no evidence that the giving of a cover was taken into account by Balfour Beatty and Mansell when pricing its tenders nor is there any evidence that the giving of a cover had any effect on these parties' pricing of the tender*'.⁶⁸⁷⁵ The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁶⁸⁷⁶ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Balfour Beatty has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Balfour Beatty's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that Balfour Beatty submits that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

IV.5025. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Willmott Dixon in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new sports centre, Jubilee Campus, Nottingham, tender deadline 20 February 2004.

⁶⁸⁷⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁸⁷¹ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁸⁷² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁸⁷³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁸⁷⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁸⁷⁵ Written representations of Balfour Beatty, 27 June 2008, paragraph 10.8.

⁶⁸⁷⁶ See paragraph III.58 of the Legal Background section.

Immunity and leniency assessment

IV.5026. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5027. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 182: Apartment Development, Speculation Street, York – 25
February 2004**
Client: Turner & Holman
Parties: Jack Lunn and Lindum/Lindum Group⁶⁸⁷⁷

IV.5028. On 6 January 2004, Turner & Holman sought tenders for an apartment development, Speculation St, York.⁶⁸⁷⁸ The following five companies were invited to tender: D & A Construction (York) Ltd, Jack Lunn, William Birch & Sons Ltd, Lotus and Lindum/Lindum Group.⁶⁸⁷⁹ The deadline for receipt of tenders was 12:00 noon 25 February 2004.⁶⁸⁸⁰

IV.5029. Turner & Holman received the following tender returns.⁶⁸⁸¹

⁶⁸⁷⁷ Lindum is a subsidiary of Lindum Group. The evidence is inconclusive as to whether Lindum, or its parent company Lindum Group, was the Participant Company in this Infringement (or indeed, both companies were Participant Companies). Noting the OFT's conclusion that Lindum and Lindum Group formed part of the same economic entity (see paragraph II.905) and would hence be jointly and severally liable for any infringement by either of them, the OFT does not consider it necessary to determine whether the Participant Company was Lindum or Lindum Group. Other than for replication of contemporaneous evidence, the OFT refers in the description of this Alleged Infringement to 'Lindum/Lindum Group', which should be taken to mean the undertaking comprising Lindum and Lindum Group. The OFT notes that in light of the finding that the two companies formed part of the same undertaking, it is immaterial whether the participant company was Lindum, Lindum Group or both companies, as the level of financial penalty for this infringement will be based on the consolidated turnover of Lindum Group, as parent company.

⁶⁸⁷⁸ Information from client, OFT Document Reference 10168.

⁶⁸⁷⁹ Information from client, OFT Document Reference 10168. In this document (information provided in response to the OFT's enquiries, dating from April 2007) the client states that 'Lindum Homes' (Lindum Homes Limited, a wholly owned subsidiary of Lindum Group) was invited to tender. However, the contemporaneous tender documents provided by the client show that the tender was in fact submitted by Lindum Group (OFT Document Reference 10173) and that a contract sum analysis was subsequently submitted by Lindum (OFT Document Reference 10173, page 4). The contemporaneous evidence accords with additional information provided by the client, in which it refers to the tender submission being received from Lindum Group and Lindum (OFT Document Reference 10171). Furthermore, Lindum Group has also informed the OFT that Lindum Homes was not involved in the Infringement: '*Lindum Homes is a residential property developer. It purchases and develops plots of land with its own workforce and then sells the finished properties directly to the public... In the relevant period, because of the nature of its business, Lindum Homes has never received an invitation to tender for a construction project. Accordingly Lindum Homes has never had an opportunity to submit a 'cover price'...*' (Written representations of Lindum Group, 27 June 2008, paragraph (1)10). The OFT therefore concludes that it was Lindum or Lindum Group, rather than Lindum Homes, that was invited to tender, and that the non-contemporaneous tender summary provided by the client (OFT Document Reference 10168) incorrectly identified Lindum Homes. Given the contemporaneous evidence, other information provided by the client and the representations of Lindum Group, the OFT does not consider this error to be material to its case.

⁶⁸⁸⁰ Information from client, OFT Document Reference 10168.

⁶⁸⁸¹ Information from client, OFT Document Reference 10168.

Company	Time & Date tender received	Amount of tender	Awarded contract
D & A Construction (York) Ltd	N/A	N/A	
Jack Lunn	Prior to 12:00 noon on 25 February 2004	£1,778,139	Yes
William Birch & Sons Ltd	Prior to 12:00 noon on 25 February 2004	£2,260,148	
Lotus	Declined	N/A	
Lindum Group	Prior to 12:00 noon on 25 February 2004	£1,875,436	

IV.5030. Turner & Holman provided no further information to suggest whether D & A Construction (York) Ltd submitted a bid or declined to tender.

IV.5031. Turner & Holman also provided a copy of the contract sum analysis received from Jack Lunn and Lindum⁶⁸⁸², in addition to Lindum Group's tender submission. Turner & Holman stated *'You will note that the tender submission from Lindum Construction was less extensive than that received from Jack Lunn, though some further information was provided by them at a later stage'*.⁶⁸⁸³ Jack Lunn originally tendered £1,778,139.00⁶⁸⁸⁴ for this contract, but later submitted a revised tender of £1,831,007.39.⁶⁸⁸⁵ Lindum Group submitted a tender on 25 February 2004, of £1,875,436.00 for this contract.⁶⁸⁸⁶ A revised contract sum analysis was provided by Lindum for £1,975,436.00.⁶⁸⁸⁷ A handwritten note on this document states, *'Revised tender summary as received from Lindum Construction at interview'*.⁶⁸⁸⁸

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Jack Lunn – Form of Tender, Fax and attached Documents.

IV.5032. During the OFT's search of Jack Lunn's premises a Form of Tender for proposed apartment development, Speculation Street, York was found. The Form of Tender stated that Jack Lunn tendered *'£1,778,139.00'* for the contract.⁶⁸⁸⁹ The Form of Tender was signed by Anthony Metcalf on 25 February 2004.⁶⁸⁹⁰ Included in this document was the contract sum analysis submitted by Jack Lunn.⁶⁸⁹¹

⁶⁸⁸² The tender submission was signed on behalf of Lindum Group. However, the contract sum analysis was subsequently provided to the client by Lindum.

⁶⁸⁸³ Information from client, OFT Document Reference 10171.

⁶⁸⁸⁴ Information from client, OFT Document Reference 10172, page 25.

⁶⁸⁸⁵ Information from client, OFT Document Reference 10172, page 24.

⁶⁸⁸⁶ Information from client, OFT Document Reference 10173, page 1.

⁶⁸⁸⁷ Information from client, OFT Document Reference 10173, page 4.

⁶⁸⁸⁸ Information from client, OFT Document Reference 10173, page 4.

⁶⁸⁸⁹ Form of Tender, OFT Document Reference A0327, page 1.

⁶⁸⁹⁰ Form of Tender, OFT Document Reference A0327, page 3.

⁶⁸⁹¹ Form of Tender, OFT Document Reference A0327, page 4.

IV.5033. Also found was a fax transmission sheet and attached documents of which there were 10 pages in total. The fax transmission sheet showed that a fax was successfully sent on '17-Mar 08:55' and stated:⁶⁸⁹²

' From: Tony Metcalf
Date: 17 Mar 2004
Our Ref: AWM/E04-04
Pages: 10
including this page:

To: Colin Burr
Company: Lindum Construction
Fax No: [...] [C]
Acknowledgement required?: Yes
Original by Post?: No

RE: SPECULATION STREET, YORK

Dear Colin

I attach herewith the contract sum analysis for the above project for your information. This has been balanced to your tender submission figure. Please feel free to adjust any figure you may feel "unbalanced".
We will be adding to our tender about £20,000 for electrical sub mains in order to position the meters at ground floor level rather than adjacent to each flat entrance.

We will also be adding about £10,000 for NHBC which we excluded from our tender.

Should you require any other information please contact me

Yours Sincerely
For Jack Lunn (Construction) Ltd
Tony Metcalfe
Estimator
Direct tel [...] [C]'

IV.5034. In addition to the fax transmission sheet, a contract sum analysis for proposed apartment development, Speculation Street, York was included in the 10-page document. The following handwritten entry was made in the top left hand corner:⁶⁸⁹³

'Colin Burr [...] [C]
LINDUM SUGGESTION'

IV.5035. The document contained a breakdown of figures for different aspects of the tender and stated the 'AMOUNT OF CONTRACT SUM £1,875,436'.⁶⁸⁹⁴

Evidence from leniency applicant – Jack Lunn

IV.5036. As part of its leniency application, Jack Lunn's legal representatives provided a general explanation of its participation in cover pricing.⁶⁸⁹⁵ This evidence is set out in paragraphs IV.431 to IV.440 above and is relied upon by the OFT in relation to this tender.

⁶⁸⁹² Fax transmission sheet, OFT Document Reference A0329.

⁶⁸⁹³ Contract sum analysis, OFT Document Reference A0331, page 1.

⁶⁸⁹⁴ Contract sum analysis, OFT Document Reference A0331, page 1.

⁶⁸⁹⁵ Leniency application, OFT Document Reference A0673, page 7.

IV.5037. In addition to its leniency application, Jack Lunn provided to the OFT a schedule (*'Jack Lunn Construction Cover Summary Schedule'*) which detailed projects/contracts identified by the company during the course of an internal investigation conducted by Stephen Bradbury, Richard Bryan, Graham Lunn, Anthony Metcalf ('AM'), an estimator at Jack Lunn, and Keith Poskitt into potential cover prices where it was considered cover prices had either been given or taken. At JLC14 of the *'Jack Lunn Construction Cover Summary Schedule'* is the following entry:⁶⁸⁹⁶

Reference Number	Date of Submission	Scheme Title	Client	Submitted tender value	Cover price Taken	Cover price given
JLC14	25-Feb-04	28 Flats Speculation Street York	K Mohan	£1,764,676		5%

Contractor and address	Person Spoken to	Jack Lunn Successful	Comments/Notes
Lindum		Yes	

IV.5038. Jack Lunn also provided to the OFT a detailed explanation of the documents taken during the OFT's search of the company's office on 21 March 2006.⁶⁸⁹⁷ In relation to the fax transmission sheet and attached documents referred to above in paragraphs IV.5033 and IV.5034 Jack Lunn stated, *'These papers are copies of a FAX TRANSMISSION SHEET and the contract sum analysis sent from Tony Metcalfe, one of the estimators employed by JLC addressed to a Mr Colin Burr, an estimator at Lindum Construction, confirming that the contract sum analysis for the Speculation Street Tender is attached along with other financial information relating to the tender. This fax is a direct result of JLC providing Lindum Construction with a cover price'*.⁶⁸⁹⁸

IV.5039. Jack Lunn further explained that *'The other two Contractors tender figures were higher than both JLC's figure and the Lindum figure. ... Turner and Holman asked for Contract Sum Analyses ('CSA') from both JLC and Lindum. ... At this stage Lindum had two options on how to proceed. They could inform the client that they had taken a cover price and not done any work on the tender or they could ask JLC for specific details such as JLC's contract sum analysis and quickly attempt to understand the scheme whilst providing their own higher contract sum analysis to represent the tender figure actually submitted by them, Lindum recognized that they could only adopt the second option if JLC were prepared to provide their contract sum analysis. Tony Metcalfe agreed to release this'*.⁶⁸⁹⁹

⁶⁸⁹⁶ Leniency application, OFT Document Reference A0675, page 2.

⁶⁸⁹⁷ Leniency application, OFT Document Reference A0673, pages 11 to 17.

⁶⁸⁹⁸ Leniency application, OFT Document Reference A0673, pages 11 and 12.

⁶⁸⁹⁹ Leniency application, OFT Document Reference A0673, page 12.

IV.5040. Jack Lunn explained that the sequence of events could be summarised as follows:⁶⁹⁰⁰

<i>'JLC gives cover price to Lindum Construction</i>	<i>24 February 2004</i>
<i>JLC submits tender figure</i>	<i>25 February 2004</i>
<i>Turner and Holman requests information and CSA</i>	<i>2 March 2004</i>
<i>JLC provides their CSA to Lindum</i>	<i>17 March 2004</i>
<i>Both JLC attends meetings with Turner and Holman/Client</i>	<i>22 March 2004</i>
<i>JLC awarded the contract</i>	<i>8 April 2004'</i>

IV.5041. In its response to the Statement, Jack Lunn did not make any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Jack Lunn

IV.5042. During interviews with the OFT on 8 March 2007, conducted in connection with Jack Lunn's leniency application, Jack Lunn employees provided further general explanations of Jack Lunn's participation in cover pricing. This evidence is set out in paragraphs IV.431 to IV.440 above and is relied upon by the OFT in relation to this tender.

IV.5043. In particular, during an interview with AM, he was asked what he recalled about the contract for 28 apartments, Speculation Street, York. AM replied *'We were approached by, I think it was Lindum Construction, who had also been given the tender documents, they were not able to prepare a tender and they asked us for a cover price based on that, which they were given'*.⁶⁹⁰¹ AM confirmed during interview that *'1875436'* was the cover price that AM supplied to Lindum.⁶⁹⁰² AM was shown the fax transmission sheet.⁶⁹⁰³ AM confirmed that he sent a fax to Colin Burr, an estimator at Lindum on 17 March 2004⁶⁹⁰⁴ with a contract sum analysis attached. AM explained *'we gave them a tender figure or a cover figure and when we submitted to them a contract sum analysis, we adjusted those sums in there to come back to the cover figure that we'd given them'*,⁶⁹⁰⁵ essentially providing Lindum with its own contract sum analysis.⁶⁹⁰⁶

Evidence from other companies – Lindum Group

IV.5044. The OFT wrote to Lindum Group on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lindum Group had participated in bid rigging on this tender. In response to this letter Lindum Group provided a statement which said *'This job was supposed to be a negotiated job, as we had done a lot of budgets for Turner & Holman, the architects. Unexpectedly, the job came out to tender and we submitted a higher price. We believe that this was the budget sqft figure of*

⁶⁹⁰⁰ Leniency application, OFT Document Reference A0673, page 12.

⁶⁹⁰¹ Interview transcript, OFT Document Reference 11292, page 12.

⁶⁹⁰² Interview transcript, OFT Document Reference 11292, page 16.

⁶⁹⁰³ Fax transmission sheet, OFT Document Reference A0329.

⁶⁹⁰⁴ Interview transcript, OFT Document Reference 11292, page 15.

⁶⁹⁰⁵ Interview transcript, OFT Document Reference 11292, pages 14 and 15.

⁶⁹⁰⁶ Interview transcript, OFT Document Reference 11292, page 15.

£1.87m. An ex-employee, Neil Coote, was involved in this job and he has said that it was a budget figure and does not know of any cover'.⁶⁹⁰⁷

IV.5045. Lindum Group stated in their response to the Statement that '*...with the benefit of detailed analysis of the [Statement], it is possible for Lindum Group now to see that it is likely that Infringement No. 182 took place...*'⁶⁹⁰⁸ and that Lindum Group '*does not contest the fact of the infringements [including this Infringement]*'.⁶⁹⁰⁹

IV.5046. Its response to the Statement further stated '*...Colin Burr breached the express and implicit instructions of his employer and engaged in "cover pricing". Mr Burr left Lindum Group shortly after the OFT inspection in January 2006*'.⁶⁹¹⁰

IV.5047. Lindum Group's response to the Statement also stated that after receiving a letter from the OFT on 23 March 2007 stating that there was evidence that Lindum had been involved in cover pricing, Lindum conducted a further investigation. At that time '*...a further investigation [was undertaken] by Mr Chambers [Lindum Group's Chairman], which involved closely questioning each of the estimators, [during which] it became apparent that cover pricing had taken place although on a limited scale...*'.⁶⁹¹¹

The OFT's analysis of the evidence and finding

IV.5048. From the evidence presented above, the OFT draws the following conclusions.

IV.5049. Jack Lunn and Lindum/Lindum Group each accepted an invitation to tender for the contract for an apartment development at Speculation Street, York. Lindum/Lindum Group was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5050. Jack Lunn completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Jack Lunn being the lowest received and the fact it won the contract.

IV.5051. AM of Jack Lunn confirmed that on 24 February 2004 he gave a cover price to Colin Burr, who he believed to be an estimator at Lindum. According to information received from Lindum Group, CB was an employee of Lindum Group at that time. The OFT does not consider that it is material to its analysis whether CB was employed by Lindum or Lindum Group. Once the tenders had been received by the client on 25 February 2004, the two lowest tenderers, Lindum/Lindum Group and Jack Lunn, were each asked by the client on 2 March 2004, to submit their contract sum analysis. At this point, according to Jack Lunn, Lindum/Lindum Group had to decide how to proceed. Lindum/Lindum Group could either inform the client that it had taken a cover price and not carried out any work for this tender, or it could ask Jack Lunn for specific information in order to complete its contract sum analysis.

⁶⁹⁰⁷ Response from Lindum, OFT Document Reference 10515, page 6.

⁶⁹⁰⁸ Written representations of Lindum, 27 June 2008, paragraph 3(13).

⁶⁹⁰⁹ Written representations of Lindum, 27 June 2008, paragraph 3.

⁶⁹¹⁰ Written representations of Lindum, 27 June 2008, paragraph 12.

⁶⁹¹¹ Written representations of Lindum, 27 June 2008, paragraphs 19 to 20.

- IV.5052. The OFT understands that Lindum/Lindum Group decided to seek information from Jack Lunn in order to provide the client with a contract sum analysis for the project. A fax sent by AM on 17 March 2004 to CB in response to this request stated *'I attach herewith the contract sum analysis for the above project for your information. This has been balanced to your tender submission figure. Please feel free to adjust any figure you feel "unbalanced"'*. The fax also gave details of adjustments to be made by Jack Lunn to its own tendered figures.
- IV.5053. Attached to this fax was a contract sum analysis with a handwritten comment *'Colin Burr [.....] [C] LINDUM, SUGGESTION'* handwritten in the top left hand corner. The *'AMOUNT OF CONTRACT SUM'* recorded was *'£1,875,436'*. This was the original amount tendered by Lindum Group.
- IV.5054. This contemporaneous evidence shows that AM of Jack Lunn supplied Colin Burr of Lindum/Lindum Group with a contract sum analysis, with the figures adjusted to reflect the initial cover figure given by Jack Lunn to Lindum/Lindum Group. The OFT considers in the light of the contemporaneous evidence from Jack Lunn, and Jack Lunn and AM's admissions and explanations of that contemporaneous evidence, that Jack Lunn supplied Lindum/Lindum Group with a cover price for this tender and in addition provided Lindum/Lindum Group with additional pricing information in the form of a contract sum analysis.
- IV.5055. The OFT also notes that the tender submitted by Lindum/Lindum Group was higher than the tender submitted by Jack Lunn, the pattern consistent with a cover price having been provided.
- IV.5056. Lindum Group has now accepted that it is likely that cover pricing took place in respect of this Infringement and does not contest the fact of this Infringement.
- IV.5057. The OFT therefore concludes that contact took place between Jack Lunn and Lindum/Lindum Group. The OFT also concludes that Jack Lunn supplied a figure to Lindum Group for a cover bid.
- IV.5058. The evidence is inconclusive as to whether it was Lindum and/or Lindum Group that submitted the tender and as to whether CB was employed by Lindum or Lindum Group. The OFT also notes that Lindum Group considered Lindum to be its 'main contracting arm' and that Lindum Group's trading activities were carried out by 'divisions' including Lindum, and as such the two related legal entities acted in concert. In light of this, and noting the OFT's conclusion that Lindum and Lindum Group formed part of the same economic entity (see paragraph II.905 above) and would hence be jointly and severally liable for any infringement by either of them, the OFT does not consider it necessary to determine whether the tender was submitted by Lindum or Lindum Group or whether the contact with Jack Lunn took place with Lindum or Lindum Group.
- IV.5059. The OFT is satisfied that the facts set out in paragraphs IV.5036 to IV.5057 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁹¹² In particular:

⁶⁹¹² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from Jack Lunn to Lindum/Lindum Group was not unilateral⁶⁹¹³, and contravenes the principle against direct or indirect contact between competitors;⁶⁹¹⁴
- (b) Lindum/Lindum Group can be presumed to have taken account of the information received from Jack Lunn (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁹¹⁵ and
- (c) Jack Lunn can be presumed to have taken account of the information it received from Lindum/Lindum Group (i.e. that Lindum/Lindum Group did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁹¹⁶

IV.5060. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jack Lunn and Lindum/Lindum Group, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for an apartment development, Speculation Street, York, tender deadline 25 February 2004.

Immunity and leniency assessment

IV.5061. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5062. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Jack Lunn will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Jack Lunn in respect of this Infringement.

**Infringement 183: Conversion for Audio Visual Services, 12 Chiswick Road,
University of Leicester – 5 March 2004**
Client: University of Leicester
Parties: Phoenix and J H Hallam

IV.5063. On 11 February 2004, the University of Leicester sought tenders for the conversion for audio visual services, 12 Chiswick Road, University of Leicester. The return date for the tender was 12:00 noon on 5 March 2004 and five companies were invited to tender: Phoenix, Brown & Shaw, Sandells Interiors, J H Hallam and B & A.⁶⁹¹⁷

⁶⁹¹³ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁹¹⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁹¹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁹¹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁹¹⁷ Information from client, OFT Document Reference 13836.

paragraph IV.5066 above. J H Hallam also stated that the figure '£253.k' indicated, 'COVER ex PHOENIX CONTRACTS'.

IV.5070. J H Hallam said, 'John Hallam made the notes in boxes and drew the arrows during discussions with Mr Gill when he was assembling the information to support Hallam's leniency application. Mr Hallam did this in order to highlight what he was told by Mr Gill and to try and make things clear for the OFT. He distinctly recalls his discussion with Mr Gill concerning this particular contract'.⁶⁹²⁴

IV.5071. Also to further assist the OFT enquiry, J H Hallam provided an explanation of the annotations made on the letter dated 30 April 2004 from the University of Leicester. J H Hallam said, 'The tender was dealt with by Mr Gill. On OFT document ABR/117 Mr Gill wrote the note 'Hallams covered by Phoenix' against Hallam's tender sum of £388,264.35 in response to Richard Blount's (Commercial Director) handwritten request to Mike Coles (General Works Director), 'Mike can you let me know which was our tender''.⁶⁹²⁵

IV.5072. In its response to the Statement, J H Hallam stated 'JH Hallam does not contest the OFT's findings of infringement'.⁶⁹²⁶

Evidence from leniency applicant Phoenix

IV.5073. As part of its leniency application, Phoenix provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.527 to IV.536 above and is relied upon by the OFT in relation to this tender.

IV.5074. In its response to the Statement, Phoenix stated that '*...Phoenix has accepted that it engaged in cover pricing in breach of the Chapter I prohibition*'.⁶⁹²⁷

Witness evidence from leniency applicant Phoenix

IV.5075. During interviews conducted in connection with its leniency application, Phoenix's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.527 to IV.536 above and is relied upon by the OFT in relation to this tender.

IV.5076. In respect of this tender, in interview Michael Williamson ('MW'), Managing Director of Phoenix, confirmed that Phoenix tendered for this contract but that he could not recall any further details about the tender.⁶⁹²⁸ On being shown by the OFT the entry from SG's diary for 5 March 2004 and the letter from the University of Leicester dated 30 April 2004 with the handwritten entry 'Hallams: Covered by Phoenix', MW said, '*.....it is possible [that Phoenix provided J H Hallam with a cover price], because I've said that we've done it backwards and forwards with various people....*'.⁶⁹²⁹ MW also said that it was a 'fair assumption'⁶⁹³⁰ to make that any contact between Phoenix and J H Hallam

⁶⁹²⁴ Response from Watson Burton, OFT Document Reference 14294.

⁶⁹²⁵ Response from Watson Burton, OFT Document Reference 14294.

⁶⁹²⁶ Written representations of J H Hallam, 27 June 2008, paragraph 73.

⁶⁹²⁷ Written representations of Phoenix, 27 June 2008, paragraph 91.

⁶⁹²⁸ Interview transcript, OFT Document Reference 13494, page 4.

⁶⁹²⁹ Interview transcript, OFT Document Reference 13494, page 7.

⁶⁹³⁰ Interview transcript, OFT Document Reference 13494, page 5.

about this tender would have been made by the estimator working at Phoenix at the time, Roger Grace.

The OFT's analysis of the evidence and finding

IV.5077. From the evidence presented above, the OFT draws the following conclusions.

IV.5078. Phoenix and J H Hallam each accepted an invitation to tender for this contract.

IV.5079. Phoenix completed the estimating process for the tender for this contract. Phoenix wanted to win the tender for this contract and submitted a bid with the hope of winning the work.

IV.5080. J H Hallam was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5081. In regard to J H Hallam, SG's diary entry for 5 March 2004 has the entry '*Chiswick Rd – 253.k*' J H Hallam has confirmed this shows that it received a cover price from Phoenix for this tender. J H Hallam's admission is corroborated by the recollection of SG who dealt with the tender at the time. SG confirmed to John Hallam that this entry referred to cover from Phoenix.

IV.5082. The OFT also notes that SG made these handwritten entries on 5 March 2004, the return date for submission of this tender. The OFT considers that this shows that Phoenix contacted J H Hallam by telephone on the day for submitting the tender, in order to provide a cover price.

IV.5083. A second contemporaneous document found at J H Hallam, the letter from the client setting out the results of the tender, has a handwritten entry from J H Hallam's Commercial Director, Richard Blount, asking the General Works Director, Mike Coles, to inform him which of the figures was J H Hallam's. In response to this request, SG wrote on the document against J H Hallam's figure, '*Hallams: Covered by Phoenix*', providing further corroboration of the cover price from Phoenix to J H Hallam for this tender.

IV.5084. Although Phoenix does not recall that it engaged in bid rigging activity on this tender, MW did confirm in interview that this was possible as Phoenix had exchanged cover prices to and from a number of competitors. The OFT considers it likely that the handwritten figure of '*253.k*' is likely to be a figure which was communicated to J H Hallam by Phoenix, as the approximate figure (exclusive of VAT) that Phoenix was going to submit for this tender, and that with this knowledge J H Hallam knew what figure it could submit without winning the tender.

IV.5085. Finally, the OFT notes that the tender submitted by J H Hallam was higher than the tender submitted by Phoenix, a pattern consistent with a cover price having been provided.

IV.5086. The OFT therefore concludes that contact took place between J H Hallam and Phoenix. The OFT also concludes that Phoenix supplied a figure to J H Hallam for a cover bid.

IV.5087. The OFT is satisfied that the facts set out in paragraphs IV.5065 to IV.5086 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁹³¹ In particular:

- (a) the provision of a figure for a cover bid from Phoenix to J H Hallam was not unilateral⁶⁹³², and contravenes the principle against direct or indirect contact between competitors;⁶⁹³³
- (b) J H Hallam can be presumed to have taken account of the information received from Phoenix (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁹³⁴ and
- (c) Phoenix can be presumed to have taken account of the information it received from J H Hallam (i.e. that J H Hallam did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁹³⁵

IV.5088. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between J H Hallam and Phoenix, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the conversion for audio visual services, 12 Chiswick Road, University of Leicester, tender deadline 5 March 2004.

Immunity and leniency assessment

IV.5089. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5090. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to J H Hallam on 6 July 2005. J H Hallam will not therefore receive 100 per cent immunity in respect of this tender. However, J H Hallam will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.5091. In respect of this tender, the OFT became aware of Phoenix's involvement in bid rigging activities by virtue of the information obtained during the visit to J H Hallam on 6 July 2005. Phoenix will not therefore receive 100 per cent immunity in respect of this tender. However, Phoenix will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁶⁹³¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁹³² See paragraph IV.73 of the General comments on cover pricing section.

⁶⁹³³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁹³⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁹³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 184: Butlers Hill Infant & Nursery School, Hucknall, Nottingham – 5 March 2004
Client: The Millward Partnership
Parties: Bodill and Hill

IV.5092. On 22 January 2004, The Millward Partnership sought tenders for alterations and extensions at Butlers Hill Infant & Nursery School, Hucknall, Nottingham. This was after four earlier tender exercises were abandoned in 2003. The return date for the tender was 5 March 2004 and four companies were invited to tender: Bodill, Hill, Wiggett and C J Cutts.⁶⁹³⁶

IV.5093. The Millward Partnership received the following tender returns on the morning of 5 March 2004:⁶⁹³⁷

Company	Date tender received	Amount of tender	Awarded the tender
Wiggett	5 March 2004	£40,851	
Bodill	5 March 2004	£45,229	Yes
Hill	5 March 2004	£49,995	
C J Cutts	Did not tender		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.5094. In Bodill's original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill:⁶⁹³⁸

1. *Bodill*

£49995.00 2. *HILL BROS. © FROM US*
GEOFF WILKINSON'

IV.5095. The tender sheet states that Bodill's submitted figure was £45,229.⁶⁹³⁹

IV.5096. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotations '*£49995.00*' and '*GEOFF WILKINSON'*', under the section headed '*Tenderers*' were made by him.⁶⁹⁴⁰ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.5097. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*© FROM US*' under the section headed '*Tenderers*' were made by him.⁶⁹⁴¹ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

⁶⁹³⁶ Information from client, OFT Document Reference 9754.

⁶⁹³⁷ Information from client, OFT Document Reference 9754.

⁶⁹³⁸ Tender sheet, OFT Document Reference 0726.

⁶⁹³⁹ Tender sheet, OFT Document Reference 0726.

⁶⁹⁴⁰ Contracts document, OFT Document Reference 6426, pages 86 and 123.

⁶⁹⁴¹ Contracts document, OFT Document Reference 6426, pages 1 and 36.

Evidence from leniency applicant Bodill

IV.5098. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.5099. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁶⁹⁴² In respect of this tender, Bodill confirmed that it gave a cover price to Hill.⁶⁹⁴³

IV.5100. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.5101. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Hill

IV.5102. During the OFT's visit to Hill under section 27 on 24 January 2007, no information was produced, or found, in relation to this contract.

IV.5103. The OFT wrote to Hill on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Hill had participated in bid rigging on this tender. In response to this letter, Hill said '*We do not accept that we are guilty of any offence under the act as alleged*' and declined the OFT's Fast Track Offer.⁶⁹⁴⁴

IV.5104. However, in its response to the Statement, Hill stated that it had not accepted the OFT's Fast Track Offer because it lacked documentary records from which to determine whether any infringement may have been committed. It submitted that this was '*part corroborated*' by the fact that the OFT's inspections found no relevant documentation. Hill stated '*[in] light of information now provided, Hill Bros. accepts the alleged infringements are infringements, and apologises for its wrongdoing*'⁶⁹⁴⁵ and '*It is accepted that submitting a price which has not been priced, and provided by a competitor, is wrongful*'⁶⁹⁴⁶ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.5105. From the evidence presented above, the OFT draws the following conclusions.

IV.5106. Bodill and Hill each accepted an invitation to tender for this tender.

⁶⁹⁴² Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁶⁹⁴³ Tender Analysis, OFT Document Reference 0465, page 6.

⁶⁹⁴⁴ Response from Hill, OFT Document Reference 10409.

⁶⁹⁴⁵ Written representations of Hill, 23 June 2008, paragraph 3.

⁶⁹⁴⁶ Written representations of Hill, 23 June 2008, paragraph 11.

IV.5107. Bodill completed the estimating process for the tender for this contract. Bodill wanted to win the tender for this contract and it appears they submitted a bid with the hope of winning the work.

IV.5108. In regard to Hill, Bodill's tender sheet records '49995.00 2. HILL BROS. © FROM US GEOFF WILKINSON'. Bodill has confirmed that this indicates that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £49,995, a figure that was identical to the tender price that Hill submitted. It is also noted that one of the directors of Hill at that time was Eric Geoffrey Wilkinson, who is likely to be the 'Geoff' in question.⁶⁹⁴⁷

IV.5109. The OFT notes in addition that the tender submitted by Hill was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.5110. Both Parties have now admitted liability in respect of this Infringement.

IV.5111. On the basis of the above the OFT therefore concludes that contact took place between Hill and Bodill. The OFT also concludes that Bodill supplied a figure to Hill for a cover bid.

IV.5112. The OFT is satisfied that the facts set out in paragraphs IV.5094 to IV.5111 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁹⁴⁸ In particular:

- (a) the provision of a figure for a cover bid from Bodill to Hill was not unilateral⁶⁹⁴⁹, and contravenes the principle against direct or indirect contact between competitors;⁶⁹⁵⁰
- (b) Hill can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁹⁵¹ and
- (c) Bodill can be presumed to have taken account of the information it received from Hill (i.e. that Hill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁹⁵²

IV.5113. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Hill and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations and extensions at Butlers Hill Infant & Nursery School, Hucknall, Nottingham, tender deadline 5 March 2004.

Immunity and leniency assessment

IV.5114. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender

⁶⁹⁴⁷ Written representations of Hill, 23 June 2008, paragraph 2.

⁶⁹⁴⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁹⁴⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁹⁵⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁹⁵¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁹⁵² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5115. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 185: Not included in the Decision

Infringement 186: Buswells Lodge Primary School, Beauville Drive, Beaumont Leys, Leicester – 23 March 2004
Client: Leicester City Council
Parties: J H Hallam and Galliford Construction

IV.5116. On 23 February 2004, Leicester City Council sought tenders for classroom replacements, the work comprising the construction of a stand-alone classroom block incorporating environmental features, with external works and drainage, at Buswells Lodge Primary School. The return date for the tender was 15:00 on 23 March 2004 and six companies were invited to tender: Connaught, Galliford Construction, J H Hallam, Mitie Property Services Ltd, Powerminster Ltd, and J & S Seddon (Building) Ltd.⁶⁹⁵³

IV.5117. Leicester City Council received the following tender returns on 23 March 2004:⁶⁹⁵⁴

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
Connaught	23 March 2004	1:55 pm	£675,369	
Galliford Construction	23 March 2004	2:45 pm	£592,811	
J H Hallam	23 March 2004	2:46 pm	£522,573	Yes
Mitie Property Services (Midlands) Ltd	23 March 2004	12:30pm	£671,589	
Powerminster Ltd	No Tender			
J & S Seddon (Building Ltd)	23 March 2004	3:15 pm		Late Returned Unopened

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from J H Hallam – RMB Estimating Report

IV.5118. As part of its leniency application, J H Hallam provided a contemporaneous copy of Richard Blount's Estimating Report for a board meeting on 7 April 2004.⁶⁹⁵⁵ It has the following typewritten entry in relation to this tender, with an additional handwritten entry *'WE GAVE A COVER PRICE TO GALLIFORD*

⁶⁹⁵³ Information from client, OFT Document Reference 8569.

⁶⁹⁵⁴ Information from client, OFT Document Reference 8569.

⁶⁹⁵⁵ RMB Report Board Meeting, OFT Document Reference 5109.

SEE ATTACHED NOTE' which was added to the document as part of the J H Hallam leniency application:

E Nr	Project	Client	Type	Tender	Mar	Res.	Comment %
1017	Bushwell Lodge	Leicester CC Primary	BOQ	522,473.00	7.50%	1	Over budget
£150K							Meeting LCC
0504'							

IV.5119. J H Hallam also provided a copy of the contemporaneous handwritten note referred to in paragraph IV.5118 above.⁶⁹⁵⁶ The note itself is a contemporaneous document with the exception of the addition of the words 'COVER PRICE?' and an arrow pointing to the circled figure '£592,811.00'. This was added to the document as part of the J H Hallam leniency application. The document contains the following original entries relevant to this tender.

'Bushwell---->Nick [...] [C]<---
Cleaver Gallifords

<----- Cover -----> [.....] [C] £592,811 – 00

----- Stinson No

----- Denman No

-----> ① Hallam ----- B+A No

-----> ② Mile-Mitie

-----> ③ Seddons

Gallifords – Cover

Canart - Leeds

Seddons – Sent Away Enquiry'

Evidence from leniency applicant J H Hallam

IV.5120. As part of its leniency application, J H Hallam provided a general explanation of its participation in cover pricing.⁶⁹⁵⁷ This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.5121. In particular, J H Hallam provided to the OFT a schedule of projects involving cover pricing March 2000 – June 2005. Examination of the entry relevant to this tender shows that J H Hallam provided a cover price of £592,814 to Nick Cleaver at 'Galliford', with a telephone number of [...] [C].⁶⁹⁵⁸

IV.5122. In its response to the Statement, J H Hallam stated 'JH Hallam does not contest the OFT's findings of infringement.'⁶⁹⁵⁹

⁶⁹⁵⁶ Handwritten tender document, OFT Document Reference 5111.

⁶⁹⁵⁷ Leniency application, OFT Document Reference 4969.

⁶⁹⁵⁸ Schedule of covers, OFT Document Reference 4977, page 13.

⁶⁹⁵⁹ Written representations of J H Hallam, 27 June 2008, paragraph 73.

Witness evidence from leniency applicant J H Hallam

IV.5123. During interviews conducted in connection with its leniency application, J H Hallam's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.420 to IV.430 above and is relied upon by the OFT in relation to this tender.

IV.5124. Additional evidence in relation to this tender comes from the interview of Spencer Robinson ('SR'), the estimator for J H Hallam. His responses to questions concerning this tender were as follows:⁶⁹⁶⁰

R. *'.....Buswells Lodge Primary School OFT document 5110, which is the incoming tender which doesn't actually – it shows you as the estimator but it doesn't actually show anything about cover.*

B. *We did – I'm sure we did – we did the job.*

R. *Yeah. Because I have another document which is 5111 -*

A. *No, we did it. We did the contract.*

Q. *If you look at 5111 for me for a second you'll see halfway down I've highlighted 'Gallifords Cover'*

A. *Oh, we gave – we did this contract. We gave a cover out to Galliford's.*

Q. *So you gave a cover to Galliford's on that one.*

A. *Yeah.*

Q. *Yeah, cover to Galliford.*

A. *Yeah. Yeah, that's what it was, we –*

Q. *it was, yeah, it's £592,814*

A. *.....Yeah, I remember that. We spent ages trying to get the, you know, to come up with the list of savings and – no, we did that contract.....'*

Evidence from other companies – Galliford Try

IV.5125. The OFT wrote to Galliford Try on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Galliford Try had participated in bid rigging on this tender. In a letter dated 3 May 2007 received from lawyers Pinsent Masons acting on behalf of Galliford Try the following admission was made: *'We are writing to confirm that our client is accepting the offer contained in the FT's letter in respect of suspect tenders numbered 1 to 16 in the Annex to the OFT's letter'*.⁶⁹⁶¹

⁶⁹⁶⁰ Interview transcript, OFT Document Reference 12754, page 14.

⁶⁹⁶¹ Response from Galliford Try, OFT Document Reference 10317, page 1.

IV.5126. Buswells Lodge Primary School is entry No.14 on that annex in which Galliford Try admits engaging in bid rigging activity in relation to this tender. In the admissions section of the annex it states: *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*. The annex was signed by G P Fitzgerald, Chief Executive of Galliford Try, on 3 May 2007.⁶⁹⁶²

IV.5127. Following the issue of the Statement, Galliford Try did not submit any written or oral representations in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.5128. From the evidence presented above, the OFT draws the following conclusions.

IV.5129. J H Hallam and Galliford Construction each accepted an invitation to tender for this contract.

IV.5130. J H Hallam appears to have completed the estimating process for the tender, and submitted a bid with the intention of winning the work. This is shown by the price submitted by J H Hallam being the lowest recorded, and the fact that it won the contract.

IV.5131. Galliford Construction was unable to submit a tender by the return date and/or did not want to win this contract.

IV.5132. In the handwritten notes referred to in paragraph IV.5119 above, *'Bushwell'* is a mis-spelling of the tender name Buswells. *'Nick Cleaver'* was the estimator for Galliford Construction in relation to this tender. *'[.....] [C]<---'* is a contact telephone number for Nick Cleaver. The figure *'£592,811 – 00'* is the exact amount submitted by Galliford Construction in relation to this tender. The document clearly shows the word *'Cover'* in conjunction with the word *'Gallifords'*.

IV.5133. Nick Cleaver is identified as a contact at *'Galliford'*, in the contact book⁶⁹⁶³ of Christopher Keith Trickett, Chief Estimator at Thomas Vale, provided to the OFT as part of the leniency application of Thomas Vale.

IV.5134. J H Hallam has confirmed that it gave a cover price to Galliford Construction and that Spencer Robinson was the estimator allocated to this tender. He has confirmed in interview that he provided a cover price to Galliford Construction.

IV.5135. Galliford Construction has also admitted to cover pricing in respect of this tender.

IV.5136. The OFT further notes that the tender submitted by Galliford Construction was higher than the tender submitted by J H Hallam, the pattern consistent with a cover price having been received.

IV.5137. The OFT therefore concludes that contact took place between J H Hallam and Galliford Construction. The OFT also concludes that J H Hallam supplied a figure to Galliford Construction a cover bid.

⁶⁹⁶² Response from Galliford Try, OFT Document Reference 10318, page 6.

⁶⁹⁶³ Contact list, OFT Document Reference 11086, page 9.

IV.5138. The OFT is satisfied that the facts set out in paragraphs IV.5118 to IV.5137 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁶⁹⁶⁴ In particular:

- (a) the provision of a figure for a cover bid from J H Hallam to Galliford Construction was not unilateral⁶⁹⁶⁵, and contravenes the principle against direct or indirect contact between competitors;⁶⁹⁶⁶
- (b) Galliford Construction can be presumed to have taken account of the information received from J H Hallam (i.e. the cover price) when determining its own conduct in the tendering process;⁶⁹⁶⁷ and
- (c) J H Hallam can be presumed to have taken account of the information it received from Galliford Construction (i.e. that Galliford Construction did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁶⁹⁶⁸

IV.5139. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between J H Hallam and Galliford Construction, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for classroom replacements at Buswells Lodge Primary School, date of tender 23 March 2004.

Immunity and leniency assessment

IV.5140. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5141. J H Hallam informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. J H Hallam will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 187: Amalgamation of Portland/Hartland Schools – 16 April 2004
Client: Nottinghamshire County Council
Parties: Sol, Mansell, G F Tomlinson and G G Middleton

IV.5142. On 17 March 2004, Nottinghamshire County Council sought tenders for the amalgamation of Portland/Hartland Schools.⁶⁹⁶⁹ The following eight companies were invited to tender: G F Tomlinson, G G Middleton, Linpave Building Ltd, Mansell, Marriott, Simons, Sol and Wright Construction. The date and time of tender return was 16 April 2004 at 10:00 am.⁶⁹⁷⁰

⁶⁹⁶⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁹⁶⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁹⁶⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁹⁶⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁹⁶⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁶⁹⁶⁹ Information from client, OFT Document Reference 9482.

⁶⁹⁷⁰ Information from client, OFT Document Reference 9482.

IV.5143. Nottinghamshire County Council received the following tender returns:⁶⁹⁷¹

Company	Date & Time tender received	Amount of tender	Awarded contract
G F Tomlinson	16 April 2004 by 10:00 am	£1,619,832	
Marriott	16 April 2004 by 10:00 am	£1,604,702	
Mansell	16 April 2004 by 10:00 am	£1,581,423	
Sol	16 April 2004 by 10:00 am	£1,589,210	
G G Middleton	16 April 2004 by 10:00 am	£1,464,892	YES
Simons	16 April 2004 by 10:00 am	£2,038,798	
Wright Construction	No tender received		
Linpave Building Ltd	No tender received		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Sol – estimating board report and tender register

IV.5144. During the search of Sol's premises an Estimating Board Report ('EBR') dated 19 April 2004 was obtained, which shows this tender under the heading 'SUBMITTED':⁶⁹⁷²

<u>DATE</u>	<u>PROJECT</u>	<u>CLIENT</u>	<u>ARCHITECT</u>	<u>QUANTITY SURVEYOR</u>
16-Apr-04	Amalgamation of Portland & Hartland Schools	Notts County Council	Boden Lloyd	Appleyard & Trew

<u>JOB</u>	<u>LOCATION</u>	<u>TYPE</u>	<u>FUNDED</u>	<u>SECTOR</u>	<u>TENDER VALUE</u>
Refurb.	Notts	B.Q.	Public	Education	£1,689,210 ⁶⁹⁷³

<u>MARGIN</u>	<u>ESTIMATOR</u>
	"C"

IV.5145. During the search of Sol's premises a handwritten tender register was produced with an entry for this tender:⁶⁹⁷⁴

⁶⁹⁷¹ Information from client, OFT Document Reference 9482.

⁶⁹⁷² Estimating Board Report, OFT Document Reference 4167, page 23.

⁶⁹⁷³ The OFT believes that this tender value is incorrect on this document, as the figure entered into the tender register matches that of the client response.

⁶⁹⁷⁴ Tender register, OFT Document Reference 4170, page 11.

confirmed it was his handwriting, stating *'again mine except the ... competition ... box which is, for reasons I've already said, Shirley Peters [admin assistant at Sol]'*. When asked about the value in the tender sum column, JC stated *'That is the cover price that we received from Middleton's'*.⁶⁹⁷⁹ JC confirmed that the 'C' in the estimator box meant cover and in respect of the results and comments box, stated *'the first two names are contact names at Middleton's and, second, I should imagine, it meant that ... we were second'* and *'That must have been Middleton's phone number ... From looking at the code'*.⁶⁹⁸⁰

IV.5151. When asked if he had made contact with both Mr Stott and Mr Horner, JC stated *'Honestly, I can't remember'* and *'Maybe Stott's ... I mean, Stott's the sort of main guy there, I think. He may have said I'm on holiday that week ... therefore you need, or he [Horner] will speak to you'*. JC confirmed that he got the cover price from Mr Horner, stating *'Yeah, as far as I can remember'*.⁶⁹⁸¹

Contemporaneous documentary evidence from leniency applicant Mansell – Meeting minutes

IV.5152. As part of its leniency application, Mansell provided contemporaneous meeting minutes⁶⁹⁸² dated 5 April 2004 with an entry for this tender which shows *'NCC Portland/Hartland School refurb Tender now launched (£1.0m project). This is to be covered'*.

Evidence from leniency applicant Mansell

IV.5153. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.⁶⁹⁸³ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.5154. Mansell's legal representatives also provided to the OFT a schedule of covers for the Eastern Region, which includes this tender. In respect of this tender the table shows that Mansell received a cover price.⁶⁹⁸⁴ Under the heading *'Documentary evidence of cover'* it states *'Minutes of the Senior Managers' Meeting dated 5 April 2004 ... state "This is to be covered" next to this job. Incomplete tender documentation. These documents give a strong indication that MCSL took a cover on this job'*.

IV.5155. Following the issue of the Statement, Mansell did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Mansell

IV.5156. During interviews conducted in connection with its leniency application, an employee of Mansell and an ex-employee from the Nottingham office provided further general explanation of its participation in cover pricing. This evidence is

⁶⁹⁷⁹ Interview transcript, OFT Document Reference 11369, page 2.

⁶⁹⁸⁰ Interview transcript, OFT Document Reference 11369, page 3.

⁶⁹⁸¹ Interview transcript, OFT Document Reference 11369, page 3.

⁶⁹⁸² Mansell meeting minutes, OFT Document Reference B3608.

⁶⁹⁸³ Leniency application, OFT Document Reference B0734.

⁶⁹⁸⁴ Schedule of covers, OFT Document Reference B3601, page 2.

that G F Tomlinson had participated in bid rigging on this tender. In response to this letter G F Tomlinson admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁶⁹⁸⁹

IV.5161. The OFT subsequently wrote to G F Tomlinson's ultimate parent company at the time of this Infringement, G F Tomlinson Group, on 5 November 2007, asking it to comment on G F Tomlinson's response to the OFT's Fast Track Offer, given that the OFT intended to hold G F Tomlinson Group jointly and severally liable for any infringements committed by G F Tomlinson in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, G F Tomlinson Group stated that it did not wish to make any further comment.⁶⁹⁹⁰

IV.5162. In their response to the Statement, G F Tomlinson and G F Tomlinson Group stated that *'Tomlinson...does not contest the OFT's findings of infringement'*.⁶⁹⁹¹

Evidence from other companies – G G Middleton

IV.5163. The OFT wrote to G G Middleton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that G G Middleton had participated in bid rigging on this tender. In response to this letter G G Middleton admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁶⁹⁹²

IV.5164. In its response to the Statement, G G Middleton stated *'We admit that we undertook cover pricing on some projects during the period of time indicated'*.⁶⁹⁹³

The OFT's analysis of the evidence and finding

IV.5165. From the evidence presented above, the OFT draws the following conclusions.

IV.5166. Sol, Mansell, G F Tomlinson and G G Middleton each accepted an invitation to tender for this contract.

IV.5167. All four companies submitted a tender. It appears that G G Middleton completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by G G Middleton being the lowest received and the fact that it won the contract.

IV.5168. Sol, Mansell and G F Tomlinson were unable to submit a tender by the return date and/or did not want to win this contract.

IV.5169. In regard to Sol, its tender register and EBR show 'C' next to this tender. Sol confirmed that this shows that it received a cover price. Sol has also confirmed that it received the cover price from G G Middleton and that the contact details

⁶⁹⁸⁹ Response from G F Tomlinson, OFT Document Reference 10347, page 4.

⁶⁹⁹⁰ Response from G F Tomlinson Group, OFT Document Reference 13979.

⁶⁹⁹¹ Written representations of G F Tomlinson and G F Tomlinson Group, 23 June 2008, paragraph 4.

⁶⁹⁹² Response from G G Middleton, OFT Document Reference 10351b, page 3.

⁶⁹⁹³ Written representations of G G Middleton, 20 June 2008, page 1.

shown in the tender register, 'S. STOTT R. HORNED. [sic Horner] [...] [C]' relate to G G Middleton.

IV.5170. The OFT notes that G G Middleton's response to the OFT's letter of 22 March 2007 was signed by Stephen Stott and the telephone number [...] [C] was G G Middleton's telephone number.⁶⁹⁹⁴

IV.5171. In regard to Mansell, its meeting minutes of 5 April 2004 show 'NCC Portland/Hartland School refurb Tender now launched (£1.0m project). This is to be covered'. Mansell has confirmed that this, combined with the fact that the tender documentation was incomplete, provides a strong indication that it received a cover price on this tender.

IV.5172. In regard to G F Tomlinson, entries in a 2004 diary belonging to an employee of G F Tomlinson show: 'Cover' on 30 March, and 'Obtain Cover' on 31 March. Also erased entries for 14 and 15 April both show 'Cover Middleton'. In addition, G F Tomlinson has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.5173. In addition, G G Middleton has admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007. All four companies have therefore admitted to engaging in bid rigging activities in respect of this tender.

IV.5174. The OFT further notes that the tenders submitted by Sol, Mansell and G F Tomlinson were all higher than the tender submitted by G G Middleton, the pattern consistent with cover prices having been provided.

IV.5175. In addition the OFT notes that G G Middleton's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from G G Middleton.

IV.5176. The OFT therefore concludes that contact took place between G G Middleton and Sol, between G G Middleton and Mansell, and between G G Middleton and G F Tomlinson. The OFT also concludes that G G Middleton supplied figures to each of Sol, Mansell and G F Tomlinson for cover bids.

IV.5177. The OFT is satisfied that the facts set out in paragraphs IV.5144 to IV.5176 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁶⁹⁹⁵ In particular:

- (a) the provision of figures for cover bids from G G Middleton to each of Sol, Mansell and G F Tomlinson was not unilateral⁶⁹⁹⁶, and contravenes the principle against direct or indirect contact between competitors;⁶⁹⁹⁷
- (b) Sol, Mansell and G F Tomlinson can each be presumed to have taken account of the information received from G G Middleton (i.e. the respective cover prices) when determining their own conduct in the tendering process,⁶⁹⁹⁸ and

⁶⁹⁹⁴ FAME Report, OFT Document Reference 11959, page 1.

⁶⁹⁹⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁶⁹⁹⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁶⁹⁹⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁶⁹⁹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) G G Middleton can be presumed to have taken account of the information it received from Sol, Mansell and G F Tomlinson (i.e. that none of them intended to submit competitive bids) when determining its conduct in the tendering process.⁶⁹⁹⁹

IV.5178. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between G G Middleton and Sol, between G G Middleton and Mansell, and between G G Middleton and G F Tomlinson in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the amalgamation of Portland/Hartland Schools, tender deadline 16 April 2004.

Immunity and leniency assessment

IV.5179. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5180. In respect of this tender, the OFT became aware of Sol's involvement in bid rigging activities by virtue of the information obtained during a section 27 visit to Sol on 18 January 2006. Sol will not therefore receive 100 per cent immunity in respect of this tender. However, Sol will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.5181. The OFT became aware of Mansell's involvement in bid rigging activities by virtue of the information provided by leniency party Mansell. As the OFT was not previously aware of this from any other source, Mansell will receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 188: Willington Down Farm, Didcot – 16 April 2004
Client: University of Reading
Parties: Mansell and A H Willis

IV.5182. On 17 March 2004, the University of Reading sought tenders for the refurbishment of Willington Down Farmhouse and Brick Cottage, Didcot.⁷⁰⁰⁰ The following four companies were invited to tender: A A Beaver, A H Willis, Cavendish Construction and Mansell. The date and time of tender return was 16 April 2004 at 12:00 noon.⁷⁰⁰¹

IV.5183. The University of Reading received the following tender returns:⁷⁰⁰²

⁶⁹⁹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁰⁰⁰ Information from client, OFT Document Reference 9851.

⁷⁰⁰¹ Information from client, OFT Document Reference 9851.

⁷⁰⁰² Information from client, OFT Document Reference 9851.

Company	Date tender received	Amount of tender	Awarded contract
Cavendish Construction	16 April 2004	£89,892.00	YES
A H Willis	16 April 2004	£100,752.00	
Mansell	16 April 2004	£105,378.00	
A A Beaver	16 April 2004	£116,108.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.5184. As part of its leniency application, Mansell’s legal representatives provided the workload reports of Barry Russ (‘BR’), a Mansell managing estimator. The 2004 workload report for special projects contained the following entry:⁷⁰⁰³

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BI	NET	LESS PROV.	%	MARGIN
02-00186	Didcot - Willington Down Farm		105378			

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
89892	100752	116108			(A H Willis)

IV.5185. In its response to the Statement, A H Willis submitted that the workload reports were unreliable because, based on BR’s explanation of his record keeping practices, i.e. that the entry might have been made weeks in advance⁷⁰⁰⁴, it was possible that an entry was made prior to obtaining cover and then not corrected if a cover was actually received from a company other than that indicated in the workload report.⁷⁰⁰⁵

IV.5186. The OFT notes that the accuracy of the workload reports has been corroborated in respect of other Infringements.⁷⁰⁰⁶ In particular, the OFT notes that A H Willis has itself effectively corroborated the accuracy of the workload reports in respect of Infringement 224, where it has admitted that Cyril Elbourn, the estimator for A H Willis on Infringement 224, gave a cover price to Mansell in respect of that tender as indicated in the workload report. The OFT does not, therefore, see any reason to doubt the inference it has drawn in respect of this Infringement, namely that the workload report is an accurate reflection of the source of the cover price obtained by Mansell.

Evidence from leniency applicant Mansell

IV.5187. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁷⁰⁰⁷ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

⁷⁰⁰³ Special works spreadsheet, OFT Document Reference B3539, page 4.

⁷⁰⁰⁴ See paragraph IV.485 above.

⁷⁰⁰⁵ Written representations of A H Willis, 27 June 2008, paragraphs 13 to 14; and oral representations of A H Willis, 16 July 2008, pages 13 to 14.

⁷⁰⁰⁶ See Infringements 42, 43, 91 and 97.

⁷⁰⁰⁷ Leniency application, OFT Document Reference B0734.

IV.5188. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from A H Willis and that this cover price was taken due to *'insufficient tender period: resource'* at Mansell.⁷⁰⁰⁸

IV.5189. In its response to the Statement, A H Willis proposed that this table could not be relied upon as evidence as it *'appears to have been based on the workload report rather than any other evidence'*.⁷⁰⁰⁹ While the OFT is not according the same evidential weight to Mansell's table provided under leniency as it is to contemporaneous documents and witness testimony, the OFT considers this document to be robust as it resulted from extensive investigation by Mansell prior to its creation (as described in Mansell's leniency application⁷⁰¹⁰). This table provides evidence of Mansell's position as to its engagement in cover pricing on this tender, and as such constitutes evidence additional to the available contemporaneous records and witness evidence.

IV.5190. Following the issue of the Statement, Mansell did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Mansell

IV.5191. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.5192. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR, when asked if Mansell took a cover price from A H Willis, stated 'Yes' and also stated *'...I think the pressure would have been on to have got a cover, rather than send that one back'*.⁷⁰¹¹ BR also confirmed that A H Willis is *'a contractor who do ... a fair bit of work in that area'*.⁷⁰¹²

IV.5193. In its response to the Statement, A H Willis suggested that BR's witness evidence could not be relied upon as evidence because *'it is apparent that Mr Russ has no direct personal recollection of the tenders in question, but is instead proceeding on the basis of his workbook entries'*.⁷⁰¹³ The OFT notes that the weight it places on BR's evidence is commensurate with its explanatory nature, accepting that it may not constitute independent recollection of the events surrounding this tender. Nonetheless, such explanation is of evidential value. Though BR may not recall the details of the exchange of cover pricing, BR provides an explanation of the document he used to record cover prices taken, which the OFT relies upon in support of the contemporaneous evidence.

⁷⁰⁰⁸ Leniency application, OFT Document Reference B1351, page 1.

⁷⁰⁰⁹ Written representations of A H Willis, 27 June 2008, paragraph 12.a.

⁷⁰¹⁰ Leniency application, OFT Document Reference B0734.

⁷⁰¹¹ Interview transcript, OFT Document Reference 11516, page 34.

⁷⁰¹² Interview transcript, OFT Document Reference 11516, page 34.

⁷⁰¹³ Written representations of A H Willis, 27 June 2008, paragraph 12.b; and oral representations of A H Willis, 16 July 2008, page 12.

Evidence from other companies – A H Willis

IV.5194. The OFT wrote to A H Willis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that A H Willis had participated in bid rigging on this tender. In response to this letter A H Willis stated that, in respect of this tender, there was *'no evidence of bid rigging and the allegation is therefore denied'*.⁷⁰¹⁴

IV.5195. In its response to the Statement, A H Willis suggested that the strength of the evidence in relation to this Infringement falls below that found in relation to Infringement 158 with regard to Allenbuild and Wildgoose, where the OFT had made no preliminary finding of infringement in relation to those parties, and therefore considered that this Infringement should not be pursued.⁷⁰¹⁵ The OFT does not find this argument persuasive, as in the case of Allenbuild and Wildgoose there was an absence of contemporaneous documentation, whereas in this Infringement there is a contemporaneous document supported by witness testimony.

IV.5196. Additionally, in its response to the Statement, A H Willis suggested *'it is apparent that the only evidence of AH Willis being involved in providing a cover price to Mansell is in fact the entry in Mr Russ' workbook.'*⁷⁰¹⁶ As the CAT stated in Claymore Dairies, cartels by their nature are hidden and secret, and that a single item of evidence may be sufficient to meet the required standard.⁷⁰¹⁷ For this particular Infringement, the OFT relies not only on the contemporaneous workload report, but also supporting witness testimony which taken together the OFT considers provide strong and compelling evidence that A H Willis gave a cover price to Mansell.

IV.5197. A H Willis also suggested that *'the OFT needs to show that if a cover price was provided it was by an individual in respect of whose actions AH Willis is legally responsible'*⁷⁰¹⁸ as opposed to a third party contractor without authority to enter into agreements on behalf of A H Willis. As discussed in III.28 to III.36, and in Infringement 224, a company is legally responsible for an agent acting on its behalf, in particular where that agent has ostensible authority to do so. Furthermore, nothing in the evidence available in respect of this Infringement suggests that Mansell received a cover price from a third party contractor. Nor is the OFT required to ascertain individual participants in an arrangement in order to establish an infringement between undertakings.

IV.5198. A H Willis further suggested that the OFT did not provide sufficient information to allow it to effectively defend itself.⁷⁰¹⁹ The OFT considers that the information as set out in the Statement together with the evidence from the OFT's file provided with the Statement was sufficient for A H Willis to review its records and locate the necessary information for its own defence. It appears that to the extent that A H Willis is not able to adduce evidence in its defence

⁷⁰¹⁴ Response from A H Willis, OFT Document Reference 10203, page 3.

⁷⁰¹⁵ Written representations of A H Willis, 27 June 2008, paragraphs 8 to 9.

⁷⁰¹⁶ Written representations of A H Willis, 27 June 2008, paragraph 12, and oral representations of A H Willis, 16 July 2008, page 12.

⁷⁰¹⁷ See paragraph III.203 of the Legal Background Section.

⁷⁰¹⁸ Written representations of A H Willis, 27 June 2008, paragraph 15.

⁷⁰¹⁹ Written representations of A H Willis, 27 June 2008, paragraph 16; and oral representations of A H Willis, 16 July 2008, pages 5 and 8 to 10.

this is a product of it not having kept records in respect of this tender, rather than the OFT's case being insufficient. The OFT has no reason to doubt A H Willis' statement that it is unable to find any records relating to this particular infringement. However, the absence of documentary records cannot of itself exculpate A H Willis from an infringement where other evidence is available which the OFT considers implicates it, and indeed is sufficient to substantiate its involvement.

IV.5199. In its response to the Statement, A H Willis stated the OFT would '*need to show that Mansell informed AH Willis that it would not be submitting a competitive bid before AH Willis submitted its own bid*'⁷⁰²⁰, in essence arguing that it should not be presumed to have acted in the market on the basis of the information that Mansell would not be submitting a competitive bid.⁷⁰²¹

IV.5200. The OFT notes that, as stated in paragraphs III.53 to III.54 above, the mere receipt of information that Mansell would not be bidding competitively may be sufficient to establish a concerted practice.⁷⁰²² Further, as stated in paragraph III.58, the ECJ has held that '*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 the market...*'⁷⁰²³

IV.5201. On that basis, the OFT does not need to show that A H Willis inflated its bid (or otherwise altered its conduct) in response to the knowledge that Mansell had accepted a cover price in order to establish that there has been an infringement of the Chapter I prohibition. It is entitled to rely on a presumption that A H Willis has acted on the information received.

IV.5202. The OFT notes that although Mansell's general practice was to receive the actual cover the day before or the morning the tender was due, it usually arranged for the exchange of cover within a few days after receiving the tender.⁷⁰²⁴ The OFT also notes that A H Willis submitted its tender on the morning of the tender return date (see paragraph IV.5183) and it is therefore unlikely that Mansell could have requested a cover price from A H Willis *after* the latter's bid had been submitted. The OFT does not therefore accept that A H Willis has satisfactorily rebutted the legal presumption that it acted upon the knowledge that Mansell had accepted a cover price.

IV.5203. Moreover, an undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept A H Willis's

⁷⁰²⁰ Written representations of A H Willis, 27 June 2008, paragraph 17.

⁷⁰²¹ Written representations of A H Willis, 27 June 2008, paragraphs 19.f and 23.

⁷⁰²² Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035 at paragraph 58, upheld by the ECJ in Case C-359/01P *British Sugar plc v Commission* [2004] ECR I-4933, citing Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 200; *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17, at paragraph 159; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 155.

⁷⁰²³ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 121; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 162; and Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(x); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(x).

⁷⁰²⁴ See paragraphs IV.482 to IV.483 of Mansell's general leniency section.

assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

The OFT's analysis of the evidence and finding

IV.5204. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.5205. Mansell and A H Willis each accepted an invitation to tender for this contract.

IV.5206. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.5207. Mansell's 2004 workload report records '(AH Willis)' in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.5208. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by A H Willis, the pattern consistent with a cover price having been provided.

IV.5209. In its response to the Statement, A H Willis stated '*While Mansell's bid was higher than that prepared by AH Willis, this provides no evidence that Mansell obtained a cover price from AH Willis...*'.⁷⁰²⁵ The OFT notes that this analysis is not relied upon in evidence and merely sets out that the pattern of the tender bids was consistent with a cover price having been provided by A H Willis to Mansell.

IV.5210. The OFT therefore concludes that contact took place between Mansell and A H Willis. The OFT also concludes that A H Willis supplied a figure to Mansell for a cover bid.

IV.5211. The OFT is satisfied that the facts set out in paragraphs IV.5184 to IV.5210 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁰²⁶ In particular:

- (a) the provision of a figure for a cover bid from A H Willis to Mansell was not unilateral⁷⁰²⁷, and contravenes the principle against direct or indirect contact between competitors;⁷⁰²⁸
- (b) Mansell can be presumed to have taken account of the information received from A H Willis (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁰²⁹ and
- (c) A H Willis can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a

⁷⁰²⁵ Written representations of A H Willis, 27 June 2008, paragraph 12.c.

⁷⁰²⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁰²⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁰²⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁰²⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

competitive bid) when determining its conduct in the tendering process.⁷⁰³⁰

IV.5212. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and A H Willis in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Willington Down Farm, Didcot, tender deadline 16 April 2004.

Immunity and leniency assessment

IV.5213. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5214. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 189: Salvation Army Halls, Doncaster – 27 April 2004
Client: Salvation Army
Parties: Strata and Lindum

IV.5215. On 16 March 2004, the Salvation Army sought tenders for Doncaster Citadel Salvation Army Hall.⁷⁰³¹ The following seven companies were invited to tender: Wildgoose, Ackroyd & Abbott, Strata, Conlon Construction Ltd, Lindum, Howard Cook Builders and B W Davies.⁷⁰³² The deadline for receipt of tenders was 12:00 noon on 27 April 2004.⁷⁰³³

IV.5216. The Salvation Army received the following tender returns:⁷⁰³⁴

⁷⁰³⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁰³¹ Extracts from file, OFT Document Reference 4337, pages 2 and 3.

⁷⁰³² Information from client, OFT Document Reference 9285.

⁷⁰³³ Extracts from file, OFT Document Reference 4337, page 2.

⁷⁰³⁴ Information from client, OFT Document Reference 9285.

Company	Time & Date tender received	Amount of tender	Awarded contract
Wildgoose	Time not recorded, 27 April 2004	£1,486,000.00	Yes
Ackroyd & Abbott	Time not recorded, 27 April 2004	£1,579,095.00	
Strata	Time not recorded, 27 April 2004	£1,641,028.00	
Conlon Construction Ltd	Time not recorded, 27 April 2004	£1,673,903.00	
Lindum	Time not recorded, 27 April 2004	£1,701,086.00	
Howard Cook Builders	Time not recorded, 27 April 2004	£1,724,000.00	
B W Davies	Time not recorded, 27 April 2004	£1,789,551.48	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Contract Information Sheet (BOB sheet)

IV.5217. During the OFT’s search of Strata’s premises a contract information sheet, or BOB sheet, was found. The BOB sheet contained the following entries typed in the tender results box:⁷⁰³⁵

TENDER RESULTS		
% DIFF	CONTRACTOR	VALUE
	STRATA	1641028
-3.77983	A. & A.	1579000
-9.447009	WILDGOOSE	1486000
	CONLON	
3.6597744	LINDUM (C)	1701086
	B.W. DAVIS (STOKE)	
	HOWARD COOK BLDS.	
3.84%		

Contemporaneous documentary evidence from Lindum – Invitation and Form of Tender

IV.5218. During a section 27 visit of Lindum’s premises an enquiry assessment form was produced. The enquiry assessment form contained the following entry handwritten under the comments heading:⁷⁰³⁶

‘We need this like a’

IV.5219. On the day of the OFT’s visit David Chambers (‘DC’), Chairman of Lindum, explained that this was a comment he wrote on the document based on previous experience working for the Salvation Army. DC said the comments suggest Lindum was not keen to tender for the contract and would have either binned it, returned the tender documents or entered an inflated tender price. DC did not think a price was submitted for this contract.⁷⁰³⁷ In addition, in his witness statement, DC explained that the handwritten comment ‘...was to

⁷⁰³⁵ Contract Information Sheet, OFT Document Reference 3875.

⁷⁰³⁶ Extracts from file, OFT Document Reference 4337, page 1.

⁷⁰³⁷ File note of visit, OFT Document Reference 5824, page 3.

mean that I knew we had lost money on the last job we carried out for this client and we should preferably not price this job at all. However the ultimate decision on this job would be for the Division Managing Director. I was merely relaying my concerns and my knowledge of similar jobs for this client in the past'.⁷⁰³⁸

IV.5220. The Form of Tender for this contract was also found during the OFT's visit. The Form of Tender states that Lindum submitted a tender price of £1,701,086.00 for this contract on 26 April 2004.⁷⁰³⁹ A signed 'Certificate of Bona Fide Tender' was also found in the bundle of documents, signed on 26 April 2004.⁷⁰⁴⁰

Evidence from leniency applicant - Strata

IV.5221. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 – Dec 2001' and 'contracts in hand' documents. This list contained the following entry:⁷⁰⁴¹

Date	Project	Strata ref no
27/04/2004	Salvation Army Halls, Doncaster	T23/04

Cover to	Cover from	Company Name	Company Address	Contract Secured
✓		Lindum Construction	Lincoln	

IV.5222. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.5223. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Lindum

IV.5224. The OFT wrote to Lindum Group on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Lindum Group had participated in bid rigging on this tender. In response to this letter Lindum Group admitted 'Yes, we cannot recall full details'.⁷⁰⁴² Lindum Group also provided a statement which said 'Yes, we did take a cover. It was a bill of quantities. We were invited and we did accept. It should not have happened. **YES, COVER RECEIVED**'.⁷⁰⁴³

⁷⁰³⁸ Witness statement of David Christopher Chambers, 26 June 2008, paragraph 12.

⁷⁰³⁹ Extracts from file, OFT Reference 4337, pages 4 and 5.

⁷⁰⁴⁰ Extracts from file, OFT Reference 4337, pages 6 and 7.

⁷⁰⁴¹ Cover information spreadsheet, OFT Document Reference 4056.

⁷⁰⁴² Response from Lindum, OFT Document Reference 10514, page 4.

⁷⁰⁴³ Response from Lindum, OFT Document Reference 10515, page 7.

IV.5225. In its response to the Statement, Lindum Group confirmed that it *'...does not contest the fact of the infringements [including this Infringement] ... [f]ollowing the OFT's inspections at the premises of the Lindum companies on 26 January 2006, Lindum Group conducted internal investigations into the alleged conduct and admitted to the OFT, so far as possible, infringements of the Chapter I prohibition...'*⁷⁰⁴⁴

The OFT's analysis of the evidence and finding

IV.5226. From the evidence presented above, the OFT draws the following conclusions.

IV.5227. Strata and Lindum each accepted an invitation to tender for the contract for Doncaster Citadel Salvation Army Hall.

IV.5228. Both companies submitted a tender. Strata completed the estimating process and submitted a bid with the hope of winning the work. Lindum did not want to win this contract.

IV.5229. Strata's contract information sheet records '3.6597744 LINDUM (C) 1701086' typed in the tender results box. Paul Throssell ('PT'), an estimator at Strata, confirmed that a '(C)' written next to a competitor's name alongside a figure and a percentage difference shows that Strata gave a cover price to the company noted, as in this case. The OFT also notes that the figure recorded as the cover price given to Lindum '£1,701,086' is the exact figure submitted by Lindum on its Form of Tender. The OFT considers in the light of the contemporaneous evidence from Strata, PT's explanation of how covers given were recorded and Lindum's admission that it received a cover price, that Strata supplied Lindum with a cover price for this tender.

IV.5230. In addition the OFT notes that the tender submitted by Lindum was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided.

IV.5231. The OFT notes that both Parties have admitted their involvement in cover pricing in respect of this Infringement.

IV.5232. The OFT therefore concludes that contact took place between Strata and Lindum. The OFT also concludes that Strata supplied a figure to Lindum for a cover bid.

IV.5233. The OFT is satisfied that the facts set out in paragraphs IV.5217 to IV.5232 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁰⁴⁵ In particular:

- (a) the provision of a figure for a cover bid from Strata to Lindum was not unilateral⁷⁰⁴⁶, and contravenes the principle against direct or indirect contact between competitors;⁷⁰⁴⁷

⁷⁰⁴⁴ Written representations of Lindum Group, 27 June 2008, paragraph 3.

⁷⁰⁴⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁰⁴⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁰⁴⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Lindum can be presumed to have taken account of the information received from Strata (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁰⁴⁸ and
- (c) Strata can be presumed to have taken account of the information it received from Lindum (i.e. that Lindum did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁰⁴⁹

IV.5234. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Lindum and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for Doncaster Citadel Salvation Army Hall, tender deadline 27 April 2004.

Immunity and leniency assessment

IV.5235. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5236. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to Strata under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this infringement.

Infringement 190: Civil Works for Aldwarke Primary Mill, Rotherham Works – 4 May 2004
Client: Corus Engineering Steels
Suspect Parties: Admiral and North Midland

IV.5237. On 6 April 2004, Corus Engineering Steels sought tenders for civil works for Aldwarke Primary Mill, Rotherham Works. The return date for the tender was 28 April 2004, extended to 4 May 2004 and four companies were invited to tender: Britcon, North Midland, Clugstons and Admiral.⁷⁰⁵⁰

IV.5238. Corus Engineering Steels received the following tender returns by noon on 4 May 2004:⁷⁰⁵¹

⁷⁰⁴⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁰⁴⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁰⁵⁰ Information from client, OFT Document Reference 7491.

⁷⁰⁵¹ Information from client, OFT Document Reference 7491.

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Britcon	6 April 2004	By 4 May 2004	£1,390,931.00	Yes
North Midland	6 April 2004	By 4 May 2004	£1,931,607.55	
Clugstons	6 April 2004	By 4 May 2004	£1,621,210.00	
Admiral	6 April 2004	By 4 May 2004	£2,122,660.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Admiral – Handwritten Document

IV.5239. In a contemporaneous note provided by Admiral to the OFT as part of its leniency application, the following entries have been made, all of which are handwritten by Andrew Clarkson ('AC'), Estimating Director at Admiral.⁷⁰⁵²

*£300K from
Last weeks
Amendment*

NMC 2.10

*OUR Figure
£2,122,000*

4/5/04

Martin Shorthouse'

Evidence from leniency applicant Admiral

IV.5240. As part of its leniency application, Admiral provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

IV.5241. In particular, Admiral provided to the OFT an analysis of its projects since January 2000 and in respect of this tender, Admiral confirmed that it received a cover price from North Midland.⁷⁰⁵³ Furthermore, Admiral provided a schedule which listed names and companies that it contacted regarding tenders. This schedule included 'Mr M Shorthouse' at North Midland.⁷⁰⁵⁴

IV.5242. Following the issue of the Statement, Admiral did not contest its participation in this infringement.⁷⁰⁵⁵

Witness evidence from leniency applicant Admiral

IV.5243. During interviews conducted in connection with its leniency application, Admiral's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

⁷⁰⁵² Handwritten note, OFT Document Reference 5203.

⁷⁰⁵³ Schedule of projects, OFT Document Reference 5189, page 6.

⁷⁰⁵⁴ Schedule of companies in contact, OFT Document Reference 5190.

⁷⁰⁵⁵ Written representations of Admiral, 26 June 2008, paragraph 21.1.

- IV.5244. AC confirmed in interview that it was his handwriting on the handwritten document and that, *'it was the back of a telephone pad, by the look of it, that I took a message on, from Martin Shorthouse, who I suspect had given me a ring to tell me what our figure was on that particular contract'*.⁷⁰⁵⁶ AC also confirmed in respect of Martin Shorthouse ('MS') at North Midland, *'Yes, he's the guy that I always spoke to'*.⁷⁰⁵⁷ AC confirmed that 'NMC' on the document stood for *'North Midland Construction'*.⁷⁰⁵⁸
- IV.5245. In its response to the Statement, North Midland, and MS in particular, denied that MS knew anyone at Admiral, including AC.⁷⁰⁵⁹ However, the OFT notes AC's specific confirmation at interview that it was MS who he always spoke to. In view of that confirmation, accompanied by MS's name on a contemporaneous document, the OFT is not persuaded by MS's evidence to the contrary.
- IV.5246. AC said in respect of this tender that, *'We decided to take a cover on this particular contract, because again we didn't want to upset Corus, who were a regular client and who, over the years we'd done a lot of work with. I obviously contacted North Midland Construction and asked them if they were pricing it. They obviously said yes, and they gave us the cover figure'*.⁷⁰⁶⁰ In respect of the handwritten note *'£300K from last weeks Amendment'*, AC explained *'The 300K that he mentions, from last week's amendment ... that's in my handwriting, that explains why we were given an extension of time, because during the tender period they obviously came out with some amendments to the tender. There was additional work in it, and so to enable contractors to have time to price it, they obviously gave them a week's extension, and that's why he's [Martin Shorthouse] given me that other figure'*.⁷⁰⁶¹
- IV.5247. In its response to the Statement, North Midland suggested that *'Mr Clarkson at Admiral is not able to say that a cover price was given by North Midland'*⁷⁰⁶², and that the allegation *'...is no more than an ex post factor [sic] "rationalisation" of a 4 year old documentation with a view to boosting Admiral's leniency application'*.⁷⁰⁶³ North Midland noted that when describing this exchange, AC used the word *'obviously'*, for example *'I obviously contacted North Midland...'*⁷⁰⁶⁴, which in its view connoted that he did not recall the events he was describing but was explaining the document in front of him.
- IV.5248. The OFT does not consider these assertions to be supported by the evidence, considered as a whole and in its proper context. It is clear from AC's interview that he had a specific recollection of this tender, and indeed stated when asked if he was sure it was North Midland who provided the cover, *'I'm 99% certain it was'*. His near-certainty in respect of this tender may be contrasted with the other tenders about which he was questioned where he did not have such a specific recollection. Throughout his interview, where he did not have any

⁷⁰⁵⁶ Interview transcript, OFT Document Reference 13299, page 39.

⁷⁰⁵⁷ Interview transcript, OFT Document Reference 13299, page 41.

⁷⁰⁵⁸ Interview transcript, OFT Document Reference 13299, page 40.

⁷⁰⁵⁹ Written representations of North Midland, 26 June 2008, page 10; witness statement of Martin Shorthouse, 26 June 2008, page 2; and oral representations of North Midland, 14 July 2008, page 17.

⁷⁰⁶⁰ Interview transcript, OFT Document Reference 13299, page 38.

⁷⁰⁶¹ Interview transcript, OFT Document Reference 13299, page 39.

⁷⁰⁶² Written representations of North Midland, 26 June 2008, page 10.

⁷⁰⁶³ Written representations of North Midland, 26 June 2008, page 9.

⁷⁰⁶⁴ Interview transcript, OFT Document Reference 13299, page 38.

specific recollection, he would answer accordingly.⁷⁰⁶⁵ For example, when asked what he recalled about another tender, he stated '*Ah, very little, to be honest*'.⁷⁰⁶⁶

IV.5249. The OFT also notes that AC volunteered the name North Midland before he was referred to the contemporaneous document. The OFT therefore considers that the strength of his recollection of this tender, and of having taken a cover from North Midland, may be relied upon. Moreover, the OFT considers that in the absence of a reason to doubt the accuracy of the contemporaneous document (which, for reasons set out below the OFT does not consider there to be) AC's explanation of that document would still be valid explanatory evidence, even absent a specific recollection.

Evidence from other companies – North Midland

IV.5250. The OFT wrote to North Midland on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that North Midland had participated in bid rigging on this tender. In response to this letter, North Midland did not admit bid rigging on this tender.⁷⁰⁶⁷

IV.5251. In its response to the Statement, North Midland suggested that the contemporaneous document described in paragraph IV.5239 did not constitute sufficient evidence that North Midland had provided a cover price to Admiral because it '*does not provide any substantive evidence that covers were given or taken*'.⁷⁰⁶⁸ Rather, it suggested, it may be a record of post tender information gathering.⁷⁰⁶⁹

IV.5252. The OFT does not consider this alternative explanation plausible. Admiral recorded in this note only a rounded down version of its own bid. It bears no relation to any other company's tender. Instead, it is consistent with a figure having been given by way of cover price being recorded, and that cover price being amended to a slightly different figure for submission to the client.⁷⁰⁷⁰ The OFT considers that, taken together with AC's explanation of this note (see paragraph IV.5244 above) and absent any plausible alternative explanation, this contemporaneous note does provide strong and compelling evidence that North Midland provided a cover to Admiral.

IV.5253. North Midland also suggested that the portion of the handwritten note referring to MS appeared to be a different style of handwriting to the rest of the contemporaneous note and more consistent with the writing on another, non-contemporaneous document.⁷⁰⁷¹ The OFT does not accept this suggestion as AC confirmed in interview that all of the handwriting on the note, including the reference to MS, was his.⁷⁰⁷²

⁷⁰⁶⁵ See, for example, interview transcript, OFT Document Reference 13299, pages 9, 20, 25, and 29.

⁷⁰⁶⁶ Interview transcript, OFT Document Reference 13299, page 12.

⁷⁰⁶⁷ Response from North Midland, OFT Document Reference 10721, page 2.

⁷⁰⁶⁸ Written representations of North Midland, 26 June 2008, page 9.

⁷⁰⁶⁹ Written representations of North Midland, 26 June 2008, page 9 and 10.

⁷⁰⁷⁰ Witness statement of Rod Walker, 26 June 2008; and witness statement of Martin Shorthouse, 26 June 2008.

⁷⁰⁷¹ Written representations of North Midland, 26 June 2008, page 9.

⁷⁰⁷² Interview transcript, OFT Document Reference 13299, pages 39 to 40.

- IV.5254. In its response to the Statement, North Midland suggested that MS could not have given a cover to AC at Admiral because he was not in any way involved in the estimating of this tender, and because he was at Kenilworth on the day when the cover was meant to be exchanged.⁷⁰⁷³ The OFT does not accept that either his presence in Kenilworth, or his lack of involvement in the preparation of this tender, precluded him from providing a cover price. MS could, through any number of avenues (the OFT does not consider it needs to speculate as to which), have been aware of the price that North Midland was submitting, or have found it out, and based on that information provided that a cover price to AC by telephone.
- IV.5255. North Midland provided a number of statements from its employees, including the Chief Executive, Directors, and a number of estimators, including MS, and Rod Walker, the estimator for this tender, all of whom asserted that North Midland did not engage in cover pricing.⁷⁰⁷⁴ The OFT accepts that North Midland may have had a policy against cover pricing; that does not, however, preclude that cover prices were given/taken by individuals in breach of that policy. Additionally, even if the OFT accepts Rod Walker's evidence that he did not provide Admiral with a cover price, this would not affect the OFT's case which is not that Rod Walker provided a cover price but only that a cover price was provided by MS.
- IV.5256. Regarding the statement from MS, as discussed above, the witness evidence from Admiral that he was a regular contact of AC (see paragraph IV.5244) contradicts his statement that he did not know anyone from Admiral. MS's name is also recorded on a contemporaneous document produced by AC. The OFT considers this calls into question the credibility of MS's statement. In any event, the OFT does not consider his statement to be sufficient evidence to undermine the contemporaneous documentary and witness evidence in relation to this Infringement.

The OFT's analysis of the evidence and provisional finding

- IV.5257. From the evidence presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.
- IV.5258. Admiral and North Midland each accepted an invitation to tender for this contract.
- IV.5259. Admiral was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.5260. In regard to North Midland, Admiral has confirmed that it received a cover price from North Midland. AC's handwritten note of the telephone call with North Midland records '*Martin Shorthouse*' and '*NMC*', providing evidence that contact was made between the two parties. AC also made a note of the cover price provided by North Midland, '*OUR figure £2,122,000*', a figure that was identical other than the addition of £660, to the tender figure that Admiral submitted, which was £2,122,660.

⁷⁰⁷³ Written representations of North Midland, 26 June 2008, page 10; witness statement of Martin Shorthouse, 26 June 2008; and oral representations of North Midland, 14 July 2008, page 17.

⁷⁰⁷⁴ Witness statements of R Moyle, Brian Evans, Chris Wheelhouse, David Blount, Martin Shorthouse, Mike Catlin, and Rod Walker.

- IV.5261. Admiral also provided a schedule which listed names and companies that it contacted about tenders. This schedule included MS at North Midland, providing further corroboration that Admiral contacted MS at North Midland about cover pricing in respect of tenders. Moreover, AC of Admiral stated in interview that MS was his regular contact at North Midland.
- IV.5262. The OFT notes in addition that the tender submitted by Admiral was higher than the tender submitted by North Midland, a pattern consistent with a cover price having been provided.
- IV.5263. The OFT therefore concludes that contact took place between North Midland and Admiral. The OFT also concludes that North Midland supplied a figure to Admiral for a cover bid.
- IV.5264. The OFT is satisfied that the facts set out in paragraphs IV.5239 to IV.5263 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁰⁷⁵ In particular:
- (a) the provision of a figure for a cover bid from North Midland to Admiral was not unilateral⁷⁰⁷⁶, and contravenes the principle against direct or indirect contact between competitors;⁷⁰⁷⁷
 - (b) Admiral can be presumed to have taken account of the information received from North Midland (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁰⁷⁸ and
 - (c) North Midland can be presumed to have taken account of the information it received from Admiral (i.e. that Admiral did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁰⁷⁹
- IV.5265. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Admiral and North Midland, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for civil works for Aldwarke Primary Mill, Rotherham Works, tender deadline 4 May 2004.

Immunity and leniency assessment

- IV.5266. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.
- IV.5267. Admiral informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Admiral will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁷⁰⁷⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁰⁷⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁰⁷⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁰⁷⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁰⁷⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 191: **The Orchard Development, The Grovelands, Bedales School, Church Road, Petersfield, Hampshire – 14 May 2004**
Client: **Bedales School**
Parties: **Jackson⁷⁰⁸⁰ and R Durnell**

IV.5268. Initially on 30 March 2004 and subsequently on 6 April 2004, Bedales School sought tenders for The Orchard Development, The Grovelands, Bedales School, Church Road, Petersfield, Hampshire. The return date for the tender was extended from 5 May 2004 to 14 May 2004 and a total of nine companies were invited to tender: R Durnell, Galliford Try, Henry Jones, Jackson, Mowlem, Willmott Dixon, Bluestone, Dean & Dyball and Raymond Brown.⁷⁰⁸¹

IV.5269. Bedales School received the following tender returns:⁷⁰⁸²

Company	Date tender received	Amount of tender	Awarded the tender
R Durnell	14 May 2004	£4,594,727	Yes
Galliford Try	14 May 2004	£4,982,335	
Henry Jones	Declined to Tender April 2004		
Jackson	14 May 2004	£5,145,000	
Mowlem	14 May 2004	£4,314,058	
Willmott Dixon	Declined to Tender 11 April 2004		
Bluestone	Declined to Tender April 2004		
Dean & Dyball	Declined to Tender 19 April 2004		
Raymond Brown	Declined to Tender 16 April 2004		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson Tender book

IV.5270. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten:⁷⁰⁸³

Enquiry Number	Date Received	Employer	Location	Description of Works
E3831	1.4.04	The Grovelands Bedales Sch	Petersfield Hampshire	Bedales School.

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
		£5,145,000	Cover from Durnells	Noon 5.5.04 JCL

⁷⁰⁸⁰ Jackson is a subsidiary of Propensity.

⁷⁰⁸¹ Information from client, OFT Document Reference 7898.

⁷⁰⁸² Information from client, OFT Document Reference 7898.

⁷⁰⁸³ Tender book, OFT Document Reference A0905, page 54.

Evidence from leniency applicant Propensity

IV.5271. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.5272. In particular, Propensity provided to the OFT an analysis of Jackson's tender book since 4 January 2000 and in respect of this tender, Propensity confirmed that it received a cover price from R Durtnell.⁷⁰⁸⁴

IV.5273. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁷⁰⁸⁵

Witness evidence from leniency applicant Propensity

IV.5274. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.5275. John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender book⁷⁰⁸⁶ and that in most instances it would be himself that arranged the cover price.⁷⁰⁸⁷ JR said in respect of the entry in the tender book, '*I'm almost certain that's my writing and my record of the figure that was submitted*'.⁷⁰⁸⁸ JR also confirmed that the figure recorded in the tender book and submitted by Jackson for this tender was most likely the figure given by R Durtnell.⁷⁰⁸⁹

Evidence from other companies – R Durtnell

IV.5276. The OFT wrote to R Durtnell on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that R Durtnell had participated in bid rigging on this tender. In response to this letter, R Durtnell admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party / parties involved*'.⁷⁰⁹⁰ Furthermore, R Durtnell in respect of this tender confirmed that it gave a cover price.⁷⁰⁹¹

IV.5277. The OFT subsequently wrote to R Durtnell's ultimate parent company at the time of this Infringement, Durtnell Holdings, on 5 November 2007, asking it to comment on R Durtnell's response to the OFT's Fast Track Offer, given that the OFT intended to hold Durtnell Holdings jointly and severally liable for any infringements committed by R Durtnell in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Durtnell

⁷⁰⁸⁴ Table of cover pricing recorded in the tender book, OFT Document Reference A1274, page 6.

⁷⁰⁸⁵ Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁷⁰⁸⁶ Interview transcript, OFT Document Reference 11347, page 10.

⁷⁰⁸⁷ Interview transcript, OFT Document Reference 11347, page 11.

⁷⁰⁸⁸ Interview transcript, OFT Document Reference 11347, page 22.

⁷⁰⁸⁹ Interview transcript, OFT Document Reference 11347, page 22.

⁷⁰⁹⁰ Response from R Durtnell, OFT Document Reference 10780, page 3.

⁷⁰⁹¹ Response from R Durtnell, OFT Document Reference 10779, page 1.

Holdings said *'We confirm that the holding company adopts the operating company's position'*.⁷⁰⁹²

IV.5278. In its response to the Statement, R Durtnell stated *'Durtnell has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement by occasional cover pricing'*.⁷⁰⁹³

The OFT's analysis of the evidence and finding

IV.5279. From the evidence presented above, the OFT draws the following conclusions.

IV.5280. Jackson and R Durtnell each accepted an invitation to tender for this contract.

IV.5281. R Durtnell completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the fact that R Durtnell won the contract.

IV.5282. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5283. In regard to R Durtnell, Jackson's tender book contains the entry *'Cover from Durtnells'*. Propensity has confirmed that this shows that it received a cover price from R Durtnell. Jackson recorded in the tender book the figure £5,145,000, as the tender figure and this was the figure that Jackson submitted.

IV.5284. Both Parties have admitted their involvement in cover pricing in respect of this Infringement. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by R Durtnell, a pattern consistent with a cover price having been provided.

IV.5285. The OFT therefore concludes that contact took place between R Durtnell and Jackson. The OFT also concludes that R Durtnell supplied a figure to Jackson for a cover bid.

IV.5286. The OFT is satisfied that the facts set out in paragraphs IV.5270 to IV.5285 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁰⁹⁴ In particular:

- (a) the provision of a figure for a cover bid from R Durtnell to Jackson was not unilateral⁷⁰⁹⁵, and contravenes the principle against direct or indirect contact between competitors;⁷⁰⁹⁶
- (b) Jackson can be presumed to have taken account of the information received from R Durtnell (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁰⁹⁷ and
- (c) R Durtnell can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a

⁷⁰⁹² Response from Durtnell Holdings, OFT Document Reference 14020.

⁷⁰⁹³ Written representations of R Durtnell, 27 June 2008, paragraph 4.

⁷⁰⁹⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁰⁹⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁰⁹⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁰⁹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

competitive bid) when determining its conduct in the tendering process.⁷⁰⁹⁸

IV.5287. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and R Durnell, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for The Orchard Development, The Grovelands, Bedales School, Church Road, Petersfield, Hampshire, tender deadline 14 May 2004.

Immunity and leniency assessment

IV.5288. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5289. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 192: New Lift Shaft, Coniston House, Willerby – 14 May 2004
Client: Hull and East Riding Community Health NHS Trust
Parties: Hobson & Porter and Robinson & Sawdon

IV.5290. On 30 April 2004, Hull and East Riding Community Health NHS Trust ('Hull and East Riding NHS'), now known as Humber Mental Health Teaching NHS Trust, sought tenders for a new lift shaft, Coniston House, Willerby. The return date for the tender was 12:00 noon on 14 May 2004 and five companies were invited to tender: Quibell and Son Ltd ('Quibell'), Geo Houlton, Robinson & Sawdon, Hobson & Porter, and Wright (Hull).⁷⁰⁹⁹

IV.5291. Hull and East Riding NHS received the following tender returns on 14 May 2004:⁷¹⁰⁰

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Quibell	14 May 2004	Between 11:00 and 11:50	£60,147	
Geo Houlton	14 May 2004	Between 11:00 and 11:50	£54,680	Yes
Robinson & Sawdon	14 May 2004	Between 11:00 and 11:50	£57,964	
Hobson & Porter	14 May 2004	Between 11:00 and 11:50	£62,643	
Wright (Hull)	14 May 2004	12:10	£69,850	

⁷⁰⁹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁰⁹⁹ Information from client, OFT Document Reference 8462.

⁷¹⁰⁰ Information from client, OFT Document Reference 8462.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter

IV.5292. The invitation to tender letter from Hull and East Riding NHS has been annotated with the handwriting '*cover due from Dave @ R & S*'.⁷¹⁰¹

IV.5293. The Minor Works Tender Summary sheet for this tender has been crossed with a banner containing the words '*VERBALLY DECLINED*'.⁷¹⁰²

Evidence from leniency applicant Hobson & Porter

IV.5294. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.5295. In Hobson & Porter's Summary of Cover Pricing Activity (Minor Works), provided to the OFT as part of its leniency application, it is stated that Hobson & Porter received a cover from Robinson & Sawdon and that the individual contact at Robinson & Sawdon was Bob Sawdon.⁷¹⁰³

IV.5296. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁷¹⁰⁴

Witness evidence from leniency applicant Hobson & Porter

IV.5297. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.5298. In respect of this tender, in interview Ian Gibbins ('IG'), Minor Works Director at Hobson & Porter, confirmed that the handwriting, '*cover due from Dave @ R & S*', on the invitation to tender letter from Hull and East Riding NHS was Andrew Scott's.⁷¹⁰⁵ IG said that Andrew Scott ('AS'), an ex-employee of Hobson & Porter, left approximately two years ago. IG confirmed that he managed AS and that AS was involved in cover pricing.⁷¹⁰⁶

IV.5299. IG in interview stated that he would have been aware that AS was taking a cover price from Robinson & Sawdon on this tender.⁷¹⁰⁷ IG said that the '*Dave*', referred to in AS's handwriting on the invitation to tender letter from Hull and East Riding NHS '*would almost certainly be Dave Marshall*'.⁷¹⁰⁸

⁷¹⁰¹ Invitation to tender, OFT Document Reference A1488.

⁷¹⁰² Minor Works Tender Summary sheet, OFT Document Reference A1490.

⁷¹⁰³ Summary of Cover Pricing Activity, OFT Document Reference A1349, page 2.

⁷¹⁰⁴ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁷¹⁰⁵ Invitation to tender, OFT Document Reference A1488.

⁷¹⁰⁶ Interview transcript, OFT Document Reference 11231, pages 10 and 11.

⁷¹⁰⁷ Interview transcript, OFT Document Reference 11231, page 12.

⁷¹⁰⁸ Interview transcript, OFT Document Reference 11231, page 13.

IV.5300. IG said that the words '*VERBALLY DECLINED*', annotated on the Minor Works Tender Summary sheet,⁷¹⁰⁹ also mean that Hobson & Porter took a cover on this tender. At the time of this tender, IG explained that his department operated a document recording system in accordance with British Standard 5750, which meant that details of tenders received were required to be completed on the tender summary sheets. IG explained that writing '*VERBALLY DECLINED*', on the tender summary sheet, was a way to get around this requirement where there were no tender details available.⁷¹¹⁰

Evidence from other companies – Robinson & Sawdon

IV.5301. The OFT wrote to Robinson & Sawdon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Robinson & Sawdon had participated in bid rigging on this tender. In response to this letter, Robinson & Sawdon admitted participating in bid rigging activities on this tender with Hobson & Porter.⁷¹¹¹

IV.5302. In the response, James Deacon ('JD'), the Managing Director of Robinson & Sawdon, said that the business of Robinson & Sawdon was sold by its owners, Bob Sawdon ('BS'), Michael Sawdon ('MS') and Charles Robinson ('CR'), to its current owners in October 2006. BS retired on 27 August 2004, MS retired on 2 August 2006 and CR resigned as a director (though remained an employee) in October 2006. David Marshall ('DM') remained employed as Contracts Manager.⁷¹¹²

IV.5303. JD explained that he had conducted an internal investigation into the tendering process at Robinson & Sawdon. As part of this investigation CR was interviewed and confirmed that Robinson & Sawdon engaged in cover pricing.⁷¹¹³ Also, as part of this investigation DM completed a questionnaire about the tendering process. DM was Estimating Manager during the period under investigation. In the questionnaire, DM confirmed that Robinson & Sawdon was involved in the practice of cover pricing and that this was done with the knowledge of the directors of the company named at paragraph IV.5302 above.⁷¹¹⁴ DM separately confirmed that any cover price provided by him, would have been on the basis of being instructed to do so by either BS or MS up to August 2004 and CR afterwards. At the time of this tender, BS was primarily responsible for the provision of prices at Robinson & Sawdon. For this tender, DM recalled that if there had been any discussion in relation to providing a cover price that it would have been with Hobson & Porter.⁷¹¹⁵

IV.5304. Following the issue of the Statement, Robinson & Sawdon did not submit any written or oral representations specifically in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.5305. From the evidence presented above, the OFT draws the following conclusions.

⁷¹⁰⁹ Minor Works Tender Summary sheet, OFT Document Reference A1490.

⁷¹¹⁰ Interview transcript, OFT Document Reference 11231, page 13.

⁷¹¹¹ Response from Robinson & Sawdon, OFT Document Reference 10819, page 3.

⁷¹¹² Response from Robinson & Sawdon, OFT Document Reference 10817.

⁷¹¹³ Minutes of disciplinary hearing, OFT Document Reference 10818, page 10.

⁷¹¹⁴ Completed questionnaire, OFT Document Reference 10818, page 16.

⁷¹¹⁵ Response from Robinson & Sawdon, OFT Document Reference 10817, page 2.

- IV.5306. Hobson & Porter and Robinson & Sawdon each accepted an invitation to tender for this contract.
- IV.5307. Hobson & Porter was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.5308. In regard to Robinson & Sawdon, Hobson & Porter's copy of the tender invitation letter from Hull and East Riding NHS has been annotated with the handwriting '*cover due from Dave @ R & S*'. Hobson & Porter has confirmed that this shows that it received a cover price for this tender from DM at Robinson & Sawdon. DM of Robinson & Sawdon recalls that if there had been any discussion in relation to providing a cover price for this tender that it would have been with Hobson & Porter.
- IV.5309. Hobson & Porter submitted a tender figure of £62,643 and Robinson & Sawdon submitted a tender figure of £57,964. The OFT notes that the tender submitted by Hobson & Porter was higher than the tender submitted by Robinson & Sawdon, a pattern consistent with a cover price having been provided.
- IV.5310. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Robinson & Sawdon admitted that the party with whom it engaged in bid rigging was Hobson & Porter without being shown the OFT's evidence that Hobson & Porter was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.5311. The OFT therefore concludes that contact took place between Robinson & Sawdon and Hobson & Porter. The OFT also concludes that Robinson & Sawdon supplied a figure to Hobson & Porter for a cover bid.
- IV.5312. The OFT is satisfied that the facts set out in paragraphs IV.5292 to IV.5311 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷¹¹⁶ In particular:
- (a) the provision of a figure for a cover bid from Robinson & Sawdon to Hobson & Porter was not unilateral⁷¹¹⁷, and contravenes the principle against direct or indirect contact between competitors;⁷¹¹⁸
 - (b) Hobson & Porter can be presumed to have taken account of the information received from Robinson & Sawdon (i.e. the cover price) when determining its own conduct in the tendering process;⁷¹¹⁹ and
 - (c) Robinson & Sawdon can be presumed to have taken account of the information it received from Hobson & Porter (i.e. that Hobson & Porter did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷¹²⁰
- IV.5313. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place

⁷¹¹⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷¹¹⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁷¹¹⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷¹¹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷¹²⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

between Hobson & Porter and Robinson & Sawdon, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new lift shaft, Coniston House, Willerby, tender deadline 14 May 2004.

Immunity and leniency assessment

IV.5314. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5315. Hobson & Porter informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Hobson & Porter will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 193: Refurbishment of Sure Start, St Anne's Metrazone, Ransom Road, Nottingham – 28 May 2004

Client: Nottinghamshire Healthcare NHS Trust
Parties: Bodill and Wiggett

IV.5316. In 2004, Nottinghamshire Healthcare NHS Trust sought tenders for refurbishment of Sure Start, St Anne's Metrazone, Ransom Road, Nottingham. The return date for the tender was 28 May 2004 and six companies were invited to tender: W S Biggin, Thomas Long, Wiggett, Bodill, Pectel and Baggaley & Jenkins.⁷¹²¹

IV.5317. Nottinghamshire Healthcare NHS Trust received the following tender returns:⁷¹²²

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
W S Biggin	28 May 2004	11:50	£154,523	
Thomas Long	28 May 2004	11:35	£107,875	Yes
Wiggett	28 May 2004	11:28	£149,850	
Bodill	28 May 2004	11:45	£141,571	
Pectel	Declined 27 May 2004			
Baggaley & Jenkins	Not Known	Not Known	£118,520	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.5318. In Bodill's original tender sheet, provided to the OFT as part of its leniency application, under the section headed 'Tenderers', the following entries have been made, all of which are handwritten except the entry for Bodill:⁷¹²³

⁷¹²¹ Information from client, OFT Document Reference 9513c.

⁷¹²² Information from client, OFT Document Reference 9513c.

⁷¹²³ Tender sheet, OFT Document Reference 0734.

1. *Bodill*

2. *T. LONG*

3. *B & J*

£149850 4. *WIGGETT BROS. © FROM US
RING PAUL FRI AM'*

IV.5319. The tender sheet states that Bodill's submitted figure was £141,571.⁷¹²⁴

IV.5320. Juris Rozentals ('JR'), Chief Estimator at Bodill, priced this tender and has indicated that the handwritten annotation '*£149850*', under the section headed '*Tenderers*' was made by him.⁷¹²⁵ JR also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.5321. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '*© FROM US RING PAUL FRI AM'*' under the section headed '*Tenderers*' were made by him.⁷¹²⁶ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.5322. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.5323. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁷¹²⁷ In respect of this tender, Bodill confirmed that it gave a cover price to Wiggett.⁷¹²⁸

IV.5324. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.5325. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Evidence from other companies – Wiggett

IV.5326. The OFT wrote to Wiggett on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that

⁷¹²⁴ Tender sheet, OFT Document Reference 0734.

⁷¹²⁵ Contracts document, OFT Document Reference 6426, pages 86 and 124.

⁷¹²⁶ Contracts document, OFT Document Reference 6426, pages 1 and 37.

⁷¹²⁷ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁷¹²⁸ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 7.

Wiggett had participated in bid rigging on this tender. Wiggett did not respond to the letter. On 15 May 2007, the OFT contacted Wiggett by telephone and it said that after consideration it was rejecting the OFT's Fast Track Offer.⁷¹²⁹

IV.5327. In its response to the Statement, however, Wiggett stated in respect of this Infringement that it '*...must accept that in light of the evidence ... a cover price must have been taken from Bodill*'⁷¹³⁰ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.5328. From the evidence presented above, the OFT draws the following conclusions.

IV.5329. Bodill and Wiggett each accepted an invitation to tender for this contract.

IV.5330. Bodill completed the estimating process for the tender for this contract. Bodill wanted to win the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.5331. In regard to Wiggett, Bodill's tender sheet records '*149850 4. WIGGETT BROS. © FROM US RING PAUL FRI AM*'. Bodill has confirmed that this indicates that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £149,850, a figure that was identical to the tender price that Wiggett submitted. Bodill has confirmed that this figure was written prior to the date of tender submission. Information obtained from W R Bloodworth, a list of contacts for cover prices, names Paul Wiggett at Wiggett with a telephone contact number.⁷¹³¹

IV.5332. The OFT notes in addition that the tender submitted by Wiggett was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.5333. Both Parties have now admitted liability in respect of this Infringement.

IV.5334. The OFT therefore concludes that contact took place between Wiggett and Bodill. The OFT also concludes that Bodill supplied a figure to Wiggett for a cover bid.

IV.5335. The OFT is satisfied that the facts set out in paragraphs IV.5318 to IV.5334 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷¹³² In particular:

- (a) the provision of a figure for a cover bid from Bodill to Wiggett was not unilateral⁷¹³³, and contravenes the principle against direct or indirect contact between competitors;⁷¹³⁴
- (b) Wiggett can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁷¹³⁵ and

⁷¹²⁹ File note of telephone conversation, OFT Document Reference 10895.

⁷¹³⁰ Written representations of Wiggett, 25 June 2008, paragraph 3.14.

⁷¹³¹ Contacts for Cover Prices, OFT Document Reference 3915, page 1.

⁷¹³² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷¹³³ See paragraph IV.73 of the General comments on cover pricing section.

⁷¹³⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷¹³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Bodill can be presumed to have taken account of the information it received from Wiggett (i.e. that Wiggett did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷¹³⁶

IV.5336. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Wiggett and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment of Sure Start, St Anne's Metrazone, Ransom Road, Nottingham, tender deadline 28 May 2004.

Immunity and leniency assessment

IV.5337. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5338. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 194: Extension and Refurbishment and Works at Malton, Norton and District Hospital – 11 June 2004
Client: Scarborough & N E Yorkshire Healthcare NHS Trust
Parties: Hobson & Porter, Geo Houlton and Wright (Hull)

IV.5339. In 2004, Scarborough & N E Yorkshire Healthcare NHS Trust ('Scarborough & NE'), now known as North Yorkshire and York Primary Care NHS Trust, sought tenders for extension and refurbishment and works at Malton, Norton and District Hospital. The return date for the tender was 11 June 2004 and six companies were invited to tender: Geo Houlton, Totty Building, Hobson & Porter, Irwins, Wright (Hull), and Scothern Construction Limited.⁷¹³⁷

IV.5340. Scarborough & NE received the following tender returns on 11 June 2004:⁷¹³⁸

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Geo Houlton	11 June 2004	11:55	£3,148,867	
Totty Building	11 June 2004	09:55	£2,921,387	
Hobson & Porter	11 June 2004	11:00	£3,024,106	Yes
Irwins	11 June 2004	10:30	£2,798,972	
Wright (Hull)	11 June 2004	11:30	£3,169,113	
Scothern Construction Limited	11 June 2004	11:42	£2,616,659	

⁷¹³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷¹³⁷ Information from client, OFT Document Reference 9062, pages 1 and 2.

⁷¹³⁸ Information from client, OFT Document Reference 9062, pages 1 and 2.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender Information sheet

IV.5341. The Tender Information sheet for this tender states that Hobson & Porter's submitted figure was £3,024,106 and in the competition section is written, '*Wright C 3,169,113*', '*Houlton C 3,148,867*'. Two other competitors are written in this section, '*Totty*' and '*Irwin*', but they do not have any markings or figures against them.⁷¹³⁹

Evidence from leniency applicant Hobson & Porter

IV.5342. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.5343. In Hobson & Porter's Summary of Cover Pricing Activity (Major Works) it is stated that Hobson & Porter provided a cover to Wright (Hull), and that the individual contact at Wright (Hull) was Chris Davis. It is also stated that Hobson & Porter provided a cover to Geo Houlton.⁷¹⁴⁰

IV.5344. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁷¹⁴¹

Witness evidence from leniency applicant Hobson & Porter

IV.5345. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.5346. In respect of this tender, in interview Russell Horner, ('RH'), Minor Works Estimating Director at Hobson & Porter, recalls that the handwritten prices next to '*Wright*' and '*Houlton*' on the Tender Information sheet were written by him, that these figures would have been entered on '*the morning that the tender went in*'⁷¹⁴² and that he would have made the telephone calls giving the cover prices to Wright (Hull) and Geo Houlton on the same morning.

Evidence from other companies – Geo Houlton

IV.5347. The OFT wrote to Geo Houlton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Geo Houlton had participated in bid rigging on this tender. In response to this

⁷¹³⁹ Tender information, OFT Document Reference A0137, pages 1 and 2.

⁷¹⁴⁰ Summary of Cover Pricing Activity, OFT Document Reference A1347, page 1. An individual contact name of Jamie Phillipson is also mentioned, but Geo Houlton has stated that '*at no material time*' did it have an employee of that or similar name (written representations of Geo Houlton, 25 June 2008, paragraph 64).

⁷¹⁴¹ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁷¹⁴² Interview transcript, OFT Document Reference 11229, pages 14 and 15.

letter, Geo Houlton admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁷¹⁴³

IV.5348. The OFT subsequently wrote to Geo Houlton's ultimate parent company at the time of this Infringement, Geo Houlton Holdings, on 5 November 2007, asking it to comment on Geo Houlton's response to the OFT's Fast Track Offer, given that the OFT intended to hold Geo Houlton Holdings jointly and severally liable for any infringements committed by Geo Houlton in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Geo Houlton Holdings said it had no comments to make.⁷¹⁴⁴

IV.5349. In its response to the Statement, Geo Houlton stated *'[i]t is not disputed that Houlton participated in cover pricing during the relevant period set out in the Statement'*.⁷¹⁴⁵

Evidence from other companies – Wright (Hull)

IV.5350. The OFT wrote to Wright (Hull) on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wright (Hull) had participated in bid rigging on this tender. In response to this letter, Wright (Hull) admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁷¹⁴⁶

IV.5351. The OFT subsequently wrote to Wright (Hull)'s ultimate parent company at the time of this Infringement, T Wright Holdings, on 5 November 2007, asking it to comment on Wright (Hull)'s response to the OFT's Fast Track Offer, given that the OFT intended to hold T Wright Holdings jointly and severally liable for any infringements committed by Wright (Hull) in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, T Wright Holdings said *'We have been made fully aware of the situation by our subsidiary and at this stage have no further comment to make'*.⁷¹⁴⁷

IV.5352. In its response to the Statement, Wright (Hull) confirmed that it *'...has admitted to engaging in "cover pricing" on this tender, but cannot recall details of the other party/parties involved'*.⁷¹⁴⁸

The OFT's analysis of the evidence and finding

IV.5353. From the evidence presented above, the OFT draws the following conclusions.

IV.5354. Hobson & Porter, Geo Houlton and Wright (Hull) each accepted an invitation to tender for this contract.

IV.5355. Hobson & Porter completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work.

⁷¹⁴³ Response from Geo Houlton, OFT Document Reference 10326, page 3.

⁷¹⁴⁴ File note of telephone conversation, OFT Document Reference 13967.

⁷¹⁴⁵ Written representations of Geo Houlton, 24 June 2008, paragraph 52.

⁷¹⁴⁶ Response from Wright (Hull), OFT Document Reference 10926, page 2.

⁷¹⁴⁷ Response from T Wright Holdings, OFT Document Reference 14040, page 1.

⁷¹⁴⁸ Written representations of Wright (Hull), 27 June 2008, paragraph 42.

- IV.5356. Geo Houlton and Wright (Hull) were unable to submit a tender by the return date and/or did not want to win this tender.
- IV.5357. In regard to Geo Houlton, Hobson & Porter's Tender Information sheet records '*Houlton C 3,148,867*'. RH of Hobson & Porter has confirmed that this is his handwriting and that it indicates that he gave Geo Houlton a cover price. RH also confirms that he would have made the telephone call to Geo Houlton providing the cover price on the morning the tender was due. Furthermore, Hobson & Porter recorded on the tender sheet the figure £3,148,867 against Geo Houlton, a figure that was identical to the tender that Geo Houlton submitted for the work.
- IV.5358. The OFT notes in addition that the tender submitted by Geo Houlton was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, Geo Houlton admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.
- IV.5359. In regard to Wright (Hull), Hobson & Porter's Tender Information sheet records '*Wright C 3,169,113*'. RH of Hobson & Porter has confirmed that this is his handwriting and that it indicates that he gave Wright (Hull) a cover price. RH also confirms that he would have made the telephone call to Wright (Hull) providing the cover price on the morning the tender was due. Furthermore, Hobson & Porter recorded on the tender sheet the figure £3,169,113 against Wright (Hull), a figure that was identical to the tender that Wright (Hull) submitted for the work.
- IV.5360. The OFT notes in addition that the tender submitted by Wright (Hull) was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, Wright (Hull) admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.
- IV.5361. The OFT therefore concludes that contact took place between Geo Houlton and Hobson & Porter, and between Wright (Hull) and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied figures to each of Geo Houlton and Wright (Hull) for cover bids.
- IV.5362. The OFT is satisfied that the facts set out in paragraphs IV.5341 to IV.5361 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷¹⁴⁹ In particular:
- (a) the provision of figures for cover bids from Hobson & Porter to each of Geo Houlton and Wright (Hull) was not unilateral⁷¹⁵⁰, and contravenes the principle against direct or indirect contact between competitors;⁷¹⁵¹
 - (b) Geo Houlton and Wright (Hull) can each be presumed to have taken account of the information received from Hobson & Porter (i.e. the

⁷¹⁴⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷¹⁵⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁷¹⁵¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- respective cover prices) when determining their own respective conduct in the tendering process;⁷¹⁵² and
- (c) Hobson & Porter can be presumed to have taken account of the information it received from Geo Houlton and Wright (Hull) (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁷¹⁵³

IV.5363. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Geo Houlton and Hobson & Porter, and between Wright (Hull) and Hobson & Porter, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for extension and refurbishment and works at Malton, Norton and District Hospital, tender deadline 11 June 2004.

Immunity and leniency assessment

IV.5364. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5365. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Hobson & Porter in respect of this Infringement.

Infringement 195: Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds – 14 June 2004
Client: RMP Properties (Headingley) Ltd
Parties: Strata, York House and Stainforth

IV.5366. On 10 May 2004, RMP Properties (Headingley) Ltd sought tenders for the design and build of 54-bed accommodation at The Old Vicarage, St Marks Road, Leeds. The following five companies were invited to tender: Strata, York House, Stainforth, Barr Limited and Kier Northern. The deadline for receipt of tenders was 12:00 noon on 14 June 2004.⁷¹⁵⁴

IV.5367. RMP Properties (Headingley) Ltd received the following tender returns:⁷¹⁵⁵

⁷¹⁵² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷¹⁵³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷¹⁵⁴ Information from client, OFT Document Reference 10609.

⁷¹⁵⁵ Information from client, OFT Document Reference 10609.

Company	Date tender received	Amount of tender	Awarded contract
Strata	Before 12:00 noon on 14 June 2004	£2,331,633.00	
York House	Before 12:00 noon on 14 June 2004	£2,398,640.00	
Stainforth	Before 12:00 noon on 14 June 2004	£2,424,767.69	
Barr Limited	Before 12:00 noon on 14 June 2004	£2,483,470.14	
Kier Northern	Declined to tender	N/A	

IV.5368. RMP Properties (Headingley) Ltd stated that '*All tenders received were in excess of the approved Financial Authority*'.⁷¹⁵⁶ The contract was therefore not awarded.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Contract Information Sheet (BOB sheet)

IV.5369. During the OFT's search of Strata's premises a contract information sheet, or BOB sheet, was found. The BOB sheet contained the following entries typed in the tender results box:⁷¹⁵⁷

<i>TENDER RESULTS</i>		
<i>% DIFF</i>	<i>CONTRACTOR</i>	<i>VALUE</i>
	<i>STRATA</i>	<i>2331633</i>
	<i>STAINFORTH (C)</i>	<i>2425000</i>
	<i>YORK HOUSE (C)</i>	<i>2398640</i>
	<i>BARR</i>	

Contemporaneous documentary evidence from leniency applicant York House – Form of Tender

IV.5370. As part of its leniency application, York House provided to the OFT a copy of its Form of Tender this contract.⁷¹⁵⁸ The Form of Tender shows that it was completed by Arthur Richardson ('AR'), Chief Estimator at York House, on 14 June 2004. It also shows that York House tendered '*£2,398,640*' for this contract.⁷¹⁵⁹

Contemporaneous documentary evidence from non-lenieny applicant Stainforth – Record of Tenders 2005

IV.5371. During the OFT's search of Stainforth's premises a sheet headed '*Stainforth Construction Ltd, RECORD OF TENDERS 2005*' was found.⁷¹⁶⁰ The sheet contained the following entries in respect of this tender:

⁷¹⁵⁶ Information from client, OFT Document Reference 10609.

⁷¹⁵⁷ Contract Information Sheet, OFT Document Reference 3257.

⁷¹⁵⁸ Form of Tender, OFT Document Reference A0647.

⁷¹⁵⁹ Form of Tender, OFT Document Reference A0647.

⁷¹⁶⁰ Record of tenders, OFT Document Reference A1605, page 58.

<i>Tender No</i>	<i>Title</i>	<i>Received from</i>
04-45	<i>Student Accomodation, St Marks Road, Leeds</i>	<i>Bernard Williams Assoc</i>

<i>Client</i>	<i>Cover</i>
<i>RMP Properties</i>	<i>£2,424,767.69</i>

Evidence from leniency applicant - Strata

IV.5372. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file '*OFT COVER INFORMATION Section 2; 2002 - 2004*' and 'contracts in hand' document. This list contained the following entry:⁷¹⁶¹

<i>Date</i>	<i>Project</i>	<i>Strata ref no</i>
14/06/2004	Student Accom. St Marks Rd, Leeds	T29/04

<i>Cover to</i>	<i>Cover from</i>	<i>Company Name</i>	<i>Company Address</i>	<i>Contract Secured</i>
✓		Stainforth /York House	S; Bradford YH; Richmond	

IV.5373. In its response to the Statement, Strata did not make any representations in respect of this Infringement.

Evidence from leniency applicant – York House

IV.5374. As part of its leniency application, York House provided a schedule detailing '*projects identified during the course of an internal investigation where cover pricing has occurred*'.⁷¹⁶² York House stated this '*schedule is as complete as records and relevant individual recollections permit. The company has tried to provide as clear and accurate a review as is possible in all the circumstances and whilst the company is confident that the list is comprehensive, the possibility exists of inadvertent omission or inaccuracy due to the passage of time/absence of detailed records during the period under investigation*'.⁷¹⁶³ The list contains the following entry:⁷¹⁶⁴

<i>Year</i>	<i>Tender Ref</i>	<i>Description</i>	<i>Client</i>	<i>Date</i>	<i>Value</i>	<i>Cover From</i>	<i>Cover To</i>
2004	072	St Mark Vicarage				Unknown	

<i>Possible Cover To/From</i>	<i>Individual Contact</i>	<i>Notes</i>

IV.5375. In its response to the Statement, York House did not make any submissions in respect of the infringements.

⁷¹⁶¹ Cover information spreadsheet, Document Reference 4056, page 2.

⁷¹⁶² Leniency application, OFT Document Reference A0633, page 4.

⁷¹⁶³ Leniency application, OFT Document Reference A0633, page 4.

⁷¹⁶⁴ Leniency application, OFT Document Reference A0633, page 6.

Witness evidence from leniency applicant - Strata

IV.5376. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

Witness evidence from leniency applicant – York House

IV.5377. During interviews conducted in connection with its leniency application, York House's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.743 to IV.751 above and is relied upon by the OFT in relation to this tender.

IV.5378. During an interview on 6 March 2007 in connection with its leniency application, AR was shown Strata's contract information sheet, or BOB sheet, in relation to this tender. AR stated that *'It is likely that we have taken that [cover price] from Strata because they've got that within their documents I'm not going to refute that ...'*⁷¹⁶⁵ AR confirmed that on the basis of the documentary evidence he accepted that York House took a cover from Strata in relation to this contract.⁷¹⁶⁶

IV.5379. During an interview on 6 March 2007 in connection with its leniency application, Robert Andrew Bruce ('RAB'), Managing Director of York House, was shown Strata's contract information sheet, or BOB sheet, in relation to this tender. RAB confirmed that on the basis of the documentary evidence he accepted that York House took a cover from Strata in relation to this contract.⁷¹⁶⁷ The OFT asked whether York House would give a cover on a tender on which it received a cover, RAB replied *'That's probably quite unusual that you'd actually give somebody cover if you've got cover. Very, very unusual'*.⁷¹⁶⁸

Evidence from other companies – Stainforth

IV.5380. The OFT wrote to Stainforth on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Stainforth had participated in bid rigging on this tender. The OFT received an email Gordons LLP who were representing Stainforth on 26 April 2007, stating that *'... we formally confirm that our Client will not be accepting your offer in advance of the deadline of 26 April 2007'*.⁷¹⁶⁹

IV.5381. However, in its response to the Statement, Stainforth accepted that *'it did not wish to win the tender because it was a complicated job that Stainforth's estimator considered "frightening"'* and that as a result *'...it requested and was*

⁷¹⁶⁵ Interview transcript, OFT Document Reference 11466, page 18.

⁷¹⁶⁶ Interview transcript, OFT Document Reference 11466, pages 18 and 19.

⁷¹⁶⁷ Interview transcript, OFT Document Reference 11467, page 12.

⁷¹⁶⁸ Interview transcript, OFT Document Reference 11467, page 13.

⁷¹⁶⁹ Response from Stainforth, OFT Document Reference 10862, page 1.

*provided with a cover price from Strata. It did not know that York House had also requested and been provided with a cover price from Strata.*⁷¹⁷⁰

The OFT's analysis of the evidence and finding

IV.5382. From the evidence presented above, the OFT draws the following conclusions.

IV.5383. Strata, York House and Stainforth each accepted an invitation to tender for the contract for the design and build of 54-bed accommodation, The Old Vicarage, St Marks Road, Leeds.

IV.5384. Strata appears to have completed the estimating process for the tender for this contract, and came lowest in the tender process.

IV.5385. Both Stainforth and York House were unable to submit a tender by the return date and/or did not want to win this contract.

IV.5386. With regard to York House, Strata's contract information sheet records '*YORK HOUSE (C) 2398640*' typed in the tender results box. Paul Throssell ('PT'), an estimator at Strata, confirmed that a '*(C)*' written next to a competitor's name alongside a figure and in some cases, a percentage difference shows that Strata gave a cover price to the company noted, as in this case.

IV.5387. York House identified this tender as being one on which it had taken a cover price, before being shown the evidence obtained from Strata by the OFT.

IV.5388. During interview AR and RAB of York House accepted on the basis of the contemporaneous documentary evidence from Strata, that York House received its cover price from Strata. The OFT considers in the light of the contemporaneous evidence from Strata and both companies' admissions, that Strata supplied York House with a cover price for this tender.

IV.5389. The OFT further notes that the tender submitted by York House was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided. Strata was the only company to submit a bid below that of York House, therefore York House could not have obtained a cover price from any other company in relation to this tender.

IV.5390. The OFT therefore concludes that contact took place between Strata and York House. The OFT also concludes that Strata supplied a figure to York House for a cover bid.

IV.5391. With regard to Stainforth, Strata's contract information sheet records '*STAINFORTH (C) 2425000*' typed in the tender results box. Paul Throssell ('PT'), an estimator at Strata, confirmed that a '*(C)*' written next to a competitor's name alongside a figure and in some cases, a percentage difference shows that Strata gave a cover price to the company noted, as in this case.

IV.5392. Also, providing corroborating contemporaneous documentary evidence is '*Stainforth Construction Ltd, RECORD OF TENDERS 2005*', found at the premises of Stainforth. Recorded on this sheet is the figure '*£2,424,767.69*'

⁷¹⁷⁰ Written representations of Stainforth, 27 June 2008, paragraphs 2.37(b) and 2.37(d).

under the heading 'Cover', entered in relation to this tender. Although the figures in the two documents differ, the OFT understands that in some cases an approximate tender price is given to a competitor as a cover price and that the competitor may then change the amount of the cover price in order to make it look more genuine. In this case Strata recorded a cover price of £2,425,000 and Stainforth submitted a tender bid of £2,424,767.69.

IV.5393. The OFT also notes that although the evidence found at Stainforth shows that it took a cover price, the documentary evidence does not show from which competitor. However, the OFT does find it significant that the only other tenderer besides Strata that could have provided a cover price is York House who in fact took a cover price from Strata themselves, and who stated in interview that, *'probably quite unusual that you'd give somebody cover if you've got cover. Very, very unusual'*.

IV.5394. The OFT considers in the light of the contemporaneous evidence from both Strata and Stainforth, and PT's explanation of how covers given were recorded, that Strata supplied Stainforth with a cover price for this tender. The OFT considers that the evidence and admissions relating to the giving of a cover price by Strata to York House reinforce the backdrop of collusion on this tender and give added weight to the evidence that Strata also gave a cover price to Stainforth for this tender.

IV.5395. In addition the OFT notes that the tender submitted by Stainforth was higher than the tender submitted by Strata, the pattern consistent with a cover price having been provided. Stainforth now accepts that it requested and was provided with a cover price from Strata for this tender. All three companies have therefore now admitted to engaging in bid rigging in respect of this tender.

IV.5396. The OFT therefore concludes that contact took place between Strata and Stainforth. The OFT also concludes that Strata supplied a figure to Stainforth for a cover bid.

IV.5397. The OFT is satisfied that the facts set out in paragraphs IV.5369 to IV.5396 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁷¹⁷¹ In particular:

- (a) the provision of figures for cover bids from Strata to Stainforth and from Strata to York House was not unilateral⁷¹⁷², and contravenes the principle against direct or indirect contact between competitors;⁷¹⁷³
- (b) Stainforth and York House can each be presumed to have taken account of the information received from Strata (i.e the respective cover prices) when determining their own conduct in the tendering process;⁷¹⁷⁴ and
- (c) Strata can be presumed to have taken account of the information it received from Stainforth and York House (i.e. that neither Stainforth nor York House intended to submit a competitive bid) when determining its conduct in the tendering process.⁷¹⁷⁵

⁷¹⁷¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷¹⁷² See paragraph IV.73 of the General comments on cover pricing section.

⁷¹⁷³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷¹⁷⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷¹⁷⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.5398. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Strata and Stainforth, and between Strata and York House, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the design and build of 54-bed accommodation, The Old Vicarage, St Marks Rd, Leeds, tender deadline 14 June 2004.

Immunity and leniency assessment

IV.5399. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5400. In respect of this tender, the OFT became aware of Strata’s involvement in bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Strata in respect of this Infringement.

IV.5401. In respect of this tender, the OFT became aware of York House’s involvement in bid rigging activities by virtue of the information obtained during the visit to Strata. York House will not therefore receive 100 per cent immunity in respect of this tender. However, York House will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 196: Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop – 30 June 2004

Client: Kent Porter Warren Architects

Parties: Bodill and Harold Adkin

IV.5402. On 4 June 2004, Kent Porter Warren Architects sought tenders for a Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop. The return date for the tender was 30 June 2004 and four companies were invited to tender: Newlife Construction, Harold Adkin, Bodill and Carmalor.⁷¹⁷⁶

IV.5403. Kent Porter Warren Architects received the following tender returns by 30 June 2004:⁷¹⁷⁷

Company	Date tender received	Amount of tender	Awarded the tender
Newlife Construction	30 June 2004	£236,721.50	Yes
Harold Adkin	30 June 2004	£248,162.00	
Bodill	30 June 2004	£259,424.00	
Carmalor	30 June 2004	£263,887.00	

⁷¹⁷⁶ Information from client, OFT Document Reference 8035.

⁷¹⁷⁷ Information from client, OFT Document Reference 8035.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.5404. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed '*Tenderers*', the following entries have been made, all of which are handwritten except the entry for Bodill:⁷¹⁷⁸

1. *Bodill*

*2. *ADKIN IAN WILL RING
US MONDAY A.M.*

IV.5405. The tender sheet for this tender also contains a ringed letter 'C' against the word '*ESTIMATOR*', and at the foot of the sheet it states that Bodill's submitted price was £259,424.00.⁷¹⁷⁹

Evidence from leniency applicant Bodill

IV.5406. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.5407. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁷¹⁸⁰ In respect of this tender, Bodill confirmed that it received a cover price from Harold Adkin⁷¹⁸¹ and that it submitted a token tender.⁷¹⁸²

IV.5408. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2004 which contains the direct telephone number for David Wraithe, whose role is to provide estimating support at Bodill, which is given as '[.....] [C]'.⁷¹⁸³

IV.5409. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.5410. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from Harold Adkin – Form of Tender

IV.5411. During the OFT's search of Harold Adkin's premises on 28 June 2005, a Form of Tender for this contract was found.⁷¹⁸⁴ On page three of the Form of Tender is handwritten '*BODILL £259,424 DAVID [W]RAITH [...] [C]*'.

⁷¹⁷⁸ Tender sheet, OFT Document Reference 0741.

⁷¹⁷⁹ Tender sheet, OFT Document Reference 0741.

⁷¹⁸⁰ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁷¹⁸¹ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 7.

⁷¹⁸² Tender Analysis, OFT Document Reference 0849, page 5.

⁷¹⁸³ Diary, OFT Document Reference 0109, page 2.

⁷¹⁸⁴ Form of Tender, OFT Document Reference 1564.

Evidence from Harold Adkin

IV.5412. The OFT wrote to Harold Adkin on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Harold Adkin had participated in bid rigging on this tender. In response to this letter, Harold Adkin admitted that, *'We engaged in bid rigging activities on this tender with the following: Bodill'*.⁷¹⁸⁵

IV.5413. The name *'IAN'* against the word *'ADKIN'* set out in Bodill's tender sheet⁷¹⁸⁶, would appear to be that of Ian Barrington Douglas, Managing Director of Harold Adkin, who submitted the Harold Adkin tender⁷¹⁸⁷ and who signed the annex when accepting the OFT's Fast Track Offer⁷¹⁸⁸, providing further corroboration that Bodill contacted Harold Adkin in respect of this tender.

IV.5414. In its response to the Statement, Harold Adkin confirmed its acceptance of the OFT's Fast Track Offer.⁷¹⁸⁹

The OFT's analysis of the evidence and finding

IV.5415. From the evidence presented above, the OFT draws the following conclusions.

IV.5416. Bodill and Harold Adkin each accepted an invitation to tender for this contract.

IV.5417. Harold Adkin completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.5418. Bodill was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5419. In regard to Harold Adkin, as well as the ringed letter 'C' against the word *'ESTIMATOR'*, Bodill's tender sheet records *'ADKIN IAN WILL RING US MONDAY A.M.'* Bodill has confirmed that this shows that it received a cover price from Harold Adkin. The OFT considers that this also more specifically indicates that Harold Adkin was to phone Bodill on the morning of the day for submitting the tender, in order to provide Bodill with a cover price. Bodill recorded on the tender sheet the figure £259,424.00 as the tender figure and this was the figure that Bodill submitted on the form of tender. Furthermore, it appears that the reference to *'IAN'* on the Bodill tender sheet is Ian Barrington Douglas, the Managing Director of Harold Adkin, providing further corroboration that Bodill contacted Harold Adkin in respect of this tender.

IV.5420. Furthermore, on page three of Harold Adkin's Form of Tender for this contract is handwritten *'BODILL £259,424 DAVID [W]RAITH [.....] [C]'*, providing additional contemporaneous corroboration that Harold Adkin contacted David Wraith at Bodill in order to provide Bodill with a cover price. Harold Adkin recorded the figure of £259,424 as Bodill's tender figure and this was the figure that Bodill submitted, providing further evidence that contact

⁷¹⁸⁵ Response from Harold Adkin, OFT Document Reference 10377, page 3.

⁷¹⁸⁶ Tender sheet, OFT Document Reference 0741.

⁷¹⁸⁷ Form of Tender, OFT Document Reference 1564.

⁷¹⁸⁸ Response from Harold Adkin, OFT Document Reference 10376.

⁷¹⁸⁹ Written representations of Harold Adkin, 25 June 2008, paragraph 6.

was made between the two parties. Furthermore, the handwritten telephone number set out in Harold Adkin's Form of Tender, [.....] [C], is the direct dial number for David Wraithe at Bodill, providing additional corroboration that Harold Adkin contacted Bodill in order to provide a cover price in respect of this tender.

IV.5421. The OFT notes in addition that the tender submitted by Bodill was higher than the tender submitted by Harold Adkin, a pattern consistent with a cover price having been provided.

IV.5422. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Harold Adkin admitted that the party with whom it engaged in bid rigging was Bodill, without being shown the OFT's evidence that Bodill was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.5423. The OFT therefore concludes that contact took place between Harold Adkin and Bodill. The OFT also concludes that Harold Adkin supplied a figure to Bodill for a cover bid.

IV.5424. The OFT is satisfied that the facts set out in paragraphs IV.5404 to IV.5423 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷¹⁹⁰ In particular:

- (a) the provision of a figure for a cover bid from Harold Adkin to Bodill was not unilateral⁷¹⁹¹, and contravenes the principle against direct or indirect contact between competitors;⁷¹⁹²
- (b) Bodill can be presumed to have taken account of the information received from Harold Adkin (i.e. the cover price) when determining its own conduct in the tendering process;⁷¹⁹³ and
- (c) Harold Adkin can be presumed to have taken account of the information it received from Bodill (i.e. that Bodill did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷¹⁹⁴

IV.5425. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bodill and Harold Adkin, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop, tender deadline 30 June 2004.

Immunity and leniency assessment

IV.5426. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁷¹⁹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷¹⁹¹ See paragraph IV.73 of the General comments on cover pricing section.

⁷¹⁹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷¹⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷¹⁹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.5427. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 197: Extension, Sutton Coldfield Police Station – 7 July 2004
Client: West Midlands Police Authority
Parties: Thomas Vale and William Sapcote

IV.5428. On 9 June 2004, West Midlands Police Authority sought tenders for an extension to Sutton Coldfield Police Station, Lichfield Road, Sutton Coldfield. The following six companies were invited to tender: Greswolde, Allenbuild, Pettifer Construction Ltd, John Sisk, Thomas Vale and William Sapcote.⁷¹⁹⁵ The deadline for the receipt of tenders was 7 July 2004 at 12:00 noon.⁷¹⁹⁶

IV.5429. West Midland Police Authority received the following tender returns:⁷¹⁹⁷

Company	Time and Date tender received	Amount of tender	Awarded contract
Greswolde	11:49 am on 7 July 2004	£3,289,619.00	Yes
Allenbuild	10:34 am on 7 July 2004	£3,351,626.95	
Pettifer Construction Ltd	11:55 am on 7 July 2004	£3,467,636.00	
John Sisk	11:27 am on 7 July 2004	£3,679,434.00	
Thomas Vale	10:54 am on 7 July 2004	£3,737,507.00	
William Sapcote	10:48 am on 7 July 2004	£3,876,240.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender summary, Tender Status spreadsheet and Tender Lists

IV.5430. During the OFT's inspection at Thomas Vale's head office, a Tender Summary sheet (also known as the QA EST6 form) was obtained.⁷¹⁹⁸ Under the section headed 'COMPETITION' is the following entry:

*'Allenbuild
Pettifer
Greswolde 3,289,619
John Sisk 3,679,000
Sapcote (C) £3,876,218 (73W)'*

IV.5431. The names of the competitors are in typed manuscript but the entry of the letter 'C' plus amounts are handwritten.

IV.5432. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁷¹⁹⁹

⁷¹⁹⁵ Information from client, OFT Document Reference 9959.

⁷¹⁹⁶ Information from client, OFT Document Reference 9959. The OFT notes that this was incorrectly recorded by the client as 4 October 2004.

⁷¹⁹⁷ Information from client, OFT Document Reference 9959.

⁷¹⁹⁸ Tender Summary, OFT Document Reference 4180.

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5641	B	West Midlands Police Authority	Extension, Sutton Coldfield Police Station	2,800,000	IFS

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
A	07/07/2004 Noon	£3,737,507		Greswolde, Pettifer, Allenbuild, Sisk, Sapcote	

IV.5433. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁷²⁰⁰ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this list, there is an entry for 'Sapcote' plus contact names and telephone numbers.⁷²⁰¹

IV.5434. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided three identical tender lists referring to this tender, for weeks commencing 14 June, 21 June and 28 June 2004. The tender list for the week commencing 28 June 2004 is shown below.⁷²⁰²

TENDER LISTS			
W.C		28-Jun-04	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5641	B	West Midlands Police Authority	Extension and alteration to Sutton Coldfield Police Station

APPROX £	EST	CAT	DUE
2,800,000	IFS	A	07/07/2004 noon

Evidence from leniency applicant Thomas Vale

IV.5435. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Summary sheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.5436. At Annex 14⁷²⁰³ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005

⁷¹⁹⁹ Tender Status spreadsheet, OFT Document Reference 4522, page 43.

⁷²⁰⁰ Interview transcript, OFT Document Reference 11418, page 21.

⁷²⁰¹ Contact list, OFT Document Reference 11086, page 23.

⁷²⁰² Tender list, OFT Document Reference 4601, page 1.

⁷²⁰³ Leniency application, OFT Document Reference 4568.

in respect of which Thomas Vale had either given or taken a cover price in the West Midlands. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. Thomas Vale explained that tenders within the schedule *'highlighted in bold are those of which the OFT was already aware; based on documentation removed during its on-site investigation on 24 January 2006'*.⁷²⁰⁴ At page nine of the schedule under Annex 14 and within the section for 2004 tenders is the following entry:⁷²⁰⁵

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5641	7 July	West Midlands Police Authority	Four Storey Extension to Sutton Coldfield Police Station, Lichfield Road, Sutton Coldfield	Given (Sapcote - £3,876,218; [...] [C])	Yes (Tender Summary Sheet)

IV.5437. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁷²⁰⁶ and William Sapcote appears on this list.

Witness evidence from leniency applicant Thomas Vale

IV.5438. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave an explanation of the use of the Tender Summary sheet to record cover prices given to its competitors.

IV.5439. In interview CKT confirmed that this tender was allocated to estimator Ian Skyrn ('IFS'), who worked within the Building Division (also known as Traditional), for which CKT was the estimating manager. CKT referred to the relevant entry in the Tender Status spreadsheet as follows: *'Well that indicates to me that we actually priced it, but we picked up some names of Greswolde, Pettifer, Allenbuild, Sisk and Sapcote, as also being competitors'*.⁷²⁰⁷

IV.5440. CKT also referred to the Tender Summary sheet and admitted that he made the handwritten annotations on the document and that these entries show that he agreed and provided a figure of £3,876,218 as a cover price to William Sapcote with a suggested contract period of 73 weeks. CKT said *'I would suggest that I rang Peter Perry at Sapcotes, and gave him that figure'*. CKT explained that the handwritten figures for Greswolde and John Sisk were obtained from the quantity surveyors after the tender deadline *'but certainly, under no circumstances, were they two covered'*. CKT added that he would

⁷²⁰⁴ Leniency application, OFT Document Reference 4568, page 1.

⁷²⁰⁵ Leniency application, OFT Document Reference 4568, page 9.

⁷²⁰⁶ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁷²⁰⁷ Interview transcript, OFT Document Reference 11420, page 7

have contacted Peter Perry, who was Estimating Director at William Sapcote, because he had a *'special relationship'* with him.⁷²⁰⁸

IV.5441. Estimator IFS was also interviewed and he recalled pricing the tender and that *'then we were asked for assistance by Sapcote's...part way through the tender period I would think'*. He confirmed that the handwritten annotations on the Tender Summary sheet were made by CKT and that it was *'more than likely'* that CKT would have dealt with the contact from William Sapcote.⁷²⁰⁹

Evidence from other companies – William Sapcote

IV.5442. The OFT wrote to William Sapcote on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that William Sapcote had participated in bid rigging on this tender. In response to this letter, William Sapcote admitted participating in bid rigging activity and stated *'We may have engaged in cover pricing activities on this tender but cannot recall details of other parties'*.⁷²¹⁰

IV.5443. The OFT subsequently wrote to William Sapcote's ultimate parent company at the time of this Infringement, Sapcote Holdings, on 6 November 2007, asking it to comment on William Sapcote's response to the OFT's Fast Track Offer, given that the OFT intended to hold Sapcote Holdings jointly and severally liable for any infringements committed by William Sapcote in respect of which the OFT ultimately decided to impose financial penalties. Sapcote Holdings did not respond with any substantive comments.⁷²¹¹

IV.5444. Following the issue of the Statement, William Sapcote did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.5445. From the evidence presented above, the OFT draws the following conclusions.

IV.5446. Thomas Vale and William Sapcote each accepted an invitation to tender for this contract.

IV.5447. Thomas Vale completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work. This is shown by the fact that the tender was categorised by the letter 'A' which indicates that a genuine competitive bid was submitted to the client. William Sapcote was unable to submit a tender by the return date and/or did not want to win this contract.

IV.5448. Thomas Vale's contemporaneous Tender Summary sheet maintained in electronic format by estimator IFS, within the Building Division, records five competitors who were also invited to tender for this contract, namely *'Allenbuild, Pettifer, Greswolde, John Sisk [and] Sapcote'* Beside the entry for *'Sapcote'* is a handwritten letter 'C' in brackets, an amount and the letters

⁷²⁰⁸ Interview transcript, OFT Document Reference 11420, page 8.

⁷²⁰⁹ Interview transcript, OFT Document Reference 11422, page 4.

⁷²¹⁰ Response from William Sapcote, OFT Document Reference 10899, page 6.

⁷²¹¹ Response from Sapcote Holdings, OFT Document Reference 14035, page 1.

'73W', also in brackets. In interview, CKT confirmed that he made these handwritten entries, which show that a cover price was given by Thomas Vale to William Sapcote. CKT admitted that he made the entries at the time and that he would have dealt with the request for a cover price from William Sapcote himself. IFS was also interviewed and recalled that Thomas Vale submitted a genuine bid to the client and *'were asked for assistance by Sapcote's'*. The handwritten figure on the Tender Summary sheet of £3,876,218 is almost identical to William Sapcote's tender amount of £3,876,240, recorded by the client West Midlands Police Authority.

IV.5449. West Midlands Police Authority also received a tendered amount of £3,737,507 from Thomas Vale, which is lower than the amount tendered by William Sapcote. This fits into the pattern consistent with a cover price having been provided from Thomas Vale to William Sapcote. The OFT notes that William Sapcote is the only company whose figure is above that of Thomas Vale and so Thomas Vale could only have given cover to William Sapcote.

IV.5450. The OFT notes that although five competitors have been recorded on the Tender Summary sheet, only one of them has the handwritten letter 'C' and tender amount, which suggests a conscious decision was made to differentiate William Sapcote from the other competitors. The letter 'C' was commonly used within the industry to indicate a cover price. [...]

[...] [C] CKT has since explained in interview that the handwritten amounts for John Sisk and Greswolde were made by him after the tender deadline and were not cover prices. In any event, both these figures were lower than the amount tendered by Thomas Vale and could not have been cover prices provided by Thomas Vale. The OFT therefore concludes that Thomas Vale did not engage in bid rigging activities with either John Sisk or Greswolde on this tender.

IV.5451. Thomas Vale admitted that William Sapcote was one of the *'key competitors'* with whom it engaged in cover pricing activity.

IV.5452. Finally, William Sapcote also admitted engaging in bid rigging activities on this tender, in response to the OFT's letter of 22 March 2007.

IV.5453. The OFT therefore concludes that contact took place between William Sapcote and Thomas Vale and that Thomas Vale supplied a figure to William Sapcote in order that it could submit a bid to the client that was not intended to win the contract.

IV.5454. The OFT is satisfied that the facts set out in paragraphs IV.5430 to IV.5453 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷²¹² In particular:

- (a) the provision of a figure for a cover bid from Thomas Vale to William Sapcote was not unilateral⁷²¹³, and contravenes the principle against direct or indirect contact between competitors;⁷²¹⁴

⁷²¹² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷²¹³ See paragraph IV.73 of the General comments on cover pricing section.

⁷²¹⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) William Sapcote can be presumed to have taken account of the information received from Thomas Vale (i.e. the cover price) when determining its own conduct in the tendering process;⁷²¹⁵ and
- (c) Thomas Vale can be presumed to have taken account of the information it received from William Sapcote (i.e. that William Sapcote did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷²¹⁶

IV.5455. In its response to the Statement, Thomas Vale stated that *'The OFT's assertion that "Thomas Vale can be presumed to have taken account of the information it received from William Sapcote (i.e. that William Sapcote did not intend to submit a competitive bid) when determining its own conduct in the tendering process" is inaccurate. The documentation shows that Thomas Vale was unaware of the Allenbuild or Pettifer Construction tenders'*.⁷²¹⁷

IV.5456. The OFT does not accept that the fact that other bidders competed for the tender provides sufficient evidence that Thomas Vale did not take into account the information it received from William Sapcote. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁷²¹⁸ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that Thomas Vale has rebutted the application of the presumption in this case. An undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept Thomas Vale's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. To the extent that Thomas Vale submits that this infringement should not be treated as serious because no effects have been shown, this point is addressed Step 1 of Section VI (Enforcement) below.

IV.5457. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and William Sapcote in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for extensions to Sutton Coldfield Police Station, tender deadline 7 July 2004.

Immunity and leniency assessment

IV.5458. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5459. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 27 on 24

⁷²¹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷²¹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷²¹⁷ Written representations of Thomas Vale, 27 June 2008, paragraph 17.12.

⁷²¹⁸ See paragraph III.58 of the Legal Background section.

January 2006. Thomas Vale will not therefore receive 100 per cent immunity in respect of this tender. However, Thomas Vale will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 198: **Alterations and Refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham – 8 July 2004**
Client: **Gleeds**
Parties: **Bodill and Phoenix**

IV.5460. On 15 June 2004, Gleeds sought tenders for alterations and refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham. The return date for the tender was 8 July 2004 and six companies were invited to tender: Bodill, McCane Construction Ltd, P Waller, Robert Woodhead, Phoenix and William Woodsend.⁷²¹⁹

IV.5461. Gleeds received the following tender returns prior to 12:00 noon on 8 July 2004:⁷²²⁰

Company	Date and time tender received	Amount of tender	Awarded the tender
Bodill	Pre – Noon 8 July 2004	£246,652.00	Yes
McCane Construction Ltd	Pre – Noon 8 July 2004	£253,576.37	
P Waller	Pre – Noon 8 July 2004	£263,687.61	
Robert Woodhead	Pre – Noon 8 July 2004	£267,198.67	
Phoenix	Pre – Noon 8 July 2004	£282,596.00	
William Woodsend	Pre – Noon 8 July 2004	£315,970.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.5462. In Bodill’s original tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed ‘*Tenderers*’, the following entries have been made, all of which are handwritten except the entry for Bodill:⁷²²¹

‘
1.) *Bodill*
£272911.00p. 2.) *PHOENIX CONTRACTORS*
© *FROM US ROGER [...]* [C]
3.) *WOODSEND*
4.) *WALLER*’

IV.5463. The tender sheet states that Bodill’s submitted figure was £246,562.⁷²²²

⁷²¹⁹ Information from client, OFT Document Reference 8152.

⁷²²⁰ Information from client, OFT Document Reference 8152.

⁷²²¹ Tender sheet, OFT Document Reference 0742.

⁷²²² Tender sheet, OFT Document Reference 0742.

IV.5464. Andrew Bodill ('AB'), an estimator at Bodill, priced this tender and has indicated that the handwritten annotations '£272911.00p.' and 'WALLER', under the section headed 'Tenderers' were made by him.⁷²²³ AB also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

IV.5465. David Wraith ('DW'), whose role is to provide estimating support at Bodill, has indicated that the handwritten annotations '© FROM US ROGER [.....] [C]' under the section headed 'Tenderers' were made by him.⁷²²⁴ DW also confirmed that these annotations were made before Bodill's tender was submitted, as explained in paragraphs IV.233 to IV.234 above.

Evidence from leniency applicant Bodill

IV.5466. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.5467. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000.⁷²²⁵ In respect of this tender, Bodill confirmed that it gave a cover price to Phoenix.⁷²²⁶

IV.5468. Following the issue of the Statement, Bodill did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bodill

IV.5469. During interviews conducted in connection with its leniency application, Bodill's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

Contemporaneous documentary evidence from other companies – G F Tomlinson

IV.5470. During a visit under section 28 to the premises of G F Tomlinson on 14 June 2005, the OFT obtained a copy of the diary of John Bishop ('JB'), an estimator at G F Tomlinson. Handwritten on the page for the date 21 June 2004 is the entry:⁷²²⁷

*'Phoenix Contracts (Leic) Univ Hosp Labs → 8/7/04?
Roger Grace Tel [...] [C]/Greenwoods?'*

⁷²²³ Contracts document, OFT Document Reference 6426, pages 41 and 81.

⁷²²⁴ Contracts document, OFT Document Reference 6426, pages 1 and 39.

⁷²²⁵ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁷²²⁶ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 7.

⁷²²⁷ Diary, OFT Document Reference 3552, page 29. G F Tomlinson did not submit a bid for this tender, and the OFT does not have any evidence to suspect that G F Tomlinson engaged in bid rigging on this tender.

Evidence from leniency applicant Phoenix

IV.5471. As part of its leniency application, Phoenix provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.527 to IV.536 above and is relied upon by the OFT in relation to this tender.

IV.5472. In its response to the Statement, Phoenix stated that *'...Phoenix has accepted that it engaged in cover pricing in breach of the Chapter I prohibition.'*⁷²²⁸

Witness evidence from leniency applicant Phoenix

IV.5473. During interviews conducted in connection with its leniency application, Phoenix's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.527 to IV.536 above and is relied upon by the OFT in relation to this tender.

IV.5474. In respect of this tender Michael Williamson ('MW'), Managing Director of Phoenix, said that it had no record of tendering for this job. On being shown by the OFT the Bodill tender sheet for this tender, MW confirmed that the telephone number '[.....] [C]' next to 'ROGER' was Phoenix's number⁷²²⁹ and that, *'I mean I can only conclude what you'd conclude [that Phoenix took a cover price] on that...'*⁷²³⁰

IV.5475. MW, on being shown by the OFT the handwritten entry for 21 June 2004 from the diary of JB at G F Tomlinson, said that, *'I mean it doesn't mean anything, but yes, that's definitely our number and it's Roger Grace's name.'*⁷²³¹

The OFT's analysis of the evidence and finding

IV.5476. From the evidence presented above, the OFT draws the following conclusions.

IV.5477. Bodill and Phoenix each accepted an invitation to tender for this contract.

IV.5478. Bodill completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Bodill being the lowest received and the fact that it won the contract.

IV.5479. In regard to Phoenix, Bodill's tender sheet records *'£272911.00p. PHOENIX CONTRACTORS @ FROM US ROGER [.....] [C]'*. Bodill has confirmed that this shows that it gave the company in question a cover price. Bodill recorded on the tender sheet the figure £272,911 against Phoenix, a figure that was £9685 lower than the tender price that Phoenix submitted. The cover price given is usually the minimum price that would be submitted, but on occasion a company that is taking a cover price, will add an amount to the cover price given, to make sure that it does not win the contract, as explained in paragraphs IV.110 to IV.112 of the General section on cover pricing above.

⁷²²⁸ Written representations of Phoenix, 27 June 2008, paragraph 91.

⁷²²⁹ Interview transcript, OFT Document Reference 11328, page 16.

⁷²³⁰ Interview transcript, OFT Document Reference 11328, page 17.

⁷²³¹ Interview transcript, OFT Document Reference 11328, page 17.

IV.5480. Bodill's tender sheet also records the name of 'ROGER' and the telephone number '[.....] [C]' against Phoenix. MW of Phoenix has confirmed that this is Roger Grace, an estimator who was working at Phoenix at the time and that the telephone number is Phoenix's, providing further evidence that contact was made between the two parties. MW also stated that he could only agree with the OFT's conclusion in respect of this tender (i.e. that Bodill gave a cover price to Phoenix).

IV.5481. Both Parties have admitted to bid rigging in relation to this tender.

IV.5482. The OFT notes in addition that the tender submitted by Phoenix was higher than the tender submitted by Bodill, a pattern consistent with a cover price having been provided.

IV.5483. The OFT therefore concludes that contact took place between Phoenix and Bodill. The OFT also concludes that Bodill supplied a figure to Phoenix for a cover bid.

IV.5484. The OFT is satisfied that the facts set out in paragraphs IV.5462 to IV.5483 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷²³² In particular:

- (a) the provision of a figure for a cover bid from Bodill to Phoenix was not unilateral⁷²³³, and contravenes the principle against direct or indirect contact between competitors;⁷²³⁴
- (b) Phoenix can be presumed to have taken account of the information received from Bodill (i.e. the cover price) when determining its own conduct in the tendering process;⁷²³⁵ and
- (c) Bodill can be presumed to have taken account of the information it received from Phoenix (i.e. that Phoenix did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷²³⁶

IV.5485. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Phoenix and Bodill, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations and refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham, tender deadline 8 July 2004.

Immunity and leniency assessment

IV.5486. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

⁷²³² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷²³³ See paragraph IV.73 of the General comments on cover pricing section.

⁷²³⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷²³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷²³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.5487. Bodill informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bodill will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.5488. In respect of this tender, the OFT became aware of Phoenix's involvement in bid rigging activities by virtue of the information provided by Bodill. Phoenix will not therefore receive 100 per cent immunity in respect of this tender. However, Phoenix will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 199: External Refurbishment, Sutton Court Shops, Hillingdon – 8 July 2004

Client: Hillingdon Homes Ltd

Parties: Mansell and Apollo

IV.5489. On 11 June 2004, Hillingdon Homes Ltd sought tenders for external refurbishment, Sutton Court Road shops.⁷²³⁷ The following six companies were invited to tender: Apollo, Borrás Construction Ltd, Botes Building Ltd, Frencon Construction Ltd, Mansell and Mucalley & Co Ltd. The date and time of tender return was 8 July 2004 at 12:00 noon.⁷²³⁸

IV.5490. Hillingdon Homes Ltd received the following tender returns:⁷²³⁹

Company	Date & time tender received	Amount of tender	Awarded contract
Mansell	Before noon on 8 July 2004	£529,855	
Apollo	Before noon on 8 July 2004	£479,344	YES
Botes Building Ltd	Before noon on 8 July 2004	£632,706	
Frencon Construction Ltd	Before noon on 8 July 2004	£512,810	
Borrás Construction Ltd	Before noon on 8 July 2004	£499,940	
Mucalley & Co Ltd	Before noon on 8 July 2004	£510,079	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.5491. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a managing estimator, workload reports. The 2004 workload report for special projects contained the following entry:⁷²⁴⁰

⁷²³⁷ Information from client, OFT Document Reference 8375.

⁷²³⁸ Information from client, OFT Document Reference 8375.

⁷²³⁹ Information from client, OFT Document Reference 8375.

⁷²⁴⁰ Special works spreadsheet, OFT Document Reference B3539, page 4.

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
00-75390	Hillingdon – Sutton Court Shop s – External Refurb		529855	529855		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
					(Apollo)

IV.5492. In its response to the Statement, Apollo suggested that the recording of the name ‘*Apollo*’ on the workload reports in the Remarks column could merely have been a record of the company that won the bid for this contract.⁷²⁴¹ However, the word ‘*Apollo*’ is in brackets on this document and as discussed in Mansell’s general leniency section, BR stated in interview that he used brackets specifically to indicate that a cover was received from that company.⁷²⁴² Further, in relation to other Infringements described in this Decision⁷²⁴³, similar markings on BR’s workload reports indicating that cover prices have been obtained have been confirmed to be correct by evidence or admissions from other Parties.

Evidence from leniency applicant Mansell

IV.5493. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁷²⁴⁴ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.5494. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Apollo and that this cover price was taken due to ‘*insufficient tender period: resource*’ at Mansell.⁷²⁴⁵

IV.5495. In its response to the Statement, Apollo listed a number of issues with Mansell’s TVR table, principally that it could not be considered a separate document because it was only restating BR’s workload reports⁷²⁴⁶, and that Mansell itself admitted that it could not be excluded that some of the tenders identified in the leniency application might not have involved cover pricing.⁷²⁴⁷

IV.5496. Whilst the OFT is not according the same evidential weight to Mansell’s table provided under leniency as it is to contemporaneous documents and witness testimony, the OFT does consider this document to be robust where the underpinning contemporaneous documents and explanatory witness testimony indicate that a cover price was taken, and Mansell’s internal investigations have yielded an assessment that confirms that indication. Although some tenders

⁷²⁴¹ Written representations of Apollo, 27 June 2008, paragraph 7.5(i).

⁷²⁴² Interview transcript, OFT Document Reference 11516, page14.

⁷²⁴³ See Infringements 42, 43, 91 and 97.

⁷²⁴⁴ Leniency application, OFT Document Reference B0734.

⁷²⁴⁵ Leniency application, OFT Document Reference B1351, page 1.

⁷²⁴⁶ Written representations of Apollo, 27 June 2008, paragraph 7.4.

⁷²⁴⁷ Written representations of Apollo, 27 June 2008, paragraph 7.5(i).

included in this table may not be supported by sufficient evidence, none of these were included in the Statement. The OFT considers that the evidence for the present Infringement does meet the strong and compelling standard as it consists of a contemporaneous document supported by witness testimony.

Witness evidence from leniency applicant Mansell

- IV.5497. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.
- IV.5498. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated '*...we took a, a cover from Apollo again, a specialist in that sort of external refurbishment work*'.⁷²⁴⁸ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁷²⁴⁹
- IV.5499. In its response to the Statement, Apollo pointed out that BR had no specific recollection of contact with Apollo for this contract.⁷²⁵⁰ The OFT accepts that BR's evidence does not constitute independent recollection of the events surrounding this tender. However, it does not consider that that undermines the credibility of his evidence. Given the number of tenders BR dealt with, as indicated on his personal workload reports, the OFT accepts that it is unlikely that he would remember every single tender in detail, particularly one that had been pre-determined not to be of high priority and therefore on which the least possible amount of effort had been expended. This does not preclude him providing an explanation of the contemporaneous documentation. The weight placed by the OFT on BR's evidence is commensurate with its explanatory nature.
- IV.5500. In its response to the Statement, Apollo also suggested that it could not have given cover to Mansell because neither BR of Mansell nor any of the relevant estimators at Apollo knew any employees of the other party involved in this tender. Apollo quoted Kenneth Lockwood ('KL') of Mansell as stating that Mansell's estimators knew the opposition and an estimator would know his opposite numbers by name.⁷²⁵¹
- IV.5501. The OFT notes that although KL stated that Mansell's estimators knew the opposition by name, it was BR's evidence (who works at a different office to KL) that he did not know estimators in other companies by name.⁷²⁵² Though it may generally have been the case that Mansell's estimators knew their opposite numbers, in this particular instance the estimator has confirmed that he did not, and there is no inconsistency therefore between his evidence and Apollo's in this regard. The OFT also notes that the workload reports that provide the contemporaneous documentary evidence for this Infringement were BR's, not

⁷²⁴⁸ Interview transcript, OFT Document Reference 11516, page 35.

⁷²⁴⁹ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁷²⁵⁰ Written representations of Apollo, 27 June 2008, paragraph 9.10(i).

⁷²⁵¹ Written representations of Apollo, 27 June 2008, paragraph 7.5(iv).

⁷²⁵² Interview transcript, OFT Document Reference 11516, page 13.

KL's, and therefore in relation to this Infringement it is BR's views that should be given greater weight.

Evidence from other companies – Apollo

IV.5502. The OFT wrote to Apollo on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Apollo had participated in bid rigging on this tender. In response to this letter Apollo stated that it was unable to accept the OFT's offer as it *'had not found any indication that [it] has been involved in any anti-competitive conduct in relation to the tenders identified'*.⁷²⁵³

IV.5503. The OFT subsequently wrote to Apollo's ultimate parent company at the time of this Infringement, Apollo Group on 6 November 2007, asking it to comment on Apollo's response to the OFT's Fast Track Offer, given that the OFT intended to hold Apollo Group jointly and severally liable for any infringements committed by Apollo in respect of which the OFT ultimately decided to impose financial penalties. The OFT received a phone call in response to this letter on 6 December 2007, which confirmed that Apollo Group *'had no comments to make regarding its subsidiary's reply...'*⁷²⁵⁴

IV.5504. In its response to the Statement, Apollo made general representations as to how, as a business, it has ensured that it generally only receives appropriate invitations to tender, how it returns unsuitable tenders, and as to its prequalification success rate in invitations to tender.⁷²⁵⁵ The OFT accepts that the evidence currently available suggests that Apollo tends to price tenders properly. However, the present Infringement relates to the provision of a cover price, not the acceptance of one. Though the OFT has found, in paragraph IV.73 above, that a common motive for providing cover prices was reciprocity, it notes that the undertaking concerned may have other motives, such as facilitating the reduction in competitive bids for a tender which it wishes to win. Moreover, and as set out in Section III (Legal Background), the subjective motives of a party are irrelevant where an anti-competitive object is established.

IV.5505. In its response to the Statement, Apollo also noted the absence of any documentary record of the contact for this tender.⁷²⁵⁶ The OFT does not consider the absence of any documentary record of the contact to be indicative of whether there was contact or not. Most cover price exchanges took place over the telephone, such that it would not be inconsistent with contact having taken place if no document had ever existed. Moreover, even if documentary records of the contact were made, as the OFT has noted in particular in paragraphs IV.122 to IV.127, it was not uncommon for companies not to retain documentary records, particularly when they did not succeed in obtaining a contract.

IV.5506. In its response to the Statement, Apollo provided a witness statement from Dean Wincott ('DW')⁷²⁵⁷, who stated in respect of this tender, *'I was the*

⁷²⁵³ Response from Apollo, OFT Document Reference 10221.

⁷²⁵⁴ File note of telephone conversation, OFT Document Reference 14210.

⁷²⁵⁵ Written representations of Apollo, 27 June 2008, paragraphs 5.4 and oral representations of Apollo, 22 July 2008, page 4.

⁷²⁵⁶ Written representations of Apollo, 27 June 2008, paragraph 7.5(iii).

⁷²⁵⁷ Written representations of Apollo, 27 June 2008, Annex 9.

estimator responsible for preparing Apollo's costs estimate...' and *'I was not approached for a cover price by any company in relation to this tender'*. DW also stated *'I have never sought a cover price from a competitor, nor have I given a cover price to a competitor, on Apollo's behalf'*. Similarly, Ian Timms ('IT'), Apollo's estimating director stated in his witness statement that he had not been approached for a cover price in relation to this tender.

IV.5507. The OFT notes the direct contradiction between this witness evidence and the contemporaneous evidence and overall explanation of BR in respect of the workload report and his specific explanation of the entry relating to this tender. On balance, the OFT considers the latter to be more compelling. BR's evidence is consistent with the markings on the contemporaneous tender register. Further, in relation to other Infringements described in this Decision⁷²⁵⁸, similar markings on BR's workload reports indicating that cover prices have been obtained have been confirmed to be correct by evidence or admissions from other Parties. The OFT further notes the possibility that the cover price may have been provided by someone at Apollo other than the estimator for the tender in question, DW, and without the knowledge of the estimating director, IT. In light of those factors, the OFT considers that the contemporaneous documentary evidence and explanation of BR should be preferred to the evidence of DW and IT.

IV.5508. In its response to the Statement, Apollo noted that the Statement indicated that cover prices were generally four to five per cent higher than the price submitted by the person providing the cover price and that in this tender Mansell's bid was approximately 10 per cent higher.⁷²⁵⁹ The OFT is unable to comment on the cover price calculation methodology of a non-leniency party, such as Apollo. In any event, although it was often the practice for companies to provide a cover price and for the recipient to add on four to five per cent, there were in fact many instances where the figure submitted on the basis of a cover price was 10 per cent or more above the figure submitted by the provider of the cover price. Accordingly, the OFT does not consider a difference of approximately 10 per cent to be indicative that cover pricing did not take place.

IV.5509. In its response to the Statement, Apollo also noted that Mansell could have obtained a cover price from three other tenderers therefore there is no reason to assume that it was Apollo that provided the cover price.⁷²⁶⁰ The OFT considers that the fact that no other competitors' name appears on the contemporaneous evidence, taken together with BR's explanation of the significance of Apollo's name on the document, as sufficient evidence to indicate that Mansell received a cover price from Apollo rather than any other competitor.

IV.5510. Apollo also asserted that as a large part of this tender was to be subcontracted to named sub-contractors, an experienced bidder could have made a realistic estimate by contacting those subcontractors thereby not requiring a cover price.⁷²⁶¹ The OFT considers it implausible that Mansell would have undertaken such a task, which amounts in essence to pricing the job, given the resource issues it has cited above. In any event, any suggestion that Mansell did undertake such a task, though not inherently implausible, is

⁷²⁵⁸ See Infringements 42, 43, 91 and 97.

⁷²⁵⁹ Written representations of Apollo, 27 June 2008, paragraphs 7.12 and 8.17(ii).

⁷²⁶⁰ Written representations of Apollo, 27 June 2008, paragraph 9.10(iii).

⁷²⁶¹ Written representations of Apollo, 27 June 2008, paragraphs 9.5 and 9.10(iv).

contradicted by the contemporaneous documentary evidence containing the entry '*Apollo*', and the witness explanation thereof as indicating a cover price having been taken from Apollo. In view of the available evidence, the OFT does not consider this suggestion can be accepted.

The OFT's analysis of the evidence and finding

IV.5511. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.5512. Mansell and Apollo each accepted an invitation to tender for this contract.

IV.5513. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Apollo completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Apollo being the lowest received and the fact that it won the contract.

IV.5514. Mansell's 2003 workload report records '*Apollo*', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.5515. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Apollo, the pattern consistent with a cover price having been provided.

IV.5516. The OFT therefore concludes that contact took place between Mansell and Apollo. The OFT also concludes that Apollo supplied a figure to Mansell for a cover bid.

IV.5517. The OFT is satisfied that the facts set out in paragraphs IV.5491 to IV.5516 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷²⁶² In particular:

- (a) the provision of a figure for a cover bid from Apollo to Mansell was not unilateral⁷²⁶³, and contravenes the principle against direct or indirect contact between competitors;⁷²⁶⁴
- (b) Mansell can be presumed to have taken account of the information received from Apollo (i.e. the cover price) when determining its own conduct in the tendering process;⁷²⁶⁵ and
- (c) Apollo can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷²⁶⁶

⁷²⁶² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷²⁶³ See paragraph IV.73 of the General comments on cover pricing section.

⁷²⁶⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷²⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷²⁶⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.5518. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Apollo in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Sutton Court shops, external refurbishment, tender deadline 8 July 2004.

Immunity and leniency assessment

IV.5519. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5520. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 200: Not included in the Decision

Infringement 201: **E-Centre Office Development – Sherwood Energy Village, Ollerton – 30 July 2004**
Client: **Sherwood Energy Village**
Parties: **Herbert Baggaley and G F Tomlinson**

IV.5521. On 7 June 2004, Sherwood Energy Village ('Sherwood Energy') sought tenders for the construction of new office accommodation and bistro at The E-Centre, Darwin Drive, Sherwood Energy Village, New Ollerton, Nottinghamshire. The following six companies were invited to tender: Herbert Baggaley, G F Tomlinson, Clegg, Robert Woodhead, Galliford Try and Bluestone. The deadline for the receipt of tenders was 30 July 2004.

IV.5522. Sherwood Energy received the following tender returns:⁷²⁶⁷

Company	Date and time tender received	Amount of tender	Awarded contract
Herbert Baggaley	30 July 2004	£3,695,766	Yes
G F Tomlinson	30 July 2004	£3,884,182	
Clegg Construction	30 July 2004	£3,682,639	
Robert Woodhead	30 July 2004	£3,755,206	
Galliford Try	30 July 2004	£3,938,821	
Bluestone	30 July 2004	£3,996,127	

⁷²⁶⁷ Information from client, OFT Document Reference 9361.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley – Pre-Tender Quality Plan

IV.5523. Herbert Baggaley's 'Pre-Tender Quality Plan' relating to this tender, provided to the OFT as part of its leniency application, has under the section headed 'Known Competitors', the following entries, all of which are handwritten:⁷²⁶⁸

*' Clegg
Bluestone
Woodhead
Tomlinson. (pr) - £ 3884182.00
Galliford*

IV.5524. The 'Pre-Tender Quality Plan' states that Herbert Baggaley's submitted figure was £3,695,766.29.

Evidence from leniency applicant Herbert Baggaley

IV.5525. As part of its leniency application, Herbert Baggaley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.5526. Following the issue of the Statement, Herbert Baggaley did not submit any specific written or oral representations in respect of this infringement.

Witness evidence from leniency applicant Herbert Baggaley

IV.5527. During interviews conducted in connection with its leniency application, Herbert Baggaley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.5528. During interview Anton Newell ('AN'), Chief Estimator at Herbert Baggaley, was specifically asked about this tender and reference was made to the 'Pre-Tender Quality Plan',⁷²⁶⁹ discussed in paragraph IV.5523 above. AN said, 'it would appear from that that we gave Tomlinson's a cover price some 100...175...£180,000 higher than ours'.⁷²⁷⁰ He was then asked about the meaning of '(pr)' recorded next to Tomlinson's name and he said, 'Yeah, price'.⁷²⁷¹

Contemporaneous documentary evidence from other companies – G F Tomlinson – Diary entries

IV.5529. During the OFT's search of G F Tomlinson's premises, Bob Hambleton's 2004 diary was seized which was found to contain 26 references to this tender

⁷²⁶⁸ Leniency application, OFT Document Reference 3905, page 3.

⁷²⁶⁹ Leniency application, OFT Document Reference 3905, page 3.

⁷²⁷⁰ Interview transcript, OFT Document Reference 11317, pages 35 and 36.

⁷²⁷¹ Interview transcript, OFT Document Reference 11317, page 36.

between 28 June 2004 and 12 August 2004, six of which are shown below:⁷²⁷²

- '19 July 2004 E CENTRE - OLLERTON (30/7/04)
1. Cover - Baggs
2. Check label - Envelope'
- '20 July 2004 'E' CENTRE, OLLERTON (30/7/04)
1. Check Envelope label.
2. Cover – Baggarley [sic] (Anton)
 Ring few days before to confirm'
- '21 July 2004 'E' CENTRE, OLLERTON (30/7/04)
1. Cover – Baggarley' [sic]
- '22 July 2004 'E' CENTRE, OLLERTON (30/7/04)
1. Cover – Baggarley' [sic]
- '23 July 2004 'E' CENTRE, OLLERTON (30/7/04)
1. Cover – Baggarley' [sic]
2. Check tender label
3. Check Info on Sustainable Products'
- '30 July 2004 'E' CENTRE (3/8/04)
1. tender Analysis to Architect - Anton to provide

IV.5530. Twelve of the references in this period had been erased and were analysed by Godfrey Jenkinson ('GJ'), a forensic scientist in the Questioned Documents Group at LGC Limited. GJ provided a statement in which he identified some of the erased entries in respect of this tender.⁷²⁷³ Combining the information visible in the diary and that provided by the analysis of GJ, the further twelve entries are:⁷²⁷⁴

- '6 July 2004 E CENTRE (23/7/04)
1. Site Visit
2. check disc for label
3. Obtain cover' [erased]
- '8 July 2004 'E' CENTRE (23/07/04)
1. Site Visit
2. check disc for label
3. Obtain ...' [erased – possible decipherment]
- '9 July 2004 'E' CENTRE (23/07/04)
1. Site Visit
2. check disc for label
3. Obt[erased] ain ...' [erased – possible decipherment]

⁷²⁷² Bob Hambleton's diary, OFT Document Reference 3526, pages 94, 95, 96 and 99.

⁷²⁷³ Witness statement, OFT Document Reference 13519.

⁷²⁷⁴ Bob Hambleton's diary, OFT Document Reference 3526, pages 89 to 93, 97, 98 and 99, and witness statement, OFT Document Reference 13519, pages 5 and 6.

'12 July 2004 'E' CENTRE (23/07/04)
1. Site Visit – Mon 12th
2. check disc for label
3. *Obta*[erased] *in* [erased – possible decipherment] *Cover'* [erased]

'13 July 2004 'E' CENTRE (23/07/04)
1. *Obtain Cover* - [erased] *try* [erased – possible decipherment] [unable to decipher]
2.' [unable to decipher]

'14 July 2004 E CENTRE (23³⁰/07/04) 10AM
1. *Obtain Cover* – [...] [C] *Ba* [erased – possible decipherment] *ggs* [erased]*lliford'* [unable to decipher - possible decipherment]

'15 July 2004 'E CENTRE' OLLERTON (30/7/04)
1. *Obtain Cover'* [erased]

'16 July 2004 E CENTRE - OLLERTON (30/7/04)
1. *Obtain C*[erased] *over* [erased – possible decipherment] - *Baggs* [erased]
2. *check label for tender envelope'* [erased]

'26 July 2004 'E' CENTRE OLLERTON (30/7/04)
1. *Cover figure* - *Bagg* [erased] *eley* [erased – possible decipherment]
2. *Check Tender Address'*

'27 July 2004 'E' CENTRE OLLERTON (30/7/04)
1. *Cover figure* - ... *aggs 01623* [erased]
2. *Check Tender Address (Ring... oney A* [erased – possible decipherment] *rch* [erased]
3. *Signature for Tender'*

'28 July 2004 *Ring Anton @ Baggs to Confirm 'E' Centre (After 3pm)*

'E' CENTRE OLLERTON (30/7/04)
1. *Cover figure* - *Baggs* [...] [C] [erased]
2. *Check tender Address'* [erased]
Ring Anton After 3pm - 'E' Centre

'29 July 2004 'E' CENTRE OLLERTON (30/7/04)
1.[unable to decipher] *figure* [erased – possible decipherment][unable to decipher] *ggs* [erased – possible decipherment]
2. *Arrange 'tender' delivery'*

Evidence from other companies - G F Tomlinson

IV.5531. The OFT wrote to G F Tomlinson on 22 March 2007, offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that G F Tomlinson had participated in bid rigging on this tender. In response to this letter, G F Tomlinson replied, by letter dated 23 April 2007, confirming its involvement in bid rigging activities in general and accepting the offered reduction.⁷²⁷⁵ In relation to this specific tender, G F Tomlinson stated 'We

⁷²⁷⁵ Response from G F Tomlinson, OFT Document Reference 10346.

engaged in bid rigging activities on this tender with Herbert Baggaley Construction Limited.⁷²⁷⁶

IV.5532. The OFT subsequently wrote to G F Tomlinson's ultimate parent company at the time of this Infringement, G F Tomlinson Group, on 5 November 2007, asking it to comment on G F Tomlinson's response to the OFT's Fast Track Offer, given that the OFT intended to hold G F Tomlinson Group jointly and severally liable for any infringements committed by G F Tomlinson in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, G F Tomlinson Group said it did not wish to comment on the response from its subsidiary G F Tomlinson.⁷²⁷⁷

IV.5533. In its response to the Statement, G F Tomlinson confirmed '*it is not disputed that Tomlinson participated in cover pricing during the relevant period set out in the Statement*'.⁷²⁷⁸

[...] [C]

IV.5534. [...] [C]⁷²⁷⁹

IV.5535. [...] [C]⁷²⁸⁰

[...] [C]

IV.5536. [...] [C]

IV.5537. [...] [C]

⁷²⁷⁶ Response from G F Tomlinson, OFT Document Reference 10347, page 4.

⁷²⁷⁷ Response from G F Tomlinson Group, OFT Document Reference 13979.

⁷²⁷⁸ Written representations of G F Tomlinson, 23 June 2008, paragraph 56.

⁷²⁷⁹ [...] [C]

⁷²⁸⁰ [...] [C]

[...] [C] ⁷²⁸¹

IV.5538. [...] [C] ⁷²⁸²

[...] [C]

IV.5539. [...] [C]

IV.5540. [...] [C] ^{7283 7284 7285}

IV.5541. [...] [C] ⁷²⁸⁶

IV.5542. [...] [C] ⁷²⁸⁷

7281 [...] [C]

7282 [...] [C]

7283 [...] [C]

7284 [...] [C]

7285 [...] [C]

7286 [...] [C]

7287 [...] [C]

[...] [C]

IV.5543. [...] [C] ⁷²⁸⁸

[...] [C]

IV.5544. [...] [C] ⁷²⁸⁹

[...] [C]

IV.5545. [...] [C]

IV.5546. [...] [C] ⁷²⁹⁰

[...] [C]

IV.5547. [...] [C]

IV.5548. [...] [C] ^{7291 7292 7293}

⁷²⁸⁸ [...] [C]

⁷²⁸⁹ [...] [C]

⁷²⁹⁰ [...] [C]

⁷²⁹¹ [...] [C]

⁷²⁹² [...] [C]

⁷²⁹³ [...] [C]

IV.5549. [...] [C]⁷²⁹⁴

The OFT's analysis of the evidence and finding

IV.5550. From the evidence presented above, the OFT draws the following conclusions.

IV.5551. Herbert Baggaley and G F Tomlinson each accepted an invitation to tender for this contract. G F Tomlinson was unable to submit a tender by the return date and/or did not want to win this tender. It appears that Herbert Baggaley completed the estimating process for this contract and submitted a bid with the hope of winning the work.

IV.5552. With regard to G F Tomlinson, Herbert Baggaley's contemporaneous '*Pre-Tender Quality Plan*' shows that a cover was given to G F Tomlinson in respect of this tender: '*Tomlinson. (pr) - £3684182.00*'. This was confirmed by AN of Herbert Baggaley during interview, '*it would appear from that that we gave Tomlinson's a cover price some 100...175...£180.000 higher than ours*'. AN was asked about the meaning of '*(pr)*' recorded next to Tomlinson's name and he said, '*Yeah, price*'.

IV.5553. Corroborating contemporaneous evidence was found at G F Tomlinson during the OFT's visit. An estimator's diary contained entries including: '*Cover – Baggs*' on 19 July 2004, '*Baggerley (Anton) Ring few days before to confirm*' on 20 July 2004, '*Ring Anton @ Baggs to Confirm 'E' Centre. (After 3pm)*' on 28 July 2004, '*Ring Anton After 3pm – 'E' Centre*' on 29 July 2004, and '*'E' Centre (3/8/04) 1. tender Analysis to Architect – Anton to provide*' on 30 July 2004. There were also erased entries including: '*Obtain Cover*' on 6 July 2004, and '*Cover Figure - Baggs [.....] [C]*' on 28 July 2004. The telephone number, [...] [C], is Herbert Baggaley's telephone number.

IV.5554. The diary entry for 14 July 2004 shows what appears to be a list of contractors who G F Tomlinson believed were tendering for this tender. The OFT has no evidence that G F Tomlinson sought a cover price from either Clegg or Galliford Try, either instead of or as well as Herbert Baggaley. As is shown by the other diary entries, Herbert Baggaley was named consistently in G F Tomlinson's diary throughout the tender period, and as Galliford Try's tender price was higher than that submitted by G F Tomlinson it could not have provided a cover price to G F Tomlinson.

IV.5555. Both G F Tomlinson and Herbert Baggaley have admitted to bid rigging in respect of this tender. In response to the OFT's letter of 22 March 2007, G F Tomlinson admitted '*We engaged in bid rigging activities on this tender with Herbert Baggaley Construction Limited*'. The OFT considers in the light of the contemporaneous evidence, the explanations of that evidence, and the admissions by both G F Tomlinson and Herbert Baggaley, that Herbert Baggaley gave a cover price to G F Tomlinson in respect of this tender.

IV.5556. [...] [C]

⁷²⁹⁴ [...] [C]

[...] [C]

IV.5557. [...] [C]

IV.5558. The OFT therefore concludes that contact took place between Herbert Baggaley and G F Tomlinson. The OFT also concludes that Herbert Baggaley supplied a figure to G F Tomlinson for a cover bid.

IV.5559. The OFT is satisfied that the facts set out in paragraphs IV.5523 to IV.5558 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷²⁹⁵ In particular:

- (a) the provision of a figure for a cover bid from Herbert Baggaley to G F Tomlinson was not unilateral⁷²⁹⁶, and contravenes the principle against direct or indirect contact between competitors;⁷²⁹⁷
- (b) G F Tomlinson can be presumed to have taken account of the information received from Herbert Baggaley (i.e. the cover price) when determining its own conduct in the tendering process;⁷²⁹⁸ and
- (c) Herbert Baggaley can be presumed to have taken account of the information it received from G F Tomlinson (i.e. that G F Tomlinson did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷²⁹⁹

IV.5560. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Herbert Baggaley and G F Tomlinson, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the construction of new office accommodation and bistro at The E Centre, Darwin Drive, Sherwood Energy Village, New Ollerton, Nottinghamshire, tender deadline 30 July 2004.

Immunity and leniency assessment

IV.5561. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5562. Herbert Baggaley informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Herbert Baggaley will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁷²⁹⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷²⁹⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁷²⁹⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷²⁹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷²⁹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 202: Alterations and Extension to Norwich Cinema City, St Andrews Street, Norwich – 27 August 2004
Client: Norfolk and Norwich Film Theatre Limited
Parties: Jackson⁷³⁰⁰ and R G Carter

IV.5563. On 27 July 2004, Norfolk and Norwich Film Theatre Limited sought tenders for alterations and extension to Norwich Cinema City, St Andrews Street, Norwich. The return date for the tender was 27 August 2004 and three companies were invited to tender: Jackson, R G Carter and Bluestone.⁷³⁰¹

IV.5564. Norfolk and Norwich Film Theatre Limited received the following tender returns before noon on 27 August 2004:⁷³⁰²

Company	Date and time tender received	Amount of tender	Awarded the tender
Bluestone	Before Noon on 27 August 2004	£2,391,032	Yes
R G Carter	Before Noon on 27 August 2004	£2,506,995	
Jackson	Before Noon on 27 August 2004	£2,678,252	

IV.5565. Norfolk and Norwich Film Theatre Limited stated in its *'Preliminary Tender Report'* that *'Jackson Building Services did not submit any supporting documentation with their tender return. It has therefore not been possible to analyse the elemental breakdown of the Jacksons tender'*.⁷³⁰³

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson tender book and Tender Sheet

IV.5566. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten:⁷³⁰⁴

Enquiry Number	Date Received	Employer	Location	Description of Works
E3871	30.7.04	Norfolk & Norwich Film Theatre Ltd	Norwich	Norwich Cinema City

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
			C Cover from Carters JH	Noon 27.8.04 JBS

⁷³⁰⁰ Jackson is a subsidiary of Propensity.

⁷³⁰¹ Information from client, OFT Document Reference 9028.

⁷³⁰² Information from client, OFT Document Reference 9028.

⁷³⁰³ Preliminary Tender Report, OFT Document Reference 9030, page 3.

⁷³⁰⁴ Tender book, OFT Document Reference A0905, page 58.

IV.5567. On the tender sheet for this tender is handwritten in the section under 'Known Competition', 'Bluestone ✓' and 'R G Carters ✓'. The estimator is shown as 'John Harvey'.⁷³⁰⁵

IV.5568. In its response to the Statement, R G Carter stated '[c]learly the tender book does not constitute "contemporaneous" evidence. According to John Rhodes' statement, the relevant details might have been added a month after the bid was submitted.'⁷³⁰⁶ The OFT does not accept R G Carter's assertion that the tender book was not completed contemporaneously. The interview transcript with John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirms the contemporaneous nature of the tender book:

JR. Sometimes the person giving the cover may have said around this price, at other times they would have given a specific figure. I wouldn't normally question that figure, I would, that figure would be entered on the formal tender and that would be what was returned. And then I would record the information in the estimate book.

KB. But you would get the cover price on the day or the day before the tender?

JR. That is correct.

KB. But you wouldn't necessarily write that price and the fact you received a cover, you wouldn't necessarily write that on the same day as the tender deadline, it might be on the day, it might be a day or two afterwards or it might be a week afterwards?

*JR. That is correct.*⁷³⁰⁷

IV.5569. The interview evidence clearly shows that the tender book was completed in the normal course of business at or around the time the tenders it recorded were submitted.

IV.5570. In its response to the Statement, R G Carter stated '[t]he page extracted from the Jackson tender book that has a reference to Norwich Cinema City is not completed as regards the columns for Jackson's position, lowest tender or, indeed, Jackson's price. Those columns appear to be completed in respect of other tenders in the book. The information does not appear to be complete and its reliability must be questioned.'⁷³⁰⁸

IV.5571. The OFT does not accept R G Carter's assertion that because the cover price used by Jackson in respect of this Infringement was not recorded in the tender book the reliability of the evidence in respect of this tender must be questioned. The OFT notes that there are several entries in the tender book which indicate the taking of a cover price but do not record the cover price in the Jackson's position column. In any event, the absence of information from certain columns does not undermine the information that is recorded in other columns of the tender book. The OFT has not sought to rely on the tender book evidence to

⁷³⁰⁵ Tender sheet, OFT Document Reference A0887.

⁷³⁰⁶ Written representations of R G Carter, 27 June 2008, paragraph 2.33.

⁷³⁰⁷ Interview transcript, OFT Document Reference 11347, pages 11 and 12.

⁷³⁰⁸ Written representations of R G Carter, 27 June 2008, paragraph 2.36.

ascertain the actual cover price given by R G Carter to Jackson in respect of this Infringement and therefore considers the absence of the actual cover price from the tender book as being immaterial to the Infringement.

IV.5572. With regard to the information on the tender sheet, R G Carter stated *'[i]n this case the other contractors would have found R G Carter already on site under the enabling contract and would have realised that R G Carter would be among the contractors invited to tender. John Harvey confirms this in his interview, saying "I remember going and doing a site visit on that one because there was another company doing some enabling works. And while we were there we bumped into some people from that company..."*. There is no indication at all that this information, added in handwriting on the Tender Sheet, was obtained by Jackson through direct contact between Jackson and R G Carter.⁷³⁰⁹

IV.5573. The OFT has not alleged that Jackson obtained the names of the other contractors in the tender process through direct contact with R G Carter. The OFT does however note, as R G Carter also points out, that there was direct contact between R G Carter and Jackson prior to the submission of the tender and that JH was a former employee of R G Carter at the time of the Infringement and has since resumed employment with R G Carter.⁷³¹⁰

Evidence from leniency applicant Propensity

IV.5574. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.5575. In particular, Propensity provided to the OFT an analysis of its tender book since 4 January 2000 and in respect of this tender, Propensity confirmed that it received a cover price from R G Carter.⁷³¹¹

IV.5576. In its response to the Statement, Propensity stated *'...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application'*.⁷³¹²

Witness evidence from leniency applicant Propensity

IV.5577. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.5578. JR confirmed in interview that it is his handwriting in the tender book⁷³¹³ and that in most instances he would have arranged the cover price.⁷³¹⁴ JR said in respect of the entry in the tender book, for this tender, *'it was a competitive tender, it was due to be submitted on 27 August 2004. Jackson's sought*

⁷³⁰⁹ Written representations of R G Carter, 27 June 2008, paragraph 2.31.

⁷³¹⁰ Interview transcript, OFT Document Reference 11347, pages 2 and 3.

⁷³¹¹ Table of cover pricing recorded in the tender book, OFT Document Reference A1274, page 7.

⁷³¹² Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁷³¹³ Interview transcript, OFT Document Reference 11347, page 10.

⁷³¹⁴ Interview transcript, OFT Document Reference 11347, page 11.

some assistance from Carters, the estimator involved would have been John Harvey.⁷³¹⁵ JR also explained that the 'C' stood for 'competitive tender'.⁷³¹⁶

IV.5579. In its response to the Statement, R G Carter stated *'When referring back to the relevant page in the Jackson tender book during his interview with the OFT ... John Rhodes is merely stating what he thought the phrase "Cover from Carters" meant; he is not stating that he actually remembers that a cover was taken.*'⁷³¹⁷ The OFT does not consider it necessary for JR to remember the obtaining of the cover price from R G Carter, it is sufficient that he has confirmed that the phrase 'Cover from Carters' in the General Notes column of the tender book was a contemporaneous record of a cover price having been taken from that company.

IV.5580. John Harvey ('JH'), a senior estimator at Jackson at the time of this Infringement, confirmed in interview that he started to price the job and recalled that, *'I remember it because I'd obviously started pricing it because I went to the site*'.⁷³¹⁸ JH confirmed that during the estimating period that it was decided that Jackson would take a cover. JH said, *'I guess John [Rhodes] would have told me, stop pricing it, and that was it*'.⁷³¹⁹

IV.5581. In its response to the Statement, R G Carter stated *'...at no time in the interview with John Harvey does he state that it was decided that Jackson would take a cover on the Norwich Cinema City tender.*'⁷³²⁰ The OFT does not accept this assertion. On the contrary, when the following question was put in interview to JH: *'At some stage in the process John Rhodes and the board decided that they weren't going to price it up, that they'd take a cover price and at that stage it was taken away from you'*, he responded with *'That's right*'.⁷³²¹

Evidence from other companies – R G Carter

IV.5582. The OFT wrote to R G Carter's immediate parent company R G Construction Limited ('R G Construction') on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that R G Construction had participated in bid rigging on this tender.⁷³²² In response to this letter, R G Construction was unable to accept the OFT's Fast Track Offer and said that *'Our investigations have not disclosed any evidence of conduct to which you refer*'.⁷³²³

⁷³¹⁵ Interview transcript, OFT Document Reference 11347, page 23.

⁷³¹⁶ Interview transcript, OFT Document Reference 11347, page 13.

⁷³¹⁷ Written representations of R G Carter, 27 June 2008, paragraph 2.37.

⁷³¹⁸ Interview transcript, OFT Document Reference 11346, page 8.

⁷³¹⁹ Interview transcript, OFT Document Reference 11346, page 9.

⁷³²⁰ Written representations of R G Carter, 27 June 2008, paragraph 2.40.

⁷³²¹ Interview transcript, OFT Document Reference 11346, page 9.

⁷³²² The OFT made the Fast Track Offer to R G Construction on the basis of information available to it at the relevant time. As R G Carter is a wholly owned subsidiary of R G Construction, the OFT does not consider it material that the Fast Track Offer was not addressed to R G Building itself. In any event, the companies in the R G Carter Group made joint representations in response to the Statement, and stated that no evidence had been found to suggest that a cover price had been provided to a competitor. The OFT concludes that none of the companies making up the R G Carter Group were willing to admit participation in bid rigging activities in relation to this tender.

⁷³²³ Response from R G Carter, OFT Document Reference 10784.

- IV.5583. The OFT subsequently wrote to R G Carter's ultimate parent company at the time of this Infringement, R G Holdings, on 6 November 2007, asking it to comment on R G Construction's response to the OFT's Fast Track Offer, given that the OFT intended to hold R G Holdings jointly and severally liable for any infringements committed by its subsidiaries in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, R G Holdings said it had '*...nothing further to add*'.⁷³²⁴
- IV.5584. In its response to the Statement, R G Carter stated '*[t]he entry "Cover from Carters" in the extract from the Jackson tender book does not mean that Jackson actually contacted R G Carter for a cover price or that a cover price was actually given ... Jackson and all other bidders had been given information about R G Carter's original second stage offer and the phrase "Cover from Carters" is likely merely to reflect that fact*'.⁷³²⁵
- IV.5585. R G Carter's explanation for the entry '*Cover from Carters*' stems from the fact that the July 2004 tender process described above was a re-tendering exercise, following an earlier two-stage tender process conducted in early 2004, in which R G Carter had participated and submitted a bid of £2.63 million following negotiations with the client. The contract was not awarded at that time, leading to the re-tendering exercise in July. R G Carter asserted that as part of the re-tendering exercise, its original, unsuccessful tender price became known to the other bidders, and that Jackson would therefore have been able to submit a 'cover' price based on R G Carter's original bid, without the need for any direct contact with R G Carter.
- IV.5586. In support of this explanation, R G Carter provided a note that it had created of a meeting on 25 June 2008 with the client's quantity surveyor, Burke Hunter Adams, stating that Burke Hunter Adams had '*briefed the contractors that Carters' second stage negotiated price (£2.63M)... was higher than the Clients budget (£2.2-2.3M) ...*'.⁷³²⁶
- IV.5587. In its response to the Statement, R G Carter stated '*[t]he tender submitted by Jackson was in the sum of £2,678,252.00 (some £118,524 in excess of the publicised amount of the Arts Council England grant and some £48,252 higher than the level of R G Carter's original bid, as communicated to all bidders by the client's consultants) with a construction period of 65 weeks. The construction period is exactly the same as in R G Carter's original second stage offer. R G Carter had itself managed to improve its construction period to 63 weeks in its re-tender bid. It is clear that Jackson knew about the level of R G Carter's original second stage bid and it did not, therefore, need to contact R G Carter or any other bidder to put in an unsuccessful bid at this level*' (emphasis added).⁷³²⁷
- IV.5588. While the OFT accepts that the quantity surveyors may have briefed the contractors to the effect that R G Carter's bid in the original tender exercise had exceeded the client's budget, R G Carter has been unable to provide any evidence that Jackson was made aware of R G Carter's precise bid by the quantity surveyors. The OFT's own enquiries into the information made

⁷³²⁴ Response from R G Carter Holdings, OFT Document Reference 14103.

⁷³²⁵ Written representations of R G Carter, 27 June 2008, paragraph 2.37.

⁷³²⁶ Note of meeting, 25 June 2008, paragraph 8.

⁷³²⁷ Written representations of R G Carter, 27 June 2008, paragraph 2.30.

available to bidders in the re-tendering exercise have found no support for R G Carter's alternative explanation that Jackson calculated an unsuccessful bid in the knowledge of R G Carter's precise previous bid. Moreover, this alternative explanation of events does not explain why the term '*Cover from*', a term widely understood in the construction industry to mean obtaining an uncompetitive tender price from another bidder in the tender process, was recorded in the tender book against the name '*Carters*'.

IV.5589. Similarly, the possibility that Jackson formulated an unsuccessful bid based on public information or a briefing from surveyors as to the client's budget would not explain the use of the term '*Cover from Carters*' in Jackson's tender book, or JR's confirmation in interview that '*Jackson's sought some assistance from Carters*' in respect of this tender.

IV.5590. In its response to the Statement, R G Carter stated '[t]he client's consultant's tender report on the Cinema City tender... indicates the fact that R G Carter made qualifications of this type [changes to the proposed amendments to the JCT Standard Form Building Contract, the performance bond and Parent Company Guarantee] in its tender for this project. Any contractor seeking a cover price from R G Carter would be at risk of being awarded the contract, even though only the second lowest price bidder, if R G Carter was unable to agree terms. R G Carter's approach to contract terms and risk is well known in the market place and probably acts as a disincentive for other contractors to approach R G Carter for cover prices'.⁷³²⁸

IV.5591. Even if R G Carter's qualifications on this job reflected an approach to risk which was 'well known in the market place' (which the OFT does not necessarily accept), the OFT does not accept that this precludes the possibility of a competitor approaching it for a cover price. Where, as in the case of this Infringement, the OFT has clear documentary and witness evidence which together indicate the giving of a cover price, the fact that certain factors may have made the initial approach less attractive are insufficient to rebut that evidence.

IV.5592. R G Carter also submitted witness statements in response to the Statement from three individuals involved in this tender: Alan Marshall Clark, senior estimator, Brian Norman, Estimating Director and Roy Burton, Director and General Manager. Each denied involvement in cover pricing in relation to this tender and stated that they did not recall any contact with or knowledge of JR of Jackson. The OFT notes that the Jackson estimator for the tender was JH, not JR.

IV.5593. Although he worked for Jackson at the time of this Infringement, it is notable that during his interview with the OFT, JH confirmed that he had worked for R G Carter between 2000 and 2004 and at the time of the interview in April 2007 was once again working for R G Carter. The OFT also notes JH's comment, when asked if he himself was involved in the taking of the cover from R G Carter, '*I can't remember ringing them. I mean, I may have said to him, well, you need to speak to so and so because obviously I knew the people involved. But whether he rang them or I did I honestly can't remember at the time*' (emphasis added).⁷³²⁹

⁷³²⁸ Written representations of R G Carter, 27 June 2008, paragraph 2.11.

⁷³²⁹ Interview transcript, OFT Document Reference 11346, page 8.

IV.5594. The OFT notes that each of the three R G Carter witnesses failed to address the fact that they knew Jackson's estimator for this tender, calling into question remarks such as that of Roy Burton asserting that *'There was no history at all of any contact between Jacksons and R G Carter – we had no contact at all with the management there'*.⁷³³⁰

IV.5595. The OFT notes the direct contradiction between the witness evidence referred to in paragraph IV.5592 and the contemporaneous evidence and overall explanation provided by JR and JH. On balance, the OFT considers the latter to be more compelling. The Jackson witness evidence is consistent with the contemporaneous contents of the tender book. Further, in relation to Infringements 103, 119, 191, and 232 in this Decision, the contents of the Jackson tender book indicating that cover prices were taken have been confirmed to be correct by evidence from other Parties.

IV.5596. In light of these factors, the OFT considers that the documentary and witness evidence from Jackson is to be preferred to that of the three R G Carter witnesses.

The OFT's analysis of the evidence and finding

IV.5597. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.5598. Jackson and R G Carter each accepted an invitation to tender for this contract.

IV.5599. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5600. In regard to R G Carter, Jackson's tender book states, *'Cover from Carters'*. Propensity has confirmed that this shows that it received a cover price from R G Carter.

IV.5601. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by R G Carter, a pattern consistent with a cover price having been provided.

IV.5602. The OFT therefore concludes that contact took place between R G Carter and Jackson. The OFT also concludes that R G Carter supplied a figure to Jackson for a cover bid.

IV.5603. The OFT is satisfied that the facts set out in paragraphs IV.5566 to IV.5602 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷³³¹ In particular:

- (a) the provision of a figure for a cover bid from R G Carter to Jackson was not unilateral⁷³³², and contravenes the principle against direct or indirect contact between competitors;⁷³³³

⁷³³⁰ Witness statement of R Burton, 17 June 2008, page 2.

⁷³³¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷³³² See paragraph IV.73 of the General comments on cover pricing section.

- (b) Jackson can be presumed to have taken account of the information received from R G Carter (i.e. the cover price) when determining its own conduct in the tendering process;⁷³³⁴ and
- (c) R G Carter can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷³³⁵

IV.5604. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and R G Carter, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations and extension to Norwich Cinema City, St Andrews Street, Norwich, tender deadline 27 August 2004.

Immunity and leniency assessment

IV.5605. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5606. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 203: Mount Pleasant, Phase 4, Window Replacement, External Redecorations, Internal Improvements, Bracknell – 9 September 2004
Client: Southern Housing Group
Parties: Mansell and Apollo

IV.5607. On 16 July 2004, Southern Housing Group sought tenders for Mount Pleasant, Phase 4, window replacement, external redecorations, internal improvements, Bracknell.⁷³³⁶ The following six companies were invited to tender: Apollo, Breyer Group plc, Diamond Build plc, Mansell, R Durtnell and T H Kenyon & Sons plc, the date and time of tender return was 9 September 2004 at 12:00 noon.⁷³³⁷

IV.5608. Southern Housing Group received the following tender returns:⁷³³⁸

⁷³³³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷³³⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷³³⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷³³⁶ Information from client, OFT Document Reference 9240.

⁷³³⁷ Information from client, OFT Document Reference 9240.

⁷³³⁸ Information from client, OFT Document Reference 9240.

Company	Date tender received	Amount of tender	Awarded contract
Apollo	Prior to deadline	£605,580.00	YES
Diamond Build plc	Prior to deadline	£697,656.00	
T. H. Kenyon & Sons plc	Prior to deadline	£827,754.23	
Mansell	Prior to deadline	£675,850.00	
R Durnell	Prior to deadline	£774,216.00	
Breyer Group plc	Prior to deadline	£911,985.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.5609. As part of its leniency application, Mansell’s legal representatives provided Barry Russ’s (‘BR’), a managing estimator, workload reports. The 2004 workload report for special projects contained the following entry:⁷³³⁹

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
01-00349	Bracknell – Mount Pleasant Ph. 4 – Window Replacement, Ext. Redecs, Int. Improvmnts		675850	675850		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
			2/5		(Apollo) – Priced schedule called

IV.5610. In its response to the Statement, Apollo suggested that the record of its name on the workload reports in the Remarks column could merely have been a record of the company that won the tender for this contract.⁷³⁴⁰ However, the word ‘Apollo’ is in brackets on this document and as discussed in Mansell’s general leniency section, BR stated in interview that he used brackets to show that a cover was received from that company.⁷³⁴¹ Further, in relation to other Infringements described in this Decision⁷³⁴², similar markings on BR’s workload reports indicating that cover prices have been obtained have been confirmed to be correct by evidence or admissions from other Parties.

IV.5611. Mansell’s legal representatives also provided two price schedules for this tender, one of which appears to be Apollo’s price schedule.⁷³⁴³ Mansell’s legal representatives have also advised in relation to this document ‘*The first tab (10 pages) on the excel sheet marked “Apollo” shows the items from a priced schedule of work ... The figures shown in the first column were obtained from Apollo and appear to have been adjusted by Apollo to arrive at the MCSL’s tendered figure of £675,850 ... The second tab headed “Mansell” represents*

⁷³³⁹ Special works spreadsheet, OFT Document Reference B3539, page 4.

⁷³⁴⁰ Written representations of Apollo, 27 June 2008, paragraph 7.5(i).

⁷³⁴¹ Interview transcript, OFT Document Reference 11516, page14.

⁷³⁴² See Infringements 42, 43, 91 and 97.

⁷³⁴³ Price schedule, OFT Document Reference B4125, page 2.

*MCSL adjustments to the figures obtained from Apollo but still arriving at the submitted total of £675,850’.*⁷³⁴⁴

IV.5612. In its response to the Statement, Apollo argued that it did not provide its price schedule for this tender to Mansell.⁷³⁴⁵ Apollo provided a copy of the price schedule in respect of this tender from its own files.⁷³⁴⁶ There are some similarities (in particular, certain figures are identical figures) between this document and the price schedule marked ‘*Apollo*’ provided by Mansell referred to above. The OFT accepts that there are also some key differences between the two documents.

IV.5613. The OFT notes that the evidence from Mansell set out in paragraph IV.5611 indicates that ‘*The figures... were obtained from Apollo*’ and that BR only stated in interview that he would ‘*assume*’ that Apollo was approached for their price schedule.⁷³⁴⁷ However, he also confirmed that the situation in respect of this tender would be the same as that in relation to Infringement 154, i.e. in his interview that ‘*I would have thought, ... if we had been pressed, we would have gone back to Apollo and said can you help us out with a schedule*’ applied equally in respect of this tender.⁷³⁴⁸

IV.5614. Considering this evidence in the round, the OFT accepts that there is insufficient evidence on which to conclude that Apollo provided Mansell with its own price schedule, but considers that at least on the balance of probabilities, the information in the Mansell sheet marked Apollo was generated in whole or in part from information requested and received from Apollo. These figures were in turn amended by Mansell before being submitted to the client.

IV.5615. In any event, however, regardless of whether, how and to what extent details of Apollo’s price schedule were transferred to Mansell in order for Mansell to be able to respond to a post-tender request from the client for further pricing detail, this does not in any way undermine the evidence and in respect of Apollo having provided a cover price to Mansell in respect of this tender.

Evidence from leniency applicant Mansell

IV.5616. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁷³⁴⁹ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.5617. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Apollo and that this cover price was taken due to ‘*insufficient tender period: resource*’ at Mansell.⁷³⁵⁰

⁷³⁴⁴ Leniency application, OFT Document Reference B4144, page 6.

⁷³⁴⁵ Written representations of Apollo, 27 June 2008, paragraph 10.11.

⁷³⁴⁶ Written representations of Apollo, 27 June 2008, Annex 12.

⁷³⁴⁷ Written representations of Apollo, 27 June 2008, paragraph 10.10.

⁷³⁴⁸ Interview transcript, OFT Document Reference 11516, page 35.

⁷³⁴⁹ Leniency application, OFT Document Reference B0734.

⁷³⁵⁰ Leniency application, OFT Document Reference B1351, page 1.

IV.5618. In its response to the Statement, Apollo listed a number of issues with Mansell's TVR table, principally that it could not be considered a separate document because it was only restating BR's workload reports⁷³⁵¹, and that Mansell itself admitted that it could not be excluded that some of the tenders identified in the leniency application might not have involved cover pricing.⁷³⁵²

IV.5619. While the OFT is not according the same evidential weight to Mansell's table provided under leniency as it is to contemporaneous documents and witness testimony, the OFT does consider this document to be robust where the underpinning contemporaneous documents and witness testimony indicate that a cover price was taken, and Mansell's internal investigations have yielded an assessment that confirms that indication. Although some tenders included in this table may not be supported by sufficient evidence, none of these were included in the Statement. The OFT considers that the evidence for the present Infringement does meet the strong and compelling standard as it consists of two contemporaneous documents supported by witness testimony.

Witness evidence from leniency applicant Mansell

IV.5620. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.5621. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *'a cover was taken ... again with that type of work Apollo were on the list and obviously we approached them and got a cover from them'*.⁷³⁵³ BR further stated *'Apollo were very, very keen on that one and we ended up with a second spot price ... even on a cover. So again it's got price schedule called for, so I, I can only assume we approached Apollo again for some assistance on that'*.⁷³⁵⁴ BR had explained earlier in interview that the note *'Priced schedule called'* would mean *'that we were probably in the lowest three tenders received. Or they were asking, because some clients, or quantity surveyors will call for all price schedules'*.⁷³⁵⁵ BR advised that in this situation they would contact the contractor who provided the cover and stated *'some contractors will say no, others would say, yes, we'll help you out, but you know, obviously if that situation is reversed we would expect you to do the same'*.⁷³⁵⁶ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁷³⁵⁷

IV.5622. In its response to the Statement, Apollo pointed out that BR had no specific recollection of contact with Apollo for this contract, including no recollection of

⁷³⁵¹ Written representations of Apollo, 27 June 2008, paragraph 7.4.

⁷³⁵² Written representations of Apollo, 27 June 2008, paragraph 7.5(i).

⁷³⁵³ Interview transcript, OFT Document Reference 11516, page 35.

⁷³⁵⁴ Interview transcript, OFT Document Reference 11516, page 35.

⁷³⁵⁵ Interview transcript, OFT Document Reference 11516, page 32.

⁷³⁵⁶ Interview transcript, OFT Document Reference 11516, page 33.

⁷³⁵⁷ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

any individual at Apollo with whom he had contact⁷³⁵⁸ and that neither of the Apollo estimators working on this tender had any knowledge of BR.⁷³⁵⁹

IV.5623. The OFT accepts that BR's evidence does not constitute independent recollection of the events surrounding this tender. However, it does not consider that that undermines the credibility of his evidence. Given the number of tenders BR dealt with, as indicated on his personal workload reports, the OFT accepts that it is unlikely that he would remember every single tender in detail, particularly one that had been pre-determined not to be of high priority and therefore on which the least possible amount of effort had been expended. This does not preclude that he is able to provide an explanation of the contemporaneous documentation. The weight placed by the OFT on BR's evidence is commensurate with its explanatory nature.

IV.5624. In its response to the Statement, Apollo also suggested that it could not have given cover to Mansell because neither BR of Mansell nor any of the relevant estimators at Apollo knew any employees of the other party involved in this tender. Apollo quoted Kenneth Lockwood ('KL') of Mansell as stating that Mansell's estimators knew the opposition and an estimator would know his opposite numbers by name.⁷³⁶⁰

IV.5625. The OFT notes that although KL stated that Mansell's estimators knew the opposition by name, it was BR's evidence (who works at a different office to KL) that he did not know estimators in other companies by name.⁷³⁶¹ Though it may generally have been the case that Mansell's estimators knew their opposite numbers, in this particular instance the estimator has confirmed that he did not, and there is no inconsistency therefore between his evidence and Apollo's in this regard. The OFT also notes that the workload reports that provide the contemporaneous documentary evidence for this Infringement were BR's, not KL's, and therefore in relation to this Infringement it is BR's views that should be given greater weight.

Evidence from other companies – Apollo

IV.5626. The OFT wrote to Apollo on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Apollo had participated in bid rigging on this tender. In response to this letter Apollo stated that it was unable to accept the OFT's Fast Track Offer as it *'had not found any indication that [it] has been involved in any anti-competitive conduct in relation to the tenders identified'*.⁷³⁶²

IV.5627. The OFT subsequently wrote to Apollo's ultimate parent company at the time of this Infringement, Apollo Group, on 6 November 2007, asking it to comment on Apollo's response to the OFT's Fast Track Offer, given that the OFT intended to hold Apollo Group jointly and severally liable for any infringements committed by Apollo in respect of which the OFT ultimately decided to impose financial penalties. The OFT received a phone call in response to this letter on 6

⁷³⁵⁸ Written representations of Apollo, 27 June 2008, paragraph 10.15.

⁷³⁵⁹ Written representations of Apollo, 27 June 2008, paragraphs 8.15 to 8.16.

⁷³⁶⁰ Written representations of Apollo, 27 June 2008, paragraph 7.5(iv).

⁷³⁶¹ Interview transcript, OFT Document Reference 11516, page 13.

⁷³⁶² Response from Apollo, OFT Document Reference 10221.

December 2007, which confirmed that Apollo Group *'had no comments to make regarding its subsidiary's reply...'*⁷³⁶³

IV.5628. In its response to the Statement, Apollo made general representations as to how, as a business, it has ensured that it generally only receives appropriate invitations to tender, how it returns unsuitable tenders, and as to its prequalification success rate in invitations to tender.⁷³⁶⁴ The OFT accepts that the evidence currently available suggests that Apollo tend to price tenders properly. However, the present Infringement relates to the provision of a cover price, not the acceptance of one. Though the OFT has found, in paragraph IV.73 above, that a common motive for providing cover prices was reciprocity, it notes that the undertaking concerned may have other motives, such as facilitating the reduction in competitive bids for a tender which it wishes to win. Moreover, and as set out in Section III (Legal Background), the subjective motives of a party are irrelevant where an anti-competitive object is established.

IV.5629. In its response to the Statement, Apollo provided a witness statement from Simon Jones ('SJ')⁷³⁶⁵, who stated in respect of this tender *'I was the estimator responsible for preparing Apollo's costs estimate...'* and *'I was not approached for a cover price by any company in relation to this tender'*. SJ also stated *'I have never sought a cover price from a competitor, nor have I given a cover price to a competitor, on Apollo's behalf'*. Similarly, Ian Timms ('IT'), Apollo's estimating director stated in his witness statement that he had not been approached for a cover price in relation to this tender.

IV.5630. The OFT notes the direct contradiction between this witness evidence and the contemporaneous evidence and overall explanation of BR in respect of the workload report and his specific explanation of the entry relating to this tender. On balance, the OFT considers the latter to be more compelling. BR's evidence is consistent with the markings on the contemporaneous tender register. Further, in relation to other Infringements described in this Decision⁷³⁶⁶, similar markings on BR's workload reports indicating that cover prices have been obtained have been confirmed to be correct by evidence or admissions from other Parties. The OFT further notes the possibility that the cover price may have been provided by someone at Apollo other than the estimator for the tender in question, SJ, and without the knowledge of the estimating director, IT. In light of those factors, the OFT considers that the contemporaneous documentary evidence and explanation of BR should be preferred to the evidence of SJ and IT.

IV.5631. In its response to the Statement, Apollo noted that the Statement indicated that cover prices were generally four to five per cent higher than the price submitted by the person providing the cover price and that in this tender Mansell's bid was approximately 12 per cent higher.⁷³⁶⁷ The OFT is unable to comment on the cover price calculation methodology of a non-leniency party, such as Apollo. In any event, although it was often the practice for companies to provide a cover and for the recipient to add on four to five per cent, there were in fact many instances where the figure submitted on the basis of a cover

⁷³⁶³ File note of telephone conversation, OFT Document Reference 14210.

⁷³⁶⁴ Written representations of Apollo, 27 June 2008, paragraphs 5.4 and oral representations, 22 July 2008, page 4.

⁷³⁶⁵ Written representations of Apollo, 27 June 2008, Annex 12.

⁷³⁶⁶ See Infringements 42, 43, 91 and 97.

⁷³⁶⁷ Written representations of Apollo, 27 June 2008, paragraphs 7.12 and 10.16(ii).

was 10 per cent or more above the figure submitted by the provider of the cover price. Accordingly, the OFT does not consider a difference of approximately 12 per cent to be indicative that cover pricing did not take place.

The OFT's analysis of the evidence and finding

IV.5632. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.5633. Mansell and Apollo each accepted an invitation to tender for this contract.

IV.5634. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Apollo completed the estimating process for this tender and that they submitted a bid with the hope of winning the work. This is shown by the price submitted by Apollo being the lowest received and that they won the contract.

IV.5635. Mansell's 2003 workload report records '*(Apollo) – Priced schedule called*', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.5636. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Apollo, the pattern consistent with a cover price having been provided.

IV.5637. In addition the OFT notes that Apollo's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from Apollo.

IV.5638. The OFT therefore concludes that contact took place between Mansell and Apollo. The OFT also concludes that Apollo supplied a figure to Mansell for a cover bid.

IV.5639. On coming second in the tender process, Mansell was requested by the client to provide a price schedule, as indicated by the note on Mansell's workload report to the effect that a '*Priced schedule [was] called*'. As a result, Mansell in turn requested further information from Apollo. Whilst the OFT concludes that Apollo supplied Mansell with details of its price schedule in order that Mansell could provide the client with the requested information, it also notes that this conclusion is not a necessary element of its finding as to whether a cover price was requested and provided and therefore as to whether Mansell and Apollo infringed the Chapter I prohibition in relation to this tender.

IV.5640. The OFT is satisfied that the facts set out in paragraphs IV.5609 to IV.5638 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷³⁶⁸ In particular:

⁷³⁶⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of a figure for a cover bid from Apollo to Mansell was not unilateral⁷³⁶⁹, and contravenes the principle against direct or indirect contact between competitors;⁷³⁷⁰
- (b) Mansell can be presumed to have taken account of the information received from Apollo (i.e. the cover price) when determining its own conduct in the tendering process;⁷³⁷¹ and
- (c) Apollo can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷³⁷²

IV.5641. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Apollo in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Mount Pleasant, Phase 4, window replacement, external redecorations, internal improvements, Bracknell, tender deadline 9 September 2004.

Immunity and leniency assessment

IV.5642. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5643. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 204: New Build of Four Office Units, The Glade Business Centre,
Phase 2, Bestwood, Nottingham – 21 October 2004**
Client: Nottingham City Council
Parties: Allenbuild, Bodill, Herbert Baggaley and William Woodsend

IV.5644. In 2004, Nottingham City Council sought tenders for the new build of four office units, The Glade Business Centre, Phase 2, Bestwood, Nottingham. The return date for the tender was 21 October and four companies were invited to tender: Allenbuild, Herbert Baggaley, William Woodsend and Bodill.⁷³⁷³

IV.5645. Nottingham City Council received the following tender returns on 21 October 2004:⁷³⁷⁴

⁷³⁶⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁷³⁷⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷³⁷¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷³⁷² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷³⁷³ Information from client, OFT Document Reference 9143.

⁷³⁷⁴ Information from client, OFT Document Reference 9143.

Company	Date tender received	Amount of tender	Awarded the tender
Allenbuild	21 October 2004	£411,606	Yes
Herbert Baggaley	21 October 2004	£431,276	
William Woodsend	21 October 2004	£445,800	
Bodill	21 October 2004	£459,990	

IV.5646. Allenbuild's tender was re-negotiated by Nottingham City Council to £399,879.69.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from Allenbuild – tender documentation

IV.5647. In Allenbuild's tender adjudication summary for this tender, obtained by the OFT during the section 28 inspection of Allenbuild's premises on 9 March 2006, under the section headed '*KNOWN COMPETITORS*', the following entries have been made:⁷³⁷⁵

'1. *Bodill* ©

2. *Baggaley* ©

3. *Woodsend* © '

IV.5648. The tender adjudication summary also states that Allenbuild's submitted price was £411,606.50.⁷³⁷⁶

IV.5649. The Form of Tender is signed by '*S. WISHER (Estimator)*'.⁷³⁷⁷

Evidence from Allenbuild

IV.5650. The OFT wrote to Allenbuild on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Allenbuild had participated in bid rigging on this tender. In response to this letter, Allenbuild admitted '*We engaged in bid rigging activities on this tender with Bodill Construction. We engaged in bid rigging activities on this tender with Baggaley. We engaged in bid rigging activities on this tender with Woodsend*'.⁷³⁷⁸

IV.5651. The OFT subsequently wrote to Allenbuild's ultimate parent company at the time of this Infringement, Renew, on 6 November 2007, asking it to comment on Allenbuild's response to the OFT's Fast Track Offer, given that the OFT intended to hold Renew jointly and severally liable for any infringements committed by Allenbuild in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Renew's legal representatives DLA Piper said, '*Renew is not in a position to make any*

⁷³⁷⁵ Tender Adjudication Summary, OFT Document Reference B0069.

⁷³⁷⁶ Tender Adjudication Summary, OFT Document Reference B0069.

⁷³⁷⁷ Form of Tender, OFT Document Reference B0070, page 5.

⁷³⁷⁸ Response from Allenbuild, OFT Document Reference 10215, page 6.

*comment on the agreement entered into with you by either Allenbuild or Bullock, because both businesses are and have been managed quite separately from the holding company’.*⁷³⁷⁹

IV.5652. In its response to the Statement, Allenbuild stated in respect of this infringement that *‘Allenbuild gave a cover price to Herbert Baggaley, William Woodsend and Bodill because it was asked to do so by these three competitors’.*⁷³⁸⁰

IV.5653. Allenbuild also suggested that if it had not given cover prices to these three competitors, the outcome of the tender would have been unchanged *‘because they would have placed bids at prices reflecting their willingness to do the work, i.e. at higher margins’.*⁷³⁸¹ Whilst noting that cover bidding is an infringement by 'object' and as such whether or not an effect on competition can be demonstrated is irrelevant, the OFT does not accept Allenbuild's assertion that the outcome of the tender 'would have been unchanged'. In particular, without cover prices, Allenbuild's competitors may have returned the tenders, giving the client the option of seeking replacement tenders. Alternatively, a competitor seeking to price itself out of the work might nonetheless have submitted a bid lower than Allenbuild's, whether due to misjudgement in pricing the project or due to greater efficiencies.

Contemporaneous documentary evidence from leniency applicant Bodill – tender sheet

IV.5654. In Bodill's tender sheet for this tender, provided to the OFT as part of its leniency application, under the section headed *‘Tenderers’*, the following entries have been made, all of which are handwritten except the entry for Bodill:⁷³⁸²

- 1. *Bodill © ALLENBUILD*
- 2. *WOODSEND*
- 3. *BAGGALEY*
- * 4. *ALLENBUILD- STEVE WILLSHIRE*
- 5. *?’*

IV.5655. The tender sheet states that Bodill's submitted price was £459,990.00.⁷³⁸³

IV.5656. Juris Rozentals ('JR'), Chief Estimator at Bodill, kept a diary for 2004 which contains an entry for this tender on 21 October which reads *‘10.00 SOUTH GLADE PK PH. 2 (C) (NOTTM)’.*⁷³⁸⁴ JR explained in interview with the OFT that when a tender is written in his diary with a 'C' in brackets, *‘It means that we're looking for some help, a cover, a cover price’.*⁷³⁸⁵

⁷³⁷⁹ Response from Renew, OFT Document Reference 14129, page 1.

⁷³⁸⁰ Written representations of Allenbuild, 4 July 2008, paragraph 5.9.1.

⁷³⁸¹ Written representations of Allenbuild, 4 July 2008, paragraph 5.9.3.

⁷³⁸² Tender sheet, OFT Document Reference 0758.

⁷³⁸³ Tender sheet, OFT Document Reference 0758.

⁷³⁸⁴ Juris Rozental's diary, OFT Document Reference 0109, page 21, obtained during a visit to Bodill's premises under section 27 on 19 November 2004.

⁷³⁸⁵ Interview transcript, OFT Document Reference 6337, page 4.

Evidence from leniency applicant Bodill

IV.5657. As part of its leniency application, Bodill provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.229 to IV.242 above and is relied upon by the OFT in relation to this tender.

IV.5658. In particular, Bodill provided to the OFT an analysis of its tender sheets since March 2000 and explained that when a ‘*’ is written against a contractor's name it means that it gave Bodill a cover price.⁷³⁸⁶ In respect of this tender, Bodill confirmed that it received a cover price from Allenbuild⁷³⁸⁷ and that it submitted a token tender.⁷³⁸⁸

Contemporaneous documentary evidence from leniency applicant Herbert Baggaley – List of Tenders and Estimate sheet

IV.5659. In a contemporaneous list of tenders, provided by Herbert Baggaley to the OFT as part of its leniency application, the following is written:⁷³⁸⁹

DATE	PROJ NO	TENDER NO	CONTRACT NO	JOB DESCRIPTION/ESTIMATOR'S COMMENTS
28/09/2004	04/178P	EO4-05/053		4 Business Units, Glade Business Park, Bestwood, Nottingham ALLENBUILD

CLIENT	APPROX £0000'S	A B C R	DUE	BID £0000'S	RESULT
Nottingham City Council	250	C C	14/10/2004	431,276	Missed

IV.5660. On the internal estimate sheet for this tender provided to the OFT by Herbert Baggaley as part of its leniency application, ‘Allenbuild’ is handwritten.⁷³⁹⁰ Herbert Baggaley has confirmed that this annotation was Anton Newell's (‘AN’), Chief Estimator at Herbert Baggaley, and that it was made either when AN believed Allenbuild had won the contract or when this document was produced by Herbert Baggaley as part of its leniency application.⁷³⁹¹

Evidence from leniency applicant Herbert Baggaley

IV.5661. As part of its leniency application, Herbert Baggaley provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

⁷³⁸⁶ Explanatory Note of Tender Sheet, OFT Document Reference 0861.

⁷³⁸⁷ Tender Analysis – Tender Sheets, OFT Document Reference 0465, page 7.

⁷³⁸⁸ Tender Analysis, OFT Document Reference 0849.

⁷³⁸⁹ List of Tenders, OFT Document Reference 3896, page 4.

⁷³⁹⁰ Estimate sheet, OFT Document Reference 6395, page 1.

⁷³⁹¹ Letter from Herbert Baggaley, OFT Document Reference 14288, page 2.

IV.5662. In their response to the Statement, Herbert Baggaley stated *'Baggaleys recognises the OFT's analysis of its involvement in each of the alleged infringements identified in the Statement of Objections in respect of which Baggaleys is alleged to have participated'*.⁷³⁹²

Witness evidence from leniency applicant Herbert Baggaley

IV.5663. During interviews conducted in connection with its leniency application, Herbert Baggaley's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.375 to IV.390 above and is relied upon by the OFT in relation to this tender.

IV.5664. In respect of this tender, AN said in respect of Herbert Baggaley's internal estimate sheet for this tender, that *'All I've got here is our internal estimate sheet with the formal tender attached to the back of it, with a note, a scribbled note on the front, suggesting that we took help from Allenbuild on that one'*.⁷³⁹³

IV.5665. AN also confirmed that on the list of tenders, a 'C' and 'Allenbuild' was indicated against this tender.⁷³⁹⁴ In interview AN confirmed that use of a 'C' in the list of tenders would normally coincide with Herbert Baggaley receiving a cover price.⁷³⁹⁵

Evidence from other companies – William Woodsend

IV.5666. The OFT wrote to William Woodsend on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that William Woodsend had participated in bid rigging on this tender. In response to this letter on 27 April 2007, William Woodsend stated, *'we have not been able to discover sufficient evidence to make any admissions at this stage'*.⁷³⁹⁶

IV.5667. In its response to the Statement, William Woodsend denied liability for this Infringement on the basis that Allenbuild did not explicitly confirm the meaning of the annotation '©' on the tender adjudication summary or explain the basis of its admission under Fast Track that it provided a cover price to William Woodsend.⁷³⁹⁷ William Woodsend's legal representatives further stated *'... only the author of that document can confirm what meaning he intended to attach to the symbol and he has not done so'*.⁷³⁹⁸

IV.5668. The OFT considers it can reasonably infer from the evidence available in respect of this Infringement that the annotation '©' on Allenbuild's tender adjudication summary indicates a cover price having been given to the party to whose name the said annotation is attached. Both Bodill and Herbert Baggaley provided contemporaneous documentary evidence (along with supporting admissions and witness evidence) which strongly supports the OFT's

⁷³⁹² Written representations of Herbert Baggaley, 27 June 2008, paragraph 2.

⁷³⁹³ Interview transcript, OFT Document Reference 11317, page 38.

⁷³⁹⁴ Interview transcript, OFT Document Reference 11317, page 38.

⁷³⁹⁵ Interview transcript, OFT Document Reference 6372, page 9.

⁷³⁹⁶ Response from William Woodsend, OFT Document 10903.

⁷³⁹⁷ Written representations of William Woodsend, 27 June 2008, page 13.

⁷³⁹⁸ Written representations of William Woodsend, 27 June 2008, page 13.

conclusion that the annotation '©' on Allenbuild's tender adjudication summary meant 'cover given'. It is not a plausible alternative explanation of this document to suggest that the author of the annotations attached a different meaning to the letter '©' when writing it next to William Woodsend's name, from the meaning attached when '©' was written next to the names of Bodill and Herbert Baggaley. Nor has William Woodsend attempted to provide any such reasonable alternative meaning.

IV.5669. With regard to Allenbuild's naming of William Woodsend (along with Bodill and Herbert Baggaley) in its Fast Track response, William Woodsend has suggested that this may have been for reasons unconnected with the tender adjudication summary document in the OFT's possession. It is suggested that the admission therefore does not corroborate the OFT's inference that the annotation '©' indicates a cover price having been given.⁷³⁹⁹ The OFT does not accept this suggestion. Allenbuild knew that this document had been seized by the OFT during its inspection of Allenbuild's premises one year prior to the OFT's Fast Track Offer being made, and is likely to have considered its decision to admit this Infringement by reference to the evidence which it knew the OFT already had in its possession, as well as any other relevant information available to it. Allenbuild's decision, and the naming of these three companies, is therefore likely to have been based, at least in part, on this document. In any event, if to the contrary these three companies were named on the basis of other information, then that would in fact provide further corroboration of the already strong and compelling evidence existing in respect of this Infringement. William Woodsend suggests by way of alternative explanation that Allenbuild might have named Bodill and Herbert Baggaley because it knew they were leniency applicants, rather than because of the information recorded in its tender adjudication summary.⁷⁴⁰⁰ The OFT does not accept this suggestion either. The identity of leniency applicants was not publicly available at the time the OFT's Fast Track Offer was made, and in any event this would not explain why Allenbuild also named William Woodsend in its response to that offer, since William Woodsend is not a leniency applicant.

IV.5670. On the above basis, the OFT concludes that its interpretation of Allenbuild's tender adjudication summary to be correct, namely that it shows William Woodsend did accept a cover price from Allenbuild in respect of this tender.

The OFT's analysis of the evidence and finding

IV.5671. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.5672. Allenbuild, Bodill, Herbert Baggaley and William Woodsend each accepted an invitation to tender for this tender.

IV.5673. It appears that Allenbuild completed the estimating process for the tender for this contract and that it submitted a bid with the hope of winning the work.

⁷³⁹⁹ Written representations of William Woodsend, 27 June 2008, page 13 to 14.

⁷⁴⁰⁰ Written representations of William Woodsend, 27 June 2008, page 14.

This is shown by the price submitted by Allenbuild being the lowest received by the client, and the fact that Allenbuild won the contract.

- IV.5674. In regard to Bodill, Allenbuild's tender adjudication summary states, '*Bodill ©*' and Allenbuild has confirmed that it gave Bodill a cover price for this tender.
- IV.5675. The OFT notes that JR of Bodill has an entry in his diary on the date for submitting the tender, which includes a 'C' in brackets, which JR has confirmed shows that Bodill was looking for a cover price for this tender.
- IV.5676. In addition, Bodill's tender sheet records '*© ALLENBUILD*' and '**' marked against '*4. ALLENBUILD*' and Bodill has confirmed that these annotations show that it received a cover price from Allenbuild.
- IV.5677. Bodill's tender sheet also recorded the name of an Allenbuild employee, '*STEVE WILLSHIRE*', providing further evidence that contact was made between the two parties. This is corroborated by tender documentation obtained from Allenbuild, where the form of tender is signed by '*S. WISHER (Estimator)*'. Although the surname has a slightly different spelling in the Bodill tender sheet, the OFT considers that Bodill was to make contact with Steve Wisher to obtain a cover price.
- IV.5678. The OFT notes that both Bodill and Allenbuild have admitted to bid rigging in relation to this tender.
- IV.5679. In regard to Herbert Baggaley, Allenbuild's tender adjudication summary states, '*Baggaley ©*' and Allenbuild has confirmed that it gave Herbert Baggaley a cover price for this tender.
- IV.5680. Herbert Baggaley's list of tenders records '*ALLENBUILD*' and a '*C*' against this tender and on the front of the internal estimate sheet for this tender is handwritten '*Allenbuild*'. AN of Herbert Baggaley has confirmed that this suggests that Herbert Baggaley received a cover price from Allenbuild for this tender.
- IV.5681. The OFT notes that both Allenbuild and Herbert Baggaley have admitted to bid rigging in relation to this tender.
- IV.5682. In regard to William Woodsend, Allenbuild's tender adjudication summary states, '*Woodsend ©*' and Allenbuild has confirmed that it gave William Woodsend a cover price for this tender.
- IV.5683. The OFT considers that the only reasonable interpretation of the annotation '*Woodsend ©*' in Allenbuild's tender adjudication summary to be that a cover price was provided to William Woodsend. This interpretation is not drawn from the fact that cover prices were provided to Bodill and Herbert Baggaley *per se*, but from the fact that cover prices were provided and this particular annotation is used to signify that fact in this document. It is also the meaning which Allenbuild have indicated should be attached. On that basis, and in view of the fact that this document was obtained by the OFT following an unannounced search, the OFT considers this to be good contemporaneous documentary

evidence that a cover price was provided by Allenbuild to William Woodsend in connection with this tender.

IV.5684. Although William Woodsend has not admitted engaging in this bid rigging activity, the OFT considers that the similarities between the evidence in respect of the other Parties involved in bid rigging activities for this tender, all of whom admit to those activities, serves to confirm the OFT's interpretation of that evidence in relation to William Woodsend.

IV.5685. The OFT notes in addition that the each of the tenders submitted by Bodill, Herbert Baggaley and William Woodsend were higher than the tender submitted by Allenbuild, a pattern consistent with cover prices having been provided.

IV.5686. The OFT therefore concludes that contact took place between Bodill and Allenbuild, between Herbert Baggaley and Allenbuild, and between William Woodsend and Allenbuild. The OFT also concludes that Allenbuild supplied figures to each of Bodill, Herbert Baggaley and William Woodsend for cover bids. The OFT notes that all four of the tenderers for this contract engaged in bid rigging, and that no genuine tenders were therefore received by the client.

IV.5687. The OFT is satisfied that the facts set out in paragraphs IV.5647 to IV.5686 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁷⁴⁰¹ In particular:

- (a) the provision of figures for cover bids from Allenbuild to each of Bodill, Herbert Baggaley and William Woodsend was not unilateral⁷⁴⁰², and contravenes the principle against direct or indirect contact between competitors;⁷⁴⁰³
- (b) Bodill, Herbert Baggaley and William Woodsend can each be presumed to have taken account of the information received from Allenbuild (i.e. the respective cover prices) when determining their own conduct in the tendering process;⁷⁴⁰⁴ and
- (c) Allenbuild can be presumed to have taken account of the information it received from each of Bodill, Herbert Baggaley and William Woodsend (i.e. that none of them intended to submit competitive bids) when determining its conduct in the tendering process.⁷⁴⁰⁵

IV.5688. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Bodill and Allenbuild, between Herbert Baggaley and Allenbuild, and between William Woodsend and Allenbuild, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the new build of four office units, The Glade Business Centre, Phase 2, Bestwood, Nottingham, tender deadline 21 October 2004.

⁷⁴⁰¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁴⁰² See paragraph IV.73 of the General comments on cover pricing section.

⁷⁴⁰³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁴⁰⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁴⁰⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.5689. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5690. In respect of this tender, the OFT became aware of Herbert Baggaley's involvement in bid rigging activities by virtue of information provided by Herbert Baggaley, before the OFT became aware of these activities from any other source. Herbert Baggaley will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.5691. In respect of this tender, the OFT became aware of Bodill's involvement in bid rigging activities by virtue of the information obtained during the visit under section 27 to Bodill on 19 November 2004. Bodill will not therefore receive 100 per cent immunity in respect of this tender. However, Bodill will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.5692. In its response to the Statement, Bodill stated that *'so far as Bodill is aware, the OFT had no knowledge of these Alleged Infringements and those contractors who had participated in them until 21 January 2005 and then only as a result of the evidence supplied by Bodill'*.⁷⁴⁰⁶ The OFT first became aware of this tender as a result of the entry in a document obtained during a section 27 visit to Bodill on 19 November 2004⁷⁴⁰⁷, which gave the OFT reasonable grounds to suspect cover pricing activity in respect of this tender prior to Bodill's leniency application being made, Bodill will therefore only receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 205: Residential Developments, Napier Street, Sheffield – 25 October 2004
Client: PTA Developments
Parties: Jack Lunn and Caddick

IV.5693. On 20 August 2004, PTA Developments sought tenders for a residential development, Napier Street, Sheffield.⁷⁴⁰⁸ The following four companies were invited to tender: Caddick, Strata, Jack Lunn and Ackroyd & Abbott. The deadline for receipt of tenders was 18 October 2004.⁷⁴⁰⁹

IV.5694. PTA Developments received the following tender returns:⁷⁴¹⁰

⁷⁴⁰⁶ Written representations of Bodill, 26 June 2008, paragraph 3.5.

⁷⁴⁰⁷ Juris Rozental's diary, OFT Document Reference 0109, as discussed in paragraph IV.5656.

⁷⁴⁰⁸ Information from client, OFT Document Reference 13789.

⁷⁴⁰⁹ Information from client, OFT Document Reference 13789.

⁷⁴¹⁰ Information from client, OFT Document Reference 13789.

Company	Time & Date tender received	Amount of tender	Awarded contract
Caddick	12:00 noon on 18 October 2004	£5,892,590	Yes
Strata	12:00 noon on 18 October 2004	£6,848,788	
Jack Lunn	12:00 noon on 18 October 2004	£6,169,422	
Ackroyd & Abbott	12:00 noon on 18 October 2004	£6,491,882	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Jack Lunn – Email and attached Tender Summary

IV.5695. During the OFT’s search of the electronic data forensically imaged from the computers at Jack Lunn’s premises, an email was found. The email contained the following information:⁷⁴¹¹

Subject: Napier Street
From: Martin Miller
Date: 01/11/2004 15:07:21
To: Anthony Metcalfe

Message Body

Attached CSA, PRELIM BREAKDOWN, PROGRAMME

Send proposals later if required’

IV.5696. The email was sent by Martin Miller (‘MM’), an estimator at Caddick, to Anthony Metcalfe (‘AM’), an estimator at Jack Lunn. Attached to this email was a Tender Summary. The Tender Summary shows a breakdown of a bid for the tender prepared by Caddick, and includes at the foot of the first page (the Tender Summary page), the tender figure submitted by Jack Lunn, ‘6,169,422’.⁷⁴¹²

Evidence from leniency applicant – Jack Lunn

IV.5697. As part of its leniency application, Jack Lunn’s legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.431 to IV.440 above and is relied upon by the OFT in relation to this tender.

IV.5698. In addition to its leniency application, Jack Lunn provided to the OFT a schedule entitled ‘*Jack Lunn Construction Cover Summary Schedule*’, which detailed projects/contracts identified by the company during the course of an internal investigation conducted by Stephen Bradbury (‘SB’), Richard Bryan (‘RB’), Graham Lunn (‘GL’), AM and Keith Poskitt (‘KP’) into potential cover prices where it was considered cover prices had either been given or taken. At JLC6 of the ‘*Jack Lunn Construction Cover Summary Schedule*’ is the following entry:⁷⁴¹³

⁷⁴¹¹ Email, OFT Document Reference A1584, page 1.

⁷⁴¹² Tender Summary, OFT Document Reference A1585, page 1

⁷⁴¹³ Jack Lunn Cover Summary Schedule, OFT Document Reference A0675, page 1.

Reference Number	Date of Submissio	Scheme Title	Client	Submitted tender value	Cover price taken
JCL6	25-Oct-04	Residential Development Napier Street Sheffield	PTA Developments	£6,169,422	£6,169,422

Cover price given	Contractor and address	Person spoken to	Jack Lunn Successful	Comments/Notes
	Caddick	Dave Elmsall/Martin???	NO	No pricing or tender build up found or Tender summary Sheet

IV.5699. Following the issue of the Statement, Jack Lunn did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Jack Lunn

IV.5700. During an interview with the OFT on 8 March 2007, conducted in connection with Jack Lunn’s leniency application, SB, AM and KP provided further general explanation of Jack Lunn’s participation in cover pricing. This evidence is set out in paragraphs IV.431 to IV.440 above and is relied upon by the OFT in relation to this tender.

IV.5701. Also, during a second interview with AM on 25 April 2007, AM was shown the email and attachment referred to above and asked what he recalled about this tender. AM replied *‘Well, this would infer that the document would be sent to myself, although I don’t remember it to be quite honest with you’*.⁷⁴¹⁴ However, AM confirmed that it appears that MM sent him an email and an attachment relating to Napier Street on 1 November 2004.⁷⁴¹⁵ AM stated *‘the attachment appears to be their build-up to the figure of £6,169,422’*, which is the figure that Jack Lunn submitted.⁷⁴¹⁶ AM explained that *‘to me this is the figures that they have given to us for the purpose of our tender submission on the contract’*.⁷⁴¹⁷ AM confirmed that he would have obtained a cover price from MM at Caddick *‘probably on the same day as the tender was due in’*, but that he had no specific recollection.⁷⁴¹⁸ The OFT asked AM if it was usual for one competitor to supply a tender summary to another competitor. AM replied *‘The usual method is for, if we approached anyone for a cover, they would just give us a figure, a tender figure and they wouldn’t give us the build-up part of it’*. AM stated that the decision to take a cover on this tender would have been a *‘management decision; at this stage, probably Stephen Bradbury’*.⁷⁴¹⁹

⁷⁴¹⁴ Interview transcript, OFT Document Reference 11278, page 1.

⁷⁴¹⁵ Interview transcript, OFT Document Reference 11278, page 1.

⁷⁴¹⁶ Interview transcript, OFT Document Reference 11278, page 1.

⁷⁴¹⁷ Interview transcript, OFT Document Reference 11278, page 2.

⁷⁴¹⁸ Interview transcript, OFT Document Reference 11278, page 2.

⁷⁴¹⁹ Interview transcript, OFT Document Reference 11278, page 2.

IV.5702. On 8 March 2007, during an interview with the OFT, SB stated in respect of this tender, *'...there was two individuals involved in this from Jack Lunn's. That was myself and a gentleman called David Barber. David Barber worked for us for a short while as estimating manager. So he actually managed Keith Poskitt and Tony Metcalf for a short while. ... he would occasionally, if we were really busy, also act as an estimator. This particular scheme, we were very interested in it once we became aware of it from a marketing point of view. So we approached the client ... asking if he would consider us to go on the tender list. ... We were interviewed by the client. ... Myself and David Barber attended that interview and we, I can only say impressed the client sufficiently enough for him to put us on the tender list and we received the tender documents... However when we received the tender documents it was extremely onerous, difficult method of construction and a very expensive method of construction. We'd never worked with the architect before, we'd never worked with the structural engineer before, and as a result of other opportunities coming into the estimating department, we decided very early on, despite us pushing for it, it wasn't really a job for ourselves. That was decided both by myself and David Barber'*.⁷⁴²⁰

IV.5703. SB stated *'...David Barber informed me that Caddicks were pricing it and that Caddicks were happy to provide us with a cover price. It was decided very early on therefore, by myself and David Barber, that we would take a cover off Caddicks'*.⁷⁴²¹ SB explained, *'It was done over the telephone and it was as simple as that. At the eleventh hour ... Caddicks simply gave us a figure over the telephone and we put that figure in'*.⁷⁴²²

IV.5704. SB continued, *'... there was a limited number of contractors on the list and we were second in price ... and the client wanted to talk to both the lowest contractor and the second contractor. So the client started to involve ourselves in lots of discussions and meetings ... But because we'd decided early on to take a cover, we'd done no work on the scheme at all. We'd no contract sum analysis produced. So we were very much in the hands of Caddick Construction. We had to get further help off Caddicks to make it appear to the client that we had actually created a bona fide tender'*.⁷⁴²³

IV.5705. In relation to the email SB stated, *'... I wasn't remotely aware of that document. But it appears that, I think it was Martin Miller from Caddicks, in order to help us, actually gave us their contract sum analysis, to Tony Metcalf ...'*⁷⁴²⁴

IV.5706. SB confirmed that the figure provided by Caddick as a cover figure was £6,169,422.⁷⁴²⁵ SB also stated that the initial agreement was made with David Emsell at Caddick, *'David handed it over to Martin Miller. David Emsell is estimating manager at Caddicks. Martin Miller was an estimator dealing with him'*.⁷⁴²⁶

⁷⁴²⁰ Interview transcript, OFT Document Reference 11290, pages 10 and 11.

⁷⁴²¹ Interview transcript, OFT Document Reference 11290, page 11.

⁷⁴²² Interview transcript, OFT Document Reference 11290, page 11.

⁷⁴²³ Interview transcript, OFT Document Reference 11290, page 11.

⁷⁴²⁴ Interview transcript, OFT Document Reference 11290, page 12. In fact this was a contract sum analysis adjusted by Caddick to reflect Jack Lunn's cover figure.

⁷⁴²⁵ Interview transcript, OFT Document Reference 11290, page 12.

⁷⁴²⁶ Interview transcript, OFT Document Reference 11290, page 12.

Evidence from other companies – Caddick

IV.5707. The OFT wrote to Caddick on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Caddick had participated in bid rigging on this tender. In response to this letter Caddick admitted that, *'We engaged in bid rigging (cover pricing) activities on this tender with J Lunn'*.⁷⁴²⁷

IV.5708. The OFT subsequently wrote to Caddick's ultimate parent company at the time of this Infringement, Caddick Group, on 5 November 2007, asking it to comment on Caddick's response to the OFT's Fast Track Offer, given that the OFT intended to hold Caddick Group jointly and severally liable for any infringements committed by Caddick in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Caddick Group stated in a telephone call to the OFT on 6 December 2007 that it had no issues to raise.⁷⁴²⁸

IV.5709. Caddick stated in their response to the Statement in respect of this Infringement, *'...CCL [Caddick Construction Limited] admits that it provided a cover because it reacted to a request by Jack Lunn.'*⁷⁴²⁹

The OFT's analysis of the evidence and finding

IV.5710. From the evidence presented above, the OFT draws the following conclusions.

IV.5711. Jack Lunn and Caddick each accepted an invitation to tender for the contract for a residential development at Napier Street, Sheffield. However, SB of Jack Lunn stated *'when we received the tender documents it was extremely onerous, difficult method of construction and a very expensive method of construction. We'd never worked with the architect before, we'd never worked with the structural engineer before, and as a result of other opportunities coming into the estimating department, we decided very early on, despite us pushing for it, it wasn't really a job for ourselves'*.

IV.5712. Caddick completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Caddick being the lowest received and the fact it won the contract.

IV.5713. Both AM and SB of Jack Lunn confirmed that Jack Lunn received a cover price from MM at Caddick. Once the tenders had been received by the client on 25 October 2004, the two lowest tenderers, Caddick and Jack Lunn, were each asked by the client to submit their contract sum analysis. At this point, according to SB of Jack Lunn, *'We had to get further help off Caddicks to make it appear to the client that we had actually created a bona fide tender'*.

IV.5714. The OFT understands that Jack Lunn decided to seek information from Caddick in order to provide the client with a contract sum analysis for the project. A contemporaneous email found at Jack Lunn shows that MM of

⁷⁴²⁷ Response from Caddick, OFT Document Reference 10964, page 3.

⁷⁴²⁸ Email re: telephone conversation, OFT Document Reference 13922.

⁷⁴²⁹ Written representations of Caddick, 24 June 2008, paragraph 29(b).

Caddick, sent an email to AM of Jack Lunn, on 1 November 2004, regarding the Napier Street tender. Attached to this email was a 'Tender Summary' ending with Jack Lunn's tender figure, '6,169,422', and including a breakdown of figures.

IV.5715. This contemporaneous evidence shows that MM of Caddick supplied AM of Jack Lunn with a contract sum analysis, with the figures adjusted to reflect the cover figure given by Caddick to Jack Lunn. The OFT considers in the light of the contemporaneous evidence from Jack Lunn, in addition to SB and AM's admissions and explanations of that contemporaneous evidence, that Caddick supplied Jack Lunn with a cover price for this tender and in addition provided Jack Lunn with additional pricing information in the form of a contract sum analysis.

IV.5716. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Caddick admitted that the party with whom it engaged in bid rigging was Jack Lunn, without being shown the OFT's evidence that Jack Lunn was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.5717. The OFT also notes that the tender submitted by Jack Lunn was higher than the tender submitted by Caddick, the pattern consistent with a cover price having been provided. The OFT further notes that Caddick was the only party to submit a tender bid below Jack Lunn's tender bid, and that Jack Lunn could therefore only have obtained a cover price from Caddick for this tender.

IV.5718. The OFT therefore concludes that contact took place between Jack Lunn and Caddick. The OFT also concludes that Caddick supplied a figure to Jack Lunn for a cover bid.

IV.5719. The OFT is satisfied that the facts set out in paragraphs IV.5695 to IV.5718 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁴³⁰ In particular:

- (a) the provision of a figure for a cover bid from Caddick to Jack Lunn was not unilateral⁷⁴³¹, and contravenes the principle against direct or indirect contact between competitors;⁷⁴³²
- (b) Jack Lunn can be presumed to have taken account of the information received from Caddick (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁴³³ and
- (c) Caddick can be presumed to have taken account of the information it received from Jack Lunn (i.e. that Jack Lunn did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁴³⁴

IV.5720. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jack Lunn and Caddick, in breach of the Chapter I prohibition, which

⁷⁴³⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁴³¹ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁴³² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁴³³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁴³⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

had the object of bid rigging in relation to the tender for a residential development at Napier Street, Sheffield, tender deadline 25 October 2004.

Immunity and leniency assessment

IV.5721. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5722. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 to Jack Lunn on 21 March 2006. Jack Lunn will not therefore receive 100 per cent immunity in respect of this tender. However, Jack Lunn will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 206: Incubator Office Units, Colburn – 26 October 2004
Client: Richmondshire Council
Parties: Bluestone and Wright (Hull)

IV.5723. On 29 September 2004, Richmondshire Council, through its consultants Turner & Townsend, sought tenders for construction of Incubator Office Units at Colburn. The following five companies were invited to tender: Bluestone, Wright (Hull), Walter Thompson, W Birch and Randell Orchard. The deadline for the receipt of tenders was noon on 26 October 2004.⁷⁴³⁵

IV.5724. Richmondshire Council received the following tender returns:⁷⁴³⁶

Company	Date and time tender received	Amount of tender	Awarded contract
Bluestone	26 October 2004 at noon	£1,260,744	Yes
Wright (Hull)	26 October 2004 at noon	£1,399,535	
Walter Thompson	26 October 2004 at noon	£1,614,190	
W Birch	26 October 2004 at noon	£1,620,087	
Randell Orchard	26 October 2004 at noon	£1,637,271	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bluestone – Tender Summary Sheet, Tender list, emails and handwritten notes

IV.5725. During the OFT's inspection at Bluestone's premises in Leeds, a Tender Summary Sheet under the main heading 'Bluestone plc Tender Finalisation Sheets', was found for this tender.⁷⁴³⁷ This contained the following entry:

⁷⁴³⁵ Information from client, OFT Document Reference 13266.

⁷⁴³⁶ Information from client, OFT Document Reference 13266.

⁷⁴³⁷ Tender Summary Sheet, OFT Document Reference B0308.

'TENDER Nr. :- 514343

Walter Thompson
Randall Orchard
W Birch
Wrights (C)

DATE :- 26-Oct-04 Revision:- A
(In Sheffield @ 12 noon)

PROJECT :- Incubator Office Units – Colburn'

IV.5726. The version of the Tender Summary Sheet mentioned in the paragraph above, recorded a provisional tender sum and contract figure of £1,280,064 and margin of 7.59%. As part of its leniency application, Bluestone provided two further versions of the Tender Summary Sheet. The first of these sheets recorded the same tender and competition details as above, however, the letter 'A' does not appear in the entry marked 'Revision'. This Tender Summary Sheet recorded a provisional tender sum of £1,286,257 and margin of 6.00%.⁷⁴³⁸ A third version of the Tender Summary Sheet, provided in Bluestone's leniency application, again recorded the same tender and competition details as in the paragraph above. This Tender Summary Sheet recorded a provisional tender sum and bid figure of £1,260,744 and margin of 6.00%.⁷⁴³⁹

IV.5727. Also found at Bluestone's premises during the OFT's inspection, was a spreadsheet of tenders, marked 'Results for 2004', which contained the following entry:⁷⁴⁴⁰

Post Date Month MTH REF	LOCATION	PROJECT	CLIENT	RESULT
Oct 10 514343	Colburn	Incubation Office Unit	Richmondshire Council	Won

IV.5728. During the OFT's inspection at Bluestone's premises, an email communication was found. The email was dated and timed 27 October 2004 at 17:46, sent from Philip Dyer ('PD') of Wright (Hull) to David Williamson ('DW') of Bluestone.⁷⁴⁴¹ The subject of the email was 'FW: 27.10.04 Letter with clarifications Colburn Digital Cluster' and contained the message 'David for your records faxed e-mailed and posted to T & T Phil'.

IV.5729. This email enclosed the contents of a separate email dated and timed 27 October 2007 at 17:44, sent from PD of Wright (Hull) to Joseph Freeman of Turner & Townsend. The enclosed email lists a total of 15 points of clarification on the subject of the tender for 'Colburn – Digital Cluster'.

IV.5730. A page of handwritten notes was also found during the OFT's inspection of Bluestone's office at Leeds, as follows:⁷⁴⁴²

⁷⁴³⁸ Tender Summary Sheet, OFT Document Reference B3105.

⁷⁴³⁹ Tender Summary Sheet, OFT Document Reference B3115.

⁷⁴⁴⁰ Tender spreadsheet, OFT Document Reference B0337.

⁷⁴⁴¹ Email, OFT Document Reference B0341.

⁷⁴⁴² Handwritten note, OFT Document Reference B0342.

'Wrights qual with tender



*Not incl any abnormals in ...
Or removal of contaminants.*

*Knows Birch – priced on £/ft2
as can't do*

PQS told Wrights they are 2ND.

£1,399,535

Phil Dyer

T [...] [C]

F [...] [C]

[...] [C]

*Told gone on fully compliant
Programme⁷⁴⁴³*

Evidence from leniency applicant Bluestone

IV.5731. As part of its leniency application, Bluestone provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.204 to IV.228 above and is relied upon by the OFT in relation to this tender.

IV.5732. Bluestone compiled a spreadsheet entitled '*Table A - Definite instances of cover pricing*'. On pages 16 to 17 of the spreadsheet is the following entry:⁷⁴⁴⁴

⁷⁴⁴³ Handwritten note, OFT Document Reference B0342. In addition, there is a handwritten arrow, pointing from the letters 'PQS' to the word 'told'.

⁷⁴⁴⁴ Definite instances of cover pricing, OFT Document Reference B2052, pages 16 and 17.

Bluestone Region	Bluestone Area	Tender No	Works	Client	Estimated Value of Contract	Tender Submitted by Bluestone
North East	Leeds	514343	Incubator Office Units Colburn, Colburn	Richmondshire Council		£1,280,064

Market Sector	Cover given/received (CG/CR)	Party(ies) to Covers (Contact)	Notes
Commercial	CG	Wrights, Hull (Phil Dyer)	Wrights did not want the job as it was not commercially viable for it (possibly because Wrights is based in Hull whilst the job was in Colburn.)
			Wrights may have come back to Bluestone for a breakdown of the cover price. Wrights asked if there were any qualifications it should be made aware of for its covered bid.

IV.5733. Following the issue of the Statement, Bluestone did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bluestone

IV.5734. During interviews conducted in connection with its leniency application, Bluestone's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.204 to IV.228 above and is relied upon by the OFT in relation to this tender.

IV.5735. Pre-Construction Manager DW, Director Michael Hesp ('MH') and senior estimator David Smith ('DS') were interviewed and provided accounts of their recall of this tender and explanations of the documents listed in the above paragraphs.

IV.5736. In interview, DW confirmed the tender deadline date and said '*we received a phone call one day from Wright's asking if we would help them out with a cover price because they were not interested in tendering for the project*'. He confirmed that the telephone call was made directly to Bluestone by PD of Wright (Hull).⁷⁴⁴⁵

⁷⁴⁴⁵ Interview transcript, OFT Document Reference 12674, page 9.

IV.5737. Referring to the subsequent email exchange between himself and PD, DW said *'I would imagine that we probably had to put in, looking at this, a detailed cost breakdown and tender information. He would have had to put in supporting information in written form to corroborate his bid, to make it look legitimate'*. DW added *'it may well have been a telephone conversation to me and it looks like he's e-mailed that to me presumably just to make us aware of what he's done...I think he was probably trying to be helpful'*.⁷⁴⁴⁶

IV.5738. DW also referred to the manuscript notes, which he agreed were in his handwriting. DW explained that the notes contained his instructions to PD of Wright (Hull) to *'make a note in their tender...he's been asked questions by the employer's agent and these are his answers to those questions...as we'd given him a cover, so that he can answer the right answers. So that he wouldn't be pursued any further'*.⁷⁴⁴⁷ DW added *'unwittingly their price was second even though they took a cover from us. Wright's didn't want the job...By being second it meant that if the client was not happy with Bluestone's offer then they might win the project and they don't want to do it'*.⁷⁴⁴⁸ DW confirmed that he provided the cover figure of £1,399,535 to Wright (Hull) and that the letter 'C' in brackets on the Tender Summary Sheet *'means cover'* and that it was likely that the entry was made by the designated estimator DS.⁷⁴⁴⁹

IV.5739. Director MH recalled that Bluestone provided a genuine price to the client and that it won the tender exercise and completed the contract. He said that he was *'aware that we were giving a cover'*.⁷⁴⁵⁰ Referring to the entry of the letter 'C' in brackets next to the word *'Wrights'* on the Tender Summary Sheet, MH said *'at the top of the page was the name of the contractors, and Wrights and the estimator slipped up here and actually written on the form that we were giving a cover'*.⁷⁴⁵¹ MH also recalled that a cover price had been given to Wright (Hull) and that pre-construction manager DW *'dealt with the cover'* and that Bluestone's tender had been prepared by senior estimator DS. He confirmed that the letter 'C' shows *'that we have given Wrights...or at the point in time, Wrights asked us for a cover and we were going to give them one'*.⁷⁴⁵²

IV.5740. Referring to the email exchange between DW and PD of Wright (Hull), MH said that although he wasn't aware of the content at the time, he could explain the circumstances. He said *'when you're bidding a job, and we clearly were here...and there's a phrase, call in your bills, the client will ring up and ask for more details, because obviously it's not enough, that part, you just bang in a figure, that he's going to use as a comparison to try and look at the other, we subsequently had the called back from Wrights saying can we help them out with some breakdown, which is a strong inference that...Wright's has become the second placed man, when you tend to think, oh right, what have we done wrong then, because there's nobody in-between, we were obviously too cheap, or it just sends that shockwave through you, bloody hell, we could have put some more money on that job...we subsequently went on to do the job and made money, but it...does send that cold shiver down you...having helped*

⁷⁴⁴⁶ Interview transcript, OFT Document Reference 12674, pages 9 and 10.

⁷⁴⁴⁷ Interview transcript, OFT Document Reference 12674, pages 10 and 11.

⁷⁴⁴⁸ Interview transcript, OFT Document Reference 12674, page 11.

⁷⁴⁴⁹ Interview transcript, OFT Document Reference 12674, pages 11 and 12.

⁷⁴⁵⁰ Interview transcript, OFT Document Reference 12681, page 11.

⁷⁴⁵¹ Interview transcript, OFT Document Reference 12681, page 11.

⁷⁴⁵² Interview transcript, OFT Document Reference 12681, page 12.

somebody out with a price, if somebody asked for a bit of a breakdown, we would give them a bit of a breakdown, because that's a devil if you like, you're sat down with a number and don't have a clue what it is'.⁷⁴⁵³

IV.5741. MH confirmed that the information provided to the client's representatives in the email suggested to him that *'obviously there was conversation, correspondence...between the two guys, where we were trying to give him a little bit more information to help him out with certain embarrassing questions the guy were being asked'*.⁷⁴⁵⁴ MH also confirmed that the information about the tender contained within the email from Wright (Hull) to Turner & Townsend, would have been obtained from Bluestone.⁷⁴⁵⁵

IV.5742. Senior estimator DS confirmed that he prepared Bluestone's internal documentation before submitting a bid to the client. He could not recall the amount of Bluestone's bid but explained differences in tendered amounts on Tender Summary Sheets as follows: *'we go through a process whereby if there are post tender negotiations...we amend the tender book to show the agreed contract figure. So it will be an internal...process, getting from the submitted tender figure to the actual contract figure which took account of post tender negotiations'*.⁷⁴⁵⁶ DS confirmed that the letter 'C' in brackets shows a cover price had been given to Wright (Hull) and the entry would have been made by him at the time.⁷⁴⁵⁷

Evidence from other companies – Wright (Hull)

IV.5743. The OFT wrote to Wright (Hull) on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Wright (Hull) had participated in bid rigging on this tender. In response, Wright (Hull), through its legal representatives, wrote to the OFT⁷⁴⁵⁸ and admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁷⁴⁵⁹

IV.5744. The OFT subsequently wrote to Wright (Hull)'s ultimate parent company at the time of this Infringement, T Wright Holdings, on 5 November 2007, asking it to comment on Wright (Hull)'s response to the OFT's Fast Track Offer, given that the OFT intended to hold T Wright Holdings jointly and severally liable for any infringements committed by Wright (Hull) in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, T Wright Holdings said *'We have been made fully aware of the situation by our subsidiary and at this stage have no further comment to make'*.⁷⁴⁶⁰

IV.5745. Wright (Hull), confirmed in its response to the Statement that Wright (Hull) *'...has admitted, and continues to admit, to having sought or offered a cover price in respect of the three Alleged Infringements...[and]...that its involvement*

⁷⁴⁵³ Interview transcript, OFT Document Reference 12681, pages 13 and 14.

⁷⁴⁵⁴ Interview transcript, OFT Document Reference 12681, page 14.

⁷⁴⁵⁵ Interview transcript, OFT Document Reference 12681, page 14.

⁷⁴⁵⁶ Interview transcript, OFT Document Reference 12673, pages 13 and 14.

⁷⁴⁵⁷ Interview transcript, OFT Document Reference 12673, page 14.

⁷⁴⁵⁸ Response from Wright (Hull), OFT Document Reference 10925.

⁷⁴⁵⁹ Response from Wright (Hull), OFT Document Reference 10926, page 2.

⁷⁴⁶⁰ Response from T Wright Holdings, OFT Document Reference 14040.

in each of the three Alleged Infringements constituted a breach of the Chapter I prohibition.⁷⁴⁶¹

The OFT's analysis of the evidence and finding

IV.5746. From the evidence presented above, the OFT draws the following conclusions.

IV.5747. Bluestone and Wright (Hull) each accepted an invitation to tender for Incubator Office Units, Colburn.

IV.5748. Wright (Hull) was unable to submit a tender by the return date and/or did not want to win this contract. Bluestone completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Bluestone being the lowest received and the fact that it won the contract.

IV.5749. Bluestone recorded four competitors who were also invited to tender for this contract on a Tender Summary Sheet, namely *'Walter Thompson, Randall Orchard, W Birch'* [and] *'Wrights'*. The letter 'C' in brackets is noted next to the name *'Wrights'*.

IV.5750. The OFT notes that although four competitors have been recorded on the Tender Summary Sheet, the letter 'C' in brackets is only noted alongside the entry for *'Wrights'*. This indicates that a conscious decision was made to differentiate *'Wrights'* from the other known competitors. Three employees from Bluestone have all agreed that this shows that a cover price was given to Wright (Hull) by Bluestone, and designated estimator DS confirmed that he would have made the entry at the time. The letter 'C' is commonly used within the construction industry as an abbreviation to indicate cover prices. Bluestone director MH conceded that the estimator had *'slipped up'* by recording the letter 'C' on the Tender Summary Sheet. From this, the OFT infers that Bluestone would normally have made some effort to conceal any evidence of contact with its competitors and the exchange of a cover price.

IV.5751. Two further contemporaneous documents from Bluestone provide additional corroboration of a cover price having been given to Wright (Hull) from Bluestone. Firstly, an email from PD of Wright (Hull) to DW of Bluestone clearly shows a direct information exchange between the two companies on the day after the tender deadline. The email incorporates clarifying details of the tender, sent from Wright (Hull) to the client's representatives. This would normally be confidential information between bidder and client and would not be disclosed to a third party, and in particular, not to another competitor invited to tender for the same contract.

IV.5752. When interviewed, both DW and MH explained that the email exchange was as a result of a conversation, which took place between DW and PD of Wright (Hull) after the tender deadline. Additional information was requested by the client from the two lowest bidders on the day following the tender deadline. This information would not have been known by Wright (Hull) because it had not submitted a genuine tender and it had *'unwittingly'* finished second in the tender process. The OFT notes that Bluestone was the only company whose

⁷⁴⁶¹ Written representations of Wright (Hull), 27 June 2008, paragraphs 10 to 11.

figure was below that of Wright (Hull). Therefore Wright (Hull) could only have received cover from Bluestone.

IV.5753. A contemporaneous record of at least one of the conversations between DW and PD was also made on a handwritten note by DW. This shows the amount of the cover price provided to Wright (Hull) by Bluestone, PD's contact details, and additional information which appears to have been required by the client. On the same note, there is a record of another competitor invited to tender, namely '*Birch*'. There is however, no evidence that a cover price was provided by Bluestone to this company or that '*Birch*' was involved in bid rigging on this tender.

IV.5754. The client Richmondshire Council received a tendered amount of £1,260,744 from Bluestone, which is the same figure as that recorded on one of Bluestone's Tender Summary Sheets. The client also received a tender of £1,399,535 from Wright (Hull), which is higher than the amount tendered by Bluestone. This fits into the pattern consistent with a cover price having been provided from Bluestone to Wright (Hull).

IV.5755. Finally, Wright (Hull) has also admitted to bid rigging on this tender, without being shown the contemporaneous evidence from Bluestone.

IV.5756. The OFT therefore concludes that contact took place between Bluestone and Wright (Hull) and that Bluestone supplied a figure to Wright (Hull) in order that it could submit a bid to the client that was not intended to win the contract.

IV.5757. The OFT is satisfied that the facts set out in paragraphs IV.5725 to IV.5756 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁴⁶² In particular:

- (a) the provision of a figure for a cover bid from Bluestone to Wright (Hull) was not unilateral⁷⁴⁶³, and contravenes the principle against direct or indirect contact between competitors;⁷⁴⁶⁴
- (b) Wright (Hull) can be presumed to have taken account of the information received from Bluestone (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁴⁶⁵ and
- (c) Bluestone can be presumed to have taken account of the information it received from Wright (Hull) (i.e. that Wright (Hull) did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷⁴⁶⁶

IV.5758. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bluestone and Wright (Hull) in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for Incubator Office Units at Colburn, tender deadline 26 October 2004.

⁷⁴⁶² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁴⁶³ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁴⁶⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁴⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁴⁶⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.5759. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5760. In respect of this tender, the OFT became aware of bid rigging activities by virtue of information obtained during the visit under section 28 to Bluestone on 23 February 2006. Bluestone will not therefore receive 100 per cent immunity in respect of this tender. However, Bluestone will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 207: Fire Reinstatement Works at 63 Westgate, Mansfield – 11 November 2004

Client: Geoffrey Nicholls Associates
Parties: ARG and Dukeries

IV.5761. On 13 October 2004, Geoffrey Nicholls Associates sought tenders for fire damage reinstatement works to existing retail/mixed use premises, 63 Westgate Mansfield, Notts. The following five companies were invited to tender: ARG, Bodill, Dukeries, Greenwood and Richards & Co (Mansfield). The tender deadline was 12:00 noon on 11 November 2004.⁷⁴⁶⁷

IV.5762. Geoffrey Nicholls Associates received the following tender returns:⁷⁴⁶⁸

Company	Date Tender Received	Amount of tender	Awarded contract
ARG	11 November 2004	£71,778	
Bodill	11 November 2004	£120,186	
Dukeries	11 November 2004	£76,919	
Greenwood	Declined to tender	N/A	
Richards & Co (Mansfield)	11 November 2004	£79,760	

IV.5763. Geoffrey Nicholls Associates was unaware which contractor won the contract. Geoffrey Nicholls Associates stated '*Tender returns submitted to our clients/ the building owners. GNA not involved in any further capacity*'.⁷⁴⁶⁹

IV.5764. Geoffrey Nicholls Associates also stated that Bowmer & Kirkland Property Services (BKPS) was invited to tender for the contract on 19 November 2004. BKPS tendered £110,665.00 for this contract.

⁷⁴⁶⁷ Information from client, OFT Document Reference 8123.

⁷⁴⁶⁸ Information from client, OFT Document Reference 8123.

⁷⁴⁶⁹ Information from client, OFT Document Reference 8123.

Dukeries admitted *'We engaged in bid rigging activities on this tender with ARG (Mansfield) Limited'*.⁷⁴⁷⁴

IV.5770. The OFT subsequently wrote to Dukeries' ultimate parent company at the time of this Infringement, Gavco, on 5 November 2007, asking it to comment on Dukeries' response to the OFT's Fast Track Offer, given that the OFT intended to hold Gavco jointly and severally liable for any infringements committed by Dukeries in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Gavco stated *'Gavco has nothing to add to the previous responses made by Dukeries ...'*.⁷⁴⁷⁵

IV.5771. In its response to the Statement, Dukeries confirmed that it had *'...admitted to engaging in cover pricing in relation to one [this Infringement] of the three tenders identified by the OFT...'*.⁷⁴⁷⁶

The OFT's analysis of the evidence and finding

IV.5772. From the evidence presented above, the OFT draws the following conclusions.

IV.5773. ARG and Dukeries each accepted an invitation to tender for fire reinstatement works at 63 Westgate, Mansfield.

IV.5774. Both companies submitted a tender. Dukeries was unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.5775. A message book found at ARG records a message taken at 12:30 on 10 November 2004, which read *'FOR JUSTIN, FROM ADRIAN STOKES, OF DUKERIES, MESSAGE HE HAS LOOKED AT 63 WESTGATE AND HE IS NOT INTERESTED. PLEASE GIVE HIM ASSISTANCE'*. AG confirmed that the note records that Adrian Stokes of Dukeries contacted Justin Marriott, an estimator at ARG, 24 hours before the tender was due to be returned and asked for a cover price. AG confirmed that later that day ARG would have contacted Dukeries and supplied them with a figure for a cover price.

IV.5776. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Dukeries admitted that the party with whom it engaged in bid rigging was *'ARG'*, without being shown the OFT's evidence that ARG was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.5777. The OFT considers in the light of the contemporaneous evidence from ARG and AG's admission and explanation of that contemporaneous evidence, together with Dukeries' admission that it engaged in bid rigging activities on this tender with ARG, that ARG supplied Dukeries with a cover price for this tender.

IV.5778. The OFT further notes that the tender submitted by Dukeries was higher than the tender submitted by ARG, the pattern consistent with a cover price having been provided.

⁷⁴⁷⁴ Response from Dukeries, OFT Document Reference 10984, page 5.

⁷⁴⁷⁵ Response from Gavco, OFT Document Reference 13934, page 2.

⁷⁴⁷⁶ Written representations of Dukeries, 27 June 2008, paragraph 3.

IV.5779. The OFT therefore concludes that contact took place between ARG and Dukeries. The OFT also concludes that ARG supplied a figure to Dukeries for a cover bid.

IV.5780. The OFT is satisfied that the facts set out in paragraphs IV.5765 to IV.5779 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁴⁷⁷ In particular:

- (a) the provision of a figure for a cover bid ARG to Dukeries was not unilateral⁷⁴⁷⁸, and contravenes the principle against direct or indirect contact between competitors;⁷⁴⁷⁹
- (b) Dukeries can be presumed to have taken account of the information received from ARG (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁴⁸⁰ and
- (c) ARG can be presumed to have taken account of the information it received from Dukeries (i.e. that Dukeries did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁴⁸¹

IV.5781. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between ARG and Dukeries, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for fire reinstatement works at 63 Westgate, Mansfield, tender deadline 11 November 2004.

Immunity and leniency assessment

IV.5782. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5783. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit to ARG under section 28 on 28 June 2005. ARG will not therefore receive 100 per cent immunity in respect of this tender. However, ARG will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

**Infringement 208: Refurbishment 10/12 Bowden Road, Sunninghill – 12
 November 2004**
Client: Windsor & District Housing Association
Parties: Mansell and Francis

IV.5784. On 21 October 2004, Windsor & District Housing Association ('Windsor Housing'), part of the Radian group⁷⁴⁸², sought tenders for refurbishment to

⁷⁴⁷⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁴⁷⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁴⁷⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁴⁸⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁴⁸¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁴⁸² Information from client, OFT Document Reference 10000.

10/12 Bowden Road, Sunninghill.⁷⁴⁸³ The following five companies were invited to tender: Benson NHC Ltd, Claude Fenton (Construction) Ltd, Francis, J B Leadbitter & Co Ltd and Mansell, the date and time of tender return was 12 November 2004 at noon.⁷⁴⁸⁴

IV.5785. Windsor Housing received the following tender returns:⁷⁴⁸⁵

Company	Date & Time tender received	Amount of tender	Awarded contract
Mansell	12 November 2004 8:55am	£395,850.00	
Claude Fenton (Construction) Ltd	12 November 2004 11:42am	£216,880.00	
J B Leadbitter & Co Ltd	12 November 2004 10:00am	£330,762.00	
Benson NHC Ltd	12 November 2004 10:55am	£297,177.00	YES
Francis	12 November 2004 10:35am	£338,889.44	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.5786. As part of its leniency application, Mansell’s legal representatives provided Barry Russ’s (‘BR’), a Mansell managing estimator, workload reports. The 2004 workload report for special projects contained the following entry:⁷⁴⁸⁶

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
02-00270	Sunninghill – Refurb 10/12 Bowden Road		395850	395850		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
					(Francis Bros)

Evidence from leniency applicant Mansell

IV.5787. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁷⁴⁸⁷ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.5788. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover

⁷⁴⁸³ Information from client, OFT Document Reference 10002.

⁷⁴⁸⁴ Information from client, OFT Document Reference 10002.

⁷⁴⁸⁵ Information from client, OFT Document Reference 10002.

⁷⁴⁸⁶ Special works spreadsheet, OFT Document Reference B3539, page 4.

⁷⁴⁸⁷ Leniency application, OFT Document Reference B0734.

price from Francis and that this cover price was taken due to *'insufficient tender period: resource'* at Mansell.⁷⁴⁸⁸

Witness evidence from leniency applicant Mansell

IV.5789. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.5790. During an interview with the OFT on 1 May 2007, BR advised how he would record in the workload report when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *'I mean we took a cover from Francis Brothers, by the looks of it...'* and *'the figure in there [in the net bid column] would have been the one we would have gone in at'*.⁷⁴⁸⁹ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁷⁴⁹⁰

Evidence from other companies – Francis

IV.5791. The OFT wrote to Francis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Francis had participated in bid rigging on this tender. In response to this letter Francis stated that it was *'unable to make the admissions'* as it had been *'unable to find any evidence that it [Francis] has been guilty of the bid rigging activities alleged against it...'*⁷⁴⁹¹

IV.5792. The OFT subsequently wrote to Francis's ultimate parent company at the time of this Infringement, Barrett, on 6 November 2007, asking it to comment on Francis's response to the OFT's Fast Track Offer, given that the OFT intended to hold Barrett jointly and severally liable for any infringements committed by Francis in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Barrett stated *'Barrett has ... nothing to add to the comments that have already been made to you on behalf of Francis Construction'*.⁷⁴⁹²

IV.5793. In their response to the Statement, however, Francis *'Francis does not contest the OFT's findings of infringement against Francis Construction'*⁷⁴⁹³ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.5794. From the evidence presented above, the OFT draws the following conclusions.

IV.5795. Mansell and Francis each accepted an invitation to tender for this contract.

⁷⁴⁸⁸ Leniency application, OFT Document Reference B1351, page 1.

⁷⁴⁸⁹ Interview transcript, OFT Document Reference 11516, page 37.

⁷⁴⁹⁰ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁷⁴⁹¹ Response from Francis, OFT Document Reference 10285, page 1.

⁷⁴⁹² Response from Barrett, OFT Document Reference 14050.

⁷⁴⁹³ Written representations of Francis, 2 July 2008, paragraph 3.

IV.5796. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.5797. Mansell's 2004 workload report records '(Francis Bros)', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.5798. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Francis, the pattern consistent with a cover price having been provided.

IV.5799. In addition, Francis has now stated that it does not contest its involvement in cover pricing in respect of this Infringement.

IV.5800. The OFT therefore concludes that contact took place between Mansell and Francis. The OFT also concludes that Francis supplied a figure to Mansell for a cover bid.

IV.5801. The OFT is satisfied that the facts set out in paragraphs IV.5786 to IV.5800 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁴⁹⁴ In particular:

- (a) the provision of a figure for a cover bid from Francis to Mansell was not unilateral⁷⁴⁹⁵, and contravenes the principle against direct or indirect contact between competitors;⁷⁴⁹⁶
- (b) Mansell can be presumed to have taken account of the information received from Francis (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁴⁹⁷ and
- (c) Francis can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁴⁹⁸

IV.5802. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Francis in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment to 10/12 Bowden Road, Sunninghill, tender deadline 12 November 2004.

Immunity and leniency assessment

IV.5803. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100

⁷⁴⁹⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁴⁹⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁴⁹⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁴⁹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁴⁹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5804. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 209: Extensions and Alterations at Bleakhouse Junior School, Oldbury, West Midlands – 3 December 2004
Client: Sandwell Metropolitan Borough Council
Parties: Thomas Vale and Arthur M Griffiths

IV.5805. On 9 November 2004, Sandwell Metropolitan Borough Council ('Sandwell MBC') sought tenders for extensions and alterations at Bleakhouse Junior School, Oldbury, West Midlands. The following six companies were invited to tender: Adonis, Arthur M Griffiths, Wygar, Ashe Construction Ltd, Interclass and Thomas Vale. The deadline for the receipt of tenders was 12:00 noon on 3 December 2004.⁷⁴⁹⁹

IV.5806. Sandwell MBC received the following tender returns:⁷⁵⁰⁰

Company	Time and Date tender received	Amount of tender	Awarded contract
Adonis	11:22 3 December 2004	£498,316	
Arthur M Griffiths	11:12 3 December 2004	£483,376	
Wygar	11:05 3 December 2004	£465,661	
Ashe Construction Ltd	11:06 3 December 2004	£434,810	
Interclass	16:00 2 December 2004	£402,806	Yes
Thomas Vale	11:35 3 December 2004	£491,272	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Estimate Register, Tender Status spreadsheet and handwritten note

IV.5807. A handwritten Estimate Register was obtained from Thomas Vale during the section 27 visit to its premises on 24 January 2006, which contained the following entry:⁷⁵⁰¹

⁷⁴⁹⁹ Information from client, OFT Document Reference 9292.

⁷⁵⁰⁰ Information from client, OFT Document Reference 9292.

⁷⁵⁰¹ Estimate Register, OFT Document Reference 4177, page 4.

ESTIMATE No.	RETURN DATE	JOB TITLE	VALUE £-P
T5746 B & M 04/039	3-12-04	Extension and Internal Alterations Bleakhouse School Bleakhouse Road Oldbury	491 272 ▽

CLIENT	ARCHITECT	Q.S	JOB WON Y/N
Sandwell MBC	Urban Design	GB Partnership	No

IV.5808. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁷⁵⁰²

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT	DUE
T5746	BM	Sandwell MBC	Extension and Alterations, Bleakhouse School, Oldbury				03/12/2004 Noon

Tender Figure	Tender Status	Tendering Contractors	Successful Contractor

IV.5809. Also as part of its leniency application, Thomas Vale provided a handwritten note headed '*a.m. Griffiths*', which reads:⁷⁵⁰³

' a.m. Griffiths

[.....] [C]
Morris [Maurice] Walsh
Bob Round
Gary Wildsmith

Gary Wildsmith

£491,272-00
£569-4534'

Evidence from leniency applicant Thomas Vale

IV.5810. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

⁷⁵⁰² Tender Status spreadsheet, OFT Document Reference 4522, page 46.

⁷⁵⁰³ Handwritten note, OFT Document Reference 4604.

IV.5811. At Annex 14⁷⁵⁰⁴ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page 12 of the schedule under Annex 14 and within the section for 2004 tenders is the following entry:⁷⁵⁰⁵

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5746	03 December	Sandwell MBC	Extension and Alterations, Bleakhouse School, Oldbury	Taken (AM Griffiths [...] [C], Gary Wildsmith, £491,272))	Yes (File Note; Estimate Register)

IV.5812. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁷⁵⁰⁶ and ‘A M Griffiths’ appears on this list.

IV.5813. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.5814. During interviews conducted in connection with its leniency application, Thomas Vale’s employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, Christopher Keith Trickett (‘CKT’), Chief Estimator at Thomas Vale, gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.5815. In respect of this tender, the OFT interviewed Nick Galliers (‘NG’), who was an estimator working in the Building and Maintenance Division of Thomas Vale at the time of this tender. NG explained that the ‘∇’ written in the ‘VALUE’ column of the Estimate Register obtained from Thomas Vale during the section 27 visit to its premises on 24 January 2006, indicated that Thomas Vale had taken a cover price on this tender.⁷⁵⁰⁷ NG further explained that he was not aware that CKT maintained an electronic spreadsheet of tenders and that he would not have informed CKT if he had taken a cover price on a job.⁷⁵⁰⁸

IV.5816. In respect of the handwritten note headed ‘a.m. Griffiths’, NG said that he did not recognise the handwriting but that he recalled that Bob Round and Gary Wildsmith were estimators who worked at Arthur M Griffiths.⁷⁵⁰⁹ In respect of the handwritten figure, ‘£491,272-00’, NG said ‘That’s the figure that they

⁷⁵⁰⁴ Leniency application, OFT Document Reference 4568.

⁷⁵⁰⁵ Leniency application, OFT Document Reference 4568, page 12.

⁷⁵⁰⁶ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁷⁵⁰⁷ Interview transcript, OFT Document Reference 13563, pages 3 and 6.

⁷⁵⁰⁸ Interview transcript, OFT Document Reference 13563, pages 3 and 4.

⁷⁵⁰⁹ Interview transcript, OFT Document Reference 13563, pages 6 and 7.

[Arthur M Griffiths] *gave us for our cover price*'.⁷⁵¹⁰ In addition, NG said, *'I would suggest it means that it had been agreed that we were going to go to AM Griffiths to get a cover price so the phone number's been jotted down and the name of the estimators put down. And then that's the figure that they gave us'*.⁷⁵¹¹

Evidence from leniency applicant Arthur M Griffiths

IV.5817. As part of its leniency application, Arthur M Griffiths provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.182 to IV.188 above and is relied upon by the OFT in relation to this tender.

IV.5818. In its response to the Statement, Arthur M Griffiths made no representations in respect of this Infringement.

Witness evidence from leniency applicant Arthur M Griffiths

IV.5819. In respect of this tender, in interview Gary Wildsmith ('GW'), Commercial Director of Arthur M Griffiths said he did not recall this job⁷⁵¹² and on being shown by the OFT the handwritten note headed *'a.m. Griffiths'*, GW said *'No idea why, why they [Thomas Vale] should put my name on that I'm sure...I've never given out a price...if they did ring up, and ...it was one of the phone calls that I had had, saying, are you pricing a certain job, we might need some help, I'd have just passed it down to Alan Griffiths'*.⁷⁵¹³

IV.5820. Also in respect of this tender, in interview Maurice Walsh ('MW'), Managing Director of Arthur M Griffiths, said he did not recall this job⁷⁵¹⁴ and on being shown by the OFT the handwritten note headed *'a.m. Griffiths'* and asked if Arthur M Griffiths provided a cover price to Thomas Vale, MW said *'I would doubt that very much indeed...I can't answer it but I would doubt that...maybe somebody sort of rang our office and spoke to Gary [Wildsmith] and said, have you got this job in, and Gary may well have said...yes we have... no, we haven't... or, you'll have to speak to Alan Griffiths'*.⁷⁵¹⁵

IV.5821. The OFT was unable to interview Alan Griffiths about this tender as he died in January 2007.

The OFT's analysis of the evidence and finding

IV.5822. From the evidence presented above, the OFT draws the following conclusions.

IV.5823. Thomas Vale and Arthur M Griffiths each accepted an invitation to tender for this contract.

IV.5824. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract.

⁷⁵¹⁰ Interview transcript, OFT Document Reference 13563 page 7.

⁷⁵¹¹ Interview transcript, OFT Document Reference 13563 page 8.

⁷⁵¹² Interview transcript, OFT Document Reference 13292, page 24.

⁷⁵¹³ Interview transcript, OFT Document Reference 13292, pages 25 and 26.

⁷⁵¹⁴ Interview transcript, OFT Document Reference 13291, page 17.

⁷⁵¹⁵ Interview transcript, OFT Document Reference 13291, page 17.

- IV.5825. Thomas Vale's contemporaneous Estimate Register maintained in handwritten form records a '∇' next to the figure '491 272' under the column headed 'VALUE'. NG of Thomas Vale has confirmed that this symbol '∇' shows that Thomas Vale obtained a cover price on this tender. Under leniency Thomas Vale has confirmed that a cover price was received from Arthur M Griffiths for this tender.
- IV.5826. The handwritten note headed '*a.m. Griffiths*' provides further corroboration that Thomas Vale contacted Arthur M Griffiths for a cover price for this tender. The figure written down on this handwritten note was the exact figure that Thomas Vale submitted for this tender. The three estimators named on the note are all employees (either current or former) of Arthur M Griffiths and the telephone number '[.....] [C]' is the telephone number of Arthur M Griffith as indicated on its company headed notepaper.⁷⁵¹⁶
- IV.5827. The OFT further notes that the tender submitted by Thomas Vale was higher than the tender submitted by Arthur M Griffiths, a pattern consistent with a cover price having been provided.
- IV.5828. Thomas Vale also admitted that '*A M Griffiths*' was one of the '*key competitors*' with whom it engaged in cover pricing activity.
- IV.5829. Although Arthur M Griffiths does not recall that it engaged in this bid rigging activity on this tender, the OFT considers that the contemporaneous evidence, together with Thomas Vale's admission and explanation of that evidence, shows that Arthur M Griffiths did indeed engage in bid rigging on this tender.
- IV.5830. The OFT therefore concludes that contact took place between Thomas Vale and Arthur M Griffiths, and that Arthur M Griffiths supplied a figure to Thomas Vale in order that it could submit a bid to the client that was not intended to win the contract.
- IV.5831. The OFT is satisfied that the facts set out in paragraphs IV.5807 to IV.5830 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁵¹⁷ In particular:
- (a) the provision of a figure for a cover bid from Arthur M Griffiths to Thomas Vale was not unilateral⁷⁵¹⁸, and contravenes the principle against direct or indirect contact between competitors;⁷⁵¹⁹
 - (b) Thomas Vale can be presumed to have taken account of the information received from Arthur M Griffiths (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁵²⁰ and
 - (c) Arthur M Griffiths can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷⁵²¹

⁷⁵¹⁶ Leniency application, OFT Document Reference 5938, page 5.

⁷⁵¹⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁵¹⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁵¹⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁵²⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁵²¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.5832. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Arthur M Griffiths in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for extensions and alterations at Bleakhouse Junior School, Oldbury, West Midlands, tender deadline 3 December 2004.

Immunity and leniency assessment

IV.5833. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5834. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.5835. In respect of this tender, the OFT became aware of Arthur M Griffiths' involvement in bid rigging activities by virtue of the information provided by Thomas Vale. Arthur M Griffiths will not therefore receive 100 per cent immunity in respect of this tender. However, Arthur M Griffiths will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 210: Three New Community Sports Complexes, Lincolnshire – 3 December 2004

Client: HBS Business Services (Group) Ltd

Parties: Mowlem and R G Building

IV.5836. On 8 November 2004⁷⁵²², HBS Business Services (Group) Ltd sought tenders for three new community sports complexes at Kirton Middlecot School, Grantham Central Technology College and Sports College and Long Sutton, The Peele School.⁷⁵²³ The following six companies were invited to tender: Clark Construction, Interserve, Linpave Building Ltd, Mowlem, North Midland and R G Building. The date and time of tender return was 3 December 2004 at 2:30 pm.⁷⁵²⁴

⁷⁵²² According to the information provided by the client, invitations to tender were sent to bidders on 8 November 2004. However, Mowlem's Tender Record notes that the tender was received on 28 October 2004 and an internal Mowlem email, dated 29 October 2004, also refers to this tender (Annexes 1 and 2 to witness statement, OFT Document References B1729 and B1731). The OFT concludes that, as this tender comprised three jobs grouped together, the invitations to tender for each job may have been staggered in time (albeit with the same closing date of 3 December 2004 for all three). It appears that the first set of tender documents were sent out by the client around 28 October 2004. In any event, the date on which the invitations to tender were issued by the client is not material to the OFT's finding of an infringement.

⁷⁵²³ Information from client, OFT Document Reference 8624b.

⁷⁵²⁴ Information from client, OFT Document Reference 8624c, page 1.

IV.5837. HBS Business Services (Group) Ltd received tender returns for each individual sports complex and also aggregated tenders. The following shows the details of the aggregated tender returns:⁷⁵²⁵

Company	Date tender received	Amount of tender	Awarded contract
Clark Construction	Not specified	£5,232,437	
R G Building	Not specified	£4,543,565	YES
Interserve	DID NOT TENDER	DID NOT TENDER	
Mowlem	Not specified	£4,661,332	
Linpave Building Ltd	Not specified	£5,214,478	
North Midland	Not specified	£5,147,360	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Carillion⁷⁵²⁶ – Manuscript notes

IV.5838. During the search of Mowlem’s Nottingham office, some manuscript notes belonging to Karl Chatburn, (‘KC’), an estimating manager⁷⁵²⁷ at Mowlem in the Nottingham office, were taken. On a page dated 25 November 2004 is an entry stating ‘③ * Cover – Lincolnshire sports complexes – Paul Whittall – [...] [C] *’.⁷⁵²⁸ On the next page there is another entry under the date 2 December 2004 which states ‘⑤ Keith – Cover – Lincoln schools ...’.⁷⁵²⁹

IV.5839. In its response to the Statement, R G Carter stated in respect of the entry of ‘③ * Cover – Lincolnshire sports complexes – Paul Whittall – [...] [C] *’ in KC’s notebook that this entry is dated 25 November 2004, whereas ‘[i]t was only on 2 December 2004 that R G Carter Building finalised its tender pricing on this tender; 25 November is a week before the tender was due to be submitted’.⁷⁵³⁰ The telephone number is that ‘...of R G Carter Building’s King’s Lynn office. This number was readily available in telephone directories, on the Company’s website and ... was actually published with reference to this tender by ABI Building Data Ltd’.⁷⁵³¹ This entry, they argued, could merely indicate that KC telephoned R G Building’s general number a week before the tender deadline and asked for the name of the estimator for this tender; it does not indicate any actual contact took place between KC and Paul Whittall (‘PW’).⁷⁵³²

IV.5840. In respect of the entry of ‘⑤ Keith – Cover – Lincoln schools ...’ in KC’s notebook which is dated 2 December 2004, R G Carter stated that this Infringement ‘does not relate to “Lincoln schools” but to community sports complexes at Grantham, Kirton and Long Sutton. The reference to Lincoln schools in the notebook may, therefore, refer to a completely different tender’.⁷⁵³³

⁷⁵²⁵ Information from client, OFT Document Reference 8624c.

⁷⁵²⁶ Mowlem was acquired by Carillion on 23 February 2006.

⁷⁵²⁷ Karl Chatburn was estimating manager from July 2003 to October 2006.

⁷⁵²⁸ Karl Chatburn’s notebook, OFT Document Reference B0650, page 2.

⁷⁵²⁹ Karl Chatburn’s notebook, OFT Document Reference B0650, page 3.

⁷⁵³⁰ Written representations of R G Carter, 27 June 2008, paragraph 2.74.

⁷⁵³¹ Written representations of R G Carter, 27 June 2008, paragraph 2.74.

⁷⁵³² Written representations of R G Carter, 27 June 2008, paragraph 2.74.

⁷⁵³³ Written representations of R G Carter, 27 June 2008, paragraph 2.75.

IV.5841. The OFT considers the entries of ‘③ * Cover – Lincolnshire sports complexes – Paul Whittall – [.....] [C] *’ and ‘⑤ Keith – Cover – Lincoln schools ...’ in KC’s notebook to be contemporaneous evidence that Mowlem took a cover price from R G Building.

IV.5842. The OFT views KC’s recording of contact in his notes, firstly, a week before the tender was due (25 November 2004) and, secondly, on the day before the tender was due to be submitted (2 December 2004), as being consistent with the practice of obtaining a cover price as described in paragraph IV.512 above. An initial call would often be placed with a competitor bidding on the same tender asking ‘...them for help’ and closer to the tender submission date, once the competitor had finalised their price, the cover price would be provided. This is also supported by the witness evidence of KC, who stated in interview ‘... I spoke to a guy Paul Whittall, and we organised a cover ... for them, to give us a cover price, which they did nearer the time’.⁷⁵³⁴

IV.5843. The alternative explanation suggested by R G Carter does not account for the inclusion of the word ‘cover’ recorded on the same line as PW’s name and contact telephone number in KC’s notebook. The OFT considers that if KC had telephoned the company’s general telephone number and asked for the name of the estimator, it is likely he would have also either requested his direct telephone number or he would have requested that he be connected. As KC has not recorded any direct dial number in his notebook, the OFT considers the latter to be a more likely reflection of what happened, and therefore cannot accept R G Building’s assertion that the notebook entries do ‘...not mean there was any contact between Karl Chatburn and Paul Whittall’.

IV.5844. Nor does the OFT accept the suggestion that the entry ‘⑤ Keith – Cover – Lincoln schools ...’ related to a different tender as the present one did not relate to ‘Lincoln schools’. Though the OFT has described this Infringement as relating to ‘community sports complexes’, these projects were to be completed at a college in Grantham and schools in Kirton and Long Sutton. The OFT further notes that this entry was made on the same date as that on which R G Building have confirmed its own pricings were completed.

Evidence from leniency applicant Carillion

IV.5845. Carillion’s legal representatives provided to the OFT a witness statement of KC, which states in respect of this tender ‘...This was a tender which we had originally intended to price but after we had received the tender documents it became apparent that we did not have the resources to pursue it ... In consultation with Kevin Watson (the Regional Director at the time ...), it was however decided that we should ask a competitor for a cover price to avoid irritating the client. I therefore contacted a number of other possible bidders and established that RG Carter was bidding. RG Carter agreed to give me a cover price which we subsequently submitted. Unsurprisingly we did not win the tender ... There are a couple of references in my manuscript notes to taking a cover for the Lincolnshire County Council contract ... Keith Biltcliffe was the

⁷⁵³⁴ Interview transcript, OFT Document Reference 12744, pages 10 and 11.

Mowlem planner who submitted the tender based on the cover price on my instructions'.⁷⁵³⁵

IV.5846. In its response to the Statement, Mowlem stated that it '*... does not contest that certain employees (and/or former employees) participated in each of the three Relevant Alleged Infringements nor does it contest its liability...*'.⁷⁵³⁶

IV.5847. In its response to the Statement, R G Carter suggested that '*It is inconceivable that the purpose of his [KC's] call to that number of other bidders was merely to find out if R G Carter was bidding; it is far more likely that he was talking to those other contractors about their bids*'.⁷⁵³⁷ The OFT considers that even if R G Carter's assertion that KC discussed the other contractors' bids with them is correct (noting that this is not supported by the available evidence) that would not undermine the finding that Mowlem obtained a cover price from R G Building. It is clear that KC did not receive a cover price from any of the other bidders, who all returned higher bids than Mowlem. The OFT also notes that this suggestion is contrary to KC's specific recollection that it was R G Building from whom he obtained a cover on this tender.

Witness evidence from leniency applicant Carillion

IV.5848. During interviews conducted in connection with its leniency application, KC from the Nottingham office provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.503 to IV.516 above and is relied upon by the OFT in relation to this tender.

IV.5849. During an interview with the OFT on 18 April 2007, KC advised how he would record when Mowlem had taken a cover as detailed in paragraphs IV.511 to IV.512 above. In relation to this tender KC explained his role, stating '*... I was the estimating manager. And Richard Hubble was the actual estimator that was gonna price it*'.⁷⁵³⁸ When asked to explain the entries, detailed above, in his notebooks, KC stated '*... from what I recall, we set out, in good faith, to actually price this project, back in that year. Then, during the tender periods, it became quite clear that actually we didn't want to win the project, but because we'd gone so far down the line, we'd sent out enquiries, we'd been talking to the clients, a decision was taken, instead of just sending the project back, that we'd take a cover, so, RG Carter's, I think it was, we thought that they would be competitive in that area ... I spoke to a guy Paul Whitall, and we organised a cover ... for them, to give us a cover price, which they did nearer the time ... they went on to win the job, I think*'.⁷⁵³⁹ KC explained that the decision to take a cover price would have been agreed with the regional director, Kevin Watson.⁷⁵⁴⁰

IV.5850. During an interview with the OFT on 17 April 2007, Richard Hubble ('RH'), who was an estimator at Mowlem in the Nottingham office, stated in respect of this tender '*We started pricing it, I was the estimator who was gonna price it, then during the tender period we, I think we has [sic] a couple of other big*

⁷⁵³⁵ Witness statement, OFT Document Reference B1727.

⁷⁵³⁶ Written representations of Mowlem, 27 June 2008, paragraph 1.4.

⁷⁵³⁷ Written representations of R G Carter, 27 June 2008, paragraph 2.102.

⁷⁵³⁸ Interview transcript, OFT Document Reference 12744, page 10.

⁷⁵³⁹ Interview transcript, OFT Document Reference 12744, pages 10 and 11.

⁷⁵⁴⁰ Interview transcript, OFT Document Reference 12744, page 11.

contracts, we hadn't got enough staff to cope if we won the job so it's decided to take a cover'. When asked who arranged the cover price, RH stated 'It were Karl Chatburn ... he actually arranged it'.⁷⁵⁴¹

IV.5851. In its response to the Statement, R G Carter suggested that there were inconsistencies between KC's witness statement described at paragraph IV.5845 above, and the evidence which he gave in interview. R G Carter suggested that KC's witness statement evidence that in respect of this tender a cover price had been taken *'to avoid irritating the client'* was *'totally inconsistent with what Karl Chatburn himself describes [in his interview] as being Mowlem's standard procedure (to send back the tender documents...)'*.⁷⁵⁴² The OFT does not accept that there is any inconsistency. During the same interview KC also stated that *'... there'll have been times in the past when, ah, instead of sending tender documents back to upset the clients, that sort of thing, it, it was deemed more appropriate to, to take a cover'*.⁷⁵⁴³ KC was not, therefore, describing any 'standard procedure' that was invariably followed when he referred to returning tenders. Further, KC is clear that the decision was taken not to return this particular tender because Mowlem had initially intended to price it, and had gone sufficiently far through the pricing process that it considered obtaining a cover price preferable. R G Carter suggested that this was inconsistent with the emails at Annex 2 of KC's witness statement which evidenced a decision on 3 November not to pursue the tender.⁷⁵⁴⁴ In fact, those emails show that KC was still in the process of pricing the tender at 12 November 2004⁷⁵⁴⁵ and the decision not to pursue it was only taken on 17 November 2004.⁷⁵⁴⁶ Given the initial documents in relation to this tender appear to have been received by Mowlem on 28 October 2004, the OFT considers this sufficient to substantiate KC's comment that they were *'far down the line'* of pricing the tender.

IV.5852. R G Carter suggested that a further *'uncertainty'* in KC's interview evidence was that *'When asked to explain the "cover – Lincolnshire sports complex" note in his notebook he is not clear, saying "so er, R G Carter's, I think it was [...we thought that they would be competitive in that area.]...." He goes on to say "We just thought R G Carter are...a biggish company from Lincolnshire, a competitive company from Lincoln." R G Carter Building has never been "from Lincoln"; nor has any other company in the R G Carter group'*.⁷⁵⁴⁷

IV.5853. The OFT does not accept the assertion that there is uncertainty about this evidence. It is clear from both KC's witness statement⁷⁵⁴⁸ and his interview⁷⁵⁴⁹ that the tender being discussed was the Lincolnshire sports complexes. It also appears that KC's reference to R G Carter's location was to the company's area of operation generally rather than the location of any particular office and that he refers to 'Lincoln' as shorthand for 'Lincolnshire'.

⁷⁵⁴¹ Interview transcript, OFT Document Reference 13401, page 2.

⁷⁵⁴² Written representations of R G Carter, 27 June 2008, paragraph 2.76.

⁷⁵⁴³ Interview transcript, OFT Document Reference 12744, page 6.

⁷⁵⁴⁴ Written representations of R G Carter, 27 June 2008, paragraph 2.81

⁷⁵⁴⁵ OFT Document Reference B1732.

⁷⁵⁴⁶ OFT Document Reference B1733.

⁷⁵⁴⁷ Written representations of R G Carter, 27 June 2008, paragraph 2.80.

⁷⁵⁴⁸ Witness statement, OFT Document Reference B1727.

⁷⁵⁴⁹ Interview transcript, OFT Document Reference 12744, pages 9 and 10.

Evidence from other companies – R G Building

IV.5854. The OFT wrote to R G Building's immediate parent company R G Construction Limited ('R G Construction') on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that R G Construction had participated in bid rigging on this tender.⁷⁵⁵⁰ In response to this letter R G Construction made no admission in respect of this tender and stated *'We have checked the tenders 2 to 20 referred to in your schedule, both paper and electronic, and have interviewed the relevant staff including former employees where possible. Our investigations have not disclosed any evidence of conduct to which you refer'*.⁷⁵⁵¹

IV.5855. The OFT subsequently wrote to R G Building's ultimate parent company at the time of this Infringement, R G Holdings, on 6 November 2007, asking it to comment on R G Construction's response to the OFT's Fast Track Offer, given that the OFT intended to hold R G Holdings jointly and severally liable for any infringements committed by its subsidiaries in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, R G Holdings stated *'... we write to advise we have nothing further to add'*.⁷⁵⁵²

IV.5856. In its response to the Statement, R G Carter made general representations as to how, as a business, it ensures it has the resources to price the tenders it receives, and as to its success rate in invitations to tender.⁷⁵⁵³ The OFT accepts that the evidence currently available suggests that R G Building tend to price tenders properly. However, the present Infringement relates to the provision of a cover price, not the acceptance of one. Though the OFT has found, in paragraph IV.73 above, that the motive for providing cover prices was usually reciprocity, it notes that other motives, including facilitating a reduction in the number of competing bids, are also possible and it is not necessary to establish exactly, or even to speculate, what a company's motive might have been for providing a cover price. Where the evidence indicates that a cover price has been provided, the OFT considers that sufficient for a finding of an Infringement.

IV.5857. In its response to the Statement, R G Carter provided a witness statement from PW, who stated in respect of this tender *'I do not recognize the name Karl Chatburn. He is not someone I can recall ever having met, spoken to or heard of before. I have no recollection of him speaking to me (or me to him) in relation to this tender or at all...I did not provide cover prices as has been alleged in either of these cases [Infringements 210 and 222]'*.⁷⁵⁵⁴

⁷⁵⁵⁰ The OFT made the Fast Track Offer to R G Construction on the basis of information available to it at the relevant time. As R G Building is a wholly owned subsidiary of R G Construction, the OFT does not consider it material that the Fast Track Offer was not addressed to R G Building itself. In any event, the companies in the R G Carter Group made joint representations in response to the Statement, and stated that no evidence had been found to suggest that a cover price had been provided to a competitor. The OFT concludes that none of the companies making up the R G Carter Group were willing to admit participation in bid rigging activities in relation to this tender.

⁷⁵⁵¹ Response from R G Carter, OFT Document Reference 10784.

⁷⁵⁵² Response from R G Carter Holdings, OFT Document Reference 14103.

⁷⁵⁵³ Written representations of R G Carter, 27 June 2008, paragraphs 2.4 to 2.13 and 2.19 to 2.21.

⁷⁵⁵⁴ Witness statement of Paul Whittall, 17 June 2008, page 1.

IV.5858. The OFT notes the direct contradiction between this witness evidence and the contemporaneous documentary evidence and overall explanation provided by KC in respect of his notebook and his specific explanation of the entry relating to this tender. On balance, the OFT considers the latter to be more compelling. KC's evidence is consistent with the markings in his notebook, in particular with the entry 'Cover' for which R G Building has not provided an alternative plausible explanation. In light of those factors, the OFT considers that the contemporaneous documentary evidence and explanation of KC should be preferred to that of PW.

IV.5859. In its response to the Statement, R G Carter also noted in respect of this Infringement '*[w]hen Karl Chatburn was asked specifically about cover pricing, he said that, when taking a cover price, the result is "So you finish third or fourth"; in the tender... Mowlem came a very close second, not third or fourth*'.⁷⁵⁵⁵ During an interview with the OFT on 18 April 2007, KC advised '*...instead of sending tender documents back up to clients, that sort of thing, it, it was deemed appropriate to, to take a cover. Um. So you finish third or fourth, but at least in the client's minds it, it was quite competitive so they'd put you on the tender list next time...*'.⁷⁵⁵⁶ The OFT regards this statement as evidence of Mowlem's general expectations in respect of a tender outcome, that if it obtained a cover price for a bid, it expected to appear 'competitive' to the client yet would probably come third or fourth after the companies who were actually bidding competitively. To be certain of being ranked in a particular position, however, would have required collusion between all or most of the tender bidders, an activity which has not been alleged in respect of this Infringement. The OFT notes that, across this investigation, although those who have accepted cover prices have often come third or fourth, it is by no means unusual for them to have come second.

IV.5860. R G Carter further stated '*...the percentage difference between R G Carter's winning bid and the cover price that R G Carter is alleged to have provided to Mowlem (which R G Carter denies), ranges from 1.5% to 3.25%. This difference is totally inconsistent with all the evidence given in the Statement of Objections relating to the calculation of cover prices*'.⁷⁵⁵⁷ It also stated that in his witness statement KC '*went on to make the point that, when giving a cover price, "...you'd usually add 5% on to the price....and then tell them to add a little more on, if, if needs be"... the difference between the Mowlem tender price and the R G Carter Building tender price was substantially less than that 5%*'.⁷⁵⁵⁸

IV.5861. The OFT has not alleged that Mowlem provided a cover price in respect of this Infringement and as such considers the methods Mowlem employed to calculate the cover prices it supplied to competitors irrelevant to this Infringement. The OFT is unable to comment on the cover price calculation methodology of a non-leniency party, such as R G Building. In any event, although it was often the practice for companies to provide a cover price and for the recipient to add on four to five per cent, there were in fact many instances where the difference between the figure submitted on the basis of a cover price and the figure submitted by the provider of the cover price was significantly higher or lower

⁷⁵⁵⁵ Written representations of R G Carter, 27 June 2008, paragraph 2.78.

⁷⁵⁵⁶ Interview transcript, OFT Document Reference 12744, pages 6 to 7.

⁷⁵⁵⁷ Written representations of R G Carter, 27 June 2008, paragraph 2.73.

⁷⁵⁵⁸ Written representations of R G Carter, 27 June 2008, paragraph 2.78.

than four to five per cent. Accordingly, the OFT does not consider a difference of approximately one to three per cent to be indicative that cover pricing did not take place. In addition, the OFT notes that although the percentage difference between R G Building's and Mowlem's bids may be small, nonetheless in real terms the difference between the bids is just over £100,000, which is a significant margin. The OFT notes that in respect of Infringement 222 the price submitted by the acceptor of a cover from R G Building is also approximately £100,000 more than R G Building's own bid.

The OFT's analysis of the evidence and finding

IV.5862. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.5863. Mowlem and R G Building each accepted an invitation to tender for this contract.

IV.5864. Both companies submitted a tender. Mowlem was unable to submit a tender by the return date and/or did not want to win this contract. It appears that R G Building completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by its bid being the lowest and the fact that it won the contract.

IV.5865. Extracts from a contemporaneous notebook found at Mowlem, belonging to the then estimating manager, KC, show '⊗ * Cover – Lincolnshire sports complexes – Paul Whitall – [.....] [C] *' and '⊗ Keith – Cover – Lincoln schools ...'. Mowlem has stated that this shows that it took a cover price from PW of R G Carter. KC confirmed in interview that he spoke to PW of R G Carter and obtained a cover price from him for this tender.

IV.5866. In addition, the telephone number noted is listed on R G Building's website as the telephone number for R G Building, Kings Lynn.⁷⁵⁵⁹

IV.5867. The OFT further notes that the tender submitted by Mowlem was higher than the tender submitted by R G Building, the pattern consistent with a cover price having been provided.

IV.5868. In its response to the Statement R G Carter stated that *'The evidence that the tender submitted by Mowlem was higher than the tender submitted by R G Carter, which the OFT suggests as being consistent with a cover price having been provided by R G Carter, is not persuasive as representing evidence that R G Carter provided a cover price'*.⁷⁵⁶⁰ The OFT notes that this analysis is not relied upon in evidence and merely sets out that the pattern of the tender bids was consistent with a cover price having been provided by R G Building to Mowlem.

IV.5869. In addition the OFT notes that R G Building's tender figure is the only figure below Mowlem's tender figure, for both the individual and aggregate tender sums, and the OFT is therefore satisfied that Mowlem could only have received a cover figure from R G Building.

⁷⁵⁵⁹ R G Carter's website, OFT Document Reference 12386, page 9.

⁷⁵⁶⁰ Written representations of R G Carter Group, 27 June 2008, paragraph 2.97.

IV.5870. The OFT therefore concludes that contact took place between Mowlem and R G Building. The OFT also concludes that R G Building supplied a figure to Mowlem for a cover bid.

IV.5871. The OFT is satisfied that the facts set out in paragraphs IV.5838 to IV.5870 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁵⁶¹ In particular:

- (a) the provision of a figure for a cover bid from R G Building to Mowlem was not unilateral⁷⁵⁶², and contravenes the principle against direct or indirect contact between competitors;⁷⁵⁶³
- (b) Mowlem can be presumed to have taken account of the information received from R G Building (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁵⁶⁴ and
- (c) R G Building can be presumed to have taken account of the information it received from Mowlem (i.e. that Mowlem did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁵⁶⁵

IV.5872. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mowlem and R G Building in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for three new community sports complexes, tender deadline 3 December 2004.

Immunity and leniency assessment

IV.5873. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5874. The OFT became aware of the bid rigging activities by virtue of documents found on a section 28 visit to the Nottingham premises of Carillion. Mowlem will not therefore receive 100 per cent immunity in respect of this tender. However, Mowlem will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 211: New Build Extra Care Housing Development, Huddersfield Road, Mirfield – 8 December 2004
Client: Hillswood Ltd
Parties: Hobson & Porter, York House and Caddick

IV.5875. On 27 September 2004, and subsequently 6, 7 and 8 October 2004, Hillswood Ltd sought tenders for a new build extra care housing development

⁷⁵⁶¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁵⁶² See paragraph IV.73 of the General comments on cover pricing section.

⁷⁵⁶³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁵⁶⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁵⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

on Huddersfield Road. The original tender expiry date was extended in order to recruit new tenderers. The extended return date for the tender was 8 December 2004 and six companies in total were invited to tender: Bramall, Hobson & Porter, Totty Building, Caddick, York House and GMI.⁷⁵⁶⁶

IV.5876. Hillswood Ltd received the following tender returns:⁷⁵⁶⁷

Company	Date invitation to tender sent	Date and time tender received	Amount of tender	Awarded the tender
Bramall	27 September 2004	Declined to tender 5 October 2004		
Hobson & Porter	27 September 2004	09:00 8 December 2004	£7,240,360	
Totty Building	27 September 2004	Declined to tender 4 October 2004		
Caddick	6 October 2004	09:00 8 December 2004	£6,983,177	Yes
York House	7 October 2004	09:00 8 December 2004	£7,183,087	
GMI	8 October 2004	Declined to tender 21 October 2004		

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant York House – Email from Caddick with attachments

IV.5877. During the search with consent at York House on 28 March 2006 an electronic image of data was taken and this image was analysed at a later date at the OFT. An email subject title *'Royd Court, Mirfield'* was sent on 10 December 2004 by Alan Fitzsimons-Brown ('AF'), Senior Estimator at Caddick, to Arthur Richardson ('AR'), Estimating Director at York House.⁷⁵⁶⁸ Sent with this email was a two-page spreadsheet containing a breakdown of costs and a total tender figure for both sections of the contract.⁷⁵⁶⁹ In the first paragraph of the email, AF wrote, *'Most important; Do not forward on electronically as it is possible to trace the history of a document (don't ask me how) and if they do, they will find that this spreadsheet was originally generated by Caddick. I'll forward a complete list of qualifications on Monday but the most important ones are; No design fees included (other than £2000 as advised to warrant the design) due to the lack of co-ordination between the design team, therefore we had no idea how much to allow. They should really be advising us what to allow...'*⁷⁵⁷⁰ The email continued with details of removal of material and diversion of services. The email attachment was titled *'Contract Sum Analysis, York House.xls'*.⁷⁵⁷¹ The total of the two *'Total to form of Tender'* figures set out on the two page spreadsheet provided by Caddick, matches exactly the total amount submitted for this tender by York House.

⁷⁵⁶⁶ Information from client, OFT Document Reference 8994.

⁷⁵⁶⁷ Information from client, OFT Document Reference 8994.

⁷⁵⁶⁸ Royd Court email, OFT Document Reference A1587.

⁷⁵⁶⁹ Royd Court email attachments, OFT Document References A1588 and A1589.

⁷⁵⁷⁰ Royd Court email, OFT Document Reference A1587, page 1.

⁷⁵⁷¹ Royd Court email, OFT Document Reference A1587, page 2.

Evidence from leniency applicant York House

IV.5878. As part of its leniency application, York House provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.743 to IV.751 above and is relied upon by the OFT in relation to this tender.

IV.5879. In a typewritten table summarising York House's cover pricing activity, prepared as part of York House's leniency application, it is stated that York House received a cover from Caddick.⁷⁵⁷² In addition, in a further handwritten table summarising York House's Cover Pricing activity, also prepared as part of York House's leniency application, it is stated that York House received a cover from Caddick.⁷⁵⁷³

IV.5880. In its response to the Statement, York House stated '*[i]t is not disputed that York House participated in cover pricing during the relevant period set out in the Statement.*'⁷⁵⁷⁴

Witness evidence from leniency applicant York House

IV.5881. During interviews conducted in connection with its leniency application, York House's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.743 to IV.751 above and is relied upon by the OFT in relation to this tender.

IV.5882. In respect of this tender, in interview AR confirmed, '*Yes we took a cover from Caddick*'⁷⁵⁷⁵ and '*... I organised the cover price I took the cover price*'.⁷⁵⁷⁶ Specifically in relation to the email from AF at Caddick, AR stated, '*That email has come about as result of us having to produce a breakdown of our price. Obviously on that occasion Caddick's must have been in a poor position and we must have been in a close position and they [the client] have requested information obviously we cannot provide because we haven't gone through the motions, so on that occasion Caddick have willingly helped us out and we've passed on this information.... because I haven't priced it and Caddick's have helped us out*'.⁷⁵⁷⁷

IV.5883. AR also stated, '*.....as I have explained we have took a cover, we have been asked [by the client] for a breakdown of our tender summary, we were unable to provide them and we have gone back to Caddick's and Caddick's have sent me that email...*'⁷⁵⁷⁸ and '*That there whatever Caddick's price was will be less than that on their appraisal and they have factored figures in there to come up with the cover price they've given us, helping us provide the client with what he was after on that occasion*'.⁷⁵⁷⁹

⁷⁵⁷² Leniency application, OFT Document Reference A0633, page 6.

⁷⁵⁷³ Leniency application, OFT Document Reference A0640, page 8.

⁷⁵⁷⁴ Written representations of York House, 27 June 2008, paragraph 50.

⁷⁵⁷⁵ Interview transcript, OFT Document Reference 11466, page 20.

⁷⁵⁷⁶ Interview transcript, OFT Document Reference 11466, page 21.

⁷⁵⁷⁷ Interview transcript, OFT Document Reference 11466, pages 20 and 21.

⁷⁵⁷⁸ Interview transcript, OFT Document Reference 11466, page 21.

⁷⁵⁷⁹ Interview transcript, OFT Document Reference 11466, page 22.

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender Information Sheet

IV.5884. The Form of Tender documentation for this tender was in two parts and stated that Hobson & Porter's submitted figure was £6,912,400.00⁷⁵⁸⁰ for extra care flats and shell construction of the ground floor south west wing and £327,960.00⁷⁵⁸¹ for the fitting out of the ground floor of the south west wing. The two figures added together give a total tender submitted of £7,240,360.

Evidence from leniency applicant Hobson & Porter

IV.5885. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.5886. In Hobson & Porter's Summary of Cover Pricing Activity (Major Works), prepared as part of its leniency application, it is stated that Hobson & Porter received a cover from Caddick, and that the individual contact at Caddick was AF.⁷⁵⁸²

IV.5887. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁷⁵⁸³

Witness evidence from leniency applicant Hobson & Porter

IV.5888. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.5889. In respect of this tender, in interview Russell Horner ('RH'), Major Works Estimating Director at Hobson & Porter, confirmed that Hobson & Porter received a cover from Caddick. RH recalled that, '*This [Form of Tender] will have been in our file where we keep all our covers, all covers that we have taken andwhere you [the OFT] got a copy of this document from and you know from recollection when we sat down and went through the lists of everything we had done we seem to recall it was Caddick's who we took it from*'.⁷⁵⁸⁴ Michael Haywood, an estimator in Major Works, confirmed that he helped with the documentation to sub-contractors on this tender, but did not recall any involvement in taking a cover price on this tender.⁷⁵⁸⁵

Evidence from other companies – Caddick

IV.5890. The OFT wrote to Caddick on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that

⁷⁵⁸⁰ Form of Tender, OFT Document Reference A0199, page 1.

⁷⁵⁸¹ Form of Tender, OFT Document Reference A0200, page 1.

⁷⁵⁸² Summary of Cover Pricing Activity, OFT Document Reference A1347, page 2.

⁷⁵⁸³ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁷⁵⁸⁴ Interview transcript, OFT Document Reference 11229, page 16.

⁷⁵⁸⁵ Interview transcript, OFT Document Reference 11232, page 15.

Caddick had participated in bid rigging on this tender. In response to this letter, Caddick admitted that *'We engaged in bid rigging (cover pricing) activities on this tender with York House (and one other, possibly, Eric Wrights'*⁷⁵⁸⁶ (emphasis in original document). The OFT notes that *'Eric Wrights'* was not invited to tender for this contract and therefore could not have been involved in cover pricing.

IV.5891. The OFT subsequently wrote to Caddick's ultimate parent company at the time of this Infringement, Caddick Group, on 5 November 2007, asking it to comment on Caddick's response to the OFT's Fast Track Offer, given that the OFT intended to hold Caddick Group jointly and severally liable for any infringements committed by Caddick in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Caddick Group said it had no issues to raise in respect of its subsidiary Caddick.⁷⁵⁸⁷

IV.5892. In their response to the Statement, Caddick and Caddick Group confirmed that *'...it [Caddick] provided a cover price to York House because it reacted to a request by them ... [and] ... also believes that it is likely that it provided a cover price to Hobson & Porter following a request by them.'*⁷⁵⁸⁸

The OFT's analysis of the evidence and finding

IV.5893. From the evidence presented above, the OFT draws the following conclusions.

IV.5894. York House, Hobson & Porter and Caddick each accepted an invitation to tender for this contract.

IV.5895. It appears that Caddick completed the estimating process for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Caddick being the lowest received by the client, and the fact that Caddick won the contract.

IV.5896. York House and Hobson & Porter were unable to submit tenders by the return date and/or did not want to win this tender.

IV.5897. In regard to Caddick, York House has confirmed that it received a cover price from Caddick. AR confirmed that he made the contact with Caddick to *'organise the cover price'*, providing corroboration that York House contacted Caddick in order to obtain a cover price.

IV.5898. In regard to the email sent on 10 December 2004 by AF of Caddick to AR at York House, AR explained that York House had been asked by the client for a breakdown of its tender summary. AR explained that as York House had not priced this tender, since it was taking a cover price, it was unable to produce breakdown figures of its own accord. AR therefore went back to Caddick, who had provided York House with the cover price, and Caddick sent an email with an attached spreadsheet which gave the requested breakdown of figures to AR. AR further explained that the figures provided by Caddick were costs based on the cover price given to York House by Caddick.

⁷⁵⁸⁶ Response from Caddick, OFT Document Reference 10964, page 3.

⁷⁵⁸⁷ Email note of telephone conversation, OFT Document Reference 13922.

⁷⁵⁸⁸ Written representations of Caddick, 24 June 2008, paragraphs 6.4(c)(iv) and (v).

- IV.5899. The OFT further notes that no other company submitted a bid lower than Caddick's, and that only Caddick could therefore have given York House a cover in respect of this tender.
- IV.5900. Caddick has admitted engaging in bid rigging activities with York House on this tender, in response to the OFT's letter of 22 March 2007. The OFT notes that Caddick admitted that the party with whom it engaged in bid rigging was York House, without being shown the OFT's evidence that York House was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.5901. The OFT notes in addition that the tender submitted by York House was higher than the tender submitted by Caddick, a pattern consistent with a cover price having been provided.
- IV.5902. In respect of the email sent to York House by Caddick, the OFT notes that AF of Caddick said, *'Most important; Do not forward on electronically as it is possible to trace the history of a document (don't ask me how) and if they do, they will find that this spreadsheet was originally generated by Caddick'*. This shows that Caddick was providing York House with a breakdown of figures based on the cover price provided, and that it did not want the client to be aware that York House's breakdown of figures was actually created by Caddick.
- IV.5903. Also, in regard to Caddick, Hobson & Porter has confirmed that it received a cover price from Caddick and that the contact at Caddick was AF. RH has also confirmed that the form of tender documentation for this contract was placed in a file *'where we keep all our covers, all covers that we have taken'*. The OFT notes the separate corroboration from Caddick at IV.5892 above that it is likely that it supplied a cover price to Hobson & Porter. The OFT notes that Caddick admitted that it had engaged in cover pricing with another company in addition to York House on this tender, and that there was no other company besides Hobson & Porter bidding for the tender.
- IV.5904. The OFT notes in addition that the tender submitted by Hobson & Porter was higher than the tender submitted by Caddick, a pattern consistent with a cover price having been provided.
- IV.5905. All three companies have admitted to bid rigging in relation to this tender. The OFT concludes from the above evidence that contact took place between Caddick and York House, and between Caddick and Hobson & Porter. The OFT also concludes that Caddick supplied figures to each of York House and Hobson & Porter for cover bids. The OFT notes that all three companies that submitted bids for this tender were involved in bid rigging, and that the client for this project therefore received no independently prepared tenders. The OFT also notes the exhortation from one of the bidders not to pass on its email to the client, confirming that it wanted its bid rigging actively kept secret from the client.
- IV.5906. The OFT is satisfied that the facts set out in paragraphs IV.5877 to IV.5905 above amount in law to agreements and/or concerted practices contrary to the Chapter I prohibition.⁷⁵⁸⁹ In particular:

⁷⁵⁸⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (a) the provision of figures for cover bids from Caddick to each of York House and Hobson & Porter was not unilateral⁷⁵⁹⁰, and contravenes the principle against direct or indirect contact between competitors;⁷⁵⁹¹
- (b) York House and Hobson & Porter can each be presumed to have taken account of the information received from Caddick (i.e. the respective cover prices) when determining their own respective conduct in the tendering process;⁷⁵⁹² and
- (c) Caddick can be presumed to have taken account of the information it received from York House and Hobson & Porter (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁷⁵⁹³

IV.5907. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Caddick and York House, and between Caddick and Hobson & Porter, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for a new build extra care housing development on Huddersfield Road, tender deadline 8 December 2004.

Immunity and leniency assessment

IV.5908. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5909. In respect of this tender, the OFT became aware of York House's involvement in bid rigging activities by virtue of the information obtained during the search with consent at York House's premises on 28 March 2006 conducted as part of its leniency application made on 23 March 2006. York House will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

IV.5910. Also, in respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Hobson & Porter in respect of this Infringement.

⁷⁵⁹⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁵⁹¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁵⁹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁵⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 212: Gotham Primary School, Gotham, Nottingham – 14 December 2004

Client: Nottinghamshire County Council

Parties: Clegg and Willmott Dixon

IV.5911. On 15 November 2004, Nottinghamshire County Council sought tenders for Gotham Primary School, involving the construction of a new single-storey primary school, services installation and site works. The following six companies were invited to tender: Wildgoose, Linford, Clegg, Linpave Building, Sol and Willmott Dixon.⁷⁵⁹⁴ The deadline for the receipt of tenders was 10:00 on 14 December 2004.

IV.5912. Nottinghamshire County Council received the following tender returns:⁷⁵⁹⁵

Company	Time & Date tender received	Amount of tender	Awarded contract
Wildgoose	14 December 2004 by 10:00	£1,685,366	
Linford	14 December 2004 by 10:00	£1,598,556	Yes
Clegg	14 December 2004 by 10:00	£1,698,491	
Linpave Building	14 December 2004 by 10:00	£1,764,925	
Sol	14 December 2004 by 10:00	£1,714,625	
Willmott Dixon	14 December 2004 by 10:00	£1,824,093	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Clegg – Tender Details & Summary report

IV.5913. As part of its leniency application, Clegg provided a contemporaneous Tender Details & Summary report completed with details of the tender. The following is an extract of the details written onto that report:⁷⁵⁹⁶

Tender No. T676	Project:	Date Due: 14 th DECEMBER 2004
Date: 13 th DEC '04	GOTHAM PRIMARY SCHOOL	Time Due: 10:00AM
Estimator: L. HUNT		Deliver To: N.C.C. COUNTY HALL
Client:	NOTTINGHAMSHIRE COUNTY COUNCIL	
Other Tenderers:	Meeting Attendees:	
WILDGOOSE LINPAVE LINFORD WILMOTT DIXON (C) £1,824,093 SOL	SIMON BLACKBURN SALU. MARTELLO LES HUNT	

⁷⁵⁹⁴ Information from client, OFT Document Reference 9467.

⁷⁵⁹⁵ Information from client, OFT Document Reference 9467.

⁷⁵⁹⁶ Tender Details & Summary, OFT Document Reference 4492.

Evidence from leniency applicant Clegg

IV.5914. As part of its leniency application, Clegg provided a general explanation of its participation in cover pricing. This evidence is outlined in paragraphs IV.274 to IV.292 above and is relied upon by the OFT in relation to this tender.

IV.5915. In Schedule A of its leniency application, Clegg set out a summary of all tenders from March 2000 to July 2005 that were *'Definites – projects where cover pricing has taken place and evidence is available together with estimator's corroboration of evidence'*.⁷⁵⁹⁷ The information in the summary was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page four of the summary within Schedule A and within the section for 2004 tenders is the following entry extract:⁷⁵⁹⁸

Year	T No.	Description	Client	Date	Value
2004	T676	Gotham Primary School, Gotham, Nottingham	Nottinghamshire County Council	14-12	1,698,491

Cover From	Cover To	Contact
	Wilmott Dixon Chantry House High Street Coleshill Birmingham	?

Evidence enclosed OFT/26 – estimators handwritten note '(C) £1,824,093' against Wilmott Dixon in other tenderers list and estimators recollection of giving a cover to Wilmott Dixon.

IV.5916. In the above table *'OFT/26 – estimators handwritten note'* refers to the Tender Details & Summary report discussed in paragraph IV.5913 above.

IV.5917. Clegg also provided to the OFT as part of an Executive Summary a list of key competitors with whom Clegg exchanged information. The name *'Wilmott Dixon Limited'* appears on this list.⁷⁵⁹⁹

IV.5918. In its response to the Statement, Clegg stated *'[i]t is not disputed that Clegg participated in cover pricing during the relevant period set out in the Statement'*.⁷⁶⁰⁰

Witness evidence from leniency applicant Clegg

IV.5919. During interviews conducted in connection with its leniency application, Clegg's employees provided general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.274 to IV.292 above and is relied upon by the OFT in relation to this tender.

⁷⁵⁹⁷ Leniency application, OFT Document Reference 4460, page 2.

⁷⁵⁹⁸ Schedule A – Definites, OFT Document Reference 4461, page 4.

⁷⁵⁹⁹ Executive Summary, OFT Document Reference 4458, page 2.

⁷⁶⁰⁰ Written representations of Clegg, 27 June 2008, paragraph 51.

IV.5920. In particular estimator Leslie Hunt ('LH'), the senior estimator for Clegg, who dealt with this tender noted during interview that on Tender Details & Summary reports a 'C' next to a competitor's name means that Clegg gave that company a cover price.⁷⁶⁰¹ LH was interviewed in regard to this contract and confirmed he was the estimator that dealt with it. LH referred to the entry on the Tender Details & Summary report, and said that the fact that it has a small 'C' next to Willmott Dixon and an exact figure gave him the impression that it was a cover price given to Willmott Dixon by Clegg. LH explained that as the Tender Details & Summary report included an exact figure of £1,824,093 this indicated this was the figure Clegg gave as a cover price rather than something it found out after the bidding process.⁷⁶⁰² LH confirmed that if the information had been received after the bidding process had completed, he would have written a more approximate figure such as '1.8 or 1.82'. LH could not recall dealing with anyone from Willmott Dixon but referred to an entry in his personal contact book⁷⁶⁰³ for Willmott Dixon and the name 'Reg Chester' and the telephone number '[.....] [C]'.⁷⁶⁰⁴

IV.5921. In its response to the Statement, Willmott Dixon's legal representatives stated *'[n]or does the appearance of the letter "c" next to the bid submitted by our client constitute "strong and compelling" evidence of the existence of cover-pricing. It is equally plausible that the letter "c" could refer to "Chester", the surname of the consultant, or that it might refer to "competitor", to identify a business known to be pricing keenly. Our client cannot accept that there is no other "plausible" explanation for the appearance of the letter "c", other than an agreement on cover-pricing.'*⁷⁶⁰⁵

IV.5922. The OFT does not accept Willmott Dixon's alternative explanations for the Clegg Tender Details & Summary Report entry 'WILMOTT DIXON (C) £1,824,093' as the alternatives are inconsistent with, and unsupported by, the contemporaneous written evidence and the corroborating witness statements. LH of Clegg confirmed in interview that where a 'C' was recorded next to a competitor's name, this meant that Clegg gave that company a cover price.

IV.5923. In its response to the Statement, Willmott Dixon also stated *'...Mr. Chester was not employed by [Willmott Dixon] at the time but was working on a freelance basis as a self employed consultant for various construction companies (including [Willmott Dixon]). While operating in this capacity, Mr. Chester spent some time in [Willmott Dixon's] office and had the use of a "hot desk", which explains why the telephone number referred to in the [Statement] (being [Willmott Dixon's] Birmingham office) appears in the contact book.'*⁷⁶⁰⁶ It further stated *'...as Mr. Chester was working on a freelance basis for [Willmott Dixon] (as well as for other contractors), we doubt very much whether he would ever have been instructed or requested to obtain a cover price on behalf of [Willmott Dixon]'*.⁷⁶⁰⁷

IV.5924. It is not the OFT's case that the cover price was definitely given to Mr Chester rather than to any other employee at Willmott Dixon and the existence of an

⁷⁶⁰¹ Interview transcript, OFT Document Reference 13277, page 15.

⁷⁶⁰² Note of telephone interview, OFT Document Reference 14316, page 1.

⁷⁶⁰³ Contact book, OFT Document Reference 14366.

⁷⁶⁰⁴ Note of telephone interview, OFT Document Reference 14316, pages 1 and 2.

⁷⁶⁰⁵ Written representations of Willmott Dixon, 27 June 2008, paragraph 31.

⁷⁶⁰⁶ Written representations of Willmott Dixon, 27 June 2008, paragraph 27.

⁷⁶⁰⁷ Written representations of Willmott Dixon, 27 June 2008, paragraph 28.

infringement is not based on that assumption. However, it appears to the OFT that Mr Chester, in working as a consultant for Willmott Dixon, working in Willmott Dixon's office and having a Willmott Dixon telephone number, would in all likelihood have been acting as agent for Willmott Dixon and therefore formed part of the same undertaking (see further paragraphs III.28 to III.36 of Legal Background above). Thus the OFT does consider that, even if the cover price was transmitted to Mr Chester rather than any employee of Willmott Dixon, that would not undermine the finding of Willmott Dixon's participation in and liability for the Infringement.

IV.5925. In its response to the Statement, Willmott Dixon further stated '[Willmott Dixon] *believes it would have been strongly disinclined to take a cover price for this particular tender, not only because there are so few instances of cover-pricing ever having occurred in relation to [Willmott Dixon] but also because the tendering authority in this case (Nottinghamshire County Council) is a major partner of [Willmott Dixon] and education is one of [Willmott Dixon's] primary sectors.*'⁷⁶⁰⁸

IV.5926. The OFT does not consider the client's '*major partner*', status to undermine the analysis that Willmott Dixon took a cover price from Clegg in respect of this tender. On the contrary, the OFT considers the fact that the client was a '*major partner*' of Willmott Dixon to have been a strong incentive for Willmott Dixon to have obtained a cover price and submit that cover price as its bid, rather than decline to bid or submit a unilateral price that was uncompetitive but potentially unrealistic.

IV.5927. In its response to the Statement, Willmott Dixon also submitted '*...that it is not uncommon for parties to become aware of prices tendered after the bids have gone in and this seems to offer a perfectly plausible explanation as to why the figure of £1,824,093 appears on Clegg's report. Nor does it seem at all implausible to suggest that an individual might record an exact figure, as opposed to a more approximate number.*'⁷⁶⁰⁹ The OFT notes that the witness evidence of LH, as outlined above at IV.5920, clearly explains Clegg's ordinary business practice in respect of recording cover prices and prices post tender. Therefore, the available evidence, in totality, does not support Willmott Dixon's assertions in respect of Clegg's internal price recording procedure.

IV.5928. Willmott Dixon further submitted that the number written on the Tender Details & Summary Report is exactly the same as the bid it submitted, whereas, it argued, if the number was a cover price it would be expected that the submitted bid would have been inflated. Whilst the OFT notes that companies taking cover prices sometimes inflate those numbers when they submit their bids, it is also recognised that this does not always happen and the absence of a further inflation by the party taking cover cannot be taken as an indication that the recorded figure was not a cover price.

Evidence from other companies – Willmott Dixon

IV.5929. The OFT wrote to Willmott Dixon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission

⁷⁶⁰⁸ Written representations of Willmott Dixon, 27 June 2008, paragraph 28.

⁷⁶⁰⁹ Written representations of Willmott Dixon, 27 June 2008, paragraph 29.

that Willmott Dixon had participated in bid rigging on this tender. Willmott Dixon, represented by Berwin Leighton Paisner LLP, indicated via email and telephone message on 26 April 2007 and subsequently by letter on 27 April 2007 that it would not be taking up this offer.⁷⁶¹⁰

IV.5930. The OFT subsequently wrote to Willmott Dixon's ultimate parent company at the time of this Infringement, Willmott Dixon Limited, on 6 November 2007, asking it to comment on Willmott Dixon's response to the OFT's Fast Track Offer, given that the OFT intended to hold Willmott Dixon Limited jointly and severally liable for any infringements committed by Willmott Dixon in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Willmott Dixon Limited stated '*... the decision was taken by the subsidiary, and is now confirmed by the parent, not to accept the reduction in penalty offer ...*'.⁷⁶¹¹

IV.5931. In its response to the Statement, Willmott Dixon stated '*...whilst we do not contest the facts as set out in the [Statement] in relation to the Gotham tender, we do question the legal inferences that the OFT proposes to draw from this set of facts, in particular, the suggestion that the evidence as stated constitutes "strong and compelling" evidence of cover-pricing*'.⁷⁶¹²

The OFT's analysis of the evidence and finding

IV.5932. From the evidence presented above, the OFT draws the following conclusions.

IV.5933. Clegg and Willmott Dixon each accepted an invitation to tender for this contract. Willmott Dixon was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5934. Clegg's contemporaneous Tender Details & Summary report, a document completed by hand by estimators, in this case noting the estimator for the tender as being LH, records under the heading '*Other Tenderers*' five competitors who were also invited to tender for this contract, namely Wildgoose, Linpave, Linford, Willmott Dixon and Sol. Where Willmott Dixon has been written, next to it is '*(C) £1,824,093*', which Clegg has confirmed shows that a cover price was given to Willmott Dixon. The report was completed on 13 December 2004, a day before the tender return deadline.

IV.5935. The OFT notes that although five competitors have been recorded on the Tender Details & Summary report, only one of these has a '*C*' and a price figure next to it, i.e. Willmott Dixon. This shows that Clegg specifically recorded that an exchange of information took place with that company out of all those that submitted a tender bid. The OFT further notes that the price figure noted against Willmott Dixon's name on Clegg's document is identical to the bid submitted by Willmott Dixon.

IV.5936. In its leniency application Clegg admitted in respect of this particular tender that the estimator recalled giving a cover price to Willmott Dixon.⁷⁶¹³ When questioned regarding this tender, LH had knowledge of Willmott Dixon and in

⁷⁶¹⁰ Response from Willmott Dixon, OFT Document Reference 10908

⁷⁶¹¹ Response from Willmott Dixon Limited, OFT Document Reference 14121, page 1.

⁷⁶¹² Written representations of Willmott Dixon, 27 June 2008, paragraph 32.

⁷⁶¹³ Schedule A – Definites, OFT Document Reference 4461, page 4.

interview noted that a 'C' with a figure next to it would indicate a cover price and the company to whom it had been given. LH noted that an exact figure being present by the name Willmott Dixon indicated Clegg had provided that figure as a cover price. In his contact book LH also has the name of a contact at Willmott Dixon and the telephone number '[.....] [C]'. This number [.....] [C] is a publicly listed telephone number of Willmott Dixon.⁷⁶¹⁴ Furthermore, Clegg admitted that Willmott Dixon was one of the competitors with whom it engaged in the exchange of information.⁷⁶¹⁵

IV.5937. In addition, the OFT notes that Nottinghamshire County Council received a tendered amount of £1,824,093 from Willmott Dixon, which is higher than the amount tendered by Clegg. This fits into the pattern consistent with a cover price having been given from Clegg to Willmott Dixon.

IV.5938. Although Willmott Dixon has not admitted engaging in this bid rigging activity, the OFT notes that it was not the successful party for this tender and as such may not have any records. The OFT notes that while Willmott Dixon does not consider the OFT's evidence to be strong and compelling, it has stated that it does not contest the facts in respect of this tender.

IV.5939. The OFT therefore concludes that contact took place between Clegg and Willmott Dixon. The OFT also concludes that Clegg supplied a figure to Willmott Dixon for a cover bid.

IV.5940. The OFT is satisfied that the facts set out in paragraphs IV.5913 to IV.5939 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁶¹⁶ In particular:

- (a) the provision of a figure for a cover bid from Clegg to Willmott Dixon was not unilateral⁷⁶¹⁷, and contravenes the principle against direct or indirect contact between competitors;⁷⁶¹⁸
- (b) Willmott Dixon can be presumed to have taken account of the information received from Clegg (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁶¹⁹ and
- (c) Clegg can be presumed to have taken account of the information it received from Willmott Dixon (i.e. that Willmott Dixon did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷⁶²⁰

IV.5941. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Clegg and Willmott Dixon in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Gotham Primary School, involving the construction of a new single-storey primary school, services installation and site works, date of tender 14 December 2004.

⁷⁶¹⁴ Willmott Dixon's website, OFT Document Reference 12603, page 6.

⁷⁶¹⁵ Executive Summary, OFT Document Reference 4458, page 2.

⁷⁶¹⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁶¹⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁶¹⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁶¹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁶²⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.5942. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5943. Clegg informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Clegg will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 213: New Warehouse, Green Road, Penistone, Sheffield – 15
December 2004**
Client: Carr Lynch Partnership
Parties: Totty Building⁷⁶²¹ and T & C Williams

IV.5944. On 24 November 2004, the Carr Lynch Partnership sought tenders for a new warehouse, Green Road, Penistone, Sheffield. The return date for the tender was 15 December 2004 and four companies were invited to tender: T & C Williams, C R Gibbs & Sons Ltd, Totty Building and Jarvale Construction Ltd.⁷⁶²²

IV.5945. The Carr Lynch Partnership received the following tenders before 12:00 noon on 15 December 2004:⁷⁶²³

Company	Date and Time tender received	Amount of tender	Awarded the tender
T & C Williams	Before 12:00 noon 15 December 2004	£195,809	
C R Gibbs & Sons Ltd	Before 12:00 noon 15 December 2004	£181,320	
Totty Building	Before 12:00 noon 15 December 2004	£215,486	
Jarvale Construction Ltd	Before 12:00 noon 15 December 2004	£157,909	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – form of tender, tender appraisal sheet and handwritten note

IV.5946. Three documents were taken during the section 28 visit at Propensity's premises on 22 March 2006: a Form of Tender, a tender appraisal sheet and a handwritten note. The Form of Tender states that Totty Building's tender was £215,486.⁷⁶²⁴

⁷⁶²¹ Totty Building is a subsidiary of Propensity and at the time of this tender was known as Totty Building Services Ltd. Propensity was the intermediate parent company of Totty Building. The ultimate parent company, from 17 December 2002, was Propensity Group.

⁷⁶²² Information from client, OFT Document Reference 9684.

⁷⁶²³ Information from client, OFT Document Reference 9684.

⁷⁶²⁴ Form of Tender, OFT Document Reference A0544, page 2.

IV.5947. The tender appraisal sheet for this tender is scored through with the handwritten words *'Not Pricing'*.⁷⁶²⁵ In addition, as part of its leniency application, Propensity provided to the OFT another version of this document which states, *'Not able to price'*.⁷⁶²⁶

IV.5948. The handwritten note contains the following entries:⁷⁶²⁷

*' Hadfield Counties
Lotus – NO
C.R. S Gibbs
T & C Williams – John Hardy – [...] [C].
Parkland Lodge
Clark (Grimsby)*

<i>£215,400.00 nett & exclusive of VAT</i>
--

Carr Lynch'

Evidence from leniency applicant Propensity

IV.5949. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.5950. In particular, Propensity provided to the OFT a table of cover pricing from 1 January 2000 and in respect of this tender stated that Propensity *'possibly took a cover, though do not know from whom'*.⁷⁶²⁸ Propensity also provided a table of analysis of documents taken by the OFT during its section 28 visit on 22 March 2006, and in respect of this tender Alan Loveday ('AL'), a commercial manager at Totty Building, said that he thought that Totty Building took a cover price on this tender.⁷⁶²⁹

IV.5951. Propensity also spoke to AL and reported in respect of this contract that, *'Alan Loveday thinks that Totty did take a cover price on this project. He has some recollection of doing so'*.⁷⁶³⁰

IV.5952. In respect of an electronic search, Propensity provided a report which included the following comments:

'AL explained that this tender had come in via Carr Lynch, the quantity surveyors, but it had come in much later than they were led to believe it would be. AL explained that this had placed a lot of pressure on the Estimating Department and they found that they couldn't price it. AL stated that they took a cover price and supplied the cover price to the client. AL thought that the handwritten price on the form of tender in document EJF/85 [A0544] had been given to them by a competitor.

⁷⁶²⁵ Tender appraisal sheet, OFT Document Reference A0546.

⁷⁶²⁶ Tender appraisal sheet, OFT Document Reference A1285, page 2.

⁷⁶²⁷ Handwritten note, OFT Document Reference A0547.

⁷⁶²⁸ Table of cover pricing, OFT Document Reference A1269, page 2.

⁷⁶²⁹ Witness comments schedule, OFT Document Reference A1267, page 3.

⁷⁶³⁰ Leniency application, OFT Document Reference A0872, page 13.

AL explained that Lotus, C R Gibbs, T & C Williams and Parkland Lodge were all main contractors and he stated that John Hardy was an Estimator at T & C Williams. AL confirmed that the cover might have been taken from T & C Williams, however, he could not confirm this.

AL confirmed that the signature on the Form in document EJF/85 [A0544] was Tim Lavin's, who is a Senior Estimator at Totty Building Services Ltd. AL stated that Tim Lavin would have contacted the other contractor and obtained the cover price. However, AL stated that Tim Lavin would have spoken to him about it as well although he could not confirm that he actually did but the decision to put in a cover price would have been cleared by him.

In respect of document EJF/86 [A0546], AL confirmed that the handwritten note "not pricing" was his own'.⁷⁶³¹

IV.5953. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁷⁶³²

Witness evidence from leniency applicant Propensity

IV.5954. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.5955. AL confirmed in interview that the handwriting on document A0547 was Tim Lavin's.⁷⁶³³ AL also said in respect of the handwritten entries '*T & C Williams – John Hardy – [.....] [C]*' and '*£215,400.00*' that, '*The fact he's got T & C Williams phone number down there does suggest to me that that figure 215400 has come from T & C Williams*' and '*..it's an unwritten rule that if somebody gives you a cover price that's the minimum price that you put in. And generally speaking we always stick with that price so that when a tender result is issued to everyone once the contract's awarded, which is common practice by the client, then you can see that people have actually maintained the position that you gave them*'.⁷⁶³⁴

IV.5956. AL confirmed that he made the handwritten entry '*Not Pricing*' on document A0546, and that it shows that, '*we're taking a cover. Not pricing it to the extent that you go through a full process*'.⁷⁶³⁵ AL also confirmed that he was fully aware that Tim Lavin was taking a cover price on this tender, and that '*He would do that under my direction*'.⁷⁶³⁶

⁷⁶³¹ Leniency application, OFT Document Reference A1279, page 3.

⁷⁶³² Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁷⁶³³ Interview transcript, OFT Document Reference 11349, page 12.

⁷⁶³⁴ Interview transcript, OFT Document Reference 11349, page 12.

⁷⁶³⁵ Interview transcript, OFT Document Reference 11349, page 13.

⁷⁶³⁶ Interview transcript, OFT Document Reference 11349, page 13.

Evidence from leniency applicant T & C Williams

IV.5957. As part of its leniency application, T & C Williams provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.635 to IV.649 above and is relied upon by the OFT in relation to this tender.

IV.5958. In its response to the Statement, T & C Williams stated '*T&C Williams does not dispute the factual basis of the allegations*'⁷⁶³⁷ in respect of the Infringements.

Witness evidence from leniency applicant T & C Williams

IV.5959. During interviews conducted in connection with its leniency application, T & C Williams's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.635 to IV.649 above and is relied upon by the OFT in relation to this tender.

IV.5960. In respect of this tender John Hardy ('JH'), the estimator at T & C Williams, recalled that, '*...it's a project which I do remember we ended up third on it, it was a job that we thought we were competitive on because we had, we'd done the previous phase and we thought we'd priced it competitively but we ended up third*'.⁷⁶³⁸ On being shown by the OFT the handwritten Totty Building document A0547, JH said that, '*...if it says they got it [the cover price] from me, then I can only assume that I did but I can't recall doing it*'.⁷⁶³⁹

IV.5961. Brian Barker ('BB'), the Managing Director at T & C Williams, on being shown by the OFT the handwritten notes described in paragraph IV.5948 above, said that, '*It's got T & C Williams and John Hardy and the telephone number on it, that's our telephone number yes but then there's a figure written down at the bottom....*'.⁷⁶⁴⁰ He said that he could not be sure that T & C Williams provided cover.

The OFT's analysis of the evidence and finding

IV.5962. From the evidence presented above, the OFT draws the following conclusions.

IV.5963. Totty Building and T & C Williams each accepted an invitation to tender for this contract.

IV.5964. Totty Building was unable to submit a tender by the return date and/or did not want to win this tender.

IV.5965. T & C Williams completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by T & C Williams saying that '*we thought we'd priced it competitively*' in respect of its submitted price.

⁷⁶³⁷ Written representations of T & C Williams, 27 June 2008, paragraph 4.

⁷⁶³⁸ Interview transcript, OFT Document Reference 12763, page 19.

⁷⁶³⁹ Interview transcript, OFT Document Reference 12763, page 19.

⁷⁶⁴⁰ Interview transcript, OFT Document Reference 12762, page 14.

- IV.5966. In regard to T & C Williams, the handwritten note found at Propensity states, '*T & C Williams – John Hardy – [.....] [C]*' and '*£215,400.00*'. Propensity has confirmed that this shows that it received a cover price from T & C Williams. Totty Building recorded the figure £215,400.00 on the handwritten note, and Totty Building submitted a figure only £486 higher than this.
- IV.5967. The OFT notes that in respect of the cover price provided by T & C Williams to Totty Building, AL confirmed that Totty Building would stick with, or near to the cover price provided when submitting its bid for this tender.
- IV.5968. Furthermore, Propensity has confirmed that it spoke to an estimator at T & C Williams, John Hardy, in order to obtain the cover price. This telephone number, [.....] [C], is a telephone number for T & C Williams, providing further corroboration that T & C Williams was telephoned by Totty Building in connection with this tender.
- IV.5969. Totty Building's tender appraisal sheet for this tender is marked '*Not Pricing*' and '*Not able to price*', consistent with obtaining a cover price for this tender.
- IV.5970. The OFT notes that T & C Williams said that it priced the job competitively and that JH accepted that he might have provided Totty Building with a cover price for this tender.
- IV.5971. The OFT notes in addition that the tender submitted by Totty Building was higher than the tender submitted by T & C Williams, a pattern consistent with a cover price having been provided.
- IV.5972. The OFT therefore concludes that contact took place between T & C Williams and Totty Building. The OFT also concludes that T & C Williams supplied a figure to Totty Building for a cover bid.
- IV.5973. The OFT is satisfied that the facts set out in paragraphs IV.5946 to IV.5972 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁶⁴¹ In particular:
- (a) the provision of a figure for a cover bid from T & C Williams to Totty Building was not unilateral⁷⁶⁴², and contravenes the principle against direct or indirect contact between competitors;⁷⁶⁴³
 - (b) Totty Building can be presumed to have taken account of the information received from T & C Williams (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁶⁴⁴ and
 - (c) T & C Williams can be presumed to have taken account of the information it received from Totty Building (i.e. that Totty Building did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁶⁴⁵

⁷⁶⁴¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁶⁴² See paragraph IV.73 of the General comments on cover pricing section.

⁷⁶⁴³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁶⁴⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁶⁴⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.5974. In its response to the Statement, T & C Williams stated in respect of this Infringement '*...[w]ithout knowledge or contact with the other tenderers, and given T & C Williams' undisputed desire to win the tender, it cannot be safely presumed that T & C Williams would have modified its conduct in any way on the basis of having given a cover to one other tenderer...*'.⁷⁶⁴⁶

IV.5975. The OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁷⁶⁴⁷ and that therefore the OFT is not required to adduce evidence in support of this. The OFT does not consider that T & C Williams has rebutted the application of the presumption in this case. To the extent that T & C Williams submits that this Infringement should not be treated as serious because no effects have been shown, this point is addressed in Step 1 of Section VI (Enforcement) below.

IV.5976. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Totty Building and T & C Williams, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new warehouse, Green Road, Penistone, Sheffield, tender deadline 15 December 2004.

Immunity and leniency assessment

IV.5977. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.5978. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Propensity on 22 March 2006. Propensity will not therefore receive 100 per cent immunity in respect of this tender. However, Propensity will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.5979. In respect of this tender, the OFT became aware of T & C Williams's involvement in bid rigging activities by virtue of the information obtained during the visit to Propensity. T & C Williams will not therefore receive 100 per cent immunity in respect of this tender. However, T & C Williams will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁷⁶⁴⁶ Written representations of T & C Williams, 27 June 2008, paragraph 5(c).

⁷⁶⁴⁷ See paragraph III.58 of the Legal Background section.

Infringement 214: **Humanities Research Institute, University of Sheffield – 23
December 2004**
Client: **University of Sheffield**
Parties: **Admiral and Quarmby**

IV.5980. On 11 November 2004, the University of Sheffield sought tenders for the Humanities Research Institute at the University of Sheffield. The return date for the tender was 23 December 2004 and five companies were invited to tender: Admiral, Interserve, Quarmby, William Birch & Sons and Simpson Construction.⁷⁶⁴⁸

IV.5981. The University of Sheffield received the following tender returns by 23 December 2004:⁷⁶⁴⁹

Company	Date tender received	Amount of tender	Awarded the tender
Admiral	By 23 December 2004	£1,527,272	
Interserve	By 23 December 2004	£1,396,890	
Quarmby	By 23 December 2004	£1,335,356	
William Birch & Sons	By 23 December 2004	£1,271,910	Yes
Simpson Construction	By 23 December 2004	£1,448,723	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Admiral – Handwritten Documents

IV.5982. In a contemporaneous note provided by Admiral to the OFT as part of its leniency application, the following entries have been made, all of which are handwritten by Andrew Clarkson ('AC'), Estimating Director:⁷⁶⁵⁰

*HUMANITIES BUILDING
QUARMBY iLKLEY
BIRCH York
SAMPSONS York
RAW?*

*HARE & RANSON
YORK:*

IV.5983. In another contemporaneous note also provided by Admiral to the OFT as part of its leniency application, the following entries have been made, all of which are handwritten except the heading and name and address of Quarmby:⁷⁶⁵¹

⁷⁶⁴⁸ Information from client, OFT Document Reference 9872.

⁷⁶⁴⁹ Information from client, OFT Document Reference 9872.

⁷⁶⁵⁰ Handwritten note, OFT Document Reference 5205.

⁷⁶⁵¹ Sheet with handwritten notes, OFT Document Reference 5206.

BT Phone Disc Standard Version

David Harrison

Quarmby Construction Co Ltd
Ilkley
2 Grove Promenade
Ilkley
West Yorkshire
LS29 8AF
[.....] [C]

Ring 4.30 wednesday Not Lowest
ASKED FOR ONE

in works
(E)mloy SUMS SUGGESTED Qualifications
Pricing feet Contingency
Prelims EXCLUDED BY No works outside
Design 60K Site boundary
O/H & Profit not SiLLY Distance away

1,527,272
+ 40KACL EXCLUDES
£1,487,250 our figure nett. + VAT TO IT.

Include £2000 PROV SUMS EMPLOYers:

Not include fees.

Excluded contingency

1527 272 + 17 ½ % = 267272.60 1794544.60

Evidence from leniency applicant Admiral

IV.5984. As part of its leniency application, Admiral provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

IV.5985. In particular, Admiral provided to the OFT an analysis of its projects since January 2000 and in respect of this tender, Admiral confirmed that it received a cover price from Quarmby.⁷⁶⁵² Furthermore, Admiral provided a schedule which lists names and companies who it contacted about tenders. This schedule includes D Harrison at Quarmby.⁷⁶⁵³

IV.5986. Following the issue of the Statement, Admiral did not make any specific written or oral representations in respect of this Infringement.

IV.5987. In its response to the Statement, Quarmby questioned the reliability of the schedule of projects which formed Appendix 1 of Admiral's leniency application, on the basis that AC's '*recollections would have been of critical importance in compiling*' that document, and yet if he was unable to recall the

⁷⁶⁵² Schedule of projects, OFT Document Reference 5189, page 6.

⁷⁶⁵³ Schedule of companies in contact, OFT Document Reference 5190.

tender when interviewed then his compilation of Appendix 1 must be called into question.⁷⁶⁵⁴ The OFT disagrees that there is anything inherently unacceptable in an individual refreshing their memory from available contemporaneous documentation, or on a corporate leniency application being drawn up based on documentary sources. Whilst the OFT does not accord leniency documents such as this the same evidential weight as contemporaneous documents and witness testimony, it does consider there is some evidential value in a statement such as this compiled and submitted to represent the conclusions of a leniency applicant's internal investigations. The OFT considers that if Appendix 1 were compiled with the assistance of the contemporaneous documents, rather than solely from AC's recollection, that would in fact provide a sounder basis on which to conclude that Appendix 1 is reliable than would a document compiled purely from an individual's memory 13 months after the event.

Witness evidence from leniency applicant Admiral

IV.5988. During interviews conducted in connection with its leniency application, Admiral's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.166 to IV.173 above and is relied upon by the OFT in relation to this tender.

IV.5989. AC confirmed in interview that it is his handwriting on the two handwritten documents.⁷⁶⁵⁵ In respect of the handwritten note headed, 'HUMANITIES BUILDING'⁷⁶⁵⁶, AC explained that, '*I must have rung up a subcontractor, or material supplier, the usual story, have you priced this particular contract for anyone? Ah yes, we have and these are the names that they gave me*'.⁷⁶⁵⁷

IV.5990. In respect of the handwritten note headed 'BT Phone Disc Standard Version'⁷⁶⁵⁸ AC said in respect of the reference to '*David Harrison*' that '*I would have rung Quarmby's anyway; David Harrison may have been the chap I spoke to.....I would have rung him and said, are you pricing this? He must have said yes. Ah, then when you have your figure ready, give me a ring at 4:30 on Wednesday...*'.⁷⁶⁵⁹

IV.5991. AC said that '*when I rang him back, he obviously gave me one or two things that I needed to put into our bid, or our tender, which was to say that there was no work outside the site boundary included within the figure*'.⁷⁶⁶⁰ AC said that the '*suggested Contingency excluded by 60k*', was suggested by David Harrison and that the column of handwritten text on the left hand side of the document ending in '*O/H & Profit*' were the items that David Harrison said were included in the Quarmby tender figure.⁷⁶⁶¹

IV.5992. In respect of the entry '*not SiLLY Distance away*', AC explained that '*He [David Harrison] must have told me our figure wasn't a lot ofwell, wasn't a*

⁷⁶⁵⁴ Written representations of Quarmby, 26 June 2008, paragraph 2.12(i).

⁷⁶⁵⁵ Interview transcript, OFT Document Reference 13299, pages 42 and 43.

⁷⁶⁵⁶ Handwritten note, OFT Document Reference 5205.

⁷⁶⁵⁷ Interview transcript, OFT Document Reference 13299, page 42.

⁷⁶⁵⁸ Sheet with handwritten notes, OFT Document Reference 5206.

⁷⁶⁵⁹ Interview transcript, OFT Document Reference 13299, page 43.

⁷⁶⁶⁰ Interview transcript, OFT Document Reference 13299, page 43.

⁷⁶⁶¹ Interview transcript, OFT Document Reference 13299, pages 43 and 44.

great distance away from their figure that they were going in at.⁷⁶⁶² AC said he suspected that the figure of '£1,487,250' was *'a figure that he gave me as our figure, as our cover figure, and it looks, and I may be wrong, but it looks as if I've then added 40,000 to that, probably based on the information that he said, you're not a silly distance away'*.⁷⁶⁶³ AC further corroborated that the handwritten note '+40KACL', was the £40,000 added to the cover price given by Quarmby and that 'ACL' stood for Admiral.⁷⁶⁶⁴ AC also confirmed that David Harrison told him to *'Include £2000 PROV SUMS EMPLOYERS', 'Not include fees' and 'Excluded contingency'* in respect of Admiral's tender figure.⁷⁶⁶⁵

IV.5993. In its response to the Statement, Quarmby stated that AC had no specific recollection of the tender for this project, but *'merely reconstructs'* from Appendix 1 of Admiral's leniency application and the contemporaneous documentation.⁷⁶⁶⁶ The OFT notes that AC was able to explain the contemporaneous documents both of which were in his handwriting. The OFT considers this a valid verification of the contents of those documents and is satisfied that the documents themselves, taken together with AC's explanation of them, is strong and compelling evidence that a cover price was provided.

Evidence from other companies – Quarmby

IV.5994. The OFT wrote to Quarmby on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Quarmby, had participated in bid rigging on this tender. The OFT telephoned the Managing Director of Quarmby on 6 June 2007 to inform him that due to Quarmby's lack of response to the OFT's letter dated 22 March 2007, the OFT were treating this as a rejection of the OFT's Fast Track Offer. The Managing Director confirmed this.⁷⁶⁶⁷

IV.5995. The OFT subsequently wrote to Quarmby's ultimate parent company at the time of this Infringement, St James Securities, on 6 November 2007, asking it to comment on Quarmby's response to the OFT's Fast Track Offer, given that the OFT intended to hold St James Securities jointly and severally liable for any infringements committed by Quarmby in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, St James Securities said it did not intend to respond to the matters referred to in the OFT's letter.⁷⁶⁶⁸

IV.5996. Following the issue of the Statement, St James Securities did not submit any written or oral representations in respect of this Infringement.

IV.5997. In its response to the Statement, Quarmby stated in respect of the BT Phone Disc document (described at paragraph IV.5983 above) that it *'...is annotated with the words "Not Lowest" and "not silly distance away". These annotations are inconsistent with the OFT's inference that the document related to any pre-bid discussions. By contrast, these annotations are entirely consistent with a*

⁷⁶⁶² Interview transcript, OFT Document Reference 13299, page 45.

⁷⁶⁶³ Interview transcript, OFT Document Reference 13299, page 45.

⁷⁶⁶⁴ Interview transcript, OFT Document Reference 13299, page 46.

⁷⁶⁶⁵ Interview transcript, OFT Document Reference 13299, pages 46 and 47.

⁷⁶⁶⁶ Written representations of Quarmby, 26 June 2008, paragraphs 2.12(b)(i) and (ii).

⁷⁶⁶⁷ Telephone note, OFT Document Reference 10771.

⁷⁶⁶⁸ Response from St James Securities, OFT Document Reference 14097.

post-bid note'.⁷⁶⁶⁹ The OFT notes that AC stated in interview *'I don't know why that's on there, I genuinely don't'*⁷⁶⁷⁰ in respect of the words *'Not Lowest'* and explained, as outlined in IV.5992 above, the meaning of the words *'not silly distance away'*. The OFT does not accept Quarmby's assertion that the entries on this document were made post bid as AC confirmed in interview that they were made before the tender was submitted.⁷⁶⁷¹

IV.5998. Moreover, other annotations, such as *'suggested contingency'* and the qualification relating to works outside the site boundary are incompatible with an explanation of solely post-tender contact. Similarly, the sums by which Admiral reached its tender figure cannot be explained by this being a post-tender document. In any event, even if the entry *'Not Lowest'* was made at a different time from the remainder of the entries (and the OFT notes from the document that this entry is set apart from other entries and in different style), the timing of this particular entry does not change the fact that there is no satisfactory alternative explanation for the remaining entries on the document and that the document should therefore be regarded as a contemporaneous record of Quarmby providing a cover price to Admiral in respect of this tender.

IV.5999. In its response to the Statement, Quarmby noted that the allegations against it do not include the taking of cover prices, only the giving. This is stated to be *'important circumstantial evidence in support of QCC's contention that it has not and does not give cover prices...to merely give cover prices would be to confer on one's competitors a benefit without any advantage to oneself and consequently would be commercially inexplicable and irrational'*.⁷⁶⁷²

IV.6000. First, the OFT notes that only three alleged infringements were pursued against each non-leniency party, out of a wider pool of evidence available to the OFT⁷⁶⁷³ and so the fact that the three allegations in the Statement regarding Quarmby related only to the giving of cover prices cannot be taken as meaningful evidence of Quarmby's pattern of behaviour. Second, the OFT does not accept that the giving of a cover price confers a benefit on competitors without any benefit to the firm in question.

IV.6001. Moreover, the OFT notes that in addition to the evidence from Admiral relating to it taking a cover price from Quarmby on this tender, the OFT also has strong and compelling evidence relating to Strata taking a cover price from Quarmby (Infringement 6) and York House taking a cover price from Quarmby (Infringement 233). The OFT considers it highly improbable that all three of these companies would have mistakenly identified Quarmby as a participant in cover pricing if indeed Quarmby never gave cover prices.

IV.6002. In its response to the Statement, Quarmby asserted that it neither gave nor took cover prices as a matter of its corporate policy, and provided witness evidence in support of this assertion.⁷⁶⁷⁴ The OFT notes in this regard the evidence of Roger Nelson, Quarmby's Commercial Director, who described becoming aware of the illegality of cover pricing in 2004, and went on to state:

⁷⁶⁶⁹ Written representations of Quarmby, 26 June 2008, paragraph 2.12(b)(ii)(B).

⁷⁶⁷⁰ Interview transcript, OFT Document Reference 13299, page 44.

⁷⁶⁷¹ Interview transcript, OFT Document Reference 13299, pages 43, 44 and 45.

⁷⁶⁷² Written representations of Quarmby, 27 June 2008, paragraph 2.7

⁷⁶⁷³ See paragraph II.1470 of Section II (The OFT's Investigation).

⁷⁶⁷⁴ Written representations of Quarmby, 27 June 2008, paragraph 2.8.

'David Jones [Quarmby's Managing Director] and I agreed that even though we thought it highly unlikely cover price had occurred or was occurring at QCC (because it was not our practice to do so) we should take measures to reinforce the message that no-one within QCC was engaged in the practice of cover pricing or would be in future'.⁷⁶⁷⁵

IV.6003. The OFT takes from this evidence that despite Quarmby's stated policy of not engaging in cover pricing activities, the Commercial Director and Managing Director were not certain that staff were not engaging in cover pricing, but only thought that it was 'highly unlikely' and that this uncertainty justified taking further action to prevent Quarmby's engagement in cover bidding. The OFT therefore considers that any such policy held by Quarmby does not undermine the evidence presented in relation to the giving of cover by Quarmby in this instance.

IV.6004. In its response to the Statement, Quarmby stated its Chief Estimator at the time, David Harrison ('DH'), has a specific recollection of this particular tender, and that *'[i]t is reasonable to assume that if David Harrison recollects submitting a tender as he affirms, he would also recollect giving a cover price, which he affirms he does not...'*⁷⁶⁷⁶ The OFT notes firstly that DH states only that he *'vaguely recalls this tender'* and that he does not *'believe that Quarmby gave a cover price to Admiral'*⁷⁶⁷⁷, statements which fall short of a denial of engaging in cover pricing activity. Second, it does not accept Quarmby's assertion that DH would necessarily have recalled giving a cover price even if he did clearly recall submitting a tender in respect of this Infringement. The OFT notes that the work involved in compiling a tender is much more significant than the brief contact(s) required to provide a cover price to a fellow bidder and therefore considers that the compilation of a tender is more likely to be recalled than the giving of a cover price.

IV.6005. In its response to the Statement, Quarmby contended *'...that the submission by ACL of a price that is 14% greater than the competitive tender is; inconsistent with the rationale for submitting a cover price for the bid (as it would be so much higher than the other competitive bidders as to lack credibility): and is inconsistent with ACL's approach of adding 4-5% to a price when giving a cover price...'*⁷⁶⁷⁸ The OFT notes that there was no exact range or standard formula used by the construction industry for the calculation of cover prices. The OFT does not accept Quarmby's assertion that the price difference between its submitted bid and the bid submitted by Admiral was too high for Admiral's price to have been a cover price provided by Quarmby; it is consistent with Quarmby providing an enhanced figure by way of cover, and Admiral themselves enhancing it further before onward transmission to the client. Indeed, according to AC's evidence at interview, explaining the contemporaneous documentation, Admiral added the sum of £40,000 to the cover price given to it by Quarmby, such that the figure of £1,487,250 provided to Admiral by Quarmby was only 11 per cent above Quarmby's own bid.

⁷⁶⁷⁵ Witness statement of Roger Nelson, paragraph 24.

⁷⁶⁷⁶ Written representations of Quarmby, 27 June 2008, paragraph 2.12(a)(ii).

⁷⁶⁷⁷ Witness statement of David Harrison, paragraph 15.

⁷⁶⁷⁸ Written representations of Quarmby, 27 June 2008, paragraph 2.12(b)(iii).

The OFT's analysis of the evidence and finding

IV.6006. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.6007. Admiral and Quarmby each accepted an invitation to tender for this contract.

IV.6008. Admiral was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6009. In regard to Quarmby, Admiral has confirmed that it received a cover price from Quarmby. AC's handwritten note records '*David Harrison*' above the printed name, address and telephone number for Quarmby, providing evidence that contact was made between the two parties. AC made a handwritten annotation of the cover price provided by Quarmby, £1,487,250 and that this was '*not a silly distance away*' from Quarmby's own bid. AC then apparently added some £40,000 to this cover price and this was the figure, £1,527,272 that Admiral submitted as its tender figure.

IV.6010. Also, in regard to the Admiral handwritten note '*Ring 4.30 Wednesday*', the OFT considers more specifically that Admiral was to phone Quarmby's estimator on the day before the date for submitting the tender, in order to obtain a cover price. The OFT takes this to mean Wednesday 22 December 2004, the day before the date for return of tenders, and notes that this is consistent with the pattern of cover pricing (with transmission of figures frequently taking place at the last minute). AC also made a note of a number of items that DH at Quarmby apparently said were included in Quarmby's tender figure.

IV.6011. Admiral also provided a schedule which lists names and companies who it contacted about tenders. This schedule lists D Harrison at Quarmby, providing further corroboration that Admiral contacted DH at Quarmby about cover pricing in respect of tenders. DH has confirmed that he was Estimating Manager at Quarmby from 1998 until 2006.⁷⁶⁷⁹

IV.6012. The OFT notes in addition that the tender submitted by Admiral was higher than the tender submitted by Quarmby, a pattern consistent with a cover price having been provided.

IV.6013. The OFT therefore concludes that contact took place between Quarmby and Admiral. The OFT also concludes that Quarmby supplied a figure to Admiral for a cover bid.

IV.6014. The OFT is satisfied that the facts set out in paragraphs IV.5982 to IV.6013 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁶⁸⁰ In particular:

- (a) the provision of a figure for a cover bid from Quarmby to Admiral was not unilateral⁷⁶⁸¹, and contravenes the principle against direct or indirect contact between competitors;⁷⁶⁸²

⁷⁶⁷⁹ Witness statement of David Harrison, paragraphs 3 to 5.

⁷⁶⁸⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (b) Admiral can be presumed to have taken account of the information received from Quarmby (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁶⁸³ and
- (c) Quarmby can be presumed to have taken account of the information it received from Admiral (i.e. that Admiral did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁶⁸⁴

IV.6015. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Admiral and Quarmby, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the Humanities Research Institute at the University of Sheffield, tender deadline 23 December 2004.

Immunity and leniency assessment

IV.6016. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6017. Admiral informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Admiral will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 215: 14 Redlands Road – 28 January 2005
Client: University of Reading
Parties: Mansell and A H Willis

IV.6018. On 10 December 2004 the University of Reading sought tenders for the conversion to flats, 14 Redlands Road.⁷⁶⁸⁵ The following six companies were invited to tender: A H Willis, Cavendish Construction, Crown Construction & Interiors Ltd, Francis, H N Edwards & Partners Ltd and Mansell. The date and time of tender return was 28 January 2005 at 12:00 noon.⁷⁶⁸⁶

IV.6019. The University of Reading received the following tender returns:⁷⁶⁸⁷

⁷⁶⁸¹ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁶⁸² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁶⁸³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁶⁸⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁶⁸⁵ Information from client, OFT Document Reference 9853.

⁷⁶⁸⁶ Information from client, OFT Document Reference 9853.

⁷⁶⁸⁷ Information from client, OFT Document Reference 9853.

Company	Date tender received	Amount of tender	Awarded contract
Crown Construction & Interiors Ltd	28 January 2005	£230,293.00	YES
H N Edwards & Partners Ltd	28 January 2005	£263,148.00	
A H Willis	28 January 2005	£276,220.00	
Cavendish Construction	28 January 2005	£297,047.00	
Mansell	28 January 2005	£299,855.00	
Francis	28 January 2005	£310,505.62	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.6020. As part of its leniency application, Mansell's legal representatives provided workload reports of Barry Russ ('BR'), a Mansell managing estimator. The 2005 workload report for special projects contained the following entry:⁷⁶⁸⁸

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
02-00289	Reading Univ – 14 Redlands Road		299855	299855		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
230293	263148	310505	5/6	-23.20%	(AH Willis)

IV.6021. In its response to the Statement, A H Willis submitted that the workload reports were unreliable because, based on BR's explanation of his record keeping practices, i.e. that the entry might have been made weeks in advance⁷⁶⁸⁹, it was possible that an entry was made prior to obtaining cover and then not corrected if a cover was actually received from a different company other than that indicated in the workload report.⁷⁶⁹⁰

IV.6022. The OFT notes that the accuracy of similar markings in BR's workload reports indicating that a cover price was obtained has been corroborated by evidence or admissions from other Parties in respect of other Infringements.⁷⁶⁹¹ In particular, the OFT notes that A H Willis has itself effectively corroborated the accuracy of the workload reports in respect of Infringement 224, where it has admitted that Cyril Elbourn, the estimator for A H Willis on Infringement 224, gave a cover price to Mansell in respect of that tender as indicated in the workload report. The OFT does not, therefore, see any reason to doubt the inference it has drawn in respect of this Infringement, namely that the workload report is an accurate reflection of the source of the cover price obtained by Mansell.

⁷⁶⁸⁸ Workload report for special projects, OFT Document Reference B3539, page 5.

⁷⁶⁸⁹ See paragraph IV.485 above.

⁷⁶⁹⁰ Written representations of A H Willis, 27 June 2008, paragraphs 13 to 14; and oral representations of A H Willis, 16 July 2008, pages 13 to 14.

⁷⁶⁹¹ See Infringements 42, 43, 91 and 97.

Evidence from leniency applicant Mansell

IV.6023. As part of its leniency application, Mansell's legal representatives provided a general explanation of its part in the process of cover pricing.⁷⁶⁹² This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.6024. Mansell's legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region ('TVR'), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from A H Willis and that this cover price was taken due to *'insufficient tender period: resource'* at Mansell.⁷⁶⁹³

IV.6025. In its response to the Statement, A H Willis proposed that this table could not be relied upon as evidence as it *'appears to have been based on the workload report rather than any other evidence'*.⁷⁶⁹⁴ While the OFT is not according the same evidential weight to Mansell's table provided under leniency as it is to contemporaneous documents and witness testimony, the OFT considers this document to be robust as it resulted from extensive investigation by Mansell prior to its creation (as described in Mansell's leniency application⁷⁶⁹⁵). This table provides evidence of Mansell's position as to its engagement in cover pricing on this tender, and as such constitutes evidence additional to the available contemporaneous records and witness evidence.

Witness evidence from leniency applicant Mansell

IV.6026. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell's participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.6027. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *'... in this instance we didn't, or weren't able to ... actually put a bid together so we, we took some help from Willis, by the looks of it'*.⁷⁶⁹⁶ In its response to the Statement, Mansell clarified that BR's admission was based on the contemporaneous evidence rather than on independent recollection of taking the cover price.⁷⁶⁹⁷

IV.6028. In its response to the Statement, A H Willis suggested that BR's witness evidence could not be relied upon as evidence because *'it is apparent that Mr Russ has no direct personal recollection of the tenders in question, but is instead proceeding on the basis of his workbook entries'*.⁷⁶⁹⁸ The OFT notes that the weight that it places on BR's evidence is commensurate with its explanatory nature, accepting that it does not constitute independent

⁷⁶⁹² General explanation on cover pricing, OFT Document Reference B0734.

⁷⁶⁹³ Leniency table of tendering activities, OFT Document Reference B1351, page 1.

⁷⁶⁹⁴ Written representations of A H Willis, 27 June 2008, paragraph 12.a.

⁷⁶⁹⁵ Leniency application, OFT Document Reference B0734.

⁷⁶⁹⁶ Interview transcript, OFT Document Reference 11516, page 37.

⁷⁶⁹⁷ Written representations of Mansell, 27 June 2008, Annex 1, page 6.

⁷⁶⁹⁸ Written representations of A H Willis, 27 June 2008, paragraph 12.b and oral representations of A H Willis, 16 July 2008, page 12.

recollection of the events surrounding this tender. Nonetheless, such explanation is of evidential value. Though BR may not recall the details of the exchange of cover pricing, BR provides an explanation of the document he used to record cover prices taken, which the OFT relies upon in support of the contemporaneous evidence.

Evidence from other companies – A H Willis

IV.6029. The OFT wrote to A H Willis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that A H Willis had participated in bid rigging on this tender. In response to this letter A H Willis stated that, in respect of this tender, there was *'no evidence of bid rigging and the allegation is therefore denied'*.⁷⁶⁹⁹

IV.6030. In its response to the Statement, A H Willis suggested that the strength of the evidence in relation to this Infringement falls below that found in Infringement 158 with regard to Allenbuild and Wildgoose, where the OFT had made no preliminary finding of infringement in relation to those parties, and therefore considered that this Infringement should not be pursued.⁷⁷⁰⁰ The OFT does not find these arguments persuasive, noting that in the case of Allenbuild and Wildgoose there was an absence of contemporaneous documentation, whereas in relation to this Infringement the OFT relies not only on the contemporaneous workload reports, but also supporting witness testimony.

IV.6031. Additionally, in its response to the Statement, A H Willis suggested *'it is apparent that the only evidence of AH Willis being involved in providing a cover price to Mansell is in fact the entry in Mr Russ' workbook'*.⁷⁷⁰¹ As the CAT stated in Claymore Dairies, cartels by their nature are hidden and secret, and that a single item of evidence may be sufficient to meet the required standard.⁷⁷⁰² For this particular Infringement, the OFT relies not only on the contemporaneous workload report, but also supporting witness testimony which taken together the OFT considers provide strong and compelling evidence that A H Willis gave a cover price to Mansell.

IV.6032. A H Willis also suggested that *'the OFT needs to show that if a cover price was provided it was by an individual in respect of whose actions AH Willis is legally responsible'*⁷⁷⁰³ as opposed to a third party contractor without authority to enter into agreements on behalf of A H Willis. As discussed in paragraphs III.28 to III.36 above, and in Infringement 224, a company is legally responsible for an agent acting on its behalf, in particular where the agent has ostensible authority to do so. Furthermore, nothing in the evidence available in respect of this Infringement suggests that Mansell received a cover price from a third party contractor. Nor is the OFT required to ascertain individual participants in an arrangement in order to establish an infringement between undertakings.

⁷⁶⁹⁹ Response from A H Willis, OFT Document Reference 10203, page 3.

⁷⁷⁰⁰ Written representations of A H Willis, 27 June 2008, paragraphs 8 to 9.

⁷⁷⁰¹ Written representations of A H Willis, 27 June 2008, paragraph 12, and oral representations of A H Willis, 16 July 2008, page 12.

⁷⁷⁰² See paragraph III.203 of the Legal Background section.

⁷⁷⁰³ Written representations of A H Willis, 27 June 2008, paragraph 15.

IV.6033. A H Willis further suggested that the OFT did not provide sufficient information to allow it to effectively defend itself.⁷⁷⁰⁴ The OFT considers the information as set out in the Statement together with the evidence from the OFT's file provided with the Statement was sufficient for A H Willis to review its records and locate the necessary information for its own defence. It appears that to the extent that A H Willis is not able to adduce evidence in its defence this is a product of it not having kept records in respect of this tender, rather than the OFT's case being insufficient. The OFT has no reason to doubt A H Willis' statement that it is unable to find any records relating to this particular Infringement. However, the absence of documentary records cannot of itself exculpate A H Willis from an Infringement where other evidence is available which the OFT considers implicates it, and indeed is sufficient to substantiate its involvement.

IV.6034. In its response to the Statement, A H Willis stated the OFT would '*need to show that Mansell informed AH Willis that it would not be submitting a competitive bid before AH Willis submitted its own bid*'⁷⁷⁰⁵, in essence arguing that it should not be presumed to have acted in the market on the basis of the information that Mansell would not be submitting a competitive bid.⁷⁷⁰⁶

IV.6035. The OFT notes that, as stated in paragraphs III.53 to III.54 above, the mere receipt of information that Mansell would not be bidding competitively may be sufficient to establish a concerted practice.⁷⁷⁰⁷ Further, as stated in paragraph III.58, the ECJ has held that '*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 the market...*'⁷⁷⁰⁸

IV.6036. On that basis, the OFT does not need to show that A H Willis inflated its bid (or otherwise altered its conduct) in response to the knowledge that Mansell had accepted a cover price in order to establish that there has been an infringement of the Chapter I prohibition. It is entitled to rely on a presumption that A H Willis has acted on the information received.

IV.6037. The OFT notes that although Mansell's general practice was to receive the actual cover the day before or the morning the tender was due, it usually arranged for the exchange of cover within a few days after receiving the tender.⁷⁷⁰⁹ The OFT also notes that A H Willis submitted its tender on the morning of the tender return date (see paragraph IV.6019) and it is therefore

⁷⁷⁰⁴ Written representations of A H Willis, 27 June 2008, paragraph 16, and oral representations of A H Willis, 16 July 2008, pages 5 and 8 to 10.

⁷⁷⁰⁵ Written representations of A H Willis, 27 June 2008, paragraph 17.

⁷⁷⁰⁶ Written representations of A H Willis, 27 June 2008, paragraphs 19.f and 23.

⁷⁷⁰⁷ Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035 at paragraph 58, upheld by the ECJ in Case C-359/01P *British Sugar plc v Commission* [2004] ECR I-4933, citing Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 200; *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17, at paragraph 159; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 155.

⁷⁷⁰⁸ Case C-49/92P *Commission v Anic Participazioni* [1999] ECR I-4125, at paragraph 121; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 162; and Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(x); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(x).

⁷⁷⁰⁹ See paragraphs IV.482 to IV.483 of Mansell's general leniency section.

unlikely that Mansell could have requested a cover price from A H Willis *after* the latter's bid had been submitted. The OFT does not therefore accept that A H Willis has satisfactorily rebutted the legal presumption that it acted upon the knowledge that Mansell had accepted a cover price.

IV.6038. Moreover, an undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept A H Willis's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition.

The OFT's analysis of the evidence and finding

IV.6039. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.6040. Mansell and A H Willis each accepted an invitation to tender for this contract.

IV.6041. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6042. Mansell's 2005 workload report records '(AH Willis)', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.6043. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by A H Willis, the pattern consistent with a cover price having been provided.

IV.6044. In its response to the Statement, A H Willis stated '*While Mansell's bid was higher than that prepared by AH Willis, this provides no evidence that Mansell obtained a cover price from AH Willis...*'.⁷⁷¹⁰ The OFT notes that this analysis is not relied upon in evidence and merely sets out that the pattern of the tender bids was consistent with a cover price having been provided by A H Willis to Mansell.

IV.6045. The OFT therefore concludes that contact took place between Mansell and A H Willis. The OFT also concludes that A H Willis supplied a figure to Mansell for a cover bid.

IV.6046. The OFT is satisfied that the facts set out in paragraphs IV.6020 to IV.6045 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁷¹¹ In particular:

- (a) the provision of a figure for a cover bid from A H Willis to Mansell was not unilateral⁷⁷¹², and contravenes the principle against direct or indirect contact between competitors;⁷⁷¹³

⁷⁷¹⁰ Written representations of A H Willis, 27 June 2008, paragraph 12.c.

⁷⁷¹¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

- (b) Mansell can be presumed to have taken account of the information received from A H Willis (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁷¹⁴ and
- (c) A H Willis can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁷¹⁵

IV.6047. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and A H Willis in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for 14 Redlands Road, tender deadline 28 January 2005.

Immunity and leniency assessment

IV.6048. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6049. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 216: New Education Centre, George Eliot Hospital, Nuneaton – 14 February 2005
Client: George Eliot Hospital NHS Trust
Parties: Thomas Vale and Shaylor

IV.6050. On 21 and 23 December 2004, George Eliot Hospital NHS Trust ('George Eliot Hospital') sought tenders for a new education centre at George Eliot Hospital, Nuneaton. The following seven companies were invited to tender: Interserve, G F Tomlinson, Thomas Vale, Stepnell Ltd, Marriott Construction, Shaylor and Galliford Try.⁷⁷¹⁶ The deadline for the receipt of tenders was 14 February 2005.⁷⁷¹⁷

IV.6051. George Eliot Hospital received the following tender returns:

⁷⁷¹² See paragraph IV.73 of the General comments on cover pricing section.

⁷⁷¹³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁷¹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷¹⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷¹⁶ Information from client, OFT Document Reference 8131.

⁷⁷¹⁷ Incorrectly recorded by the client in its letter to the OFT as 24 November 2004.

Company	Date tender received	Amount of tender	Awarded contract
Interserve	14 February 2005	£4,266,916	
G F Tomlinson	Declined to tender 11 January 2005	n/a	
Thomas Vale	14 February 2005	£4,189,731	
Stepnell Ltd	14 February 2005	£4,186,276	
Marriott Construction	14 February 2005	£4,254,181	
Shaylor	14 February 2005	£3,997,100	Yes
Galliford Try	Declined to tender 23 December 2004	n/a	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet and tender lists

IV.6052. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁷⁷¹⁸

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5772	B	George Eliot Hosp NHS Trust	New Education Centre, Geo Eliot Hosp, Nuneaton	3,300,000	CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	14/02/2005 Noon	£4,189,731		Stepnell, Shaylor, Marriott, Interserve	

IV.6053. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who kept a *'little black book'*⁷⁷¹⁹ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for Shaylor plus names and a telephone number.⁷⁷²⁰

IV.6054. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided three tender lists referring to this tender, for weeks commencing 10 January 2005,⁷⁷²¹ 31 January 2005 and 7 February 2005.⁷⁷²² They are identical except the entry for 10 January 2005 has no entry in the Category column whereas the letter 'B' appears in this column for the entries dated 31 January 2005 and 7 February 2005. The tender list for the week commencing 7 February 2005 is shown below:

⁷⁷¹⁸ Tender Status spreadsheet, OFT Document Reference 4522, page 47.

⁷⁷¹⁹ Interview transcript, OFT Document Reference 11418, pages 21 and 22.

⁷⁷²⁰ Contact list, OFT Document Reference 11086, page 22.

⁷⁷²¹ Tender list, OFT Document Reference 4597, page 2.

⁷⁷²² Tender list, OFT Document Reference 4572, pages 1 and 2.

TENDER LISTS			
W.C		7th February 2005	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5772	B	George Eliot Hospital NHS Trust	New Education Centre, George Eliot Hospital, Nuneaton
APPROX £	EST	CAT	DUE
3,500,000		B	14/02/2005 noon

Evidence from leniency applicant Thomas Vale

IV.6055. At Annex 14⁷⁷²³ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page three of the schedule under Annex 14 and within the section for 2005 tenders is the following entry:⁷⁷²⁴

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5772	14 February	George Eliot Hosp NHS Trust	New Education Centre, Geo Eliot Hosp, Nuneaton	Taken (Shaylor)	Yes (Tender Spreadsheet; Tender List)

IV.6056. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above and the Tender List is the internal tender list referred to in that explanation.

IV.6057. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁷⁷²⁵ and Shaylor appears on this list.

IV.6058. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.6059. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to

⁷⁷²³ Leniency application, OFT Document Reference 4568.

⁷⁷²⁴ Leniency application, OFT Document Reference 4568, page 3.

⁷⁷²⁵ Cover pricing activity: Key competitors, OFT Document Reference 4524.

this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.6060. CKT admitted that the initials 'CKT' which appear in the estimator column for this tender were his own and that the letter 'B' which appears in the column marked 'DIV' stands for Building division (also known as Traditional), for which CKT was the estimating manager.⁷⁷²⁶ In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: '*CKT the estimator, Category B indicating a cover, tender return date 14 February 2005, Thomas Vale tender £4,189,731. Shaylor in bold indicating Shaylor gave us a cover*'.⁷⁷²⁷

Evidence from other companies – Shaylor

IV.6061. The OFT wrote to Shaylor on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Shaylor had participated in bid rigging on this tender. In response, Shaylor stated '*We engaged in non-collusive cover pricing activities on this tender with Thomas Vale*'.⁷⁷²⁸

IV.6062. In its response to the Statement, Shaylor stated '*Shaylor is not withdrawing any of these admissions or proposing to challenge the evidence in relation to any of the three alleged infringements*'.⁷⁷²⁹

The OFT's analysis of the evidence and finding

IV.6063. From the evidence presented above, the OFT draws the following conclusions.

IV.6064. Thomas Vale and Shaylor each accepted an invitation to tender for a new education centre at George Eliot Hospital, Nuneaton.

IV.6065. It appears that Shaylor completed the estimating process for this tender and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Shaylor being the lowest received and the fact that it won the contract.

IV.6066. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that this was a cover price. Thomas Vale had not allocated the category of this tender by week commencing 10 January 2005. However, by week commencing 31 January 2005, the letter 'B' had been inserted into the category column. This indicates that a conscious decision was made in the time leading up to the tender deadline to register this as a tender for which Thomas Vale would not be submitting a competitive bid.

IV.6067. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records four competitors who were also invited to tender for this contract, namely '*Stepnell, Shaylor, Marriot [and Interserve*'. Shaylor is marked in bold lettering which Thomas Vale has

⁷⁷²⁶ Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁷⁷²⁷ Interview transcript, OFT Document Reference 13855, page 41.

⁷⁷²⁸ Response from Shaylor, OFT Document Reference 10839, page 4.

⁷⁷²⁹ Oral representations of Shaylor, 29 July 2008, pages 2 and 3.

confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet was £4,189,731 which matches the amount recorded by the client George Eliot Hospital.

- IV.6068. George Eliot Hospital also received a tendered amount of £3,997,100 from Shaylor, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Shaylor to Thomas Vale.
- IV.6069. The OFT notes that although four competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Shaylor. This indicates that a conscious decision was made to differentiate Shaylor from the other known competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price at the time. It also indicates that CKT himself made contact with Shaylor.
- IV.6070. Thomas Vale admitted that Shaylor was one of the key competitors with whom it engaged in cover pricing activity. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price was received by Thomas Vale from Shaylor.
- IV.6071. Finally, both parties admit to bid rigging activities on this tender. The OFT notes that Shaylor admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.6072. The OFT therefore concludes that contact took place between Thomas Vale and Shaylor. The OFT also concludes that Shaylor supplied a figure to Thomas Vale for a cover bid.
- IV.6073. The OFT is satisfied that the facts set out in paragraphs IV.6052 to IV.6072 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁷³⁰ In particular:
- (a) the provision of a figure for a cover bid from Shaylor to Thomas Vale was not unilateral⁷⁷³¹, and contravenes the principle against direct or indirect contact between competitors;⁷⁷³²
 - (b) Thomas Vale can be presumed to have taken account of the information received from Shaylor (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁷³³ and
 - (c) Shaylor can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to

⁷⁷³⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁷³¹ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁷³² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁷³³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

submit a competitive bid) when determining its own conduct in the tendering process.⁷⁷³⁴

IV.6074. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Shaylor in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for a new education centre at George Eliot Hospital, Nuneaton, tender deadline 14 February 2005.

Immunity and leniency assessment

IV.6075. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6076. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 217: Replacement Primary School, Elbury Mount, Worcester – 15 February 2005

Client: Worcestershire County Council
Parties: Thomas Vale and Speller-Metcalf

IV.6077. On 12 January 2005, Worcestershire County Council ('Worcestershire CC') sought tenders for a new primary school at Elbury Mount, Worcester. The following six companies were invited to tender: Weaver, Thomas Vale, E Manton, Moss, Frank Galliers and Speller-Metcalf.⁷⁷³⁵ The deadline for the receipt of tenders was 15 February 2005 at 12:00 noon.⁷⁷³⁶

IV.6078. Worcestershire CC received the following tender returns:

Company	Date tender received	Amount of tender	Awarded contract
Weaver	15 February 2005	£3,827,557.00	
Thomas Vale	15 February 2005	£3,722,119.00	
E Manton	Declined to tender 1 February 2005	n/a	
Moss	15 February 2005	£3,949,897.00	
Frank Galliers	15 February 2005	£3,928,676.97	
Speller-Metcalf	15 February 2005	£3,550,965.65	Yes

⁷⁷³⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷³⁵ Information from client, OFT Document Reference 10077.

⁷⁷³⁶ Incorrectly recorded by Worcestershire CC in its letter to the OFT as 15 May 2005.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet and tender list

IV.6079. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁷⁷³⁷

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST	CAT
T5780	B	Worcestershire CC	Replacement Primary School, Elbury Mount, Worcester	2,000,000	CKT	B

DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
10/02/2005 Noon	£3,722,119		Moss, Speller Metcalfe, Manton (returned), Weaver,	

IV.6080. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided a tender list referring to this tender, for the week commencing 14 February 2005, shown below:⁷⁷³⁸

TENDER LISTS			
W.C		14-Feb-05	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5780	B	Worcestershire CC	Replacement Primary School, Elbury Mount, Warndon, Worcester

APPROX £	EST	CAT	DUE
2,000,000		B	15/02/2005 Noon

Evidence from leniency applicant Thomas Vale

IV.6081. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence and, in particular, the use of the Tender Status spreadsheet is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.6082. At Annex 14⁷⁷³⁹ of its leniency application, Thomas Vale’s legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had

⁷⁷³⁷ Tender Status spreadsheet, OFT Document Reference 4522, page 47.

⁷⁷³⁸ Tender list, OFT Document Reference 4745, page 2.

⁷⁷³⁹ Leniency application, OFT Document Reference 4568.

been given or received, plus the recollections of staff. At page two of the schedule under Annex 14 and within the section for 2005 tenders is the following entry:⁷⁷⁴⁰

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5780	10 February	Worcestershire CC	Replacement Primary School, Elbury Mount, Worcester	Taken (Speller Metcalfe)	Yes (Tender Spreadsheet; Tender List)

IV.6083. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above and the Tender List is the internal tender list referred to in that explanation.

IV.6084. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application.⁷⁷⁴¹ Speller-Metcalfe appears on this list.

IV.6085. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.6086. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.6087. CKT admitted that the initials 'CKT' which appear in the estimator column for this tender were his own and that the letter 'B' which appears in the column marked 'DIV' stands for Building division (also known as Traditional), for which CKT was the estimating manager.⁷⁷⁴² In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: '*CKT, the estimator, Category B indicating a cover, tender return date 10 February 2005, Thomas Vale tender £3,722,190, Speller-Metcalfe involved indicating that Speller-Metcalfe gave us a cover*'.⁷⁷⁴³

Evidence from other companies – Speller-Metcalfe

IV.6088. The OFT wrote to Speller-Metcalfe on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission

⁷⁷⁴⁰ Leniency application, OFT Document Reference 4568, page 2.

⁷⁷⁴¹ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁷⁷⁴² Interview transcript, OFT Document Reference 11418, pages 10 and 13.

⁷⁷⁴³ Interview transcript, OFT Document Reference 13855, page 41.

that Speller-Metcalf had participated in bid rigging on this tender. In response to this letter, Speller-Metcalf admitted that it *'engaged in bid rigging (COVER PRICING) activities on this tender with Thomas Vale, Stourport on Severn'*. It added that *'we were approached for a cover price by Thomas Vale on the days leading up to the tender deadline and confirm that we provided them with a cover price figure'*.⁷⁷⁴⁴

IV.6089. In its response to the Statement, Speller-Metcalf stated *'Speller-Metcalf has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement'*⁷⁷⁴⁵ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.6090. From the evidence presented above, the OFT draws the following conclusions.

IV.6091. Thomas Vale and Speller-Metcalf each accepted an invitation to tender for the replacement primary school at Elbury Mount, Worcester.

IV.6092. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that a cover price was sought.

IV.6093. Speller-Metcalf completed the estimating process for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Speller-Metcalf being the lowest received and the fact that it won the contract.

IV.6094. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records four competitors for this tender, namely *'Moss, **Speller Metcalfe**, Manton [and] Weaver'*. Speller-Metcalf is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated at the time the cover price was arranged by CKT. Thomas Vale's bid is recorded by the client as £3,722,119 which matches the figure recorded by Thomas Vale on the Tender Status spreadsheet.

IV.6095. Worcestershire CC also received a tendered amount of £3,550,965.65 from Speller-Metcalf, which is lower than the amount tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from Speller-Metcalf to Thomas Vale. Speller-Metcalf is the only company whose figure is below that of Thomas Vale and so Thomas Vale could only have received cover from Speller-Metcalf.

IV.6096. The OFT notes that although four competitors have been recorded on Thomas Vale's Tender Status spreadsheet, only one company is highlighted in bold, i.e. Speller-Metcalf. This indicates that a conscious decision was made to differentiate Speller-Metcalf from the other competitors.

IV.6097. Thomas Vale admitted that Speller-Metcalf was one of the *'key competitors'* with whom it engaged in cover pricing activity. In interview, CKT admitted that

⁷⁷⁴⁴ Response from Speller-Metcalf, OFT Document Reference 10844, pages 3 and 4.

⁷⁷⁴⁵ Written representations of Speller-Metcalf, 27 June 2008, paragraph 4.

the entry in the Tender Status spreadsheet shows that a cover price had been sought and obtained by Thomas Vale from Speller-Metcalfe.

IV.6098. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Speller-Metcalfe admitted that the party with whom it engaged in bid rigging was Thomas Vale, without being shown the OFT's evidence that Thomas Vale was involved. This provides independent corroboration of the OFT's evidence in respect of this tender.

IV.6099. The OFT therefore concludes that contact took place between Thomas Vale and Speller-Metcalfe. The OFT also concludes that Speller-Metcalfe supplied a figure to Thomas Vale for a cover bid.

IV.6100. The OFT is satisfied that the facts set out in paragraphs IV.6079 to IV.6099 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁷⁴⁶ In particular:

- (a) the provision of a figure for a cover bid from Speller-Metcalfe to Thomas Vale was not unilateral⁷⁷⁴⁷, and contravenes the principle against direct or indirect contact between competitors;⁷⁷⁴⁸
- (b) Thomas Vale can be presumed to have taken account of the information received from Speller-Metcalfe (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁷⁴⁹ and
- (c) Speller-Metcalfe can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷⁷⁵⁰

IV.6101. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Speller-Metcalfe in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for the new primary school at Elbury Mount, Worcester, tender deadline 15 February 2005.

Immunity and leniency assessment

IV.6102. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6103. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

⁷⁷⁴⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁷⁴⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁷⁴⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁷⁴⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷⁵⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 218: Fire Refuge, Wilberforce Building, Hull University – 26 February 2005
Client: Hull University
Parties: Hobson & Porter and Simons

IV.6104. On 1 February 2005 Hull University sought tenders for a fire refuge, Wilberforce Building, Hull University. The return date for the tender was 12:00 noon on 25 February 2005 and four companies were invited to tender: Geo Houlton, Hobson & Porter, Robinson & Sawdon and Simons.

IV.6105. Hull University received the following four tender returns by 12:00 noon on 25 February 2005:⁷⁷⁵¹

Company	Date and time tender received	Amount of tender	Awarded the tender
Geo Houlton	12:00 noon on 25 February 2005	£208,044	
Hobson & Porter	12:00 noon on 25 February 2005	£208,516	
Robinson & Sawdon	12:00 noon on 25 February 2005	£185,792	Yes
Simons	12:00 noon on 25 February 2005	£220,525	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender Summary sheet and Form of Tender

IV.6106. The Minor Works Tender Summary sheet for this tender states that Hobson & Porter’s submitted figure was £208,515.77 and in the Known Competition section is written:⁷⁷⁵²

‘SIMONS – COVER £220,000.00’

IV.6107. The Form of Tender for this contract shows that Hobson & Porter submitted a price of £208,516.00 for this contract. The Form of Tender was signed by Paul Hairsine, an estimator/quantity surveyor at Hobson & Porter.⁷⁷⁵³

Contemporaneous documentary evidence from leniency applicant Simons – Tender Enquiry sheet and Form of Tender

IV.6108. As part of its leniency application, Simons provided a Tender Enquiry sheet for this tender. The Tender Enquiry sheet shows that Simons’s tender figure was £220,525.00 excluding VAT.⁷⁷⁵⁴

IV.6109. In particular, Simons provided its Form of Tender for this contract. The Form of Tender shows that Simons submitted a price of £220,525 for this tender. The Form of Tender was signed by Dave Moor, a ‘Foreman’ whose duties included estimating at Simons.

⁷⁷⁵¹ Information from client, OFT Document Reference 8436.

⁷⁷⁵² Minor Works Tender Summary sheet, OFT Document Reference A0090, page 1.

⁷⁷⁵³ Minor Works Tender Summary sheet, OFT Document Reference A0090, page 2.

⁷⁷⁵⁴ Tender Enquiry sheet, OFT Document Reference B3872.

Evidence from leniency applicant Hobson & Porter

IV.6110. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6111. In Hobson & Porter's Summary of Cover Pricing Activity (Minor Works) it is stated that Hobson & Porter provided a cover to Dave Mourné [Moor] at Simons.⁷⁷⁵⁵

IV.6112. Following the issue of the Statement, Hobson & Porter did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Hobson & Porter

IV.6113. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6114. In respect of this tender, in interview Ian Gibbins ('IG'), Minor Works Director at Hobson & Porter, confirmed that this tender was priced by Paul Hairsine ('PH'), an estimator at Hobson & Porter. IG confirmed that the comment '*SIMONS – COVER £220,000.00*' in the Known Competition section on the Minor Works Tender Summary sheet was in PH's handwriting. IG confirmed, '*... I would be sure that he has given Simon's a cover. It actually says that there doesn't it in the region of £220,000 ... Sometimes somebody will give you a figure sometimes they will say go in above £220,000 and you will then put £220,659 to make it look as though it's not a round figure*'.⁷⁷⁵⁶ IG confirmed that he would have been made aware that Hobson & Porter had provided Simons with a cover price, '*Even if I didn't necessarily know at the moment it went in I would have known about it when I came back into the office*'.⁷⁷⁵⁷

Witness evidence from leniency applicant Simons

IV.6115. During interviews conducted in connection with its leniency application, Simons' employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.567 to IV.592 above and is relied upon by the OFT in relation to this tender.

IV.6116. During an interview conducted on 15 March 2007 in connection with its leniency application Dave Moor ('DM'), a foreman at Simons, was asked if he could recollect this tender. DM stated '*Yeah ... I did it in a hurry. I probably did it in a day*'.⁷⁷⁵⁸ DM was shown the Minor Works Tender Summary sheet found at Hobson & Porter and the reference to a cover price given to Simons. DM stated, '*... to be quite honest I remember going to Binks Timber and pricing it quick, and getting a lot of pricing for doors. That's what I can remember*

⁷⁷⁵⁵ Summary of Cover Pricing Activity, OFT Document Reference A1349, page 1.

⁷⁷⁵⁶ Interview transcript, OFT Document Reference 11231, page 15.

⁷⁷⁵⁷ Interview transcript, OFT Document Reference 11231, pages 15.

⁷⁷⁵⁸ Interview transcript, OFT Document Reference 12794, page 11.

doing'.⁷⁷⁵⁹ DM said that he could not remember giving a cover price for this tender. When pressed by the interviewer, noting that the evidence suggested Simons had taken cover, DM replied '*I can't remember giving a cover and this all I can say*'.⁷⁷⁶⁰

IV.6117. The OFT notes that although DM declined to give a direct answer as to whether he took a cover price, he did not deny that he did take a cover on this tender. He merely recalls obtaining some pricing information, which is not inconsistent with a decision to take a cover price at some point prior to the tender deadline. The OFT further notes that although DM was interviewed in his capacity as a former employee of Simons, at the time of DM's interview he worked for Hobson & Porter, hence his response '*this is all I can say*' may therefore relate to his unwillingness to give evidence directly implicating his new employers.

Evidence from leniency applicant Simons

IV.6118. In its response to the Statement, Simons acknowledged its participation in this infringement and stated that it '*...does not contest the OFT's findings of infringement of the Competition Act 1998 in [this case] in either fact or law*'.⁷⁷⁶¹

The OFT's analysis of the evidence and finding

IV.6119. From the evidence presented above, the OFT draws the following conclusions.

IV.6120. Hobson & Porter and Simons each accepted an invitation to tender for this contract.

IV.6121. Hobson & Porter completed the estimating process for the tender for this contract. It appears that Hobson & Porter wanted to win the tender for this contract and submitted a bid with the hope of winning the work.

IV.6122. It appears that Simons was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6123. In regard to Simons, Hobson & Porter's Minor Works Tender Summary sheet records '*SIMONS – COVER £220,000.00*'. Hobson & Porter has confirmed that this shows that it gave the company in question a cover price. In addition, IG of Hobson & Porter said '*I would be sure that he [PH] has given Simons a cover*'.

IV.6124. The OFT notes that the figure Hobson & Porter recorded on the tender sheet, £220,000, is similar to the tender price Simons submitted, which was £220,525. IG of Hobson & Porter further stated '*Sometimes somebody will give you a figure sometimes they will say go in above £220,000 and you will then put £220,659 to make it look as though it's not a round figure*'.

IV.6125. The OFT notes in addition that the tender submitted by Simons was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided.

⁷⁷⁵⁹ Interview transcript, OFT Document Reference 12794, page 12.

⁷⁷⁶⁰ Interview transcript, OFT Document Reference 12794, page 15.

⁷⁷⁶¹ Written representations of Simons, 26 June 2008, paragraph 4.1.

IV.6126. The OFT notes that both Parties have now acknowledged their participation in this Infringement.

IV.6127. The OFT therefore concludes that contact took place between Simons and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied a figure to Simons for a cover bid.

IV.6128. The OFT is satisfied that the facts set out in paragraphs IV.6104 to IV.6127 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁷⁶² In particular:

- (a) the provision of a figure for a cover bid from Hobson & Porter to Simons was not unilateral⁷⁷⁶³, and contravenes the principle against direct or indirect contact between competitors;⁷⁷⁶⁴
- (b) Simons can be presumed to have taken account of the information received from Hobson & Porter (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁷⁶⁵ and
- (c) Hobson & Porter can be presumed to have taken account of the information it received from Simons (i.e. that Simons did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁷⁶⁶

IV.6129. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Simons and Hobson & Porter, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a fire refuge, Wilberforce Building, Hull University, tender deadline 25 February 2005.

Immunity and leniency assessment

IV.6130. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6131. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, Hobson & Porter will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

IV.6132. In respect of this tender, the OFT became aware of Simons' involvement in bid rigging activities by virtue of the information provided by Hobson & Porter. Simons will not therefore receive 100 per cent immunity in respect of this tender. However, Simons will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁷⁷⁶² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁷⁶³ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁷⁶⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁷⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷⁶⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 219: Eight New Dwellings, Appletree Close, Holt Heath, Worcestershire – 28 February 2005
Client: Festival Housing Group
Parties: Thomas Vale and J Harper⁷⁷⁶⁷

IV.6133. On 24 January 2005 Festival Housing Group sought tenders for the construction of eight new homes at Appletree Close, Holt Heath, Worcestershire. The following five companies were invited to tender: CJ Bayliss (Hereford) Ltd, E G Carter, Chase Norton, J Harper and Thomas Vale.⁷⁷⁶⁸ Tenders were invited for two alternatives of the project, designated A and B. The deadline for the receipt of tenders was noon on 28 February 2005.

IV.6134. Festival Housing Group received the following tender returns:

Company	Date tender received	Amount of tender	Awarded contract
CJ Bayliss (Hereford) Ltd	28 February 2005	A - £642,781 B - £660,058	Yes
E G Carter	25 February 2005	A - £804,048.26 B - no tender	
Chase Norton	28 February 2005	A - £797,628 B - no tender	
J Harper	25 February 2005	A - £687,925 B - £694,362	
Thomas Vale	28 February 2005	A - £736,824 B - £752,064	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Thomas Vale – Tender Status spreadsheet and tender lists

IV.6135. As part of its leniency application, Thomas Vale provided a contemporaneous Tender Status spreadsheet, which contained the following entry:⁷⁷⁶⁹

TENDER NO	DIV	CLIENT	DESCRIPTION	Approx £	EST
T5791	H	Festival Housing Group	8 no Dwellings, Holt Heath, Worcestershire		CKT

CAT	DUE	Tender Figure	Tender Status	Tendering Contractors	Successful Contractor
B	28/02/2005 Noon	1) 736,824 2) 752,064		Harper, Bayliss, E G Carter, Chase Norton	

IV.6136. The Tender Status spreadsheet was maintained at Thomas Vale's head office by Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, who

⁷⁷⁶⁷ J Harper is a subsidiary of Harper plc.

⁷⁷⁶⁸ Information from client, OFT Document Reference 7917.

⁷⁷⁶⁹ Tender Status spreadsheet, OFT Document Reference 4522, page 48.

kept a 'little black book'⁷⁷⁷⁰ of contacts, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Within this contact list, there is an entry for 'J. Harper' plus names and telephone numbers,⁷⁷⁷¹ which match those found on Harper's website.⁷⁷⁷²

IV.6137. Thomas Vale also maintained an internal list of tenders in progress, the use of which is referred to in the general explanation of cover pricing at paragraphs IV.689 to IV.717 above. Thomas Vale provided three tender lists referring to this tender, for weeks commencing 31 January 2005, 7 February 2005⁷⁷⁷³ and 21 February 2005.⁷⁷⁷⁴ They are identical except the entry for 31 January 2005 has no entry in the Category column whereas the letter 'B' appears in this column for the entries dated 7 February 2005 and 21 February 2005. The tender list for the week commencing 21 February 2005 is shown below:

TENDER LISTS			
W.C		21-Feb-05	
CKT/BUYING/SAH/GP/KFR/SJW/KSJ/PTW/GM/Est/R/CKT/JDI/BUYING/SAH/GP/KFR/SJW/KSJ/GM/PTW/EST/CW/GB/PT			
TENDER NO	DIV	CLIENT	DESCRIPTION
T5791	H	Festival Housing Group	8 No dwellings, Holt Heath, Worcestershire

APPROX £	EST	CAT	DUE
		B	28/02/2005 noon

Evidence from leniency applicant Thomas Vale

IV.6138. At Annex 14⁷⁷⁷⁵ of its leniency application, Thomas Vale's legal representatives compiled a schedule setting out all tenders from 2000 to 2005 in respect of which Thomas Vale had either given or taken a cover price in the West Midlands region. The information on the schedule was based on all available tender and miscellaneous documentation indicating cover prices had been given or received, plus the recollections of staff. At page five of the schedule under Annex 14 and within the section for 2005 tenders is the following entry:⁷⁷⁷⁶

Tender No	Date	Client	Comments	Cover Given/Taken	Evidence
T5791	28 February	Festival Housing Group	8 No Dwellings, Holt Heath, Worcestershire	Taken (Harper)	Yes (Tender Spreadsheet; Tender List)

IV.6139. The Tender Spreadsheet in the last column is the Tender Status spreadsheet referred to in the general explanation of cover pricing at paragraphs IV.689 to

⁷⁷⁷⁰ Interview transcript, OFT Document Reference 11418, pages 21 and 22.

⁷⁷⁷¹ Contact list, OFT Document Reference 11086, page 10.

⁷⁷⁷² Harper Group's website, OFT Document Reference 12026, page 8.

⁷⁷⁷³ Tender list, OFT Document Reference 4572.

⁷⁷⁷⁴ Tender list, OFT Document Reference 4585, page 7.

⁷⁷⁷⁵ Leniency application, OFT Document Reference 4568.

⁷⁷⁷⁶ Leniency application, OFT Document Reference 4568, page 5.

IV.717 above and the Tender List is the internal tender list referred to in that explanation.

IV.6140. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application⁷⁷⁷⁷ and *'Harpers'* appears on this list.

IV.6141. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.6142. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender. In particular, CKT gave a detailed explanation of the use of the Tender Status spreadsheet to record cover prices from its competitors.

IV.6143. CKT admitted that the initials *'CKT'* which appear in the estimator column for this tender were his own and that the letter *'H'* which appears in the column marked *'DIV'* stands for Housing division, for which CKT was the estimating manager.⁷⁷⁷⁸ In interview, CKT referred to the entry for this tender in the Tender Status spreadsheet as follows: *'the category B tender is a code that indicates a figure, a cover figure, the tender return date 28th of the 2nd 2005. There are two tender figures there, which I would guess were two options, though what the options were, obviously I don't recall, but the first option tender one is 736,824 and option two £752,064. The contractors listed on the right hand side, Harper is in bold, which indicates we took a cover figure from Harper'*.⁷⁷⁷⁹

Evidence from other companies – J Harper

IV.6144. The OFT wrote to Harper Construction Group Limited, a sister company of J Harper on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that J Harper had participated in bid rigging on this tender. In response to this letter, Harper plc wrote to the OFT through its legal representatives on 4 May 2007⁷⁷⁸⁰ and admitted that J Harper had *'engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁷⁷⁸¹ In its response to the OFT's Fast Track Offer, Harper plc provided a list of tenders where no evidence of bid rigging was found, and this tender was not on that list.⁷⁷⁸² The OFT therefore infers that J Harper's admission for this tender was made based on some form of evidence and/or information in its possession.

⁷⁷⁷⁷ Cover pricing activity: Key competitors, OFT Document Reference 4524.

⁷⁷⁷⁸ Interview transcript, OFT Document Reference 13855, page 42.

⁷⁷⁷⁹ Interview transcript, OFT Document Reference 13865, page 14.

⁷⁷⁸⁰ Response from Harper, OFT Document Reference 10387.

⁷⁷⁸¹ Response from Harper, OFT Document Reference 10390, page 8.

⁷⁷⁸² Response from Harper, OFT Document Reference 10387, page 1.

IV.6145. In its response to the Statement, J Harper confirmed that it had accepted the OFT's Fast Track Offer and was not making any representations in respect of the Infringements.⁷⁷⁸³

The OFT's analysis of the evidence and finding

IV.6146. From the evidence presented above, the OFT draws the following conclusions.

IV.6147. Thomas Vale and J Harper each accepted an invitation to tender for the construction of eight new houses at Holt Heath, Worcestershire.

IV.6148. Thomas Vale was unable to submit a tender by the return date and/or did not want to win this contract. Thomas Vale categorised this as a Category B tender, which indicated that this was a cover price.

IV.6149. Thomas Vale's contemporaneous Tender Status spreadsheet, maintained in electronic format by Chief Estimator CKT, records four competitors who were also invited to tender, namely '*Harper, Bayliss, E G Carter [and] Chase Norton*'. Harper is marked in bold lettering which Thomas Vale has confirmed shows that a cover price was received from that company and that the spreadsheet would have been updated as soon as the cover price had been arranged by CKT. Thomas Vale's bid to the client on the Tender Status spreadsheet was £736,824 for Alternative A and £752,064 for Alternative B, which matches the amounts recorded by the client Festival Group Housing.

IV.6150. Festival Group Housing also received tendered amounts of £687,925 for Alternative A and £694,362 for Alternative B, from J Harper, which are lower than the amounts tendered by Thomas Vale. This fits into the pattern consistent with a cover price having been provided from J Harper to Thomas Vale.

IV.6151. The OFT notes that although four competitors have been recorded on the Tender Status spreadsheet, only one of these is highlighted in bold, i.e. Harper. This indicates that a conscious decision was made to differentiate Harper from the other known competitors. In addition, the fact that the tender had been allocated to CKT, who was responsible for the maintenance of the Tender Status spreadsheet, means that it is likely that the entry was accurate and that CKT had personal knowledge of the decision to receive a cover price at the time. It also indicates that CKT himself made contact with Harper.

IV.6152. Thomas Vale admitted that Harper was one of the key competitors with whom it engaged in cover pricing activity. CKT had an entry for J Harper in a contact book he used to telephone other contractors for the purpose of obtaining cover prices. In interview, CKT confirmed that the entry in the Tender Status spreadsheet shows that a cover price was received by Thomas Vale from Harper.

IV.6153. Finally, both parties admit to bid rigging activities on this tender.

IV.6154. The OFT therefore concludes that contact took place between Thomas Vale and J Harper. The OFT also concludes that J Harper supplied a figure to Thomas Vale for a cover bid.

⁷⁷⁸³ Written representations of J Harper, 27 June 2008, paragraph 4.

IV.6155. The OFT is satisfied that the facts set out in paragraphs IV.6135 to IV.6154 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁷⁸⁴ In particular:

- (a) the provision of a figure for a cover bid from J Harper to Thomas Vale was not unilateral⁷⁷⁸⁵, and contravenes the principle against direct or indirect contact between competitors;⁷⁷⁸⁶
- (b) Thomas Vale can be presumed to have taken account of the information received from J Harper (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁷⁸⁷ and
- (c) J Harper can be presumed to have taken account of the information it received from Thomas Vale (i.e. that Thomas Vale did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷⁷⁸⁸

IV.6156. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and J Harper in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for a residential development at Holt Heath, Worcestershire, tender deadline 28 February 2005.

Immunity and leniency assessment

IV.6157. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6158. Thomas Vale informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 220: External Structural Refurbishment Works, 13 – 42 Claremont Close, London – 29 March 2005

Client: Newham London Borough Council

Parties: Mansell and Durkan Limited

IV.6159. On 25 February 2005⁷⁷⁸⁹ Newham London Borough Council sought tenders for external structural refurbishment works at 13 – 42 Claremont Close, London.⁷⁷⁹⁰ The following ten companies were invited to tender: Coffey Construction, Connaught, Dew Construction, Durkan Limited, Gunitite (Eastern)

⁷⁷⁸⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁷⁸⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁷⁸⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁷⁸⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷⁸⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁷⁸⁹ The OFT notes that Gunitite (Eastern) Ltd were invited to tender on 2 March 2005, information from client, OFT Document Reference 8901.

⁷⁷⁹⁰ Information from client, OFT Document Reference 8901.

Ltd, Makers Industrial Ltd, Mansell, Mulalley & Co Ltd, Roof Ltd and Yoldings Ltd. The date and time of tender return was 29 March 2005 at 12:00 noon.⁷⁷⁹¹

IV.6160. Newham London Borough Council received the following tender returns:⁷⁷⁹²

Company	Date tender received	Amount of tender	Awarded contract
Makers Industrial Ltd	Invalid – received late		
Connaught	29 March 2005 by 12:00 noon	£931,031.15	YES
Rooff Ltd	29 March 2005 by 12:00 noon	£1,336,600.00	
Yoldings Ltd	Invalid – received late		
Mansell	29 March 2005 by 12:00 noon	£1,306,772.00	
Durkan Limited	29 March 2005 by 12:00 noon	£1,201,740.00	
Mulalley & Co Ltd	29 March 2005 by 12:00 noon	£1,262,218.00	
Dew Construction	29 March 2005 by 12:00 noon	£1,144,260.70	
Coffey Construction	Declined on 15 March 2005		
Gunite (Eastern) Ltd	29 March 2005 by 12:00 noon	£1,098,874.41	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – The Builders’ Conference Interim Job Report

IV.6161. As part of its leniency application, Mansell’s legal representatives provided a Builders’ Conference Interim Job Report (‘the Report’) in respect of this tender.⁷⁷⁹³ The Report listed the contractors known to be competing as of 15 March 2005 and next to ‘Durkan Ltd’ is a handwritten cross. At the bottom of the Report is a handwritten note:

‘

<i>Brian Sharpe.</i>	£1,306.000
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 ’

IV.6162. In their response to the Supplementary Statement⁷⁷⁹⁴, Durkan Limited and Durkan Holdings noted that the figure on the Report was not written next to Durkan Limited's name, but rather at the bottom of the page.⁷⁷⁹⁵ The OFT notes that although the figure was not written next to Durkan Limited's name:

- there was a handwritten cross next to Durkan Limited’s name;
- there was no marking against any of the other company names on the Report;
- an amount almost identical to Mansell’s bid was written next to the name ‘*Brian Sharpe*’; and
- Durkan Limited has confirmed that Brian Sharpe (‘BS’) was its estimator for this tender.

⁷⁷⁹¹ Information from client, OFT Document Reference 8901.

⁷⁷⁹² Information from client, OFT Document Reference 8901.

⁷⁷⁹³ Builders’ Conference Interim Job Report, OFT Document Reference B0885.

⁷⁷⁹⁴ On 23 December 2008, the OFT issued a Supplementary Statement of Objections, which is referred to in this Infringement as the ‘Supplementary Statement’.

⁷⁷⁹⁵ Oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 6.

Evidence from leniency applicant Mansell

IV.6163. As part of its leniency application, Mansell's legal representatives also provided a general explanation of Mansell's part in the process of cover pricing.⁷⁷⁹⁶ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.6164. Mansell's legal representatives provided a summary in respect of the City Road office, in the London Region, which dealt with this tender. In respect of this tender it states *'MSCL [Mansell Construction Services Ltd] found out late in the day that there were nine bidders and [not] four/five bidders as first thought. Four or five of the nine bidders were specialist contractors. A cover price was sought and the "X" marked on the printout from the Builders' Conference indicates from whom cover was sought'*.⁷⁷⁹⁷

IV.6165. Mansell's legal representatives also provided the OFT with a schedule of cover prices for London specialised works, which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Durkan Limited and states that the reason for the pricing decision was *'UNATTRACTIVE SCHEME'*.⁷⁷⁹⁸

IV.6166. In its response to the Statement, Balfour Beatty stated it and its subsidiaries *'do not dispute the occurrence of the Alleged Infringements'*.⁷⁷⁹⁹

Witness evidence from leniency applicant Mansell

IV.6167. During interviews conducted in connection with Mansell's leniency application, Peter Goodbun ('PG'), Estimating Manager of Mansell's City Road office⁷⁸⁰⁰, provided further general explanation of Mansell's participation in cover pricing. This evidence is set out in paragraphs IV.497 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.6168. During an interview with the OFT on 17 April 2007, PG explained that the handwritten notes on the Report were notes of Phil Hart ('PH'), an estimator that dealt with this tender who no longer works for Mansell.⁷⁸⁰¹ When asked to explain the handwritten notes on the Report, PG stated *'The x against the ... name would indicate the name that he [Phil Hart] approached ... the name of [the] individual is, i.e. Brian Sharpe at Durkan, and the figure is the figure ... that would have been given to us as to the guide [on] ... which to go on'*. When asked if he knew what price Mansell submitted, PG stated *'It would have been slightly more than 1,306'*.⁷⁸⁰²

IV.6169. In respect of the decision to take a cover price from Durkan Limited, PG stated *'My decision for going to Durkan [sic] on this one is that, with the exception of probably two others, all the others ... I would have regarded as specialist contractors who in previous years have ... acted as sub contractors to us*

⁷⁷⁹⁶ Leniency application, OFT Document Reference B0734.

⁷⁷⁹⁷ City Road Summary, OFT Document Reference B0867, pages 3 and 4.

⁷⁷⁹⁸ Schedule of cover prices, OFT Document Reference B1402, page 2.

⁷⁷⁹⁹ Written representations of Balfour Beatty, 27 June 2008, paragraph 1.2.

⁷⁸⁰⁰ Peter Goodbun has worked at Mansell for 35 years, becoming Estimating Manager in 1985, interview transcript, OFT Document Reference 11507, page 2.

⁷⁸⁰¹ Interview transcript, OFT Document Reference 11507, pages 11 and 12.

⁷⁸⁰² Interview transcript, OFT Document Reference 11507, page 12.

[Mansell] *in that market and have now sort of moved in to main contracting ... that was the reason ... we elected to take cover on that scheme because there was just no way you were going to compete with specialist contractors*'.⁷⁸⁰³

IV.6170. In their response to the Supplementary Statement, Durkan Limited and Durkan Holdings suggested that PG's evidence was only interpretation of the contemporaneous document and therefore not direct evidence of the exchange, based primarily on his statement that *'the x ... would indicate'* an approach to Durkan Limited for a cover.⁷⁸⁰⁴ The OFT notes, however, that prior to the answer quoted above, PG was asked if he had knowledge of what the notes on the Report meant, to which he replied 'yes'. PG went on to give a detailed explanation of why he chose to approach Durkan for this particular contract, as quoted above in paragraph IV.6169, illustrating his firsthand knowledge of this contract and the contact and exchange of cover price between Mansell and Durkan Limited. It is within this context that his use of the words 'would indicate' cannot be said to imply that his statement was merely an interpretation of the document.⁷⁸⁰⁵ In any event, the OFT sees no reason to doubt the accuracy of the document, such that even if PG were merely giving an explanation of the contents of that document, that would still be of evidential value in explaining the significance of its contents.

IV.6171. In their response to the Supplementary Statement, Durkan Limited and Durkan Holdings also noted that the OFT did not interview PH, the estimator for this tender, such that there was nothing to indicate that this was not merely a *'manuscript note simply recording a name someone else gave him of the estimator at [Durkan Limited] responsible for the tender*'.⁷⁸⁰⁶ The OFT considers that its interview with PG was sufficient to provide supporting evidence and explanation of the contemporaneous documentary evidence for this Infringement, given that PG had direct knowledge of the contact with Durkan Limited. The OFT considers the suggestion that the handwritten note merely records a name given to PH to be contrary to PG's evidence as to what this entry signifies, and also fails entirely to explain why the name has a figure written next to it that is almost identical to the amount bid by Mansell.

IV.6172. In their response to the Supplementary Statement, Durkan Holdings and Durkan Limited further suggested that the notations on the Report could not indicate a cover because PG had stated that Mansell did not record the giving or taking of cover prices.⁷⁸⁰⁷ They noted PG's use of the words *'invariably, no'* in relation to the recording of cover exchanges. Durkan Holdings and Durkan Limited appear to have taken this out of context; the discussion to which they refer primarily related to the absence of a system of recording cover exchanges in Mansell's City Road office, which does not preclude the possibility of an estimator making a note on one of his own tender documents. In any event, PG's answer of *'invariably, no'* was made in relation to Mansell giving, not receiving covers.⁷⁸⁰⁸ Additionally, PG's use of the word 'invariably' does not appear to exclude that there may have been exceptions, as, responding to

⁷⁸⁰³ Interview transcript, OFT Document Reference 11507, page 13.

⁷⁸⁰⁴ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, pages 6, 8 and 9; and oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 6.

⁷⁸⁰⁵ Interview transcript, OFT Document Reference 11507, page 12.

⁷⁸⁰⁶ Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, page 6; and oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 5.

⁷⁸⁰⁷ Oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 6.

⁷⁸⁰⁸ Interview transcript, OFT Document Reference 11507, pages 8 to 9.

another question later in interview, he stated *'Invariably, ah, the, on the morning that the tender went in, on rare occasions maybe the evening or late afternoon of the, the day before...'*.⁷⁸⁰⁹

Contemporaneous documentary evidence from other companies – Durkan Limited – Tender Summary

IV.6173. During a section 27 inspection of Durkan's premises on 24 January 2007, a document relating to this tender was produced.⁷⁸¹⁰ The document shows that Durkan Limited finished fourth out of seven tenders and shows the name *'Brian Sharpe'*.⁷⁸¹¹

Evidence from other companies – Durkan, Durkan Limited, and Durkan Holdings

IV.6174. The OFT had originally understood, mistakenly, that the company involved in this Infringement was another company, Durkan, and not Durkan Limited. The OFT, therefore, wrote to Durkan on 22 March 2007 offering it a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Durkan had participated in bid rigging on this tender. In its response to this letter Durkan informed the OFT that it did not admit that it had engaged in bid rigging activities on this tender.⁷⁸¹² On 5 November 2007, the OFT subsequently wrote to Durkan's ultimate parent company at the time of this Infringement, Durkan Holdings, inviting it to comment on Durkan's response to the OFT's Fast Track Offer, given that the OFT intended to hold Durkan Holdings jointly and severally liable for any infringements committed by Durkan in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Durkan Holdings' legal representatives stated, *'Durkan Holdings will respect the terms of the acceptance made by Durkan Pudelek as described in paragraph 8 of your letter of 5 November 2007 ...'*.⁷⁸¹³

IV.6175. Following the issue of the Statement, which named Durkan (and not Durkan Limited) as having been a party to this Infringement, the OFT received representations from Durkan Holdings⁷⁸¹⁴, as a result of which the OFT concluded that Durkan Limited, and not Durkan, was the Durkan Holdings subsidiary involved in this Infringement. Although Durkan Limited was not named in the Statement, Durkan Holdings' written response to the Statement nevertheless included representations to the effect that Durkan Limited had not engaged in bid rigging in respect of this tender. On 17 October 2008, the OFT therefore wrote to the solicitors acting for Durkan Holdings, Durkan and Durkan Limited to inform them that, in view of Durkan Holdings' representations to the effect that Durkan Limited had not engaged in bid rigging in respect of this tender, and Durkan Holdings' confirmation that it would respect the response that Durkan had given to the OFT's Fast Track Offer (which included a rejection of the OFT's Fast Track Offer in respect of this Infringement) the OFT did not propose to apply any reduction to any financial penalty that the OFT might

⁷⁸⁰⁹ Interview transcript, OFT Document Reference 11507, page 10.

⁷⁸¹⁰ Tender Summary, OFT Document Reference 6119.

⁷⁸¹¹ While the section 27 notice was addressed to Durkan, Durkan shared offices with Durkan Limited and thus a document relating to the Durkan Limited tender was obtained during the Durkan search.

⁷⁸¹² Response from Durkan, OFT Document Reference 10992, page 3.

⁷⁸¹³ Response from Durkan Holdings, OFT Document Reference 13944, page 1.

⁷⁸¹⁴ Written representations of Durkan Holdings, OFT Document Reference SAB019.

impose in respect of Durkan Limited's conduct for this Infringement.⁷⁸¹⁵ A copy of this letter was sent directly to Durkan Limited.

IV.6176. The solicitors acting for all three companies responded on 3 November 2008 arguing that the OFT's Fast Track Offer had not been extended to Durkan Limited, or to Durkan Holdings in its capacity as Durkan Limited's ultimate parent company, for this Infringement and that the companies had not therefore had the opportunity either to accept or to reject the offer.⁷⁸¹⁶ However, the solicitors' response contained further representations clearly denying that Durkan Limited had engaged in bid rigging on this tender, and, in view of this, the OFT therefore explained in its reply to the companies' solicitors dated 25 November 2008, that as a consequence of this denial no reduction would be applied to any financial penalty that might be imposed on Durkan Limited or Durkan Holdings in respect of this Infringement.⁷⁸¹⁷ The OFT did not receive any response to this letter.

IV.6177. In their responses to the Supplementary Statement and the Statement, Durkan Limited and Durkan Holdings suggested that the cover pricing arrangement constituting this Infringement did not match Mansell's description of the usual process for cover exchange as per its leniency application, nor what the OFT described in the Statement as the most common way of calculating cover prices.⁷⁸¹⁸ Specifically, Durkan Limited and Durkan Holdings stated *'the alleged cover for the Claremont Close tender was not agreed by telephone "very, very close to the submission date" and was not recorded in a separate tender document with a "C" next to the name of the competitor – nor what is described by the OFT as the way of calculating cover pricing – e.g., usually 5% above the figure ultimately quoted to the customer'*.⁷⁸¹⁹

IV.6178. The OFT does not consider these arguments valid for the following reasons. The evidence does not specify an exact date on which the cover was agreed, or the method by which it was agreed, and therefore Durkan Limited and Durkan Holdings' assertion that it does not tally with Mansell's 'usual process' (i.e. not by phone very close to the submission date) is without support. There is no reason to believe the 'usual process' was not followed in this case given the absence of any evidence indicating that it was not. The OFT notes that the section of the Statement referenced by Durkan Limited and Durkan Holdings in respect of this argument (equivalent to paragraph IV.500 above) is concerned with PG's description of when an agreement to exchange a cover was made, and not when the actual cover was provided or received. With regard to the absence of a 'C' on the contemporaneous evidence, the OFT notes that Mansell's leniency application made clear that the letter 'C' is only one of the possible ways in which a cover could be recorded.⁷⁸²⁰ Finally, although many companies may have provided covers at around five per cent above their final price to the client, that range could vary beyond that, as is evident from witness interviews including, for example, PG's evidence that Mansell may provide a cover anywhere between five and 15 per cent higher than the bid

⁷⁸¹⁵ OFT letter to Durkan Holdings, OFT Document Reference SAB005.

⁷⁸¹⁶ Response from Durkan Holdings, OFT Document Reference SAB006.

⁷⁸¹⁷ OFT letter to Durkan Holdings, OFT Document Reference SAB007.

⁷⁸¹⁸ Written representations of Durkan Holdings, 27 June 2008, page 16 and written representations of Durkan Holdings and Durkan Limited, 6 February 2009, page 10.

⁷⁸¹⁹ Written representation of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 14.(j).

⁷⁸²⁰ Leniency application, OFT Document Reference B0734, paragraph 3.2.

Mansell submitted.⁷⁸²¹ As the figure in this Infringement is within a five to 15 per cent range, and the totality of the evidence seen by the OFT in connection with this investigation confirms that cover prices may vary as to the level of uplift applied – there is no ‘upper limit’ of 5 per cent or any other level – the OFT does not consider a difference of approximately ten per cent to be any kind of indication against cover pricing having taken place.

IV.6179. In their response to the Supplementary Statement, Durkan Holdings and Durkan Limited also suggested that the timeframe in which the bid would have been finalised did not allow for a cover price to have been given to Mansell.⁷⁸²² Specifically, they stated *'The tender ordinarily would be finalised between 9 and 10am and then dispatched by courier to arrive at its destination by the tender deadline of 12 noon. The amount tendered could change significantly from that table to approval by Brian Sharpe.'*⁷⁸²³ The OFT notes that BS was the contact recorded as providing cover to Mansell, and as the final bid was approved by him, he would have known Durkan Limited's final bid and been able to communicate a cover to Mansell. As covers were generally exchanged by phone, only one or two minutes would have been required to provide the necessary information to Mansell, which allowed Mansell sufficient time to submit its own bid.

IV.6180. Durkan Holdings and Durkan Limited also pointed out that, in their position, a company's only recourse is to provide sworn witness statements confirming that the company did not engage in bid rigging.⁷⁸²⁴ To that end, they have provided multiple witness statements from employees and ex-employees of Durkan Limited.⁷⁸²⁵ The OFT appreciates that a company would not often keep a record of giving a cover price, and in that instance recognises the need to assess the quality of evidence implicating the accused party. The OFT also recognises that where a cover price was given by a sole employee, other employees or directors of that company may not be aware whether or not such conduct took place.

IV.6181. In this case, the OFT considers the presence of a contemporaneous document with the name of Durkan Limited's estimator next to a figure consistent with a cover price, along with the explanation of that document by a Mansell employee and his recollection as to why Durkan Limited was approached for a cover on this tender to be sufficiently strong and compelling. The OFT notes the direct contradiction between the evidence given by PG and witness statements of Durkan Holdings and Durkan Limited employees, who deny that they engaged in bid rigging. However, unlike the Durkan Holdings and Durkan Limited witness evidence, PG's evidence is underpinned by contemporaneous documentation, and is consistent with the markings made on that documentation. Additionally, the OFT notes that BS, the only Durkan Limited employee directly implicated by the contemporaneous document, has declined to sign his witness statement under a statement of truth, although he has stated through his solicitors that he agreed with it.⁷⁸²⁶ In light of those factors the OFT considers, that, on balance, the contemporaneous evidence and

⁷⁸²¹ Interview transcript, OFT Document Reference 11507, page 9.

⁷⁸²² Oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 7.

⁷⁸²³ Oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 7.

⁷⁸²⁴ Oral representations of Durkan Holdings and Durkan Limited, 27 February 2009, page 10.

⁷⁸²⁵ Written representations of Durkan Holdings, 28 June 2008, Annexes 4, 5, and 6.

⁷⁸²⁶ Written representations of Durkan Holdings, 28 June 2008, paragraph 62 and Annex 6.

explanation provided by PG should be preferred to the denial of Durkan Holdings and Durkan Limited.

The OFT's analysis of the evidence and finding

IV.6182. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.6183. Mansell and Durkan Limited each accepted an invitation to tender for this contract.

IV.6184. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract. It appears that Durkan Limited completed the estimating process for this tender and that it submitted a bid with the hope of winning the work.

IV.6185. The Report provided by Mansell shows 'X', next to the entry for '*Durkan Ltd*' and a handwritten note '*Brian Sharpe*' and a figure '*£1,306,000*'. Mansell confirmed that this shows that it took a cover price from Durkan Limited and in interview PG confirmed that this was written by the estimator for this tender and that it shows that Mansell took a cover price from Durkan Limited.

IV.6186. PG confirmed that the figure '*£1,306,000*' was the cover price given by Durkan Limited and that Mansell added a small amount to this cover price in order to arrive at its tender figure. PG also confirmed that BS would have been the contact at Durkan Limited. The document provided by Durkan Limited also names BS, confirming that he was in some way connected at Durkan Limited to this tender.

IV.6187. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Durkan Limited, the pattern consistent with a cover price having been provided.

IV.6188. The OFT therefore concludes that contact took place between Mansell and Durkan Limited. The OFT also concludes that Durkan Limited supplied a figure to Mansell for a cover bid.

IV.6189. The OFT is satisfied that the facts set out in paragraphs IV.6161 to IV.6188 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁸²⁷ In particular:

- (a) the provision of a figure for a cover bid from Durkan Limited to Mansell was not unilateral⁷⁸²⁸, and contravenes the principle against direct or indirect contact between competitors;⁷⁸²⁹
- (b) Mansell can be presumed to have taken account of the information received from Durkan Limited (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁸³⁰ and

⁷⁸²⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁸²⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁸²⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁸³⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Durkan Limited can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁸³¹

IV.6190. In its response to the Supplementary Statement, Durkan Limited and Durkan Holdings object to the OFT's reliance on presumptions, arguing that *'The facts relied on by the OFT are unreliable and inconclusive. This is why the OFT can use them as a basis for nothing more than a presumption on its part that [Durkan Limited] was engaged in cover pricing. An analysis of the OFT's interpretation of the facts shows that the OFT is wrong to make presumptions on the basis of the evidence it has adduced'*.⁷⁸³² However, the OFT is satisfied on the evidence that Durkan Limited provided a cover price to Mansell (for reasons given above). As such, the OFT notes that the presumption that an undertaking involved in an exchange of information with a competitor and who acts on the market, for example by submitting a tender, is a legal presumption⁷⁸³³, and the OFT is therefore not required to adduce evidence in support of this. The OFT does not consider that Durkan Limited has rebutted the application of the presumption in this case.

IV.6191. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Durkan Limited in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for external structural refurbishment at 13 – 42 Claremont Close, London, tender deadline 29 March 2005.

Immunity and leniency assessment

IV.6192. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6193. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 221: Extension and Refurbishment at Oaklands Sports Centre, York
 – 1 April 2005**
Client: City of York Council
Parties: Strata and F Parkinson

IV.6194. On 22 February 2005, the City of York Council sought tenders for an extension and refurbishment works at Oaklands Sports Centre, York.⁷⁸³⁴ The

⁷⁸³¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁸³² Written representations of Durkan Holdings and Durkan Limited, 6 February 2009, paragraph 14(h) to (i).

⁷⁸³³ See paragraphs III.58, III.59 and III.96 of the Legal Background section.

⁷⁸³⁴ Information from client, OFT Document Reference 7404.

following six companies were invited to tender: Oakapple Estates, Linton, Rainton Construction Ltd, WM Birch, F Parkinson and Strata.⁷⁸³⁵ The tender deadline was 12:00 noon on 1 April 2005.⁷⁸³⁶

IV.6195. The City of York Council received the following tender returns:⁷⁸³⁷

Company	Time & Date Tender Received ⁷⁸³⁸	Amount of tender	Awarded contract
Oakapple Estates	Time not available, 1 April 2005	£1,484,714.96	
Linton	Time not available, 1 April 2005	£1,196,307.00	
Rainton Construction Ltd	No Tender Returned	N/A	
WM Birch	Time not available, 1 April 2005	£1,169,206.00	Yes
F Parkinson	Time not available, 1 April 2005	£1,209,772.00	
Strata	Time not available, 1 April 2005	£1,249,850.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Tracking document

IV.6196. During the OFT's search of Strata's premises a number of 'Estimating Tracking' documents were found. The tracking document contained the following entries in respect of this tender: ⁷⁸³⁹

Tender no	Year	Status	Estimator	Date Received	Return Date	Contract period	Tender Type
12	05	T	C	28 February 2005	1 April 2005	45 wks Commencing 17 May 05	B/Q

Project Description	Client/Employer	Approximate Value	Tender Value	Competitors
Oaklands Sports Centre	York Council	£2,000,000.00	£1,249,850 (Cover Taken from Parkinsons)	Parkinson Wm Birch

Next action	By	Date
8 Tenderers		

⁷⁸³⁵ Information from client, OFT Document Reference 7404.

⁷⁸³⁶ Information from client, OFT Document Reference 7404.

⁷⁸³⁷ Information from client, OFT Document Reference 7404.

⁷⁸³⁸ Information from client, OFT Document Reference 7405. It is not apparent to the OFT at which time each tender was received.

⁷⁸³⁹ Estimating tracking document, OFT Document Reference 3184, page 1.

Evidence from leniency applicant – Strata

IV.6197. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file ‘Covers from Jan 2000 to Dec 2001’ and ‘contracts in hand’ documents. This list included the following entry:⁷⁸⁴⁰

Date	Project	Strata ref no	Cover to
01/04/2005	Extension and Refurb of Oaklands Sports Centre for York City Council	T02/05	

Cover from	Company Name	Company Address
✓	Parkinsons	York?

IV.6198. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant - Strata

IV.6199. During interviews conducted in connection with its leniency application, Strata’s past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.6200. During an interview conducted on 28 March 2007 in connection with its leniency application Paul Throssell (‘PT’), estimator of Strata, was shown the estimating tracking document and the reference to ‘Cover taken from Parkinsons’ and was asked if this indicated that Strata had taken a cover price from F Parkinson. PT replied ‘Definitely’.⁷⁸⁴¹ PT also said that the cover price would have been obtained under the usual circumstances and could not recall anything about the contact except ‘other than the usual phone call ...’.⁷⁸⁴²

Evidence from other companies – F Parkinson

IV.6201. The OFT wrote to F Parkinson on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that F Parkinson had participated in bid rigging on this tender. In response to this letter F Parkinson admitted ‘We engaged in bid rigging activities on this tender with Strata’.⁷⁸⁴³

IV.6202. The OFT subsequently wrote to F Parkinson’s ultimate parent company at the time of this Infringement, Mowbray, on 5 November 2007, asking it to comment on F Parkinson’s response to the OFT’s Fast Track Offer, given that the OFT intended to hold Mowbray jointly and severally liable for any infringements committed by F Parkinson in respect of which the OFT ultimately decided to impose financial penalties. During a telephone call in response to this

⁷⁸⁴⁰ Leniency Schedule, OFT Document Reference, 4058.

⁷⁸⁴¹ Interview transcript, OFT Document Reference 11382, page 11.

⁷⁸⁴² Interview transcript, OFT Document Reference 11382, page 11.

⁷⁸⁴³ Schedule provided by F Parkinson, OFT Document Reference 10270, page 3.

letter, Colin Oakley, a Director of Mowbray stated that he was aware of the original Fast Track letter and F Parkinson's response and fully supported the position of its subsidiary, F Parkinson.⁷⁸⁴⁴

IV.6203. In its response to the Statement, F Parkinson confirmed that they have '*...accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement [in respect of this Infringement]*'.⁷⁸⁴⁵

The OFT's analysis of the evidence and finding

IV.6204. From the evidence presented above, the OFT draws the following conclusions.

IV.6205. Strata and F Parkinson each accepted an invitation to tender for the contract for an extension and refurbishment at Oaklands Sports Centre, York.

IV.6206. Both companies submitted a tender. Strata was unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.6207. Strata's tracking document records '*£1,249,850.00 (Cover Taken from Parkinsons)*', typed in the tender value column. Also '*C*' is typed in the estimator column. Strata confirmed that the '*C*' typed in the estimator column and the note in the tender value column records that it received a cover price from F Parkinson. The OFT considers in the light of the contemporaneous evidence from Strata and PT's admission and explanation of the contemporaneous evidence that F Parkinson supplied Strata with a cover price for this tender.

IV.6208. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that F Parkinson admitted that the party with whom it engaged in bid rigging was Strata, without being shown the OFT's evidence that Strata was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.6209. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by F Parkinson, the pattern consistent with a cover price having been provided.

IV.6210. The OFT therefore concludes that contact took place between Strata and F Parkinson. The OFT also concludes that F Parkinson supplied a figure to Strata for a cover bid.

IV.6211. The OFT is satisfied that the facts set out in paragraphs IV.6196 to IV.6211 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁸⁴⁶ In particular:

- (a) the provision of a figure for a cover bid from F Parkinson to Strata was not unilateral⁷⁸⁴⁷, and contravenes the principle against direct or indirect contact between competitors;⁷⁸⁴⁸

⁷⁸⁴⁴ File note of telephone conversation, OFT Document Reference 13952.

⁷⁸⁴⁵ Written representations of F Parkinson, 25 June 2008, paragraph 4.

⁷⁸⁴⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁸⁴⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁸⁴⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- (b) Strata can be presumed to have taken account of the information received from F Parkinson (i.e the cover price) when determining its own conduct in the tendering process;⁷⁸⁴⁹ and
- (c) F Parkinson can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁸⁵⁰

IV.6212. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between F Parkinson and Strata, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the extension and refurbishment at Oaklands Sports Centre, York, tender deadline 1 April 2005.

Immunity and leniency assessment

IV.6213. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6214. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, Strata will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 222: Refurbishment of Old Hall, Dersingham, Kings Lynn, Norfolk – 4 April 2005

Client: Pigeon Holdings Ltd

Parties: Jackson⁷⁸⁵¹ and R G Building⁷⁸⁵²

IV.6215. On 22 February 2005, Pigeon Holdings Ltd sought tenders for the Refurbishment of Old Hall, Dersingham, Kings Lynn, Norfolk. The return date for the tender was 4 April 2005 and six companies were invited to tender: Chalcroft Construction, R G Building, Jackson, Barnes Construction, Kier Eastern (a trading division of Kier) and J S Hay.

IV.6216. Pigeon Holdings Ltd received the following tender returns by 12:00 noon on 4 April 2005:⁷⁸⁵³

⁷⁸⁴⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁸⁵⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁸⁵¹ Jackson is a subsidiary of Propensity.

⁷⁸⁵² R G Building and R G Carter are both subsidiaries of R G Holdings. The OFT notes that the client's response indicated that 'R G Carter' tendered for this contract. However in its written representations on the Statement, R G Carter stated '*[a]mong the six companies invited to tender for the works to refurbish Old Hall at Dersingham was R G Carter Building Limited*' (27 June 2008, paragraph 2.104). In this Infringement description, the OFT has therefore referred to R G Building other than for the replication of contemporaneous evidence. However for the avoidance of doubt, where R G Building appears in the description of this Infringement and the OFT's consequent findings, this should be taken to mean R G Carter or R G Building as appropriate, if they were the Participant Company. The OFT also notes that in any event, R G Carter and R G Building both formed part of the same undertaking, and the Party as defined in paragraph I.1 above would therefore be liable for their actions.

Company	Date and time tender received	Amount of tender	Awarded the tender
Chalcroft Construction	By 12:00 Noon 4 April 2005	£1,587,538.00	Yes
R G Building	By 12:00 Noon 4 April 2005	£1,600,890.07	
Jackson	By 12:00 Noon 4 April 2005	£1,699,153.00	
Barnes Construction	By 12:00 Noon 4 April 2005	£1,708,452.23	
Kier Eastern	By 12:00 Noon 4 April 2005	£1,721,017.00	
J S Hay	By 12:00 Noon 4 April 2005	£2,096,358.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson Tender Book

IV.6217. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten:⁷⁸⁵⁴

Enquiry Number	Date Received	Employer	Location	Description of Works
E3956	23.2.05		Dersingham	Conversion of Hall to Dwellings

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
3 Of 6	£1,608,058	£1,699,153 Cover from Carters	C	4.4. 23.3.05 JBS

IV.6218. In its response to the Statement, R G Carter stated '*clearly the tender book does not constitute "contemporaneous" evidence. According to John Rhodes' statement, the relevant details might have been added a month after the bid was submitted*'.⁷⁸⁵⁵ The OFT accepts that John Rhodes ('JR') confirmed he would not necessarily write the cover price in the tender book at the exact same time it was received. However, JR did indicate that he would record the figure on Jackson's formal tender submission, and the amount tendered would then be reflected in the tender book.⁷⁸⁵⁶ There was therefore no lapse of time between receiving the figure and writing it down such as might cast doubt upon the accuracy of the written figure when it is reflected in the tender book. The interview evidence clearly shows that tender book was completed in the normal course of business at or around the time the tenders it recorded were submitted.

IV.6219. In its response to the Statement, R G Carter also stated '*[t]he Jackson tender book states that the lowest tender was £1,608,058; in fact, the information provided to the OFT by the client indicates that the lowest tender was*

⁷⁸⁵³ Information from client, OFT Document Reference 7554.

⁷⁸⁵⁴ Tender register, OFT Document Reference A0905, page 67.

⁷⁸⁵⁵ Written representations of R G Carter Group, 27 June 2008, paragraph 2.106.

⁷⁸⁵⁶ Interview transcript, OFT Document Reference 11347, pages 11 and 12.

*£1,587,538. There is no tender figure of £1,608,058. The entry of £1,608,058 is clearly not R G Carter Building's price (which was £1,600,890.07).*⁷⁸⁵⁷ The OFT accepts that the figure recorded in the 'lowest tender' column for this tender does not correspond to the lowest figure submitted to the client. However, it does not agree that this undermines the evidential value of the tender book. The OFT does not consider it necessary to speculate as to why this particular entry in the tender book may be inaccurate; it cannot see that any explanation of this inaccuracy would also account for the entry '*Cover from Carters*' in respect of this tender, or render that entry inaccurate.

IV.6220. In respect of the entry '*Cover from Carters*', R G Carter stated in its response to the Statement that it '*...could mean that Jackson wished to obtain a cover from R G Carter, or that it sought a cover price from R G Carter or that it used information concerning R G Carter's bid to provide a cover. It does not, however, demonstrate that R G Carter provided a cover price...*'⁷⁸⁵⁸ in respect of this Infringement.

IV.6221. The OFT does not accept this assertion, in view of JR's express confirmation in interview that the '*Cover from Carters*' entry in the tender book meant that Jackson received a cover price from R G Building and submitted that cover price to the client⁷⁸⁵⁹ (see further below).

Evidence from leniency applicant Propensity

IV.6222. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs above IV.537 to IV.566 and is relied upon by the OFT in relation to this tender.

Witness evidence from leniency applicant Propensity

IV.6223. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6224. JR, Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender book⁷⁸⁶⁰ and that in most instances he would have arranged the cover price.⁷⁸⁶¹ JR said in respect of the entry in the tender book for this tender, '*Jackson's entered a bid with some assistance from Carters at £1.7 million*'.⁷⁸⁶² JR also confirmed that the price that Jackson submitted for this tender was the cover price received from R G Building.⁷⁸⁶³

IV.6225. In its response to the Statement, R G Carter noted that JR '*fails to express his own recollection of the alleged events in question: he simply appears to be*

⁷⁸⁵⁷ Written representations of R G Carter, 27 June 2008, paragraph 2.107.

⁷⁸⁵⁸ Written representations of R G Carter, 27 June 2008, paragraph 2.121.

⁷⁸⁵⁹ Interview transcript, OFT Document Reference 11347, page 23.

⁷⁸⁶⁰ Interview transcript, OFT Document Reference 11347, page 10.

⁷⁸⁶¹ Interview transcript, OFT Document Reference 11347, page 11.

⁷⁸⁶² Interview transcript, OFT Document Reference 11347, page 23.

⁷⁸⁶³ Interview transcript, OFT Document Reference 11347, page 23.

*interpreting what was written in the tender register...*⁷⁸⁶⁴ and that PW, the estimator for this project at R G Buildings, had no knowledge of JR.⁷⁸⁶⁵

IV.6226. The OFT accepts that JR's evidence may not constitute independent recollection of the events surrounding this tender. However, to the extent that it does not, the OFT does not consider that that undermines his evidence. Given the number of tenders JR dealt with (as indicated by Jackson's tender book, maintained by JR⁷⁸⁶⁶), the OFT accepts that it is unlikely that he would remember every single tender in detail, particularly one that had been pre-determined not to be of high priority and therefore on which the least possible amount of effort had been expended. This does not preclude that he is able to provide an explanation of the contemporaneous documentation and in particular entries confirmed to be in JR's own handwriting. The weight placed by the OFT on JR's evidence is commensurate with its explanatory nature.

Evidence from other companies – R G Building

IV.6227. The OFT wrote to R G Building's immediate parent company R G Construction Limited ('R G Construction') on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that R G Construction had participated in bid rigging on this tender.⁷⁸⁶⁷ In response to this letter, R G Construction was unable to accept the OFT's offer and said that '*Our investigations have not disclosed any evidence of conduct to which you refer*'.⁷⁸⁶⁸

IV.6228. The OFT subsequently wrote R G Building's ultimate parent company at the time of this Infringement, R G Holdings, on 6 November 2007, asking it to comment on R G Construction's response to the OFT's Fast Track Offer, given that the OFT intended to hold R G Holdings jointly and severally liable for any infringements committed by its subsidiaries in respect of which the OFT decided to impose financial penalties. In response to this letter, R G Holdings said it had '*...nothing further to add*'.⁷⁸⁶⁹

IV.6229. In its response to the Statement R G Carter made general representations as to how, as a business, it ensures it has the resources to price the tenders it receives, and as to its success rate in invitations to tender.⁷⁸⁷⁰ The OFT accepts that the evidence currently available suggests that R G Building tend to price tenders properly. However, the present Infringement relates to the provision of a cover price, not the acceptance of one. Though the OFT has found, in paragraph IV.73 above, that the motive for providing cover prices was usually

⁷⁸⁶⁴ Written representations of R G Carter, 27 June 2008, paragraph 2.122.

⁷⁸⁶⁵ Written representations of R G Carter, 27 June 2008, paragraph 2.115; witness statement of Paul Whittall, page 2.

⁷⁸⁶⁶ Tender register, OFT Document Reference A0905.

⁷⁸⁶⁷ The OFT made the Fast Track Offer to R G Construction on the basis of information available to it at the relevant time. As R G Building is a wholly owned subsidiary of R G Construction, the OFT does not consider it material that the Fast Track Offer was not addressed to R G Building itself. In any event, the companies in the R G Carter Group made joint representations in response to the Statement, and stated that no evidence had been found to suggest that a cover price had been provided to a competitor. The OFT concludes that none of the companies making up the R G Carter Group were willing to admit participation in bid rigging activities in relation to this tender.

⁷⁸⁶⁸ Response from R G Construction, OFT Document Reference 10784.

⁷⁸⁶⁹ Response from R G Holdings, OFT Document Reference 14103.

⁷⁸⁷⁰ Written representations of R G Carter, 27 June 2008, paragraphs 2.4 to 2.13, and 2.19 to 2.21.

reciprocity, it notes that other motives, including facilitating a reduction in the number of competing bids, are also possible and it is not necessary to establish exactly, or even to speculate, what a company's motive might have been for providing a cover price. Where the evidence indicates that a cover price has been provided, the OFT considers that sufficient for a finding of an infringement.

IV.6230. In its response to the Statement, R G Carter provided a witness statement from PW, who stated in respect of this tender *'I do not recognise the name John Rhodes. He is not someone I can recall ever having met, spoken to or heard of before. I have no recollection of him speaking to me (or me to him) in relation to this tender or at all...I did not provide cover prices as has been alleged in either of these cases [Infringements 210 and 222]'*.⁷⁸⁷¹

IV.6231. The OFT notes the direct contradiction between this witness evidence and the contemporaneous evidence and overall explanation provided by JR in respect of the tender book and his specific explanation of the entry relating to this tender. On balance, the OFT considers the latter to be more compelling. JR's evidence is consistent with the markings in the tender book, in particular with the entry *'Cover from Carter'* for which R G Building have not provided an alternative plausible explanation. Further, in relation to certain other Infringements described in this Decision, the entries in Jackson's tender book indicating that cover prices were accepted have been confirmed to be correct by admissions (and sometimes independent corroborating evidence) from other Parties.⁷⁸⁷² The OFT further notes the possibility that the cover price may have been provided by someone at R G Building other than the estimator for the tender in question, PW. In light of those factors, the OFT considers that the contemporaneous evidence and explanation of JR should be preferred to that of PW.

The OFT's analysis of the evidence and finding

IV.6232. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.6233. Jackson and R G Building each accepted an invitation to tender for this contract.

IV.6234. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6235. In regard to R G Building, Jackson's tender book states, *'£1,699,153 Cover from Carters'*. Propensity has confirmed that this shows that it received a cover price from R G Building. Jackson recorded in the tender book the figure *'£1,699,153'* as the tender figure and this was the figure that Jackson submitted for this tender.

IV.6236. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by R G Building, a pattern consistent with a cover price having been provided.

⁷⁸⁷¹ Witness statement of Paul Whittall, page 2.

⁷⁸⁷² See, for example, Infringements 103, 119, 191 and 232.

IV.6237. In its response to the Statement R G Carter stated that *'The evidence that the tender submitted by Jackson was higher than the tender submitted by R G Carter, which the OFT suggests as being consistent with a cover price having been provided by R G Carter, is not persuasive as representing evidence that R G Carter provided a cover price'*.⁷⁸⁷³ The OFT notes that this analysis is not relied upon in evidence and merely sets out that the pattern of the tender bids was consistent with a cover price having been provided by R G Building to Jackson.

IV.6238. R G Building also suggested that the pattern of bids was consistent with *'Jackson having obtained a cover price from parties other than R G Carter'*.⁷⁸⁷⁴ The OFT accepts that the pattern would be also be consistent with Jackson having obtained a cover price from Chalcroft Construction rather than R G Building, but notes there is absolutely no evidence of this and that this alternative explanation is contrary to the tender book entry *'Cover from Carters'*.

IV.6239. The OFT therefore concludes that contact took place between R G Building and Jackson. The OFT also concludes that R G Building supplied a figure to Jackson for a cover bid.

IV.6240. The OFT is satisfied that the facts set out in paragraphs IV.6217 to IV.6239 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁸⁷⁵ In particular:

- (a) the provision of a figure for a cover bid from R G Building to Jackson was not unilateral⁷⁸⁷⁶, and contravenes the principle against direct or indirect contact between competitors;⁷⁸⁷⁷
- (b) Jackson can be presumed to have taken account of the information received from R G Building (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁸⁷⁸ and
- (c) R G Building can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁸⁷⁹

IV.6241. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and R G Building, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the Refurbishment of Old Hall, Dersingham, Kings Lynn, Norfolk, tender deadline 4 April 2005.

Immunity and leniency assessment

IV.6242. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100

⁷⁸⁷³ Written representations of R G Carter, 27 June 2008, paragraph 2.123.

⁷⁸⁷⁴ Written representations of R G Carter, 27 June 2008, paragraph 2.123.

⁷⁸⁷⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁸⁷⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁸⁷⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁸⁷⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁸⁷⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6243. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Alleged Infringement 223: Not included in the Decision

Infringement 224: Refurbishment, 12 & 16 Redlands Road, Reading – 27 May 2005

Client: University of Reading
Parties: Mansell and A H Willis

IV.6244. On 5 May 2005 the University of Reading sought tenders for conversion to flats, 12 & 16 Redland Road.⁷⁸⁸⁰ The following five companies were invited to tender: A H Willis, Cavendish Construction, Crown Construction & Interiors Ltd, Francis and Mansell. The date and time of tender return was 27 May 2005 at 12:00 noon.⁷⁸⁸¹

IV.6245. The invitation to tender was addressed, amongst others, to '*Mark Willis, A H Willis & Sons*'.⁷⁸⁸²

IV.6246. The University of Reading received the following tender returns:⁷⁸⁸³

Company	Date & Time tender received	Amount of tender	Awarded contract
A H Willis	27 May 2005 at 12:00 noon	£430,560.00	YES
Mansell	27 May 2005 at 12:00 noon	£455,705.00	
Crown Construction & Interiors Ltd	27 May 2005 at 12:00 noon	£533,770.00	
Cavendish Construction	27 May 2005 at 12:00 noon	£574,930.00	
Francis	27 May 2005 at 12:00 noon	£603,298.00	

IV.6247. The Form of Tender submitted by A H Willis consisted of a two page document. The first page was a typed standard-form offer to carry out works, with tender details such as the price, date of commencement of work and daywork rates completed in handwriting. The signature box at the bottom of the first page of the Form of Tender was completed as follows (printed entries are denoted in bold type, and manuscript entries in italics):⁷⁸⁸⁴

⁷⁸⁸⁰ Information from client, OFT Document Reference 9857.

⁷⁸⁸¹ Information from client, OFT Document Reference 9857.

⁷⁸⁸² Information from client, OFT Document Reference SAD001.

⁷⁸⁸³ Information from client, OFT Document Reference 9857.

⁷⁸⁸⁴ Information from client, OFT Document Reference SAD002.

Signed: C.F. Elbourn
27/5/05

Date:

On behalf of: A. H. WILLIS & SONS LTD.

Name:

Address: WILMAR GAINFIELD
BUCKLAND FARINGDON
OXON'

The second page consisted of a handwritten summary of costs, totalling £430,560.00. The handwriting on the first and second pages was consistent with that in the signature box.

IV.6248. The University of Reading's consultants subsequently requested full priced Schedules of Work from A H Willis and Mansell, which were received on 3 June 2005.⁷⁸⁸⁵

IV.6249. The Schedule of Works submitted by A H Willis consisted of a three-page cover document headed '*A H WILLIS & SONS, 12 – 16 REDLANDS ROAD, TENDER SUMMARY*' which has a 'received' stamp, dated 3 June 2005, on the first page. This document was entirely handwritten and contained a list of figures for preliminaries, builders work, sub contractors and margin, giving a total tender amount.⁷⁸⁸⁶ Attached to this were two 24-page documents (one for 12 Redlands Road and one for 16 Redlands Road). Both documents consisted of a typed itemised lists of works with a column marked 'cost' on the right hand side of each page, in which figures were entered in handwriting. The handwriting is consistent throughout these three documents (save for the correction of several figures towards the end of the handwritten document) and corresponds to the handwriting on A H Willis's Form of Tender.⁷⁸⁸⁷

IV.6250. On 27 June 2005, the University's consultants wrote to Mark Willis at A H Willis, enclosing the contract documents for the project and requesting that Mark Willis sign and return them.⁷⁸⁸⁸

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.6251. As part of its leniency application, Mansell's legal representatives provided Barry Russ's ('BR'), a Mansell managing estimator, workload reports. The 2005 workload report for special projects contained the following entry:⁷⁸⁸⁹

⁷⁸⁸⁵ Information from client, OFT Document Reference SAD003.

⁷⁸⁸⁶ Information from client, OFT Document Reference SAD004.

⁷⁸⁸⁷ Information from client, OFT Document Reference SAD002.

⁷⁸⁸⁸ Information from client, OFT Document Reference SAD005.

⁷⁸⁸⁹ 2005 workload report for special projects, OFT Document Reference B3539, page 5.

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
	Reading Univ – Refurb 12 & 16 redlands Road		455706	455706		

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
			2/5		(AH Willis) (HN Edwards won it)

Evidence from leniency applicant Mansell

IV.6252. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁷⁸⁹⁰ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.6253. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from A H Willis and that this cover price was taken due to *‘insufficient tender period: resource’* at Mansell.⁷⁸⁹¹

IV.6254. Following the issue of the Statement, Mansell did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Mansell

IV.6255. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell’s participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.6256. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *‘... Willis were approached and they helped us out with a cover’*.⁷⁸⁹²

Evidence from other companies – A H Willis

IV.6257. The OFT wrote to A H Willis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that A H Willis had participated in bid rigging on this tender. In response to that letter A H Willis stated that it *‘does not believe that it has been involved in bid rigging on any of these projects’*.⁷⁸⁹³

⁷⁸⁹⁰ Leniency application, OFT Document Reference B0734.

⁷⁸⁹¹ Tendering activities table, OFT Document Reference B1351, page 1.

⁷⁸⁹² Interview transcript, OFT Document Reference 11516, page 38.

⁷⁸⁹³ Response from A H Willis, OFT Document Reference 10203, page 3.

IV.6258. As part of its response to that letter A H Willis described its relationship with Cyril Elbourn ('CE'), as follows:

'Cyril is a freelance costs estimator/quantity surveyor who works for a number of clients, though it would be fair to say that most of his time is in fact spent working for [A H Willis]. He has been working for [A H Willis] for the past 4 years'.⁷⁸⁹⁴

IV.6259. In respect of this tender, A H Willis advised that:

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

Subsequently AHW was advised that its bid was the lowest and it was invited to provide a fuller breakdown of that bid, which it duly did. Cyril then received another telephone call from Mr Russ in which he was told that Mansells' bid had in fact been the second lowest and they too had been invited to provide a breakdown of their bid. Mr Russ pointed out that he was in difficulty doing this as he had not calculated their original bid. He asked Cyril to help him once more. Cyril then provided Mr Russ with a photostat of the breakdown that he had produced for his own bid and submitted to the University. He did not produce a further breakdown for Mr Russ' use'.⁷⁸⁹⁵

IV.6260. In summary A H Willis's solicitors advised that the activities of CE in respect of this tender *'does not amount to bid rigging by our client'*. They stated *'...Cyril is a freelance contractor. He is not an officer or even an employee of our client company'.⁷⁸⁹⁶*

IV.6261. In its response to the Statement, A H Willis repeated the information provided in its response to the OFT's Fast Track Offer in respect of CE's capacity, to the effect that *'as a third party contractor who was hired by A H Willis on a job by job basis, CE was entitled to (and would in the ordinary course of business) provide estimating services to parties other than A H Willis'.⁷⁸⁹⁷* A H Willis went

⁷⁸⁹⁴ Response from A H Willis, OFT Document Reference 10203, page 5.

⁷⁸⁹⁵ Response from A H Willis, OFT Document Reference 10203, page 4.

⁷⁸⁹⁶ Response from A H Willis, OFT Document Reference 10203, page 5.

⁷⁸⁹⁷ Written representations of A H Willis, 27 June 2008, paragraph 3.

on to state that CE assisted Mansell in preparing figures for their bid having already completed work on A H Willis' bid, and without A H Willis' knowledge that he was doing so.⁷⁸⁹⁸

- IV.6262. The OFT notes that the evidence from Mansell (at IV.6253 and IV.6256 above) is that a cover price was taken. It is not that CE was engaged to prepare a bid for Mansell to submit. A H Willis accepts that the further breakdown of figures provided by A H Willis to the client was also copied to Mansell such that Mansell submitted to the client figures based on A H Willis' bid rather than on its own genuine cost information. The OFT therefore considers there to be strong and compelling evidence that information was disclosed by CE to Mansell, and A H Willis does not appear to contest this.
- IV.6263. As to whether CE disclosed the information to Mansell with the knowledge of A H Willis, the OFT does not accept that this is the relevant legal test. The question is rather whether CE did so as an agent of A H Willis. The OFT considers that in this case CE acted with the ostensible authority of A H Willis and does not accept A H Willis' arguments in its response to the Fourth Supplementary Statement to the contrary.⁷⁸⁹⁹ In particular, the OFT notes BR's recollection that 'Willis', rather than CE, was approached for a cover and the fact that Mansell's 2005 workload report records '(AH Willis)', in the Remarks column, to indicate that Mansell had taken a cover from A H Willis, rather than CE acting on his own behalf. Thus the source of the cover price is given as A H Willis. In addition, according to A H Willis's own account of events, Mansell originally asked CE to request an extension from the client. This provides further evidence that Mansell considered that CE represented A H Willis, as there would otherwise be no value in CE (on his own behalf) requesting an extension from the client. On that basis the OFT considers it clear that Mansell considered CE to have the ostensible authority of A H Willis in its dealings with him.
- IV.6264. In its response to the OFT's Fast Track Offer, A H Willis also stated that *'the bid was keenly priced because our client was convinced that that represented its only chance of beating Crown Construction'*⁷⁹⁰⁰ who had already been awarded a contract in respect of buildings in the same street and who, it was anticipated, would have logistical and cost advantages in bidding for this contract.
- IV.6265. Further, in its response to the Statement, A H Willis repeated that its tender bid had been submitted to the University of Reading prior to giving Mansell a cover price, in essence arguing that (to the extent that it could be liable for CE's actions) it should not be presumed to have acted in the market on the basis of the information that Mansell would not be submitting a competitive bid.⁷⁹⁰¹
- IV.6266. The OFT notes that, as stated in paragraphs III.53 to III.54 above, the mere receipt of information that Mansell would not be bidding competitively may be sufficient to establish a concerted practice.⁷⁹⁰² Further, as stated in paragraph

⁷⁸⁹⁸ Written representations of A H Willis, 27 June 2008, paragraph 19.g to i.

⁷⁸⁹⁹ Written representations of A H Willis, 21 April 2009, paragraph 18.

⁷⁹⁰⁰ Response from A H Willis, OFT Document Reference 10203, page 5.

⁷⁹⁰¹ Written representations of A H Willis, 27 June 2008, paragraphs 19.f and 23.

⁷⁹⁰² Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035 at paragraph 58, upheld by the ECJ in Case C-359/01P *British Sugar plc v Commission* [2004] ECR I-4933, citing Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT

III.58, the ECJ has held that '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 the market...'.⁷⁹⁰³

IV.6267. On that basis, the OFT does not need to show that A H Willis inflated its bid (or otherwise altered its own conduct) in response to the knowledge that Mansell had accepted a cover price in order to establish that there has been an infringement of the Chapter I prohibition. It is entitled to rely on a presumption that A H Willis has acted (either directly or through its agent) on the information received.

IV.6268. The OFT notes that on A H Willis' own account '**a few days before the deadline date for bid submission, Cyril received a telephone call from someone named Barry Russ at Mansells ... Cyril said that he had nearly finished preparing their bid ... A short while later Mr Russ called again ... Cyril agreed to help**' (emphasis added) the second telephone call from Mansell requesting a cover price appears to have been made prior to the date of the tender deadline. The OFT does not therefore accept that A H Willis has satisfactorily rebutted the legal presumption that it acted upon the knowledge that Mansell had accepted a cover price.

IV.6269. Moreover, an undertaking may 'take account' of the information it receives from a competitor in a number of ways when determining its conduct in relation to this or future tenders, so even if the OFT were to accept A H Willis's assertion that the cover pricing did not affect its actual price submitted (which is not the case), that would be insufficient to demonstrate that the conduct fell short of an agreement and/or concerted practice in breach of the Chapter I prohibition. In this regard, the OFT also notes that CE, the individual who received the information from Mansell and whom the OFT considers to form part of one undertaking together with A H Willis, continued to prepare tenders on behalf of A H Willis until at least 2007 (see paragraph IV.6258).

The OFT's analysis of the evidence and finding

IV.6270. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

Cyril Elbourn and A H Willis formed part of the same undertaking

IV.6271. CE was engaged by A H Willis as a costs/estimator/quantity surveyor in relation to the preparation of this tender and other tenders in the period 2003 to 2007.⁷⁹⁰⁴

4, at paragraph 200; *JJB Sports plc v OFT and AllSports Ltd v OFT* [2004] CAT 17, at paragraph 159; *Argos Limited & Littlewoods Limited v OFT* [2004] CAT 24, at paragraph 155.

⁷⁹⁰³ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 121; Case C-199/92 P *Hüls* [1999] ECR I-4287, at paragraph 162; and Cases T-25/95 etc *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, at paragraphs 1865 and 1910. See also *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 206(x); followed in *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 103(x).

⁷⁹⁰⁴ See paragraph IV.6258.

- IV.6272. A H Willis explicitly consented to CE generating and signing tender returns on its behalf⁷⁹⁰⁵, and CE did in fact generate and sign tender returns on behalf of A H Willis, including that submitted to the University of Reading in relation to this tender. This is demonstrated by the fact that the invitation to tender for this project was addressed to Mark Willis, but the tender return was filled in and signed by CE and, following a subsequent request from the client, CE also completed a Schedule of Works and Tender Summary. A H Willis therefore authorised CE in advance to act on its behalf in dealing with the client. In addition, by entering into the contract with the client, A H Willis ratified CE's actions in submitting tender documentation to the client.
- IV.6273. In its response to the Supplementary Statement⁷⁹⁰⁶, A H Willis stated that although CE was authorised to submit tenders on its behalf on a case by case basis, CE had no discretion and no authority to negotiate or conclude contracts on its behalf.⁷⁹⁰⁷ However, the submission of a tender is an offer to the customer to perform services at a given price and the tender documentation is typically incorporated by reference into the final contract. As such, the OFT considers that by authorising CE to sign and submit tender returns on its behalf, A H Willis was involving him in the process of negotiating and concluding a contract with a customer.
- IV.6274. The OFT concludes that A H Willis expressly or impliedly consented to CE communicating with third parties on its behalf, including through the submission of tender documentation which forms part of the negotiation of a contract for services between A H Willis and a client. As such, the OFT concludes that CE acted as an agent of A H Willis. In its response to the Supplementary Statement, A H Willis stated that CE *'was not ... a sales agent, since his role was not to negotiate or conclude contracts on behalf of A H Willis for the sale or purchase of goods or services...'*⁷⁹⁰⁸ Regardless of whether or not CE was a 'sales agent', the OFT consider the principles set out in paragraphs III.28 to III.36 are relevant to the assessment of whether two legal persons have an agency relationship such that they form part of the same undertaking, and are therefore applicable in the present circumstances.
- IV.6275. In addition, as indicated above, the OFT considers that in providing Mansell with a cover price and a breakdown of A H Willis' bid, CE acted with the ostensible authority of A H Willis, and that A H Willis is therefore liable for his actions as his principal. The fact that CE exceeded his authority by disclosing confidential bid information does not prevent A H Willis from being liable for his actions.
- IV.6276. CE assumed no financial or commercial risk in relation to the contract services, he formed part of the same undertaking as A H Willis.⁷⁹⁰⁹
- IV.6277. In its response to the Supplementary Statement, A H Willis made extensive representations regarding the level of risk assumed by CE with regard to his estimating business.⁷⁹¹⁰ However, the relevant risk is not that assumed in

⁷⁹⁰⁵ Written representations of A H Willis, 21 April 2009, paragraph 17.

⁷⁹⁰⁶ On 30 March 2009, the OFT issued a Supplementary Statement of Objections to A H Willis and Mansell. It is referred to in this Infringement as the Supplementary Statement.

⁷⁹⁰⁷ Written representations of A H Willis, 21 April 2009, paragraphs 5(e), 10 to 11, 16(d).

⁷⁹⁰⁸ Written representations of A H Willis, 21 April 2009, paragraph 15.

⁷⁹⁰⁹ See paragraphs III.34 of the Legal Background section.

⁷⁹¹⁰ Written representations of A H Willis, 21 April 2009, paragraphs 14 and 20.

respect of the services provided by the contractor to the principal, but rather that assumed as between the agent and the third party with whom CE was interacting as a representative of the principal, see paragraphs III.28 to III.36 above. Although A H Willis provided an example whereby CE would be liable to A H Willis if A H Willis made a loss as a result of an error by CE⁷⁹¹¹, it has not argued that CE would be personally liable to the client after acting as a representative of A H Willis.

IV.6278. As such, A H Willis cannot avoid liability for the actions of CE by claiming that his actions in giving a cover bid to Mansell were unauthorised.⁷⁹¹² References to A H Willis in paragraphs IV.6285 to IV.6289 below are therefore in its capacity as principal of CE, and forming a single undertaking together with CE, and reflect A H Willis' liability for CE's actions.

Cover pricing

IV.6279. Mansell and A H Willis each accepted an invitation to tender for this contract.

IV.6280. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6281. The invitation to A H Willis to tender was addressed to Mark Willis, but A H Willis's tender return and summary of costs was completed and signed by CE '*on behalf of A H Willis*'. CE also subsequently created a Tender Summary document and filled in a Schedule of Works on behalf of A H Willis, both of which were submitted to the client.

IV.6282. Mansell's 2005 workload report records '*AH Willis*', in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.6283. BR of Mansell contacted CE (working on behalf of A H Willis) to request a cover price, and CE subsequently provided that cover price to BR.

IV.6284. In addition, A H Willis advised, in response to the OFT's letter of 22 March 2007, that CE, who was working for A H Willis in relation to this tender, did provide a cover price to Mansell in respect of this tender prior to the deadline for the receipt of tenders, and that he subsequently also provided a breakdown of A H Willis's bid to Mansell.

IV.6285. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by A H Willis, the pattern consistent with a cover price having been provided.

IV.6286. In addition the OFT notes that A H Willis's tender figure is the only figure below Mansell's tender figure, and the OFT is therefore satisfied that Mansell could only have received a cover figure from A H Willis.

⁷⁹¹¹ Written representations of A H Willis, 21 April 2009, paragraph 20.

⁷⁹¹² See paragraph III.36 of the Legal Background section.

IV.6287. The OFT therefore concludes that contact took place between Mansell and A H Willis. The OFT also concludes that A H Willis supplied a figure to Mansell for a cover bid.

IV.6288. The OFT is satisfied that the facts set out in paragraphs IV.6247 to IV.6287 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁹¹³ In particular:

- (a) the provision of a figure for a cover bid from A H Willis to Mansell was not unilateral⁷⁹¹⁴, and contravenes the principle against direct or indirect contact between competitors;⁷⁹¹⁵
- (b) Mansell can be presumed to have taken account of the information received from A H Willis (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁹¹⁶ and
- (c) A H Willis can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁹¹⁷

IV.6289. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and A H Willis in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for refurbishment, 12 & 16 Redlands Road, Reading, tender deadline 27 May 2005.

Immunity and leniency assessment

IV.6290. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6291. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 225: Swinnow Flats, Energy Efficiency Works – 8 June 2005
Client: Leeds City Council
Parties: Strata, Richardson Projects and P Casey

IV.6292. On 13 May 2005, Leeds City Council sought tenders for energy efficiency works and general upgrading including re-wiring and external security lighting to five blocks of three-storey Wimpey no-fines flats. The following six companies were invited to tender: Frank Haslam Milan, Connaught, Seddon, Strata,

⁷⁹¹³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁹¹⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁹¹⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁹¹⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁹¹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Richardson Projects and P Casey. The tender deadline was 12:00 noon on 8 June 2005.⁷⁹¹⁸

IV.6293. Leeds City Council received the following tender returns:⁷⁹¹⁹

Company	Time & Date Tender Received	Amount of tender	Awarded contract
Frank Haslam Milan	Before 12:00 noon on 8 June 2005	£921,406.00	Yes
Connaught	No Tender Returned	N/A	
Seddon	Before 12:00 noon on 8 June 2005	£1,033,366.45	
Strata	Before 12:00 noon on 8 June 2005	£1,068,421.00	
Richardson Projects	Before 12:00 noon on 8 June 2005	£995,922.00	
P Casey	Before 12:00 noon on 8 June 2005	£1,053,672.00	

IV.6294. The scheme was cancelled and re-tendered at a later date as the lease holders were not informed prior to the tenders being sent.⁷⁹²⁰

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata – Estimating Tracking document

IV.6295. During the OFT's search of Strata's premises a number of 'Estimating Tracking' documents were found.⁷⁹²¹ The tracking document contained the following entries in respect of this tender:

⁷⁹¹⁸ Information from client, OFT Document Reference 8502, page 1.

⁷⁹¹⁹ Information from client, OFT Document Reference 8502, page 1.

⁷⁹²⁰ Information from client, OFT Document Reference 8502, page 1.

⁷⁹²¹ Estimating tracking document, OFT Document Reference 3043.

Tender no	Year	Status	Estimator	Date Received	Return Date	Contract period	Tender Type
17	05	T	C	13 May 2005	8 June 2005	37 wks Commencing 1 Aug 05	P/S

Project Description	Client/Employer	Approximate Value	Tender Value	Competitors
Energy Efficiency Works at 5 Blocks of Flats Swinnow, Leeds	Leeds City Council	£1,200,000.00	£1,068,421.00 (cover taken from Richardson Proj)	Richardson Projects

Comments/previous Actions	Next action	By	Date

Contemporaneous documentary evidence from Richardson Projects - Tender Summary and Form of Tender

IV.6296. During the OFT's search of Richardson Project's premises a Tender Summary for this contract was found.⁷⁹²² The following entries were found on this Tender Summary:

<u>'Notes</u>	<u>Amount</u>	<u>%</u>	<u>Difference</u>
1			
2 [...] [C]			
3 J & S Seddon			
4 Casey ©	1,053,672.00	5.80%	57,749.90
5 Strata ©	1,068,421.00	7.28%	72,498.90'

IV.6297. The Form of Tender for this contract was also found during the OFT's visit. The Form of Tender was signed by T Fratzczak and stated that Richardson Projects submitted a tender price of £995,922.00 on 8 June 2005 for this contract.⁷⁹²³

Evidence from leniency applicant - Strata

IV.6298. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 to Dec 2001' and 'Contracts in hand' documents. This list included the following entry:⁷⁹²⁴

⁷⁹²² Tender Summary sheet, OFT Document Reference A0013.

⁷⁹²³ Form of Tender, OFT Document Reference A0012.

⁷⁹²⁴ Leniency Schedule, OFT Document Reference 4058.

Date	Project	Strata ref no	Cover to
08/06/2005	Energy Efficiency Works at Swinnow, Leeds for Leeds City Council	T17/05	

Cover from	Company Name	Company Address
✓	Richardson Projects	Rochdale

IV.6299. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Strata

IV.6300. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.6301. During an interview conducted on 28 March 2007 in connection with its leniency application, Paul Throssell ('PT'), an estimator at Strata, was shown the estimating tracking document and the reference to *'energy efficiency works at five blocks of flats, Swinnow Leeds'* and asked if he could recall anything about that contract. PT replied, *'...I don't to be honest with you, no, it wasn't a particularly big contract as far as we're concerned now ... so that's probably why we decided to take a cover'*.⁷⁹²⁵ PT confirmed that the entry *'cover taken from Richardson Proj'* indicates that Strata took a cover price from Richardson Projects.⁷⁹²⁶ PT also confirmed that £1,068,421.00 was the figure supplied by Richardson Projects as a cover figure.⁷⁹²⁷

Evidence from other companies – Richardson Projects

IV.6302. The OFT wrote to Richardson Projects on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that Richardson Projects had participated in bid rigging on this tender. In response to this letter Richardson Projects admitted *'We engaged in bid-rigging/cover pricing on this tender with Strata & Casey'*.⁷⁹²⁸

IV.6303. In its response to the Statement, Richardson Projects confirmed that it *'...accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement [in respect of this Infringement]*.⁷⁹²⁹

⁷⁹²⁵ Interview transcript, OFT Document Reference 11382, pages 11 and 12.

⁷⁹²⁶ Interview transcript, OFT Document Reference 11382, page12.

⁷⁹²⁷ Interview transcript, OFT Document Reference 11382, page12.

⁷⁹²⁸ Schedule provided by Richardson Projects, OFT Document Reference 10790, page 23.

⁷⁹²⁹ Written representations of Richardson Projects, 25 June 2008, paragraph 4.

Evidence from other companies – P Casey

IV.6304. The OFT wrote to P Casey on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that P Casey had participated in bid rigging on this tender. In response to this letter P Casey admitted *'We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party/parties involved'*.⁷⁹³⁰ P Casey added that *'The Company has few hard copy documents relating to the suspect tenders and does not maintain electronic tender documents. The estimator employed during the period of the suspect tenders emigrated to New Zealand in 2005 and has been unable to provide any reliable recollections of the tenders in question. For these reasons, the Company has only been able to consider incomplete records and it neither has evidence to indicate that cover pricing activity occurred nor an evidential basis upon which to challenge the allegations...'*.⁷⁹³¹

IV.6305. The OFT subsequently wrote to P Casey's ultimate parent company at the time of this Infringement, The Casey Group, on 6 November 2007, asking it to comment on P Casey's response to the OFT's Fast Track Offer, given that the OFT intended to hold The Casey Group jointly and severally liable for any infringements committed by P Casey in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter The Casey Group admitted *'We engaged in bid rigging (cover pricing) activities on this tender but cannot recall details of the other party/parties involved. We have no actual knowledge nor evidence of cover pricing having occurred in relation to this tender ...'*.⁷⁹³² The Casey Group also stated *'We also submit that all of the tenders should fall to be dealt with by The Casey Group Limited as the relevant parent company'*.⁷⁹³³

IV.6306. In its response to the Statement, P Casey stated that it had *'... not been able to establish any further facts concerning the alleged infringements referred to in the [Statement, including this Infringement] and consequently can provide no additional assistance to the Office of Fair Trading.'*⁷⁹³⁴

The OFT's analysis of the evidence and finding

IV.6307. From the evidence presented above, the OFT draws the following conclusions.

IV.6308. Strata, Richardson Projects and P Casey each accepted an invitation to tender for energy efficiency works at five blocks of flats, Swinnow, Leeds.

IV.6309. All three companies submitted a tender. Strata and P Casey were unable to submit a competitive tender by the return date and/or did not want to win this contract.

IV.6310. In regard to Richardson Projects, Strata's Estimating Tracking document records *'£1,068,421.00 (Cover Taken from Richardson Proj)'*, typed in the

⁷⁹³⁰ Response from P Casey, Schedule B, OFT Document Reference 10729, page 5.

⁷⁹³¹ Response from DLA Piper, OFT Document Reference 10731, page 1.

⁷⁹³² Response from The Casey Group, OFT Document Reference 14013, page 5.

⁷⁹³³ Response from The Casey Group, OFT Document Reference 14012, page 1.

⁷⁹³⁴ Written representations of P Casey, 27 June 2008, page 2.

Tender Value column. Also a 'C' is typed in the estimator column. PT confirmed that the note in the tender value column records that Strata received a cover price from Richardson Projects. PT also confirmed that the value recorded is the cover figure given to Strata by Richardson Projects. In addition to this Richardson Projects' Tender Summary sheet records '*Strata* © 1,068,421.00, 7.28%, 72,498.90'. This figure is the same as the tender figure submitted by Strata for the contract. The OFT considers in the light of the contemporaneous evidence from Strata and PT's admission and explanation of that contemporaneous evidence, and the fact that the tender summary from Richardson Projects provides independent corroborating evidence, that Richardson Projects supplied Strata with a cover figure for this tender.

IV.6311. The OFT also notes that Richardson Projects admitted that the party with whom it engaged in bid rigging was Strata, without being shown the OFT's evidence that Strata was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.6312. In regard to P Casey, Richardson Projects' tender summary sheet records '*Casey* © 1,053,672.00, 5.80%, 57,749.90'. Richardson Projects confirmed that it engaged in bid rigging/cover pricing on this tender with P Casey. Again, this figure is the same as the tender figure submitted by P Casey for the contract. The OFT considers in the light of the contemporaneous evidence (the Tender Summary sheet from Richardson Projects) and Richardson Projects' admission to engaging in cover pricing with P Casey, that Richardson Projects also supplied P Casey with a cover figure for this tender.

IV.6313. All three companies, Strata, P Casey and Richardson Projects, have admitted to bid rigging in relation to this tender.

IV.6314. The OFT further notes that the tenders submitted by Strata and P Casey were higher than the tender submitted by Richardson Projects, the pattern consistent with cover prices having been provided.

IV.6315. The OFT therefore concludes that contact took place between Strata and Richardson Projects and between P Casey and Richardson Projects. The OFT also concludes that Richardson Projects supplied figures to Strata and to P Casey for cover bids.

IV.6316. The OFT is satisfied that the facts set out in paragraphs IV.6295 to IV.6315 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁹³⁵ In particular:

- (a) the provision of figures for cover bids from Richardson Projects to Strata and from Richardson Projects to P Casey was not unilateral⁷⁹³⁶, and contravenes the principle against direct or indirect contact between competitors;⁷⁹³⁷
- (b) Strata and P Casey can each be presumed to have taken account of the information received from Richardson Projects (i.e. the respective cover

⁷⁹³⁵ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁹³⁶ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁹³⁷ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

- prices) when determining their own conduct in the tendering process;⁷⁹³⁸ and
- (c) Richardson Projects can be presumed to have taken account of the information it received from each of Strata and P Casey (i.e. that each of Strata and P Casey did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁷⁹³⁹

IV.6317. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Strata and Richardson Projects and between P Casey and Richardson Projects, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for the energy efficiency works to five blocks of Wimpey flats, Swinnow, Leeds, tender deadline 8 June 2005.

Immunity and leniency assessment

IV.6318. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6319. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, Strata will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 226: New Library, Centurian Way, Brough – 8 June 2005
Client: East Riding of Yorkshire Council
Parties: Hobson & Porter and Geo Houlton

IV.6320. On 4 May 2005 East Riding of Yorkshire Council ('East Riding') sought tenders for a new library, Centurian Way, Brough. The return date for the tender was 12:00 noon on 8 June 2005 and six companies were invited to tender: Clark Construction Ltd, Topcon (Builders & Contractors) Ltd, Hobson & Porter, Geo Houlton, Wright (Hull) and F Parkinson.

IV.6321. East Riding received the following five tender returns on 8 June 2005.⁷⁹⁴⁰

⁷⁹³⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁹³⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁹⁴⁰ Information from client, OFT Document Reference 7824.

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Clark Construction Ltd	8 June 2005	11:38	£1,397,897.00	Yes
Topcon (Builders & Contractors) Ltd	8 June 2005	08:30	£1,398,949.92	
Hobson & Porter	8 June 2005	11:14	£1,566,631.00	
Geo Houlton	8 June 2005	11:37	£1,646,422.00	
Wright (Hull)	8 June 2005	11:37	£1,819,390.00	
F Parkinson	Did not return tender			

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender information sheet

IV.6322. The tender information sheet for this tender states that Hobson & Porter's submitted figure was £1,566,631 and in the competition section is written, '*HOULTON 'C' 1,646,400*'.⁷⁹⁴¹ Three other competitors are written in that section, '*Topcon, Clark and Parkinson*'⁷⁹⁴², but none of these have any markings or figures against them.

Evidence from leniency applicant Hobson & Porter

IV.6323. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6324. In Hobson & Porter's Summary of Cover Pricing Activity (Major Works) it is stated that Hobson & Porter provided a cover to Geo Houlton and that the individual contact at Geo Houlton was Trevor Townsend.⁷⁹⁴³

IV.6325. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁷⁹⁴⁴

Witness evidence from leniency applicant Hobson & Porter

IV.6326. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6327. In respect of this tender, in interview David Watson ('DW'), Managing Director of Hobson & Porter, recalls that he gave the cover price to Trevor Townsend of Geo Houlton, '*He phoned us up and asked for a cover I said yes we will give him one and obviously nearer the date when we calculated our price I rang him*

⁷⁹⁴¹ Tender information sheet, OFT Document Reference A0153, pages 1 and 2.

⁷⁹⁴² Tender information sheet, OFT Document Reference A0153, page 1.

⁷⁹⁴³ Summary of cover pricing activity, OFT Document Reference A1347, page 1.

⁷⁹⁴⁴ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

back and gave him a cover'.⁷⁹⁴⁵ DW added that the 'C' written next to Geo Houlton on the tender information sheet was probably written by Michael Haywood ('MH'), an estimator in Major Works,⁷⁹⁴⁶ although MH has no specific recollection of this particular tender.⁷⁹⁴⁷

Evidence from other companies – Geo Houlton

IV.6328. The OFT wrote to Geo Houlton on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Geo Houlton had participated in bid rigging on this tender. In response to this letter, Geo Houlton admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁷⁹⁴⁸

IV.6329. The OFT subsequently wrote to Geo Houlton's ultimate parent company at the time of this Infringement, Geo Houlton Holdings, on 5 November 2007, asking it to comment on Geo Houlton's response to the OFT's Fast Track Offer, given that the OFT intended to hold Geo Houlton Holdings jointly and severally liable for any infringements committed by Geo Houlton in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Geo Houlton Holdings said it had no comments to make.⁷⁹⁴⁹

IV.6330. In its response to the Statement, Geo Houlton stated *'[i]t is not disputed that Houlton participated in cover pricing during the relevant period set out in the Statement'*.⁷⁹⁵⁰

The OFT's analysis of the evidence and finding

IV.6331. From the evidence presented above, the OFT draws the following conclusions.

IV.6332. Hobson & Porter and Geo Houlton each accepted an invitation to tender for this contract.

IV.6333. Hobson & Porter completed the estimating process for the tender for this contract. Hobson & Porter wanted to win the tender for this contract and submitted a genuine bid.

IV.6334. Geo Houlton was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6335. In regard to Geo Houlton, Hobson & Porter's tender information sheet records *'HOULTON 'C' 1,646,400'*. Hobson & Porter has confirmed that this indicates that it gave the company in question a cover price. Hobson & Porter recorded on the tender information sheet the figure £1,646,400 against Geo Houlton, a figure that was identical other than the addition of £22, to the tender price that Geo Houlton submitted, which was £1,646,422. Furthermore, DW has

⁷⁹⁴⁵ Interview transcript, OFT Document Reference 11230, page 11.

⁷⁹⁴⁶ Interview transcript, OFT Document Reference 11230, page 11.

⁷⁹⁴⁷ Interview transcript, OFT Document Reference 11232, page 16.

⁷⁹⁴⁸ Response from Geo Houlton, OFT Document Reference 10325, page 3.

⁷⁹⁴⁹ File note of telephone conversation, OFT Document Reference 13967.

⁷⁹⁵⁰ Written representations of Geo Houlton, 24 June, paragraph 52.

confirmed that Trevor Townsend contacted Hobson & Porter to ask for a cover price as set out in paragraph IV.6327 above.

IV.6336. The OFT notes in addition that the tender submitted by Geo Houlton was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, both parties have admitted engaging in bid rigging on this tender.

IV.6337. The OFT therefore concludes that contact took place between Geo Houlton and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied a figure to Geo Houlton for a cover bid.

IV.6338. The OFT is satisfied that the facts set out in paragraphs IV.6322 to IV.6337 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁹⁵¹ In particular:

- (a) the provision of a figure for a cover bid from Hobson & Porter to Geo Houlton was not unilateral⁷⁹⁵², and contravenes the principle against direct or indirect contact between competitors;⁷⁹⁵³
- (b) Geo Houlton can be presumed to have taken account of the information received from Hobson & Porter (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁹⁵⁴ and
- (c) Hobson & Porter can be presumed to have taken account of the information it received from Geo Houlton (i.e. that Geo Houlton did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁹⁵⁵

IV.6339. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Geo Houlton and Hobson & Porter, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for a new library, Centurian Way, Brough, tender deadline 8 June 2005.

Immunity and leniency assessment

IV.6340. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6341. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, in accordance with paragraph VI.386 of Section VI (Enforcement), the OFT is not imposing any financial penalty on Hobson & Porter in respect of this Infringement.

⁷⁹⁵¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁹⁵² See paragraph IV.73 of the General comments on cover pricing section.

⁷⁹⁵³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁹⁵⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁹⁵⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 227: Burngreave Facelifts 2005/06 – Contract 1 – 13 June 2005
Client: Sheffield City Council
Parties: Strata and Ackroyd & Abbott

IV.6342. On 20 May 2005, Sheffield City Council sought tenders for the refurbishment of 67 council-owned properties of various types.⁷⁹⁵⁶ The following six companies were invited to tender: Ackroyd & Abbott, A. Baldwin & Co (Builders) Ltd, Henry Boot, Burngreave Building Co, Richardson Projects and Strata.⁷⁹⁵⁷ The tender deadline was 12:00 noon on 13 June 2005.⁷⁹⁵⁸

IV.6343. Sheffield City Council received the following tender returns:⁷⁹⁵⁹

Company	Time & Date Tender Received	Amount of tender	Awarded contract
Ackroyd & Abbott	Prior to 12:00 noon on 13 June 2005	£631,953.00	
A. Baldwin & Co (Builders) Ltd	Prior to 12:00 noon on 13 June 2005	£481,276.52	
Henry Boot	Prior to 12:00 noon on 13 June 2005	£593,733.00	
Burngreave Building Co	Prior to 12:00 noon on 13 June 2005	£323,636.00	Yes
Richardson Projects	Prior to 12:00 noon on 13 June 2005	£695,933.00	
Strata	Prior to 12:00 noon on 13 June 2005	£686,317.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Strata - Estimating Tracking document

IV.6344. During the OFT’s search of Strata’s premises a number of ‘Estimating Tracking’ documents were found.⁷⁹⁶⁰ The tracking document contained the following entries in respect of this tender:

⁷⁹⁵⁶ Information from client, OFT Document Reference 9344.

⁷⁹⁵⁷ Information from client, OFT Document Reference 9344.

⁷⁹⁵⁸ Information from client, OFT Document Reference 9344.

⁷⁹⁵⁹ Information from client, OFT Document Reference 9344.

⁷⁹⁶⁰ Estimating tracking document, OFT Document Reference 3043.

Tender no	Year	Status	Estimator	Date Received	Return Date	Contract period	Tender Type
21	05	T	C	23 May 2005	13 June 2005	38 wks Commencing 11 July 05	Schd of rates with Approx Quants

Project Description	Client/Employer	Approximate Value	Tender Value	Competitors
Burngreave Facelifts 2005/06 – Contract 1	Sheffield City Council	£750,000.00	£686,317.00 (cover taken from Ackroyd & Abbot)	Ackroyd & Abbott, Henry Boot

Comments/previous Actions	Next action	By	Date

Evidence from leniency applicant - Strata

IV.6345. As part of its leniency application, Strata provided to the OFT a list of covers prepared by reference to its contract information sheets, the file 'Covers from Jan 2000 to Dec 2001' and 'contracts in hand' documents. This list contained the following entry:⁷⁹⁶¹

Date	Project	Strata ref no	Cover to
13/06/2005	Burngreave Facelifts 2005/06 for Sheffield City Council	T21/05	

Cover from	Company Name	Company Address
✓	Ackroyd & Abbott	Sheffield

IV.6346. Following the issue of the Statement, Strata did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Strata

IV.6347. During interviews conducted in connection with its leniency application, Strata's past and present employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.617 to IV.634 above and is relied upon by the OFT in relation to this tender.

IV.6348. During an interview conducted on 28 March 2007 in connection with its leniency application Paul Throssell ('PT'), an estimator at Strata, was shown the 'Estimating Tracking' document and the reference to Burngreave Facilities and asked in general whether the word 'cover' and a reference to another company

⁷⁹⁶¹ Leniency Schedule, section 3, OFT Document Reference 4058.

recorded somewhere on the estimating tracking document would indicate that Strata had taken a cover from that company noted. PT confirmed that this was correct.⁷⁹⁶²

IV.6349. PT further clarified the sequence of events in a fax received by the OFT on 15 August 2007.⁷⁹⁶³ PT stated that the enquiry came *'out of the blue'* and was one that Strata was not interested in winning.⁷⁹⁶⁴ PT confirmed that the presence of a 'C' in the Estimator column of the 'Estimating Tracking' document refers to a cover taken by Strata.⁷⁹⁶⁵ PT explained that the reference to *'Cover taken from Ackroyd & Abbot'* typed in the tender value column shows that *'Ackroyd & Abbott provided us with a price above their own tender figure to submit as our tender price for the contract'*.⁷⁹⁶⁶ PT had *'no recollection of who, at Strata sought the cover price'*. PT claimed that it might well have been himself, although he could not find any records to substantiate this.⁷⁹⁶⁷

IV.6350. PT also confirmed that *'The price would have been arranged by telephone in advance of the Tender return deadline, usually by two calls, one at the beginning of the tender period to request the figure and a second at the end of the tender period to receive the price'*.⁷⁹⁶⁸ PT added that there would not have been any contact with any other competitor regarding this contract.

Evidence from other companies – Ackroyd & Abbott

IV.6351. The OFT wrote to Ackroyd & Abbott on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Ackroyd & Abbott had participated in bid rigging on this tender. In response to this letter Ackroyd & Abbott stated *'It has not been possible to uncover any documentary evidence other than the documents that were seized by the OFT. The individuals that were interviewed had some recollection of all the tenders on the OFT's list but were simply not able to recall whether they had given or taken a cover price ...'*.⁷⁹⁶⁹ Ackroyd & Abbott did not admit to engaging in cover pricing on this contract.⁷⁹⁷⁰

IV.6352. In its response to the Statement, Ackroyd & Abbott stated that it had *'...seen the evidence available and accept[s] that Ackroyd & Abbott Construction participated in cover pricing in the Alleged Infringements [including this Infringement]'*.⁷⁹⁷¹

The OFT's analysis of the evidence and finding

IV.6353. From the evidence presented above, the OFT draws the following conclusions.

⁷⁹⁶² Interview transcript, OFT Document Reference 11378, page 12.

⁷⁹⁶³ Fax from Paul Throssell, OFT Document Reference 12897.

⁷⁹⁶⁴ Fax from Paul Throssell, OFT Document Reference 12897.

⁷⁹⁶⁵ Fax from Paul Throssell, OFT Document Reference 12897.

⁷⁹⁶⁶ Fax from Paul Throssell, OFT Document Reference 12897.

⁷⁹⁶⁷ Fax from Paul Throssell, OFT Document Reference 12897.

⁷⁹⁶⁸ Fax from Paul Throssell, OFT Document Reference 12897, page 2.

⁷⁹⁶⁹ Response from Ackroyd & Abbott, OFT Document Reference 10193, page 1.

⁷⁹⁷⁰ Response from Ackroyd & Abbott, OFT Document Reference 10194, page 4.

⁷⁹⁷¹ Written representations of Ackroyd & Abbott, 2 July 2008, paragraph 76.

- IV.6354. Strata and Ackroyd & Abbott each accepted an invitation to tender for the contract for Burngreave Facelifts 2005/06.
- IV.6355. Both companies submitted a tender. Strata was not interested in winning the contract as it was not its type of work and the value was below the level where it felt that it could be competitive, and estimating resources were fully employed on other, more attractive contracts.
- IV.6356. Strata's 'Estimating Tracking' document records '*£686,317.00 (cover taken from Ackroyd & Abbot)*', typed in the tender value column. Also a 'C' is typed in the estimator column. PT confirmed that the note in the tender value column records that Strata received a cover price from Ackroyd & Abbott and the 'C' refers to a cover received by Strata. The OFT considers in the light of the contemporaneous evidence from Strata and PT's admission and explanation of that contemporaneous evidence that Ackroyd & Abbott supplied Strata with a cover figure for this tender.
- IV.6357. The OFT further notes that the tender submitted by Strata was higher than the tender submitted by Ackroyd & Abbott, the pattern consistent with a cover price having been provided.
- IV.6358. The OFT notes that both Parties have now admitted their involvement in cover pricing in respect of this Infringement.
- IV.6359. The OFT therefore concludes that contact took place between Strata and Ackroyd & Abbott. The OFT also concludes that Ackroyd & Abbott supplied a figure to Strata for a cover bid.
- IV.6360. The OFT is satisfied that the facts set out in paragraphs IV.6344 to IV.6359 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁹⁷² In particular:
- (a) the provision of a figure for a cover bid from Ackroyd & Abbott to Strata was not unilateral⁷⁹⁷³, and contravenes the principle against direct or indirect contact between competitors;⁷⁹⁷⁴
 - (b) Strata can be presumed to have taken account of the information received from Ackroyd & Abbott (i.e the cover price) when determining its own conduct in the tendering process;⁷⁹⁷⁵ and
 - (c) Ackroyd & Abbott can be presumed to have taken account of the information it received from Strata (i.e. that Strata did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁷⁹⁷⁶
- IV.6361. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Strata and Ackroyd & Abbott in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Burngreave Facelifts 2005/06, tender deadline 13 June 2005.

⁷⁹⁷² See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁹⁷³ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁹⁷⁴ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁹⁷⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁷⁹⁷⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.6362. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6363. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 6 and 7 July 2005. Strata will not therefore receive 100 per cent immunity in respect of this tender. However, Strata will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 228: Extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds – 20 June 2005

Client: Leeds College of Art & Design

Parties: Totty⁷⁹⁷⁷ and GMI

IV.6364. On 7 April 2005 Leeds College of Art & Design sought tenders for extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds. The return date for the tender was midday on 20 June 2005 and five companies were invited to tender: GMI, Interserve, NU Construction Ltd, Quarmby and Totty.⁷⁹⁷⁸

IV.6365. Leeds College of Art & Design received the following tender returns by midday on 20 June 2005:⁷⁹⁷⁹

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
GMI	7 April 2005	20 June 2005	£4,795,210	
Interserve	7 April 2005	20 June 2005	£4,190,601	
NU Construction Ltd	7 April 2005	20 June 2005	£3,806,543	Yes
Quarmby	7 April 2005	Declined to tender		
Totty	7 April 2005	20 June 2005	£4,604,432	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Totty tender sheet

IV.6366. The tender final summary sheet for this tender states that Totty's submitted figure was £4,604,432 and in the competition section is handwritten, '*GMI (cover) £4,795*'.⁷⁹⁸⁰ Three other competitors are type-written in that section,

⁷⁹⁷⁷ Totty is a subsidiary of Propensity.

⁷⁹⁷⁸ Information from client, OFT Document Reference 8513. Note that the dates of tender return are incorrectly stated as 20 June 2007 on this schedule.

⁷⁹⁷⁹ Information from client, OFT Document Reference 8513. Note that the dates of tender return are incorrectly stated as 20 June 2007 on this schedule.

⁷⁹⁸⁰ Tender sheet, OFT Document Reference A2463.

'Quarmby SP, NewCon' and 'Interserve', but none of these have any markings or figures against them.

Evidence from leniency applicant Propensity

IV.6367. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6368. Following the issue of the Statement, Propensity did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Propensity

IV.6369. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6370. Martin Miller ('MM'), who at the time of the tender was a Bid Manager in the Commercial Division of Totty, confirmed in interview that this was one of the tenders for which he was responsible⁷⁹⁸¹ and that the handwriting 'GMI (cover) £4,795', on the tender final summary sheet was his.⁷⁹⁸² MM confirmed that, 'GMI received a cover from Totty Construction'⁷⁹⁸³ and that he made the handwritten annotations, 'pre tender date'.⁷⁹⁸⁴

IV.6371. In its response to the Statement, GMI submitted that as MM does not remember ever having spoken personally to GMI, and could not recall who at Totty spoke to GMI, his recollection that a cover price was given to GMI is unreliable.⁷⁹⁸⁵ The OFT does not accept that submission. MM clearly recalled that a cover price was given to GMI, notwithstanding his lack of recollection as to which of the estimators in the officer made the call to GMI. MM had a specific recollection of making a note of the cover price on the tender document himself and it is in his handwriting.⁷⁹⁸⁶

Evidence from other companies – GMI

IV.6372. The OFT wrote to GMI on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that GMI had participated in bid rigging on this tender. In response to this letter, GMI rejected the OFT's Fast Track Offer.⁷⁹⁸⁷

IV.6373. The OFT subsequently wrote to GMI's ultimate parent company at the time of this Infringement, GMI Construction Holdings, on 6 November 2007, asking it to comment on GMI's response to the OFT's Fast Track Offer, given that the OFT intended to hold GMI Construction Holdings jointly and severally liable for

⁷⁹⁸¹ Interview transcript, OFT Document Reference 11354, page 10.

⁷⁹⁸² Interview transcript, OFT Document Reference 11354, page 11.

⁷⁹⁸³ Interview transcript, OFT Document Reference 11354, page 11.

⁷⁹⁸⁴ Interview transcript, OFT Document Reference 11354, page 11.

⁷⁹⁸⁵ Written representations of GMI, 26 June 2008, paragraphs 66.7 to 66.10.

⁷⁹⁸⁶ Interview transcript, OFT Document Reference 11354, pages 10 to 11.

⁷⁹⁸⁷ Response from GMI, OFT Document Reference 10355.

any infringements committed by GMI in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, GMI Construction Holdings said it had no comments to make.⁷⁹⁸⁸

IV.6374. In its response to the Statement, GMI stated that it *'...submitted its competitive tender by the return date. GMI subsequently contacted Totty after the return date to establish how much Totty had tendered in order that GMI could establish whether it was likely to win the work. GMI and Totty exchanged their tendered prices which explains why Martin Miller of Totty added the entry referred to in the [Statement, also set out at paragraph IV.6366 above] to the tender register. It is noted that this entry is hand written whereas the remainder of the tender register revealed by the OFT is typed which GMI submits is because Martin Miller added the entry after the tender had been submitted'*.⁷⁹⁸⁹

IV.6375. In a witness statement attached to GMI's response, its Chief Executive stated *'...John Naylor, our Estimating Director, recalls that at some point after the date of return for tenders he telephoned Totty's Estimating Department, whom we knew were also submitting a bid, with a view to exchanging prices to check our bid was competitive. Whilst there were other contractors tendering for this project, he chose Totty as being a similar size company and very competitive like ourselves, and John Naylor thought that this would give us a good indication of the likely result of the tender'*.⁷⁹⁹⁰

IV.6376. The OFT notes the direct contradiction between the evidence of John Naylor and MM as to whether the *'GMI (cover) £4,795'* entry was added to the Totty tender sheet before or after the tender return date had passed. In particular, the OFT notes that MM in responding to the interview question *'...when you put GMI cover, was that written down pre tender?'* replied *'Yes, pre tender date, yes'*.⁷⁹⁹¹ The OFT considers that GMI's suggested alternative version of events is not supported by the wording of the document, including the word *'(cover)'* recorded by Totty against GMI's name. On balance the OFT therefore prefers the contemporaneous evidence and witness explanation of MM to the evidence of Mr Naylor, which is unsupported by any other evidence.

IV.6377. In its response to the Statement GMI submitted that it was unlikely that Totty would have offered a cover price to GMI as it was a competitor that it did not know well.⁷⁹⁹² However the fact that it was unusual to give a cover price in those circumstances does not mean that it did not happen in this case and the OFT considers this argument to be insufficient to undermine its conclusions in relation to the evidence. Moreover, the OFT notes the explanation given by John Naylor when describing a post-tender approach to Totty, as set out at paragraph IV.6375 above, in particular that Totty was *'a similar size company and very competitive like ourselves'*. The OFT considers that this explanation could equally apply when deciding which other bidder to approach for a cover price, and would explain why GMI made contact with Totty even if the two competitors did not know one another well.

⁷⁹⁸⁸ File note of telephone conversation, OFT Document Reference 14062.

⁷⁹⁸⁹ Written representations of GMI, 26 June 2008, paragraphs 66.2 to 66.4.

⁷⁹⁹⁰ Written representations of GMI, 26 June 2008, TAB 2 Exhibits bundle, paragraph 31.

⁷⁹⁹¹ Interview transcript, OFT Document Reference 11354, page 11.

⁷⁹⁹² Written representations of GMI, 26 June 2008, paragraphs 66.9 to 66.10.

IV.6378. In its response to the Statement, GMI also stated '*...in the circumstances of the case, Martin Miller of Totty is likely to have considered himself under considerable pressure to provide information to the OFT which would result in his company and his personal conduct being viewed in the best possible light in the hope and expectation that the degree of leniency offered to and subsequently obtained by Totty would be the most substantial possible*'.⁷⁹⁹³ The OFT does not accept GMI's assertion that Totty might have changed or fabricated evidence as part of a strategy to cooperate with the OFT and implicate its competitors. Indeed the document described at paragraph IV.6366 above was obtained during the OFT's search of Totty's premises and can confirm that it is a faithful facsimile of the original document. Any suggestion that either MM or Totty sought to obtain an advantage by fabricating evidence cannot be sustained and has not been supported by any contemporaneous evidence contradicting the OFT's case.

IV.6379. GMI also submitted in its response to the Statement that the fact that it sought quotes from sub-contractors for the work shows that they intended to, and did, submit a competitive tender.⁷⁹⁹⁴ The OFT does not accept this assertion. It is equally plausible that after initial enquiries GMI concluded that it did not wish to complete the full estimation process. The OFT notes that a decision to take a cover price may have been taken after work had begun to seek prices from sub-contractors, for example because the firm in question had won other tenders and would have been unable to take on the tendered works but did not wish to offend the client by returning the tender, or because the sub-contractor prices or other research led the firm to conclude late in the process that the job was unattractive. It is not the OFT's case that either of these or any other particular reason for deciding to take cover price applied in the case of GMI, it only notes that there are a number of plausible explanations for this scenario. The evidence of GMI's initial enquiries to sub-contractors does not therefore undermine the OFT's conclusion that cover pricing took place in relation to this tender.

IV.6380. In its response to the Statement, GMI claimed there was no reason for it to participate in cover pricing as it clearly had a policy of declining tenders where, for whatever reason, it felt unable to submit a tender, noting that an example of this can be found in the description of Infringement 211 where GMI was an invited bidder but declined to tender.⁷⁹⁹⁵ The OFT notes that the present Infringement relates to the provision of a cover price, not the acceptance of one, which is compatible with a policy of declining tenders. Though the OFT has found, in paragraph IV.73 above, that a common motive for providing cover prices was reciprocity, it notes that the undertaking concerned may have other motives, such as facilitating the reduction in competitive bids for a tender which it wishes to win. Therefore, any evidence of GMI declining tenders has no bearing on the finding that it gave a cover price to a competitor.

The OFT's analysis of the evidence and finding

IV.6381. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

⁷⁹⁹³ Written representations of GMI, 26 June 2008, paragraph 66.13.

⁷⁹⁹⁴ Written representations of GMI, 24 June 2008, paragraph 66.1.

⁷⁹⁹⁵ Written representations of GMI, 24 June 2008, paragraphs 68 to 71.

- IV.6382. Totty and GMI each accepted an invitation to tender for this contract.
- IV.6383. Totty completed the estimating process for the tender for this contract. Totty wanted to win the tender for this contract and it appears that it submitted a bid with the hope of winning the work.
- IV.6384. GMI was unable to submit a tender by the return date and/or did not want to win this tender.
- IV.6385. In regard to GMI, Totty's tender information sheet records '*GMI (cover) £4,795*'. Propensity has confirmed that this shows that it gave the company in question a cover price. No amounts are recorded against any other companies on Totty's tender information sheet. The figure that Totty recorded against GMI on the tender final summary sheet, '*£4,795*', was a figure that was identical to the first four numbers of the tender price that GMI submitted.
- IV.6386. The OFT notes in addition that the tender submitted by GMI was higher than the tender submitted by Totty, a pattern consistent with a cover price having been provided. The OFT further notes that no other company submitted a bid higher than Totty's bid, and that Totty could not therefore have given cover to anyone else in respect of this tender.
- IV.6387. The OFT therefore concludes that contact took place between GMI and Totty. The OFT also concludes that Totty supplied a figure to GMI for a cover bid.
- IV.6388. The OFT is satisfied that the facts set out in paragraphs IV.6364 to IV.6387 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁷⁹⁹⁶ In particular:
- (a) the provision of a figure for a cover bid from Totty to GMI was not unilateral⁷⁹⁹⁷, and contravenes the principle against direct or indirect contact between competitors;⁷⁹⁹⁸
 - (b) GMI can be presumed to have taken account of the information received from Totty (i.e. the cover price) when determining its own conduct in the tendering process;⁷⁹⁹⁹ and
 - (c) Totty can be presumed to have taken account of the information it received from GMI (i.e. that GMI did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸⁰⁰⁰
- IV.6389. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between GMI and Totty, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds, tender deadline 20 June 2005.

⁷⁹⁹⁶ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁷⁹⁹⁷ See paragraph IV.73 of the General comments on cover pricing section.

⁷⁹⁹⁸ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁷⁹⁹⁹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸⁰⁰⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.6390. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6391. Propensity informed the OFT of the bid rigging activities in respect of this tender as part of its leniency application and was granted immunity from penalty in respect of those activities. The OFT now notes that it did in fact have some information on the bid rigging activities from documents obtained on its earlier visit to Propensity's premises (see paragraph IV.6366 above), but noting the contents of the Statement and the OFT's leniency agreement with Propensity, the OFT will not impose a penalty on Propensity in respect of this Infringement.

Infringement 229: Alterations to Law Faculty Offices, Fielding Johnson Building, University of Leicester – 24 June 2005

Client: University of Leicester

Parties: Phoenix and B & A

IV.6392. On 3 June 2005 the University of Leicester sought tenders for alterations to law faculty offices at the Fielding Johnson Building. The return date for the tender was 12:00 noon on 24 June 2005 and four companies were invited to tender: Brown & Kirby Ltd, Brown & Shaw, Phoenix and B & A.⁸⁰⁰¹

IV.6393. The University of Leicester received the following four tender returns before 12:00 noon on 24 June 2005:⁸⁰⁰²

Company	Time and Date tender received	Amount of tender	Awarded the tender
Brown & Kirby Ltd	Before 12 noon 24 June 2005	£19,973.82	Yes
Brown & Shaw	Before 12 noon 24 June 2005	£29,739.25	
Phoenix	Before 12 noon 24 June 2005	£28,493.75	
B & A	Before 12 noon 24 June 2005	£32,714.35	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Phoenix

IV.6394. A number of documents relevant to this tender were obtained by the OFT during the visit under section 27 to Phoenix's premises on 25 January 2006. The first of these was the invitation to tender letter which has the handwritten entries, '7/6 B & A, - Martin – Help. [.....] [C]' and '8/6/ Brown & Shaw⁸⁰⁰³ also pricing tender'.⁸⁰⁰⁴

⁸⁰⁰¹ Information from client, OFT Document Reference 13837.

⁸⁰⁰² Information from client, OFT Document Reference 13837.

⁸⁰⁰³ The OFT has no evidence that Brown & Shaw was a party to bid rigging on this tender.

⁸⁰⁰⁴ Invitation to tender letter, OFT Document Reference 4144.

IV.6395. Secondly, the Form of Tender shows that Phoenix's submitted price was £24,250 exclusive of VAT and £28,493.75 including VAT, and that this tender was submitted by senior estimator Matt Pickering ('MP').⁸⁰⁰⁵

IV.6396. Thirdly, a '*Tender Abstract document*' has the handwritten entry '*covers given at 25k to 26k*'.⁸⁰⁰⁶

Evidence from leniency applicant Phoenix

IV.6397. As part of its leniency application, Phoenix provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.527 to IV.536 above and is relied upon by the OFT in relation to this tender.

IV.6398. In Phoenix's Table of Cover Pricing Activity provided under leniency it is stated that Phoenix provided a cover to B & A at £25k to £26k and that the individual contact at B & A was Martin.⁸⁰⁰⁷

IV.6399. In its response to the Statement, Phoenix stated that '*...Phoenix has accepted that it engaged in cover pricing in breach of the Chapter 1 prohibition.*'⁸⁰⁰⁸

Witness evidence from leniency applicant Phoenix

IV.6400. During interviews conducted in connection with its leniency application, Phoenix's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.527 to IV.536 above and is relied upon by the OFT in relation to this tender.

IV.6401. In respect of this tender, in interview MP believed that the handwriting on the invitation to tender letter, '*7/6 B & A, - Martin - Help. [.....] [C]*' was that of Roger Grace ('RG'), an ex-employee of Phoenix. He confirmed, '*So they, [B & A] it basically says they want a cover price*'.⁸⁰⁰⁹ MP said that RG would have prepared the submission, but he would have submitted the tender.⁸⁰¹⁰

IV.6402. MP explained that this was a record of the initial contact made with B & A, '*Yeah, they'd ring around to the usual mob who'd tender for the work, because they either don't want the job, or can't price it in the time. And just wanted a cover price to ... so they could submit a tender, and really, stay on the tender list*'.⁸⁰¹¹ MP confirmed that he would have had subsequent telephone contact with B & A, '*probably the day before or the morning of the submission, I'd have got a phone call from B and A begging for a figure, basically. And, that's when I would have given it [the cover price]*'.⁸⁰¹²

IV.6403. MP confirmed that the handwriting '*covers given at 25k to 26k*', on the '*Tender Abstract document*' was his and that based on the Phoenix tender figure (before VAT) of £24,250, Phoenix could provide a cover price between

⁸⁰⁰⁵ Form of Tender, OFT Document Reference 4145.

⁸⁰⁰⁶ Tender Abstract document, OFT Document Reference 4146.

⁸⁰⁰⁷ Table of cover pricing activity, OFT Document Reference 4416, page 2.

⁸⁰⁰⁸ Written representations of Phoenix, 27 June 2008, paragraph 91.

⁸⁰⁰⁹ Interview transcript, OFT Document Reference 13495, page 2.

⁸⁰¹⁰ Interview transcript, OFT Document Reference 13495, page 5.

⁸⁰¹¹ Interview transcript, OFT Document Reference 13495, page 2.

⁸⁰¹² Interview transcript, OFT Document Reference 13495, page 6.

£25,000 and £26,000.⁸⁰¹³ MP said, *'Yeah, you know, to say if they make up their own figure between that, then they wouldn't look silly, but they wouldn't get the job'*.⁸⁰¹⁴

Evidence from other companies – B & A

IV.6404. The OFT wrote to B & A on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that B & A had participated in bid rigging on this tender. B & A did not respond to this letter and on 8 May 2007 confirmed in a telephone conversation with the OFT that it was rejecting the OFT's Fast Track Offer.⁸⁰¹⁵

IV.6405. However, in its response to the Statement, B & A stated that as the individual estimators involved had left the company in 2007, are now not contactable, and B & A does not have records in respect of this tender *'...B&A has no means of challenging the evidence now presented by the OFT in support of its allegations in relation to cover pricing, and therefore admits liability for the cover pricing infringements alleged by the OFT'*.⁸⁰¹⁶

IV.6406. B & A also confirmed in its response that one of the individual estimators employed at the time of this infringement (and who has since left) was an individual named Martin Alderson *'who must be the "Martin" referred to in relation to infringement 229'*.⁸⁰¹⁷

Evidence from D & B small business centre website

IV.6407. The company information obtained for B & A gives the contact number for B & A as '[.....] [C]'.⁸⁰¹⁸

The OFT's analysis of the evidence and finding

IV.6408. From the evidence presented above, the OFT draws the following conclusions.

IV.6409. Phoenix and B & A each accepted an invitation to tender for this contract.

IV.6410. Phoenix completed the estimating process for the tender for this contract. Phoenix wanted to win the tender for this contract and submitted a genuine bid.

IV.6411. B & A was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6412. In regard to B & A, the invitation to tender document has the handwritten entry *'7/6 B & A, - Martin – Help. [.....] [C]'*. Phoenix has confirmed that this shows that B & A asked Phoenix to provide it with a cover price. MP explained in interview that this would have been a record of an initial contact on 7 June during which B & A would have requested a cover price and that

⁸⁰¹³ Interview transcript, OFT Document Reference 13495, page 3.

⁸⁰¹⁴ Interview transcript, OFT Document Reference 13495, page 4.

⁸⁰¹⁵ File note of telephone conversation, OFT Document Reference 10227.

⁸⁰¹⁶ Written representations of B & A, 27 June 2008, paragraph 6.

⁸⁰¹⁷ Written representations of B & A, 27 June 2008, paragraph 5.

⁸⁰¹⁸ D & B small business centre website, OFT Document Reference 11609, page 1.

there would have been a second contact, probably on the morning of the tender submission, when the cover price would have been given by Phoenix to B & A.

IV.6413. MP recorded on the '*Tender Abstract document*' '*covers given at 25k to 26k*', as a figure that B & A could submit for this tender without winning the tender. This shows that a cover price was given to B & A of the amount noted. The OFT believes that these figures are exclusive of VAT and notes that B & A's price submitted for this tender was £32,714.35. The OFT considers it likely that B & A added a further figure to the figure supplied by Phoenix in order to ensure that it did not win the contract. The OFT notes that the telephone number in '*Martin – Help*. [.....] [C]' is the telephone number for B & A and provides further corroboration that Phoenix made subsequent contact with B & A to provide a cover price. B & A has confirmed that the '*Martin*' referred to must be Martin Alderson, who worked at B & A at the time of this infringement.

IV.6414. The OFT notes in addition that the tender submitted by B & A was higher than the tender submitted by Phoenix, a pattern consistent with a cover price having been provided.

IV.6415. Both B & A and Phoenix have admitted engaging in cover pricing in respect of this tender for alterations to law faculty offices at the Fielding Johnson Building.

IV.6416. The OFT therefore concludes that contact took place between B & A and Phoenix. The OFT also concludes that Phoenix supplied a figure to B & A for a cover bid.

IV.6417. The OFT is satisfied that the facts set out in paragraphs IV.6394 to IV.6416 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸⁰¹⁹ In particular:

- (a) the provision of a figure for a cover bid from Phoenix to B & A was not unilateral⁸⁰²⁰, and contravenes the principle against direct or indirect contact between competitors;⁸⁰²¹
- (b) B & A can be presumed to have taken account of the information received from Phoenix (i.e. the cover price) when determining its own conduct in the tendering process;⁸⁰²² and
- (c) Phoenix can be presumed to have taken account of the information it received from B & A (i.e. that B & A did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸⁰²³

IV.6418. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between B & A and Phoenix, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations to law faculty offices at the Fielding Johnson Building, University of Leicester, tender deadline 24 June 2005.

⁸⁰¹⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸⁰²⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁸⁰²¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸⁰²² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸⁰²³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.6419. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6420. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 27 to Phoenix on 25 January 2006. Phoenix will not therefore receive 100 per cent immunity in respect of this tender. However, Phoenix will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 230: 34 Residential Apartments at 71 - 75 Wright Street, Hull – 25 July 2005

Client: Kingscourt Developments Limited

Parties: Hobson & Porter and Wright (Hull)

IV.6421. On 13 June 2005 Kingscourt Developments Limited ('Kingscourt') sought tenders for 34 residential apartments at 71 - 75 Wright Street, Hull. The return date for the tender was 25 July 2005 and four companies were invited to tender: Hobson & Porter, MR Builder Limited, Wright (Hull) and Hall.⁸⁰²⁴

IV.6422. Kingscourt received the following four tender returns on 25 July 2005:⁸⁰²⁵

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Hobson & Porter	25 July 2005	09:00	£2,367,982	
MR Builder Limited	25 July 2005	09:00	£2,847,513	
Wright (Hull)	25 July 2005	09:00	£2,496,218	
Hall	25 July 2005	09:00	£2,370,850	Yes

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender information sheet

IV.6423. The tender information sheet for this tender states that Hobson & Porter's submitted figure was £2,367,982 and in the competition section is written, 'WRIGHTS'C'.⁸⁰²⁶ One other competitor is written in this section, 'HALLS', but does not have any marking or figure against it. On page three of the tender information sheet is written 'WRIGHT £2,496,218'.

⁸⁰²⁴ Information from client, OFT Document Reference 8058.

⁸⁰²⁵ Information from client, OFT Document Reference 8058.

⁸⁰²⁶ Tender information sheet, OFT Document Reference A0155, pages 1 and 2.

Evidence from leniency applicant Hobson & Porter

IV.6424. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6425. In Hobson & Porter's Summary of Cover Pricing Activity (Major Works) it is stated that Hobson & Porter provided a cover to Wright (Hull) and that the individual contact at Wright (Hull) was Chris Davis.⁸⁰²⁷

IV.6426. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁸⁰²⁸

Witness evidence from leniency applicant Hobson & Porter

IV.6427. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6428. In respect of this tender, in interview Russell Horner ('RH'), Major Works Estimating Director, recalled that Michael Haywood ('MH'), an estimator at Hobson & Porter, priced the tender and that he would have completed the tender information sheet and added the 'C' next to 'WRIGHTS'.⁸⁰²⁹ RH confirmed that Hobson & Porter provided cover to Wright (Hull). David Watson ('DW'), Managing Director, confirmed that Hobson & Porter gave '*a cover to Wrights*'.⁸⁰³⁰

IV.6429. MH confirmed that he priced this tender and added the 'C' next to 'WRIGHTS' on the tender information sheet. MH also stated that '*at some stage I was aware that Wrights had taken a cover*'.⁸⁰³¹ but that he could not confirm that the cover price was provided by Hobson & Porter.

IV.6430. MH was interviewed a second time about this contract and said, '*I believe we gave the cover to Wrights, and Halls were successful in winning the contract*'.⁸⁰³² In respect of the handwritten annotation 'WRIGHT £2,496,218' on page three of the tender information sheet, MH said that it was his handwriting and that, '*I would imagine that is the figure [the cover price] I gave to Wright Construction*'.⁸⁰³³ MH also confirmed that he made this handwritten annotation before Hobson & Porter submitted its tender.⁸⁰³⁴

Evidence from other companies – Wright (Hull)

IV.6431. The OFT wrote to Wright (Hull) on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its

⁸⁰²⁷ Summary of cover pricing activity, OFT Document Reference A1347, page 1.

⁸⁰²⁸ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁸⁰²⁹ Interview transcript, OFT Document Reference 11229, page 19.

⁸⁰³⁰ Interview transcript, OFT Document Reference 11230, page 12.

⁸⁰³¹ Interview transcript, OFT Document Reference 11232, pages 16 and 17.

⁸⁰³² Interview transcript, OFT Document Reference 13883, page 2.

⁸⁰³³ Interview transcript, OFT Document Reference 13883, page 2.

⁸⁰³⁴ Interview transcript, OFT Document Reference 13883, page 2.

alleged participation in bid rigging on this tender, in return for an admission that Wright (Hull) had participated in bid rigging on this tender. In response to this letter, Wright (Hull) admitted *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁸⁰³⁵

IV.6432. The OFT subsequently wrote to Wright (Hull)'s ultimate parent company at the time of this Infringement, T Wright Holdings, on 5 November 2007, asking it to comment on Wright (Hull)'s response to the OFT's Fast Track Offer, given that the OFT intended to hold T Wright Holdings jointly and severally liable for any infringements committed by Wright (Hull) in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, T Wright Holdings said *'We have been made fully aware of the situation by our subsidiary and at this stage have no further comment to make'*.⁸⁰³⁶

IV.6433. In its response to the Statement, Wright (Hull) confirmed that it *'...has admitted to engaging in "cover pricing" on this tender, but cannot recall details of the other party/parties involved.'*⁸⁰³⁷

The OFT's analysis of the evidence and finding

IV.6434. From the evidence presented above, the OFT draws the following conclusions.

IV.6435. Hobson & Porter and Wright (Hull) each accepted an invitation to tender for this contract.

IV.6436. Hobson & Porter completed the estimating process for the tender for this contract. Hobson & Porter wanted to win the tender for this contract and submitted a bid with the hope of winning the work.

IV.6437. Wright (Hull) was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6438. In regard to Wright (Hull), Hobson & Porter's tender information sheet records *'WRIGHTS 'C''*. RH of Hobson & Porter has confirmed that this indicates that it gave Wright (Hull) a cover price. DW of Hobson & Porter has also confirmed that Hobson & Porter gave a cover price to Wright (Hull). MH has confirmed that the *'C'* written next to *'WRIGHT'* on the tender information sheet, indicates that Wright (Hull) received a cover price from Hobson & Porter.

IV.6439. In regard to the handwritten annotation *'WRIGHT £2,496,218'* on page three of the tender information sheet, MH has confirmed that this is a record, made by him, of the cover price that Hobson and Porter supplied to Wright (Hull), providing further corroboration of contact between Hobson & Porter and Wright (Hull) in respect of this tender. This figure was identical to the tender that Wright (Hull) submitted for the work.

IV.6440. The OFT notes in addition that the tender submitted by Wright (Hull) was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, both companies have admitted to engaging in bid rigging on this tender.

⁸⁰³⁵ Response from Wright (Hull), OFT Document Reference 10926, page 3.

⁸⁰³⁶ Response from T Wright Holdings, OFT Document Reference 14040.

⁸⁰³⁷ Written representations of Wright (Hull), 27 June 2008, paragraph 44.

IV.6441. The OFT therefore concludes that contact took place between Wright (Hull) and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied a figure to Wright (Hull) for a cover bid.

IV.6442. The OFT is satisfied that the facts set out in paragraphs IV.6423 to IV.6441 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸⁰³⁸ In particular:

- (a) the provision of a figure for a cover bid from Hobson & Porter to Wright (Hull) was not unilateral⁸⁰³⁹, and contravenes the principle against direct or indirect contact between competitors;⁸⁰⁴⁰
- (b) Wright (Hull) can be presumed to have taken account of the information received from Hobson & Porter (i.e. the cover price) when determining its own conduct in the tendering process;⁸⁰⁴¹ and
- (c) Hobson & Porter can be presumed to have taken account of the information it received from Wright (Hull) (i.e. that Wright (Hull) did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸⁰⁴²

IV.6443. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Wright (Hull) and Hobson & Porter, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for 34 residential apartments at 71 - 75 Wright Street, Hull, tender deadline 25 July 2005.

Immunity and leniency assessment

IV.6444. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6445. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, Hobson & Porter will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁸⁰³⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸⁰³⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁸⁰⁴⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸⁰⁴¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸⁰⁴² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 231: Phase 3 Office Development, Park Lane, Allerton Bywater – 29 July 2005
Client: Elmfield Business Parks
Parties: Irwins and Holroyd

IV.6446. On 24 June 2005, SDA Architects & Designers on behalf of Elmfield Business Parks⁸⁰⁴³ sought tenders for three two-storey buildings with associated external works at Park Lane, Allerton Bywater.⁸⁰⁴⁴ Each tenderer was required to provide costings for building the project in three phases.⁸⁰⁴⁵ This Infringement relates to Phase 3. The following seven companies were invited to tender: William Birch & Sons, Bluestone, Irwins, Stainforth, Ham Construction Ltd, Houseman & Falshaw Ltd and Holroyd.⁸⁰⁴⁶ The deadline for receipt of tenders was changed from Monday 25 July 2005 to noon on Friday 29 July 2005 following requests from various tenderers to extend the tender deadline due to staff shortages over the holiday period.⁸⁰⁴⁷

IV.6447. SDA Architects & Designers received the following tender returns for Phase 3 of the project.⁸⁰⁴⁸

Company	Time & Date tender received	Amount of tender
William Birch and Sons	Prior to 29 July 2005	£1,888,779.89
Bluestone	Returned un-priced on 30 June 2005	
Irwins	Prior to 29 July 2005	£1,527,670.00
Stainforth	Prior to 29 July 2005	£1,533,406.00
Ham Construction Ltd	Prior to 29 July 2005	£1,361,750.00
Houseman & Falshaw Ltd	Prior to 29 July 2005	£1,446,708.00
Holroyd	Prior to 29 July 2005	£1,391,498.00

IV.6448. On 3 October 2005 a letter was sent to all tenderers stating that the project was over budget and that the client had decided to defer the project.⁸⁰⁴⁹

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Irwins – Tender Register

IV.6449. During the OFT's search of Irwins' premises a 'Tender Register' was found.⁸⁰⁵⁰ The tender register contained the following entry in respect of this tender:

⁸⁰⁴³ Email from Trevor Wheatley, OFT Document Reference 7834.

⁸⁰⁴⁴ Information from client, OFT Document Reference 7836.

⁸⁰⁴⁵ Information from client, OFT Document Reference 7836.

⁸⁰⁴⁶ Information from client, OFT Document Reference 7836.

⁸⁰⁴⁷ Information from client, OFT Document Reference 7836, page 2.

⁸⁰⁴⁸ Information from client, OFT Document Reference 7836.

⁸⁰⁴⁹ Information from client, OFT Document Reference 7836, page 3.

⁸⁰⁵⁰ Extract of Tender Register, OFT Document Reference A0339, page 73.

Tender no and date Received	Project	Client	Type of Works, % Diff	Amount tendered	Date tender Due	Estimator	
0605032 24 June 05 754 X2	Office Development Park Lane Allerton Bywater	Elmfield Business Parks, SDA Jackson Calvert	P&S C	1527670	Mon-Fri 25 July 29	G.R.	

Competition
Stainforth *Holroyd W Birch Andrew ??? [.....] [C]

Evidence from leniency applicant – Irwins

IV.6450. As part of its leniency application, Irwins’ legal representatives provided a general explanation of its participation in cover pricing.⁸⁰⁵¹ This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.6451. In addition to its leniency application, Irwins provided to the OFT two schedules, one each for ‘Covers Taken’ and ‘Covers Given’, which detail projects/contracts identified by the company during the course of an internal investigation conducted by Ivan Peter Nelson (‘IPN’), Estimating Director at Irwins, into potential cover prices. At number 116 of the ‘Covers Taken’ schedule is the following entry:⁸⁰⁵²

	Year	Tender Ref	Description	Client	Date	Value	Cover From
116	2005	0605032	Office Development, Park Lane Allerton Bywater	Elmfield Business Parks	29.07.05	1527670	Holroyd

Individual Contact	Notes
Andrew Waldon	

⁸⁰⁵¹ Leniency application, OFT Document Reference A0714.

⁸⁰⁵² Extract from Covers Taken schedule, OFT Document Reference A0718, page 10.

IV.6452. Irwins also provided to the OFT a schedule listing its competitors' contact details. The name of Holroyd appears on the list and Andrew Waldon is named as the contact point.⁸⁰⁵³

IV.6453. Following the issue of the Statement, Irwins did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Irwins

IV.6454. During an interview with the OFT on 8 March 2007 conducted in connection with Irwins' leniency application, IPN provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.408 to IV.419 above and is relied upon by the OFT in relation to this tender.

IV.6455. Also during this interview, IPN was shown the '*Tender Register*'⁸⁰⁵⁴ and in particular the reference to the entry for an office development at Allerton Bywater and was asked if he could recall anything about that contract. IPN replied '*Yeah, This is one that, um, we set about to price and then gathered that it wouldn't go ahead anyway and so...*'⁸⁰⁵⁵ '*I think that perhaps one of the reasons, when you've got it all and, I mean, you're halfway through and you find out from someone who's in for it and then you think, well, we're just wasting our time*'.⁸⁰⁵⁶ IPN explained that the presence of a 'C' in the fourth column on the tender register shows that Irwins took a cover in relation to that contract.⁸⁰⁵⁷ When it was pointed out by the OFT that there was an '*' against Holroyd's name in the '*Competition*' column IPN further confirmed that Holroyd was the company which gave Irwins a cover price, '*yeah, I used Holroyd*'.⁸⁰⁵⁸ IPN also stated in respect of another tender during interview that '[.....] [C]' was the telephone number of Andrew Waldren at Holroyd.⁸⁰⁵⁹ In respect of the present tender, IPN confirmed again that the number was Holroyd's.⁸⁰⁶⁰

Evidence from other companies – Holroyd

IV.6456. The OFT wrote to Holroyd on 21 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Holroyd had participated in bid rigging on this tender. Holroyd did not respond to this letter and on 8 May 2007 the OFT informed the Managing Director of Holroyd that a failure to respond to the Fast Track letter denoted a rejection. The Managing Director of Holroyd confirmed that Holroyd had rejected the OFT's Fast Track Offer.⁸⁰⁶¹

⁸⁰⁵³ List of contractors, OFT Document Reference A0715, page 4.

⁸⁰⁵⁴ Extract of Tender Register, OFT Document Reference A0339, page 73.

⁸⁰⁵⁵ Interview transcript, OFT Document Reference 11255, page 13.

⁸⁰⁵⁶ Interview transcript, OFT Document Reference 11255, page 13.

⁸⁰⁵⁷ Interview transcript, OFT Document Reference 11255, page 14.

⁸⁰⁵⁸ Interview transcript, OFT Document Reference 11255, page 14.

⁸⁰⁵⁹ Interview transcript, OFT Document Reference 11255, page 11 & 12. Note that in interview IPN was asked to confirm that [.....] [C] was Andrew Waldon's phone number, however the document referred to during this part of the interview states [.....] [C] and the OFT is satisfied that IPN was confirming the latter number as being Holroyd.

⁸⁰⁶⁰ Interview transcript, OFT Document Reference 11255, pages 11 and 12.

⁸⁰⁶¹ File note of telephone conversation, OFT Document Reference 10412.

IV.6457. The OFT subsequently wrote to Holroyd's ultimate parent company at the time of this Infringement, Holroyd Group, on 5 November 2007, asking it to comment on Holroyd's response to the OFT's Fast Track Offer, given that the OFT intended to hold Holroyd Group jointly and severally liable for any infringements committed by Holroyd in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Holroyd Group stated *'the directors of Holroyd Construction Group Ltd will have nothing to add to any statements made by Holroyd Construction Ltd as it was not involved in the day to day management and operations of the business'*.⁸⁰⁶²

IV.6458. Following the issue of the Statement, Holroyd did not submit any written or oral representations.

The OFT's analysis of the evidence and finding

IV.6459. From the evidence presented above, the OFT draws the following conclusions.

IV.6460. Irwins and Holroyd each accepted an invitation to tender for the contract for Phase 3 of an office development at Allerton Bywater. Irwins was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6461. Holroyd appears to have completed the estimating process for the tender for this contract and came second lowest in the tender process.

IV.6462. Irwins' tender register records *'Stainforth, *Holroyd, W Birch, Andrew ??* [.....] [C]', typed in the final column. IPN confirmed that the presence of an '*' next to *'Holroyd'* and also the name *'Andrew'* and the telephone number [.....] [C] shows that the cover price was received from Holroyd and more specifically Andrew Waldren, an estimator at Holroyd. The OFT notes that [.....] [C] was a Holroyd telephone number. Also a 'C' is typed in the type of work/ percentage difference column. IPN confirmed that the 'C' typed in this column shows that Irwins sought a cover price in relation to this contract. The OFT considers in the light of the contemporaneous evidence from Irwins and IPN's admission and explanation of the contemporaneous evidence, that Holroyd supplied Irwins with a cover price for this tender.

IV.6463. The OFT also notes that the only companies whose submitted tender figures were below that of Irwins were Holroyd, Ham Construction Ltd and Houseman & Falshaw Ltd. Irwins could therefore only have received a cover figure from one of those three companies, and the OFT further notes that Holroyd is the only one of those three companies recorded on Irwins' tender register. The OFT therefore considers that this provides further evidence that Irwins received a cover figure from Holroyd.

IV.6464. The OFT also notes that neither Ham Construction Ltd nor Houseman & Falshaw Ltd appear on the schedule that Irwins provided to the OFT, listing their competitors' contact details. The OFT considers that this is a further indication that Irwins would not have approached either of those two companies for a cover price.

⁸⁰⁶² Response from Holroyd Group, OFT Document Reference 14067, page 1.

IV.6465. In addition the OFT notes that the tender submitted by Irwins was higher than the tender submitted by Holroyd, the pattern consistent with a cover price having been provided.

IV.6466. The OFT therefore concludes that contact took place between Irwins and Holroyd. The OFT also concludes that Holroyd supplied a figure to Irwins for a cover bid.

IV.6467. The OFT is satisfied that the facts set out in paragraphs IV.6449 to IV.6466 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸⁰⁶³ In particular:

- (a) the provision of a figure for a cover bid from Holroyd to Irwins was not unilateral⁸⁰⁶⁴, and contravenes the principle against direct or indirect contact between competitors;⁸⁰⁶⁵
- (b) Irwins can be presumed to have taken account of the information received from Holroyd (i.e. the cover price) when determining its own conduct in the tendering process;⁸⁰⁶⁶ and
- (c) Holroyd can be presumed to have taken account of the information it received from Irwins (i.e. that Irwins did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸⁰⁶⁷

IV.6468. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Irwins and Holroyd, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Phase 3 of an office development at Park Lane, Allerton Bywater, tender deadline 29 July 2005.

Immunity and leniency assessment

IV.6469. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6470. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained during the visit under section 28 on 21 March 2006. Irwins will not therefore receive 100 per cent immunity in respect of this tender. However, Irwins will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁸⁰⁶³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸⁰⁶⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁸⁰⁶⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸⁰⁶⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸⁰⁶⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Infringement 232: **New Build Agricultural Building, Crowe Hall, Stutton – 29 July 2005**

Client: **Church Manor Estates**

Parties: **Jackson⁸⁰⁶⁸ and Haymills**

IV.6471. On 24 June 2005, Church Manor Estates sought tenders for a new build agricultural building (stable), Crowe Hall, Stutton. The return date for the tender was 29 July 2005 and six companies were invited to tender: Elliston Steady & Hawes, Haymills, Jackson, Rose Builders, R G Carter and Brooks & Wood.⁸⁰⁶⁹

IV.6472. Church Manor Estates received the following tender returns by 12:00 noon on 29 July 2005:⁸⁰⁷⁰

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Elliston Steady & Hawes	29 July 2005	By 12:00 Noon	£905,800.00	
Haymills	29 July 2005	By 12:00 Noon	£1,075,590.00	
Jackson	29 July 2005	By 12:00 Noon	£1,118,846.00	
Rose Builders	29 July 2005	By 12:00 Noon	£544,488.30	Yes
R G Carter	29 July 2005	By 12:00 Noon	£589,379.00	
Brooks & Wood	Declined to tender 7 July 2005			

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson Tender Book

IV.6473. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten.⁸⁰⁷¹

Enquiry Number	Date Received	Employer	Location	Description of Works
E4016	1.7.05		Stutton	Stables Conversion Crowe Hall

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
			C Cover from Haymills ST.	25.7.05 JBS

⁸⁰⁶⁸ Jackson is a subsidiary of Propensity.

⁸⁰⁶⁹ Information from client, OFT Document Reference 7386.

⁸⁰⁷⁰ Information from client, OFT Document Reference 7386.

⁸⁰⁷¹ Tender book, OFT Document Reference A0905, page 73.

Evidence from leniency applicant Propensity

IV.6474. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6475. In particular, Propensity provided to the OFT an analysis of Jackson's Tender Records Book since 4 January 2000 and in respect of this tender, Propensity confirmed that it received a cover price from Haymills.⁸⁰⁷²

IV.6476. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁸⁰⁷³

Witness evidence from leniency applicant Propensity

IV.6477. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6478. John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender book⁸⁰⁷⁴ and that in most instances it would be himself that arranged the cover price.⁸⁰⁷⁵ JR said in respect of the entry for this tender in the tender book, that 'ST' stood for the estimator Stuart Talbot ('ST') and that the 'C' stood for '*competitive tender*'.⁸⁰⁷⁶ JR further explained that ST was responsible for arranging the cover on this particular tender, which explains why the figure obtained from Haymills was not entered into the tender book.⁸⁰⁷⁷ Despite ST arranging the cover, JR was aware that Jackson was taking a cover price.⁸⁰⁷⁸

IV.6479. ST, a senior estimator at Jackson confirmed, '*that's one that I was involved in, and I did obtain a cover price on that project*'.⁸⁰⁷⁹ ST said that Jackson decided that it could not deal with this tender, '*So rather than the embarrassment of sending it back after chasing it through, and also potentially upsetting a client that we wanted to do future works with, I got in touch with Haymill's, who we knew had worked there before. So I assumed they would be on the tender list, and obtained a cover price from them so that we could not secure the project, without the embarrassment of having to send the documents back*'.⁸⁰⁸⁰ ST further confirmed that, '*That was the price that we put in, or they told me the figure not to go below, and I think we then would have calculated a figure above that*' and the person he spoke to at Haymills, '*Yes, it was a chap called Nick Dye, who is the guy who gave me the cover price*'.⁸⁰⁸¹

⁸⁰⁷² Analysis of Tender Records Book, OFT Document Reference A1274, page 8.

⁸⁰⁷³ Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁸⁰⁷⁴ Interview transcript, OFT Document Reference 11347, page 10.

⁸⁰⁷⁵ Interview transcript, OFT Document Reference 11347, page 11.

⁸⁰⁷⁶ Interview transcript, OFT Document Reference 11347, page 23.

⁸⁰⁷⁷ Interview transcript, OFT Document Reference 11347, page 24.

⁸⁰⁷⁸ Interview transcript, OFT Document Reference 11347, page 24.

⁸⁰⁷⁹ Interview transcript, OFT Document Reference 11343, page 12.

⁸⁰⁸⁰ Interview transcript, OFT Document Reference 11343, page 13.

⁸⁰⁸¹ Interview transcript, OFT Document Reference 11343, page 13.

Evidence from other companies – Haymills

IV.6480. The OFT wrote to Haymills on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Haymills had participated in bid rigging on this tender. In response to this letter, Haymills admitted *'We engaged in cover pricing (a form of bid rigging activities) on this tender with Jacksons'*.⁸⁰⁸²

IV.6481. In its response Haymills enclosed a copy of its Tender Analysis Form for this tender and under the section headed *'Competition'* is written *'JACKSONS (HELP REQUESTED) STUART TALBOT [.....] [C]'*.⁸⁰⁸³ In addition, Haymills said in respect of this tender, after its internal enquiries and interviews, that *'Nick Dye, a Quantity Surveyor based at Haymills' Stowmarket office, has a specific recollection of providing a cover price in respect of the above contract to Stuart Talbot of Jacksons (a competitor building contractor). Stuart Talbot telephoned Haymills on several occasions requesting a cover price, which Nick Dye eventually gave after Haymills had finalised its own tender price ... The tender analysis form for this contract supports Nick Dye's recollection'*.⁸⁰⁸⁴

IV.6482. The OFT subsequently wrote to Haymills' ultimate parent company at the time of this Infringement, Haymills Group, on 6 November 2007, asking it to comment on Haymills' response to the OFT's Fast Track Offer, given that the OFT intended to hold Haymills Group jointly and severally liable for any infringements committed by Haymills in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Haymills Group said it had no comments to make.⁸⁰⁸⁵

IV.6483. In its response to the Statement, Haymills stated that it *'...does not challenge its participation in cover pricing and its breach of the Chapter I prohibition in respect of ... [this Infringement]. Haymills Group regrets its participation in cover pricing and now operates a strict policy of competition law compliance'*.⁸⁰⁸⁶

The OFT's analysis of the evidence and finding

IV.6484. From the evidence presented above, the OFT draws the following conclusions.

IV.6485. Jackson and Haymills each accepted an invitation to tender for this contract.

IV.6486. Haymills completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work.

IV.6487. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

⁸⁰⁸² Response from Haymills, OFT Document Reference 11069, page 4.

⁸⁰⁸³ Haymills' tender analysis form, OFT Document Reference 11079, page 1.

⁸⁰⁸⁴ Response from Haymills, OFT Document Reference 10404, page 4.

⁸⁰⁸⁵ File note of telephone conversation, OFT Document Reference 13991.

⁸⁰⁸⁶ Written representations of Haymills, 27 June 2008, paragraph 2.

- IV.6488. In regard to Haymills, Jackson's tender book states, '*Cover from Haymills*'. Propensity has confirmed that this shows that it received a cover price from Haymills.
- IV.6489. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by Haymills, a pattern consistent with a cover price having been provided.
- IV.6490. Both companies have admitted to bid rigging in relation to this tender. Both companies also specifically recall the details of the contact with regard to the provision of the cover price for this tender. Jackson's estimator dealing with the tender was ST, who specifically recalled requesting a cover price from Nick Dye at Haymills. Similarly, Haymills has confirmed that its estimator dealing with the tender was Nick Dye, who specifically recalled giving a cover price to ST at Jackson.
- IV.6491. The OFT notes that Haymills admitted that the party with whom it engaged in bid rigging was Jackson, and that Jackson's estimator dealing with this tender was ST, without being shown the OFT's evidence that Jackson was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.
- IV.6492. The OFT therefore concludes that contact took place between Haymills and Jackson. The OFT also concludes that Haymills supplied a figure to Jackson for a cover bid.
- IV.6493. The OFT is satisfied that the facts set out in paragraphs IV.6473 to IV.6492 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸⁰⁸⁷ In particular:
- (a) the provision of a figure for a cover bid from Haymills to Jackson was not unilateral⁸⁰⁸⁸, and contravenes the principle against direct or indirect contact between competitors;⁸⁰⁸⁹
 - (b) Jackson can be presumed to have taken account of the information received from Haymills (i.e. the cover price) when determining its own conduct in the tendering process;⁸⁰⁹⁰ and
 - (c) Haymills can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸⁰⁹¹
- IV.6494. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and Haymills, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the new build agricultural building (stable), Crowe Hall, Stutton, tender deadline 29 July 2005.

⁸⁰⁸⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸⁰⁸⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁸⁰⁸⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸⁰⁹⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸⁰⁹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.6495. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6496. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 233: Eastbrook Hall, Little Germany, Bradford – 8 August 2005
Client: Aldersgate Estates Ltd
Parties: York House and Quarmby

IV.6497. During June and July 2005, Aldersgate Estates Ltd sought tenders for new build construction inside the retained facade of Eastbrook Hall (Listed Building). The return date for the tender was 12:00 noon on 8 August 2005 and five companies were invited to tender: Ham, Myddelton, Quarmby, Stainforth and York House.⁸⁰⁹²

IV.6498. Aldersgate Estates Ltd received the following tender returns on 8 August 2005:⁸⁰⁹³

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
Ham	8 August 2005	Pre Noon	£8,264,409	Yes
Myddelton	8 August 2005	Pre Noon	£8,644,210	
Quarmby	8 August 2005	Pre Noon	£9,140,967	
Stainforth	8 August 2005	Pre Noon	£7,790,969	
York House	8 August 2005	Pre Noon	£9,852,263	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from York House – Original Documents

IV.6499. As part of its leniency application, York House provided an Estimating Programme Printout relating to several tenders.⁸⁰⁹⁴ In section 16 the following typed and handwritten entries were made:⁸⁰⁹⁵

ID	Task Name	Duration	Start	Finish	27 Jun'05	04 Jul'05	11 Jul'05	18 Jul'05	25 Jul'05
16	0580 Eastbrook Hall, Bradford COV	20 days	Tue 28/06/05	Mon 25/07/05	XXXXXX	XXXXXX	XXXXXX	XXXXXX	XX 1/8 Quarmby

⁸⁰⁹² Information from client, OFT Document Reference 7023.

⁸⁰⁹³ Information from client, OFT Document Reference 7023.

⁸⁰⁹⁴ Estimating programme, OFT Document Reference A0490.

⁸⁰⁹⁵ Estimating programme, OFT Document Reference A0490, page 27.

IV.6500. At the time of its leniency application York House was in the process of computerising its estimating procedures. A further document was produced as a result of an I.T. sift of its computer system. A partial extract of the information contained in that document reads as follows:⁸⁰⁹⁶

	Task Name	Duration	Start	Finish
15	15 COV 0580 Eastbrook Hall, Bradford	136hrs	Mon 4/7/2005	Mon 25/7/2005

Evidence from leniency applicant York House

IV.6501. On 28 March 2006, a search with consent was undertaken at the premises of York House and in the course of the search the managing director Mr Andrew Bruce produced a handwritten list of covers.⁸⁰⁹⁷ The entry relating to Eastbrook Hall reads as follows:⁸⁰⁹⁸

[From/]	Cover		
	Given	Taken	To who
'5080 Eastbrook Hall Bradford	X	✓	QUARMBY'

IV.6502. As part of its leniency application, York House provided a general explanation of its participation in cover pricing.⁸⁰⁹⁹ This evidence is set out in paragraphs IV.743 to IV.751 above and is relied upon by the OFT in relation to this tender.

IV.6503. In particular, York House provided to the OFT a schedule of covers given and taken. The schedule confirms that York House received a cover price from Quarmby in relation to Eastbrook Hall. The individual contact named in the schedule is David Harrison, with a contact number of [...] [C].⁸¹⁰⁰

IV.6504. In its response to the Statement, York House did not make any submissions in respect of this Infringement.

Witness evidence from leniency applicant York House

IV.6505. During interviews conducted in connection with its leniency application, York House employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.743 to IV.751 above and is relied upon by the OFT in relation to this tender.

IV.6506. Additional evidence in relation to this tender comes from the interview of Arthur Richardson ('AR'), the estimator for York House. His response to questions concerning this tender were as follows:⁸¹⁰¹

Questions relating to the type of work

⁸⁰⁹⁶ Computerised estimating programme, OFT Document Reference A1595, page 2.

⁸⁰⁹⁷ Handwritten schedule of covers, OFT Document Reference A0491.

⁸⁰⁹⁸ Handwritten schedule of covers, OFT Document Reference A0491, page 4.

⁸⁰⁹⁹ Schedule of covers, OFT Document Reference A0633.

⁸¹⁰⁰ Schedule of covers, OFT Document Reference A0633, page 5.

⁸¹⁰¹ Interview transcript, OFT Document Reference 11457, page 25.

- S. *'Facade retention. Right again I am going to show you some documents. What do you recall about the contract first of all.*
- C. *Well again it's not our type of work and a nightmare scenario if you don't get it right.*
- S. *Is that a very specialist job.*
- A. *Yes*
- Q *Was there an estimator allocated to it.*
- A. *No'*

Questions relating to a computerised estimating register⁸¹⁰²

- Q. *'.....it's got here 15 C.O.V 0580 Eastbrook Hall, Bradford 136 hours Monday 47205 and it says at the very beginning C.O.V*
- A. *Yes*
- Q. *Now I asked you earlier in the interview...*
- A. *That means cover'*

IV.6507. In its response to the Statement, Quarmby contended in respect of AR's interview that he *'...does not however, recollect taking a cover from [Quarmby] in respect of this tender and only agrees that a cover was taken from [Quarmby] when the OFT interviewer asks the leading question "do you admit taking a cover from Quarmby"? [AR]'s response was "Again if you show me...". The OFT interviewer proceeded to show [AR] two OFT documents A1595 and A0490. Both of these documents identify that York House submitted a cover price but neither document identifies [Quarmby] as the giver of such cover price'.⁸¹⁰³*

IV.6508. The OFT notes that, contrary to Quarmby's assertion, OFT document A0490 does in fact identify Quarmby as the provider of the cover price, see paragraph IV.6499 above. The OFT considers that the interview evidence, when taken together with the contemporaneous documents, is sufficient to conclude that Quarmby gave a cover price to York House in respect of this tender.

Evidence from other companies – Quarmby

IV.6509. The OFT wrote to Quarmby on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Quarmby had participated in bid rigging on this tender. The OFT telephoned the Managing Director of Quarmby on 6 June 2007 to inform him that due to Quarmby's lack of response to the OFT's letter dated 22 March 2007, the OFT

⁸¹⁰² Interview transcript, OFT Document Reference 11457, page 26.

⁸¹⁰³ Written representations of Quarmby, 27 June 2008, paragraph 2.13(b)(i).

were treating this as a rejection of the OFT's Fast Track Offer. The Managing Director confirmed this.⁸¹⁰⁴

IV.6510. The OFT subsequently wrote to Quarmby's ultimate parent company at the time of this Infringement, St James Securities, on 6 November 2007, asking it to comment on Quarmby's response to the OFT's Fast Track Offer, given that the OFT intended to hold St James Securities jointly and severally liable for any infringements committed by Quarmby in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, St James Securities said it did not intend to respond to the matters referred to in the OFT's letter.⁸¹⁰⁵

IV.6511. Following the issue of the Statement, St James Securities did not submit any written or oral representations in respect of this Infringement.

IV.6512. In respect of this tender David Harrison ('DH'), Quarmby's former Estimating Manager, who was named as York House's contact in the evidence set out at paragraph IV.6503 above, stated *'I remember this project because the scheme involved a façade retention system. However, I did not price the project. It was in fact priced by my colleague and Senior Estimator at [Quarmby], Andrew Bucker. Andrew worked under me and reported to me on a day to day basis. My understanding is that Andrew priced the job properly in the usual way...to the best of my knowledge QCC did not give a 'cover price' for this contract to any other tenderers'*.⁸¹⁰⁶ The OFT considers the fact that the estimator for this tender reported to DH on a day to day basis as clear evidence that DH would have had access to Quarmby's pricing information in respect of this tender.

IV.6513. In its response to the Statement, Quarmby also provided a witness statement from Andrew Buckler ('AB'), who stated that *'during [his] employment with QCC [he had] never given or taken a cover price'* and confirmed that specifically in respect of the Eastbrook Hall tender he did not give a cover price to any other contractor.⁸¹⁰⁷

IV.6514. The OFT notes the evidence of these witnesses. However, it also notes that it requires to be balanced against the contemporaneous documentation and explanatory witness evidence from York House, which indicate the contrary. In this regard, the OFT notes in particular that no alternative plausible explanation has been given for the marking "COV" on the documents obtained from York House and that the explanation given for this marking by AR was clear. It is further noted that the only competitor's name which appears on York House's documents in relation to this tender is 'Quarmby'. Taking these factors, together with the remainder of the analysis set out below, into account, the OFT considers that on balance the documentary and witness evidence from York House should be preferred to that of AB and DH, each of whom may have been genuinely unaware as to whether a colleague supplied a cover price to York House.

IV.6515. In its response to the Statement, Quarmby asserted that it neither gave nor took cover prices as a matter of its corporate policy, and provided witness

⁸¹⁰⁴ Telephone note, OFT Document Reference 10771.

⁸¹⁰⁵ St James Securities' Response, OFT Document Reference 14097.

⁸¹⁰⁶ Witness statement of David Harrison, paragraphs 16 to 17.

⁸¹⁰⁷ Witness statement of Andrew Buckler, paragraphs 6 and 8.

evidence in support of this assertion. The OFT notes in this regard the evidence of Roger Nelson ('RN'), Quarmby's Commercial Director, who described becoming aware of the illegality of cover pricing in 2004, and went on to state:

'David Jones [Quarmby's Managing Director] and I agreed that even though we thought it highly unlikely cover price had occurred or was occurring at QCC (because it was not our practice to do so) we should take measures to reinforce the message that no-one within QCC was engaged in the practice of cover pricing or would be in future'.⁸¹⁰⁸

IV.6516. The OFT takes from this evidence that despite Quarmby's stated policy of not engaging in cover pricing activities, the Commercial Director and Managing Director were not certain that staff were not engaging in cover pricing, but only thought that it was 'highly unlikely' and that this uncertainty justified taking further action to prevent Quarmby's engagement in cover bidding. The OFT therefore considers that any such policy held by Quarmby does not undermine the evidence presented in relation to the giving of a cover price by Quarmby in this instance.

IV.6517. In its response to the Statement, Quarmby questioned *'...why York House would employ resources to complete the pre-qualification process in respect of a tender that it did not want and specifically was not, as it alleges, its type of work... [and] ...why York House would employ the resources of attending a meeting in relation to a tender it did not want to win'.⁸¹⁰⁹* It also relies on the evidence of Robert Hicks, who recollects attending a meeting with the client's agents on 7 July 2005 at which York House's representative was also present.⁸¹¹⁰ The OFT notes that AR explained in interview that a cover price *'...means you don't have to go through the process of having to have all the bills taken off, all the enquiries sent out and there are occasions where we have actually gone to the expense of doing all that and found that we were too busy to actually put the prices together at the last minute'.⁸¹¹¹* The OFT considers that AR's description of cover pricing provides a plausible explanation as to why York House would have sought a cover price from Quarmby after it had completed the pre-qualification process; it may have been too busy to actually put the price together at the last minute. The OFT also considers that the evidence of David Jones on behalf of Quarmby that *'Even on the extended deadline, it would barely be enough time to prepare a tender that met the employer's requirements'⁸¹¹²* tends to support this view. Likewise the evidence of RN on behalf of Quarmby that *'Many employers having gone through the process of selecting six contractors to price the work become extremely agitated if a contractor returns the documents unpriced and declines to tender having indicated to the employer during the pre-qualification process that he would price the contract if invited to do so'.⁸¹¹³* It is entirely feasible that York House initially intended to tender properly, and sought a cover price when the deadline approached and it became apparent that they would not be able to meet it. Accordingly, whilst the OFT makes no finding as to whether or not York House completed a pre-qualification process and/or attended a meeting

⁸¹⁰⁸ Witness Statement of Roger Nelson, paragraph 24.

⁸¹⁰⁹ Written representations of Quarmby, 27 June 2008, paragraphs 2.13(a)(v)(A) and (B).

⁸¹¹⁰ Witness Statement of Robert Hicks, paragraph 6; written representations of Quarmby, 27 June 2008, paragraph 2.13(iv)(C).

⁸¹¹¹ Interview transcript, OFT Document Reference 11457, page 6.

⁸¹¹² Witness Statement of David Jones, paragraph 22.

⁸¹¹³ Witness statement of Roger Nelson, paragraph 9.

with the client's agents, it considers that neither of those actions would preclude a finding that the party concerned engaged in cover pricing.

IV.6518. In its response to the Statement, Quarmby also questioned '*...why York House would submit a cover price that was more than 7% greater than the competitive tender...contractors take cover prices to "maintain face" with the employer. A cover price of 4-5% above the winning tender price is consistent with this approach, and credible. In the case of York House, however, the alleged cover price is over 7% higher than the [Quarmby] price. This is not credible, and provides further circumstantial evidence that the [Quarmby] price was not a cover, or at least not a cover for [Quarmby]*'.⁸¹¹⁴ The OFT notes that there was no exact range or standard formula used by the construction industry for the calculation of cover prices. The OFT does not accept Quarmby's assertion that the price difference between its submitted bid and the bid submitted by York House was too high for York House's price to have been a cover price provided by Quarmby; it is consistent with Quarmby providing an inflated figure by way of a cover price, and York House themselves increasing it further before onward transmission to the client. In any event the addition of a 7 per cent premium on a cover price provider's own bid price is consistent with industry practice on calculating a cover price as outlined in paragraphs IV.99 to IV.104 above.

IV.6519. In its response to the Statement, Quarmby noted that the allegations against it do not include the taking of cover prices, only the giving. This is stated to be '*important circumstantial evidence in support of QCC's contention that it has not and does not give cover prices...to merely give cover prices would be to confer on one's competitors a benefit without any advantage to oneself and consequently would be commercially inexplicable and irrational*'.⁸¹¹⁵

IV.6520. First, the OFT notes that only three alleged infringements were pursued against each non-leniency party, out of a wider pool of evidence available to the OFT⁸¹¹⁶ and so the fact that the three allegations in the Statement regarding Quarmby related only to the giving of cover cannot be taken as meaningful evidence of Quarmby's pattern of behaviour. Second, the OFT does not accept that the giving of cover confers a benefit on competitors without any benefit to the firm in question.

IV.6521. Moreover, the OFT notes that in addition to the evidence from York House relating to it taking a cover price from Quarmby on this tender, the OFT also has strong and compelling evidence relating to Strata taking a cover price from Quarmby (Infringement 6) and Admiral taking a cover price from Quarmby (Infringement 214). The OFT considers it highly improbable that all three of these companies would have mistakenly identified Quarmby as a participant in cover pricing if indeed Quarmby never gave cover prices.

The OFT's analysis of the evidence and finding

IV.6522. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

⁸¹¹⁴ Written representations of Quarmby, 27 June 2008, paragraph 2.13(a)(v)(C).

⁸¹¹⁵ Written representations of Quarmby, 27 June 2008, paragraph 2.7

⁸¹¹⁶ See paragraph III.203 of Section II (The OFT's Investigation).

- IV.6523. York House and Quarmby each accepted an invitation to tender for this contract.
- IV.6524. Quarmby appears to have completed the estimating process for the tender, and submitted a bid, with the intention of winning the work.
- IV.6525. York House was unable to submit a tender by the return date and/or did not want to win this contract.
- IV.6526. In regard to Quarmby, York House has confirmed that AR's handwritten entries 'COV' and 'Quarmby' on the Estimating Programme Printout⁸¹¹⁷, and the typed entry 'COV' on the Computerised Estimating Programme⁸¹¹⁸, show that it received a cover price from Quarmby. This was confirmed in interview by AR.
- IV.6527. DH, whom York House named as their contact for arranging a cover price in relation to this tender, worked as Estimating Manager at Quarmby between 1998 and 2006.⁸¹¹⁹ DH is also listed as being a contact at Quarmby, by a contact list obtained from the I.T. sift at the premises of Richardson Projects.⁸¹²⁰
- IV.6528. The OFT notes that 'Quarmby' is the only competitor's name noted on the contemporaneous document from York House, indicating that this was the only competitor bidding for the contract of whom York House was aware.
- IV.6529. The OFT further notes that the tender submitted by York House was higher than the tender submitted by Quarmby, an increase consistent with a cover price having been received.
- IV.6530. The OFT therefore concludes that contact took place between Quarmby and York House. The OFT also concludes that Quarmby supplied a figure to York House for a cover bid.
- IV.6531. The OFT is satisfied that the facts set out in paragraphs IV.6499 to IV.6530 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸¹²¹ In particular:
- (a) the provision of a figure for a cover bid from Quarmby to York House was not unilateral⁸¹²², and contravenes the principle against direct or indirect contact between competitors;⁸¹²³
 - (b) York House can be presumed to have taken account of the information received from Quarmby (i.e. the cover price) when determining its own respective conduct in the tendering process;⁸¹²⁴ and
 - (c) Quarmby can be presumed to have taken account of the information it received from York House (i.e. that York House did not intend to submit

⁸¹¹⁷ Estimating programme, OFT Document Reference A0490, page 27.

⁸¹¹⁸ Computerised estimating programme, OFT Document Reference A1595, page 2.

⁸¹¹⁹ Written representations of Quarmby, 27 June 2008, Annex 4.

⁸¹²⁰ Contact list, OFT Document Reference A1650, page 27.

⁸¹²¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸¹²² See paragraph IV.73 of the General comments on cover pricing section.

⁸¹²³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸¹²⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

a competitive bid) when determining its conduct in the tendering process.⁸¹²⁵

IV.6532. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Quarmby and York House, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for new build construction inside the retained facade of Eastbrook Hall, date of tender 8 August 2005.

Immunity and leniency assessment

IV.6533. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6534. York House informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. York House will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 234: Hillside Primary School, Classroom Extension – 24 August 2005
Client: Wokingham District Council
Parties: Mansell and Francis

IV.6535. In July 2005 Wokingham District Council sought tenders for Hillside Primary School, classroom extension.⁸¹²⁶ The following six companies were invited to tender: Ashe Construction, F. J. Lane, Feltham Construction, Francis, Mansell and Morris and Blunt. The date and time of tender return was 24 August 2005 at 2:30 pm.⁸¹²⁷

IV.6536. Wokingham District Council received the following tender returns:⁸¹²⁸

Company	Date & Time tender received	Amount of tender	Awarded contract
Francis	24 August 2005 12.55pm	£374,227.74	
Morris and Blunt	24 August 2005 14.15pm	£341,456.00	YES
F. J. Lane	23 August 2005 11.05am	£342,619.00	
Mansell	24 August 2005 13.00pm	£419,255.00	
Feltham Construction	24 August 2005 13.55pm	£382,195.00	

IV.6537. Ashe Construction declined to submit a tender.⁸¹²⁹

⁸¹²⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸¹²⁶ Information from client, OFT Document Reference 10022.

⁸¹²⁷ Information from client, OFT Document Reference 10022.

⁸¹²⁸ Information from client, OFT Document Reference 10022.

⁸¹²⁹ Information from client, OFT Document Reference 10022.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Mansell – tender spreadsheet

IV.6538. As part of its leniency application, Mansell’s legal representatives provided Barry Russ’s (‘BR’), a Mansell managing estimator, workload reports. The 2005 workload report for special projects contained the following entry:⁸¹³⁰

EST NO.	LOCATION/DESCRIPTION	OUR BID				
		BID	NET	LESS PROV.	%	MARGIN
02-00345	Lower Earley – Hillside Primary School – Classroom Extension					

OTHER BIDS			RESULT		REMARKS
LOWEST	SECOND	HIGHEST	POSN.	POSS.%	
341456	342619	419255	5/5		(Francis Construction)

Evidence from leniency applicant Mansell

IV.6539. As part of its leniency application, Mansell’s legal representatives provided a general explanation of its part in the process of cover pricing.⁸¹³¹ This evidence is set out in paragraphs IV.470 to IV.502 above and is relied upon by the OFT in relation to this tender.

IV.6540. Mansell’s legal representatives also provided to the OFT a table showing information relating to tendering activities in which a calculated competitive bid was not submitted, for the Thames Valley Region (‘TVR’), which includes this tender. In respect of this tender the table shows that Mansell received a cover price from Francis and that this cover price was taken due to *‘insufficient tender period: resource’* at Mansell.⁸¹³²

IV.6541. In its response to the Statement, Mansell did not make any substantive oral or written representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Mansell

IV.6542. During interviews conducted in connection with its leniency application, BR provided further general explanation of Mansell’s participation in cover pricing in the TVR. This evidence is set out in paragraphs IV.481 to IV.489 above and is relied upon by the OFT in relation to this tender.

IV.6543. During an interview with the OFT on 1 May 2007, BR advised how he would record when Mansell had taken a cover as detailed in paragraphs IV.482 to IV.485 above. In relation to this tender BR stated *‘Francis Construction would have given us the figure..’*⁸¹³³ BR explained that although the figure had not been typed into the net column, because Mansell came fifth out of five

⁸¹³⁰ 2005 workload report for special projects, OFT Document Reference B3539, page 5.

⁸¹³¹ Leniency application, OFT Document Reference B0734.

⁸¹³² Tendering activities table, OFT Document Reference B1351, page 1.

⁸¹³³ Interview transcript, OFT Document Reference 11516, page 38.

contractors that Mansell bid was the figure shown in the column headed 'Highest' on the workload sheet⁸¹³⁴ which shows '419255'.⁸¹³⁵

Evidence from other companies – Francis

IV.6544. The OFT wrote to Francis on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Francis had participated in bid rigging on this tender. In response to this letter Francis stated that it was *'unable to make the admissions'* as it had been *'unable to find any evidence that it [Francis] has been guilty of the bid rigging activities alleged against it...'*⁸¹³⁶

IV.6545. The OFT subsequently wrote to Francis's ultimate parent company at the time of this Infringement, Barrett, on 6 November 2007, asking it to comment on Francis's response to the OFT's Fast Track Offer, given that the OFT intended to hold Barrett jointly and severally liable for any infringements committed by Francis in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Barrett stated *'Barrett has ... nothing to add to the comments that have already been made to you on behalf of Francis Construction...'*⁸¹³⁷

IV.6546. In their response to the Statement, however, Francis and Barrett stated *'Francis does not contest the OFT's findings of infringement against Francis Construction'*⁸¹³⁸ in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.6547. From the evidence presented above, the OFT draws the following conclusions.

IV.6548. Mansell and Francis each accepted an invitation to tender for this contract.

IV.6549. Both companies submitted a tender. Mansell was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6550. Mansell's 2005 workload report records *'(Francis Construction)'*, in the Remarks column. Mansell confirmed that this shows that it took a cover price from the company noted. In addition, Mansell has confirmed that the lack of figures in the margin and percentage columns would also indicate a cover price had been taken.

IV.6551. The OFT further notes that the tender submitted by Mansell was higher than the tender submitted by Francis, the pattern consistent with a cover price having been provided.

IV.6552. In addition, Francis has now stated that it does not contest its involvement in cover pricing in respect of this Infringement.

⁸¹³⁴ Interview transcript , OFT Document Reference 11516, page 39.

⁸¹³⁵ 2005 workload report for special projects, OFT Document Reference B3539, page 5.

⁸¹³⁶ Response from Francis, OFT Document Reference 10285, page 1.

⁸¹³⁷ Response from Barrett, OFT Document Reference 14050.

⁸¹³⁸ Written representations of Francis and Barrett, 2 July 2008, paragraph 3.

IV.6553. The OFT therefore concludes that contact took place between Mansell and Francis. The OFT also concludes that Francis supplied a figure to Mansell for a cover bid.

IV.6554. The OFT is satisfied that the facts set out in paragraphs IV.6538 to IV.6553 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸¹³⁹ In particular:

- (a) the provision of a figure for a cover bid from Francis to Mansell was not unilateral⁸¹⁴⁰, and contravenes the principle against direct or indirect contact between competitors;⁸¹⁴¹
- (b) Mansell can be presumed to have taken account of the information received from Francis (i.e. the cover price) when determining its own conduct in the tendering process;⁸¹⁴² and
- (c) Francis can be presumed to have taken account of the information it received from Mansell (i.e. that Mansell did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸¹⁴³

IV.6555. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Mansell and Francis in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for Hillside Primary School, classroom extension, tender deadline 24 August 2005.

Immunity and leniency assessment

IV.6556. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6557. Mansell informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Mansell will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 235: Adnams Distribution Centre, Reydon, Southwold – 19
 September 2005**

Client: Adnams plc

Parties: Jackson⁸¹⁴⁴ and Kier Eastern⁸¹⁴⁵

IV.6558. On 25 May and subsequently on 25 July 2005, Adnams plc sought tenders for the Adnams Distribution Centre, Reydon, Southwold. The return date for the tender was 19 September 2005 and seven companies were invited to tender:

⁸¹³⁹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸¹⁴⁰ See paragraph IV.73 of the General comments on cover pricing section.

⁸¹⁴¹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸¹⁴² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸¹⁴³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸¹⁴⁴ Jackson is a subsidiary of Propensity.

⁸¹⁴⁵ Kier Eastern is a trading division of Kier.

Jackson, Baines Construction, Haymills, Kier Eastern, Amec Construction Ltd, Willmott Dixon and R G Carter.⁸¹⁴⁶

IV.6559. Adnams plc received the following tender returns by 12:00 noon on 19 September 2005:⁸¹⁴⁷

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Jackson	25 May 2005	By 12:00 Noon 19 September 2005	£7,256,430.00	
Baines Construction	25 May 2005	By 12:00 Noon 19 September 2005	£7,013,929.52	
Haymills	25 May 2005	By 12:00 Noon 19 September 2005	£6,370,129.00	Yes
Kier Eastern	25 May 2005	By 12:00 Noon 19 September 2005	£6,377,463.00	
Amec Construction Ltd	25 May 2005	By 12:00 Noon 19 September 2005	£7,199,019.88	
Willmott Dixon	25 May 2005	Declined to Tender 21 July 2005		
R G Carter	25 July 2005	By 12:00 Noon 19 September 2005	£6, 565,130.59	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Propensity – Jackson Tender book

IV.6560. In Jackson's tender book provided by Propensity to the OFT as part of its leniency application, in respect of this tender, the following entries have been made, all of which are handwritten.⁸¹⁴⁸

Enquiry Number	Date Received	Employer	Location	Description of Works
E4032	1.8.05	Adnams	Reydon	Distribution Centre

Pos Out of	Lowest Tender	Jacksons	General Notes	Date for Return
		£7,256,430	C Cover from Kier Eastern	Noon 19.9.05 JCL

IV.6561. On the tender sheet for this tender is handwritten in the section under '*Known Competition*', '*Kier – Wisbech*' along with a number of other companies, while at the foot of the page is written, '*Kier – Ian Walsham [...] [C]*'.⁸¹⁴⁹

⁸¹⁴⁶ Information from client, OFT Document Reference 6989.

⁸¹⁴⁷ Information from client, OFT Document Reference 6989.

⁸¹⁴⁸ Tender book, OFT Document Reference A0905, page 74.

⁸¹⁴⁹ Tender sheet, OFT Document Reference A0879.

Evidence from leniency applicant Propensity

IV.6562. As part of its leniency application, Propensity provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6563. In particular, Propensity provided to the OFT an analysis of its Tender Records Book since 4 January 2000 and in respect of this tender, Propensity confirmed that it received a cover price from Kier Eastern.⁸¹⁵⁰

IV.6564. In its response to the Statement, Propensity stated '*...Propensity Group has made admissions in relation to all instances of cover pricing it uncovered as part of its leniency application*'.⁸¹⁵¹

Witness evidence from leniency applicant Propensity

IV.6565. During interviews conducted in connection with its leniency application, Propensity's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.537 to IV.566 above and is relied upon by the OFT in relation to this tender.

IV.6566. John Rhodes ('JR'), Pre-Contracts Manager at Jackson, confirmed in interview that it is his handwriting in the tender register⁸¹⁵² and that in most instances it would be himself that arranged the cover price.⁸¹⁵³ JR said in respect of the entry in the tender register for this tender, '*the bid submitted by Jackson's was in the region of £7¼ million, it was a competitive tender and some assistance was sought from Kier Eastern. The bid was submitted on 19 September 2005*'.⁸¹⁵⁴

IV.6567. JR also confirmed that the handwriting on the tender sheet was his⁸¹⁵⁵ and that Ian Walsham was an estimator at Kier Eastern, with whom he spoke to obtain a cover price.⁸¹⁵⁶ JR further confirmed that the job was not allocated to an estimator at Jackson's because it decided at an early stage that it would seek help on the tender.⁸¹⁵⁷

Evidence from other companies – Kier

IV.6568. The OFT wrote to Kier on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Kier had participated in bid rigging on this tender. In response to this letter, Kier said that it was unable to accept the OFT's Fast Track Offer.⁸¹⁵⁸

IV.6569. Kier stated in its response to the Statement that it did not wish to comment on the Infringements other than to make comments and observations which

⁸¹⁵⁰ Analysis of Tender Records Book, OFT Document Reference A1274, page 8.

⁸¹⁵¹ Written representations of Propensity, 27 June 2008 (as amended on 31 March 2009), paragraph 6.2.

⁸¹⁵² Interview transcript, OFT Document Reference 11347, page 10.

⁸¹⁵³ Interview transcript, OFT Document Reference 11347, page 11.

⁸¹⁵⁴ Interview transcript, OFT Document Reference 11347, page 24.

⁸¹⁵⁵ Interview transcript, OFT Document Reference 11347, page 24.

⁸¹⁵⁶ Interview transcript, OFT Document Reference 11347, page 25.

⁸¹⁵⁷ Interview transcript, OFT Document Reference 11347, page 24.

⁸¹⁵⁸ Response from Kier, OFT Document Reference 10477, page 1.

should be taken into account when calculating any penalty.⁸¹⁵⁹ Such points are addressed in Section VI (Enforcement) below.

The OFT's analysis of the evidence and finding

IV.6570. From the evidence presented above, the OFT draws the following conclusions.

IV.6571. Jackson and Kier Eastern each accepted an invitation to tender for this contract.

IV.6572. Jackson was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6573. In regard to Kier Eastern, Jackson's tender book states, '*Cover from Kier Eastern*'. Propensity has confirmed that this shows that it received a cover price from Kier Eastern. Jackson recorded in the tender book the figure £7,256,430, as the tender figure and this was the figure that Jackson submitted. Furthermore, Jackson has confirmed that it spoke to an estimator at Kier Eastern, Ian Walsham, in order to obtain the cover price. This name is also recorded on Jackson's contemporaneous tender sheet for this tender, along with a telephone number, '[.....] [C]', which is a telephone number for Kier Eastern⁸¹⁶⁰, providing further corroboration that Kier Eastern was telephoned by Jackson in connection with this tender.

IV.6574. The OFT notes in addition that the tender submitted by Jackson was higher than the tender submitted by Kier Eastern, a pattern consistent with a cover price having been provided.

IV.6575. The OFT therefore concludes that contact took place between Kier Eastern and Jackson. The OFT also concludes that Kier Eastern supplied a figure to Jackson for a cover bid.

IV.6576. The OFT is satisfied that the facts set out in paragraphs IV.6560 to IV.6575 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸¹⁶¹ In particular:

- (a) the provision of a figure for a cover bid from Kier Eastern to Jackson was not unilateral⁸¹⁶², and contravenes the principle against direct or indirect contact between competitors;⁸¹⁶³
- (b) Jackson can be presumed to have taken account of the information received from Kier Eastern (i.e. the cover price) when determining its own conduct in the tendering process;⁸¹⁶⁴ and
- (c) Kier Eastern can be presumed to have taken account of the information it received from Jackson (i.e. that Jackson did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸¹⁶⁵

⁸¹⁵⁹ Written representations of Kier Group and Kier, 27 June 2008, paragraphs 1.2 and 2.1.

⁸¹⁶⁰ www.cambridgeshirechamber.co.uk/pooled/profiles, OFT Document Reference 5961b.

⁸¹⁶¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸¹⁶² See paragraph IV.73 of the General comments on cover pricing section.

⁸¹⁶³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸¹⁶⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸¹⁶⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.6577. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jackson and Kier Eastern, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the Adnams Distribution Centre, Reydon, Southwold, tender deadline 19 September 2005.

Immunity and leniency assessment

IV.6578. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6579. Propensity informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Propensity will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

**Infringement 236: New Build Nursery, Bridlington Sure Start at Bridlington
Nursery School – 7 November 2005**
Client: East Riding of Yorkshire Council
Parties: Hobson & Porter, Robinson & Sawdon and Hall

IV.6580. On 5 October 2005 East Riding of Yorkshire Council ('East Riding') sought tenders for a new build nursery, Bridlington Sure Start at Bridlington Nursery School. The return date for the tender was 7 November 2005 and six companies were invited to tender: Barker & Grantham, Brian Fell (Leven) Ltd, Hobson & Porter, Hall, Robinson & Sawdon and William Birch & Sons Ltd.⁸¹⁶⁶

IV.6581. East Riding received the following tender returns on 7 November 2005:⁸¹⁶⁷

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Barker & Grantham	7 November 2005	11:35	£989,389	Yes
Brian Fell (Leven) Ltd	7 November 2005	11:05	£1,000,380	
Hobson & Porter	7 November 2005	11:30	£1,006,597	
Hall	7 November 2005	11:36	£1,056,370	
Robinson & Sawdon	7 November 2005	11:20	£1,071,837	
William Birch & Sons Ltd	7 November 2005	11:20	£1,088,444	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter – Tender Information Sheet

IV.6582. The tender information sheet for this tender states that Hobson & Porter's submitted figure was £1,006,597 and in the competition section is written, 'HALLS 'C'' and 'Robinson & Sawdon 'C''. Two other competitors are written

⁸¹⁶⁶ Information from client, OFT Document Reference 13649b.

⁸¹⁶⁷ Information from client, OFT Document Reference 13649b.

in this section, '*B FELL*' and '*WILLIAM BIRCH*', but they do not have any markings or figures against them.⁸¹⁶⁸

Evidence from leniency applicant Hobson & Porter

IV.6583. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6584. In Hobson & Porter's Summary of Cover Pricing Activity (Major Works) it is stated that Hobson & Porter provided a cover to Hall, and that the individual contact at Hall was John Grey. It is also stated that Hobson & Porter provided a cover to Robinson & Sawdon and that the individual contact at Robinson & Sawdon was Dave Marshall ('DM').⁸¹⁶⁹

IV.6585. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁸¹⁷⁰

Witness evidence from leniency applicant Hobson & Porter

IV.6586. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6587. In respect of this tender, in interview Russell Horner ('RH'), Major Works Estimating Director, confirmed that Hobson & Porter provided cover prices both to Hall and to Robinson & Sawdon, and that he signed off the provision.⁸¹⁷¹ David Watson ('DW'), Managing Director, confirmed that '*we will have given a cover to Hall's and to Robinson & Sawdon*'.⁸¹⁷² Michael Haywood ('MH'), an estimator in Major Works, confirmed that he priced this tender and added the C's in next to '*HALLS*' and '*Robinson & Sawdon*' on the tender information sheet. MH said '*I would certainly have filled those C's in*' and '*It records that Halls and Robinson & Sawdon in Hobson and Porters knowledge had received covers. Whether it was from Hobson and Porter, I can't recall*'.⁸¹⁷³

Evidence from other companies – Robinson & Sawdon

IV.6588. The OFT wrote to Robinson & Sawdon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Robinson & Sawdon had participated in bid rigging on this tender. In response to this letter, Robinson & Sawdon admitted participating in bid rigging activities on this tender with Hobson & Porter.⁸¹⁷⁴

⁸¹⁶⁸ Tender information sheet, OFT Document Reference A0157, page 1 and 2.

⁸¹⁶⁹ Summary of Cover Pricing Activity, OFT Document Reference A1347, page 1.

⁸¹⁷⁰ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁸¹⁷¹ Interview transcript, OFT Document Reference 11229, page 19.

⁸¹⁷² Interview transcript, OFT Document Reference 11230, page 12.

⁸¹⁷³ Interview transcript, OFT Document Reference 11232, pages 18 and 19.

⁸¹⁷⁴ Response from Robinson & Sawdon, OFT Document Reference 10819, page 4.

IV.6589. In its response, James Deacon ('JD'), the Managing Director of Robinson & Sawdon, said that he had conducted an internal investigation into the tendering process at Robinson & Sawdon. As part of this investigation Charles Robinson ('CR') was interviewed and confirmed that Robinson & Sawdon engaged in cover pricing.⁸¹⁷⁵ CR further confirmed in respect of this tender that a cover price was issued following conversations with Hobson & Porter.⁸¹⁷⁶ Also, as part of this investigation DM, completed a questionnaire about the tendering process. DM was Estimating Manager during the period under investigation. In the questionnaire, DM confirmed that Robinson & Sawdon was involved in the practice of cover pricing and that this was done with the knowledge of the directors of Robinson & Sawdon.⁸¹⁷⁷ DM separately confirmed that any cover price provided by him would have been on the basis of being instructed to do so by either Bob Sawdon or Mike Sawdon up to August 2004 and CR afterwards.⁸¹⁷⁸

IV.6590. Following the issue of the Statement, Robinson & Sawdon did not submit any specific written or oral representations in respect of this Infringement.

Evidence from other companies – Hall

IV.6591. The OFT wrote to Hall on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Hall had participated in bid rigging on this tender. In response to this letter, Hall admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved*'.⁸¹⁷⁹

IV.6592. In its response to the Statement, Hall confirmed that '*[i]t is not disputed that Hall participated in cover pricing during the relevant period set out in the Statement*'.⁸¹⁸⁰

The OFT's analysis of the evidence and finding

IV.6593. From the evidence presented above, the OFT draws the following conclusions.

IV.6594. Hobson & Porter, Robinson & Sawdon and Hall each accepted an invitation to tender for this contract.

IV.6595. Hobson & Porter completed the estimating process for the tender for this contract and it appears they submitted a bid with the hope of winning the work.

IV.6596. Robinson & Sawdon and Hall were unable to submit a tender by the return date and/or did not want to win this tender.

IV.6597. In regard to Robinson & Sawdon, Hobson & Porter's tender sheet records '*Robinson & Sawdon 'C'*'. RH and DW of Hobson & Porter have confirmed that

⁸¹⁷⁵ Response from Robinson & Sawdon, OFT Document Reference 10818, page 10.

⁸¹⁷⁶ Response from Robinson & Sawdon, OFT Document Reference 10817, page 2.

⁸¹⁷⁷ Response from Robinson & Sawdon, OFT Document Reference 10818, page 16.

⁸¹⁷⁸ Response from Robinson & Sawdon, OFT Document Reference 10817, page 2.

⁸¹⁷⁹ Response from Hall, OFT Document Reference 10373, page 7.

⁸¹⁸⁰ Written representations of Hall, 24 June 2008, paragraph 53.

this indicates that it gave Robinson & Sawdon a cover price. MH of Hobson & Porter has confirmed that the 'C' written next to Robinson & Sawdon on the tender sheet, indicates that Robinson & Sawdon received a cover price, but he cannot confirm if Hobson & Porter provided it. The OFT considers in the light of the weight of the evidence on this tender that the cover price must have been provided by Hobson & Porter. CR of Robinson & Sawdon has confirmed, in respect of this tender, that a cover price was issued following conversations with Hobson & Porter.

IV.6598. The OFT notes in addition that the tender submitted by Robinson & Sawdon was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, Robinson & Sawdon admitted engaging in bid rigging activities with Hobson & Porter on this tender.

IV.6599. In regard to Hall, Hobson & Porter's tender information sheet records 'HALLS C'. RH and DW of Hobson & Porter have confirmed that this indicates that it gave Hall a cover price. MH of Hobson & Porter has confirmed that the 'C' written next to 'HALLS' on the tender sheet, indicates that Hall received a cover price, but he cannot confirm if Hobson & Porter provided it. The OFT considers in the light of the weight of the evidence on this tender that the cover price must have been provided by Hobson & Porter.

IV.6600. The OFT notes in addition that the tender submitted by Hall was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided. Furthermore, Hall admitted engaging in bid rigging activities on this tender.

IV.6601. All three companies have admitted to bid rigging in relation to this tender. The OFT notes that Robinson & Sawdon admitted that the party with whom it engaged in bid rigging was Hobson & Porter without being shown the OFT's evidence that Hobson & Porter was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.6602. The OFT therefore concludes that contact took place between Robinson & Sawdon and Hobson & Porter, and between Hall and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied figures to each of Robinson & Sawdon and Hall for cover bids.

IV.6603. The OFT is satisfied that the facts set out in paragraphs IV.6582 to IV.6602 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸¹⁸¹ In particular:

- (a) the provision of figures for cover bids from Hobson & Porter to each of Robinson & Sawdon and Hall was not unilateral⁸¹⁸², and contravenes the principle against direct or indirect contact between competitors;⁸¹⁸³
- (b) Robinson & Sawdon and Hall can each be presumed to have taken account of the information received from Hobson & Porter (i.e. the respective cover prices) when determining their own respective conduct in the tendering process,⁸¹⁸⁴ and

⁸¹⁸¹ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸¹⁸² See paragraph IV.73 of the General comments on cover pricing section.

⁸¹⁸³ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸¹⁸⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

- (c) Hobson & Porter can be presumed to have taken account of the information it received from Robinson & Sawdon and Hall (i.e. that neither of them intended to submit competitive bids) when determining its conduct in the tendering process.⁸¹⁸⁵

IV.6604. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that agreements and/or concerted practices were in place between Robinson & Sawdon and Hobson & Porter, and between Hall and Hobson & Porter, in breach of the Chapter I prohibition, each of which had the object of bid rigging in relation to the tender for a new build nursery, Bridlington Sure Start at Bridlington Nursery School, tender deadline 7 November 2005.

Immunity and leniency assessment

IV.6605. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6606. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, Hobson & Porter will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 237: Whetley Primary School Refurbishment – 14 November 2005
Client: Bradford Metropolitan Borough
Parties: Harlow & Milner and Lotus

IV.6607. In October 2005, the City of Bradford Metropolitan District Council ('CBMDC') sought tenders for refurbishment work to Whetley Primary School, Whetley Lane, Bradford, West Yorkshire. The following five companies were invited to tender: Whitaker & Leach, Harlow & Milner, Lotus, Calder Construction and Slimline Building.⁸¹⁸⁶ CBMDC did not provide deadline details for this tender nor the times it received tenders from the tendering undertakings.

IV.6608. The CBMDC received the following tender returns:⁸¹⁸⁷

Company	Date tender received	Amount of tender	Awarded tender
Whitaker & Leach	14 November 2005	£54,208.00	
Harlow & Milner	14 November 2005	£57,638.00	
Lotus	14 November 2005	£51,854.00	Yes
Calder Construction	14 November 2005	£73,959.70	
Slimline Building	14 November 2005	£73,000.00	

IV.6609. In its response to the Statement, Lotus stated that contrary to the information provided by CBMDC, it did not win the contract despite submitting the lowest

⁸¹⁸⁵ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸¹⁸⁶ Information from client, OFT Document Reference 7241.

⁸¹⁸⁷ Information from client, OFT Document Reference 7241.

Evidence from leniency applicant Harlow & Milner

IV.6613. As part of its leniency application, Harlow & Milner provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.352 to IV.362 above and is relied upon by the OFT in relation to this tender.

IV.6614. In particular, Harlow & Milner provided to the OFT an analysis of its tender sheets since March 2000. In respect of the tender for the Whetley Primary School refurbishment, dated 14 November 2005, Harlow & Milner confirmed that it received a cover price from Lotus.⁸¹⁹⁰

IV.6615. In its response to the Statement, Harlow & Milner accepted in respect of this Infringement ‘... *that it requested and received a cover price from Lotus.*’⁸¹⁹¹

Witness evidence from leniency applicant Harlow & Milner

IV.6616. During interviews conducted in connection with its leniency application, Harlow & Milner’s employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.352 to IV.362 above and is relied upon by the OFT in relation to this tender.

IV.6617. With regard to this particular tender, Chris Smithson (‘CS’), Chief Estimator, was asked to explain the handwritten note described in paragraph IV.6610 to IV.6612 above. He said, ‘*I would hazard a guess that if the form of tender has a break down on it, those could well show the figures from certain sections of a bill [of quantities] I would think*’. When asked to explain Lotus Thurs 51-00 he said, ‘*It would be Lotus Construction, probably contacted on Thursday, or [we were] given the price on Thursday and I would guess 51,000 is the figure that we’ve been given*’ [by Lotus].⁸¹⁹²

IV.6618. CS further explained, ‘*Usually when you’re given a cover, you would just add a bit extra on really to make sure so I’m assuming they [the Tender Adjudication Board, headed by Richard Milner] just added a bit more to make sure they’re [the Board] away from other contractors*’.⁸¹⁹³

IV.6619. When asked to explain the figure ‘57,638.00’, CS said, ‘*I would assume that it’s the tender figure*’.⁸¹⁹⁴ This figure is the same as that in the tender reply received by CBMDC from Harlow & Milner.⁸¹⁹⁵

Evidence from other companies – Lotus

IV.6620. The OFT wrote to Lotus on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty it might impose in respect of its alleged participation in bid rigging on this tender in return for an admission that Lotus had participated in bid rigging on this tender. In response to this letter, Lotus

⁸¹⁹⁰ Summary of cover pricing activity, OFT Document Reference A0565, page 5.

⁸¹⁹¹ Written representations of Harlow & Milner, 27 June 2008, paragraph 3.10(j).

⁸¹⁹² Interview transcript, OFT Document Reference 12733, page 8.

⁸¹⁹³ Interview transcript, OFT Document Reference 12733, page 9.

⁸¹⁹⁴ Interview transcript, OFT Document Reference 12733, page 9.

⁸¹⁹⁵ Information from client, OFT Document Reference 7241.

admitted *'We engaged in bid rigging activities on this tender but cannot recall details of other parties involved'*.⁸¹⁹⁶

IV.6621. Lotus confirmed in its response to the Statement that *'...Lotus is compelled ... to accept its participation in the Alleged Infringements...'*.⁸¹⁹⁷

The OFT's analysis of the evidence and finding

IV.6622. From the evidence presented above, the OFT draws the following conclusions.

IV.6623. Harlow & Milner and Lotus each accepted an invitation to tender for this contract.

IV.6624. It appears that Lotus completed the estimating process for this contract and that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Lotus being the lowest received. CBMDC also informed the OFT that Lotus won the contract, although this information was later contradicted by Lotus – however, this is not material to the OFT's findings in respect of this Infringement.

IV.6625. Harlow & Milner was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6626. Lotus was contacted by a member of Harlow & Milner's estimating team and asked to supply a figure for a cover bid. The handwritten note, discussed in paragraphs IV.6610 to IV.6612 above, contains the phrase, *'LOTUS Thurs 51 – 00'*. Harlow & Milner has explained that this probably refers to a telephone call to Lotus on a Thursday and the provision of a cover figure by Lotus. The OFT notes the comment *'HM Price + 55K'* at the foot of this note and considers it likely, given the figures submitted by both Lotus and Harlow & Milner, that Harlow & Milner was asked by Lotus to submit a price in excess of £55,000.

IV.6627. Harlow & Milner's handwritten note also contains various figures necessary to make a tender submission and the words *'Cover Figures Lotus'*. The tender figure of £57,638 submitted by Harlow & Milner is in keeping with a cover price being sufficiently higher than the bid from Lotus to remain credible whilst also ensuring that the undertaking lost the tender.

IV.6628. Lotus, in its reply to the OFT's Fast Track Offer, admitted that it engaged in bid rigging activities in this tender but was unable to provide details or recall the parties involved. The OFT considers that this provides corroborating evidence that Harlow & Milner was supplied with a cover price by Lotus.

IV.6629. The OFT notes in addition that the tender figure submitted by Harlow & Milner was the same as that recorded on the handwritten note submitted in leniency and that Harlow & Milner submitted a tender which was some 11 per cent higher than the tender submitted by Lotus, the pattern consistent with a cover price having been provided.

⁸¹⁹⁶ Response from Lotus, OFT Document Reference 10528, page 3.

⁸¹⁹⁷ Written representations of Lotus, 26 June 2008, paragraph 7.3.

IV.6630. The OFT therefore concludes that contact took place between Harlow & Milner and Lotus. The OFT also concludes that Lotus supplied a figure to Harlow & Milner for a cover bid.

IV.6631. The OFT is satisfied that the facts set out in paragraphs IV.6610 to IV.6630 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸¹⁹⁸ In particular:

- (a) the provision of a figure for a cover bid from Lotus to Harlow & Milner was not unilateral⁸¹⁹⁹, and contravenes the principle against direct or indirect contact between competitors;⁸²⁰⁰
- (b) Harlow & Milner can be presumed to have taken account of the information received from Lotus (i.e. the cover price) when determining its own conduct in the tendering process;⁸²⁰¹ and
- (c) Lotus can be presumed to have taken account of the information it received from Harlow & Milner (i.e. that Harlow & Milner did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸²⁰²

IV.6632. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Lotus and Harlow & Milner, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for refurbishment work at Whetley Primary School, Whetley Lane, Bradford, West Yorkshire, tender deadline 14 November 2005.

Immunity and leniency assessment

IV.6633. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6634. Harlow & Milner informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Harlow & Milner will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 238: Calder Link Building, University of Hull – 28 November 2005
Client: The University of Hull
Parties: Hobson & Porter and Robinson & Sawdon

IV.6635. On 18 October 2005, The University of Hull sought tenders for works at the Calder Link Building. The return date for the tender was 12:00 noon on 28

⁸¹⁹⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸¹⁹⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁸²⁰⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸²⁰¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸²⁰² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

November 2005 and three companies were invited to tender: Hobson & Porter, Geo Houlton and Robinson & Sawdon.⁸²⁰³

IV.6636. The University of Hull received the following three tender returns by 28 November 2005:⁸²⁰⁴

Company	Date tender received	Time tender received	Amount of tender	Awarded the tender
Hobson & Porter	28 November 2005		£602,498	Yes
Geo Houlton	28 November 2005		£635,536	
Robinson & Sawdon	28 November 2005		£647,213	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Hobson & Porter

IV.6637. The tender information sheet shows that Hobson & Porter's submitted figure was £602,498 and in the competition section is written, '*Robinson & Sawdon 'C'*'.⁸²⁰⁵

Evidence from leniency applicant Hobson & Porter

IV.6638. As part of its leniency application, Hobson & Porter provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6639. In Hobson & Porter's Summary of Cover Pricing Activity (Major Works) it is stated that Hobson & Porter provided a cover to Robinson & Sawdon and that the contact at Robinson & Sawdon was Dave Marshall ('DM').⁸²⁰⁶

IV.6640. In its response to the Statement, Hobson & Porter stated that it '*...does not contest the OFT's findings of infringement*'.⁸²⁰⁷

Witness evidence from leniency applicant Hobson & Porter

IV.6641. During interviews conducted in connection with its leniency application, Hobson & Porter's employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.391 to IV.407 above and is relied upon by the OFT in relation to this tender.

IV.6642. In respect of this tender, in interview Russell Horner ('RH'), Major Works Estimating Director, recalls that Michael Haywood ('MH'), an estimator in Major Works, priced the tender and that he would have completed the Tender Information sheet and added the '*C*' next to Robinson & Sawdon.⁸²⁰⁸ RH

⁸²⁰³ Information from client, OFT Document Reference 8432.

⁸²⁰⁴ Information from client, OFT Document Reference 8432.

⁸²⁰⁵ Tender information sheet, OFT Document Reference A0107, pages 1 and 2.

⁸²⁰⁶ Summary of cover pricing activity, OFT Document Reference A1347, page 1.

⁸²⁰⁷ Written representations of Hobson & Porter, 27 June 2008, paragraph 4.

⁸²⁰⁸ Interview transcript, OFT Document Reference 11229, pages 19 and 20.

confirmed that Hobson & Porter provided cover to Robinson & Sawdon. MH confirmed that he priced this tender and added the 'C' next to Robinson & Sawdon on the Tender Information sheet. MH has spoken with DM of Robinson & Sawdon but cannot recall if he spoke to him about this specific tender. MH also stated that while he confirms that Robinson & Sawdon received a cover price, he could not confirm that the cover price was provided by Hobson & Porter.⁸²⁰⁹

Evidence from other companies – Robinson & Sawdon

IV.6643. The OFT wrote to Robinson & Sawdon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Robinson & Sawdon had participated in bid rigging on this tender. In response to this letter, Robinson & Sawdon admitted participating in bid rigging activities on this tender with Hobson & Porter.⁸²¹⁰

IV.6644. In the response, James Deacon ('JD'), the Managing Director of Robinson & Sawdon, said that the business of Robinson & Sawdon was sold by its owners, Bob Sawdon ('BS'), Michael Sawdon ('MS') and Charles Robinson ('CR'), to its current owners in October 2006. BS retired on 27 August 2004, MS retired on 2 August 2006, and CR resigned as a director (though remained an employee) in October 2006. David Marshall ('DM') remains employed as a Contracts Manager.

IV.6645. JD explained that he had conducted an internal investigation into the tendering process at Robinson & Sawdon. As part of this investigation CR was interviewed and confirmed that Robinson & Sawdon engaged in cover pricing.⁸²¹¹ CR further confirmed in respect of this tender that a cover price was issued following conversations with Hobson & Porter.⁸²¹² Also, as part of this investigation DM completed a questionnaire about the tendering process. DM was Estimating Manager during the period under investigation. In the questionnaire DM confirmed that Robinson & Sawdon was involved in the practice of cover pricing and that this was done with the knowledge of the directors of the company named at paragraph IV.6644 above.⁸²¹³

IV.6646. Following the issue of the Statement, Robinson & Sawdon did not submit any written or oral representations specifically in respect of this Infringement.

The OFT's analysis of the evidence and finding

IV.6647. From the evidence presented above, the OFT draws the following conclusions.

IV.6648. Hobson & Porter and Robinson & Sawdon each accepted an invitation to tender for this contract.

IV.6649. Hobson & Porter completed the estimating process for the tender for this contract. Hobson & Porter wanted to win the tender for this contract and

⁸²⁰⁹ Interview transcript, OFT Document Reference 11232, pages 19 and 20.

⁸²¹⁰ Response from Robinson & Sawdon, OFT Document Reference 10819, page 4.

⁸²¹¹ Response from Robinson & Sawdon, OFT Document Reference 10818, page 10.

⁸²¹² Response from Robinson & Sawdon, OFT Document Reference 10817, page 2.

⁸²¹³ Response from Robinson & Sawdon, OFT Document Reference 10818, page 16.

submitted a bid with the hope of winning the work. This is shown by the price submitted by Hobson & Porter being the lowest received by the client, and the fact that Hobson & Porter won the contract

IV.6650. Robinson & Sawdon was unable to submit a tender by the return date and/or did not want to win this tender.

IV.6651. In regard to Robinson & Sawdon, Hobson & Porter's tender sheet records '*Robinson & Sawdon 'C'*'. RH of Hobson & Porter has confirmed that this indicates that it gave Robinson & Sawdon a cover price. MH of Hobson & Porter has confirmed that the '*C*' written next to Robinson & Sawdon on the tender sheet, indicates that Robinson & Sawdon received a cover price, but he cannot confirm if Hobson & Porter provided it. CR of Robinson & Sawdon has confirmed, in respect of this tender, that a cover price was submitted following conversations with Hobson & Porter.

IV.6652. Both companies have admitted to bid rigging in relation to this tender. The OFT notes that Robinson & Sawdon admitted that the party with whom it engaged in bid rigging was Hobson & Porter without being shown the OFT's evidence that Hobson & Porter was involved. This provides additional independent corroboration of the OFT's evidence in respect of this tender.

IV.6653. The OFT notes in addition that the tender submitted by Robinson & Sawdon was higher than the tender submitted by Hobson & Porter, a pattern consistent with a cover price having been provided.

IV.6654. The OFT therefore concludes that contact took place between Robinson & Sawdon and Hobson & Porter. The OFT also concludes that Hobson & Porter supplied a figure to Robinson & Sawdon for a cover bid.

IV.6655. The OFT is satisfied that the facts set out in paragraphs IV.6637 to IV.6654 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸²¹⁴ In particular:

- (a) the provision of a figure for a cover bid from Hobson & Porter to Robinson & Sawdon was not unilateral⁸²¹⁵, and contravenes the principle against direct or indirect contact between competitors;⁸²¹⁶
- (b) Robinson & Sawdon can be presumed to have taken account of the information received from Hobson & Porter (i.e. the cover price) when determining its own conduct in the tendering process;⁸²¹⁷ and
- (c) Hobson & Porter can be presumed to have taken account of the information it received from Robinson & Sawdon (i.e. that Robinson & Sawdon did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸²¹⁸

IV.6656. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Robinson & Sawdon and Hobson & Porter, in breach of the Chapter I

⁸²¹⁴ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸²¹⁵ See paragraph IV.73 of the General comments on cover pricing section.

⁸²¹⁶ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸²¹⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸²¹⁸ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

prohibition, which had the object of bid rigging in relation to the tender for Calder Link Building, University of Hull, tender deadline 28 November 2005.

Immunity and leniency assessment

IV.6657. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6658. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to Hobson & Porter on 28 March 2006. Hobson & Porter will not therefore receive 100 per cent immunity in respect of this tender. However, Hobson & Porter will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 239: Sydenham High School – 14 December 2005
Client: Girls’ Day Schools Trust
Parties: Bluestone and R Durtnell

IV.6659. On 16 November 2005, Girls’ Day Schools Trust (‘GDST’) sought tenders for a performing arts development at Sydenham High School, 19 Westwood Hill, London.⁸²¹⁹ The following six companies were invited to tender: R Durtnell, Neilcott Special Works, Barnes Webster & Sons, Bluestone, Bryen & Langley and Crispin and Borst. The deadline for the receipt of tenders was 12:00 noon on 14 December 2005.

IV.6660. GDST received the following tender returns:⁸²²⁰

Company	Date and time tender received	Amount of tender	Awarded contract
R Durtnell	14 December 2005 at noon	£1,645,405.00	
Neilcott Special Works	14 December 2005 at noon	£1,479,166.05	
Barnes Webster & Sons	14 December 2005 at noon	£1,326,746.20	
Bluestone	14 December 2005 at noon	£1,692,746.00	
Bryen & Langley	14 December 2005 at noon	£1,327,334.00	Yes
Crispin and Borst	14 December 2005 at noon	£1,351,640.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bluestone – Extract from notebook

IV.6661. As part of Bluestone’s leniency application to the OFT, an extract from former estimator Geoff Hixon’s (‘GH’) notebook was provided, with the following entry:⁸²²¹

⁸²¹⁹ Information from client, OFT Document Reference 9637.

⁸²²⁰ Information from client, OFT Document Reference 9637.

⁸²²¹ Extract from notebook, OFT Document Reference B2135.

account of his recollection of this tender and an explanation of the notebook entry described above.

IV.6667. GH said that he recalled the tender and had priced tenders for the same client on previous occasions. He said that GDST *'was a good client...they're quite a big organisation. They've got quite a few schools under their control...And they have always got plenty of work, ongoing. So they're very, very good clients, you would need to keep in with them'*. GH recalled taking a cover price in respect of this tender and said *'Unfortunately I was pricing something else at the time and I wasn't able to fit it in...But I remember saying that, I would try and price it, try and fit it in. But at the end, after, I don't know, a few days, I said, Look it's not possible, I'm not going to be able to do it'*.⁸²²⁴

IV.6668. GH explained that he communicated this to his estimating manager Owen Chad, who would have referred any decision as to what to do with the tender to his director Ashley Ward. GH said *'probably a couple of days later Owen came back and said, can you see if you can get some help on it?'*. Referring to the entry in his notebook, GH confirmed that it was in his handwriting and said *'I record all telephone conversations I make in and out...It means that I spoke to Keith Allen from Durtnell and he gave me prices £1,690,000 and a period of 34 weeks, and it was for Sydenham High School...Which was due in two days later...Ian Price was probably the guy that I spoke to initially but he said Keith was doing it'*.⁸²²⁵

IV.6669. GH said that he would have made a preliminary telephone call to R Durtnell before obtaining the cover figure, on 12 December 2005. Explaining the difference between the figure of £1,690,000 and Bluestone's bid to the client of £1,692,746, GH said he would have amended the figure provided by R Durtnell *'rather than a round number'*.⁸²²⁶

Evidence from other companies – R Durtnell

IV.6670. The OFT wrote to R Durtnell on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that R Durtnell had participated in bid rigging on this tender. In response, R Durtnell wrote to the OFT on 26 April 2007⁸²²⁷ and stated *'We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved'*.⁸²²⁸ In its letter to the OFT, R Durtnell categorised this tender as *'Cover prices given...on the basis that we have retained detailed pricing notes for these contracts which demonstrate that we priced the schemes and therefore could not have taken a cover price'*. R Durtnell stated *'an instruction was given to stop this practice on 25 July 2005 when a memorandum was issued to relevant estimating/other employees by the Chief Estimator, Ian Price'*.⁸²²⁹

⁸²²⁴ Interview transcript, OFT Document Reference 13100, page 13.

⁸²²⁵ Interview transcript, OFT Document Reference 13100, pages 14 and 15.

⁸²²⁶ Interview transcript, OFT Document Reference 13100, page 16.

⁸²²⁷ Response from R Durtnell, OFT Document Reference 10779.

⁸²²⁸ R Durtnell response form, OFT Document Reference 10780, page 3.

⁸²²⁹ Response from R Durtnell, OFT Document Reference 10779.

IV.6671. The OFT subsequently wrote to R Durnell's ultimate parent company at the time of this Infringement, Durnell Holdings, on 5 November 2007, asking it to comment on R Durnell's response to the OFT's Fast Track Offer, given that the OFT intended to hold Durnell Holdings jointly and severally liable for any infringements committed by R Durnell in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Durnell Holdings said *'We confirm that the holding company adopts the operating company's position'*.⁸²³⁰

IV.6672. R Durnell in its response to the Statement stated *'Durnell has accepted the OFT's Fast Track Offer and does not contest the OFT's findings of infringement...'*⁸²³¹ In respect of Infringement 239, they stated that *'...this is the 'one that got away', in that it occurred after Durnell had as a matter of company policy stopped participating in cover pricing...'*⁸²³²

The OFT's analysis of the evidence and finding

IV.6673. From the evidence presented above, the OFT draws the following conclusions.

IV.6674. Bluestone and R Durnell each accepted an invitation to tender for this contract.

IV.6675. Bluestone was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6676. Based at Bluestone's Reigate office, senior estimator GH provided an extract from his notebook, which he stated was a record of *'all telephone conversations in and out'*. The entry dated 12 December 2005, recorded a figure of £1,690,000 and a 34 week contract period. In addition, the contemporaneous note shows two contact names and a telephone number of [...] [C], which matches the telephone number for R Durnell.

IV.6677. The name *'Ian Price'* recorded on this note corresponds with the reference to *'Chief Estimator, Ian Price'* in R Durnell's response to the OFT's letter of 22 March 2007. In interview, GH recalled that he sought and received a cover price on this tender from Keith Allan of R Durnell because Bluestone was too busy to submit a genuine bid to the client.

IV.6678. The client GDST received a tendered amount of £1,692,746 from Bluestone, which matches the figure provided by Bluestone in its leniency application and is almost identical to the figure recorded in GH's notebook. The client also received a tender of £1,645,405 from R Durnell, which is lower than the amount tendered by Bluestone. This fits into the pattern consistent with a cover price having been provided from R Durnell to Bluestone.

IV.6679. Finally, both companies have admitted to bid rigging in relation to this tender. R Durnell has admitted to giving a cover price on this tender. The OFT notes that Bluestone was the only company whose figure was above that of R Durnell. Therefore R Durnell could only have given cover to Bluestone.

⁸²³⁰ Response from Durnell Holdings, OFT Document Reference 14020.

⁸²³¹ Written representations of R Durnell, 27 June 2008, paragraph 4.

⁸²³² Written representations of R Durnell, 27 June 2008, paragraph 121.

IV.6680. The OFT therefore concludes that contact took place between Bluestone and R Durtnell, and that R Durtnell supplied a figure to Bluestone in order that it could submit a bid to the client that was not intended to win the contract.

IV.6681. The OFT is satisfied that the facts set out in paragraphs IV.6661 to IV.6680 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸²³³ In particular:

- (a) the provision of a figure for a cover bid from R Durtnell to Bluestone was not unilateral⁸²³⁴, and contravenes the principle against direct or indirect contact between competitors;⁸²³⁵
- (b) Bluestone can be presumed to have taken account of the information received from R Durtnell (i.e. the cover price) when determining its own conduct in the tendering process;⁸²³⁶ and
- (c) R Durtnell can be presumed to have taken account of the information it received from Bluestone (i.e. that Bluestone did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁸²³⁷

IV.6682. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bluestone and R Durtnell in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for Sydenham High School, tender deadline 14 December 2005.

Immunity and leniency assessment

IV.6683. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6684. Bluestone informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bluestone will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 240: Redevelopment and Refurbishment of 45 – 46 South Molton Street, London – 2 February 2006
Client: City of London
Parties: BBRL and Durkan

IV.6685. On 7 December 2005, the City of London sought tenders for the redevelopment and refurbishment of 45 – 46 South Molton Street, London.⁸²³⁸ The following five companies were invited to tender: Allenbuild, BBRL, Durkan,

⁸²³³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸²³⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁸²³⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸²³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸²³⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸²³⁸ Information from client, OFT Document Reference 7484.

Galliford Try and Withey Contracts Ltd. The date and time of tender return was 2 February 2006 at 12:00 noon.⁸²³⁹

IV.6686. City of London received the tender returns set out in the table below.⁸²⁴⁰

Following the issue of the Statement and representations received from Durkan, the OFT contacted the City of London on 10 December 2008 and requested further documentation in respect of the bid it had received from Durkan, with a view to confirming which of Durkan Holdings' subsidiaries had submitted the tender return. On 11 December 2008⁸²⁴¹, the City of London provided the OFT with a copy of a letter dated 2 February 2006⁸²⁴² from Durkan under cover of which Durkan had submitted its bid for this tender, thereby confirming that it was Durkan that submitted the bid for this contract, as set out in the Statement.

Company	Date and time tender received	Amount of tender	Awarded contract
Withey Contracts Ltd	2 February 2006 before noon	£1,785,697.96	
BBRL	2 February 2006 at 10.33am	£1,891,946.00	
Durkan	2 February 2006 before noon	£1,766,369.00	
Galliford Try	2 February 2006 at 10.51am	£1,906,374.00	
Allenbuild	2 February 2006 before noon	£1,526,026.00	YES

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Balfour Beatty – London Refurbishment Tenders/Prospects/Awards table

IV.6687. As part of its leniency application, Balfour Beatty's legal representatives provided a London Refurbishment Tenders/Prospects/Awards table for February 2006, which has an entry for this tender.⁸²⁴³

Tender Received	PBN	Project	Sub'n Date	Meeting Date
	1222	South Molten Street- Corp'n Lon	02-Feb-06	01-Feb-06

Programme	Likely start Date	Tendered Value	Lost	Real Prospect	Award	Award Value
45 weeks	April '06	1,891,946* *				

Evidence from leniency applicant Balfour Beatty

IV.6688. Balfour Beatty's legal representatives also provided to the OFT a schedule setting out instances of covers received by BBRL. In respect of this tender the schedule contains the following entry:⁸²⁴⁴

⁸²³⁹ Information from client, OFT Document Reference 7484.

⁸²⁴⁰ Information from client, OFT Document Reference 7484.

⁸²⁴¹ Email from City of London, 11 December 2008, OFT Document Reference SAB018.

⁸²⁴² Letter from Durkan, 2 February 2006, OFT Document Reference SAB016.

⁸²⁴³ London Refurbishment Tenders/Prospect/Awards table, OFT Document Reference B1637, page 86.

⁸²⁴⁴ Schedule of covers, OFT Document Reference B1609, pages 1 and 2.

Internal Ref/Job No	Project name/client	Project type	Submission Date	Tender Value	Firm from whom cover was taken
1222	South Molton Street / Corporation of London	Traditional	2/2/06	1,891,946	Durkan Pudelek

Other Bidders of which BBRL was aware	Who won the contract (if known)?	What information was received other than/in addition to inflated pricing data?	Reasons for seeking cover price
Not known	Not known	None	Resource availability and high risk logistics. Job site was a pedestrian street with restricted access for the necessary materials to be brought in. Resources concentrated on a preferable job which came in at the same time.

IV.6689. In respect of the contemporaneous evidence, Balfour Beatty's legal representatives provided an explanation of documents indicating cover pricing, stating *'BBRL Tender lists from March 2000 to March 2006. ** indicates where BBRL has received a cover from a competitor'*.⁸²⁴⁵

IV.6690. Following the issue of the Statement, Balfour Beatty did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Balfour Beatty

IV.6691. During interviews conducted in connection with its leniency application, Cliff Davey ('CD'), a Pre-Contract Manager at BBRL, and Hugh McElhill ('HM'), a senior estimator at BBRL, provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.199 to IV.203 above and is relied upon by the OFT in relation to this tender.

IV.6692. During an interview with the OFT on 30 March 2007, in respect of this tender, HM stated *'I think I was given it to look at'*. HM explained that it was not a project which BBRL wanted to win because of problems with access to the site.⁸²⁴⁶ When asked whether he recalled a cover price being taken on this tender, HM stated *'Yes. I phoned Durkan and asked them for assistance'*.⁸²⁴⁷

IV.6693. During an interview with the OFT on 29 March 2007, when asked what the two stars next to this tender in the London Refurbishment Tenders/Prospects/Awards table for February 2006 meant, CD stated *'That indicates a cover'*. CD explained that it could show that either a cover price had been given or received, and confirmed that in respect of this tender BBRL had

⁸²⁴⁵ Explanation of document indicating cover pricing, OFT Document Reference B1613, page 2.

⁸²⁴⁶ Interview transcript, OFT Document Reference 11141, page 11.

⁸²⁴⁷ Interview transcript, OFT Document Reference 11141, page 12.

been provided with a cover price, by Durkan as indicated on the tender schedule.⁸²⁴⁸

Evidence from other companies – Durkan

IV.6694. The OFT wrote to Durkan on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participating in bid rigging on this tender, in return for an admission that Durkan had participated in bid rigging on this tender. In response to this letter Durkan admitted '*We engaged in bid rigging activities on this tender but cannot recall details of the other party/parties involved*'.⁸²⁴⁹

IV.6695. The OFT subsequently wrote to Durkan's ultimate parent company at the time of this Infringement, Durkan Holdings, on 5 November 2007, asking it to comment on Durkan's response to the OFT's Fast Track Offer, given that the OFT intended to hold Durkan Holdings jointly and severally liable for any infringements committed by Durkan in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter Durkan Holdings stated '*Durkan Holdings will respect the terms of the acceptance made by Durkan Pudelek ...*'.⁸²⁵⁰

IV.6696. In its response to the Statement, although Durkan made numerous points regarding the evidence for this Infringement (set out below), it referenced itself as giving a cover price to BBRL⁸²⁵¹, and confirmed in further correspondence with the OFT that it maintained its admission to cover pricing on this Infringement, under the terms of the OFT's Fast Track Offer.⁸²⁵²

IV.6697. In its response to the Statement, Durkan made the following comments on the evidence set out in paragraphs IV.6687 to IV.6693 above:

- (a) The interview of HM described at paragraph IV.6692 was imprecise because he was unfamiliar with the leniency and contemporaneous documents, he was shown the leniency document before confirming he approached Durkan for a cover, and he could not recall whom at Durkan he contacted;⁸²⁵³
- (b) No company is identified on the table set out at paragraph IV.6687 in connection with the stars;
- (c) CD, whose interview is described at paragraph IV.6693, like HM, was unable to recall the name of the person at Durkan whom he dealt with;⁸²⁵⁴ and
- (d) Neither HM or CD directly named Durkan in their interviews.⁸²⁵⁵

IV.6698. The OFT does not consider that any of these points undermine the strength of the evidence when viewed in its totality. In particular:

⁸²⁴⁸ Interview transcript, OFT Document Reference 11144, page 15.

⁸²⁴⁹ Response from Durkan, OFT Document Reference 10992, page 3.

⁸²⁵⁰ Response from Durkan Holdings, OFT Document Reference 13944, page 1.

⁸²⁵¹ Written representations of Durkan, 27 June 2008, paragraphs 12(f)(iv) and 180 to 181.

⁸²⁵² Letter from Durkan, 4 March 2009.

⁸²⁵³ Written representations of Durkan, 16 April 2008, paragraphs 121 to 126.

⁸²⁵⁴ Written representations of Durkan, 16 April 2008, paragraph 126.

⁸²⁵⁵ Written representations of Durkan, 16 April 2008, paragraphs 125 and 126.

- (a) The OFT does not consider HM's interview to be unreliable. It is clear from the interview that HM had specific recollection of this tender, describing in detail the reasons BBRL did not want this job, and contacting Durkan for assistance. The clarity of his recollection in these respects stands in contrast to his answers on those points which he did not recollect. Further, HM had indicated earlier in interview that he would not know contacts at other companies when seeking a cover, and would ask for the estimator for the job.⁸²⁵⁶ On that basis the OFT does not consider it inconsistent with his recollection, or practice when obtaining covers, that he could not remember the name of the contact at Durkan;
- (b) The OFT does not consider that the absence of a name on the starred document undermines the evidential value of the document, with CD's explanation, as showing that a cover was taken in respect of this tender;
- (c) The OFT notes that HM confirmed that it was he who called Durkan for the cover, and there is therefore no reason why CD would be aware of or recall the individual contact at Durkan; and
- (d) Both HM and CD were giving their evidence by reference to a tender schedule which named 'Durkan Pudelek' as the source of the cover price. Given that both witnesses specifically recalled the tender the OFT considers it likely that had the tender schedule been inaccurate either one or both of them would have said so. In the absence of a reason to doubt the accuracy of the tender schedule, or a reason to doubt their recollection of the tender, the OFT does not accept there is any reason to doubt that their recollection of whom they obtained a cover from accorded with the tender schedule.

IV.6699. Moreover, Durkan has confirmed its admission of bid rigging in relation to this tender, which provides corroboration for the various items of evidence which are the subject of Durkan's comments.

IV.6700. Durkan suggested that the terms of the OFT's Fast Track Offer was '*confusingly inconsistent*' with the terms of the Statement, the former having referred to '*South Molton Street*' and '*the Corporation of London*', whereas the latter referred more specifically to '*redevelopment and refurbishment of 45-46 South Molton Street*' and '*the City of London*'. Durkan also suggest that the OFT's evidence against it had been obtained after the OFT's Fast Track Offer letter was sent to it. The OFT does not accept these arguments. The OFT's Fast Track Offer, and its terms, were based on the contents of the tender schedule obtained from the leniency applicant Balfour Beatty before the OFT's Fast Track Offer was sent. The OFT further notes that Durkan did not request clarification of the tender referred to when it received the OFT's Fast Track Offer, nor has it retracted its admission of liability upon clarification becoming available. The OFT considers it is therefore clear that Durkan had sufficient information to enable it to determine whether or not it wished to accept the offer.

⁸²⁵⁶ Interview transcript, OFT Document Reference 11141, page 11.

The OFT's analysis of the evidence and finding

IV.6701. From the evidence and arguments presented above, and having taken into account the representations made by the Parties, the OFT draws the following conclusions.

IV.6702. BBRL and Durkan each accepted an invitation to tender for this contract.

IV.6703. Both companies submitted a tender. BBRL was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6704. The London Refurbishment Tenders/Prospects/Awards table for February 2006 provided by Balfour Beatty shows '***', next to the entry for this tender. Balfour Beatty confirmed that this shows that it received a cover price on this tender. In interview HM of BBRL recalled contacting Durkan for a cover price on this tender. He said '*I phoned Durkan and asked them for assistance*'.

IV.6705. In addition, Durkan admitted engaging in bid rigging on this tender in response to the OFT's letter of 22 March 2007, and maintained that admission in response to the Statement and in subsequent correspondence.

IV.6706. The OFT further notes that the tender submitted by BBRL was higher than the tender submitted by Durkan, the pattern consistent with a cover price having been provided.

IV.6707. The OFT therefore concludes that contact took place between BBRL and Durkan. The OFT also concludes that Durkan supplied a figure to BBRL for a cover bid.

IV.6708. The OFT is satisfied that the facts set out in paragraphs IV.6687 to IV.6707 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸²⁵⁷ In particular:

- (a) the provision of a figure for a cover bid from Durkan to BBRL was not unilateral⁸²⁵⁸, and contravenes the principle against direct or indirect contact between competitors;⁸²⁵⁹
- (b) BBRL can be presumed to have taken account of the information received from Durkan (i.e. the cover price) when determining its own conduct in the tendering process;⁸²⁶⁰ and
- (c) Durkan can be presumed to have taken account of the information it received from BBRL (i.e. that BBRL did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸²⁶¹

IV.6709. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between BBRL and Durkan in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for the redevelopment and

⁸²⁵⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸²⁵⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁸²⁵⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸²⁶⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸²⁶¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

refurbishment of 45 – 46 South Molton Street, London, tender deadline 2 February 2006.

Immunity and leniency assessment

IV.6710. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6711. Balfour Beatty informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Balfour Beatty will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 241: 29 Houses, Rosemount Clifton Villas – 13 February 2006
Client: Firebird Homes Limited
Parties: Jack Lunn and Harlow & Milner

IV.6712. On 13 December 2005, Firebird Homes Limited sought tenders for 29 new build houses at Rosemount Clifton Villas.⁸²⁶² The following four companies were invited to tender: Richardson Projects, Strata, Jack Lunn and Harlow & Milner.⁸²⁶³ The deadline for receipt of tenders was 12:00 noon on 13 February 2006.⁸²⁶⁴

IV.6713. Firebird Homes received the following tender returns.⁸²⁶⁵

Company	Time & Date tender received	Amount of tender	Awarded contract
Richardson Projects	13 February 2006	A £3,806,442 B £3,587,511	Yes
Strata	13 February 2006	A £4,797,353 B £4,610,799	
Jack Lunn	13 February 2006	A £4,185,400 B £3,998,500	
Harlow & Milner	13 February 2006	A £4,406,885 B £4,211,508	

IV.6714. Firebird Homes Limited stated that two alternative tenders were received from each company, one for natural stone (A) and one for artificial stone (B).⁸²⁶⁶

⁸²⁶² Information from client, OFT Document Reference 7927.

⁸²⁶³ Information from client, OFT Document Reference 7927.

⁸²⁶⁴ Information from client, OFT Document Reference 7927.

⁸²⁶⁵ Information from client, OFT Document Reference 7927.

⁸²⁶⁶ Information from client, OFT Document Reference 7927.

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Harlow & Milner – Handwritten Note

IV.6715. During the OFT's search of Harlow & Milner's premises a piece of paper was found which contained the following handwritten notes in relation to Rosemount Clifton Villas:⁸²⁶⁷

'Strata Construction

[.....] [C]

Rosemount Paul Donghue [sic]
Clifton Villas
Bradford NO

[.....]

Jack Lunn

[...] [C]
[.....]

Keith Poskitt

Price	Artificial Stone/Slate	£4,211,508-00
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Price	Natural Stone/Slate	£4,406,885-00
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Contemporaneous documentary evidence from leniency applicant Jack Lunn – Handwritten Note

IV.6716. Jack Lunn provided to the OFT a piece of paper which contained the following handwritten notes in relation to Rosemount Clifton Villas:⁸²⁶⁸

⁸²⁶⁷ Handwritten note, OFT Document Reference A0450.
⁸²⁶⁸ Handwritten note, OFT Document Reference A0689.

' CHRIS/SMITHSON
[.....] [C]
HARLOW & MILNER
HELP
ART + STONE

STRATA

RICHARDSONS'

IV.6717. A contact list found at Loach confirmed that Harlow & Milner's telephone number is '[.....] [C]'.⁸²⁶⁹

Evidence from leniency applicant – Harlow & Milner

IV.6718. As part of its leniency application, Harlow & Milner's legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.352 to IV.362 above and is relied upon by the OFT in relation to this tender.

IV.6719. In addition to its leniency application, Harlow & Milner provided to the OFT a schedule (*'Combined Office of Fair Trading and Harlow & Milner Projects List'*) which detailed projects/contracts identified by the company during the course of an internal investigation into potential cover prices given and/or received, between January 2000 and February 2006. On page six of the *'Combined Office of Fair Trading and Harlow & Milner Projects List'* is the following entry:⁸²⁷⁰

⁸²⁶⁹ Contact list, OFT Document Reference 2954, page 6.

⁸²⁷⁰ Leniency Schedule, OFT Document Reference A0565.

<u>Date</u>	<u>Contract</u>	<u>Client</u>	<u>Job Ref</u>	<u>H & M Tender Value</u>	<u>Cover from/To</u>	<u>Won/Lost</u>
13/02/06	29 Houses at Rosemount Clifton Villas, Bradford	Firebird Homes	1365	4,211,508.00	From Jack Lunn	Lost

<u>H&M</u>
<u>Comments</u>
<u>Contact</u>
Keith Poskitt

IV.6720. In its response to the Statement, Harlow & Milner accept in respect of this Infringement that ‘... *that it requested and received a cover price from Jack Lunn.*⁸²⁷¹

Evidence from leniency applicant – Jack Lunn

IV.6721. As part of its leniency application, Jack Lunn’s legal representatives provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.431 to IV.440 above and is relied upon by the OFT in relation to this tender.

IV.6722. In addition to its leniency application, Jack Lunn provided to the OFT a Schedule (*‘Jack Lunn Construction Cover Summary Schedule’*) which detailed projects/contracts identified by the company during the course of an internal investigation conducted by Stephen Bradbury (*‘SB’*), Richard Bryan (*‘RB’*), Graham Lunn (*‘GL’*), Anthony Metcalf (*‘AM’*) and Keith Poskitt (*‘KP’*) into potential cover prices where it was considered cover prices had either been given or taken. At JLC2 of the *‘Jack Lunn Construction Cover Summary Schedule’* is the following entry:⁸²⁷²

⁸²⁷¹ Written representations of Harlow & Milner, 27 June 2008, paragraph 13.11(p).

⁸²⁷² Cover summary schedule, OFT Document Reference A0675, page 1.

Reference Number	Date of Submission	Scheme Title	Client	Submitted tender value	Cover price Taken	Cover price given
JLC2	13-Feb-06	29 New Houses Rosemount Clifton Villas Manningham Lane Bradford	Firebird Homes Ltd (Manningham HA)	£3,988,500		??????

Contractor and address	Person Spoken to	Jack Lunn Successful	Comments/Notes
Harlow & Milner Ltd	Chris Smithson [.....] [C]	NO	

IV.6723. Jack Lunn also provided supplementary information in relation to this contract in its leniency application. Jack Lunn stated *'No information has been retained relating to the cover price given by JLC to Harlow Milner Ltd. It is, however, the norm to provide a cover price of between 3 and 5% above JLC proposed submission price. By way of example of how little hard copy information is retained, Appendix 7 contains a sheet of A4 paper with an individual's name "Chris Smithson", a telephone number ([.....] [C]), and the name "Harlow Milner" with the word "HELP" on the same sheet. Also on this sheet are the words "STRATA" and "RICHARDSONS". This is the only paperwork suggesting that a cover was given'*.⁸²⁷³

IV.6724. Following the issue of the Statement, Jack Lunn did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant – Harlow & Milner

IV.6725. During an interview with Chris Smithson ('CS'), Chief Estimator at Harlow & Milner, CS was asked if he could recall anything in relation to the tender for 29 houses at Rosemount Clifton Villas. CS replied, *'That's definitely one I remember'*.⁸²⁷⁴ CS was shown the handwritten note found at Harlow & Milner to which CS stated *'Yes, that's my handwriting, we found out that Strata Construction and Jack Lunn were pricing the scheme, I did approach Strata originally but they weren't keen on giving a cover. [...] [C]'*.⁸²⁷⁵

IV.6726. CS was asked who at Jack Lunn he had contacted for a cover price. CS replied *'I've written Keith Poskitt down so I'm sure I would have spoken to Keith'*.⁸²⁷⁶ CS confirmed that because of the nature of the project two cover prices were obtained from Jack Lunn, one for artificial materials and one for

⁸²⁷³ Leniency application, Cover Schedule Information, OFT Document Reference A0673, page 10.

⁸²⁷⁴ Interview transcript, OFT Document Reference 12733, page 17.

⁸²⁷⁵ Interview transcript, OFT Document Reference 12733, pages 17 and 18.

⁸²⁷⁶ Interview transcript, OFT Document Reference 12733, page 18.

natural materials.⁸²⁷⁷ CS stated that the figures written on the sheet of paper were the figures provided by Jack Lunn as cover figures, however, *'we might not have actually gone on those figures... They might have been put up slightly, we'd never go down below somebody's cover price, we'd usually put a bit on, or go in at the price they've given, so they may not ... be the actual tender figure that we went in at'*.⁸²⁷⁸

IV.6727. Also, during an interview with Richard Milner ('RM'), Managing Director at Harlow & Milner, RM was asked if he could recall anything in relation to the tender for 29 houses at Rosemount Clifton Villas. RM confirmed the events involving the obtaining of a cover price as described by CS above.⁸²⁷⁹ RM explained that the reason Harlow & Milner did not want to price the job was because *'we didn't have the resource to be able to actually execute the works and we were ..., I seem to remember it was during a period where we'd got people on holiday as well in the estimating department so we .. for 2 reasons, 1 we couldn't physically price it and 2 we didn't have the resource to execute the works even if we did price it, and we were very very conscious that if we fell out with Firebird Homes then we would be fallen out for a long time and it was ... obviously ... we're a local contractor and they're a local organization and we rely, very heavily, on repeat business'*.⁸²⁸⁰

Witness evidence from leniency applicant – Jack Lunn

IV.6728. During an interview with the OFT on 8 March 2007, conducted in connection with Jack Lunn's leniency application, SB, AM and KP provided further general explanation of Jack Lunn's participation in cover pricing. This evidence is set out in paragraphs IV.431 to IV.440 above and is relied upon by the OFT in relation to this tender.

IV.6729. Also during this interview, KP was asked what he recalled about the exchange of cover prices in relation to the tender for 29 houses at Rosemount Clifton Villas. KP replied *'Not the actual sort of nitty gritty but I do recollect writing the sort of notes about help and the guy's name etc'*.⁸²⁸¹ KP was shown the handwritten note that referred to *'CHRIS/SMITHSON HARLOW & MILNER [.....] [C] HELP'* found during the OFT's search. KP confirmed that this was his handwriting and explained that the reference to CS refers to *'... someone from Harlow & Milner I am not sure whether if he's an estimator or one of the managers'*.⁸²⁸² When asked if *'[.....] [C]'* was Harlow & Milner's telephone number, KP replied, *'I can only believe so it's the way I contact Harlow'*.⁸²⁸³ KP confirmed that he gave CS of Harlow & Milner a cover price, *'I actually think on this particular case, we were quite late with our tender and they also rung us about 3 or 4 times because they were closer and closer to the tender return time and then probably we would finally ring them with a number'*.⁸²⁸⁴

⁸²⁷⁷ Interview transcript, OFT Document Reference 12733, page 19.

⁸²⁷⁸ Interview transcript, OFT Document Reference 12733, page 19.

⁸²⁷⁹ Interview transcript, OFT Document Reference 12731, pages 21 to 24.

⁸²⁸⁰ Interview transcript, OFT Document Reference 12731, page 23.

⁸²⁸¹ Interview transcript, OFT Document Reference 11293, page 13.

⁸²⁸² Interview transcript, OFT Document Reference 11293, page 13.

⁸²⁸³ Interview transcript, OFT Document Reference 11293, page 13.

⁸²⁸⁴ Interview transcript, OFT Document Reference 11293, page 13.

Evidence from other companies – Strata

IV.6730. The OFT received a letter from Strata’s legal representatives on 24 February 2006 stating *‘in the week of 6 February 2006, Strata was contacted by a company called Harlow and Milner from Wakefield seeking a cover price for a scheme in Bradford. The contract is called 29 Houses, Rosemount, Clifton Villas. The client is Firebird Homes.*

*Strata obviously declined to give a cover price advising them that they do not engage in such practices. It submitted its tender on 13 February 2006. The Strata estimator did not keep a record of the name of the person from this company who made contact. However, given the late stage of the request for a cover, Strata believes it is highly unlikely that this company could have priced the job itself. Moreover, it seemed desperate for a cover price. Strata therefore believes that if this company did submit a tender it must have been on the basis of a cover price. Harlow and Milner appeared to know that Jack Lunn Construction from Leeds was also pricing the job and Strata suspects that it would have sought a cover price from Jack Lunn following the call to it. Strata believes that Harlow came to it first for a cover as Strata had already won two contracts for the same client, and therefore was likely to be pricing the job’.*⁸²⁸⁵

The OFT’s analysis of the evidence and finding

IV.6731. From the evidence presented above, the OFT draws the following conclusions.

IV.6732. Jack Lunn and Harlow & Milner each accepted an invitation to tender for the contract for 29 houses at Rosemount Clifton Villas. Harlow & Milner was unable to tender and/or did not want to win this contract.

IV.6733. A contemporaneous piece of paper found at Harlow & Milner records *‘Strata Construction [.....] [C] Rosemount Clifton Villas Bradford, Paul Donghue NO’*. *‘[.....] [C]’* was a telephone number for Strata⁸²⁸⁶ and Paul Donhue was the name of an estimator at Strata.⁸²⁸⁷ CS of Harlow & Milner confirmed that he approached Strata in the first instance for a cover price but was told that it was unable to offer him assistance (as it no longer participated in cover pricing following the OFT’s visit and its leniency application). Strata contacted the OFT independently on 24 February 2006 and stated that it had been contacted by Harlow & Milner and asked to provide a cover price, to which it declined. Strata also stated that it suspected that Harlow & Milner would then approach Jack Lunn for a cover price.

IV.6734. The piece of paper also records *‘Jack Lunn [.....] [C] Keith Poskitt, Price Artificial Stone/Slate £4,211508-00, Price Natural Stone/Slate £4,406885-00’*. CS confirmed that the note shows that he obtained cover prices (one each for artificial and natural stone) from KP of Jack Lunn. *‘[.....] [C]’* was a telephone number for Jack Lunn⁸²⁸⁸ and KP was an estimator at Jack Lunn.

IV.6735. Another contemporaneous piece of paper provided by Jack Lunn under leniency records *‘CHRIS SMITHSON [.....] [C] HARLOW & MILNER HELP*

⁸²⁸⁵ Letter from Strata, OFT Document Reference 4052, page 4.

⁸²⁸⁶ FAME report, OFT Document Reference 12520.

⁸²⁸⁷ Interview transcript, OFT Document Reference 11380, page 2.

⁸²⁸⁸ Fax header confirming Jack Lunn’s telephone number, OFT Document Reference A0333.

ART + STONE. KP of Jack Lunn confirmed that these notes were made by himself and show that he was contacted by CS of Harlow & Milner and asked for '*HELP*' (in the form of cover prices) for both artificial and natural stone for the contract. KP confirmed that he did supply CS of Harlow & Milner with the figures for cover prices. '[.....] [C]' was a telephone number for Harlow & Milner⁸²⁸⁹ and CS was an estimator at Harlow & Milner.

IV.6736. The OFT considers in the light of the contemporaneous documentary evidence from Harlow & Milner, CS and RM's admissions and explanations of that contemporaneous evidence, and Jack Lunn's and KP's admissions and explanations of the corroborating contemporaneous documentary evidence from Jack Lunn, that Jack Lunn supplied Harlow & Milner with cover prices in relation to this tender.

IV.6737. The OFT also notes that the tender submitted by Harlow & Milner was higher than the tender submitted by Jack Lunn, the pattern consistent with a cover price having been provided.

IV.6738. The OFT therefore concludes that contact took place between Jack Lunn and Harlow & Milner. The OFT also concludes that Jack Lunn supplied figures to Harlow & Milner for cover bids.

IV.6739. The OFT is satisfied that the facts set out in paragraphs IV.6715 to IV.6738 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸²⁹⁰ In particular:

- (a) the provision of figures for cover bids from Jack Lunn to Harlow & Milner was not unilateral⁸²⁹¹, and contravenes the principle against direct or indirect contact between competitors;⁸²⁹²
- (b) Harlow & Milner can be presumed to have taken account of the information received from Jack Lunn (i.e the cover prices) when determining its own conduct in the tendering process;⁸²⁹³ and
- (c) Jack Lunn can be presumed to have taken account of the information it received from Harlow & Milner (i.e. that Harlow & Milner did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸²⁹⁴

IV.6740. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Jack Lunn and Harlow & Milner, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for 29 houses, Rosemount, Clifton Villas, tender deadline 13 February 2006.

Immunity and leniency assessment

IV.6741. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender

⁸²⁸⁹ Response from Harlow & Milner, OFT Document Reference A2538.

⁸²⁹⁰ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸²⁹¹ See paragraph IV.73 of the General comments on cover pricing section.

⁸²⁹² See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸²⁹³ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸²⁹⁴ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6742. In respect of this tender, the OFT became aware of bid rigging activities by virtue of the information obtained from Strata's legal representatives, as part of its leniency application on 24 February 2006. Therefore neither Harlow & Milner nor Jack Lunn will receive 100 per cent immunity in respect of this tender. However, both Harlow & Milner and Jack Lunn will receive their normal leniency percentage reductions from the fines that the OFT is imposing in respect of this tender.

Infringement 242: Brookfield Manor, Hathersage – 13 February 2006
Client: Bamford Hall Holdings Ltd
Parties: T & C Williams and Quarmby (Special Projects)

IV.6743. On 16 January 2006, Barraclough English & Wright, on behalf of the client Bamford Hall Holdings Ltd sought tenders for alterations, refurbishment and extensions to Brookfield Manor, Hathersage. The return date for the tender was 12:00 noon on 13 February 2006 and five companies were invited to tender: Quarmby (Special Projects), Milward, Atlas Refurbishment (North) Ltd, Totty, and T & C Williams.⁸²⁹⁵

IV.6744. Barraclough English & Wright received the following tender returns on 13 February 2006.⁸²⁹⁶

Company	Date tender received	Time tender received	Amount of tender	Awarded the contract
Quarmby (Special Projects)	13 February 2006	Before 12:00 noon	£1,146,160.00	Yes
Milward	13 February 2006	Before 12:00 noon	£957,159.57	
Atlas Refurbishment (North) Ltd	13 February 2006	Before 12:00 noon	£1,469,922.00	
Totty	13 February 2006			Declined to tender
T & C Williams	13 February 2006	Before 12:00 noon	£1,230,463.00	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant T & C Williams - Original Note

IV.6745. During the OFT's search of T & C Williams's premises a single sheet of A4 paper was recovered and copied. The following handwritten notations were on either side of the sheet. In interview John Hardy the estimator states he believes Side 1 to have been written by a receptionist. The figure on Side 2 is

⁸²⁹⁵ Information from client, OFT Document Reference 7114.

⁸²⁹⁶ Information from client, OFT Document Reference 7114.

his writing and is the cover figure which he says T & C Williams received from Quarmby (Special Projects)⁸²⁹⁷ (see paragraph IV.6749 below).

Side 1

Side 2

*'QSP
Construction*

'£1,230,463'

Martin Brown
[...] [C]
[...] [C]
Re: Tender

*Brookfield
Manor'*

Evidence from leniency applicant T & C Williams

IV.6746. As part of its leniency application, T & C Williams provided a *'Corporate Statement'* giving a general explanation of its participation in cover pricing.⁸²⁹⁸ This evidence is set out in paragraphs IV.635 to IV.649 above and is relied upon by the OFT in relation to this tender.

IV.6747. As a further part of its leniency application, T & C Williams also provided to the OFT an annex to the *'Corporate Statement'* dealing with specific tenders.⁸²⁹⁹ Examination of the entry relevant to this tender, confirms that T & C Williams received a cover price.

Witness evidence from leniency applicant T & C Williams

IV.6748. During interviews conducted in connection with its leniency application, T & C Williams' employees provided further general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.635 to IV.649 above and is relied upon by the OFT in relation to this tender.

IV.6749. Additional evidence in relation to this tender comes from the interview of John Hardy, the estimator for T & C Williams. His response to questions concerning this tender was as follows:

'I think it was design build project as well and at the end of the day.....I know it was a job that once we'd got it in we couldn't send it back because we'd already told the QS who we knew quite well that we were definitely pricing for it. We couldn't refuse to price it after that so yes I..... we took a cover and I believe it was from QSP'.⁸³⁰⁰

⁸²⁹⁷ Handwritten note, OFT Document Reference A0314.

⁸²⁹⁸ Corporate Statement, OFT Document Reference A0358.

⁸²⁹⁹ Annex to Corporate Statement, OFT Document Reference A0865.

⁸³⁰⁰ Interview transcript, OFT Document Reference 12763, page 20.

Evidence from other companies – Quarmby (Special Projects)

IV.6750. The OFT wrote to Quarmby (Special Projects) on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Quarmby (Special Projects) had participated in bid rigging on this tender.

IV.6751. In a response to the OFT's Fast Track Offer the Managing Director of Quarmby (Special Projects) Mr C.D. Fielden stated:⁸³⁰¹

'We have no records or recollection of either giving or receiving cover prices for the projects you have listed in appendix A, with the exception of Brookfield Manor Item 6. On this project we can confirm that we were asked by T C Williams Ltd Sheffield to assist them with a Tender figure'.

IV.6752. Subsequently the OFT received a letter dated 1 May explaining '*...we did not feel comfortable signing a declaration that we had been involved in bid rigging, when the reason contractors request cover prices, is that severe pressure of work can make it impossible to submit a tender for work where willingness had previously been expressed for inclusion on a specific tender list'.*⁸³⁰² Quarmby (Special Projects) therefore did not accept the OFT's Fast Track Offer.

IV.6753. The OFT subsequently wrote to Quarmby (Special Projects)'s ultimate parent company at the time of this Infringement, Justgrade, on 6 November 2007, asking it to comment on Quarmby (Special Projects)'s response to the OFT's Fast Track Offer, given that the OFT intended to hold Justgrade jointly and severally liable for any infringements committed by Quarmby (Special Projects) in respect of which the OFT ultimately decided to impose financial penalties. In response to this letter, Justgrade confirmed the position of its subsidiary, Quarmby (Special Projects) in its rejection of the OFT's Fast Track Offer.⁸³⁰³

IV.6754. In its response to the Statement, Quarmby (Special Projects) stated '*...we would again confirm that your original correspondence was taken very seriously within our company structure. We also again confirm in that any conduct by our staff, that may have constituted an infringement or a breach of the Companies Act 1998 [sic] happened due to a genuine lack of knowledge and naivety of the Act. We trust you will accept our sincere apologies in this instance and we confirm that adequate steps have been taken within the company to ensure compliance with the law'.*⁸³⁰⁴

The OFT's analysis of the evidence and finding

IV.6755. From the evidence presented above, the OFT draws the following conclusions.

IV.6756. T & C Williams and Quarmby (Special Projects) each accepted an invitation to tender for this contract.

⁸³⁰¹ Response from Quarmby (Special Projects), OFT Document Reference 10765.

⁸³⁰² Response from Quarmby (Special Projects), OFT Document Reference 10768.

⁸³⁰³ Response from Justgrade, OFT Document Reference 14089.

⁸³⁰⁴ Written representations of Quarmby (Special Projects), 12 June 2008, page 2.

IV.6757. Quarmby (Special Projects) appears to have completed the estimating process for the tender and submitted a bid with the intention of winning the work, since it won the contract.

IV.6758. T & C Williams was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6759. In regard to T & C Williams, the figure written on John Hardy's contemporaneous handwritten note, '£1,230,463 - 00', is confirmed as the cover price received by T & C Williams from Quarmby (Special Projects). This figure is identical to the tender figure received by Barraclough English & Wright on the tender return date.⁸³⁰⁵

IV.6760. The telephone number written on the contemporaneous handwritten note, '[.....] [C]', is the telephone number associated with Quarmby (Special Projects).⁸³⁰⁶ T & C Williams has confirmed that it took a cover on this tender and this document shows that contact was made with Quarmby (Special Projects) in connection with this tender.

IV.6761. The OFT further notes the initial admission from Quarmby (Special Projects), that it was asked to give a cover price to T&C Williams in relation to this tender.⁸³⁰⁷

IV.6762. The OFT notes in addition that the tender submitted by T & C Williams was higher than the tender submitted by Quarmby (Special Projects), a pattern consistent with a cover price having been received.

IV.6763. The OFT therefore concludes that contact took place between Quarmby (Special Projects) and T & C Williams. The OFT also concludes that Quarmby (Special Projects) supplied a figure to T & C Williams for a cover bid.

IV.6764. The OFT is satisfied that the facts set out in paragraphs IV.6745 to IV.6763 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸³⁰⁸ In particular:

- (a) the provision of a figure for a cover bid from Quarmby (Special Projects) to T & C Williams was not unilateral⁸³⁰⁹, and contravenes the principle against direct or indirect contact between competitors;⁸³¹⁰
- (b) T & C Williams can be presumed to have taken account of the information received from Quarmby (Special Projects) (i.e. the cover price) when determining its own conduct in the tendering process;⁸³¹¹ and
- (c) Quarmby (Special Projects) can be presumed to have taken account of the information it received from T & C Williams (i.e. that T & C Williams did not intend to submit a competitive bid) when determining its conduct in the tendering process.⁸³¹²

⁸³⁰⁵ Information from client, OFT Document Reference 7114.

⁸³⁰⁶ FAME report, OFT Document Reference 12396, page 1.

⁸³⁰⁷ Response from Quarmby (Special Projects), OFT Document Reference 10765.

⁸³⁰⁸ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸³⁰⁹ See paragraph IV.73 of the General comments on cover pricing section.

⁸³¹⁰ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸³¹¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸³¹² See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

IV.6765. In its response to the Statement, T & C Williams stated ‘...[t]here is no evidence of which T&C Williams is aware to suggest that Quarmby was in contact with any other tenderers; or ... that it modified its conduct after giving the cover to T&C Williams. Moreover, T&C Williams took a cover because it lacked the capacity for the work in question and may therefore not have tendered, or not have tendered competitively, had it not received a cover. Indeed, the contract was ultimately not awarded on the basis of price at all, given that the successful party, Quarmby, won the contract despite not having submitted the lowest tender’.⁸³¹³

IV.6766. The OFT notes that there is a legal presumption that an undertaking takes account of information received from a competitor when determining its own conduct⁸³¹⁴, which neither Quarmby (Special Projects) nor T & C Williams has adduced any evidence to rebut. The OFT is therefore not required to adduce evidence that one or both parties modified their conduct in order to establish an Infringement. To the extent that T & C Williams submits that this infringement should not be treated as serious because no effects have been shown, this point is addressed in step 1 of Section VI (Enforcement) below.

IV.6767. Moreover, the OFT does not accept T & C Williams’ assertion that the contract was not awarded ‘on the basis of price at all’. The price would have been a factor taken in to account by the client in awarding the tender. An unaffordable tender price, for example, submitted with a tender would more than likely be rejected by a client regardless of the other factors considered. The fact that the tender was not awarded to the bidder submitting the lowest price is therefore irrelevant to the OFT’s finding of infringement. In any event, T & C Williams’ argument that the agreement in question had no anti-competitive effects as the contract was ultimately not awarded on the basis of price, is therefore not relevant as it is not necessary to show anti-competitive effect in the case of an object infringement.

IV.6768. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Quarmby (Special Projects) and T & C Williams, in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the tender for alterations, refurbishment and extensions to Brookfield Manor, date of tender 13 February 2006.

Immunity and leniency assessment

IV.6769. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6770. In respect of this tender, the OFT became aware of the bid rigging activities by virtue of the information obtained during the visit under section 28 to T & C Williams on 28 March 2006. T & C Williams will not therefore receive 100 per cent immunity in respect of this tender. However, T & C Williams will receive

⁸³¹³ Written representations of T & C Williams, 27 June 2008, paragraph 7(d)ii.

⁸³¹⁴ See paragraph III.58 of the Legal Background section.

its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

Infringement 243: Digital Media Centre, Barnsley – 21 February 2006
Client: Barnsley Metropolitan Council
Parties: Bluestone and Willmott Dixon

IV.6771. On 3 January 2006, Barnsley Metropolitan Council ('Barnsley MC') sought tenders for a six storey office development, creating a digital media centre in Barnsley.⁸³¹⁵ The following six companies were invited to tender: Bluestone, Willmott Dixon, Henry Boot, HBG Construction, Miller Construction (UK) Ltd and ISG Interior Exterior plc. The deadline for the receipt of tenders was noon on 21 February 2006.

IV.6772. Barnsley MBC received the following tender returns:

Company	Date and time tender received	Amount of tender	Awarded contract
Bluestone	21 February 2006 at 11:30am	£7,988,226	Yes
Willmott Dixon	21 February 2006 at 11:30am	£8,681,322	
Henry Boot	21 February 2006 at 11:10am	£8,219,022	
HBG Construction	Declined to tender 11 January 2006	n/a	
Miller Construction (UK) Ltd	Declined to tender	n/a	
ISG Interior Exterior plc	Declined to tender	n/a	

Evidence of agreement and/or concerted practice

Contemporaneous documentary evidence from leniency applicant Bluestone – Tender register, agenda for tender settlement meeting and tender list

IV.6773. As part of Bluestone's leniency application to the OFT, a tender register⁸³¹⁶ was provided, listing full typed details of this tender, with handwritten annotations thereon. Extracts from the tender register are replicated below with manuscript annotations marked in italics and typed entries denoted in bold as below:

'Chris Evans/Bob/Mike Hesp/David Smith/SteveHart/Steve/GR/MH/MP/Scott.'

Bluestone *17/02/06* **Tender Register**

Tender No: **TM40G001** **KMS No:** **5617** **Date Received:** **04/01/2005**

Project Name: **Barnsley – Digital Media Centre**

Bid Manager:	David Williamson	Estimator:	David Smith
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⁸³¹⁵ Information from client, OFT Document Reference 7127.

⁸³¹⁶ Tender register, OFT Document Reference B2208.

Planner:	Bob Andersen	D & B Manager:	Michael Heppleston
Const'n Manager:	Chris Evans		

	Date	Time	Location
Strategy Meeting:	16/01/2006	9.00am	Training Room, Garforth
Settlement Meeting:	17/02/2006	9.00am	Training Room, Garforth
Tender Return Date	21/02/2006	12 noon	

Competition:	Company	Comments/Notes
	HBG	
	Kier	
	Henry Boot ✓ <i>EOT?</i>	
	Willmott Dixon ✓ <i>Z.</i>	

IV.6774. Bluestone also provided an agenda for the tender settlement meeting on 17 February 2006 at 9:00 am⁸³¹⁷, with the following entry:

'01 **Project Description**

Description of Site and Proposed Buildings ✓

Client ✓

Competition ✓

Form of Contract ✓

IV.6775. The OFT conducted an inspection of Bluestone's office at Garforth, Leeds, on 23 and 24 February 2006, two days after the deadline for this tender and a spreadsheet containing a total of five tenders dated January and February 2006, was found.⁸³¹⁸ Within the right hand column of this spreadsheet appear the handwritten words '*None Won Yet*'. This spreadsheet contained the following entry:

Post Date	LOCATION	PROJECT	CLIENT
Month MTH REF			
Jan 1 TM40G001	Barnsley	Digital Media Centre	Barnsley MBC

Evidence from leniency applicant Bluestone

IV.6776. As part of its leniency application, Bluestone provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.204 to IV.228 above and is relied upon by the OFT in relation to this tender.

⁸³¹⁷ Agenda for tender settlement meeting, OFT Document Reference B4079.

⁸³¹⁸ Tender spreadsheet, OFT Document Reference B0339.

IV.6777. Bluestone compiled a spreadsheet entitled 'Table A - Definite instances of cover pricing'.⁸³¹⁹ On page 18 of the spreadsheet is the following entry, numbered 262:

Bluestone Region	Bluestone Area	Year	Tender No	Works	Client	Estimated Value of Contract
North East	Leeds	2005	TM40G001	Digital Media Centre, Barnsley	Barnsley MBC	£6,400,000

Tender Submitted by Bluestone	Market Sector	Date Tender Documents Received	Personnel Involved	Cover given/received (CG/CR)	Party(ies) to Covers (Contact)
£7,988,226	Government	04/01/2005	David Smith, Martin Pitt	CG	Willmott Dixon, Leeds

Documentary Evidence	Notes
Document 149 states "Z" against Willmott Dixon on Tender Register Form	As a result of giving the cover, competition was reduced from 3 to 2. (Bluestone had been told that the tender had originally been sent to 5-6 tenderers. Bluestone's intelligence, through the sub-contractors, told them only about two competitors: Henry Boot and Willmott Dixon.)
	Bluestone told the Willmott Dixon employee to put together some documents and a programme. Bluestone gave Willmott Dixon details of the programme, programme timetable and the cover figure. It is possible that Willmott Dixon was asked by the client to provide it with more details. Willmott Dixon was told by Bluestone that it would not provide it with any more details. The cover was given approximately a week before the OFT visits (around 16/17 February 2006.)

IV.6778. Following the issue of the Statement, Bluestone did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Bluestone

IV.6779. During interviews conducted in connection with its leniency application, Bluestone's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in paragraphs IV.204 to IV.228 above and is relied upon by the OFT in relation to this tender.

IV.6780. Commercial Director Martin Pitt ('MP'), Pre-Construction Director Michael Hesp ('MH'), Pre-Construction Manager David Williamson ('DW') and senior estimator

⁸³¹⁹ Spreadsheet of instances of cover pricing OFT Document Reference B2052.

David Smith ('DS') were interviewed and provided their recollection of this tender and explanations of the documents listed in the above paragraphs.

IV.6781. In interview, MP explained that the tender for this contract was one in which Bluestone was genuinely interested, and subsequently won. He attended a tender settlement meeting on 17 February 2006, prior to the tender deadline of 21 February 2006. MP also confirmed that he made the manuscript annotations on the tender register including the initials and names of Bluestone employees who attended the meeting and annotations made within the section marked '*Competition*'. MP said '*in terms of these companies...there's some dialogue...and we do talk about it in each tender*'.⁸³²⁰

IV.6782. MP confirmed that he made the annotations against the known competition during the tender settlement meeting and explained: '*in terms of HBG and Kier, those are crossed out. That...could mean that...they're not interested...or...we don't see them as big players for the job...Henry Boot I've got a tick against in terms of...they've been active in the marketplace*'. Referring to the handwritten letters 'EOT' which appear next to the entry for Henry Boot, MP said '*they had been looking for an extension of time on the tender period...EOT*'. MP also explained the appearance of the handwritten letter 'Z' next to the entry of Willmott Dixon as follows: '*That was in response to a question or a comment that...I think Dave Smith made at the meeting which was Willmott Dixon are looking for assistance*'.⁸³²¹ MP confirmed that the letter 'Z' was used by Bluestone to indicate a cover price and meant '*zero interest*'.⁸³²²

IV.6783. MH was also interviewed about this tender and he recalled that Bluestone provided a cover price to Willmott Dixon and that Bluestone won the contract. He said '*It was a nice job for us and we did give a cover to Willmott Dixon, and they did come on to us after the event, but that was a day or two, if not the same day when you were here, and we politely told them that we would not be able to give them any further information*'.⁸³²³ MH confirmed that the date received on the tender register had been incorrectly recorded by Bluestone as 4 January 2005 instead of 4 January 2006.⁸³²⁴ MH also attended the tender settlement meeting on 17 February 2006 and said that he '*knew it was Willmott Dixon we were giving a cover out to*'. He also recalled further contact from Willmott Dixon after the tender deadline and said '*I'd had a nasty shock on the morning when you gentlemen arrived, I went up the stairs...and somebody said, you're not going to believe this, we've just a phone call from Dixon...I can't tell you the exact words, but I know they were wanting, they'd been asked for a breakdown, clearly they hadn't got any, so they were a little worried*'.⁸³²⁵

IV.6784. DW was the bid manager for this tender and confirmed that DS was the designated estimator. DW recalled that Willmott Dixon was provided with a cover price and that this was discussed internally at Bluestone. He also confirmed that the letter 'Z' on the tender register was an indication that cover was provided to Willmott Dixon.⁸³²⁶

⁸³²⁰ Interview transcript, OFT Document Reference 12679, pages 12 to 15.

⁸³²¹ Interview transcript, OFT Document Reference 12679, page 15.

⁸³²² Interview transcript, OFT Document Reference 12679, page 18.

⁸³²³ Interview transcript, OFT Document Reference 12682, page 1.

⁸³²⁴ Interview transcript, OFT Document Reference 12682, page 2.

⁸³²⁵ Interview transcript, OFT Document Reference 12682, pages 4 and 5.

⁸³²⁶ Interview transcript, OFT Document Reference 12674, pages 12 to 15.

IV.6785. Senior estimator DS was also interviewed and confirmed that he was the project estimator for this tender. He said *'the fact that there's a Z against Wilmot Dixon suggests that they had been in touch asking for a cover price...we were aware that Wilmot Dixon's were actively seeking a cover on the...bid'*.⁸³²⁷ He could not recall who at Bluestone received contact and subsequently gave cover to Willmott Dixon.

Evidence from other companies – Willmott Dixon

IV.6786. The OFT wrote to Willmott Dixon on 22 March 2007 offering this party a 25 per cent reduction of any financial penalty the OFT might impose in respect of its alleged participation in bid rigging on this tender, in return for an admission that Willmott Dixon had participated in bid rigging on this tender. In response, Willmott Dixon, through its legal representatives, wrote to the OFT⁸³²⁸ and declined the Fast Track Offer.

IV.6787. The OFT subsequently wrote to Willmott Dixon's ultimate parent company at the time of this Infringement, Willmott Dixon Limited, on 6 November 2007, asking it to comment on Willmott Dixon's response to the OFT's Fast Track Offer, given that the OFT intended to hold Willmott Dixon Limited jointly and severally liable for any infringements committed by Willmott Dixon in respect of which the OFT ultimately decided to impose financial penalties. Willmott Dixon Limited stated *'the decision was taken by the subsidiary, and is now confirmed by the parent, not to accept the reduction in penalty offer'*.⁸³²⁹

IV.6788. Willmott Dixon stated in their response to the Statement in respect of this Infringement that, although they considered the evidence to be *'less than strong and compelling'*⁸³³⁰ (a suggestion which the OFT entirely refutes), nevertheless *'...our client took the step, which it regrets, to approach another company (Bluestone) and obtain a cover price for the job...[and] ...in this case, our client admits that a cover price was obtained in relation to the tender for the Digital Media Centre in Barnsley.'*⁸³³¹

IV.6789. In its response to the Statement, Willmott Dixon also noted that *'the Council needed to have three tenders and specifically asked our client to provide one of them in the full knowledge that it would most likely be uncompetitive'*.⁸³³² For the avoidance of doubt, the OFT emphasises that while there is no prohibition in competition law against a company unilaterally deciding to submit an inflated bid and calculating and submitting that inflated bid without any form of collusion with its competitors, it was a contravention of the Chapter I prohibition for Willmott Dixon to have approached Bluestone in order to obtain a cover price for this tender. There is no evidence that Willmott Dixon was asked by the client to collude with Bluestone in order to provide an uncompetitive tender bid.

⁸³²⁷ Interview transcript, OFT Document Reference 12673, pages 16 and 17.

⁸³²⁸ Response from Willmott Dixon, OFT Document Reference 10908.

⁸³²⁹ Response from Willmott Dixon Limited, OFT Document Reference 14120.

⁸³³⁰ Written representations of Willmott Dixon, 27 June 2008, paragraph 33.

⁸³³¹ Written representations of Willmott Dixon, 27 June 2008, paragraphs 37 and 38.

⁸³³² Written representations of Willmott Dixon, 27 June 2008, paragraph 37.

The OFT's analysis of the evidence and finding

IV.6790. From the evidence presented above, the OFT draws the following conclusions.

IV.6791. Bluestone and Willmott Dixon each accepted an invitation to tender for this contract.

IV.6792. Willmott Dixon was unable to submit a tender by the return date and/or did not want to win this contract. Bluestone completed the estimating process for the tender for this contract and it appears that it submitted a bid with the hope of winning the work. This is shown by the price submitted by Bluestone being the lowest received and the fact that it won the contract.

IV.6793. Bluestone recorded four competitors who were also invited to tender for this contract on a tender register, namely *'HBG, Kier, Henry Boot [and] Willmott Dixon'*. The letter 'Z' is noted next to the name of *'Willmott Dixon'*. Bluestone has confirmed that this letter indicates *'zero interest'* and that Willmott Dixon sought and received a cover price from Bluestone on this tender.

IV.6794. The OFT notes that although there are annotations by all four competitors on the tender register, the letter 'Z' only appears by the entry for Willmott Dixon. Four employees from Bluestone have all confirmed in interview that the letter 'Z' indicates that cover was given to Willmott Dixon and have a clear recollection that this took place. In addition, Commercial Director MP confirmed that he made the handwritten entries on the tender register, including the letter 'Z', from information obtained during the tender settlement meeting on 17 February 2006, where all relevant estimating and contract staff were in attendance. This meeting took place four days before the tender deadline.

IV.6795. Pre-Construction Director MH also had a clear recollection that soon after the tender deadline of 21 February 2006 Willmott Dixon made a telephone request to Bluestone for follow-up information about this tender, since Willmott Dixon was unable to provide the client with a breakdown of its tender figure. MH said that this telephone call was made while the OFT was in the process of carrying out an inspection under section 28 of Bluestone's premises at Leeds. The OFT's inspection at Bluestone's Leeds site took place on 23 and 24 February 2006.

IV.6796. The client Barnsley MBC received a tendered amount of £7,988,226 from Bluestone, which matches the figure provided by Bluestone in its leniency application. The client also received a tender of £8,681,322 from Willmott Dixon, which is higher than the amount tendered by Bluestone. This fits into the pattern consistent with a cover price having been provided from Bluestone to Willmott Dixon.

IV.6797. Finally, both Bluestone and Willmott Dixon have admitted engaging in cover pricing in respect of this tender for the six storey office development, creating a digital media centre in Barnsley.

IV.6798. The OFT therefore concludes that contact took place between Bluestone and Willmott Dixon, and that Bluestone supplied a figure to Willmott Dixon in order that it could submit a bid to the client that was not intended to win the contract.

IV.6799. The OFT is satisfied that the facts set out in paragraphs IV.6773 to IV.6798 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸³³³ In particular:

- (a) the provision of a figure for a cover bid from Bluestone to Willmott Dixon was not unilateral⁸³³⁴, and contravenes the principle against direct or indirect contact between competitors;⁸³³⁵
- (b) Willmott Dixon can be presumed to have taken account of the information received from Bluestone (i.e. the cover price) when determining its own conduct in the tendering process;⁸³³⁶ and
- (c) Bluestone can be presumed to have taken account of the information it received from Willmott Dixon (i.e. that Willmott Dixon did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁸³³⁷

IV.6800. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Bluestone and Willmott Dixon in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for a digital media centre in Barnsley, tender deadline 21 February 2006.

Immunity and leniency assessment

IV.6801. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6802. Bluestone informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Bluestone will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.

Infringement 244: Extension to Tipton and Coseley Building Society, Tipton – 9 June 2006

Client: Building Design Practice Ltd

Parties: Thomas Vale and Arthur M Griffiths

IV.6803. On 25 May 2006 Building Design Practice Ltd sought tenders for an extension to Tipton and Coseley Building Society, Tipton. The following three companies were invited to tender: Arthur M Griffiths, Thomas Vale and McPhilips. The deadline for the receipt of tenders was 12:00 noon on 9 June 2006.

IV.6804. Building Design Practice Ltd received the following tender returns by 12:00 noon on 9 June 2006:⁸³³⁸

⁸³³³ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸³³⁴ See paragraph IV.73 of the General comments on cover pricing section.

⁸³³⁵ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸³³⁶ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸³³⁷ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸³³⁸ Information from client, OFT Document Reference 7279.

Company	Time and Date tender received	Amount of tender	Awarded contract
Arthur M Griffiths	By 12:00 on 9 June 2006	£1,179,206	
Thomas Vale	By 12:00 noon on 9 June 2006	£994,305	
McPhilips	By 12:00 noon on 9 June 2006	£1,116,647	

IV.6805. Building Design Practice Ltd abandoned this tender exercise and re-tendered on a scaled down project on 14 July and 12 September 2006. Following this re-tender exercise it was decided to cancel the project.

Evidence of agreement and/or concerted practice

Evidence from leniency applicant Arthur M Griffiths

IV.6806. As part of its leniency application, Arthur M Griffiths provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.182 to IV.188 above and is relied upon by the OFT in relation to this tender.

IV.6807. Also as part of its leniency application made on 22 June 2006 Arthur M Griffiths provided information in respect of this tender. It is explained that Gary Wildsmith ('GW'), Commercial Director, was assigned to this tender but that due to work and holiday commitments, *'the tender would not be completed by submission date of Friday 09/06/06'*.⁸³³⁹ It was further explained that, *'In MJW's [Maurice Walsh ('MW'), Managing Director] absence at the last minute as a desperate act of temporary insanity GJW [GW] contacted Thomas Vale City and Interiors to ask if they could assist us in submitting our tender. There was no one to answer the call so he contacted CT [Chris Trickett] at Thomas Vales Stourport Office. Having assessed the scheme was probably over a million pounds GJW suggested to CT that if AM Griffiths & Son Ltd were to submit a bid at around £1.17 million then we should not be the lowest bidder – this was confirmed by CT, nothing more was disclosed and we submitted our form of tender accordingly'*.⁸³⁴⁰

IV.6808. The Form of Tender states that Arthur M Griffiths' submitted figure was £1,179,206.⁸³⁴¹

IV.6809. After an emergency board meeting of Arthur M Griffiths which took place on 9 June 2006, GW was ordered to withdraw the tender submission for this contract⁸³⁴² and the following policy statement was adopted *'With immediate effect following today's disclosures [in relation to this tender] it is now the policy of AM Griffiths & Son Ltd to not take or receive covers on tenders. No Exceptions'*.⁸³⁴³

⁸³³⁹ Leniency application, OFT Document Reference 5938, page 1.

⁸³⁴⁰ Leniency application, OFT Document Reference 5938, page 2.

⁸³⁴¹ Leniency application, OFT Document Reference 5938, page 4.

⁸³⁴² Leniency application, OFT Document Reference 5938, pages 2 and 5.

⁸³⁴³ Leniency application, OFT Document Reference 5938, page 6.

IV.6810. Following the issue of the Statement, Arthur M Griffiths did not submit any written or oral representations specifically in respect of this Infringement.

Witness Evidence from leniency applicant Arthur M Griffiths

IV.6811. In respect of this tender, in interview GW said, *'as I saidrun out of time....you know, Alan [Griffiths] wasn't in at that time, Maurice [Walsh] was....away on a half term... so I thought, well, I'm left to get this job in, I've got to submit something, I didn't want to sort of not, not return anything, so I spoke to Chris [Trickett] about it. But to be fair, I mean I didn't actually get a figure of[f] Vales. I think, I knew it was a million pound budget. I think the conversation went, if I go sort of about 17% over the budget price, do you think that'll put us out of court? And I think Chris said, yeah, you should be safe with that. And I put a figure of about 17% over a million pound, as I remember, but that was it. No figures were ever discussed or exchanged'*.⁸³⁴⁴

IV.6812. GW added *'I think he [Chris Trickett] was torn, a rock and a hard place... because we'd helped them a lot on this Wolverhampton Decent Homes project. He could see I was struggling. I think he felt duty bound to try and help me personally out of a ... because I said ... I'm in a hole here, I need ... help just to get out. I want to put a figure in, but ... I've not got the time to do it ... he said ... well, I shouldn't be doing this, but I'll see what I can do ... so he was doing it reluctantly'*.⁸³⁴⁵

IV.6813. GW explained that he contacted Thomas Vale because he had been working at its office in Stourport for the previous month and *'felt quite at home there, and it was a, an easy, easy ask really'*.⁸³⁴⁶

IV.6814. GW further explained that he subsequently had a conversation with MW who was unhappy with GW that Arthur M Griffiths was not going to price the job and had instead taken a cover price. GW said, *'[MW] said, I shouldn't have done it really. I should have, I should have got a, I should have done the price proper'*.⁸³⁴⁷

IV.6815. Also in respect of this tender, in interview MW said *'Gary [Wildsmith] was pricing that job, or I thought he was pricing that job, it, it transpired after the tender had been submitted that he'd run out of time, so apparently he spoke to somebody at Thomas Vale, I think ultimately it was Chris Trickett and said, look, you know, I'm struggling with this job, I think the budget's £1. whatever it is, £1. something, I'm thinking I'm going to go in at whatever it is, I don't want this job, do you think this would be okay, and I think Chris said, you know, you should be comfortable with that ... I came in and Gary obviously told me about this and I said, Gaz, we could be in trouble here, we had a sit down...we called a [board] meeting and we made the resolution that we wouldn't do that [give or take cover prices] because in honesty, at that stage, we knew that this [the OFT's investigation] was going on ... that there'd been problems elsewhere in the country...and I didn't want us to be in that position'*.⁸³⁴⁸

⁸³⁴⁴ Interview transcript, OFT Document Reference 13292, pages 7 and 8.

⁸³⁴⁵ Interview transcript, OFT Document Reference 13292, page 18.

⁸³⁴⁶ Interview transcript, OFT Document Reference 13292, page 17.

⁸³⁴⁷ Interview transcript, OFT Document Reference 13292, page 22.

⁸³⁴⁸ Interview transcript, OFT Document Reference 13291, page 13.

Evidence from leniency applicant Thomas Vale

IV.6816. As part of its leniency application, Thomas Vale provided a general explanation of its participation in cover pricing. This evidence is set out in paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.6817. On 15 August 2006, further to its leniency application, Thomas Vale's legal representatives provided information to the OFT in respect of this tender and specifically details of discussions between Christopher Keith Trickett ('CKT'), Chief Estimator at Thomas Vale, and Arthur M Griffiths. Thomas Vale explained that GW of Arthur M Griffiths had contacted Thomas Vale on three separate occasions about this tender.⁸³⁴⁹ Firstly, during the week commencing 29 May 2006, CKT received a telephone call from GW requesting assistance (a cover price) for this tender. CKT refused at that stage to provide assistance but referred GW to Nigel Stone ('NS') of Thomas Vale. On 9 June 2006, GW telephoned NS to request assistance which was also refused by NS. Shortly after this telephone conversation, GW telephoned CKT again.

IV.6818. Thomas Vale's legal representatives stated: *'we understand that Chris Trickett was put under significant pressure to assist Griffiths based on: (a) Griffiths' claims that they were "desperate" and significantly under resourced; (b) the perceived legitimacy of the request given the "partnership" arrangement⁸³⁵⁰ in place between TVC [Thomas Vale] and Griffiths; and (c) his personal friendship with the directors of Griffiths'*.⁸³⁵¹ After this third contact with GW, CKT contacted NS and obtained *'a "ballpark" figure for TVC's bid (i.e. in the region of £1 million)*'.⁸³⁵² CT then contacted GW, *'simply to confirm that Griffiths' intended bid of £1.1 million would leave it "fully covered"'*.⁸³⁵³

IV.6819. Thomas Vale explained that following CKT's conversations with GW, CKT was suspended on full pay and that a meeting was held with CKT on 22 June 2006. At this meeting CKT *'was informed that his dealings in this matter were in contradiction of clear company policy and amounted to "gross misconduct" worthy of dismissal'*.⁸³⁵⁴

IV.6820. Thomas Vale also provided to the OFT a schedule listing key competitors with whom Thomas Vale frequently dealt in relation to cover pricing at Annex 5 of its leniency application and Arthur M Griffiths appears on this list.⁸³⁵⁵

IV.6821. Following the issue of the Statement, Thomas Vale did not submit any written or oral representations specifically in respect of this Infringement.

Witness evidence from leniency applicant Thomas Vale

IV.6822. During interviews conducted in connection with its leniency application, Thomas Vale's employees provided further general explanation of its participation in and recording of cover pricing. This evidence is set out in

⁸³⁴⁹ Response from Thomas Vale, OFT Document Reference 5922, pages 2 and 3.

⁸³⁵⁰ Response from Thomas Vale, OFT Document Reference 5922, pages 2 and 3.

⁸³⁵¹ Response from Thomas Vale, OFT Document Reference 5922, page 2 and 3.

⁸³⁵² Response from Thomas Vale, OFT Document Reference 5922, page 3.

⁸³⁵³ Response from Thomas Vale, OFT Document Reference 5922, page 3.

⁸³⁵⁴ Response from Thomas Vale, OFT Document Reference 5922, page 3.

⁸³⁵⁵ Contact list, OFT Document Reference 11086, page 9.

paragraphs IV.689 to IV.717 above and is relied upon by the OFT in relation to this tender.

IV.6823. In interview CKT said *'the initial contact was when Gary Wildsmith spoke to me and asked for some assistance on that particular job, and obviously I said to him the company policy is that we don't do that, but I felt that if he perhaps spoke with Nigel Stone over at the Aston office, it may well be that he may have come across some other names of contractors who may also be tendering, which I'm sure he'd be happy to sort of oblige him with. And it was left at that at the time.*

....on the day that the tender was due in, Gary actually spoke to me, and said that he still wanted some help, which put me in quite an awkward position to be perfectly honest. Really personal contact with them and then obviously the relationship with Thomas Vale and AM Griffiths at that particular time, with the partnering tender that was going as a joint tender submission from Thomas Vale and AM Griffiths for the Wolverhampton Decent Homes scheme. So he did put me in a little bit awkward position. I did actually speak to Nigel Stone who, as it says in the statement said they were still, hadn't defined the exact tender submission figure, but you know, the figure would be round about so and so.

I spoke then with Gary, I didn't actually give him any figure, but he was quite persistent. And we knew, well he knew and I knew from talk with Nigel that obviously the approximate figure was going to be so and so. We'd obviously been told that before the tender came out to or the tender document was issued, the approximate value of it. Near on a million and 75 thousand as it happens, or 1.07, and Gary asked me the question, well if I go in at that figure will I be ok? And I said yes, not telling him actually that he'd have been way way above....' ⁸³⁵⁶

The OFT's analysis of the evidence and finding

IV.6824. From the evidence presented above, the OFT draws the following conclusions.

IV.6825. Thomas Vale and Arthur M Griffiths each accepted an invitation to tender for this contract.

IV.6826. Arthur M Griffiths was unable to submit a tender by the return date and/or did not want to win this contract.

IV.6827. Thomas Vale completed the estimating process for the tender for this contract and submitted a bid with the hope of winning the work. This is shown by the price submitted by Thomas Vale being the lowest received by the client.

IV.6828. In respect of Arthur M Griffiths, the OFT notes that it has confirmed that it engaged in bid rigging activities with Thomas Vale in respect of this tender. GW of Arthur M Griffiths has provided a clear recollection of the events leading up to the final conversation with Thomas Vale on the day of the tender deadline. Although the bid rigging activity did not involve the actual provision of a specific cover price from Thomas Vale to Arthur Griffiths, Thomas Vale provided Arthur M Griffiths with information regarding the level of its tender

⁸³⁵⁶ Interview transcript, OFT Document Reference 13865, pages 15 and 16.

price and with this information Arthur M Griffiths knew that it could submit its tender in the knowledge that it would not win the contract.

IV.6829. The OFT considers that Arthur M Griffiths would have realised that Thomas Vale had changed its policy on giving out cover prices at the time of this tender, and that this realisation would have influenced the timing of Arthur M Griffiths' leniency application to the OFT, and together with the withdrawal of its tender submission this shows that Arthur M Griffiths was aware that such bid rigging activity was anti-competitive.

IV.6830. In regard to Thomas Vale, the OFT notes that it has confirmed that it engaged in bid rigging activities with Arthur M Griffiths in respect of this tender. CKT of Thomas Vale has provided a clear recollection of his conversations with GW of Arthur M Griffiths. CKT has confirmed that he felt that GW had put him in '*an awkward position*' in asking Thomas Vale for assistance on this tender and that in spite of this CKT did provide the requested assistance to Arthur M Griffiths.

IV.6831. Thomas Vale has admitted that Arthur M Griffiths was one of the '*key competitors*' with whom it engaged in cover pricing activity. The OFT notes that both companies have admitted to bid rigging in relation to this tender.

IV.6832. The OFT therefore concludes that contact took place between Arthur M Griffiths and Thomas Vale, and that Thomas Vale supplied information to Arthur M Griffiths in order that it could submit a bid to the client that was not intended to win the contract.

IV.6833. The OFT is satisfied that the facts set out in paragraphs IV.6806 to IV.6832 above amount in law to an agreement and/or concerted practice contrary to the Chapter I prohibition.⁸³⁵⁷ In particular:

- (a) the provision of cover pricing information from Thomas Vale to Arthur M Griffiths was not unilateral⁸³⁵⁸, and contravenes the principle against direct or indirect contact between competitors;⁸³⁵⁹
- (b) Arthur M Griffiths can be presumed to have taken account of the information received from Thomas Vale when determining its own conduct in the tendering process;⁸³⁶⁰ and
- (c) Thomas Vale can be presumed to have taken account of the information it received from Arthur M Griffiths (i.e. that Arthur M Griffiths did not intend to submit a competitive bid) when determining its own conduct in the tendering process.⁸³⁶¹

IV.6834. Accordingly, the OFT concludes that the totality of the evidence as set out above establishes that an agreement and/or concerted practice was in place between Thomas Vale and Arthur M Griffiths in breach of the Chapter I prohibition, which had the object of bid rigging in relation to the contract for an extension to Tipton and Coseley Building Society, Tipton, tender deadline 9 June 2006.

⁸³⁵⁷ See paragraphs III.3 and III.89 to III.126 of the Legal Background section.

⁸³⁵⁸ See paragraph IV.73 of the General comments on cover pricing section.

⁸³⁵⁹ See paragraphs III.48 to III.51 and III.93 to III.94 of the Legal Background section.

⁸³⁶⁰ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

⁸³⁶¹ See paragraphs III.58, III.95 to III.96, and III.125 of the Legal Background section.

Immunity and leniency assessment

IV.6835. As explained in paragraphs II.1475 to II.1476 above, where the OFT would not have been aware of the bid rigging activities in relation to a particular tender but for the information provided by a leniency party, that party shall have 100 per cent immunity from any fine that the OFT may eventually impose in respect of that tender.

IV.6836. Arthur M Griffiths and Thomas Vale each informed the OFT of the bid rigging activities in respect of this tender before the OFT became aware of these activities from any other source. Thomas Vale applied for leniency before Arthur M Griffiths and will therefore receive 100 per cent immunity from the fine that the OFT is imposing in respect of this tender.⁸³⁶²

IV.6837. As Thomas Vale applied for leniency first, Arthur M Griffiths will not receive 100 per cent immunity in respect of this tender. However, Arthur M Griffiths will receive its normal leniency percentage reduction from the fine that the OFT is imposing in respect of this tender.

⁸³⁶² The OFT notes that by engaging in cover pricing activity after its leniency application on 27 January 2006, Thomas Vale breached its duty under leniency to refrain from participation in further cartel activity. The OFT has considered this breach in the light of all the circumstances of this case and has concluded that on this occasion no action will be taken in respect of Thomas Vale. However, it should be clearly noted that this does not provide any sort of indication as to the OFT's likely decision should a similar situation occur in a future case.

SECTION V – LEGAL ASSESSMENT

A. Introduction

- V.1. The OFT sets out in this section its conclusions concerning the legal assessment of the conduct of the Parties described above.
- V.2. Parts B to I of this Section set out the OFT's conclusions concerning the requirements which must be fulfilled in order to establish a breach of the Chapter I prohibition.

B. Undertakings

- V.3. The meaning of the word 'undertaking' for the purposes of the Act is set out above at paragraphs III.10 to III.36 of the Legal Background section. The OFT has also set out in those paragraphs its reasoning for its conclusions on the concept of a single undertaking.
- V.4. For the reasons set out in each of the relevant parts of Section II.A above, the OFT considers that each of the Parties listed in paragraph I.1 of the Introduction constitutes an undertaking for the purposes of the Act.

C. Agreement and/or concerted practice

- V.5. The law on agreements and concerted practices, with particular reference to collusive tendering, whether through cover bidding, agreements on tender costs and/or compensation payments, is set out in detail at paragraphs III.38 to III.59, III.92 to III.96 and III.138 to III.142 of the Legal Background section above.
- V.6. On the basis of the facts and evidence set out in the Conduct of the Parties section above, and noting the concluding paragraphs set out in relation to each Infringement in that section, the OFT has decided that the conduct of the Parties amounted to agreements and/or concerted practices within the meaning of the Act.
- V.7. As stated in paragraphs III.38 to III.42 of the Legal Background section above, it is not necessary for the OFT to conclude as to whether the behaviour of the Parties specifically constituted an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.

D. Anti-competitive object

- V.8. As set out in paragraphs III.97 to III.114, III.127 to III.135 and III.143 to III.157 of the Legal Background section above, the OFT considers that collusive tendering, whether in the form of cover bidding, cover bidding in conjunction with a compensation payment arrangement, or compensation payment arrangements without cover bidding, constitutes an obvious restriction of competition, and thus has as its 'object' the prevention, restriction or distortion of competition.
- V.9. The OFT therefore considers that each of the agreements and/or concerted practices described in this Decision had as its object the prevention, restriction or distortion of competition.

E. Appreciability

- V.10. As set out in paragraph III.176 and III.182 of the Legal Background section above⁸³⁶³, the agreements and/or concerted practices described in this Decision involved bid rigging and/or price fixing and are therefore considered by the OFT to be capable of having an appreciable effect on competition whether or not the Parties' combined market share in the relevant market falls below 10 per cent.
- V.11. The OFT considers that each of the agreements and/or concerted practices specified in this Decision had the object of preventing, restricting and/or distorting competition to an appreciable extent.

F. Effect on trade within the UK

- V.12. As set out in paragraphs III.184 to III.190 of the Legal Background section above, the OFT considers that by its very nature, an agreement or concerted practice between competitors to rig bids and/or fix prices is likely to affect trade within the UK.
- V.13. The agreements and/or concerted practices referred to in this Decision operated in a part of the UK – England – and the Parties' conduct is therefore considered by the OFT to have affected trade within the UK. The Parties' bid rigging and/or price fixing agreements and/or concerted practices were capable of altering the structure of competition in a part of the UK by reducing competition in the competitive tendering process and altering the pattern of trade within the UK.
- V.14. The OFT therefore considers that the requirement of an effect on trade within the UK is satisfied in this case for all of the agreements and/or concerted practices specified in this Decision.

G. Effect on trade between Member States

- V.15. As stated at paragraph III.191 of the Legal Background section above, the OFT has a duty to consider whether trade between EC Member States may have been appreciably affected by the Infringements, in order to determine whether Article 81(1) is applicable as well as the Chapter I prohibition.
- V.16. The OFT does not consider that the agreements and/or concerted practices described in this Decision were capable, individually or in aggregate, of appreciably affecting trade between Member States for the reasons set out below.
- V.17. The Infringements were not cross-border by nature, in the sense that all of the relevant tenders and instances of bid rigging took place within *England* only. The OFT therefore considered whether the Infringements were capable of influencing cross-border trade.
- V.18. Out of the 103 Parties that are addressees of this Decision, only two undertakings involve non-UK legal entities. These are Ballast Nedam (the parent company of Ballast), registered in the Netherlands, and Sicon (the parent company of John Sisk), registered in the Republic of Ireland. The subsidiaries of those two entities that had direct involvement in the agreements and/or

⁸³⁶³ The OFT does not consider that the agreements and/or concerted practices produced only insignificant effects in the sense outlined in Case 5/69 *Volk v Vervaeke* [1979] ECR 295.

concerted practices described in this Decision, Ballast (in liquidation) and John Sisk, do not have business activities outside of the UK. Accordingly, the OFT does not consider that the infringing activities have resulted in a significant number of foreign undertakings conforming to the conduct carried out in the UK by the Parties. There is no evidence that a significant number of foreign undertakings played an active part in the bid rigging activities which are the subject of this Decision.

- V.19. The OFT also examined whether there is significant demand for services from non-UK construction firms by customers in the UK. According to the evidence examined, firms from non-UK EU Member States provide less than four per cent of construction activities in the UK. This figure is relatively low and may indicate that there is little tendency for foreign undertakings to provide services in the UK without setting up UK subsidiaries whose activities are limited to the UK (such as in the case of Ballast and John Sisk). The evidence reviewed by the OFT indicates that it is not common practice for firms from other Member States to tender for and fulfil UK-based contracts due to high transport costs.
- V.20. The OFT has considered the extent to which the UK construction industry has been affected by the activities of the Parties. According to the evidence reviewed, approximately six per cent⁸³⁶⁴ of construction activity in the UK is represented by the Parties in aggregate for the period of the Infringements. The OFT does not consider this to be an excessively high proportion, noting also that not all turnover of the Parties will generally have been affected by infringing conduct. Furthermore, no single Infringement is likely to have had a significant impact on the UK construction sector, given that the average value of a directly affected contract is approximately £1 million, and the UK construction sector has a value of over £100 billion.⁸³⁶⁵
- V.21. Horizontal cartels that cover the whole of a Member State are normally capable of affecting trade between Member States by reason of the exclusion by participants of competitors from other Member States, hindering the economic penetration which the Treaty is designed to bring about.⁸³⁶⁶ The OFT's investigation is only concerned with infringements that have occurred in England and the OFT has not dealt in this investigation with any bid rigging activities that may have occurred in the remainder of the UK.
- V.22. The OFT has not uncovered any evidence that the bid rigging activities of the Parties in the UK have had an actual exclusionary effect on competitors from other Member States. Furthermore, based upon the above evidence of the low demand in the UK for construction undertakings from other Member States and the non-tradable nature of construction services, it seems unlikely that if market

⁸³⁶⁴ OFT estimate based on data provided by the UK Office of National Statistics, as available at the time of issue of the Statement. The OFT has received no information to suggest any material change to this figure since that date.

⁸³⁶⁵ OFT estimate based on data provided by the UK Office of National Statistics, as available at the time of issue of the Statement. The OFT has received no information to suggest any material change to this figure since that date.

⁸³⁶⁶ European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, at paragraphs 78-79. See also Case 215/96 *Carlo Bagnasco v BPN* [1999] ECR I-135, at paragraphs 51-53; Commission decision *Dutch Banks* OJ L271, 21 October 1999, page 28, at paragraph 61, citing Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, at paragraph 29 and Case T-29/92 *SPO v Commission* [1995] ECR II-289, at paragraph 229.

conditions changed in the UK, cartel members would take action against competitors from other Member States.⁸³⁶⁷

- V.23. The OFT also considered the applicability of the EC rules on public procurement and whether these could indicate a potential effect on interstate trade. Public procurement is the purchase of goods or services by public bodies. The EC public procurement rules are intended to ensure that public procurement is open to EU-wide competition and that suppliers in any EU Member State have an equal opportunity to bid for public contracts. The relevant directive at the time of the Infringements was the Works Directive⁸³⁶⁸ (no longer in force) which covered contracts awarded by central government, local authorities and other public sector bodies such as schools, universities and health authorities. If the value of the contract exceeded certain thresholds, public procurement rules would apply, including the requirement to publish a contract notice in the *Official Journal of the European Communities* to enable suppliers throughout the EU to submit bids.
- V.24. A relatively low proportion (seven) of the Suspect Tenders met the thresholds that were in force during the relevant period and were therefore within the scope of the EC public procurement rules. The OFT considers that this is unlikely to indicate a potential appreciable effect on trade between Member States. This is on the basis that, even though the contracts fell within the scope of the EC public procurement rules, in practice, only a small proportion of bids would have been submitted by non-UK firms. Moreover, as indicated above, firms from other EU Member States represent less than four per cent of all firms that provide construction services in the UK.
- V.25. On the basis of the above, the OFT considers that the Infringements are not, individually or in aggregate, capable of appreciably affecting trade between Member States. The OFT is therefore not obliged to apply Article 81(1) to the Infringements.

H. Duration of the Infringements

- V.26. On the basis of the evidence available, set out in the Conduct of the Parties section above, the OFT has considered the relevant duration of each of the Infringements committed by the Parties. The OFT considers that the duration of Infringements of this nature is at least from the date of initial contact between the Parties, alerting one another that they had been invited to tender and were either interested in winning the tender or in making bids that would ensure that they would not win the tender, to the date when bids were actually submitted or due to be submitted.
- V.27. In cases involving compensation payments made after the date when bids were submitted, the OFT considers that the duration of Infringements of this nature lasted at least until the date when the final compensation payment was made.

⁸³⁶⁷ European Commission's *Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty*, OJ C101, 27 April 2004, page 81, paragraph 80.

⁸³⁶⁸ Works Directive (93/37/EEC) of 14 June 1993, OJ 1993, L 199/54, amended by Directive 97/52/EC of 13 October 1997, OJ 1997, L 328/1. This has been replaced by the Public Works Directive, Directive 2004/18, OJ 2004 L134/114, which was implemented in the UK on 31 January 2006 by the Public Contracts Regulations 2006 (SI 2006/5). All of the infringing tenders relating to public works pre-date 31 January 2006.

V.28. The nature of the initial contacts, which were usually by telephone, coupled with the fact that tender documentation was not always retained beyond the end of the tender process, means that the OFT does not always have precise information as to either or both of the start and completion dates in respect of each Infringement.

V.29. In any event, the OFT considers that the concept of duration is generally speaking of less significance in bidding markets compared to fixed price markets. As the CAT stated in *Apex*:⁸³⁶⁹

'(I)n the present case, the effect of the infringement is not restricted to the short period referred to above but has a potential impact on future tendering processes by the same tenderees. Moreover, in relation to tenders we bear in mind the specific nature of the 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.'

V.30. R Durnnell stated in its response to the Statement that the situation in the construction markets in which it operates is different from that in *Apex*, such that its Infringements had no impact on future tendering processes involving the same tenderees.⁸³⁷⁰ For the reasons set out in the Legal Background section, the OFT does not accept this submission.

V.31. In light of the above, and as the OFT is not making any adjustment to the level of penalty consequent on the duration of any Infringement in this case (see paragraphs VI.181 to VI.188 of the Enforcement section below), the OFT considers it unnecessary to make a finding as to the duration of each of the agreements and/or concerted practices described in this Decision.

I. Exclusion or exemption

V.32. The OFT considers that the arrangements entered into between the Parties are not exempted from the Chapter I prohibition by operation of section 9 of the Act. In particular, the Parties' conduct clearly does not contribute to improving production or distribution, or promoting technical or economic progress. In the circumstances, it is not necessary for the OFT to consider whether any of the remaining requirements for exemption under section 9 of the Act would have been met.

V.33. There is also no block exemption order under section 6 that would exempt the conduct of the Parties from the Chapter I prohibition. Nor is there any applicable EU Council or Commission Regulation by virtue of which the conduct of the Parties would be exempt from Article 81(1) and would benefit from a parallel exemption from the Chapter I prohibition under section 10 of the Act.

V.34. Finally, none of the exclusions from the Chapter I prohibition provided for by sections 3 or 50 of the Act applies.

⁸³⁶⁹ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 at paragraph 278.

⁸³⁷⁰ Written representations of R Durnnell, 27 June 2008, paragraph 135.

SECTION VI – ENFORCEMENT

VI.1. This Section of the Decision sets out the enforcement action which the OFT is taking and its reasons for taking that action.

A. Decision

VI.2. On the basis of the evidence set out in the Conduct of the Parties section above, the OFT finds that each of the Parties has infringed the Chapter I prohibition by participating at various times since March 2000 in one or more agreements and/or concerted practices involving bid rigging activities with the object of preventing, restricting or distorting competition. The list of Infringements in which the OFT finds that each Party has engaged is set out at Annex A.

B. Directions

VI.3. Section 32(1) of the Act provides that if the OFT has made a decision that an agreement and/or concerted practice infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. As the OFT considers that the Infringements have already come to an end, it is not necessary to issue directions in this case.

C. Financial penalties

General points

VI.4. Section 36(1) of the Act provides that on making a decision that an agreement and/or concerted practice has infringed the Chapter I prohibition, the OFT may require the undertaking⁸³⁷¹ concerned to pay it a financial penalty in respect of the infringement. 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, for the time being in force, when setting the amount of the penalty.⁸³⁷²

VI.5. The OFT has included in this Decision a maximum of three Infringements per non-leniency Party in respect of which financial penalties are being imposed. These have been selected as described above in paragraphs II.1495 to II.1498 of the OFT's Investigation section.

VI.6. The OFT notes that the leniency Parties are in many cases involved in more than three Infringements; however, for the reasons discussed in paragraphs II.1472 to II.1478 of the OFT's Investigation section above, the OFT is not imposing financial penalties in respect of more than three Infringements per Party (see also paragraph VI.386 below).

⁸³⁷¹ See paragraph VI.53 below.

⁸³⁷² OFT 423 *OFT's guidance as to the appropriate amount of a penalty* (December 2004).

Section 60 of the Act

- VI.7. A number of Parties have asserted that the OFT must act consistently with the Commission's practice on penalties as a result of section 60 of the Act.⁸³⁷³ This argument has been raised, for example, in relation to the following issues:
- year of turnover on which step 1 of the penalty calculation is based;
 - assessment of the effects of an Infringement in setting penalties;
 - negligence as a mitigating factor;
 - the circumstances in which a nominal penalty, or no penalty at all, should be imposed; and
 - the limitation period for imposing penalties.
- VI.8. The OFT does not consider, however, that it is required by section 60 to calculate the penalties it imposes under the Act in the same manner as fines imposed by the Commission under Regulation 1/2003 for infringements of Articles 81 or 82. Section 60 is concerned with ensuring that, so far as possible and having regard to any relevant differences between the provisions concerned, questions arising under the Act are dealt with consistently with the treatment of corresponding questions arising under EC competition law, the principal concern being to ensure consistency in the interpretation of the substantive UK and EC competition law provisions concerned. Save as regards fundamental procedural safeguards, questions of procedure, investigation and enforcement, including the calculation of financial penalties, are not the focus of section 60.⁸³⁷⁴ Rather, specific provision is made for these under the Act.⁸³⁷⁵ The OFT's primary obligation when calculating penalties under the Act is, therefore, to have regard to its own penalty guidance (see paragraph VI.4 above).⁸³⁷⁶ Moreover, to the extent that this produces a different result from that which would arise from the approach adopted by the Commission, the OFT regards this as a 'relevant difference' between the provisions concerned under section 60(1) of the Act.
- VI.9. Furthermore, whilst the OFT's approach will be broadly consistent with the general principles applied by the Commission – such as the need for appropriate punishment and deterrence as per the preamble to the Commission's guidance – the OFT is not bound to adopt, in relation to the detail, the same methodology as the Commission, particularly where the Commission has itself a margin of appreciation under its own guidelines. That would be tantamount to arguing that the OFT should apply the Commission's guidelines. Moreover, the

⁸³⁷³ For example, written representations of Harlow & Milner, 27 June 2008 (as amended 6 January 2009), paragraph 4.3; written representations of Crest Nicholson, 27 June 2008, paragraphs 8.18 to 8.20; and written representations of Dukeries, 27 June 2008, paragraph 60.

⁸³⁷⁴ See comments in Hansard at the time the Competition Bill was being enacted, such as, for example, the comment on behalf of the Government that section 60 was intended to import '*high level principles, such as proportionality, legal certainty and administrative fairness*' into domestic law (see Lord Simon of Highbury, Hansard, House of Lords' debates, 25 November 1997: Column 961).

⁸³⁷⁵ See, in particular, sections 25 to 44, section 51 and Schedule 9 of the Act, together with the guidance and secondary legislation made under those provisions.

⁸³⁷⁶ This is consistent with the architecture of Regulation 1/2003, which does not require national competition authorities to apply the same approach to sanctions as the Commission in respect of infringements of Article 81 or 82.

OFT's duty under section 60(3) is at most only to have regard to any relevant decision or statement of the Commission.

- VI.10. In any event, the OFT does not consider that a Party can credibly suggest that the OFT must adopt those aspects of the Commission's penalties practice which are to that Party's advantage, whilst ignoring the other aspects of the Commission's practice which would be to its disadvantage. For example, none of the Parties has suggested that the OFT should adopt the same starting point as the Commission (effectively, up to 30 per cent of relevant turnover) or an 'entry fee' uplift of 15 to 25 percent of relevant turnover for serious infringements such as price fixing or bid rigging. Indeed, if the OFT were to recalculate its penalties on the basis of the Commission's guidance then many of the Parties would face higher penalties than those being imposed by the OFT in this Decision.

Previous OFT decisions

- VI.11. A number of the Parties have pointed to alleged inconsistencies between the OFT's approach to the calculation of the penalties in this case and the approach it has adopted in previous cases.⁸³⁷⁷ Provided the penalties it imposes in a particular case are within the range of penalties permitted by section 36(8) of the Act and the 2000 Order (as amended by the 2004 Order) and the OFT has had regard to its Penalty Guidance under section 38 of the Act, the OFT has a margin of appreciation when determining the appropriate amount of a penalty under the Act.⁸³⁷⁸ Moreover, each case is specific to its own facts and circumstances and it cannot be assumed that the level of penalty appropriate for a particular party in one case (or the manner in which the Penalties Guidance has been applied) will necessarily be the same in respect of another party in another case. Finally, the OFT does not accept that it is in any event bound by its decisions in relation to the calculation of penalties in previous cases. Rather, the OFT considers that, subject to the above, it is free to adapt its policy as appropriate having regard to all relevant circumstances and its overall policy objectives on financial penalties, as set out in its Penalty Guidance.⁸³⁷⁹

Separate penalty per Infringement

- VI.12. As discussed in the Statement, the OFT considers that it is appropriate in this case to treat each Infringement separately and is therefore imposing a separate financial penalty in respect of each Infringement committed by each undertaking, up to a maximum of three Infringements. The OFT is therefore imposing between one and three financial penalties on each Party, according to the number of Infringements in which the OFT finds that Party has been involved as set out in this Decision.

⁸³⁷⁷ For example, written representations of J Guest, 27 June 2008, paragraph 105; written representations of Harlow & Milner, 27 June 2008 (as amended 6 January 2009), paragraph 5.7; and written representations of GMI, 26 June 2008, paragraphs 79 to 81.

⁸³⁷⁸ *Argos Ltd and Littlewoods Ltd v OFT* [2005] CAT 13, at paragraph 168; *Umbro Holdings Ltd and Manchester United plc and JJB Sports plc and Allsports Ltd v OFT* [2005] CAT 22, at paragraph 102.

⁸³⁷⁹ Joined cases 100/80 to 103/80 *Musique Diffusion Francaise and others v European Commission ('Pioneer')* [1983] ECR 1825, at paragraphs 101 to 110; Joined cases C-189/02P, C-202/02P, C-205/02P to C-208/02P and C-213/02P *Dansk Romindustri A/S and others v European Commission* [2005] ECR I-5425, at paragraph 169.

- VI.13. Around 20 of the Parties suggested in their responses to the Statement, that the imposition of three financial penalties is arbitrary, resulting as it does from the OFT's selection of three Infringements per non-leniency Party, and that it will lead to financial penalties that are three times the amount they would have been if the OFT had treated each Party's Infringements as one single overall infringement.⁸³⁸⁰ Some Parties noted⁸³⁸¹ that the OFT had applied a single financial penalty per party in each of the roofing cases.⁸³⁸² Several Parties submitted that, if the OFT imposes a separate penalty for each Infringement, then the aggregate penalty for three Infringements occurring in the same market and in the same year should be no greater than it would have been had the Parties entered into an overall bid rigging scheme for every tender in that market in that year.⁸³⁸³ Two Parties submitted that the OFT should take into account the cumulative impact of three penalties when setting the starting point.⁸³⁸⁴
- VI.14. The OFT does not consider it appropriate to treat the Infringements in this case as one single overall infringement, or to lower the starting point to take into account the cumulative impact of three penalties, for a number of reasons.
- VI.15. First, there is no evidence that there was one overall bid rigging scheme by which the Parties engaged in market allocation, deciding between them who was going to win each particular tender. Indeed, for many Parties, their Infringements involved different counterparties, making it wholly artificial to treat these as a single Infringement.
- VI.16. Secondly, it cannot in any event be assumed, as the Parties' representations imply, that the penalty for a single overall bid rigging scheme would have been the same as or lower than the penalties being imposed in this case. As noted in paragraphs VI.103 and VI.233 below, had there been sufficient evidence of an overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel over a period of time and/or with the explicit intention of inflating the level of the winning bids, this would have constituted one of the most serious examples of collusive tendering and would almost certainly have warranted higher penalties than are being imposed in this case. It may also have affected wider relevant markets.
- VI.17. Thirdly, where a Party has been found to have participated in more than one Infringement, the OFT considers it appropriate that it should face more than one penalty. As provided for in the Act and as stated in paragraph VI.4 above, the OFT may require an undertaking to pay a financial penalty in respect of any

⁸³⁸⁰ For example, written representations of Clegg, 27 June 2008, paragraphs 127 to 133; written representations of G & J Seddon, 27 June 2008, paragraphs 106 to 109; written representations of J H Hallam, 27 June 2008, paragraphs 107 to 111.

⁸³⁸¹ For example, written representations of GMI, 26 June 2008, paragraphs 80/81; written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraph 6.1; and written representations of Willmott Dixon, 27 June 2008, paragraph 56.

⁸³⁸² See, for example, CA98/02/2005 *Collusive tendering for felt and single ply flat-roofing contracts in the North East of England*, 16 March 2005, and CA98/1/2004 *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*, 16 March 2004.

⁸³⁸³ For example, written representations of A H Willis, 27 June 2008, paragraph 25; written representations of Herbert Baggaley, 27 June 2008, paragraph 29; and written representations of Wright (Hull), 27 June 2008, paragraphs 17 and 28.

⁸³⁸⁴ Written representations of Greswolde, 27 June 2008, paragraph 7.31; and written representations of Bluestone, 27 June 2008, paragraph 6.20.

infringement of the Act. Some Parties are facing penalties for only one Infringement and the OFT does not consider it appropriate that these Parties should face the same level of penalty as those Parties found to have committed more than one Infringement of the Act.

- VI.18. Fourthly, as noted in paragraph II.1460 above the OFT had initial evidence of more infringements for each of the Parties – in some cases considerably more – and decided not to pursue these additional suspected infringements primarily in order to ensure that its resources were targeted as effectively as possible, and that it could proceed to an infringement decision in as short a time as possible so that undertakings are appropriately deterred from bid rigging activities in the future. Thus many of the Parties could have faced much higher financial penalties than those being imposed by the OFT.
- VI.19. Fifthly, the Infringements for many of the Parties occurred in different markets and it would be artificial to attempt to impose a single overall penalty where a number of different markets had been affected or had had the capacity to be affected by such Infringements. Similarly, other relevant factors, such as director involvement, instigation/coercion and acceptance of the OFT's Fast Track Offer, often varied between Infringements as well as between Parties.
- VI.20. Finally, if the OFT were to treat the Infringements as one single overall infringement, one logical corollary would be that there would be one product and geographic market affected by that Infringement, namely construction in England, rather than the many separate product and geographic markets found by the OFT in this Decision. Not only would this be contrary to the OFT's actual findings, it would also result in a much higher penalty at step 1 for all of the Parties, who without exception operated in more than one of the product and geographic markets found by the OFT. In turn, for many of the Parties this would have led to higher overall penalties.
- VI.21. Notwithstanding the above, however, the OFT has ensured that the penalties imposed in this Decision are fair and proportionate taking into account all of the factors in this case, including the fact that penalties are being imposed for a maximum of three Infringements per Party. For example:
- this is one of the factors taken into account by the OFT when setting the level of the Minimum Deterrence Threshold at a level sufficient to achieve deterrence – see paragraph VI.223 below; and
 - where a Party has more than one Infringement in this Decision that occurred in the same relevant market, the OFT has considered whether a reduction is required at step 3 in order to ensure that the cumulative impact of the aggregate penalty is not excessive by virtue of the Party conducting a large proportion of its business in that relevant market during the financial year prior to the OFT's decision – see paragraphs VI.271 to VI.273 below.
- VI.22. As noted in paragraphs IV.120 to IV.121 above, certain Infringements involved tender processes where more than two bidders were involved, and there may have been two or more separate agreements or concerted practices in relation to that tender. As the OFT is imposing a maximum of three financial penalties on each Party, any Party involved in more than one agreement or concerted practice for a given tender will nonetheless receive only one financial penalty for its conduct in respect of that tender.

VI.23. Bullock and Pearce Group stated that their respective penalties should reflect the fact that they are being held liable for only one Infringement, whereas other Parties are being held liable for three.⁸³⁸⁵ As each Infringement is being treated separately and the OFT is imposing a separate penalty for each, these Parties' involvement in one Infringement will be reflected in the fact they are subject to only one penalty, as opposed to three. The OFT does not consider that a reduction in penalty should also be applied in these circumstances.

No penalty/nominal penalty

VI.24. Several Parties⁸³⁸⁶ submitted (by reference to a number of European cases) that the Commission's practice was to not impose a fine in certain circumstances, or to impose only a nominal fine in other circumstances. They argued that the OFT should adopt the same approach under section 60 of the Act and either impose no penalty at all, or only a nominal penalty, in this case. For the reasons set out in paragraphs VI.7 to VI.10 above, the OFT does not accept that it is obliged to adopt the Commission's practice on penalties.⁸³⁸⁷ Moreover, the OFT notes that the circumstances in which the Commission would not impose a fine are very limited.

VI.25. A few Parties⁸³⁸⁸ also submitted that the OFT was not entitled to impose a penalty due to the lack of legal certainty surrounding their conduct.⁸³⁸⁹ These Parties stated that the law in relation to what they termed 'simple' cover pricing was unclear at the time of the relevant Infringements, and that 'simple' cover pricing was not clearly and ascertainably punishable at that time. The OFT has considered the arguments in relation to 'simple' cover pricing at paragraphs III.159 to III.161 of the Legal Background section and does not repeat them again here. The OFT does not accept that there was any lack of clarity regarding the application of the Chapter I prohibition to the Parties' conduct as described in this decision and considers that each of the Parties should have been aware that its conduct had the object or effect of preventing, restricting or distorting competition (see paragraphs VI.38 to VI.51 below). A prior OFT or Commission decision that a particular type of conduct infringes the Act is **not** a pre-condition for the OFT to find an undertaking liable or to impose a penalty where its conduct is found to have infringed the Chapter I prohibition.

VI.26. A number of Parties⁸³⁹⁰ also submitted that, in setting penalties in this case, the OFT should take into account the fact that their Infringements occurred prior to the OFT's previous decisions in relation to cover pricing. This issue is discussed in relation to steps 1 and 3 of the penalty calculation, at paragraphs VI.173 and VI.251 below.

⁸³⁸⁵ Written representations of Bullock, 26 June 2008, paragraph 6.16.37; and written representations of Pearce Group, 1 June 2009, paragraph 5.29.

⁸³⁸⁶ For example, written representations of Caddick, 24 June 2008, section 4; written representations of Harlow & Milner, 27 June 2008 (as amended 6 January 2009), paragraphs 4.1 to 4.12; and written representations of Quarmby, 27 June 2008, paragraphs 4.1 to 4.12.

⁸³⁸⁷ Notwithstanding this, the OFT has reduced the penalty for one Party to a nominal penalty in view of its financial hardship – see penalty table for Harper plc below.

⁸³⁸⁸ For example, written representations of Caddick, 24 June 2008, section 5; written representations of Stainforth, 27 June 2008, paragraphs 4.25 to 4.28.

⁸³⁸⁹ These Parties cited *Norris v Government of the United States of America* [2008] UKHL 16, at paragraph 53, in support of their submission.

⁸³⁹⁰ For example, written representations of Admiral, 26 June 2008, paragraph 23.4.

Statutory cap on penalties

VI.27. No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the 2000 Order, as amended by the 2004 Order.⁸³⁹¹ This is discussed further in general terms at paragraphs VI.369 to VI.373 below, and in the check of each individual financial penalty against the statutory cap, in each Party's individual financial penalty calculations below.

Limitation period

VI.28. Some Parties, for example Bullock and Galliford Try, noted that the Commission has a five year limitation period within which it must bring action against infringements of Article 81 and Article 82, and suggested that by virtue of section 60 of the Act, the OFT should be subject to the same limitation period in relation to the older Infringements in this Decision.⁸³⁹²

VI.29. The limitation period under Regulation 1/2003 (Art 25(1)(b)) is expressed to apply to the Commission's fining powers under Articles 23 and 24 of that Regulation. There is no equivalent limitation period expressed to apply to the OFT's power to require the payment of a penalty under section 36 of the Act. The OFT therefore considers this to be a 'relevant difference' for the purpose of section 60(1) (see paragraphs VI.7 to VI.10 above) and does not consider that its ability to require the payment of penalties for infringements of the Act is subject to a five year limitation period.

VI.30. Furthermore, the OFT does not accept that there has been any undue delay in its conduct of the investigation. The conduct that is the subject of this decision came to light in 2004 following a report from the Queen's Medical Centre in Nottingham and the investigation has proceeded at an appropriate pace since the conduct was brought to the OFT's attention. This is particularly so, given the number of Parties involved in this case and the unprecedented number of tenders in respect of which the OFT uncovered evidence of an infringement and the large number of undertakings involved. Moreover, there is no evidence to suggest that any of the Parties suffered harm as a result of the time taken to investigate the matter.

Small agreements

VI.31. Section 39(3) of the Act provides that a person is immune from the effect of section 36(1) if he is 'party to a "small agreement"'. 'Small agreement' is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000⁸³⁹³, as an agreement between undertakings, the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred, does not exceed £20 million.

VI.32. However, by virtue of section 39(1)(b), price fixing agreements⁸³⁹⁴ are not 'small agreements' for the purposes of the Act. A few Parties⁸³⁹⁵ argued that

⁸³⁹¹ Section 36(8) of the Act.

⁸³⁹² Written representations of Bullock, 26 June 2008, paragraphs 7.31 to 7.35; and written representations of Galliford Try, 27 June 2008, paragraphs 5.2 to 5.4.

⁸³⁹³ SI 2000/262.

⁸³⁹⁴ Which includes concerted practices: section 2(5) of the Act..

the Infringements should constitute 'small agreements' because they are not price fixing agreements and/or concerted practices. The OFT does not accept these arguments. Section 39(9) of the Act defines a price fixing agreement as '*an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates*'.

- VI.33. By giving a cover price, each of the relevant Parties to the Infringements was restricting the freedom of the recipient of the cover price to determine its own bid for the tender, since the joint intention of the Parties was that the recipient of the cover price would bid at or around the level of the cover price. The conduct of the recipient of the cover price was in fact clearly affected by receipt of that cover price – in most cases its bid was at or very close to the cover price given.
- VI.34. The OFT notes that the freedom of only one of the Parties to the agreement need be restricted. The OFT nonetheless considers that each of the relevant Parties to the Infringements was also restricting the freedom of the giver of the cover price, since the joint intention of the Parties was that the giver of the cover price would bid at a level below the cover price.
- VI.35. All of the cover pricing Infringements set out in this Decision are therefore price fixing agreements within the meaning of section 39(1)(b).
- VI.36. However, since none of the Infringements in this Decision involving compensation payments without cover pricing is capable of constituting a 'small agreement' due to the combined turnover of the relevant Parties, the OFT does not need to consider the applicability of section 39(9) to these Infringements.
- VI.37. Accordingly, none of the Parties will benefit from immunity from penalties under section 39(3) (see also paragraphs III.119 to III.124 above on price fixing in the Legal Background section).

Intention/negligence

- VI.38. The OFT may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently⁸³⁹⁶, although the OFT is not obliged to specify whether it considers the infringement to be intentional or merely negligent. The CAT has stated that:⁸³⁹⁷

'...an infringement is committed intentionally for the purposes of the Act if the undertaking must have been aware that its conduct was of such a nature as to encourage a restriction or distortion of competition.'

⁸³⁹⁵ For example, written representations of Bodill, 26 June 2008, paragraph 4; written representations of Milward, 26 June 2008, paragraphs 7.1 to 7.8; and written representations of Thomas Long, 26 June 2008, paragraph 4.

⁸³⁹⁶ Section 36(3) of the Act.

⁸³⁹⁷ See *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1 [2002], at paragraphs 452 to 458.

- VI.39. The OFT considers that serious infringements of the Chapter I prohibition, which have as their object the restriction of competition, such as price fixing or bid rigging, are likely to have been, by their very nature, committed intentionally.⁸³⁹⁸ Ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act.
- VI.40. A few Parties⁸³⁹⁹ submitted that the Infringements in which they were involved were not anti-competitive by object, or were not price fixing arrangements, and hence the conclusion in the preceding paragraph is not applicable. For the reasons set out in paragraphs III.97 to III.135 and III.143 to III.157 of the Legal Background section, the OFT does not accept the premise of these representations.
- VI.41. In the present case, the OFT considers that the Parties must have been aware that one of the primary purposes of conducting a tendering process is to ensure competition in the award of contracts, or at the very least they ought to have been. Indeed, the OFT notes that a party organising a tender procedure will often require the parties invited to tender to complete a detailed non-collusion statement expressly confirming that the tender submitted is a competitive offer and that there have been no undue contacts with any competing company in connection with the tender offer (see examples listed in the General comments on cover pricing section, at paragraph IV.119 above). For the avoidance of doubt, however, the OFT does not consider that it is necessary to show that a party completed such a non-collusion statement for the OFT to find that it infringed the Chapter I prohibition intentionally (or indeed negligently).
- VI.42. A number of Parties stated in their responses to the Statement that they were neither intentional nor negligent in committing the Infringements.⁸⁴⁰⁰ For example, several Parties stated that they could not have known until March 2004, when the OFT issued its decision in *West Midlands Flat Roofing*⁸⁴⁰¹, that cover pricing was anti-competitive.⁸⁴⁰² Bullock highlighted that its Infringement occurred only a few months after the entry into force of the Act.⁸⁴⁰³ Greswolde noted that the whole industry, including its experts (citing the textbook referred to in paragraph IV.19 above), considered cover pricing to be a legitimate practice.⁸⁴⁰⁴ Lotus stated that even the legal community was unaware that

⁸³⁹⁸ See OFT 407, *Enforcement* (December 2004) at paragraphs 5.9 to 5.11. In this regard the OFT also notes that price fixing falls within the OECD (Organisation for Economic Cooperation and Development) definition of 'hardcore cartels' – see the Penalty Guidance, at paragraph 1.4, footnote 8.

⁸³⁹⁹ Written representations of Durkan, 27 June 2008, paragraphs 162 to 166; written representations of Stainforth, 27 June 2008, paragraphs 4.31 to 4.32.

⁸⁴⁰⁰ For example, written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraph 6.3; written representations of Derwent Valley, 26 June 2008, paragraphs 3.1 to 3.12; and written representations of Greswolde, 27 June 2008, paragraphs 7.5 to 7.15.

⁸⁴⁰¹ CA98/1/2004 *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*, 16 March 2004.

⁸⁴⁰² For example, written representations of Bodill, 26 June 2008, paragraph 4.4; written representations of Thomas Long, 26 June 2008, paragraphs 4.3 to 4.4; written representations of Derwent Valley, 26 June 2008, paragraph 3.10. Similar points were made by Caddick, which suggested that December 2005 was the salient date (written representations of Caddick, 24 June 2008, paragraph 10.6) and by Durkan, which suggested that February 2006 was the salient date (written representations of Durkan, 27 June 2008, paragraph 168).

⁸⁴⁰³ Written representations of Bullock, 26 June 2008, paragraph 5.16.

⁸⁴⁰⁴ Written representations of Greswolde, 27 June 2008, paragraphs 7.12 to 7.13. See also, for example, written representations of Bodill, 26 June 2008, paragraph 4.4; written representations of Derwent Valley, 26 June 2008, paragraph 3.5.

cover pricing was illegal until the OFT's first roofing decision.⁸⁴⁰⁵ Greswolde stated that *West Midlands Flat Roofing* is materially different from this case, so it is not an appropriate benchmark for determining whether the Infringements had been committed intentionally or negligently.⁸⁴⁰⁶ Similarly, Caddick submitted that there is still uncertainty as to whether 'simple' cover pricing is a hardcore restriction.⁸⁴⁰⁷ Other Parties emphasised that their conduct was not intentional.⁸⁴⁰⁸

- VI.43. Wright (Hull) submitted that negligence should be measured by reference to what the reasonable man would have done; highlighting the fact that cover pricing was widespread in the construction industry, and asserting that no one in the industry knew it to be illegal.⁸⁴⁰⁹
- VI.44. The OFT does not accept these arguments. According to the CAT in *Napp*, an infringement is committed intentionally if the undertaking must have known that its conduct would result in a restriction or distortion of competition and is committed negligently if it ought to have done so.⁸⁴¹⁰ The OFT considers that, by the very nature of the agreements and/or concerted practices involving collusive tendering, each of the Parties must have been aware that the agreements and/or concerted practices in which they participated had the object of preventing, restricting or distorting competition and that the Infringements were therefore committed intentionally. Examined objectively, in each cover pricing Infringement one Party provided the other(s) with prices which they could use to ensure that they did not win the contract and which, although bogus, would appear to the client to be genuine. To the extent that any of the Parties may genuinely have been unaware of the anti-competitive nature of their conduct, however, the OFT considers that the Parties at the very least ought to have realised that the provision of prices in this way would constitute a restriction or distortion of competition and that the Infringements were, therefore, committed negligently. Moreover, it is not necessary for the OFT to have made a decision that a particular action constitutes a breach of the law, for a party or its legal advisers to make its own assessment of the anti-competitive consequences of that action.
- VI.45. Furthermore, it is apparent from the representations of certain Parties that they understood cover pricing to be anti-competitive and had instructed staff not to engage in this conduct. For example, Lindum stated that it had '*...explained the effects of the Competition Act when it came into force and there was **no doubt on the part of the estimators that cover pricing breached the competition rules.***' (emphasis added).⁸⁴¹¹ If certain Parties were in no doubt that cover pricing was anti-competitive, then the OFT considers that other Parties must have been at least negligent in their failure also to recognise this.

⁸⁴⁰⁵ Written representations of Lotus, 26 June 2008, paragraph 5.20. See also, for example, written representations of Bullock, 26 June 2008, paragraph 5.16; written representations of Derwent Valley, 26 June 2008, paragraph 3.11.

⁸⁴⁰⁶ Written representations of Greswolde, 27 June 2008, paragraph 7.14.

⁸⁴⁰⁷ Written representations of Caddick, 24 June 2008, paragraph 10.6.

⁸⁴⁰⁸ For example, written representations of ARG, 25 June 2008, paragraph 5.1.4; written representations of Loach, 26 June 2008, page 22; and written representations of the Construction Confederation, 16 June 2008, paragraphs 3.1 to 3.2.

⁸⁴⁰⁹ Written representations of Wright (Hull), 27 June 2008, paragraphs 35 and 48 to 49.

⁸⁴¹⁰ *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at paragraph 457.

⁸⁴¹¹ Written representations of Lindum, 27 June 2008, paragraph 62.

- VI.46. The OFT also does not accept submissions that small companies without in-house counsel could not have been expected to keep up to date with changes in legislation, or to have known that cover pricing was illegal, or that the Act was not as widely advertised as it should have been.⁸⁴¹² Ignorance of the law is irrelevant to the assessment of intent or negligence (see paragraph VI.39 above), and the OFT is not obliged to show that an undertaking knew that its conduct infringed the Act.⁸⁴¹³
- VI.47. Pearce stated in its response to the Statement that the OFT is required to examine the actual intention of the Parties.⁸⁴¹⁴ It referred to the decision of the Court of Appeal in *Napp*⁸⁴¹⁵, and submitted that it is not sufficient for the OFT to deduce intent from the alleged anti-competitive object or effect of the agreement.⁸⁴¹⁶ Pearce stated that the OFT is entitled to infer intent where a company realises that it is for all practical purposes inevitable that its actions will result in a restriction of competition, but the OFT still needs to demonstrate that the company realised or ought to have realised that this was the case. Pearce stated that it is far from clear that giving or seeking a cover price a few hours before the tender deadline would have any effect on competition.
- VI.48. In response, the OFT notes first that provided the cover price is given prior to the tender deadline, the arrangement has the potential to prevent, restrict or distort competition for the reasons stated in paragraphs III.97 to III.106 of the Legal Background section.
- VI.49. Secondly, the OFT notes that the Court of Appeal was not considering the substance of the case but whether the party had leave to appeal (which was refused). The Court of Appeal noted only that the CAT had properly considered the intention of the parties and had not erred in its approach. In its own judgment, the CAT stated that *'While in some cases the undertaking's intention will be confirmed by internal documents, in our judgment, and in the absence of any evidence to the contrary, the fact that certain consequences are plainly foreseeable is an element from which the requisite intention may be inferred'*.⁸⁴¹⁷ In the present case, the OFT considers that it was plainly foreseeable that the giving of a cover price to a competitor to use as its bogus bid for the contract had the potential to prevent, restrict or distort competition. There is nothing in the Court of Appeal's judgment in *Napp* which the OFT considers should lead it to adopt a different approach from that described above, or to reach a different conclusion on the facts.
- VI.50. A few Parties⁸⁴¹⁸ submitted that the OFT should conduct an individual appraisal of whether each Party had the requisite intent or negligence, rather than a single appraisal for all Parties. Whilst the OFT will have regard to any relevant

⁸⁴¹² For example, written representations of Durkan, 27 June 2008, paragraphs 168 to 169; written representations of Derwent Valley, 26 June 2008, paragraph 3.9; and written representations of E Manton, 25 June 2008, pages 10 to 11.

⁸⁴¹³ *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, at paragraph 456.

⁸⁴¹⁴ See written representations of Pearce, 14 July 2008, paragraphs 4.2 to 4.3. See also written representations of Pearce Group, 1 June 2009, paragraph 5.5.

⁸⁴¹⁵ *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] EWCA Civ 796.

⁸⁴¹⁶ See paragraphs 49 to 50 and 52 to 53.

⁸⁴¹⁷ See *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director of Fair Trading* [2002] CAT 1 [2002] Comp AR 13, paragraph 456.

⁸⁴¹⁸ For example, written representations of Lotus, 26 June 2008, paragraph 5.13; written representations of Galliford Try, 27 June 2008, paragraph 5.13; and written representations of Derwent Valley, 26 June 2008, paragraph 3.3.

circumstance or factor which suggests that a particular Party did not commit an Infringement negligently or intentionally, this does not detract from the principle described in the preceding paragraphs. Moreover, the OFT does not consider that there are any such circumstances or factors in this case that would lead it to conclude that any Party lacked the requisite intent or negligence in this case. The OFT's view is unaffected by any differences in the nature of the Infringements.⁸⁴¹⁹

- VI.51. The OFT is therefore satisfied that each of the Parties intentionally or at the very least negligently infringed the Chapter I prohibition. Notwithstanding this, the OFT has considered the background to the Infringements cited by the Parties as discussed in the foregoing paragraphs and in paragraphs IV.19 to IV.29 of the General section on cover pricing, and has taken this into account when assessing the seriousness of the conduct at step 1 of the penalty calculation – see paragraphs VI.173 to VI.174 below.

Calculation of penalties

- VI.52. 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, for the time being in force, when setting the amount of the penalty.⁸⁴²⁰ The Penalty Guidance sets out five steps for determining the penalty.

Turnover of the undertaking

- VI.53. For the purpose of the penalty calculation, the OFT considers that the relevant turnover or total turnover as applicable, is the turnover of the undertaking that comprises the relevant single economic entity, as defined in paragraph I.1 of the Introduction and as described in more detail in the relevant paragraphs of the Parties section.
- VI.54. In many cases, the relevant undertaking comprises several legal entities within the same corporate group (or who were within the same corporate group at the time of the Infringement(s)). In such cases, the OFT is basing its penalty calculations on the consolidated turnover of the parent company⁸⁴²¹, to whom this Decision is addressed, that ultimately controls the legal entity directly involved in the Infringements (the Participant Company, to whom this Decision is also addressed). For these purposes, the 'consolidated turnover' of the parent company includes the turnover of all wholly and majority owned subsidiaries over which the parent exercises control, including but not limited to the turnover of the Participant Company and its wholly/majority owned subsidiaries.
- VI.55. Some Parties suggested that it would be '*wholly unjust*'⁸⁴²² for the penalty to be based on consolidated turnover where the relevant undertaking at the time of the Infringement comprised several legal entities within the same corporate group, some of which did not participate in the Infringement.⁸⁴²³

⁸⁴¹⁹ For example, written representations of Bullock, 26 June 2008, paragraphs 5.12 to 5.13; written representations of Greswolde, 27 June 2008, paragraphs 7.7 to 7.11; and written representations of Lotus, 26 June 2008, paragraphs 5.11 to 5.12.

⁸⁴²⁰ OFT 423 *OFT's Guidance as to the appropriate amount of a Penalty* (December 2004).

⁸⁴²¹ Or, in the case of Adam Eastwood, the parent registered charity.

⁸⁴²² Written representations of Crown Point, 27 June 2008, paragraph 6.16.

⁸⁴²³ For example, written representations of McGinley Holdings, 27 June 2008, paragraph 40.2.

- VI.56. The OFT considers that it is fair and appropriate to calculate penalties on the basis of the consolidated turnover of the parent in the present case since this legal entity exercised decisive influence over the Participant Company at the time of the Infringement, and was itself a part of the undertaking responsible for the Infringement. Its joint and several liability, and the calculation of penalties by reference to its turnover, is therefore a result of its direct responsibility for the Infringement.
- VI.57. Other Parties submitted that the OFT should only take into account consolidated turnover in the construction industry and not in relation to their other activities.⁸⁴²⁴ This issue does not arise at step 1, as only consolidated turnover in the relevant market will be captured (hence, the turnover captured at step 1 will be less than that suggested by the Parties). The need to take into account total consolidated turnover at step 3, rather than confining this to consolidated turnover derived in the construction industry, is addressed at paragraphs VI.237 to VI.239 below.
- VI.58. Where the corporate group structure has changed such that the legal entity that ultimately controlled the Participant Company at the time of the Infringements no longer exercises such control, the OFT is calculating the financial penalty on the basis of the consolidated turnover of the group as structured at the time of the Infringements. The OFT is therefore basing its calculation on the consolidated turnover of both (i) the Participant Company together with its current wholly/majority owned subsidiaries and (ii) the former parent company that ultimately controlled the Participant Company at the time of the Infringements together with its current wholly/majority owned subsidiaries; both the Participant Company and the former parent being addressees of this Decision.
- VI.59. Bullock stated that any penalty imposed on it would be met by its new parent (either directly or indirectly), which is unfair as the new parent company had no control over Bullock at the time of its Infringement.⁸⁴²⁵ Pearce Group made similar representations and stated that its new parent company will be unfairly penalised for activities in which it was not involved and from which it had derived no benefit.⁸⁴²⁶ Conversely, Durkan Holdings⁸⁴²⁷ submitted that the OFT should exercise its discretion not to sanction it, even if the OFT determines that it formed part of the same undertaking as its former subsidiary, Durkan, at the time of Durkan's Infringements.
- VI.60. Pearce Group also referred to the practical difficulties of holding a former parent and subsidiary jointly and severally liable, as it is unclear how the penalty should be apportioned between the now separate legal entities. Pearce Group submitted that the OFT should instead hold each of the Participant Company and its former parent solely liable for a separate stated penalty.⁸⁴²⁸ Pearce Group

⁸⁴²⁴ For example, written representations of F Parkinson, 25 June 2008, paragraph 112; written representations of G & J Seddon, 27 June 2008, paragraph 114; and written representations of Geo Houlton, 25 June 2008, paragraph 117.

⁸⁴²⁵ Written representations of Bullock, 26 June 2008, paragraph 6.16.36.

⁸⁴²⁶ Written representations of Pearce Group, 1 June 2009, paragraphs 5.9 and 5.20.

⁸⁴²⁷ Written representations of Durkan Holdings, 27 June 2008, paragraphs 82 to 88.

⁸⁴²⁸ Written representations of Pearce Group, 1 June 2009, paragraphs 5.8 to 5.10 and 5.21.

also stated that it was unaware of any EC or UK precedent for the OFT's proposed approach.⁸⁴²⁹

- VI.61. Where the OFT concludes that a Participant Company and its former parent company constituted a single economic entity at the time of the Infringement, the OFT considers that it is most appropriate in the interests of effective sanctioning and deterrence to hold both entities jointly and severally liable, and to base any penalty on the consolidated turnover of the entities (that is, the Participant Company and the parent company) comprising the undertaking as it was structured at the time of the Infringement. This ensures that the Participant Company is properly sanctioned for its direct participation in the Infringement. It also recognises the failure of the former parent to prevent the Participant Company (over which it exercised decisive influence) from acting in contravention of the Chapter I prohibition, and reflects the fact that the parent was itself part of the undertaking responsible for the Infringement. It acts as a deterrent to both legal entities, and ensures that parent companies cannot escape liability for competition law breaches by disposing of their infringing subsidiaries. In response to the Parties' specific arguments, the OFT is holding Bullock and Pearce/Pearce Group liable for Infringements in which they directly participated, and does not accept that this is in any sense unfair. The OFT also considers it appropriate to sanction Durkan Holdings for the reasons of effective sanctioning and deterrence described in this paragraph (this is particularly relevant in the case of Durkan Holdings, as two of its subsidiaries - Durkan and Durkan Limited - participated in Infringements).
- VI.62. Where a Participant Company and its former parent are being held jointly and severally liable for a penalty, any attribution or division of the penalty is a matter between them and does not concern the OFT (indeed, the OFT notes that this may be determined in part by the terms of the agreement for the sale of the Participant Company, including any warranties, indemnities and related limitations periods contained therein). The OFT also notes that joint and several liability is a concept which operates in tort, contract and other spheres of law, frequently with the effect of making independent legal entities jointly and severally liable for the same damage or debt. The OFT therefore does not consider it a bar to joint and several liability that a Participant Company and its parent company at the time of an Infringement no longer form part of the same corporate group. Notwithstanding the above, where the penalty for an undertaking exceeds 10 per cent of the total turnover of either the Participant Company or its former parent in the most recent business year preceding the Decision, the OFT is limiting the extent of each company's liability for that penalty to 10 per cent of the total turnover of each (see paragraph VI.381 below).
- VI.63. Some Parties, for example Francis, pointed out that the consolidated turnover of the current or former parent would include 'innocent' acquisitions that had been made since the time of the Infringement and suggested that this would have a disproportionate effect on the penalty.⁸⁴³⁰
- VI.64. The OFT notes that while consolidated turnover may have increased due to acquisitions since the date of the Infringement, it may equally have reduced due to disposals. In order to achieve adequate deterrence, the OFT considers it appropriate for a penalty to reflect the size of the undertaking on which it is

⁸⁴²⁹ Written representations of Pearce Group, 1 June 2009, paragraph 5.7.

⁸⁴³⁰ Written representations of Francis, 2 July 2008, paragraphs 125 to 130.

imposed, for which current turnover is used as a proxy. In this respect, there is no basis for differentiating between acquisitions/disposals and 'organic' growth/decline.

- VI.65. Crest Nicholson stated in its response that, having disposed of its subsidiary, its own turnover is irrelevant since it is no longer active in the relevant markets.⁸⁴³¹ The OFT considers this fact to be irrelevant as it will still be appropriate to deter Crest Nicholson and others from engaging in anti-competitive conduct in other markets. Any reduction in relevant turnover due to cessation of activity in a market will be reflected in a reduction of the penalty at step 1 of the calculation given that this is based on the combined consolidated relevant turnover of the infringing subsidiary and its former parent.
- VI.66. Bullock pointed out in its written representations⁸⁴³² that the wording used by the OFT in paragraph VI.18 of the Statement referred to '*the parent company ... that ultimately **controls** the legal entity directly involved in the Alleged Infringements ...*' (emphasis added) and noted that it was no longer controlled by Renew. However, the OFT points to the subsequent paragraph VI.19 of the Statement which dealt with Bullock's situation where the corporate group structure has changed and referred to '*the former parent company that ultimately **controlled** the Participant Company at the time of the Alleged Infringements*' (emphasis added).
- VI.67. Bullock and Pearce Group also made representations submitting that the OFT should not base any financial penalty on the combined consolidated turnover of both themselves and their respective former parents. Bullock stated that, when it was acquired from Renew there was an injection of capital from Bullock's new parent DTB (representing the purchase price of Bullock) that was employed to increase Renew's turnover in subsequent years, which will result in the OFT counting the same turnover twice in its penalty calculations. Bullock also stated that post-acquisition it had little control over Renew's investment decisions and therefore its financial penalty would depend on the commercial success of Renew.⁸⁴³³ Pearce Group⁸⁴³⁴ stated that the resulting penalty based on consolidated turnover will be inappropriate and out of proportion to its total turnover and will reflect the structure and turnover of two, now unrelated, legal entities. It also stated that taking the turnover of a parent company into account in calculating a fine is inconsistent with the OFT's decisional practice.
- VI.68. Proceeds from the sale of shares in a subsidiary constitute capital proceeds, rather than turnover. Whilst this capital could be employed with the aim of directly increasing turnover, for example through investment in the business, it could equally be employed in a variety of other ways, such as to reduce debt or pay dividends to equity shareholders. The OFT therefore does not consider that it is counting the same turnover twice in its penalty calculations for Bullock.
- VI.69. Whilst the calculation of Bullock's and Pearce's/Pearce Group's penalties will partially be based on the commercial success of their former parents through the use of consolidated turnover, as noted above, their own liability will be limited to an amount calculated by reference to their own total turnover (see paragraph VI.381 below). This will ensure that the liability of Bullock and

⁸⁴³¹ Written representations of Crest Nicholson, 27 June 2008, paragraphs 8.3 to 8.4.

⁸⁴³² Written representations of Bullock, 26 June 2008, paragraphs 7.13 to 7.14.

⁸⁴³³ Written representations of Bullock, 26 June 2008, paragraphs 7.15 to 7.22.

⁸⁴³⁴ Written representations of Pearce Group, 1 June 2009, paragraphs 5.15 to 5.21.

Pearce/Pearce Group does not exceed the statutory maximum having regard to their current turnover.

Turnover vs Profit

- VI.70. Some Parties suggested that the OFT should base its financial penalties on profit rather than turnover, noting that the Parties in this investigation operate in a high turnover / low margin business where much of the work is passed through to subcontractors with the main contractor taking a small portion of the profit for itself for overseeing the operation of the contract.⁸⁴³⁵ They stated that as a result, turnover is no indication of financial strength. Some Parties⁸⁴³⁶ cited a recent article by Sir Jeremy Lever, in which he criticised the Commission's reliance on turnover for its penalty calculations, stating that turnover is no indication of financial strength or ability to pay.⁸⁴³⁷ Other Parties stated that, if turnover is used, the OFT should have regard to the fact that penalties will be more onerous than for other industries, or will be disproportionate overall.⁸⁴³⁸
- VI.71. In response, the OFT notes that its Penalty Guidance provides for the imposition of penalties based on turnover. As noted in paragraph VI.4 above, the OFT is required to have regard to this Penalty Guidance when setting the amount of the penalty, by virtue of primary legislation, and may depart from this guidance only when there is good reason to do so. Likewise, the statutory cap on penalties, which is also derived from primary legislation, is also based on turnover. The OFT has not been provided with a compelling reason to depart from a turnover-based approach in this case.
- VI.72. Secondly, a calculation based on relevant turnover reflects the size of the affected market. This means that it is capable of also reflecting the impact of the Infringement on competitors, third parties and consumers more effectively than an undertaking-specific measure such as profitability.
- VI.73. Thirdly, turnover is a simple measure that is well-known both to the OFT and to business. It is easily ascertained from corporate accounts and is less susceptible to subjective interpretation or manipulation than measures such as profitability or 'value added' turnover.
- VI.74. Fourthly, turnover is used as the basis for calculating financial penalties in most, if not all, major jurisdictions, including the EC. Whilst the OFT does not consider that it is obliged to follow the Commission's penalties practice (see paragraphs VI.7 to VI.10 above), it notes that the CFI has recently confirmed that turnover is the appropriate measure for the Commission to use as the basis for its penalties calculations.⁸⁴³⁹ The CFI also concluded in the same case that the Commission was not required to discount certain input costs from an undertaking's turnover when calculating penalties.

⁸⁴³⁵ For example, written representations of Kier, 27 June 2008, paragraphs 3.23 to 3.26; written representations of Peter Baines, 26 June 2008, paragraph 6.2; and written representations of Thomas Vale, 27 June 2008, paragraph 59.

⁸⁴³⁶ For example, written representations of Hall, 25 June 2008, paragraph 84; written representations of Irwins and Jack Lunn, 27 June 2008, paragraph 78; and written representations of York House, 27 June 2008, paragraph 74.

⁸⁴³⁷ See Sir Jeremy Lever QC '*Just Desserts?*' [2008] Comp Law 123, paragraphs 125 to 126.

⁸⁴³⁸ For example, written representations of Harper plc, 27 June 2008, paragraph 85.

⁸⁴³⁹ Case T-122/04 *Industrial Copper Tubes*, judgment of 6 May 2009 (not yet reported).

- VI.75. Finally, with respect to the relationship with subcontractors' turnover, the OFT considers that there is little to distinguish the construction industry in this respect from many other industries where work is passed on to subcontractors, or from cartels in other industries that operate at a particular level of the distribution chain (e.g. at the retail level), where the parties' turnover figures reflect the cost price of goods purchased from undertakings operating at another level of the distribution chain (e.g. from manufacturers or wholesalers).
- VI.76. In terms of overall proportionality, in any specific case where a penalty calculated by reference to turnover is disproportionately high, an adjustment may be made at step 3.
- VI.77. R Durnnell stated that its turnover includes profits on which it has been taxed and, if the OFT's penalties are not tax deductible, it will effectively have been subject to double-taxation.⁸⁴⁴⁰ Penalties imposed by the OFT under the Act are not a form of 'taxation', but are imposed as a consequence of R Durnnell having engaged in illegal conduct. For the reasons set out above, the OFT considers that turnover is the appropriate basis for imposing financial penalties under the Act. The fact that the turnover may include profits on which the undertaking has been taxed does not alter the OFT's conclusion.

Step 1 – calculation of the starting point

- VI.78. The starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.⁸⁴⁴¹ 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 business year (see paragraphs II.1727 to II.1731 above in the Definition of the Markets section).⁸⁴⁴² The last business year is the business year preceding the date of the OFT's final decision.⁸⁴⁴³ This is consistent with the approach for calculating the maximum penalty under section 36(8) of the Act.⁸⁴⁴⁴ The starting point may be any amount up to a maximum of 10 per cent of each undertaking's relevant turnover.⁸⁴⁴⁵

Relevant turnover

- VI.79. Some Parties, for example Baggaley & Jenkins and Dukeries, suggested in their written representations that the starting point should be based on the amount of the winning tender, which they stated was the only way of obtaining a fair proxy for the possible impact or effect of the Infringement. Dukeries cited both *Parker Pen v Commission*⁸⁴⁴⁶, in which it was stressed that there was a need to have regard to the turnover to which the infringement relates, and the Commission's 2006 Fining Guidelines, which state that the basic amount of the

⁸⁴⁴⁰ Written representations of R Durnnell, 27 June 2008, paragraph 149.

⁸⁴⁴¹ Penalty Guidance, at paragraph 2.3.

⁸⁴⁴² Penalty Guidance, at paragraph 2.7.

⁸⁴⁴³ While the OFT has made every effort to calculate penalties based on the latest possible turnover provided by the Parties, it has not been practicable to take account of turnover figures provided after 31 August 2009. Parties were informed by letter in June 2009 that the OFT would be unlikely to be able to take account of turnover figures received after the end of July 2009.

⁸⁴⁴⁴ See the 2000 order, as amended by the 2004 Order.

⁸⁴⁴⁵ Penalty Guidance, at paragraph 2.8.

⁸⁴⁴⁶ Case T-77/92 *Parker Pen v Commission* [1994] ECR II-354, paragraphs 94 and 95.

Commission's fine is determined as a proportion of the value of sales 'to which the infringement directly or indirectly relates'.⁸⁴⁴⁷

- VI.80. For the reasons set out in paragraphs VI.7 to VI.10, the OFT does not consider that it is obliged to follow the Commission's penalties practice. In any event, the OFT does not consider there to be a material difference between the Commission's practice and the OFT's own practice in this respect (as set out in paragraphs II.1600 to II.1602 in the Definition of the Markets section above). In effect, these Parties are arguing that the OFT's market definition should be no wider than the particular tender in question. The OFT does not accept this argument, however. The market definition adopted in this case is discussed in Section II above.
- VI.81. Propensity submitted that there was no market affected by one of its Infringements, and no relevant turnover, as the customer did not proceed with any of the tenders received, but instead re-tendered the project.⁸⁴⁴⁸ Paragraph III.114 of the Legal Background section describes why Propensity's conduct still amounts to an Infringement in these circumstances and hence why there was an affected market.

Business year

- VI.82. Many of the Parties claimed in their responses to the Statement that the OFT's selection of the business year preceding the date of the decision as the basis for relevant turnover is arbitrary.⁸⁴⁴⁹ A range of arguments were made in favour of using the year prior to the Infringement instead. Other Parties argued that the most rational approach at step 1 is to use turnover achieved in the business year during which the Infringement in question occurred.⁸⁴⁵⁰
- VI.83. Many Parties⁸⁴⁵¹ suggested in their written representations that the last business year prior to the Infringement is more logical at step 1 since this step of the penalty calculation is intended to reflect the effect or potential effect of the conduct on the relevant market. They stated that this step should represent the magnitude of the effect of the Infringement and the scale of the financial benefit accruing to the Party engaged in the Infringement. In the same way as the penalty at step 1 is derived from turnover only in the relevant market, it should they said be calculated on the basis of turnover in that market at the time the Infringement was committed. Greswolde noted that, unlike with a hardcore cartel lasting several years, each of the Infringements was discrete and its effects, if any, would have been felt only for a very short period of time, and it was therefore unfair for the OFT to take into account more recent turnover.

⁸⁴⁴⁷ Written representations of Dukeries, 27 June 2008, paragraph 60.

⁸⁴⁴⁸ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraph 7.8.

⁸⁴⁴⁹ For example, written representations of Francis, 2 July 2008, paragraph 131; written representations of Baggaley & Jenkins, 27 June 2008, paragraph 47; and written representations of G & J Seddon, 27 June 2008, paragraph 115.

⁸⁴⁵⁰ For example, written representations of Clegg, 27 June 2008, paragraphs 136 to 137; written representations of Hall, 25 June 2008, paragraphs 123 to 125; and written representations of Speller-Metcalf, 27 June 2008, paragraph 118.

⁸⁴⁵¹ For example, written representations of B & A, 27 June 2008, paragraphs 24 to 25; written representations of Dukeries, 27 June 2008, paragraph 66; and written representations of Phoenix, 27 June 2008, paragraph 22.

- VI.84. Several Parties, including Crest Nicholson, GMI, Greswolde, Harlow & Milner, Milward, Phoenix, Quarmby, Sol and Galliford Try, noted that the 2004 Order was concerned with amending the definition of the last business year at step 5 of the OFT's penalty calculation, as reflected by the Penalty Guidance⁸⁴⁵², and stated that it did not provide a basis for amending the OFT's approach to the last business year at step 1 of the penalty calculation. Sol, Crest Nicholson and others noted in addition that the Penalty Guidance explicitly states in relation to step 5 that the last business year is the year preceding the date of the OFT's final decision, whereas in relation to step 1 the Penalty Guidance is silent on the issue.⁸⁴⁵³
- VI.85. A number of Parties, including Balfour Beatty Group, noted that most of the Infringements were committed prior to the 2004 Order and therefore they had a legitimate expectation that the law applying to these Infringements would be the law that applied prior to the 2004 Order.⁸⁴⁵⁴ They noted that Article 7 of the ECHR states that a penalty should not be heavier than that applying at the time the offence was committed.⁸⁴⁵⁵
- VI.86. Several Parties, including Crest Nicholson, Harlow & Milner and Quarmby, submitted that all of the OFT's decisions on cartel activity in the roofing industry had used the year prior to infringement as last business year at step 1.⁸⁴⁵⁶ Kier noted that the OFT did not announce any change to its policy at step 1 and stated that it could not change its policy without informing people first.⁸⁴⁵⁷ Some Parties, for example Balfour Beatty Group and Loach, noted that the Infringements were generally committed prior to any change in OFT policy, therefore again the Parties had a legitimate expectation as to the method of penalty calculation applicable.⁸⁴⁵⁸
- VI.87. In response to this, the OFT would note that it is entirely within the OFT's discretion as to the precise method by which it calculates penalties in any particular case, providing it has regard to its Penalty Guidance, as noted in paragraph VI.52 above. In any event, all of the OFT's roofing decisions since 2005 have used the year prior to decision at step 1 (*North East Flat Roofing*⁸⁴⁵⁹, *Scottish Flat Roofing (I)*⁸⁴⁶⁰, *Scottish Flat Roofing (II)*⁸⁴⁶¹, and *Makers*⁸⁴⁶²).

⁸⁴⁵² Penalty Guidance, at paragraph 2.17.

⁸⁴⁵³ For example, written representations of Sol, 2 June 2008; and written representations of Crest Nicholson, 27 June 2008, paragraph 8.9.

⁸⁴⁵⁴ For example, written representations of Balfour Beatty group, 27 June 2008, paragraphs 8.6 to 8.9.

⁸⁴⁵⁵ Article 7, No punishment without law 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed, European Convention on Human Rights, 4 November 1950.

⁸⁴⁵⁶ Written representations of Crest Nicholson, 27 June 2008, paragraphs 8.11 to 8.14; written representations of Harlow & Milner (as amended 6 January 2009), 27 June 2008, paragraph 5.7; and written representations of Quarmby, 27 June 2008, paragraph 5.3.

⁸⁴⁵⁷ Written representations of Kier, 27 June 2008, paragraph 3.28.

⁸⁴⁵⁸ Written representations of Balfour Beatty group, 27 June 2008, paragraph 8.8; and written representations of Loach, 26 June 2008, Section C, paragraph 14.

⁸⁴⁵⁹ CA98/02/2005 *Collusive tendering for felt and single ply flat-roofing contracts in the North East of England*, 16 March 2005, at paragraph 256.

⁸⁴⁶⁰ CA98/01/2005 *Collusive tendering for mastic asphalt flat-roofing contracts in Scotland*, 15 March 2005, at paragraph 353.

⁸⁴⁶¹ CA98/04/2005 *Collusive tendering for felt and single ply roofing contracts in Western-Central Scotland*, 8 July 2005, at paragraph 274.

- VI.88. A number of Parties, including B & A, Crest Nicholson and Galliford Try, noted that the year prior to the infringement is consistent with the practice of the Commission, and suggested that the OFT is obliged to follow this practice under section 60 of the Act.⁸⁴⁶³ The OFT does not accept this submission, for the reasons set out in paragraphs VI.7 to VI.10 above.
- VI.89. Some Parties, including Baggaley & Jenkins, Connaught, Henry Boot and Bluestone⁸⁴⁶⁴, informed the OFT that turnover had changed markedly in the years since the Infringements, mostly increasing, and stated that it would be unfair for the OFT to base step 1 of the penalty calculation on more recent turnover which they claimed had been obtained legitimately and reflected the genuine success of the undertakings concerned. They stated that the OFT's approach would disproportionately harm those companies whose turnover had grown most, and that these were likely to be the most efficient and competitive firms. They also noted that turnover was particularly high in 2007 in some of the regions covered by the Statement due to the flooding problems, and stated that profits will be unusually low in 2008/09 due to recession and a downturn in the housing market.
- VI.90. In response to these arguments, the OFT notes that by restricting step 1 of the penalty calculation to the relevant market the OFT is ensuring that there is a correlation between the penalty and the harm. This correlation is not damaged by using the year prior to the decision as the last business year. The OFT considers that by using the year prior to the decision, it is ensuring that the penalty takes full account of any benefits that may have accrued from the illegal activity. Using the year prior to the Infringement would not necessarily reflect the benefit that a company may have obtained from its cover pricing activities.
- VI.91. Pearce Group stated that, for Infringements which occurred before the 2004 Order, the OFT should adopt the same approach at step 1 and step 3 as at step 5; namely, to apply a dual approach to turnover so that either year before decision or year before infringement is used as a basis for calculation, whichever results in the lesser penalty, so as to avoid retroactivity of penalties.⁸⁴⁶⁵ The OFT considers, however, that in accordance with the Penalty Guidance it is appropriate to apply a dual approach only at step 5 to ensure the *overall penalty* imposed on an undertaking is not above the pre-May 2004 statutory cap. The OFT does not consider it appropriate to apply a dual approach at each step of its calculation.
- VI.92. A few Parties submitted that the OFT should not base its penalty calculations on a year with exceptionally high turnover⁸⁴⁶⁶, citing *Böel*⁸⁴⁶⁷ in support of their

⁸⁴⁶² CA98/01/2006 *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, at paragraph 717.

⁸⁴⁶³ Written representations of B & A, 27 June 2008, paragraph 26; written representations of Crest Nicholson, 27 June 2008, paragraphs 8.18 to 8.23; and written representations of Galliford Try, 27 June 2008, paragraph 6.6.

⁸⁴⁶⁴ Written representations of Baggaley & Jenkins, 27 June 2008, paragraph 52; written representations of Connaught, 27 June 2008, paragraphs 5.2 to 5.4; written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraph 10.9; written representations of Bluestone, 27 June 2008, paragraph 6.14.

⁸⁴⁶⁵ Written representations of Pearce Group, 1 June 2009, paragraphs 5.22 to 5.27.

⁸⁴⁶⁶ For example, written representations of B & A, 27 June 2008, paragraph 30; oral representations of Connaught, 21 July 2008, page 15.

⁸⁴⁶⁷ Case T-142/89 *Böel v Commission* [1995] ECR II-867, at paragraph 133.

submissions. The OFT has considered the proportionality of the penalties imposed by this Decision, and has concluded that none of the penalties are disproportionate. As such, the OFT does not consider that the CFI's judgment in *Boël* can be construed as imposing any restriction on the year of turnover which the OFT may select as the basis of its penalty calculations. In any event, for the reasons set out in paragraphs VI.7 to VI.10 above, the OFT does not regard section 60 of the Act as applying to the mechanics of calculating penalties.

- VI.93. Furthermore, for the majority of Parties the turnover upon which the financial penalty is based, has been earned in the years 2008 and 2009 rather than in 2007.

Parties that did not trade in the business year preceding the decision

- VI.94. A number of Parties, including Corringway, Frudd, G Carter, Thorndyke and William Sapcote/Sapcote Holdings, did not trade in the business year preceding the date of the OFT's decision.
- VI.95. The statutory instrument which sets out the basis of calculation of turnover for the purposes of section 36(8) of the Act, the 2000 Order (as amended by the 2004 Order), defines 'business year' as '*a period of more than six months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts*'. Consistent with the position being adopted at step 5 of the penalty calculation (see paragraphs VI.374 to VI.375 below and the Penalty Guidance⁸⁴⁶⁸), where no accounts have been published or prepared in recent years the OFT is using at step 1 the turnover figures from the most recent period of more than six months in which they have been published or prepared.
- VI.96. Where figures have been published or prepared for a limited period in excess of six months, the 2000 Order (as amended by the 2004 Order) provides for pro-rating up to the full 12 month period: '*where a business year does not equal 12 months the applicable turnover shall be the amount which bears the same proportion to the applicable turnover during that business year as 12 months does to that period*'. The OFT is therefore pro-rating figures up to the full 12 month period at step 1, where the most recent business year for the Parties in paragraph VI.97 below is less than a year but more than six months.
- VI.97. The effect of this on the relevant Parties' penalty calculations is discussed below in each of the affected Parties' individual penalty calculation sections.

Parties that were unable to provide any relevant turnover figures

- VI.98. Three Parties, Frudd, Thorndyke and William Sapcote/Sapcote Holdings, informed the OFT that all of their records had been destroyed or were impossible to access and that they were therefore unable to provide any relevant turnover figures as they were unable to ascertain what turnover they had generated in each of the relevant markets. The OFT is therefore using a proxy figure for these Parties' relevant turnover figures, which is based on the median percentage of total turnover represented by all of the Parties' relevant

⁸⁴⁶⁸ Penalty Guidance, at paragraph 2.17, '*The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it*'.

turnover, for **all** Infringements (regardless of the market in which they occurred) where relevant turnover is more than nil. The OFT considers this to be a robust proxy that, in view of the number of Parties and Infringements involved, is relatively undisturbed by the particular market positions of other Parties. The proxy figure is **2.9 per cent** and the OFT is applying this percentage to these Parties' most recent total turnover figures before applying the starting point set out in paragraph VI.168 below.

Parties that were unable to provide any relevant turnover figures for their most recent business year, but have provided total turnover figures for that business year

VI.99. Two Parties, G Carter and Lotus, were unable to provide any relevant turnover figures to the OFT for their most recent business year as all of their relevant records had been destroyed or were impossible to access. These Parties were, however, able to provide total turnover figures for their most recent year and were in addition able to provide some relevant turnover figures for previous years. In these circumstances, the OFT is using a proxy figure for these Parties' relevant turnover figures, which for each Party is based on the percentage of total turnover represented by that Party's relevant turnover in the most recent year for which relevant turnover has been supplied, applied to that Party's most recent total turnover figure. The OFT considers this to be the fairest proxy in the absence of the most recent relevant turnover figure. The OFT is then applying the starting point set out in paragraph VI.168 below to this proxy figure.

Use of percentage rate

VI.100. Notwithstanding the Parties' arguments discussed above in paragraphs VI.70 to VI.77 and without prejudice to the OFT's discretion to adopt other approaches, the OFT considers it appropriate in this case to calculate the starting point at step 1 of the penalty calculation by applying a percentage figure to each undertaking's relevant turnover.

VI.101. The actual percentage which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.⁸⁴⁶⁹ When making this assessment in the present case, the OFT has considered a number of factors, including the nature of the product/ services, the structure of the market, the market shares of the undertakings involved in the Infringements and the effect on competitors and third parties.⁸⁴⁷⁰

Nature of the infringement

VI.102. The first factor considered by the OFT is the nature of the Infringements. The starting point for each penalty is based on the fact that the agreements and/or concerted practices described in this Decision involved collusive tendering (or bid rigging) and most also amounted to a form of price fixing. Whilst several

⁸⁴⁶⁹ Penalty Guidance, at paragraph 2.4.

⁸⁴⁷⁰ Penalty Guidance, at paragraph 2.5. The damage caused to consumers, whether directly or indirectly, will also be an important consideration.

Parties⁸⁴⁷¹ challenged this conclusion in their representations on penalties, the OFT's reasoning in relation to price fixing and bid rigging is set out in the Legal Background section and is therefore not considered further here. Price fixing and other cartel activities (including collusive tendering) are among the most serious infringements of the Chapter I prohibition.⁸⁴⁷²

VI.103. The OFT considers that one of the most serious examples of collusive tendering would be a cartel where collusion in relation to individual tenders was part of an overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel over a period of time and/or with the explicit intention of inflating the level of the winning bids. The OFT does not have evidence of such an overall arrangement in this case.

Cover pricing

VI.104. The OFT notes that the instances of cover pricing described in this Decision were individual, discrete Infringements, resulting in the submission of uncompetitive tender bids, and that as discussed in the previous paragraph they are less serious forms of collusive tendering than those involving an overall scheme.⁸⁴⁷³

VI.105. Around five Parties submitted that the practical effects of cover pricing are at the lowest end of the scale of seriousness of bid rigging infringements, for the following reasons:

- there was no agreement between all parties concerned to rig their bids to achieve an agreed outcome or to determine the price that the customer would pay, which differentiates the Infringements from more serious forms of bid rigging;⁸⁴⁷⁴
- the passage of information involved in cover pricing is a discrete and individual occurrence, and is less serious than infringements involving an overall scheme where collusion occurs on a regular basis;⁸⁴⁷⁵
- the OFT should have regard to the economic context of cover pricing when assessing the seriousness of the infringement (the relevant economic context being one of high turnover and low margins in a highly fragmented market, and with no evidence that cover pricing increased profits);⁸⁴⁷⁶

⁸⁴⁷¹ For example, written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 61 to 63; written representations of Stainforth, 27 June 2008, paragraph 4.38; and written representations of Wright (Hull), 27 June 2008, paragraphs 32 to 34 and 59.

⁸⁴⁷² Penalty Guidance, paragraph 2.4.

⁸⁴⁷³ CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, at paragraph 721.

⁸⁴⁷⁴ For example, written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraphs 5.19 to 5.20; written representations of Bramall and Frank Haslam Milan, 27 June 2008 (as amended 30 March 2009), paragraph 2.23; written representations of Herbert Baggaley, 27 June 2008, paragraph 33(b) and explanatory letter to the OFT, dated 26 January 2009.

⁸⁴⁷⁵ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009) paragraph 5.25 to 5.26.

⁸⁴⁷⁶ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraphs 5.6 to 5.9; and written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraphs 4.4 to 4.7.

- the OFT found no evidence of secrecy, which is one of the essential features of more serious forms of bid rigging;⁸⁴⁷⁷
- cover pricing was regarded as a legitimate practice in the construction industry and a way for parties to maintain their status on customer tender lists;⁸⁴⁷⁸
- it is not apparent that cover pricing led to customers receiving no genuinely competitive bids, or inflated bids winning tenders, or that customers viewed cover pricing as a distortion of the tender process;⁸⁴⁷⁹
- cover pricing was typically decided upon at a late stage in the tender process, by which time it would be too late for a customer to seek replacement bids;⁸⁴⁸⁰
- cover pricing did not impact on the decisions of the companies involved, as the company taking a cover price would otherwise not bid at all or submit a unilaterally inflated bid, the practical effect being therefore limited to the customer receiving one bid not based on a detailed estimate;⁸⁴⁸¹ and
- other genuine bidders participated in the tender, so the customer was not deprived of a competitive outcome.⁸⁴⁸²

VI.106. Whilst the OFT does not accept all of the arguments listed above, when setting the starting point for penalties the OFT has taken into account the fact that discrete individual instances of cover pricing can generally be expected to be less serious than an overall bid rigging scheme involving all bidders in a particular tender – see paragraph VI.103 above. A number of the arguments described above relate to the structure of the market or the effects of the infringements, and are addressed in more detail at paragraphs VI.120 to VI.166 below.

VI.107. Around 25 Parties stated that they did not engage in cover pricing with the motive of overcharging customers or seeking financial gain, and did not have any anti-competitive intent.⁸⁴⁸³ As discussed above in paragraphs IV.30 to IV.44 of the General comments on cover pricing section, many of the Parties informed the OFT that there was perceived pressure in the industry for suppliers to submit tender bids, even when they did not wish to win the contract, because otherwise there was a risk of not being invited to tender in the future.

⁸⁴⁷⁷ Written representations of Admiral, 26 June 2008, paragraph 14.

⁸⁴⁷⁸ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraph 5.10; written representations of Bramall and Frank Haslam Milan, 27 June 2008 (as amended 30 March 2009), paragraphs 2.8, 2.12 and 2.26; and written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraph 4.7.1.

⁸⁴⁷⁹ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraph 5.12; written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraph 4.7.2.

⁸⁴⁸⁰ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraph 5.14.

⁸⁴⁸¹ Written representations of Propensity, 27 June 2008 (as amended 31 March 2009), paragraphs 5.15 to 5.16.

⁸⁴⁸² Written representations of Bramall and Frank Haslam Milan, 27 June 2008 (as amended 30 March 2009), paragraph 2.8; and written representations of Admiral, 26 June 2008, paragraph 18.1.

⁸⁴⁸³ For example, written representations of Baggaley & Jenkins, 27 June 2008, paragraph 44; written representations of Davlyn, 25 June 2008, page 1; and written representations of Kier, 27 June 2008, paragraph 3.6.

- VI.108. A desire to maintain relationships with customers does not diminish each supplier's obligation to comply with the Act. All undertakings are independently free to submit bids at a price at which they would not expect to win the contract. However, where competitors have not acted independently of each other but have coordinated their pricing conduct, this will be prohibited under the Chapter I prohibition. In the OFT's view, the fact that the Parties' contact with each other may have been motivated by a desire to stay on tender lists does not detract significantly from the seriousness of the Infringements. The OFT has, however, taken these factors into account in setting the starting point at step 1, such that the starting point is likely to have been higher had the OFT had evidence that the Parties' explicit intent was to inflate prices.
- VI.109. Several Parties suggested that they were not at fault for engaging in cover pricing, but were merely reacting to a situation created by others; for example, Bullock and Linford suggested that Government policy was conducive to cover pricing⁸⁴⁸⁴, while several Parties suggested that they were 'driven' to participate in cover pricing because of unrealistic public sector expectations as to the number of tenders required⁸⁴⁸⁵ and/or customers' disorganised approach to tendering procedures.⁸⁴⁸⁶ Wildgoose stated that tendering processes were inherently unfair and unsustainable.⁸⁴⁸⁷
- VI.110. The OFT does not accept either that public sector expectations were unrealistic – for example, since submitting their leniency applications the 33 leniency Parties in this case have apparently managed to fulfil the requirements of both public and private sector tenders in a competitive way without resorting to cover pricing – or that the Parties were driven to engage in cover pricing. As noted above, they could have simply declined to tender. Indeed, a number of Parties stressed in their representations that it had always been their policy to decline tenders that they did not want to win.
- VI.111. Other Parties described limited estimating resource, difficulties in recruitment, holidays, sickness, time and cost of tender preparation and/or volume of work as reasons for engaging in cover pricing.⁸⁴⁸⁸ As noted above, the OFT considers that the Parties could have declined to tender instead of engaging in illegal conduct, however, and those factors do not diminish the seriousness of the Infringements. To the extent, however, that the Parties submit they were motivated by these factors rather than by an explicit intent to overcharge the customer and make financial gain, this has been taken into account in setting the starting point for the penalties.
- VI.112. Some Parties suggested that their starting point and/or overall penalty should be lower because they had only provided cover prices and had not sought to

⁸⁴⁸⁴ For example, written representations of Linford, 26 June 2008, paragraph 9.28; and written representations of Bullock, 26 June 2008, paragraph 6.16.7.

⁸⁴⁸⁵ For example, written representations of G & J Seddon, 27 June 2008, paragraphs 91 to 96; written representations of Interclass, 27 June 2008, paragraphs 90 to 99; and written representations of Wygar, 27 June 2008, paragraphs 73 to 78.

⁸⁴⁸⁶ For example, written representations of Clegg, 27 June 2008, paragraphs 106 to 107; written representations of E Manton, 25 June 2008, page 18; and written representations of Richardson Projects, 27 June 2008, paragraph 92.

⁸⁴⁸⁷ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.29.

⁸⁴⁸⁸ For example, written representations of Bodill, 26 June 2008, paragraph 5; written representations of Harper plc, 27 June 2008, paragraph 30; and written representations of Hobson & Porter, 27 June 2008, paragraph 96.

instigate the cover pricing arrangements.⁸⁴⁸⁹ However, the OFT considers it irrelevant that these Parties did not seek cover prices in the Infringements that are the subject of this Decision. By providing cover prices to their competitors, these Parties were participating in an activity that infringed the Chapter I prohibition. Their actions ensured the success of that activity and allowed the Party requesting the cover price to submit a bogus bid and to deceive the client into thinking that it had received more genuine bids than it had in fact received. Moreover, in knowing that they faced less genuine competition for the tender these Parties had the opportunity to modify their bids to the client's detriment. Furthermore, to the extent that any of the Infringements may have prevented a potentially more efficient competitor from entering the competition and submitting a bid, this will have been the result of the combined actions of all of the Parties to that Infringement.

Compensation payments

VI.113. The table below sets out the six⁸⁴⁹⁰ instances of compensation payment agreements and/or concerted practices particularised in this Decision. These Infringements are described in detail in the relevant paragraphs of the Conduct of the Parties section above.

Infringement Number	Infringement Date	Infringement Name	Parties to the Infringement
85	3 December 2001	Alterations to the Press Hall Derby Daily Telegraph	Herbert Baggaley Bowmer & Kirkland
89	11 December 2001	Meadow House Mansfield	Thomas Fish Herbert Baggaley Mansell
98	20 February 2002	Conversion of Davers Steel Building	Herbert Baggaley Wildgoose
104	22 April 2002	Alterations to Café & Conservatory Extension Burton College Burton on Trent	Mansell Wildgoose
135	27 January 2003	17/18 Dover Street, W1	Mansell Durkan
146	5 May 2003	Construction of Four Storey Lift Tower Burton College Burton on Trent	Herbert Baggaley Wildgoose

VI.114. The OFT considers that bid rigging arrangements where the participants offer (or request) inducements to (or from) other cartel participants (for example, by making compensation payments) are more serious than those infringements where no such inducement is offered (see paragraphs III.130 to III.131 of the Legal Background section above). In line with previous decisions⁸⁴⁹¹, the OFT is

⁸⁴⁸⁹ For example, written representations of Apollo, 27 June 2008, paragraph 12.4(i); written representations of Haymills, 27 June 2008, paragraphs 34 to 37; and written representations of Lotus, 26 June 2008, paragraph 6.21.

⁸⁴⁹⁰ Although Infringement 158 involved a payment being made in connection with cover pricing, this was agreed between an undertaking and an individual acting on his own account, and did not form part of the agreement or concerted practice between undertakings. It is therefore not included in the table. The factual circumstances of Infringement 158 are addressed further at paragraphs VI.295 to VI.299 below.

⁸⁴⁹¹ See, for example, OFT Decision, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, Case CA98/01/2006 at paragraph 722.

treating compensation payments as an aspect of the seriousness of an infringement to be reflected in step 1 of the calculation of penalties.

VI.115. As described above in paragraphs III.127 to III.135 and III.136 to III.157 of the Legal Background section, the OFT considers that there are two types of compensation payments relevant to the Decision: those that involve cover pricing and arrangements to make compensation payments without any cover pricing. For the purpose of calculating penalties, the OFT is treating both types of compensation payments in the same way, since the factors which make them more serious, referred to in paragraph VI.114 above, apply in all cases.

VI.116. Mansell and Wildgoose submitted that a higher starting point was not justified for their compensation payment Infringements either because they did not submit a cover price, or they did not make the compensation payment as an inducement for a competitor to 'stand aside', and/or they did not inflate their tender price as a result of the compensation payment.⁸⁴⁹² Wildgoose further stated that both Parties to the compensation payment arrangement would continue to compete against each other, as winning the tender in question would be more profitable than the compensation payment.⁸⁴⁹³ Bowmer & Kirkland stated that there was unlikely to be any detriment to the customer as the compensation payment made no difference to the outcome of the tender.⁸⁴⁹⁴

VI.117. Wildgoose and Herbert Baggaley also submitted that tender prices were not increased by compensation payments (either specifically in a particular tender and/or on average).⁸⁴⁹⁵ Wildgoose further stated that, where the amount of the compensation payment was added to its tender price, this was only a minor amount and the effect on the customer was marginal.⁸⁴⁹⁶ Herbert Baggaley submitted that there was no opportunity for bids to be inflated because of the presence of other 'genuine' bidders, and there was no attempt to earn supra-competitive profits.⁸⁴⁹⁷

VI.118. However, many other Parties⁸⁴⁹⁸ agreed with the OFT's position that compensation payments are more serious than cover pricing absent a compensation payment (indeed, they have argued that this should be treated as a mitigating factor for their own conduct). The OFT considers that the giving or acceptance of a payment facilitates collusion and that this is generally concealed through the submission of a false invoice, constitutes a particularly serious breach of the Chapter I prohibition and that it is important that companies are properly deterred from such activity in the future. The OFT is therefore maintaining the difference in starting points that was originally proposed in the Statement.

⁸⁴⁹² Written representations of Balfour Beatty group, 27 June 2008, paragraphs 7.1 to 7.15 and 8.5; written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.34.

⁸⁴⁹³ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 4.72 to 4.77.

⁸⁴⁹⁴ Written representations of Bowmer & Kirkland, 4 July 2008, paragraph 68.

⁸⁴⁹⁵ Written representations of Loach, 26 June 2008, pages 9 and 13; written representations of Herbert Baggaley, 27 June 2008, paragraph 33; and written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.34.

⁸⁴⁹⁶ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 4.78, 4.86 and 6.34.

⁸⁴⁹⁷ Written representations of Herbert Baggaley, 27 June 2008, paragraphs 33 and 46.

⁸⁴⁹⁸ For example, written representations of Interserve, 25 June 2008, paragraph 5.4.4; written representations of Robert Woodhead, 2 July 2008, paragraph 4.1.4; and written representations of Bullock, 26 June 2008, 6.16.1.

VI.119. The OFT has taken into account in this Decision the lack of evidence that the Parties were explicitly motivated by a desire to earn supra-competitive profits. If the OFT had consistent evidence of this intent, the starting point for compensation payments would in all likelihood have been higher.

Nature of the product, structure of the market, and the effect on customers, competitors and third parties

VI.120. When calculating the starting point, the OFT has regard to the nature of the product, the structure of the market, the market shares of the Parties (see paragraphs II.1727 to II.1731 above in the Definition of the Markets section), and the effect of the Infringements on customers, competitors and third parties. It also takes into account whether or not a Party was a participant in the more serious category of collusive tendering involving compensation payments, when fixing individual starting points for the Infringements.

VI.121. Wildgoose submitted that the Statement included no substantive discussion of the factors set out in the preceding paragraph, which was in breach of its legitimate expectations and contrary to the Penalty Guidance.⁸⁴⁹⁹ The OFT does not accept that its consideration of the seriousness of the Infringements in the Statement, or in this Decision, is inconsistent with its Penalty Guidance, nor that there was any breach of Wildgoose's legitimate expectations.

Market structure, size of Parties, and market shares

VI.122. A number of Parties submitted that the OFT should take into account the highly fragmented nature of the construction industry⁸⁵⁰⁰, the size of the Parties⁸⁵⁰¹ and/or their small market shares⁸⁵⁰² in setting a starting point at step 1. The OFT can confirm that it has taken the structure of the market into account in setting the starting point. Had the Infringements occurred in a more concentrated market, then the starting point would in all likelihood have been higher. In terms of the size of the Parties and their relative market shares, this will be reflected in their respective relevant and total turnover figures and, consequently, the size of their individual penalty. The OFT does not consider that there is any need also to adjust the percentage starting point at step 1 to account for this factor.

VI.123. Herbert Baggaley⁸⁵⁰³ submitted that the starting point should be very low, in order to reflect the fact that each of the Infringements did not apply to the whole of the relevant market, but only to a single tender. The OFT has taken this into account in setting the starting point. Had the Infringements been part of a wider cartel scheme, the OFT would almost certainly have adopted a higher

⁸⁴⁹⁹ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 6.35 to 6.37.

⁸⁵⁰⁰ For example, written representations of Bluestone, 27 June 2008, paragraph 6.20; written representations of Greswolde, 27 June 2008, paragraph 7.31; and written representations of Willmott Dixon, 27 June 2008, paragraph 51.

⁸⁵⁰¹ For example, written representations of Crown Point, 27 June 2008, paragraph 6.24; written representations of Lindum, 27 June 2008, paragraph 32; and written representations of Shaylor, 25 June 2008, paragraph 4.4.4.

⁸⁵⁰² For example, written representations of Connaught, 27 June 2008, paragraph 5.5; written representations of Harper plc, 27 June 2008, paragraphs 18 and 33 to 35; and written representations of Linford, 26 June 2008, paragraph 9.28.

⁸⁵⁰³ Written representations of Herbert Baggaley, 27 June 2008, paragraph 33.

starting point closer to the upper end of the possible range – see paragraph VI.103 above.

Value of tenders

- VI.124. The values of the tenders that are the subject matter of this Decision range from £2,200 to over £8.5 million. The size of a tender may be a relevant factor when assessing the seriousness of an infringement for the purposes of determining the starting point. Some Parties (for example, Crown Point, Greswolde and McGinley Holdings⁸⁵⁰⁴) suggested in their written representations that the OFT should take into account the size of tender since it affects likely consumer detriment. Phoenix submitted that the OFT is required by its Penalty Guidance to take account of the real impact of an Infringement and, therefore, the value of the tender.⁸⁵⁰⁵
- VI.125. Given the range of sizes of the tenders in this Decision and the process of selection of the maximum of three Infringements which are subject to a penalty, the OFT remains of the view as expressed in the Statement that any increase or decrease would be arbitrary and discriminate against some Parties compared with others. The OFT has therefore concluded that there should be no increase or decrease in the starting point on account of the size of any of the tenders. Moreover, the OFT does not consider that it is required by the Penalty Guidance to take account of the tender values.
- VI.126. Furthermore, the size of the tender may not, in fact, accurately reflect the likely consumer detriment which arises from the Infringement. In particular, the practice of cover pricing on a smaller tender risks distorting the list of invited bidders for a subsequent larger tender or for multiple tenders in future. As the CAT noted in *Apex*, one of the results of cover pricing is that it gives the customer a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.⁸⁵⁰⁶

Approach to analysis of effects

- VI.127. A few Parties⁸⁵⁰⁷ stated that the OFT must take into account the lack of material adverse effect in setting penalties, in line with *Archer Daniel Midland*⁸⁵⁰⁸ and the Commission's decision in *Seamless Tubes*⁸⁵⁰⁹ to which it should have regard under section 60 of the Act. For the reasons set out in paragraphs VI.7 to VI.10, the OFT does not consider that section 60 of the Act obliges it to adhere to the Commission's practice on setting penalties.
- VI.128. Interserve stated that, whilst there is no need for the OFT to establish the effects of the Infringements for the purpose of establishing liability, the OFT should base its penalties assessment on empirical evidence of any financial

⁸⁵⁰⁴ Written representations of Crown Point, 27 June 2008, paragraphs 6.2 and 6.12 to 6.15; written representations of Greswolde, 27 June 2008, paragraph 7.31; written representations of McGinley Holdings, 27 June 2008, paragraph 42.

⁸⁵⁰⁵ Written representations of Phoenix, 27 June 2008, paragraphs 42 to 46.

⁸⁵⁰⁶ *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 at paragraph 251.

⁸⁵⁰⁷ For example, written representations of Dukeries, 27 June 2008, paragraph 15; written representations of William Woodsend, 27 June 2008, paragraph 41; and written representations of Baggaley & Jenkins, 27 June 2008, paragraph 45.

⁸⁵⁰⁸ Case T-239/01 *Archer Daniels Midland*, at paragraph 80.

⁸⁵⁰⁹ [2003] OJ L140/1

harm caused.⁸⁵¹⁰ The OFT does not accept this to be correct. Indeed, imposing this evidential burden on the OFT would undermine the distinction between 'object' and 'effect' infringements. The OFT would be able to reach a finding of liability in respect of 'object' infringements without engaging in detailed and extensive economic analysis, but would be unable to sanction these most serious breaches of competition law without also discharging a further significant evidential burden of proving the actual effect of the infringement (indeed, in many cases, it would be impossible to adduce empirical evidence of the financial harm caused).

VI.129. The OFT has, however, considered below the Parties' substantive arguments with respect to lack of adverse effects in line with its own Penalty Guidance and practice.

Impact on building costs and taxpayers

VI.130. In the Statement, the OFT stated that the foreseeable effect of cover pricing was allocative inefficiencies in the affected market, and a higher cost for building projects than would otherwise be the case. As many customers in this case are public authorities, the further consequence of the Infringements was likely to have been higher taxes or a reduction in spending on other public projects, both at a national and at a local level.

VI.131. A number of Parties disputed that cover pricing could have led to allocative inefficiencies and/or higher costs for building projects.⁸⁵¹¹ For example, several Parties stated in their written representations that there would have been no impact on competition and/or the price paid by the client with regard to some or all of the Infringements in which they were involved (see also paragraph VI.135 below).⁸⁵¹² A few Parties stated that taxes are based on a myriad of factors and that there is no causal link between the Infringements and higher taxes.⁸⁵¹³ Propensity stated that the OFT had no evidence to support the allegation of higher taxes.⁸⁵¹⁴

VI.132. The OFT does not have and has not sought empirical evidence showing a direct causal link between cover pricing and higher costs for building projects. Indeed, as the Infringements in this case are anti-competitive by object, the Statement noted that the OFT was not required to prove the effects of the Infringements or to quantify the loss suffered by customers.

VI.133. The Statement therefore described what the OFT considers to be the foreseeable impact of the Infringements. As noted above, a number of Parties disagreed with the OFT's view and considered that their Infringements had no effect on the prices paid by customers. The OFT rejects any suggestion that cover bidding never had an effect on price (or was never capable of doing so),

⁸⁵¹⁰ Written representations of Interserve, 25 June 2008, paragraph 5.4.

⁸⁵¹¹ For example, written representations of Durkan, 27 June 2008, paragraph 172; written representations of E Manton, 25 June 2008, page 19; and written representations of J H Hallam, 27 June 2008, paragraph 100.

⁸⁵¹² For example, written representations of Harper plc, 27 June 2008, paragraph 39; written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 6.30 to 6.33; and written representations of Bowmer & Kirkland, 4 July 2008, paragraphs 66 to 69.

⁸⁵¹³ For example, written representations of Bullock, 26 June 2008, paragraph 6.16.26; written representations of Lotus, 26 June 2008, paragraph 6.20; and written representations of Linford, 26 June 2008, paragraph 9.28.

⁸⁵¹⁴ Written representations of Propensity, 3 July 2008 (as amended 31 March 2009), paragraph 7.12.

but it does accept that there may not have been a direct inflation of prices in each and every cover bidding Infringement, and has taken this into account in setting the starting point for all such Infringements. In any event, even where there is no demonstrable adverse impact on *price*, this must not be equated with a lack of adverse impact on competition (see below).

VI.134. A few Parties submitted that press statements made by the OFT at the time of issue of the Statement had substantially damaged their business, and that this loss should be taken into account in setting penalties.⁸⁵¹⁵ The OFT does not accept that any adverse publicity that may have resulted for a Party following the issue of the Statement is a relevant factor for the purposes of setting the starting point for the OFT's calculation of penalties.

Purported lack of adverse effects

VI.135. A large number of Parties submitted that their cover pricing Infringements had no material or serious adverse effects.⁸⁵¹⁶ Reasons advanced in support of this argument included the following:

- other 'genuine' bidders participated in the tender, so the practice of cover bidding did not deprive the customer of a competitive outcome or have any effect on the price of the winning bid.⁸⁵¹⁷ In particular, around five Parties stated that, as long as two genuine bidders participate in a tender process, the winning price will be reduced to marginal cost;⁸⁵¹⁸
- whilst two or more tenderers engaged in cover pricing, the winning tenderer did not, so there was no effect on the winning price or the customer;⁸⁵¹⁹
- the bid submitted by the company giving a cover price was unaffected, as it was only asked for a cover price late in the tender process and/or it was still constrained by other 'genuine' bidders when calculating its price;⁸⁵²⁰
- the bid by the customer giving cover was not the winning bid, so there was no effect on the winning price or the customer;⁸⁵²¹

⁸⁵¹⁵ For example, oral representations of F Parkinson, 16 July 2008, pages 3 to 4; and oral representations of G F Tomlinson, 8 July 2008, page 4.

⁸⁵¹⁶ For example, written representations of Lindum, 27 June 2008, paragraph 32.

⁸⁵¹⁷ Written representations of Simons, 26 June 2008, paragraphs 6.13 and 6.15; written representations of ARG, 25 June 2008, paragraph 5.1.2; and written representations of Milward, 26 June 2008, paragraphs 6.1.2 to 6.1.3.

⁸⁵¹⁸ For example, written representations of Lotus, 26 June 2008, paragraph 6.20; written representations of Derwent Valley, 26 June 2008, paragraph 13.4; and written representations of Linford, 26 June 2008, paragraph 9.28.

⁸⁵¹⁹ For example, written representations of Greswolde, 27 June 2008, paragraph 7.31; and written representations of McGinley Holdings, 27 June 2008, paragraph 51.

⁸⁵²⁰ For example, written representations of Bullock, 26 June 2008, paragraphs 6.16.16 to 6.16.18; written representations of Haymills, 27 June 2008, paragraph 40; and written representations of T & C Williams, 27 June 2008, paragraph 7. Several Parties stated the fact the company giving a cover price submitted the lowest bid, or that it eventually made a loss on the contract, was evidence that its bid was unaffected by cover pricing (for example, written representations of John Sisk, 27 June 2008, paragraphs 181 to 196; written representations of Bluestone, 27 June 2008, paragraph 6.20; and written representations of Greswolde, 27 June 2008, paragraphs 7.31 and 7.39).

⁸⁵²¹ Written representations of Kier, 27 June 2008, paragraph 3.7.

- the contract was not awarded to the lowest priced bidder, so cover pricing did not affect the price paid by the customer;⁸⁵²² and
- the company taking a cover price was considered not to be a serious competitor in any event, so there would be no difference to the outcome of the tender.⁸⁵²³

VI.136. These arguments focus on the purported lack of impact on the winning *price* or the identity of the winning bidder. The OFT does not necessarily accept each of these arguments - in particular, the OFT rejects any suggestion that there was never an impact on the winning price or that cover bidding was not capable of affecting the price paid by the customer. Nevertheless, even if a particular Infringement had no demonstrable direct impact on *price* or on the identity of the winning bidder, this must not be equated with a lack of adverse impact on *competition*.

VI.137. The OFT considers that, whilst not all of the Infringements described in this Decision will necessarily have had the actual effect of preventing or restricting competition, as a minimum all of the Infringements had as their object the distortion of competition and, contrary to some Parties' suggestions, none of them can be expected to have had a benign or positive effect. The starting point at step 1 has been set to reflect this distortion.

VI.138. Distortion of competition by engaging in bid rigging has been confirmed by the CAT to be a contravention of the Chapter I prohibition since '*(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*'.⁸⁵²⁴

VI.139. First, the client is deliberately deceived into thinking that it has received a certain number of genuine bids when in fact only a proportion of them are genuine and unaffected by illegal contact with other parties.

VI.140. Secondly, the client is deprived of obtaining an alternative bid from another contractor who generally wants to win the work. That other bidder might be more efficient than any of the bidders currently in the race and able to submit a lower bid. The client may also have some form of requirement to obtain a certain number of genuine bids in order to satisfy carefully agreed procurement rules that are designed to guarantee effective competition, and will unknowingly have been thwarted in its attempt to satisfy that requirement.

VI.141. Thirdly, a potentially more efficient bidder that wanted the job may have been deprived of the opportunity to win the work. This represents a form of barrier to entry that prevents new entrants from being added to the list of tenderers. Similarly, where the Parties' motives for submitting cover bids were to stay on

⁸⁵²² For example, written representations of Galliford Try, 27 June 2008, paragraph 6.17; written representations of Wright (Hull), 27 June 2008, paragraphs 70 and 79; and written representations of T & C Williams, 27 June 2008, paragraph 7.

⁸⁵²³ Written representations of Bluestone, 27 June 2008, paragraph 6.20.

⁸⁵²⁴ *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 251. See also *Makers UK Limited v OFT* [2007] CAT 11, at paragraphs 14 to 15.

tender lists for future projects, the effect extends to depriving (potentially more efficient) competitors of the chance to win future work.

VI.142. Fourthly, the company submitting the cover price was in no position to know whether the remaining bidders were submitting genuine bids or not. That is, whilst the Parties are able with hindsight to identify that there appear to have been other genuine bidders in a particular tender having reviewed the evidence contained in the Statement, at the time of the tender they would have been unaware of the number of 'genuine' bidders. As is the situation with eleven of the Infringements in this Decision, all of the bids could have been tainted by either the giving or taking of a cover price. The Parties' lack of contemporaneous knowledge as to the number of 'genuine' bids is demonstrated by K J Bryan's representations in relation to Infringement 34, where it was one of six participating tenderers and took a cover price from Bodill. K J Bryan stated that it was unaware that Bodill (the winning bidder) had also given cover prices to two other tenderers, Loach and Beaufort (see paragraphs IV.1167 to IV.1203 above).

Effect on customers of compensation payment arrangements (without cover bidding)

VI.143. As with cover pricing, the OFT has not attempted to quantify effects in terms of the direct impact of a compensation payment arrangement on the price paid for the tender in question. The ways in which effects on competition and consumers arise from such arrangements are set out at paragraphs III.143 to III.155 of the Legal Background section above.

Supra-competitive profits

VI.144. Around 14 Parties stated that there was no evidence of supra-competitive profits being earned.⁸⁵²⁵ A few Parties also stated that customers (alternatively, the quantity surveyors employed by customers to monitor project costs) would have been aware of excessive pricing.⁸⁵²⁶ Wildgoose stated that profit margins on projects involving cover pricing or compensation payments were no higher than other similar sized projects over the same period and, consequently, there was no evidence of a detrimental effect on customers.⁸⁵²⁷ Bodill stated that the low levels of profitability in the construction industry demonstrate that customers are getting substantial value for money.⁸⁵²⁸

VI.145. The OFT has not attempted to engage in detailed financial analysis in order to determine whether the Parties earned supra-competitive profits as a result of the Infringements. There is no requirement for the OFT to engage in such analysis, and it would not be possible in many cases to determine this. In particular, the practice of cover pricing had been going on for so long that it would be difficult to determine what the real competitive price level was. As noted above, the OFT rejects any suggestion that cover pricing or compensation

⁸⁵²⁵ For example, written representations of W R Bloodworth, 27 June 2008, paragraphs 78 and 86; written representations of Wygar, 27 June 2008, paragraphs 61 and 70; and written representations of G F Tomlinson, 23 June 2008, paragraphs 87 and 99.

⁸⁵²⁶ For example, written representations of E Manton, 25 June 2008, page 16; written representations of John Sisk, 27 June 2008, paragraph 171; and written representations of R Durnnell, 27 June 2008, paragraph 197.

⁸⁵²⁷ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 6.32 to 6.33.

⁸⁵²⁸ For example, written representations of Bodill, 26 June 2008, paragraph 5.

payments never had an impact on the price charged to customers (or were not capable of doing so), and it therefore also rejects the suggestion that cover pricing and compensation payments will never have resulted in an increased profit margin (or were not capable of doing so). The OFT accepts, however, that there may not have been a direct inflation of price and/or profit margin as a result of each and every Infringement, and has taken this into account in setting the starting point.

VI.146. In its representations, Bullock suggested that if supra-competitive prices were being charged then this would encourage entry by new firms which would drive prices back down to a competitive level.⁸⁵²⁹ However, the OFT does not consider it necessary for it to assess the extent to which new entry did in fact occur for this reason or (if so) what effect if any it had on prices, which in any event would be particularly difficult in this case. Indeed, one likely consequence of the widespread practice of cover pricing will have been to make it more difficult for new entrants to obtain opportunities to tender. As such, the theoretical notion of new entry may have been prevented from occurring in practice. Furthermore, as noted above, the prevalence of cover pricing over time makes it particularly difficult to determine what the real competitive price level was. Finally, the same argument could be made in relation to any hardcore price fixing arrangement. This is simply not an indicator that the Infringements were less serious, nor a mitigating factor.

Alternatives to cover pricing

VI.147. A large number of Parties stated that, in the absence of cover bidding, the company taking a cover price would have unilaterally submitted an inflated bid, or would have declined to bid, so that cover pricing made no difference to the outcome of the tender or the intensity of competition.⁸⁵³⁰ A few Parties also stated that a unilaterally inflated bid would have had the same effect as a cover price in terms of giving the customer the 'illusion' of a genuine bid.⁸⁵³¹ Another Party submitted that a cover price represents the 'genuine' price at which the party submitting it would be prepared to carry out the work, so there is no reduction in the number of competitive bids.⁸⁵³²

VI.148. The OFT does not accept that these arguments demonstrate a lack of adverse effect on competition. A competitive bid is one which reflects the bidders' perception of the potential risks and rewards involved in the project and in the wider marketplace. Whilst a bidder might unilaterally submit a high bid in the hope of not winning a tender, in doing so it runs the risk that the bid will be so low as to win a contract it is unable (or unwilling) to fulfil, or so high as to damage its credibility. Whilst the resulting bid may be above the level of the winning bid (and, in that sense, uncompetitive), it genuinely reflects the bidder's perception of the risks and rewards involved in the market. Where a bidder submits a cover price, however, these risks are curtailed as the price has simply been obtained from a competitor. In this way, a bidder submitting a

⁸⁵²⁹ Written representations of Bullock, 26 June 2008, paragraph 6.16.10.

⁸⁵³⁰ For example, written representations of Balfour Beatty group, 27 June 2008, paragraph 8.3; written representations of Connaught, 27 June 2008, paragraph 5.5; and written representations of Linford, 26 June 2008, paragraph 9.28.

⁸⁵³¹ Written representations of A H Willis, 27 June 2008, paragraph 40; written representations of Bowmer & Kirkland, 4 July 2008, paragraph 69; and written representations of Baggaley & Jenkins, 27 June 2008, paragraph 41.

⁸⁵³² Written representations of Allenbuild, 4 July 2008, paragraphs 4.11 to 4.19.

cover price deliberately substitutes practical cooperation for the risks of competition⁸⁵³³ and the bid cannot, therefore, be regarded as 'genuine' or competitive. The OFT therefore rejects the suggestion that cover pricing has the same impact on the competitive process as submitting a unilaterally high bid (albeit that the outcome of the tender process – in terms of the winning bidder – may be the same in each scenario).

- VI.149. Around 10 Parties submitted that, if a Party had declined to tender rather than submitting a cover price, the customer would not have invited a replacement bidder and/or any such replacement bidder would have been unlikely to bid any lower than the winning bid.⁸⁵³⁴ A few of these Parties stated that a cover price was sought late in the tender process, so there would have been no time for a replacement bidder to be sought.⁸⁵³⁵ Haymills submitted that there was only a three per cent probability that a customer would obtain an additional bid and it would produce a lower price.⁸⁵³⁶
- VI.150. Whilst the OFT recognises that the customer may not seek a replacement in every instance in which an invited bidder declines to tender, the OFT does not necessarily accept that the customer would be unlikely to do so. Regardless of the likelihood of a replacement bidder being sought, the customer is still deprived of the opportunity to seek a replacement bidder if so desired (see also paragraph III.102 of the Legal Background section). Finally, even if the customer would not have sought a replacement bidder, this does not mean that the cover pricing had no impact – the customer will have received fewer competitive bids than it intended, and it will have been given a false impression of the nature of competition in the market with the potential for future tenders to be similarly impaired.

Customers' knowledge

- VI.151. Other Parties submitted that customers would have been aware of the practice of cover bidding and can be assumed to have taken this into account in designing their tender process⁸⁵³⁷ Admiral and E Manton submitted that their behaviour was carried out openly and recorded in tender books.⁸⁵³⁸
- VI.152. The OFT rejects these submissions, as customers cannot be assumed to have knowledge of cover bidding when the intention of a Party engaging in this practice was to appear to submit a 'genuine' bid. The OFT does not accept that a customer could have any means of identifying if any or all of the bids it received were from tenderers engaged in cover pricing. There is no evidence that the client was aware of cover pricing having taken place in most, if not all,

⁸⁵³³ Case C-209/07 *Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats*, judgment of 20 November 2008, at paragraph 34.

⁸⁵³⁴ For example, written representations of Baggaley & Jenkins, 27 June 2008, paragraph 41; written representations of Connaught, 27 June 2008, paragraph 5.5; and written representations of R Durnell, 27 June 2008, paragraph 197.

⁸⁵³⁵ For example, written representations of Bullock, 26 June 2008, paragraph 6.16; written representations of Lotus, 26 June 2008, paragraph 6.20; and written representations of Milward, 26 June 2008, paragraph 6.15.

⁸⁵³⁶ Written representations of Haymills, 27 June 2008, paragraph 40.

⁸⁵³⁷ For example, written representations of Allenbuild, 4 July 2008, paragraph 4.16; written representations of Admiral, 26 June 2008, paragraph 11.8; and written representations of Quarmby, 27 June 2008, paragraph 3.12.

⁸⁵³⁸ Written representations of Admiral, 26 June 2008, paragraph 23.3; written representations of E Manton, 25 June 2008, page 25.

of the Infringements in this Decision. As regards Admiral and E Manton, there is no suggestion that these Parties informed their respective customers when they engaged in cover pricing. Customers were therefore deceived into thinking that cover bids were genuine competitive bids. Whilst these Parties may have recorded the giving and taking of cover prices in their internal tender records, it is therefore incorrect to characterise the practice as having been carried out openly.

Purported positive effects

- VI.153. A number of Parties suggested that the cover pricing Infringements engaged in by the Parties were in fact benign and had a positive effect since they saved on unnecessary tendering costs and/or ensured that companies stayed on tendering lists and could therefore compete for future work.⁸⁵³⁹ Around five Parties submitted that the costs saved when taking a cover price, rather than employing estimating resource to price the contract, were passed on to clients through reduced overheads which were recovered on the contracts for which they did compete.⁸⁵⁴⁰
- VI.154. Submission of cover prices may have reduced a Party's general overheads, but the OFT considers that this demonstrates a further potential impact on competition. The natural corollary of this submission is that construction companies which chose not to engage in cover pricing, but instead to price tenders received, would be running with higher overhead costs (as well as increased risk – see paragraph VI.148 above), disadvantaging them across a whole range of work when competing against companies who chose to engage in cover pricing.⁸⁵⁴¹
- VI.155. Moreover, even if the purported costs savings were passed on to customers in the form of lower overheads, they would not benefit the customer in respect of whose tender a Party had submitted a cover price, but would rather result in lower prices for other customers for whom the Party was the successful bidder. The customer involved in each particular Infringement does not therefore obtain any cost benefit from cover pricing in respect of the relevant tender. Finally, the OFT notes that it has not been provided with any evidence that these purported cost savings were passed on to any other customers.
- VI.156. Linford stated that it used cover pricing as a means of remaining on tender lists in order to exert competitive pressure as a potential entrant in a new market.⁸⁵⁴² Given that a cover price is intended to be too high to win the job and the giver of the cover price would know that Linford was not intending to submit a competitive bid, the OFT does not accept that the submission of a cover price exerts any competitive pressure on the other bidders.

⁸⁵³⁹ For example, written representations of Bullock, 26 June 2008, paragraph 6.16; written representations of the Construction Confederation, 16 June 2008, paragraph 1.3; and written representations of W R Bloodworth, 27 June 2008, paragraph 86.

⁸⁵⁴⁰ For example, written representations of Admiral, 26 June 2008, paragraph 23.6; written representations of F Parkinson, 25 June 2008, paragraph 43; and written representations of Durkan, 27 June 2008, paragraph 175.

⁸⁵⁴¹ For the avoidance of doubt, the OFT has not taken any such potential effect on competitors into account in setting the starting point in this case, but merely notes it in response to these Parties' submissions.

⁸⁵⁴² Written representations of Linford, 26 June 2008, paragraph 9.28.5. Bramall and Frank Haslam Milan made a similar submission (written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraph 2.71).

- VI.157. Admiral stated that declining to bid (instead of cover pricing) would decrease the number of bidders on future tender lists.⁸⁵⁴³ As noted above, the OFT considers that, contrary to Admiral's submission, declining to bid would give the customer the opportunity to invite a replacement bidder to tender, thereby potentially allowing a more efficient competitor to enter the market.
- VI.158. Bramall/Frank Haslam submitted that the OFT should have regard to the potential benefits of some information exchange in tender auctions. In particular, Bramall/Frank Haslam considered that the tender system used by local authorities exhibited a sort of market failure in which information asymmetries led to inefficient bidding behaviour, and submitted that information exchange seemed to be an appropriate answer to this.⁸⁵⁴⁴ The OFT does not accept that cover pricing provides any such benefit for customers, and does not consider this provides an excuse for the Parties' unlawful conduct.

Tenders not awarded

- VI.159. A few Parties stated that certain tenders described in this Decision were not taken forward by the customer (for example, because the customer decided to abandon the bids and re-tender the contract, or because the price of the winning bid was subject to negotiation post-tender) and, consequently, the Infringements could have had no effect on the customer or competitors.⁸⁵⁴⁵
- VI.160. Where a tender process has been completely abandoned, there can obviously be no impact on the price paid by the customer in respect of that tender. There is, however, an impact on the customer's perception of the level of competition in the market which has the potential to impact future tenders. The submission of a cover price has also prevented the customer from inviting a replacement bidder to tender; which could have an impact on the undertakings invited to tender by the same customer in future.
- VI.161. Where a tender has not been completely abandoned, but has effectively turned into a negotiated contract post-tender, the OFT does not accept that an impact on price can be discounted. If the winning tender price was inflated as a result of cover pricing, then the impact would be carried across to the subsequent negotiations, as they would have commenced at an inflated level. Moreover, any such negotiations will inevitably be informed by the customers' perception of competition and pricing more generally in the market, which the practice of cover pricing will tend to distort.

Other arguments in relation to seriousness

- VI.162. A number of other submissions were advanced by Parties in respect of the OFT's starting point at step 1. Bullock stated that the Party which gave a cover price to it had also provided a cover price to two other bidders, so giving the third cover to Bullock added nothing.⁸⁵⁴⁶ The OFT rejects any suggestion that the giving of a cover price had no effect merely because two other cover prices were also given in the context of the same tender process. If anything, the OFT

⁸⁵⁴³ Written representations of Admiral, 26 June 2008, paragraph 23.6.

⁸⁵⁴⁴ Written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraphs 2.65 to 2.72.

⁸⁵⁴⁵ For example, written representations of Interserve, 25 June 2008, paragraph 5.4; written representations of Simons Group, 26 June 2008, paragraph 6.14; and written representations of Galliford Try, 27 June 2008, paragraph 6.17.

⁸⁵⁴⁶ Written representations of Bullock, 26 June 2008, paragraph 6.16.22.

considers that this resulted in a greater distortion of competition than if only one cover price had been given, as four of the bids received by the customer were tainted by cover pricing.

- VI.163. Linford submitted that, for those Infringements where it gave a cover, the OFT has failed to demonstrate that the Party seeking a cover could not have approached someone else. Linford therefore concluded that cover pricing would have occurred even without its involvement.⁸⁵⁴⁷ It is not incumbent on the OFT, however, either in establishing liability or imposing penalties, to demonstrate that a similar Infringement could not (or would not) have been committed by another undertaking.
- VI.164. Willmott Dixon stated that for one Infringement (Infringement 243), cover pricing saved the client time and money and there was consequently no consumer detriment.⁸⁵⁴⁸ This representation is based on the suggestion that, by submitting a cover price, Willmott Dixon made up the minimum number of tenderers required by the client for procurement purposes, thereby avoiding the need to re-tender the job. The OFT considers, however, that it is not for a bidder to determine what would be in the customer's best interests, and it cannot be presumed that a customer would prefer to be deceived and receive a cover price than to receive a smaller number of tenders and, if necessary, re-tender the project.
- VI.165. Bullock submitted that, as it had no turnover in the relevant market at the time of its Infringement, the effect of its conduct on competition was limited.⁸⁵⁴⁹ The OFT does not agree. In many cases, the Parties were taking a cover price because the relevant job was not one that they wished to win, often because it was not their preferred type of work. The consequences of doing so, however, are the same as for other Infringements – the number of competitive bids is reduced, the customer is deprived of the opportunity to invite a replacement bidder to tender, a potential new entrant is prevented from being able to tender and the customer's perception of the nature of competition in the market is impaired (see paragraph VI.138). Consequently, the seriousness of the Infringement is not diminished by the fact that it has occurred in a market in which the relevant Party does not usually operate.
- VI.166. Harold Adkin stated that it is essential that owners of construction firms see a reasonable return on their risk and investment, and penalties should take this into account.⁸⁵⁵⁰ The OFT does not accept that this is a relevant factor when setting the starting point for penalties. To the extent that a penalty imposed by the OFT in this Decision is likely to result in financial hardship, this is addressed at step 3 (see paragraphs VI.276 to VI.288 below).
- VI.167. Taking into account all of the above factors, the OFT has set the starting points for the Infringements within the middle to upper end of the scale (the maximum being 10 per cent of an undertaking's relevant turnover). The starting point for those Infringements involving compensation payments is set at a higher level than the starting point for those Infringements not involving compensation payments, in order to reflect the comparative seriousness of the two types of Infringement.

⁸⁵⁴⁷ Written representations of Linford, 26 June 2008, paragraph 9.28.

⁸⁵⁴⁸ Written representations of Willmott Dixon, 27 June 2008, paragraph 54.

⁸⁵⁴⁹ Written representations of Bullock, 26 June 2008, paragraph 6.16.3.

⁸⁵⁵⁰ Written representations of Harold Adkin, 25 June 2008, point 2 in relation to penalties.

- VI.168. For those Infringements not involving compensation payments, the starting point is therefore **5 per cent**.
- VI.169. For those Infringements involving compensation payments, the starting point is therefore **7 per cent**.⁸⁵⁵¹
- VI.170. The levels of starting points set in this Decision are the same as those used in the OFT's previous investigations into bid rigging activity in the roofing industry.⁸⁵⁵²
- VI.171. Galliford Try stated that one of those previous cases, *West Midlands Flat Roofing*⁸⁵⁵³, involved multilateral contacts between customers and detailed written cover prices, whereas it had only minimal contact with another Party and there was no evidence of written communications.⁸⁵⁵⁴ First, the OFT does not consider that the form of communication between Parties – either written or oral – is relevant to its calculation of penalties; it is the substance of the contact which is important. Secondly, whilst some of the infringements in *West Midlands Flat Roofing* involved between three and five parties, there was no finding of multilateral contact in relation to any of those infringements, so the OFT does not consider this to be a distinguishing factor. The issue of whether there should be different starting points in this case based on the number of parties involved in an Infringement is discussed at paragraph VI.177 below.
- VI.172. The OFT also considered whether the starting points in this case should be set at a higher level than in its previous roofing cases, given that a number of the Infringements took place after the OFT issued those decisions (the first of which was issued in March 2004) and there was no evidence that the construction industry as a whole reduced its involvement in cover pricing to any significant extent between the OFT's roofing decisions and the issue of the Statement in April 2008.
- VI.173. However, the OFT has given consideration to the Parties' arguments in response to the Statement, to the effect that many of the Infringements occurred before the OFT's roofing decisions and that there was general widespread ignorance about the illegality of cover pricing as demonstrated by the text book referred to in paragraph IV.19 above.⁸⁵⁵⁵ While such arguments do not excuse the practice of cover pricing, since ignorance of the law is no defence, taking these submissions into account (along with the other factors referred to in this section and in paragraphs VI.38 to VI.51 above), the OFT has determined, on balance, that it would not be appropriate, in this instance, to apply a higher starting point than that used in the previous roofing cases.
- VI.174. **However, it should be clearly noted by the Parties and by other firms, both in the construction industry and more generally, that cover pricing in whatever form is an infringement by object of the Chapter I prohibition and that the OFT**

⁸⁵⁵¹ The Infringements involving compensation payments are listed at paragraph VI.113, above.

⁸⁵⁵² See for example, CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, at paragraph 722.

⁸⁵⁵³ CA98/1/2004 *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*, 16 March 2004.

⁸⁵⁵⁴ Written representations of Galliford Try, 27 June 2008, paragraph 6.19.

⁸⁵⁵⁵ For example, written representations of Ballast Nedam, 26 September 2008, paragraph 63; written representations of GMI, 26 June 2008, paragraph 82; and written representations of T Denman, 27 June 2008, paragraph 8.

may well consider it appropriate to apply a significantly higher starting point in any future cases involving cover pricing.

- VI.175. Around 12 Parties submitted that the OFT was treating them in an inequitable and discriminatory manner when compared with the level of penalties agreed as a result of early resolution with J Sainsbury in *Dairy* and British Airways in *Fuel surcharges*.⁸⁵⁵⁶ First, the OFT notes that each case is specific to its own facts and circumstances and the level of penalties imposed on a party in one case cannot be directly compared with that in another case due to potential differences, for example, in turnover, relevant markets, seriousness of the infringements, duration, aggravating and mitigating factors, and discounts for leniency, cooperation or early resolution. Moreover, the OFT does not accept that it is in any event bound by its decisions in relation to the calculation of penalties in previous cases. Rather, the OFT considers that, subject to the above, it is free to adapt its policy as appropriate having regard to all relevant circumstances and its overall policy objectives on financial penalties, as set out in its Penalty Guidance (see paragraph VI.11 above). Secondly, the OFT notes that these Parties have compared penalties on the basis of the proportion of profits which they represent (effectively arguing that any penalty imposed on them should represent a lower proportion of their profits), whereas the OFT bases its penalty calculations on the infringing undertaking's turnover. The OFT has addressed at paragraphs VI.70 to VI.77 above the reasons why it does not consider a profit-based approach to be appropriate in this case.
- VI.176. Around six Parties submitted that the OFT should set the starting point individually for each Party, taking into account the seriousness of each Infringement.⁸⁵⁵⁷ The OFT has had due regard to the facts and evidence for each individual Infringement, but (other than in respect of Infringements involving compensation payments) considers that there are insufficient differences between them to justify any difference in starting point at step 1.
- VI.177. In particular, whilst the OFT recognises that in the case of some cover pricing Infringements competition for the tender in question was entirely eliminated (for example, where a Party gave a cover price to all other participating tenderers) whereas in others competition was merely distorted, the evidence is not always clear as to whether the recipient (and, less often, the giver) of a cover price knew at the time cover was given or received the extent to which in any particular instance competition was likely to be eliminated. As such, the OFT considers that it would be unfair to distinguish between different Infringements on this basis when setting penalties. At a minimum, a recipient of a cover price may have been 'turning a blind eye' as to whether all other tenderers were similarly tainted (see also paragraph VI.142 above).
- VI.178. Furthermore, whilst it is possible that bid prices (and also profit margins) will have been deliberately raised where a Party knew that it faced very little or no competition as a result of cover pricing, without a full examination of the evidence on this (which in some cases it would be impossible to obtain), the

⁸⁵⁵⁶ For example, written representations of Francis, 2 July 2008, paragraph 95; written representations of Irwins and Jack Lunn, 27 June 2008, paragraph 91; and written representations of Wygar, 27 June 2008, paragraph 4.

⁸⁵⁵⁷ For example, written representations of Baggaley & Jenkins, 27 June 2008, paragraph 42; written representations of Phoenix, 27 June 2008, paragraphs 27 to 28; and written representations of Galliford Try, 27 June 2008, paragraphs 6.8 to 6.10.

OFT does not consider this to be a sound basis for differentiating between the Parties in this case in terms of the starting point adopted at step 1.

VI.179. For these reasons, the starting point for all cover pricing Infringements has been set at 5 per cent, rather than any higher starting point. The OFT cannot exclude the possibility, however, that the factors identified in paragraphs VI.177 to VI.178 would be taken into account in any future cases involving cover pricing. A number of other differentiating factors (such as director involvement, the Party's role in instigating the Infringement, and any steps taken to cooperate and promote compliance) are taken into account as aggravating and mitigating factors at step 4.

VI.180. Several Parties made representations regarding the level of the starting point in terms of the possible damage a high starting point might cause to their businesses, citing the low profitability in the construction industry⁸⁵⁵⁸ and suggesting that it would put companies out of business.⁸⁵⁵⁹ The OFT has dealt with the arguments about profitability as opposed to turnover at paragraphs VI.70 to VI.76 above. In terms of financial hardship, the Parties have had an opportunity to make representations on their own individual circumstances and the OFT has the ability to take these into account at step 3 of the penalty calculation. This is discussed in more detail at paragraphs VI.276 to VI.288 below.

Step 2 – adjustment for duration

VI.181. The starting point under step 1 may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement.⁸⁵⁶⁰ For almost all of the Infringements described in this Decision, the OFT has concluded that the duration was less than a year. The OFT does not believe that the fact that the actual bid rigging arrangements lasted for less than one year should lead to any downward adjustment in penalties imposed because the anti-competitive effects are irreversible and could have a continuing adverse impact on future tendering processes.⁸⁵⁶¹

VI.182. A few Parties concluded that the OFT had characterised the Infringements as being a year in duration.⁸⁵⁶² For example, Allenbuild and Robert Woodhead stated that '*the artificial categorisation of an infringement as being a year in duration means that the level of the fine is being further distorted.*'⁸⁵⁶³ These Parties have, however, misunderstood the OFT's position as set out in the Statement and at paragraph VI.181 above; namely, the OFT recognises that these Parties' Infringements lasted less than one year.

⁸⁵⁵⁸ For example, written representations of Davlyn, 25 June 2008, page 3; written representations of K J Bryan, 24 June 2008, page 6; written representations of Thomas Vale, 27 June 2008, paragraph 59.

⁸⁵⁵⁹ For example, written representations of Beaufort, 27 June 2008, page 1; written representations of Adam Eastwood, 26 June 2008, point 1 on penalties; written representations of Speller-Metcalf, 27 June 2008, paragraphs 80 to 84.

⁸⁵⁶⁰ Penalty Guidance, at paragraph 2.10.

⁸⁵⁶¹ This approach is consistent with previous OFT decisions, for example, CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, at paragraph 732, and has also been endorsed by the CAT in *Apex* at paragraph 278.

⁸⁵⁶² For example, written representations of Hill, 23 June 2008, paragraph 20; written representations of R Durnell, 27 June 2008, paragraph 199.

⁸⁵⁶³ Written representations of Allenbuild, 4 July 2008, paragraph 6.2.2; and written representations of Robert Woodhead, 2 July 2008, paragraph 4.2.2.

- VI.183. Several Parties⁸⁵⁶⁴ argued that the OFT should make a downward adjustment where an Infringement lasted less than a year. In particular, Haymills submitted that it was arguable that an Infringement commenced on the day the cover price was given and did not last longer than the date tenders were returned, because neither it nor the counterparty involved in cover pricing won the bid.⁸⁵⁶⁵ Haymills submitted that the OFT should follow the approach in *Aberdeen Journals*, in which the CAT reduced a penalty due to its short duration.⁸⁵⁶⁶ Pearce Group stated that the short duration of its infringement constitutes an exceptional circumstance that should lead to a reduction in penalty at step 2.⁸⁵⁶⁷ A few Parties disputed that their Infringements had any impact on future tendering processes.⁸⁵⁶⁸
- VI.184. However, as noted in the Statement and above at paragraph V.26 to V.28, the OFT considers that the Infringements lasted at least from the date of the initial contact between the Parties, alerting one another that they had been invited to tender and were either interested in winning the tender or in making bids that would ensure that they would not win the tender, to the date when bids were actually submitted or due to be submitted for the duration of the work. The OFT further considers that the consequences of the bid rigging Infringements distorted competition at least until the work had been carried out, a period which varied considerably in length from tender to tender but almost always constituted a matter of months. Furthermore, the effects were irreversible because the competition lost in respect of the affected tender can never be recovered (see also paragraphs III.103 to III.105 of the Legal Background section). In cases involving compensation payments made after the date when bids were submitted, the OFT considers that the duration of Infringements of this nature lasted at least until the date when the final compensation payment was made (see paragraph V.27).
- VI.185. Furthermore, even were the duration of the Infringements to be regarded as shorter in duration, the Penalty Guidance states that the starting point will only be decreased at step 2 *in exceptional circumstances*⁸⁵⁶⁹ and the OFT does not consider that the circumstances surrounding the Infringements were in any way exceptional in this respect.
- VI.186. Wright (Hull) submitted that the Infringements are individual and discrete and therefore have '*no measurable duration*' in the sense used in the Penalty Guidance.⁸⁵⁷⁰ The OFT accepts that the Infringements are discrete and individual. The OFT has therefore had regard to the practice of the CAT in assessing the penalties imposed in respect of similar infringements (see footnote 8561, and paragraphs VI.181 and VI.184).
- VI.187. For Infringement 135, which lasted over a year because it involved a compensation payment with an outstanding invoice, the OFT considers that the

⁸⁵⁶⁴ For example, written representations of Crown Point, 27 June 2008, paragraphs 6.17 to 6.18; written representations of Durkan, 27 June 2008, paragraphs 183 to 187; written representations of Haymills, 27 June 2008, paragraphs 42 to 46.

⁸⁵⁶⁵ Written representations of Haymills, 27 June 2008, paragraphs 44 to 45.

⁸⁵⁶⁶ Oral representations of Haymills, 28 July 2008, page 17.

⁸⁵⁶⁷ Written representations of Pearce Group, 1 June 2009, paragraph 5.32.

⁸⁵⁶⁸ For example, written representations of Haymills, 27 June 2008, paragraphs 44 to 45; written representations of McGinley Holdings, 27 June 2008, paragraph 45; and written representations of R Durnell, 27 June 2008, paragraph 199.

⁸⁵⁶⁹ Penalty Guidance, at paragraph 2.10.

⁸⁵⁷⁰ Written representations of Wright (Hull), 27 June 2008, paragraphs 18 and 83.

impact (in terms of duration) of collusive tendering is no different from the Infringements lasting less than a year. No upward adjustment for duration will therefore be made for this Infringement, despite the fact that as noted above and contrary to the representations of Wildgoose⁸⁵⁷¹, the OFT considers that the duration of Infringements of this nature lasted at least until the date when the final compensation payment was made.

VI.188. The OFT is therefore making no adjustment for duration at step 2 of the penalty calculation.

Step 3 – adjustment for other factors

VI.189. The penalty may be adjusted, after step 2, to achieve policy objectives, particularly deterring undertakings from engaging in anti-competitive practices, such as collusive tendering (including importantly, other undertakings which may be considering engaging in anti-competitive practices). Considerations at this stage may also include the OFT's estimate of any economic or financial benefit made by the infringing undertakings from the infringements, and the special characteristics, including the size and financial position of the undertakings in question.⁸⁵⁷²

Economic benefit

VI.190. Around 15 Parties⁸⁵⁷³ informed the OFT in their representations that they had derived no economic or financial benefit from the Infringements.

VI.191. As noted at paragraphs VI.145 and VI.178 above, the OFT has not analysed (nor would it be possible to analyse in many instances) the economic or financial benefit derived by the Parties from each of the Infringements. Whilst any such benefit cannot be ruled out, the OFT is not applying an upward adjustment to the penalties on this basis.

General comments on deterrence

VI.192. The OFT considers that deterrence is an important part of its fining policy, vis-à-vis both the Parties and other undertakings who are not addressees of this Decision but may be considering engaging in bid rigging activities. The need for effective deterrence is essential in view of the fact that cover pricing has been endemic in the construction industry, and the penalties therefore need to reflect this wider problem. The OFT has imposed financial penalties for cover pricing in the past in a related sector (the flat roofing sector⁸⁵⁷⁴). However, the OFT learned that cover pricing continued throughout the construction industry since its previous investigations. In the Statement, the OFT noted that as a result it considered that the overall level of financial penalties in this case might need to be higher than it was in the OFT's previous bid rigging cases, in order to represent an effective deterrent. Moreover, it cannot be assumed that cover bidding will necessarily be confined to the construction industry, so it is also

⁸⁵⁷¹ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.39.

⁸⁵⁷² Penalty Guidance, at paragraph 2.11.

⁸⁵⁷³ For example, written representations of Crown Point, 27 June 2008, paragraphs 6.21 to 6.23; written representations of T & C Williams, 27 June 2008, paragraph 9; and written representations of Thomas Long, 26 June 2008, paragraph 5.

⁸⁵⁷⁴ See for example CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006.

important to deter undertakings from engaging in such activities in other sectors.

- VI.193. Harper plc stated that a recent study commissioned by the OFT had suggested that criminal penalties and director disqualification are a greater deterrent than increased fines. Harper plc argued that there was consequently no need to increase penalties in order to deter third parties.⁸⁵⁷⁵ As noted above, deterrence is an important part of the OFT's fining policy, and remains so. It does not follow from the fact that criminal penalties and director disqualification may be regarded as having a more significant deterrent impact, that financial penalties should therefore be lower. Indeed, the fact that some companies regard criminal penalties and director disqualification as more important in deterring infringements than financial penalties may suggest that an increase in the level of the OFT's penalties is required in order to ensure they act as an effective deterrent, and some of the findings of the study on deterrence would support that.⁸⁵⁷⁶
- VI.194. A large number of Parties argued that there was no need for deterrence to be a consideration in relation to their penalty. Around 15 Parties⁸⁵⁷⁷ made the specific point that they ceased all cover pricing activity once it became known that it was illegal, whilst around seven Parties⁸⁵⁷⁸ stated that they had ceased cover pricing before the OFT's investigation commenced. Other Parties argued that they did not need to be deterred from further infringements because cover pricing was a rare occurrence for them⁸⁵⁷⁹, because their Infringements involved only one rogue employee⁸⁵⁸⁰, because they have exited the UK construction industry, or because the Participant Company has ceased trading or has been dissolved.⁸⁵⁸¹
- VI.195. Deterrence is, however, about the actions of other companies, as much as the addressees of this Decision (see paragraph VI.192 above). Whilst the OFT welcomes the fact that Parties may have ceased cover pricing, there is still a need to ensure that other companies are sufficiently deterred from engaging in similar activities, and indeed that the Parties are sufficiently deterred from engaging in other forms of anti-competitive behaviour. To the extent that Parties have demonstrated the implementation of a suitable compliance policy, this is taken into account as a mitigating factor at step 4. It is also immaterial whether or not the Parties remain active in the construction industry, or have exited the market since the Infringements, or no longer trade, as this does not negate the need for a wider deterrent.

⁸⁵⁷⁵ Written representations of Harper plc, 27 June 2008, paragraph 45.

⁸⁵⁷⁶ OFT 963 *The deterrent effect of competition enforcement by the OFT – Discussion document* (November 2007) and OFT 963a *The deterrent effect of competition enforcement by the OFT – Summary of comments* (March 2008).

⁸⁵⁷⁷ For example, written representations of Lindum, 27 June 2008, paragraph 51; written representations of Clegg, 27 June 2008, paragraph 146; and written representations of F Parkinson, 25 June 2008, paragraph 125.

⁸⁵⁷⁸ For example, written representations of Ballast Nedam, 26 September 2008, paragraph 56; written representations of Herbert Baggaley, 27 June 2008, paragraph 30; and written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.44.

⁸⁵⁷⁹ For example, written representations of Dukeries, 27 June 2008, paragraphs 6 to 9; written representations of E Taylor, 27 June 2008, page 7; and written representations of Willmott Dixon, 27 June 2008, paragraphs 12 to 14.

⁸⁵⁸⁰ Written representations of Lindum, 27 June 2008, paragraph 49.

⁸⁵⁸¹ Written representations of Ballast Nedam, 26 September 2008, paragraph 61; written representations of Pearce, 14 July 2008, paragraph 4.13; and written representations of Crown Point, 27 June 2008, paragraph 6.20.

- VI.196. The OFT's assessment of deterrence is also not affected by the number of instances of cover pricing in which a Party has engaged. Given the consolidation and selection process undertaken in this case, the OFT does not consider it would be fair to differentiate between Parties when considering deterrence on the basis of the number of instances of cover pricing in which each Party was involved.
- VI.197. Around four Parties submitted that, where a Participant Company has been acquired by a new parent company since the Infringements, there is no need to deter the new parent company, as it was not involved in the Infringements and/or did not benefit from the illegal conduct.⁸⁵⁸² The OFT considers, however, that the Participant Company should be deterred from engaging in further anti-competitive conduct (regardless of the fact that it now forms part of a different undertaking). Furthermore, and as noted above, deterrence is also aimed at other companies as well as the addressees of the Decision.
- VI.198. Wright (Hull) submitted that, as a small firm, fining it will not deter other firms as it is not sufficiently prominent for an effective message to be sent to others.⁸⁵⁸³ Even if this were true (which the OFT does not necessarily accept), this does not negate the need to consider deterrence as the penalty should be sufficiently high to deter Wright (Hull) itself from engaging in similar infringing conduct in future. Moreover, the OFT would not wish smaller firms to assume from the penalty imposed on Wright (Hull) in this case that, because of their size, they could infringe competition law with impunity.
- VI.199. Balfour Beatty stated that the OFT had previously recognised that an uplift for deterrence is not justified where a party has acted as whistleblower and where the infringing conduct took place against that party's business strategy. Balfour Beatty submitted it should be treated in the same manner in this case.⁸⁵⁸⁴ First, the OFT notes that every case is necessarily fact-specific and the approach to penalty calculation taken for one party in one case cannot be directly read across to an entirely separate case. Secondly, for those Infringements in relation to which Balfour Beatty was the whistleblower, it is not being penalised at all (as they are But For Infringements). Thirdly, the OFT is pursuing at least three Infringements for almost every leniency applicant in this case (including Balfour Beatty). The OFT therefore does not consider that cover pricing can be characterised as an aberration or a 'one-off' occurrence for these Parties.
- VI.200. Around 15 Parties⁸⁵⁸⁵ suggested in their representations that there was no need for deterrence because there has been a movement away from traditional tendering methods in favour of negotiated tenders and framework agreements where, they suggested, cover pricing is more difficult if not impossible. However, the OFT notes first that there are still a significant number of projects that are allocated by means of traditional tendering methods, as indeed has

⁸⁵⁸² For example, written representations of Bullock, 26 June 2008, paragraph 6.22; written representations of Mowlem, 27 June 2008, paragraphs 4.8 and 4.11 to 4.15; and written representations of Lotus, 26 June 2008, paragraph 6.22.

⁸⁵⁸³ Written representations of Wright (Hull), 27 June 2008, paragraph 93.

⁸⁵⁸⁴ Written representations of Balfour Beatty group, 27 June 2008, paragraph 8.23, citing CA98/06/2003 *Replica Kit*, at paragraph 752.

⁸⁵⁸⁵ For example, written representations of Francis, 2 July 2008, paragraph 110; written representations of Durkan, 27 June 2008, paragraphs 196 to 197; and written representations of Lotus, 26 June 2008, paragraph 6.27. Similarly, Wright (Hull) stated that there was no need for deterrence as it has mostly moved away from tendered construction work to in-house property development so it had no opportunity to cover price (written representations of Wright (Hull), 27 June 2008, paragraphs 88 to 92).

been noted by some of the Parties.⁸⁵⁸⁶ Secondly, the majority if not all of negotiated tenders and framework agreements involve a price element at some stage of the process and the OFT therefore rejects any suggestion that cover pricing would be impossible. Thirdly, cover pricing is of course only one form of bid rigging or price collusion and if companies were insufficiently deterred from bid rigging activity then they are more likely to seek other ways of manipulating the tendering process to their advantage.

VI.201. Almost half of the Parties⁸⁵⁸⁷ made representations to the effect that the widespread publicity following the issue of the Statement in April 2008 had already affected their reputation to the extent that they are properly deterred from engaging in similar behaviour in the future, and suggested that other companies will have noted this publicity and be similarly deterred from engaging in bid rigging. Around 10 Parties⁸⁵⁸⁸ noted that they had incurred considerable legal expenses and management time in defending the OFT's allegations and suggested that this was sufficient deterrent.

VI.202. As noted above, deterrence is not only about the particular addressees of this Decision, however, but also other companies. In any event, the OFT does not consider that publicity to the effect that the Parties had engaged in bid rigging, as took place at the time of the issue of the Statement, would on its own act as a sufficient deterrent, nor would management and legal costs. In order to ensure proper deterrence it is important that the OFT reaches an infringement decision and that appropriately calculated financial penalties are levied on the Parties.

Potential for exclusion from tender lists and follow-on private actions for damages

VI.203. Several Parties⁸⁵⁸⁹ expressed concern at the possibility of exclusion from tender lists following the OFT's decision. E Manton stated that virtually all reputable contractors in the Birmingham area will be fined and, if they are then excluded from tender lists, customers will struggle to obtain firms to carry out work and may have to pay a premium for firms from outside the area.⁸⁵⁹⁰ The OFT does not accept that this possibility is sufficient reason to make a downward adjustment to the penalties in this case, however. Moreover, whilst it must ultimately be the decision of each individual procurer, the OFT is issuing advice to procurers that **in the particular circumstances of this case** it would **not** be advisable for the Parties that are the subject of this Decision to be excluded from tender lists solely because of the OFT's enforcement action. In view of this, the OFT considers that it is particularly important to ensure that the penalties are set at an appropriate level to deter future bid rigging conduct.

⁸⁵⁸⁶ For example, written representations of Peter Baines, 26 June 2008, paragraph 5.4.

⁸⁵⁸⁷ [...] [C]

⁸⁵⁸⁸ For example, written representations of Bodill, 26 June 2008, paragraph 5; written representations of Lotus, 26 June 2008, paragraph 6.27; and written representations of Wright (Hull), 27 June 2008, paragraph 85.3.

⁸⁵⁸⁹ For example, written representations of Caddick, 24 June 2008, paragraph 12.5; and written representations of Galliford Try, 27 June 2008, paragraph 6.23.

⁸⁵⁹⁰ Written representations of E Manton, 25 June 2008, page 19.

VI.204. Other Parties⁸⁵⁹¹ were concerned about the possibility of follow-on private actions, and suggested that an adjustment for deterrence was unnecessary in the light of these other deterrence factors. The OFT considers that an effective system for private actions is a useful additional tool for encouraging businesses to comply with competition law but does not consider that the potential for private actions in the present case is a reason to reduce the adjustment for deterrence at step 3 of the penalty calculation.

VI.205. A large number of Parties⁸⁵⁹² noted that the OFT's selection process meant that a sample of companies are being pursued and suggested that the competitive process would be further distorted if the OFT imposed heavy financial penalties that put companies out of business or caused them to alter their investment decisions. They noted that the OFT had found the practice of cover pricing to be endemic and suggested that other companies had infringed the Act but escaped a penalty merely through good fortune. Harper plc suggested that investigating these other companies would do more to deter other companies than uplifting the penalties to be imposed on the Parties.⁸⁵⁹³

VI.206. A number of Parties objected to the OFT's stated intention, as set out in the Statement, to increase the level of penalties above those applied in the OFT's previous cover pricing cases. Around 25 Parties⁸⁵⁹⁴ noted in their representations on the Statement that the majority of the Infringements (around 70 per cent) took place prior to the OFT's first decision on cover pricing in the roofing industry in March 2004.⁸⁵⁹⁵ The Parties suggested that it was still not clear following that decision, that what they referred to as 'simple' cover pricing was illegal and noted that the CAT's first decision on cover pricing was not made until 2005.⁸⁵⁹⁶ Some Parties⁸⁵⁹⁷ noted that a significant number of the Infringements (around 10 per cent) occurred in 2000 when the Competition Act 1998 had only just come into force and there was, according to these Parties, general uncertainty about its scope. Other Parties⁸⁵⁹⁸ emphasised the general lack of awareness of the illegality of cover pricing, citing for example the text book referred to by the OFT at paragraph IV.19 above and a lack of awareness even amongst the legal community. The Parties stated that in all of these circumstances it would not be fair to increase the level of financial penalties above those applied in the OFT's previous bid rigging cases.

VI.207. The OFT has considered the Parties' representations and has decided in the light of these that it is not appropriate in the present case to raise the level of the adjustment for deterrence at step 3 above the level set in the OFT's

⁸⁵⁹¹ For example, written representations of [.....][C], [.....][C], page [C]; written representations of [.....][C], [.....][C], paragraph [C]; and written representations of [.....][C], [.....][C], paragraph [C].

⁸⁵⁹² For example, written representations of Shaylor, 25 June 2008, paragraph 4.9; written representations of A H Willis, 27 June 2008, paragraph 50; and written representations of Willmott Dixon, 27 June 2008, paragraphs 10 to 11.

⁸⁵⁹³ Written representations of Harper plc, 27 June 2008, paragraph 46.

⁸⁵⁹⁴ For example, written representations of Ballast Nedam, 26 September 2008, paragraph 63; written representations of Harold Adkin, 25 June 2008, point 4 on penalties; written representations of Interserve, 25 June 2008, paragraphs 5.9 and 5.33.

⁸⁵⁹⁵ CA98/1/2004 *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands*, 16 March 2004..

⁸⁵⁹⁶ *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4.

⁸⁵⁹⁷ For example, written representations of Sol, 2 June 2008, page 12.

⁸⁵⁹⁸ For example, written representations of Baggaley & Jenkins, 27 June 2008, paragraph 63; written representations of Mowlem, 27 June 2008, paragraph 4.10; written representations of Quarmby, 27 June 2008, paragraph 5.5.

decisions on bid rigging in the roofing industry. However, as stated in paragraph VI.192 above deterrence is an important element of the OFT's fining policy and it remains important that there be some form of adjustment at step 3 of the penalty calculation in the present case in order to ensure that undertakings are sufficiently deterred from similar behaviour in the future, not only in the construction industry but also in other industries where work is allocated by means of tendering processes and other similar methods. While there may have been a lack of certainty amongst the Parties about the legality of cover pricing, as noted in paragraph VI.44 above the OFT considers that the Parties must (or at the very least should) have realised that the provision of prices to each other during the bidding process would constitute at the very least a restriction or distortion of competition.

VI.208. The following subsection discusses how the adjustment for deterrence at step 3 should be applied in the present case.

Minimum Deterrence Threshold

VI.209. For some Parties, the financial penalty calculated at the end of step 2 of the calculation represents a relatively low proportion of the undertaking's total turnover, as a consequence of that party's relevant turnover being a low proportion of its total turnover because it may have significant activities in other markets. In such cases, the OFT considers that the penalty figure reached at the end of step 2 is unlikely to represent a significant sum for that Party, and it will therefore be necessary to increase the Party's penalty at step 3 to arrive at a sum that represents, for that Party, a sufficient deterrent, having regard to the seriousness of the Infringements and the participant's total turnover.

VI.210. Those Parties whose circumstances are as set out in paragraph VI.209 above will therefore be subject to an increase in their penalty at step 3. In order to ensure equal treatment amongst the Parties, the penalty in each case will be increased to a level equivalent to a fixed proportion of the Party's total turnover in the last business year prior to this Decision (to be known as the Minimum Deterrence Threshold ('MDT')) and set at a level proportionate to the starting points for the different types of Infringements. The same MDT will be applied to all **Parties** involved in equally serious infringements. The MDT will be calculated having regard to the seriousness of the Infringements to which it is applied and the total turnover in the last business year of each undertaking.⁸⁵⁹⁹

VI.211. This approach has been applied in previous decisions⁸⁶⁰⁰, and endorsed by the CAT.⁸⁶⁰¹

VI.212. As stated above in paragraph VI.114, the OFT considers that Infringements which involve compensation payments are more serious and therefore attract a higher starting point at step 1. In order to ensure adequate deterrence for more serious types of infringement, those Parties which are involved in compensation payments and whose circumstances are as set out in paragraph VI.209 above

⁸⁵⁹⁹ While the OFT has made every effort to calculate penalties based on the latest possible turnover provided by the Parties, it has not been practicable to take account of turnover figures provided after 31 August 2009. Parties were informed by letter in June 2009 that the OFT would be unlikely to be able to take account of turnover figures received after the end of July 2009, and the OFT therefore considers that it has more than fulfilled its requirements in this regard.

⁸⁶⁰⁰ For example, CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006.

⁸⁶⁰¹ *Makers UK Limited v Office of Fair Trading* [2007] CAT 11.

will face a higher MDT than those Parties which are not involved in compensation payments (see further paragraph VI.248 below).

VI.213. Two Parties, Balfour Beatty Group and Wildgoose, made representations to the effect that the compensation payment Infringements in which they were involved were either less serious than those of other Parties or were less serious than those that occurred in the OFT's roofing cartel decisions and that they should not therefore be subject to a higher level of MDT.⁸⁶⁰² However, other Parties⁸⁶⁰³ agreed with the OFT's position that compensation payments are more serious than cover pricing (indeed, some attempted to use this as a mitigating factor for their own conduct – see paragraph VI.118 above). The OFT considers that the giving or acceptance of a payment that facilitates collusion and that is generally covered up by the submission of a false invoice, constitutes a serious breach of the Chapter I prohibition and that it is important that companies are properly deterred from such activity in the future. The OFT is therefore maintaining the different levels of MDT as originally proposed in the Statement.

VI.214. Where the penalty for a particular Infringement at the end of step 2 already exceeds the MDT it will not be subject to any increase at step 3 because, in the OFT's view, the penalty arrived at after step 2 is already a sufficient deterrent.

Application of MDT to only one Infringement

VI.215. The MDT will only apply *once* to each undertaking, that is, the OFT is taking the Infringement with the highest penalty at the end of step 2 for each undertaking first, and only applying the MDT to that penalty at step 3 if necessary to ensure deterrence. Where two or three penalties are joint highest at the end of step 2, due to identical relevant turnover figures at step 1, the OFT is applying the MDT to the latest of the two or three Infringements so affected. Parties facing two or more penalties will not have the MDT applied at step 3 for the second and/or third penalties, as they (and the other undertakings) have received sufficient deterrence due to the first application of the MDT.

Arguments against the application of an MDT

VI.216. A number of Parties objected to the application of an MDT in this case for a variety of reasons. Kier stated in its representations that the MDT mechanism was not properly explained in the Statement, thereby risking procedural unfairness.⁸⁶⁰⁴ Galliford Try and Thomas Vale both pointed out that the Penalty Guidance does not envisage the use of an MDT.⁸⁶⁰⁵ Galliford Try also stated that the application of an MDT would be contrary to its legitimate expectations.⁸⁶⁰⁶

VI.217. Whilst the Penalty Guidance does not make explicit reference to the MDT methodology, it does contemplate an adjustment at step 3 of the penalties

⁸⁶⁰² Written representations of Balfour Beatty group, 27 June 2008, paragraphs 7.1 to 7.15 and 8.15; written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.46.

⁸⁶⁰³ For example, written representations of Interserve, 25 June 2008, paragraph 5.35; written representations of Shaylor, 25 June 2008, paragraph 4.11.

⁸⁶⁰⁴ Written representations of Kier, 27 June 2008, paragraph 3.32.

⁸⁶⁰⁵ Written representations of Thomas Vale, 27 June 2008, paragraph 61; and written representations of Galliford Try, 27 June 2008, paragraphs 6.27 to 6.31.

⁸⁶⁰⁶ Written representations of Galliford Try, 27 June 2008, paragraphs 6.27 to 6.31.

calculation for deterrence and, as noted above, the use of an MDT for this purpose has previously been endorsed by the CAT. Moreover, the OFT considers that its proposals with respect to the application of the MDT specifically (and indeed penalty calculations in general) were clearly explained in a considerable amount of detail in the Statement. Indeed, a number of Parties in this case have commended the OFT on the amount of detail the Statement contained in respect of penalty calculations.⁸⁶⁰⁷

- VI.218. Willmott Dixon stated that the Penalty Guidance only refers to an uplift at step 3 where relevant turnover is zero.⁸⁶⁰⁸ This is incorrect. The Penalty Guidance envisages the possibility of adjustments at step 3 for several factors – one of these is deterrence, another is where relevant turnover is zero. In other words, these are separate adjustments, rather than cumulative conditions required for a single adjustment.
- VI.219. Ackroyd & Abbott stated that smaller companies are less able to absorb the additional penalty resulting from the application of an MDT.⁸⁶⁰⁹ However, as the MDT is calculated by reference to total turnover, the OFT does not accept that it discriminates between larger and smaller companies.
- VI.220. Thomas Vale submitted that any MDT should be offset against the advantages gained from a leniency applicant's cooperation.⁸⁶¹⁰ The OFT considers that deterrence and leniency are two separate elements of its approach to penalties and these are, therefore, considered separately. The cooperation afforded by leniency applicants is recognised by a percentage discount applied at the end of step 5 (see paragraphs VI.385 to VI.389 below).
- VI.221. Around 20 Parties⁸⁶¹¹ argued that there is no need for an MDT to be applied in the present case since the OFT is imposing penalties in relation to three Infringements for many of the Parties (alternatively, the MDT should only be applied if the aggregate penalty for a Party for all of its Infringements is less than the MDT threshold). The OFT does not accept this argument, however. First, it does not follow that where a penalty is being imposed on a Party for more than one Infringement, the combined penalties will necessarily be sufficient to achieve deterrence.
- VI.222. Secondly, where a Party has been found to have participated in more than one Infringement, the OFT considers it appropriate that it should face more than one penalty and, indeed, should have considered the potential consequences of its actions before engaging in repeat behaviour – as provided for in the Act and as stated in paragraph VI.4 above, the OFT may require an undertaking to pay a financial penalty in respect of any infringement of the Act. Given that some Parties are facing a penalty for only one or two Infringements, the OFT does not consider it appropriate that these Parties should face the same level of penalty as those Parties found to have committed one or more further Infringements of

⁸⁶⁰⁷ For example, oral representations of Interclass, 23 July 2008, page 4; oral representations of G F Tomlinson, 8 July 2008, page 4; and oral representations of Speller-Metcalfe, 14 July 2008, page 3.

⁸⁶⁰⁸ Written representations of Willmott Dixon, 27 June 2008, paragraphs 62 to 70. Pearce Group also submitted that, consistent with the Penalty Guidance, MDT should only be applied to an undertaking with nil penalty after step 3 (written representations of Pearce Group, 1 June 2009, paragraph 5.35).

⁸⁶⁰⁹ Written representations of Ackroyd & Abbott, 2 July 2008, paragraph 105.

⁸⁶¹⁰ Written representations of Thomas Vale, 27 June 2008, paragraph 61.

⁸⁶¹¹ For example, written representations of G F Tomlinson, 23 June 2008, paragraph 133; written representations of Irwins and Jack Lunn, 27 June 2008, paragraph 127; and written representations of York House, 27 June 2008, paragraphs 117 to 118.

the Act, which would be the practical effect of applying an MDT only in circumstances where the aggregate penalty for a Party for all of its Infringements was less than the MDT threshold.

- VI.223. Thirdly, the OFT recognises that it is imposing up to three penalties on each Party in this case and has taken into account both this factor and all of the factors discussed above in this section, along with the figures for relevant and total turnover supplied by the Parties, when deciding the level of MDT that needs to be applied in order that the overall penalties in aggregate will act as an effective deterrent for all Parties. Furthermore, where a Party has more than one Infringement in this Decision that occurred in the same relevant market, the OFT has considered whether a reduction is required at step 3 in order to ensure that the cumulative impact of the aggregate penalty is not excessive – see paragraphs VI.256 to VI.270 below.
- VI.224. Mowlem stated that an MDT should not be used as a substitute for investigating other instances of cover pricing which were admitted and taking them all to a final decision. The OFT confirms that it is not using the MDT to uplift fines in this manner.
- VI.225. Finally, Stainforth stated that: *‘...it is inappropriate for the OFT to implement an MDT when the OFT is culpable for failing to educate [the construction] industry to the possibility that simple cover pricing gave rise to an infringement of competition law... If the OFT was to suggest that it had so engaged the industry, it is no fault of Stainforth’s that it did not receive the message if the industry was unable to get that message across to individual contractors. Stainforth must not be unduly prejudiced by the imposition of a more onerous fine than might have otherwise been the case because of the failings of others outside its control.’*⁸⁶¹²
- VI.226. First, the OFT does not accept that it is in any way *‘culpable’* for a failure to educate the construction industry about the requirements of the Act. Each undertaking is responsible for ensuring that it is compliant with competition law (as with any other law) and the OFT completely refutes the suggestion that responsibility for Stainforth’s illegal conduct should be attributed to anyone other than Stainforth itself.
- VI.227. Furthermore, Stainforth’s representations demonstrate clearly why deterrence forms such an important part of the OFT’s fining policy. When an undertaking is unwilling to admit responsibility for breaches of the law, but instead attempts to lay the blame entirely on others (either the OFT or representatives of the construction industry at large), there is a clear need for the penalty imposed on that undertaking to be sufficiently large to deter it from further infringing conduct.

Representations on calculation and level of MDT

- VI.228. Other Parties objected to the method of calculation of the MDT, or the level at which the MDT would be set.
- VI.229. Several Parties submitted that the OFT is required to have regard to the level of deterrence required for each individual undertaking by reference to its particular

⁸⁶¹² Written representations of Stainforth, 27 June 2008, paragraph 4.40(g).

circumstances, rather than adopting a '*blanket*' approach of using a percentage of turnover for all Parties.⁸⁶¹³

VI.230. Provided its methodology is properly explained, the OFT has a margin of appreciation in assessing the appropriate penalty level for achieving deterrence in any particular case; this is an area requiring judgment.⁸⁶¹⁴ The OFT considers that applying an MDT by reference to a percentage of total turnover is within its margin of appreciation and that, given the range of Parties involved in the case, this is appropriate so as to ensure that in each case the penalty properly reflects the size of the particular undertaking in question. The OFT has also considered whether there are other individual circumstances that should be taken into account in assessing the need for a penalty adjustment at step 3 to achieve deterrence but (save to distinguish between those Infringements involving compensation payments) has concluded that it would not be appropriate to do so in this case. In particular and as noted above, the OFT considers it would be unfair in this case to differentiate at step 3 on the basis of the number of Infringements in which a Party was involved, given (in particular) the consolidation and selection exercise conducted in this case. Whilst the OFT is applying a higher level of MDT to Infringements involving compensation payments, it does not consider that there are sufficient other differences between the various Infringements to justify a range of different MDT levels. Finally, whilst it might be possible to differentiate between the Parties on the basis of when each ceased its infringing conduct, compliance, along with a number of other factors, is taken into account at step 4. Indeed, the OFT considers that the approach it has adopted is the fairest means of achieving a deterrent effect in the circumstances of this case.

VI.231. John Sisk stated in its representations that, as the OFT had pursued fewer than three Infringements against it, the level of MDT applicable to it should be lower than that applicable to Parties with three Infringements.⁸⁶¹⁵ Similarly, Pearce Group submitted that any MDT applied to it should be reduced to reflect its liability for only one Infringement.⁸⁶¹⁶ However, the purpose of the MDT is to ensure that the penalty imposed on a Party is sufficient to deter it (and other undertakings) from engaging in anti-competitive conduct, regardless of the number of Infringements in which it was involved. Moreover, where a Party has been found to have participated in only one Infringement, it will only receive one penalty thus distinguishing it from those Parties found to have been involved in two or more Infringements.

VI.232. Around 10 Parties⁸⁶¹⁷ made similar arguments to those described in paragraph VI.70 above, suggesting that the OFT should base its financial penalties on profit rather than turnover because the Parties in this investigation operate in a high turnover/low margin business and as a result, turnover is no indication of financial strength. The OFT has considered the arguments for the use of profit,

⁸⁶¹³ For example, written representations of Kier, 27 June 2008, paragraphs 3.31 to 3.33; written representations of Phoenix, 27 June 2008, paragraph 54; and written representations of Lindum, 27 June 2008, paragraphs 55 to 58.

⁸⁶¹⁴ *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, at paragraph 168; *Umbro and others v OFT* [2005] CAT 22, at paragraph 102; *Makers UK Limited v OFT* [2007] CAT 11, at paragraph 117.

⁸⁶¹⁵ Written representations of John Sisk, 27 June 2008, paragraph 80.

⁸⁶¹⁶ Written representations of Pearce Group, 1 June 2009, paragraph 5.35.

⁸⁶¹⁷ For example, written representations of Phoenix, 27 June 2008, paragraphs 67 to 72; written representations of Galliford Try, 27 June 2008, paragraph 6.26; and written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraphs 6.18 to 6.19.

rather than turnover, as a basis for calculating penalties at paragraphs VI.71 to VI.75 above.

VI.233. Around 20 Parties⁸⁶¹⁸ argued that the cover pricing Infringements described in this Decision were not as serious as other types of cartel activity, and that the MDT should be set at a level that reflects this fact. The OFT is satisfied the MDT in this case is being set at a level appropriate to the seriousness of the Infringements and reflects the fact that a higher MDT would be warranted for more serious cartel activity such as an overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel over a period of time and/or with the explicit intention of inflating the level of the winning bids.

Representations on turnover to which MDT should be applied

VI.234. A number of Parties also made representations about the specific turnover to which any MDT should be applied.

VI.235. Several Parties⁸⁶¹⁹ argued that the OFT should use the turnover in the year prior to the Infringement rather than the turnover in the last business year prior to decision, for its calculations at step 3 of the penalty calculation. The Parties set forth similar arguments to those described in paragraphs VI.82 to VI.92 above. Other Parties submitted that major acquisitions or substantial increases in their turnover since the Infringements should be disregarded when calculating any MDT.⁸⁶²⁰

VI.236. In response to these arguments, the OFT notes that the adjustment at step 3 of the penalty calculation is intended to ensure that the penalty represents a proportion of the undertaking's total turnover sufficient to deter that undertaking and other undertakings from similar behaviour in the future, and this outcome would not necessarily be achieved by using turnover from the year prior to the Infringement, particularly where an undertaking's turnover has grown considerably in the years since the Infringement took place.

VI.237. Around 15 Parties⁸⁶²¹ suggested in their representations that the OFT should limit its assessment of sufficient deterrence at step 3, to the turnover generated by the Participating Company, and/or in the product market represented by the Infringement. For example, John Sisk and Sicon stated that the MDT should not apply to Sicon's turnover derived from activities outside the UK⁸⁶²² and Crest stated that its turnover should not be taken into account at step 3 as it was not active in the particular trade affected by the Infringement.⁸⁶²³ Simons Group submitted that applying an MDT by reference to total turnover results in unfair

⁸⁶¹⁸ For example, written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraph 10.17; and written representations of Greswolde, 27 June 2008, paragraph 7.39.22 and 7.39.23.

⁸⁶¹⁹ For example, written representations of Connaught, 27 June 2008, paragraph 5.10; written representations of Crest Nicholson, 27 June 2008, paragraph 8.25; written representations of Galliford Try, 27 June 2008, paragraph 6.32.

⁸⁶²⁰ Written representations of Connaught, 27 June 2008, paragraphs 5.6 to 5.7; written representations of Bluestone, 27 June 2008, paragraph 6.15.

⁸⁶²¹ For example, written representations of G & J Seddon, 27 June 2008, paragraph 120; written representations of GMI, 26 June 2008, paragraphs 98 to 99; and written representations of Simons Group, 26 June 2008, paragraphs 6.28 to 6.34.

⁸⁶²² Written representations of John Sisk, 27 June 2008, paragraphs 78 and 122 to 124.

⁸⁶²³ Written representations of Crest Nicholson, 27 June 2008, paragraphs 8.26 to 8.27.

treatment to diversified companies with substantial activities outside construction, as they will have a much larger multiplier added to their penalty, despite the fact that the majority of their business is not affected by cover pricing and is competition law compliant.⁸⁶²⁴ Mowlem and Galliford Try objected to the application of an MDT as in their view it results in a penalty which bears no link to the impact of an Infringement.⁸⁶²⁵

VI.238. However, the point of the adjustment at step 3 is to ensure that the penalty as a whole is sufficient to deter companies from engaging in similar conduct in the future. It is therefore necessary to ensure that the adjustment takes into account both the overall size of the economic undertaking of which the Participating Company formed a part (where applicable), and the total turnover of that economic undertaking, not just the part of the turnover represented by the market in which the Infringement occurred. For large companies with many interests it is important that the overall penalty represents a sufficiently large proportion of their total turnover to deter them, and to deter similarly sized companies, from engaging in similar behaviour not only in the relevant market but also in the other markets in which they operate.

VI.239. Furthermore, the CAT has recognised that, whilst up to 10 per cent of relevant turnover is an appropriate starting point for penalties, the need to achieve sufficient deterrence may require the OFT to go well beyond this (subject only to the statutory cap at step 5).⁸⁶²⁶

VI.240. Renew/Allenbuild and Bullock stated that, where a parent and subsidiary formed part of one undertaking at the time of an Infringement but have since separated, the MDT should be assessed separately by reference to the turnover of each currently independent undertaking, in order to assess the deterrent effect separately for each of them.⁸⁶²⁷ As noted at paragraph II.89 above, the OFT is holding Renew and Bullock jointly and severally liable for Bullock's participation in its Infringement. As the OFT is imposing a single penalty on these entities, it does not consider it appropriate (or indeed practicable) to calculate the MDT separately for each of them. Notwithstanding this, Bullock's liability for this Infringement will be limited by virtue of the statutory cap at step 5, to the extent that its penalty would otherwise exceed 10 per cent of its turnover.

VI.241. Approximately 15 Parties⁸⁶²⁸ stated that the OFT's proposed approach to MDT, as set out in the Statement, went beyond that endorsed by the CAT in *Makers*.⁸⁶²⁹ There was, however, some disagreement amongst those Parties as to how the MDT had been calculated in *Makers* and, consequently, how they suggested the OFT should apply any MDT in this case.

- Around 10 Parties suggested that the relevant market in *Makers* was very localised and resulted in a small penalty, so the MDT was

⁸⁶²⁴ Written representations of Simons Group, 26 June 2008, paragraphs 6.28 to 6.34.

⁸⁶²⁵ Written representations of Mowlem, 27 June 2008, paragraphs 4.16 to 4.18; and written representations of Galliford Try, 27 June 2008, paragraphs 6.27 to 6.31.

⁸⁶²⁶ *Napp v Director General of Fair Trading* [2002] CAT 1, at paragraph 502.

⁸⁶²⁷ Written representations of Allenbuild, 4 July 2008, paragraph 6.1.12; and written representations of Bullock, 26 June 2008, paragraph 7.25.

⁸⁶²⁸ For example, written representations of G & J Seddon, 27 June 2008, paragraph 120; oral representations of Clegg, 21 July 2008, page 6; and oral representations of R Durnell, 14 July 2008, page 6.

⁸⁶²⁹ *Makers UK Limited v OFT* [2007] CAT 11.

calculated by reference to national turnover in the affected product market, but was **not** applied to total turnover.⁸⁶³⁰

- Quarmby stated that the MDT was applied to Makers' total turnover, but not to the turnover of its parent company.⁸⁶³¹
- Mowlem stated that the MDT in *Makers* was applied by reference to total turnover, but the relevant market in that case was national, whereas the relevant markets are regional in the present case. Consequently, the use of total turnover in this case would result in a disproportionate increase in penalty.⁸⁶³²
- Interserve and Simons Group submitted that, whilst the MDT in *Makers* was calculated by reference to total turnover, that case did not involve the same degree of prioritisation and consolidation as this case. As a result, they stated that any MDT applied in this case should be calculated by reference to total UK turnover in relation to either competitively tendered work or all construction work.⁸⁶³³

VI.242. In response to these arguments, the OFT notes that in *Makers* the MDT was applied by reference to the **total turnover** of Makers, which was the infringing undertaking and addressee of the OFT's decision in that case (the penalty was calculated as if Makers had achieved 15 per cent of its total turnover in the relevant market).⁸⁶³⁴ This accords with the approach adopted by the OFT in the present case. Any MDT applied at step 3 is calculated by reference to the total turnover of the undertaking in question (see paragraph VI.210).

VI.243. Where an undertaking consists of parent and subsidiary companies, the MDT is calculated by reference to the total turnover of the entire undertaking, in other words, the consolidated turnover of the parent company.

VI.244. The OFT notes that the '*ultimate holding company*' of Makers was Keller Group plc ('Keller').⁸⁶³⁵ Keller was, however, not an addressee of the OFT's decision in that case; the infringing undertaking and addressee of the OFT's decision in that case was Makers itself (rather than a larger undertaking comprising both Makers and Keller). For this reason, Keller's turnover was not taken into account by the OFT in calculating Makers' penalty. Given that in this case the Decision is addressed not only to the Participant Companies but also to relevant parent companies, the OFT does not consider that its approach to the calculation of the penalties at step 3 in this case is inconsistent with that adopted in *Makers*. Moreover, as discussed in paragraph VI.11 above, the OFT is not in any event bound by its decisional practice in relation to the calculation of penalties in previous decisions.

VI.245. Willmott Dixon also stated that there is no reason to apply an MDT unless there is a dramatic reduction in turnover in the relevant market in the year used as

⁸⁶³⁰ For example, oral representations of York House, 8 July 2008, page 6; oral representations of Richardson Projects, 30 July 2008, pages 6 – 7; and oral representations of Speller-Metcalf, 14 July 2008, pages 5 to 6;

⁸⁶³¹ Written representations of Quarmby, 27 June 2008, paragraph 6.3.

⁸⁶³² Written representations of Mowlem, 27 June 2008, paragraphs 4.19 to 4.20.

⁸⁶³³ Written representations of Interserve, 25 June 2008, paragraphs 5.10 to 5.11 and 5.15 to 5.16; written representations of Simons Group, 26 June 2008, paragraphs 6.35 to 6.45.

⁸⁶³⁴ *Makers UK Limited v OFT* [2007] CAT 11, paragraphs 132 to 133.

⁸⁶³⁵ *Makers UK Limited v OFT* [2007] CAT 11, paragraph 10.

the basis for calculation, and that the general scheme of guidance suggests there should only be a revision upwards in unusual circumstances.⁸⁶³⁶ Again, the OFT disagrees with this characterisation of its Penalty Guidance. As noted above, deterrence is an important part of the OFT's policy and one which has been endorsed by the CAT. Willmott Dixon also stated that, since the relevant geographic markets are narrow in this case, any MDT applied should be less than the 15 per cent applied in *Makers* as most Parties would not generate such a high proportion of their total turnover in such small markets.⁸⁶³⁷ In response to this, the OFT would note that the purpose of the MDT is not to replicate the 'average' or 'standard' proportion of total turnover represented by relevant turnover across the Parties. Rather, it is intended to ensure that the penalties imposed on the Parties represent a *sufficient* proportion of their total turnover to have a deterrent effect.

Conclusion on level of MDT

- VI.246. For the reasons set out above, the penalties of those Parties whose circumstances are as set out in paragraph VI.209 above will be increased at step 3 to the level of the applicable MDT.
- VI.247. For those Parties who do **not** have any Infringements involving compensation payments, the MDT is set at **0.75 per cent** of total turnover in the last business year prior to this Decision.
- VI.248. For those Parties who **do** have at least one Infringement involving a compensation payment, the MDT is set at **1.05 per cent** of total turnover in the last business year prior to this Decision. The MDT is Party-specific, that is it will apply at this level for such Parties, irrespective of whether the Infringement to which the MDT applies is itself a compensation payment.
- VI.249. The levels of MDT applied in this Decision are the same as those used in the OFT's previous investigations into bid rigging activity in the roofing industry.⁸⁶³⁸ The OFT considered whether the MDT should be set at a higher level than in those previous cases, given that a number of the Infringements took place after the OFT issued those decisions (the first of which was issued in March 2004) and there was no evidence that the construction industry as a whole had reduced its involvement in cover pricing to any significant extent during the period from the OFT's roofing decisions to the issue of the Statement in April 2008.
- VI.250. The OFT notes, however, the compliance efforts taken within the industry generally since the issue of the Statement, for example, Building Magazine's 'Rebuilding Trust' campaign and the UK Construction Group and National Federation of Builders code of conduct on competition compliance, each of which has been signed up to by a number of Parties.
- VI.251. The OFT has also given consideration to the Parties' arguments in response to the Statement, to the effect that many of the Infringements occurred before the OFT's roofing decisions and that there was general widespread ignorance about the illegality of cover pricing as demonstrated by the text book referred to in

⁸⁶³⁶ Written representations of Willmott Dixon, 27 June 2008, paragraphs 62 to 70.

⁸⁶³⁷ Written representations of Willmott Dixon, 27 June 2008, paragraphs 62 to 70.

⁸⁶³⁸ See for example, CA98/01/2006, *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, 22 February 2006, at paragraph 722.

paragraph IV.19 above. While such arguments do not excuse the practice of cover pricing, since ignorance of the law is no defence, the OFT has taken them into account when deciding the level of adjustment at step 3 and has therefore decided to maintain the MDT at the same levels as those used previously.

VI.252. **However, it should be clearly noted by the Parties and by other firms, both in the construction industry and more generally, that cover pricing in whatever form is an infringement by object of the Chapter I prohibition and that the OFT may well consider it appropriate to apply a significantly higher MDT in any future cases involving cover pricing and/ or compensation payments, in order to achieve sufficient deterrence.**

VI.253. Pearce Group submitted that, whatever approach the OFT adopted to MDT, the figure derived after its application should then be adjusted for duration under step 2.⁸⁶³⁹ The suggested approach of revisiting step 2 does not accord with the Penalty Guidance. In any event, the OFT is not making any adjustment for duration in this case (see paragraph VI.188).

Calculation of MDT for Parties that did not trade in the business year preceding the decision

VI.254. As noted at paragraphs VI.94 to VI.97, a number of Parties did not trade in the business year preceding the date of this Decision. Where no accounts have been published or prepared in recent years, the OFT is using the turnover figures from the most recent period of more than six months in which they have been published or prepared. Where figures have been published or prepared for a limited period in excess of six months but less than a year, the OFT is pro-rating figures up to the full 12 month period.

VI.255. In calculating the MDT (where it is applicable), the OFT is therefore using turnover figures as described below in each of the affected Parties' individual penalty calculation sections.

Infringements to which the MDT does not apply, where the penalty at the end of step 2 is zero

VI.256. Where the relevant turnover of an undertaking is zero and the penalty figure reached at the end of step 2 is therefore zero, the OFT may adjust the penalty at step 3.⁸⁶⁴⁰ This may be the case for a variety of reasons, for example, where the undertaking has ceased trading altogether, where the undertaking in question remains in business but has exited the relevant product or geographic market since the infringements took place, or, in bidding markets, where the undertaking has been unsuccessful in winning tenders in the relevant year. In setting penalties for an undertaking (Price) with nil turnover in *WM Roofing II*⁸⁶⁴¹, the CAT stated:

'We take into account the penalties imposed on the other undertakings, the relationship between the turnover of those undertakings and the penalties imposed on them, that Price had no relevant turnover, that Price only committed one infringement but that there was involvement on the part of a director and also that the OFT's calculation of Price's penalty for deterrent

⁸⁶³⁹ Written representations of Pearce Group, 1 June 2009, paragraph 5.4(f).

⁸⁶⁴⁰ Penalty Guidance, at paragraph 2.13.

⁸⁶⁴¹ *Richard W Price (Roofing Contractors) Limited v Office of Fair Trading* [2005] CAT 5 at paragraph 63.

effect was necessarily based on an arbitrary assessment since Price had no relevant turnover.'

- VI.257. Although as noted in paragraph VI.215 above the OFT is applying the MDT only once for each Party, to the Infringement with the highest penalty at the end of step 2, the OFT does not consider it appropriate that a Party should avoid a penalty altogether for any of its Infringements by virtue of the Party having no turnover in the relevant market (other than where, in the case of a leniency Party, the Infringement is a But For Infringement, as discussed in paragraph II.1475 above and at paragraph VI.385 below). In many cases the Parties were taking a cover price because the relevant job was one that they did not want, often because it was not their normal type of work. The OFT nevertheless considers that the need for deterrence applies broadly and is not limited to markets or sectors in which undertakings are currently operating. There is a need to deter undertakings from infringing also in markets they have exited, or where they have never carried out any work, and this would not be achieved if companies faced no penalty in respect of Infringements affecting such markets.
- VI.258. The OFT has therefore used a proxy figure for any second or third Infringements in respect of which the penalty is nil at the end of step 2. The OFT informed the Parties by means of a letter dated 15 April 2009 that it proposed to use a percentage of the relevant Party's total turnover in the business year preceding the OFT's decision for this purpose. The OFT indicated in its letter that the proxy figure would be based on some kind of average percentage of total turnover represented by the penalty reached at the end of step 2, for **all** Infringements (regardless of the market in which they occurred) where relevant turnover is more than nil. The OFT considered this to be a robust proxy that, in view of the number of Infringements involved, would be relatively unaffected by the particular market positions of other Parties.
- VI.259. In response to the OFT's letter, several Parties took the opportunity to repeat a number of the representations already made in response to the Statement, for example on matters such as the fairness of an MDT, the level of MDT, or the fairness of using turnover in the year prior to decision rather than in the year prior to infringement, and applied them in addition specifically to this particular issue. The Parties' representations on these matters have already been addressed in the preceding paragraphs, including to the extent that they are of relevance to this issue, and the OFT does not repeat them or the OFT's response here. However, some Parties made additional arguments specifically in relation to the proposals set out in the preceding paragraph, and these are dealt with in the paragraphs below.
- VI.260. A number of Parties⁸⁶⁴² stated that the OFT's proposals did not contain enough specificity for them to make meaningful representations. Parties such as Interserve and Kier said that the OFT had allowed itself a wide margin of discretion in making this proposal, while Parties such as Allenbuild/Renew, Greswolde and Morgan Ashurst said that given the lack of information any detailed response they made would be speculative in nature. Some Parties⁸⁶⁴³

⁸⁶⁴² For example, letter from Ackroyd & Abbott, 29 April 2009; letter from Corringway, 13 May 2009; letter from Greswolde, 6 May 2009; letter from Interserve, 29 April 2009; letter from Kier, 29 April 2009; letter from Bluestone, 6 May 2009; letter from Propency, 28 April 2009; and letter from Quarmby, 28 April 2009.

⁸⁶⁴³ For example, letter from Stainforth, 29 April 2009; and letter from Strata, 28 April 2009.

suggested that the OFT should have issued an amended or supplementary Statement of Objections in order to present this proposal to them.

- VI.261. In response, the OFT considers that its letter of 15 April 2009 discussed in sufficient detail the nature of its proposal, as set out in paragraphs VI.257 and VI.258 above, and that this was specific enough for the Parties to make meaningful representations based on the extent to which they considered the proposal would affect their own position. Indeed, this is demonstrated by the fact that several Parties did make such representations, as discussed in the following paragraphs. It was not necessary or appropriate for the OFT to discuss detailed figures at that stage since these could only be calculated once updated turnover figures had been received from all of the Parties and the OFT could determine the resulting levels of penalties, both overall and at each step of the calculation.
- VI.262. Some Parties⁸⁶⁴⁴ noted that the OFT had stated in the Statement that it would apply the MDT only once for each undertaking, since this would provide sufficient deterrence for companies considering engaging in bid rigging in the future, and suggested that this additional proposal departed from that position. Other Parties, such as Interserve and Simons Group, asked why it mattered if some Infringements faced a penalty of nil, providing overall the penalty was sufficiently high in the OFT's view.⁸⁶⁴⁵
- VI.263. As noted in paragraph VI.257 above, this issue is concerned not with the overall level of the penalties imposed on a Party but with ensuring that Parties do not avoid a penalty merely because in the year prior to the Decision they happen to have had no turnover in the market concerned. Rather, the OFT considers that the Parties should face a penalty for each Infringement in which they were involved, irrespective of whether they happen to have generated turnover in the market or markets affected and that to do otherwise would be inequitable for those Parties found to have been involved in the same number of Infringements which also happened to have generated turnover in the relevant market concerned. Applying a proxy to calculate the penalty for a Party's second and/or third Infringements in circumstances where it had no turnover in the relevant market or markets addresses this potential inconsistency. The OFT notes that some Parties, such as Crest Nicholson, have supported the OFT's position in this respect.⁸⁶⁴⁶
- VI.264. Ackroyd & Abbott and Propensity suggested that if the proposal were adopted, the OFT should only establish the appropriate level of MDT after first aggregating each Party's penalties for each of its Infringements including the additional amount for the second and third Infringements where applicable. However, the effect of this would be that Parties which had infringed twice or three times would face the same level of penalties as those Parties that had infringed only once. The OFT does not consider this to be an equitable outcome, for the reasons stated in paragraph VI.257 above.
- VI.265. Milward referred the OFT to paragraph 2.13 of its Penalty Guidance where it is stated that the OFT may adjust the penalty at step 3 in the case of nil relevant

⁸⁶⁴⁴ For example, letter from Ackroyd & Abbott, 29 April 2009; letter from Milward, 29 April 2009; letter from Propensity, 28 April 2009; letter from Quarmby, 28 April 2009; letter from Stainforth, 29 April 2009; and letter from Strata, 28 April 2009.

⁸⁶⁴⁵ Letter from Interserve, 29 April 2009; and letter from Simons, 29 April 2009.

⁸⁶⁴⁶ Letter from Crest Nicholson, 29 April 2009, paragraph 2.6(c).

turnover *'in exceptional circumstances'*, and noted that if the additional amount were to be applied to every Party with nil relevant turnover in a market this would not constitute exceptional circumstances. It suggested that the OFT had to justify why exceptional circumstances applied in this case. However, the wording of this paragraph does not say that the OFT is entitled to apply an uplift only in exceptional circumstances – as is clear from the CAT's endorsement of the OFT's MDT approach in *Apex* and *Makers* – rather, it suggests that nil relevant turnover will only apply in exceptional circumstances. The fact that it occurs relatively frequently in the present case is a consequence of the relatively narrow market definitions adopted by the OFT in this case.

- VI.266. Milward also suggested that the proposal discriminates against small and medium-sized companies because they are more likely to incur peaks and troughs resulting in nil turnover in a particular market in a particular year. However, there is little evidence of this happening from the turnover figures presented to the OFT – it is more the case that some Parties, regardless of their size, had nil turnover in a particular market on a regular basis. For this reason, Simons Group's alternative proposal of using an average of turnover achieved in the relevant market over a number of years might have been useful for some Parties but would make no difference to the position for several Parties that have never actively operated in the relevant market.
- VI.267. Some Parties⁸⁶⁴⁷ suggested that the proposal would result in arbitrary and unfair outcomes whereby, all other things being equal, Parties with very low relevant turnover in a market would end up with a lower penalty than Parties with nil turnover in a market. The OFT acknowledges that this is a potential concern but notes that the impact of this is in fact minimal given the relatively low amount by which penalties are in fact being increased where a Party's turnover in the relevant market is nil. As previously noted in paragraph VI.262 above, the OFT considers that more inequitable outcomes would result if it did not adopt this measure, since Parties with two Infringements with relevant turnover would end up paying a higher penalty than Parties with three Infringements where relevant turnover is nil in two or three of the relevant markets, all other things being equal.
- VI.268. Mowlem suggested that a large adjustment at step 3 would negate the relevance of step 1 of the penalty calculation and thereby undo all the work the OFT had carried out on market definition in this case, resulting in disproportionate penalties that do not bear any relation to the Infringements.⁸⁶⁴⁸ Again, the OFT acknowledges that this might be the outcome if it were to impose a large additional amount at step 3 for additional infringements where turnover in the relevant market is nil, but does not consider this has happened in the present case given the relatively low amount by which penalties are in fact being increased where a Party's turnover in the relevant market is nil.
- VI.269. Mowlem also suggested that when calculating the proxy figure, the OFT should base it on an average percentage of total turnover represented by the penalty reached at the end of step 2, for *all* Infringements, not only regardless of the market in which they occurred, but also including those Infringements where the Party's relevant turnover was nil.⁸⁶⁴⁹ The OFT has carefully considered

⁸⁶⁴⁷ For example, letter from Ackroyd & Abbott, 29 April 2009; letter from Milward, 29 April 2009; letter from Propensity, 28 April 2009; and letter from Simons Group, 29 April 2009.

⁸⁶⁴⁸ Letter from Mowlem, 29 April 2009.

⁸⁶⁴⁹ Written representations of Mowlem, 27 June 2009, paragraphs 4.16 to 4.20.

Mowlem's suggestion and decided that it would provide a fairer outcome than its original proposal since this reflects the aggregate situation of all Parties in all Infringements. The OFT is therefore using a figure based broadly on the median percentage of total turnover represented by the penalty reached at the end of step 2, for all Infringements.

VI.270. The proxy figure is **0.14 per cent** and the OFT is applying this percentage to Parties' most recent total turnover figures, for any Infringements where the most recent relevant turnover figure is nil, in order to derive a figure to be reached at the end of step 2 (and at the end of step 3), for any Infringements to which the MDT does not apply (i.e. Parties' second and/or third Infringements), where the penalty at the end of step 2 would otherwise be zero.

Cumulative effect of the aggregate penalty for Parties with more than one Infringement in the same relevant market

VI.271. Around four Parties argued that the MDT should also act as a maximum cap on each penalty imposed in this case.⁸⁶⁵⁰ Robert Woodhead stated that if a Party obtains more than 15 per cent of its total turnover in the relevant market, then it will be subject to a higher penalty than that recognised by the OFT as being required for deterrence.⁸⁶⁵¹

VI.272. The OFT does not accept these Parties' arguments, since the MDT represents the *minimum* figure necessary in the OFT's view to act as a proper deterrent. Moreover, the application of a maximum as well as a minimum threshold at step 3 would result in one single percentage of total turnover to apply at step 3 and would therefore completely negate the considerations at steps 1 and 2.

VI.273. Nevertheless, in response to representations from Parties such as Strata⁸⁶⁵², the OFT has considered whether any form of reduction would be appropriate at step 3 in certain cases in order to ensure that the cumulative impact of the aggregate penalty is not excessive where a Party has been found to have participated in more than one Infringement in the same relevant market and a large proportion of its total turnover in the relevant business year was achieved in that market. An aggregate penalty may be considered excessive if it significantly exceeds the equivalent penalties for other parties in the same case that were involved in very similar infringements and is well above the level necessary to ensure deterrence. The OFT has concluded that where a Party has either two or three Infringements in the same market and as a result its overall penalty for all Infringements at the end of step 3 would amount to more than **4.5 per cent** of its total turnover, a downward adjustment should be made at step 3 to each of the Infringements in that market to bring the resulting overall penalty for each of those Parties to a level which is sufficient to ensure deterrence and which is within the range of penalties faced by the other Parties. This adjustment is discussed below in relation to each of the relevant Parties' individual penalty calculations and it applies to the following [...] Parties:

- [...] Parties:

⁸⁶⁵⁰ For example, written representations of Allenbuild, 4 July 2008, paragraphs 6.1.10 to 6.1.11; written representations of Lotus, 26 June 2008, paragraph 6.34; and written representations of Strata, 27 June 2008, paragraphs 2.9 to 2.15 and 2.17 to 2.20.

⁸⁶⁵¹ Written representations of Robert Woodhead, 2 July 2008, paragraphs 4.1.14 to 4.1.19.

⁸⁶⁵² Written representations of Strata, 27 June 2008, paragraphs 2.9 to 2.15 and 2.17 to 2.20.

[...][C]

Materiality

VI.274. Durkan stated in its representations that the level of penalties contemplated by the OFT in the Statement would be unjust since the Infringements in aggregate did not affect a material level of construction activity, and no single Infringement is likely to have had a significant impact on the UK construction industry. In relation to its own Infringements, Durkan stated that the duration was limited and the cumulative value was low relative to the value of the UK construction industry as a whole. Durkan therefore suggested that its penalty should be adjusted at step 3 to reflect this lack of materiality.⁸⁶⁵³

VI.275. The OFT does not consider that the Infringements particularised in this Decision lack materiality. Indeed, the OFT considers them to be serious breaches of the Act, as reflected in the starting point adopted at step 1. The OFT therefore does not accept Durkan's suggestion that its penalty should be adjusted downwards at step 3.

Financial position

VI.276. In the Statement, the OFT noted that the financial position of the Parties is a relevant consideration in the context of determining whether the sum reached at the end of step 2 is an appropriate amount for deterrence, and that it is within the OFT's margin of appreciation to take the financial position of an undertaking into account but there can be no expectation that a penalty will be adjusted on this account.⁸⁶⁵⁴ The OFT noted that financial hardship claims would be considered strictly on a case-by-case basis.

VI.277. [...][C]⁸⁶⁵⁵ referred to the Commission's Fining Guidelines on financial hardship and Advocate General Slynn's Opinion in *Musique Diffusion*⁸⁶⁵⁶, which refers to the need to have regard to the ability of undertakings to pay. Dukeries submitted that the OFT was bound to follow the same approach as a result of section 60 of the Act. For the reasons set out in paragraphs VI.7 to VI.10 above, the OFT does not accept this submission. The OFT has, however, considered financial hardship claims in line with its own Penalty Guidance and practice, and the principles outlined by the CAT.

⁸⁶⁵³ Written representations of Durkan, 27 June 2008, paragraphs 189 to 192.

⁸⁶⁵⁴ *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited* [2007] CAT 13 at paragraph 94.

⁸⁶⁵⁵ [...][C]

⁸⁶⁵⁶ Opinion of AG Slynn in Case 100/80 *Musique Diffusion* [1983] ECR-1825, page 1952.

- VI.278. Balfour Beatty Group submitted that the OFT should take into account the impact of penalties on a Party's profits.⁸⁶⁵⁷ The Penalty Guidance does not require the OFT to consider impact on profits and, other than as a part of the broader assessment of financial position for those firms that have advanced a sufficiently well supported claim for financial hardship, the OFT does not consider that there is any reason to depart from the guidance and introduce an assessment of penalty relative to profit levels.
- VI.279. In response to the Statement, around 80 of the Parties made representations of some form or other regarding their own individual financial position. Many of these representations were, however, either not evidenced or so poorly evidenced that the OFT was unable to make a proper assessment of the Party's financial position.
- VI.280. In this respect, the OFT notes the principles adopted by the CAT and set out in the following extracts from the CAT's judgment in the *Sepia Logistics* case which were also cited in the Statement.
- VI.281. The onus is upon the party in question to provide information sufficient for the OFT to make a proper assessment of its financial hardship – it is not the OFT's responsibility to search for this information or make additional enquiries of the party:

*'The financial position of the undertaking in question is not something that the OFT must consider in all cases, but rather is something that the OFT may consider, upon the application of the undertaking. In making such an application, it seems to us that the onus must be on the applicant to provide the regulator with all information and/ or documentation it wishes to have taken into account ... It is for the applicant to satisfy the OFT that they are eligible for a reduction in penalty, and not for the OFT to disprove that application. Given that in this case the OFT did not have at the time it took its Decision sufficient information to assess the financial position of the undertaking as a whole, we think it was reasonable for the OFT to conclude that a reduction in the level of penalty on the grounds of financial hardship was not justified.'*⁸⁶⁵⁸

- VI.282. Many Parties made assertions that the imposition of a financial penalty would adversely affect their financial position, but did not provide the OFT with evidence in support of that claim. Without supporting information or documentation which would enable the OFT to assess the financial position of these undertakings, a reduction in the level of penalty on the grounds of financial hardship cannot be justified in these cases.
- VI.283. The CAT has also held that where an economic undertaking comprises more than one legal entity, it is necessary for the undertaking to provide evidence of the financial position of all of its various component parts, in order for the OFT to be able to assess whether there is genuine financial hardship for the undertaking as a whole:

'we support the OFT's finding that PC, SGH, PBM and DQS all form part of a single undertaking, and that the OFT was within its rights to hold DQS and PC

⁸⁶⁵⁷ Written representations of Balfour Beatty group, 27 June 2008, paragraph 8.14.

⁸⁶⁵⁸ *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited* [2007] CAT 13 at paragraphs 100 to 101.

*jointly and severally liable for the penalty. It follows naturally that in order to assess the financial situation of that undertaking, the OFT would have required information on each of the companies which form part of that undertaking.*⁸⁶⁵⁹

Adequately supported financial hardship claims

VI.284. The following Parties made a claim of financial hardship with supporting information and/or documentation, which the OFT cross checked against publicly filed accounts available from Companies House. However, the OFT was unable to conclude that there was sufficient indication that the penalty which the OFT is imposing would seriously threaten the viability of the Party concerned. Accordingly, no reduction in the level of penalty on the grounds of financial hardship can be justified in these cases.

i. [...] [C]

⁸⁶⁵⁹ *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited* [2007] CAT 13 at paragraph 98.

[...][C]

VI.285. In making this assessment, the OFT has had regard in particular to the following three factors:

- The level of net current assets relative to the size of penalty for the Party;
- The level of net assets, adjusted to take account of dividend payments made out of the undertaking in the last three years, relative to the size of penalty for the Party; and
- The level of profit (or loss) after tax averaged over the last three years for which accounts were available, relative to the size of penalty for the Party.

VI.286. The OFT has also had regard to its decision in the present case to allow all Parties to pay the penalty by instalments over a three year period, subject to payment of interest and other conditions (discussed below at paragraphs VI.290 and VI.665, and set out in more detail in the covering letters to the Parties accompanying this Decision).

VI.287. Of the Parties listed in paragraph VI.284 above, there were some for which there was a reasonably strong indication on one or more of the bases set out in paragraph VI.285 above that the imposition of the penalty might threaten the viability of that Party, but the OFT has nonetheless concluded that, in light of other factors, the Party was not eligible for a reduction in penalty. For such Parties, an individual assessment has been briefly set out in the relevant Party's penalty calculation section below.

VI.288. Finally, each of the following Parties submitted a claim that the penalty would cause financial hardship, accompanied with supporting information and/or documentation, which the OFT cross checked against publicly filed accounts available from Companies House. On the basis of these claims and consideration of the financial circumstances of these Parties, the OFT considers that for each of these Parties there is sufficient indication that the penalty which the OFT would otherwise impose would seriously threaten the viability of the Party concerned. Accordingly, reduced penalties are warranted in each case. The OFT sets out a brief assessment of each Party's individual circumstances in the relevant Party's penalty calculation section below.

i. [...]C]

Financial position of the construction industry generally

VI.289. The OFT also noted in the Statement more generally that it does not consider that there are any special characteristics of the construction industry which would warrant reduced penalties for all or individual Parties on the basis of financial position. In response, around 10 Parties⁸⁶⁶⁰ made general representations to the effect that if the OFT were to set penalties at too high a level, this would have serious financial consequences, given the current condition of the world economy and the UK construction industry in particular, and that this in turn would have an effect on competition in the construction industry. As noted above, where the OFT is satisfied that a penalty will affect the viability of a specific Party, it will consider making an adjustment to that penalty. This will reflect economic circumstances more widely, insofar as those circumstances are detrimental to a particular Party's viability. The OFT does not consider, however, that it is appropriate to reduce penalties across the board as a result of the current economic climate, as not all Parties will be similarly affected.

⁸⁶⁶⁰ For example, written representations of Bullock, 26 June 2008, paragraph 6.27; written representations of the Construction Confederation, 16 June 2008, paragraph 3.9; written representations of Beaufort, 27 June 2008, page 1.

VI.290. In light of the current economic climate, and in particular its effect on the UK construction industry, however, the OFT has decided in the particular circumstances of this case to offer the Parties a more extended period in which to pay their penalty (subject to payment of interest on the outstanding balance). In making this offer to all Parties rather than on a case by case basis in response to individual representations, the OFT has also had regard to the exceptional number of Parties involved in this case and the public interest in ensuring that the OFT is able to deal with the matter as efficiently and effectively as possible. It should not therefore be assumed that the OFT would adopt a similar approach in other cases, particularly where these involve fewer parties. Details of this extended period and the applicable interest rate have been provided to each of the Parties in the covering letter accompanying this Decision.

Step 4 – adjustment for aggravating and mitigating factors

Aggravating factors

VI.291. The OFT may increase the penalty at step 4 where there are other aggravating factors, or decrease it where there are mitigating factors.⁸⁶⁶¹

Repeat infringements

VI.292. The OFT notes that where parties have committed repeated infringements, this constitutes an aggravating factor under step 4 of the penalty calculation. The magnitude of the penalty may therefore be adjusted to reflect the number of infringements that each party has committed.⁸⁶⁶² However, in the present case, the OFT considers that such an uplift would be unnecessary and duplicative, given that it is imposing a separate penalty for each Infringement, up to a maximum of three penalties per Party. Moreover, none of the Parties has previously been found to have infringed the Chapter I or Chapter II prohibitions. There will therefore be no increase to the level of penalty for repeat infringements.

VI.293. Around 20 Parties⁸⁶⁶³ included their comments on the treatment of repeat infringements in their representations regarding the OFT's imposition of separate penalties for a maximum of three Infringements per Party in this case. The OFT has discussed this issue at paragraphs VI.12 to VI.23 above.

Role of the undertaking as leader/instigator

VI.294. The OFT also notes that the role of an undertaking as a leader in, or an instigator of, the Infringement may be an aggravating factor.⁸⁶⁶⁴ The OFT considers that 'instigation' in this context is something more than mere initiation of collusion by being the first party to make contact with others or the first to suggest collusion in relation to a specific tender.

⁸⁶⁶¹ Penalty Guidance, at paragraph 2.14.

⁸⁶⁶² CA98/01/2006 *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, at paragraph 745.

⁸⁶⁶³ For example, written representations of Clegg, 27 June 2008, paragraphs 127 to 133; written representations of F Parkinson, 25 June 2008, paragraphs 105 to 108; written representations of G F Tomlinson, 23 June 2008, paragraphs 120 to 124.

⁸⁶⁶⁴ Penalty Guidance, at paragraph 2.15.

- VI.295. The OFT has uncovered evidence of one instance, Infringement 158⁸⁶⁶⁵, where a Party, Wildgoose, which was responsible for managing the contract process on behalf of the client (Chesterfield Borough Council), went beyond this and sought to reach a situation where the other bidders (Greenwood and Herbert Baggaley) submitted cover prices so that Wildgoose would win the contract. The OFT considers that Wildgoose used its position to instigate this Infringement by actively asking Greenwood and Herbert Baggaley to submit cover prices.
- VI.296. Wildgoose made representations about its motivation for engaging in this conduct and the impact on the customer, which are addressed at paragraphs IV.4347 to IV.4439 above.
- VI.297. As the OFT noted in the Statement, it does not consider that the instigation of this Infringement amounted to coercion, and taking into account all of the circumstances of this Infringement the OFT is limiting the increase in the penalty imposed on Wildgoose for instigating Infringement 158 to a **5 per cent** uplift at step 4 of the penalty calculation. The OFT also confirms that Wildgoose's role as an instigator in this Infringement does not affect its status as a leniency applicant.
- VI.298. Furthermore, the OFT does not consider that Wildgoose's instigation of this Infringement in any way diminishes the culpability of each of Herbert Baggaley and Greenwood. The OFT is not therefore reducing their respective penalties for Infringement 158.
- VI.299. In addition to instigating cover pricing, Wildgoose also made a related payment of £1,000 to an individual in connection with Infringement 158 (see paragraphs IV.4347 to IV.4439 above). For the purposes of calculating penalties, the OFT is **not** treating Infringement 158 as involving a compensation payment (in other words, it will attract only a 5 per cent starting point at step 1) as it does not consider that this payment was made to another undertaking involved in the tender, in the same manner as the other compensation payments in this case. However, the OFT considers that making a payment to an individual in connection with cover pricing is a serious matter, and is an aggravating factor which should properly be reflected in Wildgoose's penalty. The OFT is therefore increasing the penalty imposed on Wildgoose in respect of Infringement 158 by a further **15 per cent** at step 4 of the penalty calculation, **in addition** to the 5 per cent uplift described at paragraph VI.297 above.
- VI.300. Some Parties noted that in the Infringements set out in the Statement they had only given cover prices, and therefore that they had not instigated any of the cover pricing arrangements.⁸⁶⁶⁶ However, the OFT considers that in the circumstances where cover pricing was endemic by the industry's own admission and existed as a background practice and understanding, it is not of material significance that any particular party initiated a cover pricing arrangement by requesting the cover price. The provider of the cover price responded to the request, not with a refusal on the basis that it was illegal, but instead with a price that was related in some way to its own bid and that was designed to deceive the procurer into thinking that it had received a genuine bid

⁸⁶⁶⁵ Infringement 158, North Lodge and Cricket Pavilion, Queen's Park, Chesterfield, 25 and 30 July 2003.

⁸⁶⁶⁶ For example, written representations of Francis, 2 July 2008, paragraph 140; written representations of Derwent Valley, 26 June 2008, paragraph 7.1; and written representations of Bluestone, 27 June 2008, paragraph 6.32.

from the recipient of the cover price. No discount can be given for such activity, the object of which must be at least to distort competition. See also paragraph VI.112 above, which responds to similar points made in respect of step 1 of the penalty calculation.

Involvement of directors

- VI.301. The OFT considers that the involvement of company directors in the Infringements is an aggravating factor. This is in line with the approach taken by the OFT in its previous decisions relating to the roofing sector.⁸⁶⁶⁷
- VI.302. In its written representations, Admiral noted that its directors were also its shareholders and that there was therefore no independent body of persons to whom a definable duty was owed.⁸⁶⁶⁸ The OFT does not consider that this gave Admiral's directors an excuse to act outside the law.
- VI.303. In their representations, a number of the smaller Parties in this case⁸⁶⁶⁹ noted that in a small family run company, unlike in a large company, decision making is in practice in the hands of only a small number of people and so it is much more likely that directors will be involved. They argued that as a result, an uplift for director involvement would discriminate unfairly against the smaller Parties.
- VI.304. The OFT notes, however, that company directors have an additional responsibility, beyond that of other employees, not to infringe the law. The OFT considers that this applies equally, regardless of the size of the company.
- VI.305. Some infringing subsidiary companies⁸⁶⁷⁰ made the point that although directors of the subsidiary had been involved in Infringements, they were not directors of the parent company at that time. As the OFT is imposing penalties based on the consolidated turnover of the parent company, they said, it would not be right to apply an increase for the involvement of someone who was not a director of that parent company. However, the OFT considers that the parent companies bore responsibility for the acts of their subsidiaries and for the acts of those subsidiary companies' directors whom, in most if not all cases, they were responsible for appointing. The OFT therefore considers that it is appropriate for an uplift to be applied at step 4 of the penalty calculation for the involvement of directors, whether they were directors of parent companies or directors of infringing subsidiary companies.
- VI.306. Some of the leniency Parties⁸⁶⁷¹ complained that they were being penalised for a full and frank disclosure. One leniency Party suggested that it should receive a discount for cooperation equivalent to the value of the increase for director involvement, since the OFT would not have known about it but for that leniency

⁸⁶⁶⁷ CA98/01/2006 *Collusive tendering for flat roof and car park surfacing contracts in England and Scotland*, at paragraph 758, for example.

⁸⁶⁶⁸ Written representations of Admiral, 26 June 2008, paragraph 23.11.

⁸⁶⁶⁹ For example, written representations of Hall, 25 June 2008, paragraph 131; written representations of J H Hallam, 27 June 2008, paragraph 123; and written representations of Hill, 23 June 2008, paragraph 21. Similarly, Bramall submitted that the likelihood of a director being involved in an Infringement would depend on how 'flat' the company's structure is (written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraph 6.29).

⁸⁶⁷⁰ For example, written representations of Balfour Beatty group, 27 June 2008, paragraphs 8.28 to 8.37.

⁸⁶⁷¹ For example, written representations of Irwins and Jack Lunn, 27 June 2008, paragraph 132; written representations of W R Bloodworth, 27 June 2008, paragraph 119; and written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraphs 6.30 to 6.32.

Party's information.⁸⁶⁷² However, the information regarding director involvement might well have become evident to the OFT in any event as part of its investigation – for example, from a contemporaneous document with an individual's name on it obtained or found on a visit under section 27 or 28, or from witness testimony from another company involved in an Infringement to the effect that he or she spoke to the director in question about the cover price. This is part of the overall assessment as to whether to apply for leniency, and leniency applicants have a duty to give all available and relevant information to the OFT. Furthermore, the OFT considers that the leniency Parties in this case are gaining considerable benefit in return for their cooperation, in terms of complete immunity from penalty on some Infringements, and substantial discounts from the penalty on all remaining Infringements, regardless of the fact that they may have infringed on a large number of occasions and provided details of many other instances of cover pricing which the OFT is not taking forward for appropriate prioritisation reasons. It would not therefore be appropriate for the OFT to waive an increase for involvement of directors in the Infringements of these Parties.

VI.307. Other Parties argued that director involvement should not be treated as an aggravating factor if the director had since left the company⁸⁶⁷³, no longer had management responsibility⁸⁶⁷⁴, or ceased his involvement in cover pricing once he became aware that it was illegal.⁸⁶⁷⁵

VI.308. The OFT considers, however, that Boards of Directors would not be properly incentivised to ensure that they are cognisant and compliant with competition law requirements, if they could avoid increases in penalties by removing management responsibility from a director once the OFT had identified him as being involved in illegal activity, or by instructing him to cease illegal activities once the company is investigated by the OFT. Whilst the OFT welcomes the fact that directors of companies may have brought an end to infringements, it perceives this as a reactive response to the OFT's investigation, rather than a proactive approach to compliance which the OFT is seeking to promote. The OFT therefore does not accept that it should waive an increase for director involvement in any of these circumstances.

VI.309. Whilst the OFT does not accept the points made by the Parties set out in the preceding paragraphs, it has considered what would be an appropriate amount of increase for the involvement of directors in the particular circumstances of the present case. Given, in particular, the need to ensure that any adjustment is fair and proportionate for all Parties, the OFT has decided to limit the increase for director involvement at step 4 in this case to **[5-10] per cent**. This is at the lower end of the range of possible adjustments that the OFT may make for director involvement and it should not be assumed that the OFT would necessarily adopt the same approach in other cases.

VI.310. Annex C contains a list of the Parties whose company directors the OFT finds were involved in one or more of the Infringements.⁸⁶⁷⁶ The first table in Annex

⁸⁶⁷² Written representations of Fish Holdings, 27 Jun 2008, paragraph 25.

⁸⁶⁷³ Written representations of Hill, 23 June 2008, paragraph 21.

⁸⁶⁷⁴ Written representations of Simons Group, 26 June 2008, paragraphs 6.49 to 6.50.

⁸⁶⁷⁵ Written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraphs 10.18 to 10.19.

⁸⁶⁷⁶ This Decision is concerned with liability of a corporate nature and does not deal with the possibility of Competition Disqualification Orders ('CDOs') against individual directors, which may be pursued as a

C, headed **List of Parties whose directors the OFT considers were involved in every one of that Party's Infringements, by virtue of their knowledge of cover pricing within the company as described in the relevant part of Section IV.C relating to that Party**, contains a list of Parties in respect of which the OFT has evidence of general director involvement in bid rigging activities for all instances of bid rigging. For these Parties, the OFT is applying a [5-10] per cent uplift at step 4 of the penalty calculation to all of the Infringements in respect of which the OFT is imposing a penalty.

VI.311. The second table in Annex C, headed **List of Parties whose directors the OFT considers were involved in one or more specific Infringements**, contains a list of Parties in respect of which the OFT has evidence of specific director involvement in bid rigging activities in relation to particular Infringement(s). For these Parties, the OFT is applying a [5-10] per cent uplift at step 4 of the penalty calculation to the specific Infringement(s) listed in that table in respect of which the OFT is imposing a penalty.

VI.312. Note that where a Party is listed in the second table in relation to a specific Infringement as well as more generally in the first table, the OFT is applying only one [5-10] per cent uplift at step 4 of the penalty calculation for each such Infringement.

VI.313. In respect of those Parties not listed in Annex C, Bramall submitted that these Parties' directors would also likely have been aware of cover pricing (or at least negligent if they were unaware), given that cover pricing was endemic in the construction industry.⁸⁶⁷⁷ However, the adjustments made at step 4 are to reflect the aggravating and mitigating circumstances of individual Parties and in the absence of evidence specific to a Party the OFT does not consider it would be appropriate to make an individual adjustment to that Party's penalty at step 4 based on mere supposition. The OFT also does not consider this to be a good reason for not applying an uplift to those Parties in respect of which the OFT does possess such evidence. A Party cannot hope to avoid the consequences of its own illegal conduct (or that of its directors) by suggesting that other Parties might also be culpable, particularly without any supporting evidence.

VI.314. Where the OFT identified in Annex C of the Statement that a particular director was involved in one or more Infringements and has now accepted following representations from the Party in question that either the individual was not a director and/or was not involved in any Infringements, that director's name has been removed from Annex C for the Decision and no uplift is applied to the penalty by virtue of that director's previously alleged involvement in an Infringement. Where Parties' representations in this respect have not been accepted, these are discussed either in the Party's general leniency section (section IV.C) or in the relevant Infringement description (section IV.D) above.

Intent

VI.315. The Penalty Guidance recognises that intent is a potential aggravating factor. The OFT has not attempted to determine in each case whether an Infringement

separate matter following the issue of this Decision (see OFT 510 *Competition Disqualification Orders* (May 2003)). The OFT can confirm that, in accordance with paragraph 4.12 of that guidance, it will not apply for a CDO against any current director of a company whose company benefited from leniency in respect of the activities described in this Decision to which the grant of leniency relates.

⁸⁶⁷⁷ Written representations of Bramall and Frank Haslam Milan, 27 June 2008, paragraph 6.31.

was committed intentionally or negligently but is satisfied that they were all committed either intentionally or, at the very least, negligently. As such, the OFT will not be increasing the penalty at step 4 for intent. Likewise, the OFT is not treating alleged negligence (rather than intent) as a mitigating factor (see paragraph VI.337 below).

Mitigating factors

Compliance

- VI.316. The OFT considers that where a Party can demonstrate that it has taken adequate steps with a view to ensuring compliance with the Chapter I and Chapter II prohibitions and Articles 81 and 82 of the EC Treaty, this may be treated as a mitigating factor.⁸⁶⁷⁸ In the Statement, the OFT stated that it was of the view that in order to obtain a discount, a Party would need to show that it had introduced a compliance policy and communicated this to all appropriate members of staff since it first became aware of the OFT's investigation.
- VI.317. Most of the Parties made submissions regarding the existence of a compliance policy, in their responses to the Statement. Although these submissions varied considerably, following a detailed assessment the OFT is satisfied in the case of around 80 Parties that they have adequately demonstrated that they have taken positive steps to introduce a formal compliance policy that is appropriate for the size of the undertaking in question (taking account in each case of all the entities forming part of the undertaking concerned), and to ensure that all appropriate staff have been made properly aware of their competition law obligations. The application of a discount at step 4 for compliance is reflected in each of the relevant Parties' penalty calculations, set out below.
- VI.318. For these Parties, the OFT considers a **[5-10] per cent** reduction at step 4 of the penalty calculation to be appropriate. The OFT considers that these Parties are the ones that are most likely to have successfully minimised the likelihood of future infringement.
- VI.319. The remaining Parties did not provide the OFT with sufficient evidence that they had taken sufficient positive steps to introduce a formal compliance programme appropriate for the size of the undertaking (taking account in each case of all the entities forming part of the undertaking concerned), and will therefore receive no discount for compliance.

Cooperation

- VI.320. The OFT considers that cooperation which enables the enforcement process to be concluded more effectively and speedily is a mitigating factor. In the Statement, the OFT stated that if any Party had provided voluntary cooperation above and beyond its legal obligations, the OFT would consider whether it should reduce that Party's penalty. The OFT noted that it considers that the fast track procedure is a form of cooperation but that, in accordance with the OFT's Fast Track Offer, acceptance of the offer would be taken into account after step 5 of the penalty calculation. The OFT also noted that undertakings already benefiting from the leniency programme or the OFT's Fast Track Offer would not receive an additional reduction in financial penalties to reflect general cooperation.

⁸⁶⁷⁸ Penalty Guidance, at paragraph 2.16.

VI.321. The OFT further noted that, other than the voluntary assistance of Frudd which did not subsequently result in a formal grant of leniency⁸⁶⁷⁹, the OFT was not aware of any exceptional cooperation by any Party which would enable the process in this case to be concluded more efficiently and speedily, warranting a downward adjustment at step 4.

VI.322. Thomas Vale submitted that it had provided exceptional cooperation above and beyond its legal obligations, which should be recognised at step 4.⁸⁶⁸⁰ Similarly, Harper plc submitted that it had provided cooperation beyond that required under the terms of the OFT's Fast Track Offer by providing an additional list of potential infringements.⁸⁶⁸¹ As noted in the Statement, the OFT is not providing additional discounts at step 4 to Parties that are already in receipt of leniency or Fast Track discounts (see also paragraph VI.320 above).

Cooperation – New admissions

VI.323. In response to the Statement, the OFT also received new admissions from a number of Parties that had not applied for leniency and that had rejected the OFT's Fast Track Offer in respect of one or more of their Infringements. Following sight of the Statement, these Parties informed the OFT that they were satisfied they had engaged in conduct infringing the Chapter I prohibition, in respect of one or more of their Infringements.

VI.324. The OFT considers that such new admissions **do** warrant a discount at step 4 of the penalty calculation in this case. These Parties made the admissions without any commitment by the OFT that this would result in a penalty discount, and these admissions helped the OFT to conclude its enforcement process more effectively and speedily.⁸⁶⁸²

VI.325. However, the OFT does not consider that the new admissions should attract the same level of discount as that awarded for acceptance of the OFT's Fast Track Offer. As noted in paragraph II.1701 above, the OFT's Fast Track Offer discount was given because of the considerable benefit to the OFT's enforcement process provided by admissions from Parties that had not been granted sight of the evidence, and at a stage of the case which helped the OFT to select the tenders that would be taken forward to its Statement. In that sense, the OFT's Fast Track Offer had a number of similarities with leniency and similarly resulted in a discount from the final penalty after step 5 of the penalty calculation.

VI.326. The new admissions, by contrast, have been made after sight of the OFT's evidence and at a very late stage in the case. Nevertheless, as noted above in paragraph VI.324, the new admissions do add some value and the OFT is therefore granting the following discounts at step 4 of the penalty calculation to these Parties:

- where a Party has made a clear admission of the facts, or alternatively a clear positive statement that it does not dispute or contest the facts: **[10-15] per cent discount**

⁸⁶⁷⁹ See paragraph II.491 of the Factual Background section above.

⁸⁶⁸⁰ Written representations of Thomas Vale, 27 June 2008, paragraph 58.

⁸⁶⁸¹ Written representations of Harper plc, 27 June 2008, paragraph 83.

⁸⁶⁸² See Penalty Guidance, at paragraph 2.16.

- where, *in addition* to the above, a Party has clearly admitted that its conduct constituted an infringement of the Act: **[10-15] per cent discount** – this discount applies in place of, and not in addition to, the [10-15] per cent discount noted in the previous paragraph.

VI.327. The application of a discount at step 4 for new admission is reflected in each of the relevant Parties' penalty calculations, set out below. Such discount cannot, of course, be applied in respect of any Infringements where a Party is already benefiting from discount by virtue of either leniency or acceptance of the OFT's Fast Track Offer.

VI.328. Where a Party has apparently made some form of qualified new admission that is so obscurely worded or beset by equivocation within that Party's representations that it has proved impossible for the OFT to determine whether the Party is actually admitting to or denying the conduct, the OFT has not given any discount in this regard.

Other arguments on mitigating factors

VI.329. In response to the Statement, the OFT received a number of representations on other factors which the OFT does **not** consider warrant a discount at step 4, as follows.

VI.330. Some Parties noted variously that they had no directors involved in Infringements⁸⁶⁸³, or that they were not involved in compensation payments.⁸⁶⁸⁴ The OFT confirms that these Parties are not receiving uplifts as set out above for these factors, but the absence of these factors is not a basis for reducing these Parties' penalties further.

VI.331. Many Parties noted that they had terminated their infringing activities promptly following the OFT's intervention (or indeed before the OFT's investigation into them commenced).⁸⁶⁸⁵ The Penalty Guidance states that adjustment may be made at step 4 for this factor.⁸⁶⁸⁶ However, the OFT does not consider that it is appropriate in the present case for a discount to be given for prompt termination, given the clear illegality of price fixing and the exchange of prices between competitors.

VI.332. Some Parties noted in some detail the charitable works and community activities they had undertaken.⁸⁶⁸⁷ The OFT does not consider this to be a relevant mitigating factor that would warrant a discount from a penalty for infringement of the Chapter I prohibition.

⁸⁶⁸³ For example, written representations of Lemmeleg, 26 June 2008, paragraph 6.2.7; written representations of McGinley Holdings, 27 June 2008, paragraph 50; and written representations of A H Willis, 27 June 2008, paragraph 59(c).

⁸⁶⁸⁴ For example, written representations of Admiral, 26 June 2008, paragraph 23.12; written representations of GMI, 26 June 2008, paragraph 94; and written representations of Lindum, 27 June 2008, paragraph 32(4).

⁸⁶⁸⁵ For example, written representations of Durkan, 27 June 2008, paragraph 194; written representations of R Durnell, 27 June 2008, paragraph 217; and written representations of Strata, 27 June 2008, paragraph 2.31.

⁸⁶⁸⁶ Penalty Guidance, at paragraph 2.16.

⁸⁶⁸⁷ For example, written representations of P Casey, 27 June 2008, page 2; written representations of Dukeries, 27 June 2008, paragraph 17; and written representations of G & J Seddon, 27 June 2008, paragraph 126.

- VI.333. Many Parties noted that they had genuine uncertainty as to whether their conduct constituted an infringement.⁸⁶⁸⁸ Again, the Penalty Guidance states that adjustment may be made at step 4 for this factor.⁸⁶⁸⁹ However, the OFT does not consider that it is appropriate in the present case for a discount to be given since, as discussed in paragraph VI.44 above, by the very fact that the agreements and/or concerted practices involved collusive tendering, each of the Parties must (or at the very least should) have been aware that the agreements and/or concerted practices in which they participated had the object of preventing, restricting or distorting competition. Nevertheless, as noted above in paragraphs VI.51, VI.173 and VI.251, the OFT has taken the general level of ignorance of competition law within the industry into account (amongst other things) in deciding not to increase step 1 of the penalty above the level applied in its roofing decisions or to increase the level of the MDT above that which applied in those decisions.
- VI.334. Some Parties suggested in their representations that they should get an additional discount for having named the counter-party to their Infringement in their response to the OFT's Fast Track Offer.⁸⁶⁹⁰ However, the OFT notes that many of the Parties that responded positively to the OFT's Fast Track Offer were unable to name the counter-party because they had destroyed their relevant tender records, and does not consider that those Parties that were able to provide the name of the counter-party should benefit from an additional discount by comparison with these Parties.
- VI.335. A few Parties suggested that they were under severe pressure to engage in cover pricing in order to remain on customer tender lists, and that the OFT should treat this as a mitigating factor.⁸⁶⁹¹ Whilst the Penalty Guidance recognises that severe duress or pressure is a potential mitigating factor, the OFT does not consider that it existed in this case. According to these Parties, they engaged in illegal conduct in order to gain a commercial benefit; namely, remaining on a customer's tender list. Whilst the OFT has not attempted to measure this benefit, nor taken it into account in calculating penalties, the OFT does not consider that the prospect of missing out on such a benefit can properly be construed as giving rise to 'severe duress or pressure' to engage in a breach of the Act.
- VI.336. Several Parties submitted that the Infringement(s) in which they were involved were the responsibility of a 'rogue' employee or contractor acting outside the scope of his or her authority, in breach of company policy and/or without the knowledge of any directors, and that this should be recognised as a mitigating factor.⁸⁶⁹² The OFT considers that each undertaking is responsible for ensuring that it complies with competition law including through the promotion of an appropriate compliance 'culture', implementing suitable compliance policies and monitoring those policies to ensure that its employees, agents and contractors

⁸⁶⁸⁸ For example, written representations of Pearce, 14 July 2008, paragraph 4.15; written representations of Kier, 27 June 2008, paragraphs 3.44 to 3.45; and written representations of Linford, 26 June 2008, paragraph 9.43.

⁸⁶⁸⁹ Penalty Guidance, at paragraph 2.16.

⁸⁶⁹⁰ For example, written representations of Greswolde, 27 June 2008, paragraph 7.42.

⁸⁶⁹¹ For example, written representations of Bullock, 26 June 2008, paragraph 6.33; written representations of Lotus, 26 June 2008, paragraph 6.48; and written representations of E Manton, 25 June 2008, paragraphs 18 to 19.

⁸⁶⁹² For example, written representations of Quarmby, 27 June 2008, paragraph 5.6; written representations of Bowmer & Kirkland, 4 July 2008, paragraph 77; and written representations of Lindum, 27 June 2008, paragraphs 49, 62 and 77.

are aware of the requirements of competition law and do not engage in illegal conduct. Consequently, the OFT does not consider that a discount is warranted merely because an individual has acted on his or her own initiative.

VI.337. A number of Parties made representations to the effect that their Infringements were committed negligently, rather than intentionally. A few Parties went on specifically to submit that negligence should be treated as a mitigating factor at step 4 of the OFT's penalty calculations.⁸⁶⁹³ Some Parties also stated that negligence is a mitigating factor under the Commission's Fining Guidelines, and the OFT should have regard to this under section 60 of the Act.⁸⁶⁹⁴ As noted at paragraph VI.315 above, the OFT is not uplifting any Party's penalty for intent at step 4, but is also not treating negligence as a mitigating factor. The OFT also does not accept the Parties submissions based on section 60, for the reasons set out in paragraphs VI.7 to VI.10 above.

VI.338. Lindum⁸⁶⁹⁵ stated that willingness to apologise for an infringement is relevant at step 4, citing the CAT's judgment in *Replica Kit*.⁸⁶⁹⁶ The OFT does not agree with Lindum's conclusion that the CAT awarded a reduction in penalty on the basis of a willingness to apologise. Rather, the CAT considered that an update to the relevant undertaking's compliance programme and its acceptance of responsibility for the infringement could justify a small reduction in penalty. The OFT is already awarding discounts at step 4 for both compliance and admissions of liability since the Statement (see paragraphs VI.316 to VI.326 above). The OFT does not consider that a separate discount is warranted for willingness to apologise.

VI.339. Ballast Nedam stated in mitigation that it was involved in bilateral arrangements only, not involving all tendering parties.⁸⁶⁹⁷ The OFT confirms that this has been taken into account at step 1 (as a multilateral agreement or concerted practice involving all tenderers would almost certainly have attracted a higher starting percentage), but it does not warrant a discount at step 4.

VI.340. GMI stated that there was no evidence that it completed a non-collusion statement in relation to any of its Infringements, and submitted that this was a mitigating factor.⁸⁶⁹⁸ The OFT does not consider that this is a mitigating factor that warrants a discount at step 4.

VI.341. Willmott Dixon stated that, as it had admitted taking a cover price in respect of one Infringement despite the fact that the OFT's evidence was not strong and compelling, this should be treated as a mitigating factor.⁸⁶⁹⁹ The OFT refutes the suggestion that the evidence in respect of this Infringement does not meet the required evidential threshold. As noted above, the OFT is treating post-Statement admissions as a mitigating factor (see paragraphs VI.323 to VI.326).

VI.342. Willmott Dixon also stated in respect of the same Infringement that it submitted a cover price under pressure from the client, and that this should be treated as

⁸⁶⁹³ For example, written representations of GMI, 26 June 2008, paragraph 100; and written representations of Galliford Try, 27 June 2008, paragraph 6.13.

⁸⁶⁹⁴ Written representations of Lotus, 26 June 2008, paragraph 6.21; written representations of Linford, 26 June 2008, paragraph 9.43; and written representations of Bullock, 26 June 2008, paragraph 6.33.

⁸⁶⁹⁵ Written representations of Lindum, 27 June 2008, paragraph 68.

⁸⁶⁹⁶ *Umbro and others v OFT* [2005] CAT 22, at paragraph 265.

⁸⁶⁹⁷ Written representations of Ballast Nedam, 26 September 2008, paragraph 57.

⁸⁶⁹⁸ Written representations of GMI, 26 June 2008, paragraph 92.

⁸⁶⁹⁹ Written representations of Willmott Dixon, 27 June 2008, paragraph 77.

a mitigating factor.⁸⁷⁰⁰ The OFT has addressed the substance of this representation at paragraphs IV.6771 to IV.6802 above.

Consideration of alleged objectively different positions in relation to the OFT's Fast Track Offer

VI.343. As set out in paragraph II.1576 above, following the issue of the Statement, Crest Nicholson applied for judicial review of the OFT's decision not to reopen the OFT's Fast Track Offer. On 24 July 2009 the Court rejected Crest Nicholson's claim that the OFT's decision not to reopen the Fast Track Offer following the issue of the Statement was contrary to the principles of equal treatment and procedural fairness. However, the Court found that the OFT should have acknowledged that Crest Nicholson might have been in an objectively different position from other recipients of the OFT's Fast Track Offer. Then, if a difference was established, the OFT had to decide what effect, if any, that should have on any penalty (see outline of the ruling at paragraphs II.1577 to II.1578 above).⁸⁷⁰¹

VI.344. As a result, on 27 July 2009 the OFT wrote to Crest Nicholson and all of the other Parties and invited them to make submissions on:

- (a) *'Whether, and if so how, [the Party] was in an objectively different position compared to other Fast Track Offer recipients which put it in a position where it could not fairly admit the allegations and accept the Fast Track Offer at the time it was made;*
- (b) *If so, what effect, if any, that claimed different position should have on any penalty which the OFT may subsequently impose for alleged cover pricing.*⁸⁷⁰²

Crest Nicholson's submissions

VI.345. In response to the OFT's letter Crest Nicholson submitted⁸⁷⁰³ that it was in an objectively different position from other recipients of the OFT's Fast Track Offer on the grounds that:

- (a) it was an historic indirect parent company of Pearce⁸⁷⁰⁴ (a Participant Company) and when it received the OFT's Fast Track Offer it attempted to investigate but could only make limited internal investigations because of the lack of documentary records remaining in its possession and any relevant knowledge of Crest Nicholson employees⁸⁷⁰⁵;
- (b) it attempted to obtain information from Pearce Group but these attempts were unsuccessful, and a lack of cooperation by Pearce Group reflected a conflict of interest between Crest and Pearce Group⁸⁷⁰⁶; and

⁸⁷⁰⁰ Written representations of Willmott Dixon, 27 June 2008, paragraph 72.

⁸⁷⁰¹ <http://www.bailii.org/ew/cases/EWHC/Admin/2009/1875.html>

⁸⁷⁰² Excerpt from letter sent to the Parties on 27 July 2009 inviting further submissions following Mr Justice Cranston's Judgment on 24 July.

⁸⁷⁰³ Written representations of Crest Nicholson, 10 August 2009.

⁸⁷⁰⁴ Pearce and Pearce Group were sold more than a year prior to the commencement of the OFT's investigation. Written representations of Crest Nicholson, 10 August 2009, paragraphs 2.4 and 2.6

⁸⁷⁰⁵ Written representations of Crest Nicholson, 10 August 2009, paragraph 2.9

⁸⁷⁰⁶ Written representations of Crest Nicholson, 10 August 2009, paragraph 2.10

- (c) whereas all other recipients of the November Fast Track Offer were in a position to know whether their subsidiaries had accepted the March Fast Track Offer⁸⁷⁰⁷, Crest Nicholson was the only historic parent whose former subsidiary had not been sent the March Fast Track Offer and it could not, therefore, be guided by the stance adopted by its former subsidiary in relation to an admission of liability as could other historic parent companies.⁸⁷⁰⁸

VI.346. Further, Crest Nicholson submitted that it was now willing to admit joint and several liability for its remaining Infringement, Infringement 75.⁸⁷⁰⁹

VI.347. Crest Nicholson submitted that because of these claimed objective differences it should receive a reduction in penalty in order to place it in the position it would have been in had it been able to make an informed decision as to whether to accept the OFT's Fast Track Offer.⁸⁷¹⁰ Crest Nicholson further submitted that because it was now willing to admit joint and several liability for Infringement 75 this indicated that, had it been able to make an informed decision at the time of the OFT's Fast Track Offer, it would have decided to admit liability in respect of those allegations it considered to be well founded.⁸⁷¹¹ Crest Nicholson stated that it was no answer for the OFT to say that Crest Nicholson did not materially assist the OFT's investigation at the Fast Track Offer stage, because it was not given the opportunity to generate the same benefits provided by other parties.⁸⁷¹²

VI.348. Therefore Crest Nicholson submitted that, in light of its admission and the fact that it had no opportunity to accept the OFT's Fast Track Offer at the time it was made, it should receive a 25 per cent discount from any penalty imposed.⁸⁷¹³

VI.349. The OFT has carefully considered Crest Nicholson's position. The OFT accepts that prima facie Crest Nicholson could be seen as in an objectively different position from the other Fast Track Offer recipients. In particular, the OFT notes that as well as being an historic indirect parent of Pearce, the relevant Participant Company, at the time Crest Nicholson received the OFT's Fast Track Offer its former subsidiary had not responded to the OFT's original Fast Track Offer. However, the OFT does not consider that it would be appropriate by reason of these differences to grant Crest Nicholson a 25 per cent discount in its penalty which has been requested. Indeed, to do so would have the same effect as re-opening the OFT's Fast Track Offer, which the OFT considers would not only be unequal and unfair to other Parties that accepted the OFT's Fast Track Offer but would also be inconsistent with the Court's explicit rejection of Crest Nicholson's request that the OFT reopen the Fast Track Offer post-Statement. Indeed, in its judgment the Court specifically stated as follows:

⁸⁷⁰⁷ Written representations of Crest Nicholson, 10 August 2009, paragraph 2.19. Paragraph 2.21 notes that the OFT has acknowledged that the relationship between Crest Nicholson, Pearce Group and Pearce was complicated and had presented difficulties for the OFT during its investigation.

⁸⁷⁰⁸ Written representations of Crest Nicholson, 10 August 2009, paragraph 2.20

⁸⁷⁰⁹ Written representations of Crest Nicholson, 10 August 2009, paragraph 3.9 and 4.2

⁸⁷¹⁰ Written representations of Crest Nicholson, 10 August 2009, paragraph 3.10 and 3.11

⁸⁷¹¹ Written representations of Crest Nicholson, 10 August 2009, paragraph 3.9

⁸⁷¹² Written representations of Crest Nicholson, 10 August 2009, paragraph 3.7

⁸⁷¹³ Written representations of Crest Nicholson, 10 August 2009, paragraph 3.10

'treating the claimant differently, and fairly, does not mean that the OFT needed to give it the gist of the case against it on the evidence possessed by the OFT relevant to alleged bid rigging. That would be inimical to the legal principle that enforcement authorities are entrusted with wide discretionary powers in the conduct of an investigation. The very design of the Fast Track Offer was to reduce the burden on the OFT in the conduct of what was its largest ever investigation. Nor was it necessary for the OFT to reopen the Fast Track Offer after the Statement of Objections was published in April 2008. To do so would have resulted in unequal and preferential treatment to the claimant, and unfairness to the other recipients of the Fast track Offer, who had accepted it without the benefit of knowing what was in the Statement of Objections and OFT file'⁸⁷¹⁴ (emphasis added).

- VI.350. Where an undertaking accepted the OFT's Fast Track Offer pre-Statement in respect of a particular Suspect Tender, (i) it provided an admission, upon which as discussed in paragraph II.1567 above the OFT was able to rely at a stage when the OFT had not yet decided which Suspect Tenders to pursue, thereby assisting the OFT both in selecting the contracts it wished to pursue and strengthening the OFT's case in respect of that Alleged Infringement in the Statement, and (ii) it agreed to limit the extent of its representations in circumstances where it had not seen the OFT's evidence and so did not know the strength of the case against it or the likelihood (absent its admission) of the OFT ultimately being able to proceed against it in respect of that Suspect Tender. This is true of all those Parties which accepted the OFT's Fast Track Offer, whatever their position.
- VI.351. Although the OFT does not accept that Crest Nicholson's post-Statement admission warrants a 25 per cent reduction in penalty, the OFT does accept that the admission warrants some reduction in its liability for the penalty imposed in respect of Infringement 75. The OFT has considered the particular matters raised by Crest Nicholson which it has been suggested mean that Crest Nicholson was in an objectively different position from other recipients of the OFT's Fast Track Offer such that it should be treated materially differently from other parties which made post-Statement admissions.
- VI.352. The OFT notes that many of the recipients of the OFT's Fast Track Offer, including those that accepted it, will have been able to access only limited information in relation to the Suspect Tenders. There might be a range of reasons why limited information was available to such Parties and the OFT does not consider that the reasons given by Crest Nicholson are such as to warrant a materially higher discount than [10-15] per cent (in the light of the nature and purpose of the OFT's Fast Track Offer). The OFT does not accept either that Crest Nicholson received no assistance from Pearce Group or Pearce or that it was unable to be guided at all by its former subsidiaries' likely reply to the OFT's Fast Track Offer. Rather, the OFT notes that in its letter of 18 December 2007 responding to the OFT's Fast Track Offer, Crest Nicholson stated that Pearce's solicitors had *'informed us that they [had] not uncovered any evidence to support the OFT's allegations'*. Moreover, to the extent that Crest Nicholson wished to be guided by its former subsidiary's response to the OFT's Fast Track Offer, this was a clear indication as to Pearce's likely position (and was accurate). In any event, the OFT does not consider that even if the assistance it

⁸⁷¹⁴ Paragraph 89 of Mr Justice Cranston's 24 July 2009 Judgment.

received from Pearce Group and/or Pearce was limited, that this is sufficient basis for a materially higher discount than [10-15] per cent.

VI.353. In the light of the consideration of each of the matters raised by Crest Nicholson, taking into account the nature and purpose of the OFT's Fast Track Offer and bearing in mind the principles of fairness and effectiveness in the setting of financial penalties, the OFT does not consider that the matters raised by Crest Nicholson together justify any reduction in penalty higher than the [10-15] per cent discount awarded to other Parties who also made admissions following the issue of the Statement - see paragraphs VI.323 to VI.328 above. The OFT does not consider that the difference between Crest Nicholson's position and that of other Fast Track Offer recipients was so significant as to warrant any additional discount.

Other Parties' submissions

VI.354. Several other Parties, in response to the OFT's letters of 27 July 2009, took the opportunity to repeat a number of the representations already made in response to the OFT's Fast Track Offer and the Statement, for example on matters such as the fairness of the OFT's Fast Track Offer⁸⁷¹⁵ and the amount of information that the OFT provided with the Fast Track Offer.⁸⁷¹⁶ The Parties' representations on these matters have already been addressed in section II above, and the OFT does not repeat these representations or the OFT's response here. However, some Parties made additional arguments specifically in relation to the issue of whether they were in an objectively different position and these are dealt with in the following paragraphs.

VI.355. Several Parties submitted that for a variety of reasons (for example that the infringing activity had been carried out by a dormant company⁸⁷¹⁷ or that the relevant employees had since left the business⁸⁷¹⁸), they did not have access to the documents or people in order fully to investigate the Suspect Tenders, and as a result they were unable to accept the OFT's Fast Track Offer.

VI.356. One Party, Renew, which accepted the OFT's Fast Track Offer at the time it was made, submitted that because it was an ex-parent company of Bullock (one of the Participant Companies) (as well as being a current parent of Allenbuild, another Participant Company), it was in the same position as Crest Nicholson.⁸⁷¹⁹ The OFT does not accept this submission because even though Renew may not have been able fully to investigate the Suspect Tenders relating to Bullock, it did know that its subsidiary and ex-subsiary had accepted the OFT's Fast Track Offer. Therefore Renew was in a position to be guided as to whether or not to accept the Fast Track Offer on this basis (and indeed does already benefit from the 25 per cent discount for accepting it).

VI.357. Similarly, Durkan Holdings suggested that it was in an objectively different position because at the time it received the OFT's Fast Track Offer it was a separate economic entity from its subsidiary at the time of the Infringements, Durkan, and therefore it *'could do no more than acknowledge the admissions*

⁸⁷¹⁵ For example, letters from Willmott Dixon, 29 July 2009 and 30 July 2009.

⁸⁷¹⁶ For example, written representations of Durkan, 19 August 2009.

⁸⁷¹⁷ For example, written representations of Bowmer & Kirkland, 31 July 2009.

⁸⁷¹⁸ For example, letter from Bowmer & Kirkland, 31 July 2009; letter from Francis, 31 July 2009; letter from Lindum, 7 August 2009; written representations of Pearce, 10 August 2009 paragraph 3.1 and 3.2

⁸⁷¹⁹ Letter from Allenbuild and Renew, 10 August 2009.

that Concentra had made.⁸⁷²⁰ The OFT does not accept that as a result Durkan Holdings was *'pressurised ... into making a commercial decision to admit liability'*.⁸⁷²¹ Like Renew, and by Durkan Holdings' own admission, it was in a position to be guided by the actions of its subsidiary, which had accepted the OFT's Fast Track Offer in respect of both Infringements 135 and 240. Durkan Holdings has not withdrawn this admission following the Statement and continues to benefit from the 25 per cent discount deriving from that admission.

VI.358. For those Parties (i.e. Durkan Limited, G Hurst/PDH, Pearce and E Taylor) which made submissions in response to the OFT's letter but rejected the OFT's Fast Track Offer and continue to deny participation in the Infringement(s)⁸⁷²², the OFT considers that there is no reason to consider further whether these Parties were in an objectively different position from other Fast Track Offer recipients as there are no new admissions which might attract a discount for cooperation at step 4 of the penalty calculation.

VI.359. A few Parties, Apollo (which rejected the OFT's Fast Track Offer), Francis/Barrett (which rejected the OFT's Fast Track Offer but made new admissions after receiving the Statement) and Bowmer and Kirkland (which accepted the OFT's Fast Track Offer in relation to one Infringement and has since made new admissions in relation to its two remaining Infringements) said that following their own internal investigations they found no evidence of participation in the Suspect Tenders so could not fairly admit to the OFT's Fast Track Offer.⁸⁷²³ One Party, Robert Woodhead, submitted the same argument even though it accepted the OFT's Fast Track Offer.⁸⁷²⁴

VI.360. A number of Parties which made similar submissions in response to the OFT's letter that they were in an objectively different position from other Parties due to non-availability of information, namely Ackroyd and Abbott⁸⁷²⁵, B&A⁸⁷²⁶, Connaught⁸⁷²⁷, Interserve⁸⁷²⁸, Lindum⁸⁷²⁹, T Denman⁸⁷³⁰ and Thomas Long⁸⁷³¹, rejected the OFT's Fast Track Offer in relation to one or more Suspect Tenders but went on to make new admissions in respect of one or more Infringements after receiving the Statement. As a result these Parties are, as discussed above, receiving discounts of [10-15] or [10-15] per cent as appropriate from their penalty at step 4 of the calculation.

VI.361. The OFT does not accept that the factors outlined by these Parties mean that they were in an objectively different position from other Fast Track Offer recipients such as would warrant an additional penalty discount over and above

⁸⁷²⁰ Letter from Durkan Holdings, 19 August 2009, paragraph 16.

⁸⁷²¹ Letter from Durkan Holdings, 19 August 2009, paragraph 19.

⁸⁷²² Written representations of Durkan Limited, 19 August 2009, paragraph 34; G Hurst, 27 May 2008 attachment D page 3; written representations of Pearce Group and Pearce, 10 August 2009 paragraph 6.1; written representations of E Taylor, 27 June 2008 paragraph 5.2

⁸⁷²³ Letter from Apollo, 3 August 2009; letter from Francis, 31 July 2009; letter from Bowmer & Kirkland, 31 July 2009; Letter from Francis, 31 July 2009

⁸⁷²⁴ Letter from Robert Woodhead, 10 August 2009

⁸⁷²⁵ Written representations of Ackroyd and Abbott, 2 July 2008 paragraph 76,

⁸⁷²⁶ Written representations of B & A Construction, 27 June 2008 paragraph 6

⁸⁷²⁷ Written representations of Connaught, 27 June 2008 paragraph 1.4

⁸⁷²⁸ Written representations of Interserve, 25 June 2008 paragraph 1.2

⁸⁷²⁹ Written representations of Lindum, 27 June 2008 paragraph 3

⁸⁷³⁰ Written representations of T Denman, 27 June 2008 paragraph 6

⁸⁷³¹ Written representations of Thomas Long, 26 June 2008, paragraph 3.1

the [10-15] or [10-15] per cent discount for making new admissions following the issue of the Statement. As stated in paragraphs II.1554 to II.1556 above, the OFT does not accept that a fast track offer can be made and fairly accepted only where a company is able to carry out its own internal investigations and determine for itself whether or not the OFT's suspicion of an infringement is well-founded. There was no compulsion on the Parties to accept the OFT's offer. The alternative was to go through the normal process of receiving and responding to the Statement. Some of the companies which accepted the OFT's Fast Track Offer may have done so simply because they regarded participation in bid rigging as very likely, or knew that it was widespread at the time; some may have been willing to accept liability on the basis of the description of specific tenders in the OFT's letter. Some companies informed the OFT that they were accepting the offer as a 'commercial' decision, having no evidence of illegal activity but wishing to benefit from the penalty reduction on offer. In the circumstances, the OFT considers that the Parties were not in a materially different position from other Fast Track Offer recipients, and, in any event, to the extent that their positions might be considered different, the differences are not sufficient to justify any materially increased discount in penalty. For the avoidance of doubt, for the reasons set out in paragraphs VI.349 to VI.350 above the OFT does not consider that their positions would warrant the granting of a 25 per cent discount.

- VI.362. A number of Parties (for example, Kier) submitted that they were in an objectively different position from other Fast Track Offer recipients because they had no pre-warning of the OFT's investigation or the OFT's Fast Track Offer.⁸⁷³² This, the Parties submitted, meant that there was insufficient time for them fully to investigate the Suspect Tenders.⁸⁷³³ The OFT does not accept that this placed these Parties in an objectively different position from other Fast Track Offer recipients. In response to requests, extensions of time were provided to Parties which, in the OFT's view, gave them sufficient opportunity to respond, given all of the circumstances including the amount of time that had elapsed since the OFT's original letter was sent. The OFT notes that Kier made no new admissions in response to the Statement.
- VI.363. One Party, Greswolde, which in fact accepted the OFT's Fast Track Offer, submitted that it was '*subject to an unusual and detrimental circumstance*'⁸⁷³⁴ because its legal advisor joined the OFT around the time that the Statement was issued. The OFT does not accept that this means that Greswolde is in an objectively different position from other recipients of the OFT's Fast Track Offer.
- VI.364. Another Party which accepted the OFT's Fast Track Offer, Durkan, submitted in relation to Infringement 240 that there were insufficient details in the schedule of Suspect Tenders for it to make an informed decision whether to accept the OFT's offer.⁸⁷³⁵ The OFT does not consider that the level of detail in the schedule for this Suspect Tender was materially different from the general level of detail provided in relation to other Suspect Tenders for this and other Parties, or that this in any way placed Durkan in an objectively different position from other Parties, particularly given that Durkan accepted the OFT's Fast Track

⁸⁷³² For example, letter from Kier, 10 August 2009.

⁸⁷³³ For example, letter from Kier, 10 August 2009.

⁸⁷³⁴ Letter from Mantisson, 10 August 2009.

⁸⁷³⁵ Written representations of Durkan, 19 August 2009, paragraph 7.

Offer in relation to this Suspect Tender and has since confirmed specifically to the OFT that it does not withdraw that admission (as discussed in the description of Infringement 240 in section IV above). The OFT also notes that in its judgment the Court specifically stated that *'treating the claimant differently, and fairly, does not mean that the OFT needed to give it the gist of the case against it on the evidence possessed by the OFT relevant to alleged bid rigging. That would be inimical to the legal principle that enforcement authorities are entrusted with wide discretionary powers in the conduct of an investigation. The very design of the Fast Track Offer was to reduce the burden on the OFT in the conduct of what was its largest ever investigation.'*⁸⁷³⁶

- VI.365. Durkan also suggested that it was in an objectively different position from other Parties because the OFT *'promptly informed some FTO recipients of the evidence in the OFT's possession'* but failed to provide the same information to Durkan.⁸⁷³⁷ As the OFT discusses in paragraph II.1553 above, it provided on an equal basis to any Party upon request brief information to help identify the tender where this was available to the OFT, but for the reasons given in section II it did not provide the *'evidence'* to any Party.
- VI.366. A number of Leniency Parties (Balfour Beatty Group, Thomas Vale and Wildgoose) repeated submissions that they considered that the Leniency Parties had been treated unfairly.⁸⁷³⁸ The OFT does not accept these submissions and has addressed the concerns of the Leniency Parties in paragraphs II.1545 to II.1548 and II.1582 to II.1583 above and paragraphs VI.390 to VI.395 below.
- VI.367. Stainforth submitted that it considers that what it termed *'simple'* cover pricing, if it is an infringement at all (which it denies), is an effects based infringement and therefore it was unable to accept the OFT's Fast Track Offer without assessing the evidence.⁸⁷³⁹ Stainforth went on to make an admission as to the facts set out in the Statement after it had received it.⁸⁷⁴⁰ The OFT does not accept that cover pricing is an effects based infringement (see Legal Background section above) and neither does the OFT accept that Stainforth needed to assess the evidence before deciding whether or not to accept the offer (indeed, a significant number of Fast Track Offer acceptors did not agree with the OFT's assessment either). The OFT does not therefore accept that Stainforth was in an objectively different position from other recipients of the OFT's Fast Track Offer.
- VI.368. One of the Parties, [.....] [C], submitted that it was in an objectively different position from other Fast Track Offer recipients because it depends more heavily on public sector work and is likely to face potentially severe economic prejudice as a result of the reputational damage that an admission of guilt to the OFT's Fast Track Offer would inevitably have entailed.⁸⁷⁴¹ The OFT does not accept this submission. In fact, [.....] [C] made an admission as to the facts set out in the Statement after it had received it.⁸⁷⁴² [.....] [C]

⁸⁷³⁶ Paragraph 89 of Mr Justice Cranston's 24 July 2009 Judgment.

⁸⁷³⁷ Written representations of Durkan, 19 August 2009, paragraph 12.

⁸⁷³⁸ Letter from Balfour Beatty group, 10 August 2009; letter from Thomas Vale, 10 August 2009; letter from Wildgoose, 10 August 2009.

⁸⁷³⁹ Letter from Stainforth, 7 August 2009

⁸⁷⁴⁰ Written representations of Stainforth, 27 June 2008, paragraph 4.42(q)

⁸⁷⁴¹ Letter from [...] [C], 30 July 2009

⁸⁷⁴² [...] [C]

also submitted that the whole Fast Track Offer was procedurally unfair.⁸⁷⁴³ The OFT does not accept this and agrees with the Court that *'treating the claimant differently, and fairly, does not mean that the OFT needed to give it the gist of the case against it on the evidence possessed by the OFT relevant to alleged bid rigging. That would be inimical to the legal principle that enforcement authorities are entrusted with wide discretionary powers in the conduct of an investigation.'*⁸⁷⁴⁴ As set out in paragraphs VI.325 and VI.326 above, the OFT does not consider that new admissions should attract the same level of discount as that awarded for acceptance of the Fast Track Offer.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

- VI.369. As stated above in paragraph VI.12, the OFT is imposing a penalty in respect of each of up to maximum of three Infringements per Party. The OFT may not fix a penalty that exceeds 10 per cent of the worldwide turnover of the undertaking⁸⁷⁴⁵ in its last business year before the date of the OFT's final Decision, calculated in accordance with the provisions of the 2000 Order, as amended ('the section 36(8) turnover').⁸⁷⁴⁶ The section 36(8) turnover is not restricted to a party's turnover in the relevant product market and relevant geographic market.⁸⁷⁴⁷
- VI.370. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of the turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.⁸⁷⁴⁸
- VI.371. The OFT has assessed each of the Parties' penalties against the tests set out in the preceding paragraphs (as applicable). This assessment has not necessitated any reductions to penalties at step 5 of the penalty calculation.
- VI.372. Also, the OFT must, when setting the amount of a penalty for a particular agreement (or concerted practice), take into account any penalty or fine that has been imposed by the European Commission or by a court or other body in another Member State in respect of the same agreement (or concerted practice).⁸⁷⁴⁹ Such adjustments are not necessary for assessing penalties in this case.
- VI.373. Henry Boot was concerned that the OFT would adjust its penalty at step 5 to a level out of proportion with the conduct concerned, given that its consolidated turnover is significantly higher than its relevant turnover.⁸⁷⁵⁰ In accordance with the Penalty Guidance, however, the OFT is only making a downward adjustment at step 5 for those Parties whose penalty exceeds the statutory cap

⁸⁷⁴³ Letters from [...] [C], 29 July 2009 and 30 July 2009

⁸⁷⁴⁴ Paragraph 89 of Mr Justice Cranston's 24 July 2009 judgment.

⁸⁷⁴⁵ Note that the statutory cap applies to the turnover of the undertaking, not separately to the turnover of each legal entity within the undertaking. See paragraph VI.380 below.

⁸⁷⁴⁶ Section 36(8) of the Act and the 2000 Order, as amended by the 2004 Order.

⁸⁷⁴⁷ Penalty Guidance, at paragraph 2.17.

⁸⁷⁴⁸ *Ibid.* at paragraph 2.18.

⁸⁷⁴⁹ *Ibid.* at paragraph 2.20.

⁸⁷⁵⁰ Written representations of Henry Boot, 27 June 2008 (as amended 16 February 2009), paragraph 10.26.

(the substance of Henry Boot's submission is addressed at paragraph VI.209 to VI.245 in the context of step 3 adjustments).

Parties that did not trade in the business year preceding the decision

VI.374. As noted at paragraphs VI.94 to VI.97 above, a number of Parties did not trade in the business year preceding the date of this Decision. Where no accounts have been published or prepared in recent years, the OFT is using the turnover figures from the most recent period of more than six months in which they have been published or prepared. Where figures have been published or prepared for a limited period in excess of six months but less than a year, the OFT is pro-rating figures up to the full 12 month period.

VI.375. In applying the statutory cap at step 5, the OFT is therefore using turnover figures as described below in each of the affected Parties' individual penalty calculation sections.

Limitation of liability for companies that formed part of a single undertaking at the time of one or more Infringements but are now separate undertakings

VI.376. A number of Parties comprise two or more legal entities which constituted one undertaking at the time of one or more of the Infringements, but have since parted and now constitute two separate undertakings. The Parties so affected are as follows:

- ***Bullock*** – Bullock's ultimate parent at the time of its Infringement was Renew. Bullock has since been acquired by a different company such that it is no longer owned by Renew (see paragraph II.90 above).
- ***Durkan*** – Durkan's ultimate parent at the time of its two Infringements was Durkan Holdings. On 10 September 2007, Durkan was the subject of a management buyout (and rebranded as Concentra) such that it is no longer owned by Durkan Holdings (see paragraph II.387 above).
- ***Haymills*** – Haymills' ultimate parent at the time of its first two Infringements was Haymills plc, now known as Corringway Conclusions, which has been in liquidation since 2004 (see paragraph II.620 above). Haymills' ultimate parent at the time of its third Infringement was Ever 2312 Limited, now known as Haymills Group (see paragraph II.624 above).
- ***Holroyd*** – Holroyd's ultimate parent at the time of its first two Infringements was Holderness. Holroyd's immediate parent at the time was Holroyd Group (see paragraph II.693 above). Holroyd's ultimate parent at the time of its third Infringement was Holroyd Group (see paragraph II.695 above). Both Holroyd and Holroyd Group are now in liquidation.
- ***Irwins*** – Irwins' ultimate parent at the time of all of its Infringements was Jack Lunn Holdings. On 14 June 2007, Irwins became independently owned such that it is no longer owned by Jack Lunn Holdings (see paragraph II.767 above).

- **J J McGinley** – J J McGinley’s ultimate parent at the time of all three of its Infringements was McGinley Holdings. J J McGinley was sold by McGinley Holdings on 22 September 2004 and was subsequently acquired by a new parent on 24 March 2005 (see paragraph II.819 above).
- **Pearce** – Pearce’s ultimate parent at the time of its Infringement was Crest Nicholson. On 31 January 2003, Pearce and its immediate parent Pearce Group were the subject of a management buyout and the share capital was acquired by a new company such that they are no longer owned by Crest Nicholson (see paragraph II.1005 above).
- **Propensity/Totty/Jackson** – Totty’s ultimate parent at the time of its Infringements was Propensity. Jackson’s ultimate parent at the time of its Infringement was Propensity. In 2007, Propensity’s ultimate parent restructured the group of companies such that neither Totty nor Jackson is now owned by Propensity.

VI.377. In the case of Bullock, Durkan, Irwins, J J McGinley, Pearce and Propensity/Totty/Jackson, the OFT is as stated in paragraph VI.58 above basing its calculation on the consolidated turnover of both (i) the Participant Company together with its current wholly/majority owned subsidiaries and (ii) the former parent company that ultimately controlled the Participant Company at the time of the Infringements together with its current wholly/majority owned subsidiaries; both the Participant Company and the former parent being addressees of this Decision.

VI.378. Bullock and Renew both submitted that the OFT should apply the cap at step 5 based on their current structure, thereby limiting each of their liability to an amount based on their own respective turnover, rather than their total combined turnover.⁸⁷⁵¹

VI.379. Durkan Holdings stated in its written representations that Article 23(2) of Regulation 1/2003 *‘provides that the Commission cannot, by imposing joint and several liability increase an undertakings’ liability beyond the limit set by Article 23(2), so the total fine on all parties subject to the joint and several liability cannot exceed 10% of the turnover of the smallest undertaking concerned’*.⁸⁷⁵² It referred to a CFI case in which the CFI *‘concluded that in applying the 10% upper limit the European Commission may refer to the turnover of the undertaking involved in the infringement (rather than the parent company)’*.⁸⁷⁵³

VI.380. First, Article 23(2) states that *‘For each **undertaking**...participating in the infringement, the fine shall not exceed 10% of **its** total turnover’* (emphasis added). Whilst Article 23(2) therefore provides that the fine imposed on an undertaking may not exceed 10 per cent of that undertaking’s turnover, it is completely silent as to the extent of liability that may be imposed on a legal entity which formed part of a larger undertaking at the time of an infringement. Secondly, the CFI case referred to above stated only that, in applying the 10 per cent upper limit, the Commission *‘may’* refer to the turnover of the

⁸⁷⁵¹ Written representations of Bullock, 26 June 2008, paragraphs 7.17 to 7.22; written representations of Renew, 04 July 2008, paragraph 6.5.

⁸⁷⁵² Written representations of Durkan Holdings, 27 June 2008, paragraph 77.

⁸⁷⁵³ Written representations of Durkan Holdings, 27 June 2008, footnote to paragraph 77 referring to Case T-28/99 *Pre-Insulated Pipes* [2002] ECR II-01845, paragraphs 90 to 91.

subsidiary, not that it was compelled to do so. Thirdly, the CFI has more recently stated as follows:

*'The fact that several companies are held jointly and severally liable for a fine on the ground that they form part of the same undertaking...does not mean, as regards the application of the maximum amount of 10% of turnover laid down by Article 23(2) of Regulation 1/2003, that the obligation of each of them is limited to 10% of turnover which it achieved during the last business year. The maximum amount of 10% of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking..., since only the total turnover of the component companies can constitute an indication of the size and economic power of the undertaking in question.'*⁸⁷⁵⁴

VI.381. Notwithstanding the above, where a Party listed in paragraph VI.376 comprises two or more legal entities which now constitute two separate undertakings, the OFT is limiting the liability of each of those separate undertakings to the share of that Party's overall penalty which represents 10 per cent of that separate undertaking's total turnover in the most recent business year preceding the OFT's decision.

VI.382. This affects [...] [C], and is explained in more detail in relation to their individual penalty calculations below.

VI.383. In the case of Haymills and Holroyd, not only would the limitation of liability as set out in paragraphs VI.377 and VI.381 apply as necessary (however, this affects neither company), but in addition the OFT has made two separate penalty calculations, one for each set of Infringements involving a particular parent. In the case of Haymills, one penalty calculation has been made for the first two Infringements involving the turnover of Haymills and Corringway, while the other for the third Infringement has involved the turnover of Haymills and Haymills Group. In the case of Holroyd, one penalty calculation has been made for the first two Infringements involving the turnover of Holroyd and Holderness, while the other for the third Infringement has involved the turnover of Holroyd and Holroyd Group.

VI.384. This is explained in more detail in relation to these Parties' individual penalty calculations below, along with the fact that the OFT will be applying only one MDT to each of these undertakings – in both cases, for the penalty calculation involving the first two Infringements.

Application of the OFT's Leniency Policy

VI.385. As stated in paragraph II.1475 of the OFT's Investigation section above, each leniency Party will⁸⁷⁵⁵ benefit from a 100 per cent reduction in penalty for any

⁸⁷⁵⁴ Case T-112/05 *Akzo Nobel NV v Commission* [2007] ECR II-5049, at paragraph 90. See also Case T-9/99 *HFB* [2002] ECR II 1487, at paragraph 528 and Case T-71/03 *Tokai Carbon* [2005] ECR II-10 at paragraph 390.

⁸⁷⁵⁵ Subject to its continued compliance with the conditions on which leniency was granted, as indicated at paragraphs 3.9 to 3.17 of the OFT's Penalty Guidance, which was published on 21 December 2004. It is noted that three Parties, John Cawley, Bodill and Wildgoose, applied for leniency prior to the introduction of this guidance. The relevant guidance on leniency and penalties prior to 21 December 2004 was contained in OFT 423 '*Director General of Fair Trading's guidance as to the appropriate amount of a penalty*', (March 2000). In calculating penalties in respect of these three Parties, the OFT has exercised its discretion as to the applicability of this previous guidance to ensure that these Parties do not lose the benefit of any terms contained in that previous guidance.

Infringement where it informed the OFT about that Infringement before the OFT had been made aware of it from any other source, that is, where the OFT would not have known about the Infringement but for the disclosure by that leniency Party. Where two leniency Parties both informed the OFT, prior to being questioned by the OFT in interview, of bid rigging on a tender that involved both Parties, the Party that applied first for leniency will obtain the benefit of the 100 per cent But For immunity on that tender. Where there were two instances of bid rigging on a tender, each involving a different leniency Party, it would be possible for both leniency Parties to obtain 100 per cent But For immunity from penalty. The OFT's assessment of 100 per cent But For immunity is set out in relation to each involved leniency Party for each tender included in the Conduct of the Parties section above.

VI.386. As noted above, for the remaining Infringements involving leniency Parties, the OFT is imposing fines only in respect of a maximum of three Not But For Infringements (even though it may be the case that a leniency Party is involved in more than three Not But For Infringements). The OFT has concluded that the most objective way to select the three Infringements for penalty calculations is to impose fines in respect of the three most recent Not But For Infringements.

VI.387. Leniency Parties will⁸⁷⁵⁶ receive a reduced penalty (reduced by between 35 per cent and 65 per cent) where the OFT has learnt of an Infringement from an alternative source, for example, from evidence gathered during an inspection or from another Party. The same reduction percentage for each relevant leniency Party applies in respect of each of its Infringements, where the 100 per cent reduction described above does not apply.

VI.388. The level of the reduction percentage to be applied to leniency Parties has been decided on the basis of the overall value added by a leniency Party to the OFT's investigation and is being applied at the end of the calculation.⁸⁷⁵⁷ The OFT has assessed the value of the information provided by each leniency Party according to the following factors:

- (a) the number of Alleged Infringements in the Statement which the OFT would not have been able to investigate but for the evidence of that leniency Party;
- (b) the number of Alleged Infringements in respect of which that leniency Party provided contemporaneous evidence of cover pricing to the OFT in its leniency application, in particular where that evidence named the other Party(ies) involved in cover pricing;
- (c) the number of Alleged Infringements in respect of which that leniency Party made clear and unambiguous admissions of its involvement in cover pricing, both in its leniency application and in its interviews with the OFT;
- (d) the length of time between the OFT's inspection of or visit to that leniency Party's premises and that leniency Party's application for leniency; and

⁸⁷⁵⁶ Subject to their continued compliance with the conditions on which leniency was granted.

⁸⁷⁵⁷ See paragraph VI.389 below, and the Navigation Table at Annex A, which identify the leniency Parties.

- (e) in the case of John Cawley, the fact that it was the first Party to apply for leniency in this investigation.

VI.389. The reduction percentages applied to the Not But For Infringements of each leniency Party are as follows:

Leniency Parties with a 50 per cent reduction

Balfour Beatty Group
Bodill
Propensity
Thomas Vale
Wildgoose

Leniency Parties with a 45 per cent reduction

Admiral
Bluestone
Clegg
Derwent Valley
Harlow & Milner
Henry Boot
Herbert Baggaley
Hobson & Porter
Irwins and Jack Lunn
J H Hallam
Mowlem
Sol
Strata
York House

Leniency Parties with a 40 per cent reduction

Adam Eastwood
ARG
Bramall/Frank Haslam Milan
Frudd
John Cawley⁸⁷⁵⁸
Loach
P Waller
Phoenix
Simons/Wrights (Lincoln)
T & C Williams
Thomas Fish

Leniency Parties with a 35 per cent reduction

Arthur M Griffiths
Davlyn
W R Bloodworth

⁸⁷⁵⁸ John Cawley receives an additional 25 per cent leniency discount, making a total leniency discount of 65 per cent, due to the fact that it was the first Party to apply for leniency after the commencement of the OFT's investigation (see Penalty Guidance, paragraph 3.11).

- VI.390. Some leniency Parties⁸⁷⁵⁹ claimed that they should be entitled to a greater reduction than that awarded by the OFT, or otherwise criticised the OFT's approach to leniency in this case, although the majority of these claims and comments appeared to be based largely on a misunderstanding of the reason for the 65 per cent reduction awarded to John Cawley by virtue of its being first to apply for leniency. In any event, the OFT considers that the leniency reductions applied in this case are generous when considered in their overall context, and there is no basis for any further reductions.
- VI.391. Some leniency Parties claimed that they should be entitled to 100 per cent immunity on some of their Infringements where the OFT has given the relevant Party a leniency reduction. The OFT deals with such representations in the leniency assessment section of each Infringement in question.
- VI.392. Several leniency Parties disagreed with the OFT's decision to fine leniency applicants for up to three Not But For Infringements (see paragraph VI.386). Fish Holdings stated that this approach deprived it of any benefit from the leniency programme.⁸⁷⁶⁰ Thomas Vale stated that this policy leaves it no better off than undertakings which have not cooperated with the OFT.⁸⁷⁶¹
- VI.393. The OFT considers that the leniency Parties in this case are gaining considerable benefit in return for their cooperation. Despite the fact they may have infringed the Act on a large number of occasions, they are only being penalised for a maximum of three Infringements. Whilst they complain that this places them in the same position as non-leniency Parties (who are also being fined for a maximum of three Infringements), this ignores the fact that the leniency Parties are receiving substantial discounts on these penalties, whereas those who have failed to cooperate with the OFT will not. Contrary to the representations described above, the OFT is satisfied that the leniency Parties in this case are in a more favourable position than non-leniency Parties.
- VI.394. Thomas Vale also objected to the prospect of being named in this Decision as a participant in those other Infringements, in respect of which it is not being penalised (largely because it benefits from But For immunity), claiming that this exposure outweighs the benefits of leniency.⁸⁷⁶² The prospect of exposure, in the form of being named as a participant in an infringement decision, is one of the many factors that an undertaking must take into account as part of its overall assessment as to whether or not to apply for leniency. The OFT does not consider it reasonable for Thomas Vale to expect that, as a consequence of its leniency status, the OFT should not proceed to an infringement decision and name Thomas Vale as a participant in these Infringements. Moreover, Thomas Vale benefits substantially from the fact that it has complete immunity from penalty in respect of a substantial number of But For Infringements.
- VI.395. Both Thomas Vale and Wildgoose objected to the OFT's decision to stop its investigation at the stage it did. Wildgoose stated that, as an early leniency applicant it supplied evidence in relation to a large number of Infringements, but the OFT's decision to cease its investigation resulted in later leniency parties

⁸⁷⁵⁹ For example, written representations of Bramall and Frank Haslam Milan, 27 June 2008 (as amended 30 March 2009), paragraph 6.27; written representations of Bluestone, 27 June 2008, paragraph 7.3; and written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraph 6.60.

⁸⁷⁶⁰ Written representations of Fish Holdings, 27 June 2008, paragraph 7.

⁸⁷⁶¹ Written representations of Thomas Vale, 27 June 2008, paragraph 52.

⁸⁷⁶² Written representations of Thomas Vale, 27 June 2008, paragraph 52.

facing fewer Infringements and therefore potentially less exposure to civil penalties.⁸⁷⁶³ Thomas Vale submitted that the OFT cannot limit its investigation due to manpower and resource constraints when this would disadvantage certain companies because other guilty parties remain unpunished. The OFT does not accept these submissions. As noted above, being named as an infringing party and, consequently, facing potential liability for civil penalties is one of the factors to be taken into account in applying for leniency. By applying for leniency earlier, Wildgoose improved its chances of obtaining But For immunity for its Infringements. The history of this investigation, and the reasons for the selection and consolidation process, are outlined in the OFT's Investigation section above. The OFT does not consider that its approach to this investigation has in any way disadvantaged leniency Parties.

VI.396. Several Parties stated that they were unaware of the OFT's investigation until they received the OFT's Fast Track Offer, by which time the OFT was not accepting any further leniency applications in respect of this case. As a result, these Parties claim they were disadvantaged as they did not have the same opportunity to apply for leniency as those Parties that were visited or interviewed by the OFT earlier in the process.⁸⁷⁶⁴ This argument is without merit, as any undertaking can approach the OFT at any time to apply for leniency. There is no need for an investigation to be underway or a visit to have occurred before leniency can be sought. Consequently, these Parties had the same opportunity to apply for leniency as any other Party in this case.

VI.397. Similarly, Lindum submitted that it was prevented from applying for leniency because its Infringements were attributable to a 'rogue' employee without management knowledge.⁸⁷⁶⁵ The fact that its internal controls were insufficiently rigorous to prevent and/or identify illegal conduct on the part of its employees is a failing on the part of Lindum itself. This cannot be attributed as a defect in the OFT's leniency programme.

Application of the OFT's Fast Track Offer

VI.398. Around half of the non-lenieny Parties⁸⁷⁶⁶ accepted the OFT's Fast Track Offer (see paragraphs II.1481 to II.1494 of the OFT's Investigation section), whereby the OFT offered a reduction of 25 per cent of any penalty imposed, on an infringement by infringement basis. This offer was subject to the Party admitting its participation in the Infringements and certain other conditions. None of these Parties have withdrawn their acceptance of the Fast Track Offer in response to the evidence presented in the Statement. The OFT is applying the 25 per cent reduction at the end of step 5 in respect of each Infringement admitted by the relevant Party⁸⁷⁶⁷ (subject to the relevant Party continuing to comply with the conditions of the OFT's Fast Track Offer).

VI.399. Thomas Vale stated that the OFT's Fast Track Offer seriously undermined its position as a leniency applicant, as companies were favoured that had not

⁸⁷⁶³ Written representations of Wildgoose, 3 July 2008 (as amended 1 April 2009), paragraphs 6.17 to 6.19.

⁸⁷⁶⁴ For example, written representations of Adam Eastwood, 26 June 2008, point 6 on penalties; written representations of Interserve, 25 June 2008, paragraphs 5.43 – 5.44; written representations of Shaylor, 25 June 2008, paragraphs 4.17 to 4.18.

⁸⁷⁶⁵ Written representations of Lindum, 27 June 2008, paragraph 71.

⁸⁷⁶⁶ See the Navigation Table at Annex A, which identifies the Fast Track Parties.

⁸⁷⁶⁷ See the Navigation Table at Annex A, which identifies which Infringements were admitted by each Party.

assisted the investigation, had not provided detailed information and would not usually have had the option of leniency. It stated that the Fast Track Parties were unjustly getting a discount for expending much less cost and management time than that invested by Thomas Vale.⁸⁷⁶⁸ The background to the OFT's Fast Track Offer is set out in the OFT's Investigation section and is therefore not repeated here. The OFT considers that the assistance and cooperation provided to it by the Fast Track Parties does merit the 25 per cent reduction in penalty being awarded to them. The OFT does not consider this to be unjust in comparison with the 50 per cent leniency discount Thomas Vale is receiving in respect of its Not But For Infringements (in addition to But For immunity in respect of a substantial number of Infringements).

D. Individual penalty calculations

VI.400. The following tables set out the individual penalty calculations for each of the Parties. Unless stated otherwise, the penalty calculation methodology discussed in detail in the foregoing paragraphs of this section applies in respect of each Party. As both the individual penalty and the total penalty figures are rounded, differences of up to one pound may occur when adding individual penalties together to reach the total penalty. In such instances the total penalty figure takes precedence.

⁸⁷⁶⁸ Written representations of Thomas Vale, 27 June 2008, paragraph 61.

Party 1: A H Willis

VI.401. This Party did not apply for leniency or accept the OFT's Fast Track Offer, and it made no fresh admissions in response to the Statement. This Party was not involved in any compensation payments.

Penalty step		Infringement 188	Infringement 215	Infringement 224
Infringement date		16/04/2004	28/01/2005	27/05/2005
Product market		Private Housing	Private Housing	Private Housing
Geographic market		South East	South East	South East
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
		[C]		
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£120,018	
Final penalty after leniency/fast track			£120,018	

VI.402. In accordance with paragraph VI.215 above, as all three penalties are joint highest at the end of step 2, due to identical relevant turnover figures at step 1, the OFT is applying the MDT to the latest of the three Infringements.

VI.403. [...] [C]

VI.404. [...] [C]

[...] [C]

Party 2: ARG

VI.405. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 9	Infringement 133	Infringement 207
Infringement date		11/04/2000	19/12/2002	11/11/2004
Product market		Office	Entertainment (inc Leisure)	Retail
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty		£20,213		
Final penalty after leniency/fast track		£12,128		

Party 3: Ackroyd & Abbott together with its subsidiary Ackroyd & Abbott Construction

VI.406. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all three of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 47	Infringement 124	Infringement 227
Infringement date		31/01/2001	15/10/2002	13/06/2005
Product market		Public Housing	Education	Public Housing
Geographic market		Yorkshire & Humberside	East Midlands	Yorkshire & Humberside
Total turnover yr end		30/04/2009	30/04/2009	30/04/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/04/2009	30/04/2009	30/04/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-[10-15%]
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£49,581	
Final penalty after leniency/fast track			£49,581	

VI.407. [...] [C]

Party 4: Adam Eastwood together with its controlling party the Eastwood Foundation

VI.408. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step	Infringement 50	Infringement 108	Infringement 116
Infringement date	30/03/2001	15/05/2002	02/08/2002
Product market	Public Housing	Office	Public Housing
Geographic market	East Midlands	East Midlands	East Midlands
Total turnover yr end	31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	31/03/2009	31/03/2009	31/03/2009
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3	[C]	[C]	[C]
Step 4	Instigator	-	-
Aggravating/ Mitigating Factors	Directors	[5-10%]	[5-10%]
	Compliance	-	-
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	-40%	-40%	-100%
Final gross penalty		£12,298	
Final penalty after leniency/fast track		£2,006	

VI.409. [...] [C]

VI.410. The penalty for Infringement 116 is reduced to nil as this is a But For Infringement.

Party 5: Admiral together with (for infringements from 31 October 2003) its ultimate parent company A C Holdings

VI.411. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 53	Infringement 136	Infringement 214
Infringement date		19/04/2001	05/02/2003	23/12/2004
Product market		Education	Public Housing	Education
Geographic market		East Midlands	East Midlands	Yorkshire & Humberside
Total turnover yr end		30/06/2008	30/06/2008	30/06/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/06/2008	30/06/2008	30/06/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 2004 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-100%
Final gross penalty			£116,414	
Final penalty after leniency/fast track			£17,406	

VI.412. [...] [C]

VI.413. The penalty for Infringement 214 is reduced to nil as this is a But For Infringement.

Party 6: Allenbuild and Bullock together with the current ultimate parent company of Allenbuild and the former ultimate parent company of Bullock, Renew

VI.414. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step	Infringement 39	Infringement 137	Infringement 204	
Infringement date	20/12/2000	07/02/2003	21/10/2004	
Product market	Public Housing	Public Housing	Office	
Geographic market	Yorkshire & Humberside	West Midlands	East Midlands	
Total turnover yr end	30/09/2008	30/09/2008	30/09/2008	
Total worldwide turnover	£571,263,000	£390,557,000	£390,557,000	
Relevant turnover yr end	30/09/2008	30/09/2008	30/09/2008	
Relevant turnover	[C]	[C]	[C]	
Step 1 starting point	5%	5%	5%	
Penalty after step 1	[C]	[C]	[C]	
Duration multiplier	1	1	1	
Penalty after step 2	[C]	[C]	[C]	
Penalty as % of total t/o	[C]	[C]	[C]	
MDT to apply		[C]		
	[C]			
Penalty after step 3	[C]	[C]	[C]	
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	
	Directors	-	-	
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment	[C]	[C]	[C]	
Penalty after step 4	[C]	[C]	[C]	
% of total turnover	[C]	[C]	[C]	
% of pre 1/5/04 turnover	[C]	[C]	n/a	
Penalty after step 5	[C]	[C]	[C]	
Leniency/fast track	-25%	-25%	-25%	
Final gross penalty		£4,730,575		
Final penalty after leniency/fast track		£3,547,931		

VI.415. In respect of Infringement 39, the Participant Company involved in this Infringement was Bullock. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for this Infringement on the consolidated turnover of both (i) the Participant Company (Bullock) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Renew) that ultimately controlled the Participant Company at the time of the Infringement together with its current wholly/majority owned subsidiaries.

VI.416. In respect of Infringements 137 and 204, the Participant Company involved in these Infringements was Allenbuild. The OFT is therefore basing its penalty calculations for these Infringements on the consolidated turnover of Renew.

VI.417. [...] [C]

Party 7: Apollo together with its former ultimate parent company Apollo Group

VI.418. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 154	Infringement 199	Infringement 203
Infringement date		08/07/2003	08/07/2004	09/09/2004
Product market		Office	Retail	Private Housing
Geographic market		South East	London	London
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£2,150,536	
Final penalty after leniency/fast track			£2,150,536	

VI.419. [...] [C]

Party 8: Arthur M Griffiths

VI.420. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 49	Infringement 209	Infringement 244
Infringement date		16/03/2001	03/12/2004	09/06/2006
Product market		Health	Education	Office
Geographic market		West Midlands	West Midlands	West Midlands
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		£10,440,599	£10,440,599	£10,440,599
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-35%	-35%	-35%
Final gross penalty			£313,218	
Final penalty after leniency/fast track			£203,592	

Party 9: B & A

VI.421. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to both of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 95	Infringement 229
Infringement date		04/02/2002	24/06/2005
Product market		Entertainment (inc Leisure)	Education
Geographic market		East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	0%
Final gross penalty		£18,224	
Final penalty after leniency/fast track		£18,224	

Party 10: Baggaley & Jenkins

VI.422. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 61	Infringement 65	Infringement 112
Infringement date		29/05/2001	09/07/2001	31/05/2002
Product market		Public Housing	Education	Public Housing
Geographic market		Yorkshire & Humberside	East Midlands	East Midlands
Total turnover yr end		30/06/2009	30/06/2009	30/06/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/06/2009	30/06/2009	30/06/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£192,203	
Final penalty after leniency/fast track			£144,153	

Party 11: BBCL and BBRL (for infringements from 2000 onwards) and Mansell (for infringements from 19 December 2003), together with their current ultimate parent company Balfour Beatty plc. For infringements involving Mansell prior to 19 December 2003, Mansell and its former ultimate parent company Mansell plc

VI.423. This Party applied for and was granted leniency. This Party was involved in compensation payments.

Penalty step	Infringement 89	Infringement 104	Infringement 116
Infringement date	11/12/2001	22/04/2002	02/08/2002
Product market	Office	Education	Public Housing
Geographic market	East Midlands	West Midlands	East Midlands
Total turnover yr end	31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	31/12/2008	31/12/2008	31/12/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	7%	7%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	-50%	-50%	-50%
Final gross penalty	£10,394,008		
Final penalty after leniency/fast track	£5,197,004		

VI.424. All of this Party's three latest Not But For Infringements were committed by Mansell prior to its acquisition by Balfour Beatty. The penalties for these Infringements have therefore been calculated on the basis of the consolidated turnover of Mansell's ultimate parent at the time of the Infringements, Mansell plc.

VI.425. The turnover of Mansell plc includes an amount of [...] [C] reported by this Party to be the turnover of one of its subsidiaries for 2007. Since updated 2008 figures for this subsidiary were not available, and the 2008 figure was expected by this Party to be of a similar amount, the OFT has used this figure as a proxy for that subsidiary's turnover for 2008.

VI.426. As this Party was involved in at least one Infringement involving a compensation payment, the MDT at step 3 is set at 1.05 per cent of total turnover in its last business year. For the Infringements that were compensation payments, the starting point is set at 7 per cent of total turnover in its last business year.

Party 12: Ballast Nedam as the ultimate parent company of its dissolved subsidiary Ballast

VI.427. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 41	Infringement 47	Infringement 48
Infringement date		11/01/2001	31/01/2001	09/02/2001
Product market		Defence	Public Housing	Education
Geographic market		East Midlands	Yorkshire & Humberside	South East
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£11,110,821	
Final penalty after leniency/fast track			£8,333,116	

VI.428. Although the Participant Company entered into liquidation in 2004, its ultimate parent continues to trade and the OFT has therefore used the total and relevant turnover figures from the ultimate parent in its last business year.

VI.429. [...] [C]

VI.430. All turnover figures for this Party are in Euros and have therefore been converted into pounds sterling using the average European Central Bank exchange rate for 2008, to be found at www.ecb.int/stats/exchange/eurofxref/html/index.en.html.

Party 13: Beaufort together with its ultimate parent company Beaufort Holdings

VI.431. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 34	Infringement 66	Infringement 152
Infringement date		05/12/2000	13/07/2001	27/06/2003
Product market		Office	Education	Public Housing
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£111,604	
Final penalty after leniency/fast track			£83,703	

Party 14: Bodill

VI.432. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 127	Infringement 160	Infringement 204
Infringement date		13/11/2002	01/08/2003	21/10/2004
Product market		Public Housing	Public Housing	Office
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
[C]				
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-50%	-50%	-50%
Final gross penalty			£109,695	
Final penalty after leniency/fast track			£54,848	

VI.433. [...] [C]

Party 15: Bowmer & Kirkland together with its subsidiary BKPS

VI.434. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of one of its Infringements. In its response to the Statement, however, it made fresh admissions in relation to its two remaining Infringements. This Party was involved in a compensation payment.

Penalty step		Infringement 18	Infringement 85	Infringement 134
Infringement date		11/08/2000	03/12/2001	24/01/2003
Product market		Retail	Other Industrial Buildings	Education
Geographic market		West Midlands	East Midlands	East Midlands
Total turnover yr end		31/08/2008	31/08/2008	31/08/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/08/2008	31/08/2008	31/08/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	7%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	-25%
Final gross penalty			£9,782,543	
Final penalty after leniency/fast track			£7,574,736	

VI.435. As this Party was involved in at least one Infringement involving a compensation payment, the MDT at step 3 is set at 1.05 per cent of total turnover in its last business year. For the Infringement that was a compensation payment, the starting point is set at 7 per cent of total turnover in its last business year.

Party 16: Bramall and Frank Haslam Milan together with their ultimate parent company Keepmoat

VI.436. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 57	Infringement 123	Infringement 179
Infringement date		30/04/2001	11/10/2002	09/02/2004
Product market		Education	Public Housing	Entertainment (inc Leisure)
Geographic market		Yorkshire & Humberside	North East	North West
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-100%	-100%
Final gross penalty			£5,848,183	
Final penalty after leniency/fast track			£455,235	

VI.437. [...] [C]

VI.438. The penalties for Infringements 123 and 179 are reduced to nil as these are But For Infringements.

Party 17: C J Ellmore

VI.439. This Party did not apply for leniency or accept the OFT's Fast Track Offer, and it made no fresh admissions in response to the Statement. This Party was not involved in any compensation payments.

Penalty step	Infringement 7	Infringement 94	Infringement 105
Infringement date	08/03/2000	23/01/2002	23/04/2002
Product market	Education	Entertainment (inc Leisure)	Health
Geographic market	Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end	30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover	£14,350,074	£14,350,074	£14,350,074
Relevant turnover yr end	30/09/2008	30/09/2008	30/09/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	0%	0%	0%
Final gross penalty		£295,979	
Final penalty after leniency/fast track		£295,979	

VI.440. C J Ellmore was only able to provide turnover figures to the OFT for the 10 month period to 30 September 2008, and informed the OFT that figures for the remainder of its business year were not finalised prior to the company going into administration. In accordance with paragraphs VI.96, VI.254 and VI.374 above, the OFT has therefore used these figures and multiplied them by 12/10 in order to arrive at a full year's turnover figures.

Party 18: Caddick together with its ultimate parent company Caddick Group

VI.441. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 35	Infringement 205	Infringement 211
Infringement date		08/12/2000	25/10/2004	08/12/2004
Product market		Entertainment (inc Leisure)	Private Housing	Public Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/08/2008	31/08/2008	31/08/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/08/2008	31/08/2008	31/08/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£521,764	
Final penalty after leniency/fast track			£391,323	

Party 19: Mowlem

VI.442. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 27	Infringement 39	Infringement 210
Infringement date		16/10/2000	20/12/2000	03/12/2004
Product market		Police/Fire & Rescue	Public Housing	Education
Geographic market		North East	Yorkshire & Humberside	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-100%	-45%	-45%
Final gross penalty			£11,311,460	
Final penalty after leniency/fast track			£5,375,689	

VI.443. Carillion transferred a portion of Mowlem's trade to other parts of its business at the beginning of 2008. Whilst the OFT is not generally holding a new parent liable where it is in the position of Carillion, that is it has acquired the Participant Company after the Infringement and either the Participant Company or its previous parent company still exists, the OFT considers that if all or a significant portion of trade/turnover has transferred to the new parent from the Participant Company, it would be contrary to the effective enforcement of competition law not to take account of that trade/turnover when calculating the applicable penalty. The OFT has therefore included this portion of turnover in its penalty calculation.

VI.444. [...] [C]

VI.445. The penalty for Infringement 27 is reduced to nil as this is a But For Infringement.

Party 20: Clegg together with its ultimate parent company D E Clegg

VI.446. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 139	Infringement 168	Infringement 212
Infringement date		28/02/2003	21/10/2003	14/12/2004
Product market		Other Industrial Buildings	Health	Education
Geographic market		North West	East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-100%
Final gross penalty			£709,449	
Final penalty after leniency/fast track			£359,967	

VI.447. The penalty for Infringement 212 is reduced to nil as this is a But For Infringement.

Party 21: Connaught together with its ultimate parent company Connaught plc

VI.448. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to two out of three of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 22	Infringement 123	Infringement 175
Infringement date		07/09/2000	11/10/2002	22/12/2003
Product market		Public Housing	Public Housing	Public Housing
Geographic market		South East	North East	Yorkshire & Humberside
Total turnover yr end		31/08/2008	31/08/2008	31/08/2008
Total worldwide turnover		£552,900,000	£552,900,000	£552,900,000
Relevant turnover yr end		31/08/2008	31/08/2008	31/08/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-	-[10-15%]
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£5,568,868	
Final penalty after leniency/fast track			£5,568,868	

VI.449. [...] [C]

Party 22: Crown Point as the ultimate parent company of its dissolved subsidiary Greenwood, for Greenwood's infringements after 11 June 2002

VI.450. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all three of its Infringements. This Party was not involved in any compensation payments.

Penalty step	Infringement 118	Infringement 133	Infringement 158
Infringement date	06/09/2002	19/12/2002	25&30/07/2003
Product market	Education	Entertainment (inc Leisure)	Entertainment (inc Leisure)
Geographic market	East Midlands	East Midlands	East Midlands
Total turnover yr end	31/05/2008	31/05/2008	31/05/2008
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	31/05/2008	31/05/2008	31/05/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
	[C]		
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-	-
	Cooperation	-[10-15%]	-[10-15%]
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	0%	0%	0%
Final gross penalty		£3,571	
Final penalty after leniency/fast track		£3,571	

VI.451. [...] [C]

VI.452. [...] [C]

VI.453. For the purposes of the dual check against UK turnover in the business year preceding date of Infringement for Infringements ending prior to 1 May 2004, detailed in paragraph VI.370 above, for Infringements 118 and 133 where the business year preceding date of Infringement also preceded the date of purchase of Greenwood by Crown Point, the OFT has calculated the check against the combined consolidated turnover for business year ending 31 May 2002 of both (i) Crown Point and (ii) Greenwood.

Party 23: Davlyn

VI.454. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 72	Infringement 84	Infringement 164
Infringement date		24/08/2001	30/11/2001	22/09/2003
Product market		Office	Education	Other Industrial Buildings
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-35%	-35%	-35%
Final gross penalty			£112,179	
Final penalty after leniency/fast track			£72,916	

Party 24: Derwent Valley together with its ultimate parent company Chevin

VI.455. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 144	Infringement 152	Infringement 164
Infringement date		14/04/2003	27/06/2003	22/09/2003
Product market		Public Housing	Public Housing	Other Industrial Buildings
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-45%
Final gross penalty			£44,577	
Final penalty after leniency/fast track			£24,517	

VI.456. [...] [C]

Party 25: Dukeries

VI.457. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of one of its Infringements. In its response to the Statement, it made fresh admissions in relation to its two remaining Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 144	Infringement 160	Infringement 207
Infringement date		14/04/2003	01/08/2003	11/11/2004
Product market		Public Housing	Public Housing	Retail
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		30/09/2007	30/09/2007	30/09/2007
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/09/2007	30/09/2007	30/09/2007
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
[C]				
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	-25%
Final gross penalty			£99,778	
Final penalty after leniency/fast track			£99,773	

VI.458. Although Dukeries continued to trade until it entered administration on 9 December 2008, it was only able to provide turnover figures to the OFT for the business year ending 30 September 2007. Consistent with paragraphs VI.95, VI.254 and VI.374 above, the OFT has therefore used these figures as the basis for its penalty calculations.

VI.459. [...] [C]

VI.460. [...] [C]

VI.461. [...] [C]

Party 26: Durkan and Durkan Limited together with the former ultimate parent company of Durkan and the current ultimate parent company of Durkan Limited, Durkan Holdings

VI.462. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of two of its Infringements. This Party was involved in a compensation payment.

Penalty step		Infringement 135	Infringement 220	Infringement 240
Infringement date		27/01/2003	29/03/2005	02/02/2006
Product market		Office	Public Housing	Public Housing
Geographic market		London	London	London
Total turnover yr end		31/01/2009	31/01/2009	31/01/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/01/2009	31/01/2009	31/01/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		7%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
		[C]		
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	-	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	0%	-25%
Final gross penalty			£7,862,496	
Final penalty after leniency/fast track			£6,720,551	

VI.463. In respect of Infringements 135 and 240, the Participant Company involved in these Infringements was Durkan. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for these Infringements on the consolidated turnover of both (i) the Participant Company (Durkan) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Durkan Holdings) that ultimately controlled the Participant Company at the time of the Infringements together with its current wholly/majority owned subsidiaries.

VI.464. In respect of Infringement 220, the Participant Company involved in this Infringement was Durkan Limited. The OFT is therefore basing its penalty calculation for this Infringement on the consolidated turnover of Durkan Holdings.

VI.465. For Durkan, the business year preceding the Decision was the 11 month period ending 31 December 2008. In accordance with paragraphs VI.96, VI.254 and VI.374 above, the OFT has therefore used these figures and multiplied them by 12/11 in order to arrive at a full year's turnover figures.

VI.466. As this Party was involved in at least one Infringement involving a compensation payment, the MDT at step 3 is set at 1.05 per cent of total turnover in its last business year. For the Infringement that was a compensation payment, the starting point is set at 7 per cent of total turnover in its last business year.

VI.467. [...] [C]

VI.468. [...] [C]

Party 27: E Manton

VI.469. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.*

Penalty step		Infringement 53	Infringement 68
Infringement date		19/04/2001	30/07/2001
Product market		Education	Public Housing
Geographic market		East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]
Penalty after step 5		[C]	[C]
Leniency/fast track		-25%	-25%
Final gross penalty		£156,867	
Final penalty after leniency/fast track		£117,650	

VI.470. [...] [C]

* The following table reflects a revision of this Party's penalty issued on 5 November 2009, in order to correct an administrative error in the Decision as issued on 21 September 2009.

Party 28: E Taylor trading as Carmalor

VI.471. This Party did not apply for leniency or accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 29	Infringement 115	Infringement 141
Infringement date		08/11/2000	12/07/2002	03/03/2003
Product market		Public Housing	Education	Public Housing
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/08/2008	31/08/2008	31/08/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/08/2008	31/08/2008	31/08/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£59,261	
Final penalty after leniency/fast track			£59,261	

Party 29: F Parkinson together with its ultimate parent company Mowbray

VI.472. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 128	Infringement 139	Infringement 221
Infringement date		22/11/2002	28/02/2003	01/04/2005
Product market		Entertainment (inc Leisure)	Other Industrial Buildings	Entertainment (inc Leisure)
Geographic market		North East	North West	Yorkshire & Humberside
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		£23,556,298	£23,556,298	£23,556,298
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	[5-10%]	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£232,147	
Final penalty after leniency/fast track			£174,110	

VI.473. [...] [C]

Party 30: Francis together with its ultimate parent company Barrett

VI.474. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 69	Infringement 208	Infringement 234
Infringement date		13/08/2001	12/11/2004	24/08/2005
Product market		Education	Public Housing	Education
Geographic market		South East	South East	South East
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-[10-15%]
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£530,238	
Final penalty after leniency/fast track			£530,238	

VI.475. [...] [C]

Party 31: Frudd

VI.476. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 112	Infringement 163	Infringement 178
Infringement date		31/05/2002	05/09/2003	30/01/2004
Product market		Public Housing	Public Housing	Education
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/10/2006	31/10/2006	31/10/2006
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/10/2006	31/10/2006	31/10/2006
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty			£109,794	
Final penalty after leniency/fast track			£65,876	

VI.477. Frudd was unable to provide turnover figures to the OFT for its most recent business year ending 31 March 2008 because it went into administration on 4 January 2007. Frudd was only able to provide a total turnover figure to the OFT for the 7 month period to 31 October 2006. Consistent with paragraphs VI.254 and VI.374 above, the OFT has therefore used this figure and multiplied it by 12/7 in order to arrive at a full year's turnover figure.

VI.478. Frudd informed the OFT that all of its records had been destroyed or were impossible to access and that it was therefore unable to provide any relevant turnover figures. In accordance with paragraph VI.98 above, the OFT is therefore using a proxy figure of 2.9 per cent for Frudd's relevant turnover figures, and applying this percentage to Frudd's most recent total turnover figure before applying the starting point of 5 per cent.

VI.479. [...] [C]

Party 32: GAJ together with its ultimate parent company GAJ Holdings

VI.480. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 174
Infringement date		22/12/2003
Product market		Other Industrial Buildings
Geographic market		West Midlands
Total turnover yr end		30/06/2008
Total worldwide turnover		£20,525,508
Relevant turnover yr end		30/06/2008
Relevant turnover		[C]
Step 1 starting point		5%
Penalty after step 1		[C]
Duration multiplier		1
Penalty after step 2		[C]
Penalty as % of total t/o		[C]
MDT to apply		[C]
Penalty after step 3		[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-
	Directors	-
	Compliance	-[5-10%]
	Cooperation	-
Total step 4 adjustment		[C]
Penalty after step 4		[C]
% of total turnover		[C]
% of pre 1/5/04 turnover		[C]
Penalty after step 5		[C]
Leniency/fast track		-25%
Final gross penalty		£146,244
Final penalty after leniency/fast track		£109,683

Party 33: G Carter

VI.481. This Party did not apply for leniency or accept the OFT's Fast Track Offer, and it made no fresh admissions in response to the Statement. This Party was not involved in any compensation payments.

Penalty step		Infringement 82	Infringement 147	Infringement 169
Infringement date		20/11/2001	13/05/2003	28/10/2003
Product market		Prisons	Health	Prisons
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/01/2008	31/01/2008	31/01/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/01/2008	31/01/2008	31/01/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£91,466	
Final penalty after leniency/fast track			£91,466	

VI.482. G Carter was only able to provide a total turnover figure to the OFT for the 9 month period to 31 January 2008, because it has been in liquidation since 19 March 2008. In accordance with paragraphs VI.254 and VI.374 above, the OFT has therefore used this figure and multiplied it by 12/9 in order to arrive at a full year's turnover figure.

VI.483. G Carter was unable to provide any relevant turnover figures to the OFT for its most recent business year as all of its relevant records have been destroyed or were impossible to access. G Carter was, however, able to provide relevant turnover figures for its business year ending 30 April 2007. In accordance with paragraph VI.99 above, the OFT is therefore using a proxy figure for G Carter's relevant turnover figures, based on the percentage of total turnover represented by G Carter's relevant turnover in its business year ending 30 April 2007, applied to G Carter's most recent total turnover figure calculated as described in the preceding paragraph. The OFT is then applying the starting point of 5 per cent to this proxy figure.

VI.484. [...] [C]

Party 34: G F Tomlinson together with its ultimate parent company G F Tomlinson Group

VI.485. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 46	Infringement 187	Infringement 201
Infringement date		22/01/2001	16/04/2004	30/07/2004
Product market		Private Housing	Education	Office
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£1,692,359	
Final penalty after leniency/fast track			£1,269,270	

Party 35: G G Middleton

VI.486. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 149	Infringement 156	Infringement 187
Infringement date		23/06/2003	15/07/2003	16/04/2004
Product market		Health	Education	Education
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£0	
Final penalty after leniency/fast track			£0	

VI.487. [...] [C]

VI.488. By virtue of the check against this Party's total turnover in its last business year, carried out at step 5 of the penalty calculation and discussed in paragraph VI.369 above, G G Middleton's penalty is reduced to nil.

Party 36: G & J Seddon together with its ultimate parent company Seddon

VI.489. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 23	Infringement 39	Infringement 176
Infringement date		15/09/2000	20/12/2000	28/01/2004
Product market		Entertainment (inc Leisure)	Public Housing	Public Housing
Geographic market		North West	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£2,022,195	
Final penalty after leniency/fast track			£1,516,646	

Party 37: GMI together with (for infringements after 6 February 2005) its current ultimate parent company GMI Construction Holdings

VI.490. This Party did not apply for leniency or accept the OFT's Fast Track Offer, and it made no fresh admissions in response to the Statement. This Party was not involved in any compensation payments.

Penalty step		Infringement 14	Infringement 228
Infringement date		12/06/2000	20/06/2005
Product market		Office	Education
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	0%
Final gross penalty		£1,752,584	
Final penalty after leniency/fast track		£1,752,584	

VI.491. In its representations on the Statement, GMI suggested that turnover for its 'connected companies' should be excluded on the grounds that this was negotiated work and in GMI's view should therefore have constituted a different market.⁸⁷⁶⁹ However, as explained in paragraphs II.1673 to II.1694 of the Market Definition section above, the OFT considers that negotiated work does not constitute a separate market and this turnover for GMI's 'connected companies' has therefore been included in the above calculations.

VI.492. The penalty for Infringement 14 is calculated on the basis of the consolidated turnover of GMI as this Infringement occurred before its purchase by GMI Construction Holdings. The penalty for Infringement 228 is calculated on the basis of the consolidated turnover of GMI Construction Holdings.

⁸⁷⁶⁹ Written representations of GMI, 26 June 2008, paragraphs 88 to 89 and supplementary letter dated 13 January 2009.

Party 38: Geo Houlton together with its ultimate parent company Geo Houlton Holdings

VI.493. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 83	Infringement 194	Infringement 226
Infringement date		28/11/2001	11/06/2004	08/06/2005
Product market		Office	Health	Office
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/04/2009	30/04/2009	30/04/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/04/2009	30/04/2009	30/04/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£353,990	
Final penalty after leniency/fast track			£265,492	

VI.494. [...] [C]

Party 39: Greswolde together with its ultimate parent company Mantisson

VI.495. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 20	Infringement 58	Infringement 102
Infringement date		18/08/2000	08/05/2001	15/04/2002
Product market		Private Housing	Private Housing	Office
Geographic market		West Midlands	West Midlands	West Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£224,746	
Final penalty after leniency/fast track			£168,559	

Party 40: Hall

VI.496. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 122	Infringement 172	Infringement 236
Infringement date		25/09/2002	05/12/2003	07/11/2005
Product market		Education	Other Industrial Buildings	Education
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£359,511	
Final penalty after leniency/fast track			£269,634	

VI.497. [...] [C]

Party 41: Harlow & Milner

VI.498. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 138	Infringement 237	Infringement 241
Infringement date		12/02/2003	14/11/2005	13/02/2006
Product market		Office	Education	Public Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-100%	-100%	-45%
Final gross penalty			£163,289	
Final penalty after leniency/fast track			£23,170	

VI.499. [...] [C]

VI.500. The penalties for Infringements 138 and 237 are reduced to nil as these are But For Infringements.

Party 42: Harold Adkin

VI.501. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 118	Infringement 152	Infringement 196
Infringement date		06/09/2002	27/06/2003	30/06/2004
Product market		Education	Public Housing	Retail
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	-	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£7,914	
Final penalty after leniency/fast track			£5,936	

VI.502. [...] [C]

Party 43: Haymills together with (for infringements prior to 26 May 2004) its former ultimate parent company Corringway and (for infringements after 26 May 2004) its current ultimate parent company Haymills Group

VI.503. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 103	Infringement 119	Infringement 232
Infringement date		16/04/2002	16/09/2002	29/07/2005
Product market		Health	Health	Private Housing
Geographic market		East of England	East of England	East of England
Total turnover yr end		31/03/2008 + 20 04	31/03/2008 + 20 04	31/03/2008
Total worldwide turnover		£205,577,000	£205,577,000	£181,195,000
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
[C]				
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£1,041,921	
Final penalty after leniency/fast track			£781,440	

VI.504. In respect of Infringements 103 and 119, at the time of these Infringements the ultimate parent of the Participant Company Haymills was Corringway. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for these Infringements on the consolidated turnover of both (i) the Participant Company (Haymills) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Corringway) that ultimately controlled the Participant Company at the time of the Infringement together with its current wholly/majority owned subsidiaries.

VI.505. In respect of Infringement 232, at the time of this Infringement the ultimate parent of the Participant Company Haymills was its current ultimate parent Haymills Group. The OFT is therefore basing its penalty calculation for this Infringement on the consolidated turnover of Haymills Group.

VI.506. Although Corringway continued to trade until it went into liquidation in September 2004, it was only able to provide turnover figures to the OFT for the business year ending 31 March 2003. Consistent with paragraphs VI.95, VI.254 and VI.374 above, the OFT has therefore used these figures as the

basis for the Corringway turnover element of its penalty calculations for Infringements 103 and 119. Since the Corringway turnover figures included an amount for the 2002/2003 turnover of Haymills and since the OFT is adding the latest turnover figures for Haymills (that is, the turnover for its business year ending 31 March 2008) to the turnover figures for Corringway, the Haymills element of Corringway's 2002/2003 turnover figures is being removed before adding Haymills' 2007/2008 turnover figures, in order to avoid double counting.

VI.507. [...] [C]

VI.508. [...] [C]

Party 44: Henry Boot together with its ultimate parent company Henry Boot plc

VI.509. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 47	Infringement 149	Infringement 175
Infringement date		31/01/2001	23/06/2003	22/12/2003
Product market		Public Housing	Health	Public Housing
Geographic market		Yorkshire & Humberside	East Midlands	Yorkshire & Humberside
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-100%	-100%
Final gross penalty			£4,009,881	
Final penalty after leniency/fast track			£1,074,441	

VI.510. [...] [C]

VI.511. The penalties for Infringements 149 and 175 are reduced to nil as these are But For Infringements.

Party 45: Herbert Baggaley together with its ultimate parent company Baggaley Group

VI.512. This Party applied for and was granted leniency. This Party was involved in compensation payments.

Penalty step		Infringement 146	Infringement 158	Infringement 168
Infringement date		12/05/2003	25&30/07/2003	21/10/2003
Product market		Education	Entertainment (inc Leisure)	Health
Geographic market		West Midlands	East Midlands	East Midlands
Total turnover yr end		30/06/2009	30/06/2009	30/06/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/06/2009	30/06/2009	30/06/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		7%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-45%
Final gross penalty			£360,079	
Final penalty after leniency/fast track			£198,043	

VI.513. As this Party was involved in at least one Infringement involving a compensation payment, the MDT at step 3 is set at 1.05 per cent of total turnover in its last business year. For the Infringement that was a compensation payment, the starting point is set at 7 per cent of total turnover in its last business year.

VI.514. [...] [C]

Party 46: Hill

VI.515. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all three of its Infringements. This Party was not involved in any compensation payments.

Penalty step	Infringement 67	Infringement 110	Infringement 184
Infringement date	25/07/2001	30/05/2002	05/03/2004
Product market	Education	Public Housing	Education
Geographic market	East Midlands	East Midlands	East Midlands
Total turnover yr end	30/11/2008	30/11/2008	30/11/2008
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	30/11/2008	30/11/2008	30/11/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	[5-10%]
	Compliance	-	-
	Cooperation	-[10-15%]	-[10-15%]
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	0%	0%	0%
Final gross penalty		£5,808	
Final penalty after leniency/fast track		£5,808	

Party 47: Hobson & Porter

VI.516. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 230	Infringement 236	Infringement 238
Infringement date		25/07/2005	07/11/2005	28/11/2005
Product market		Private Housing	Education	Education
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
			[C]	
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-45%
Final gross penalty			£1,044,558	
Final penalty after leniency/fast track			£574,507	

VI.517. [...] [C]

VI.518. [...] [C]

Party 48: Holroyd together with (for infringements prior to 30 March 2005) its former ultimate parent company Holderness and (for infringements after 30 March 2005) its current ultimate parent company Holroyd Group

VI.519. This Party did not apply for leniency or accept the OFT's Fast Track Offer, and it made no fresh admissions in response to the Statement. This Party was not involved in any compensation payments.

Penalty step	Infringement 31	Infringement 125	Infringement 231
Infringement date	27/11/2000	28/10/2002	29/07/2005
Product market	Places of Worship	Office	Office
Geographic market	Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end	30/06/2007	30/06/2007	30/06/2007
Total worldwide turnover	£20,115,275	£20,115,275	£15,541,822
Relevant turnover yr end	30/06/2007	30/06/2007	30/06/2007
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
	[C]		
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-	-
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	n/a
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	0%	0%	0%
Final gross penalty		£200,784	
Final penalty after leniency/fast track		£200,784	

VI.520. In respect of Infringements 31 and 125, at the time of these Infringements the ultimate parent of the Participant Company Holroyd was Holderness. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for these Infringements on the consolidated turnover of both (i) the Participant Company (Holroyd) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Holderness) that ultimately controlled the Participant Company at the time of the Infringement together with its current wholly/majority owned subsidiaries.

VI.521. In respect of Infringement 231, at the time of this Infringement the ultimate parent of the Participant Company Holroyd was its current ultimate parent Holroyd Group. The OFT is therefore basing its penalty calculation for this Infringement on the consolidated turnover of Holroyd Group.

VI.522. Both Holroyd and Holroyd Group are now in administration, and this Party has only been able to provide turnover figures to the OFT for the business year ending 30 June 2007. Consistent with paragraphs VI.95, VI.254 and VI.374

above, the OFT has therefore used these figures as the basis for its penalty calculations.

VI.523. In the interests of effective enforcement, the OFT is applying the MDT to one of the two Infringements for which Holderness was the ultimate parent. [...] [C]

VI.524. [...] [C]

Party 49: Interclass together with its ultimate parent company Interclass Holdings

VI.525. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 75	Infringement 150
Infringement date		18/09/2001	25/06/2003
Product market		Education	Education
Geographic market		West Midlands	West Midlands
Total turnover yr end		31/10/2008	31/10/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/10/2008	31/10/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]
Penalty after step 5		[C]	[C]
Leniency/fast track		-25%	-25%
Final gross penalty		£619,207	
Final penalty after leniency/fast track		£464,406	

VI.526. [...] [C]

VI.527. [...] [C]

Party 50: Interserve together with its ultimate parent company Interserve plc

VI.528. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of one of its Infringements. In its response to the Statement, it made a fresh admission in relation to its one remaining Infringement. This Party was not involved in any compensation payments.

Penalty step		Infringement 27	Infringement 36
Infringement date		16/10/2000	08/12/2000
Product market		Police/Fire & Rescue	Private Housing
Geographic market		North East	West Midlands
Total turnover yr end		31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	-25%
Final gross penalty		£14,841,000	
Final penalty after leniency/fast track		£11,634,750	

VI.529. [...] [C]

Party 51: Irwins and Jack Lunn together with their ultimate parent company Jack Lunn Holdings

VI.530. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 205	Infringement 231	Infringement 241
Infringement date		25/10/2004	29/07/2005	13/02/2006
Product market		Private Housing	Office	Public Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		£17,340,180	£44,748,235	£17,340,180
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-45%
Final gross penalty			£572,605	
Final penalty after leniency/fast track			£314,933	

VI.531. In respect of Infringement 231, the Participant Company involved in this Infringement was Irwins. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for this Infringement on the consolidated turnover of both (i) the Participant Company (Irwins) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Jack Lunn Holdings) that ultimately controlled the Participant Company at the time of the Infringement together with its current wholly/majority owned subsidiaries.

VI.532. In respect of Infringements 205 and 241, the Participant Company involved in these Infringements was Jack Lunn. The OFT is therefore basing its penalty calculations for these Infringements on the consolidated turnover of Jack Lunn Holdings.

VI.533. The most recent business year in respect of which Irwins has provided turnover figures is the six month period ending 31 March 2008. As this is not a period in excess of six months, the OFT is in accordance with paragraphs VI.95, VI.254 and VI.374 above using the turnover figures from the most recent period in excess of six months, that is, the business year ending 30 September 2007. For Jack Lunn Holdings the OFT is using the turnover figures for the business year ending 30 September 2008, which have been confirmed not to include any turnover for Irwins.

Party 52: J Harper together with its ultimate parent company Harper plc

VI.534. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 121	Infringement 219
Infringement date		23/09/2002	28/02/2005
Product market		Public Housing	Public Housing
Geographic market		West Midlands	West Midlands
Total turnover yr end		31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
		[C]	
Revised pen. after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a
Penalty after step 5		[C]	[C]
Leniency/fast track		-25%	-25%
Final gross penalty		£950	
Final penalty after leniency/fast track		£713	

VI.535. [...] [C]

VI.536. [...] [C]

VI.537. [...] [C]

[...] [C]

Party 53: J H Hallam together with its ultimate parent company Hallam

VI.538. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step	Infringement 95	Infringement 96	Infringement 183
Infringement date	04/02/2002	07/02/2002	05/03/2004
Product market	Entertainment (inc Leisure)	Education	Education
Geographic market	East Midlands	East Midlands	East Midlands
Total turnover yr end	31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	31/03/2009	31/03/2009	31/03/2009
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3	[C]	[C]	[C]
		[C]	
Revised pen. after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	-45%	-45%	-45%
Final gross penalty		£653,796	
Final penalty after leniency/fast track		£359,588	

VI.539. [...] [C]

VI.540. [...] [C]

VI.541. [...] [C]

Party 54: J J & A R Jackson

VI.542. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step	Infringement 8	Infringement 9	Infringement 80
Infringement date	14/03/2000	11/04/2000	01/11/2001
Product market	Public Housing	Office	Public Housing
Geographic market	Yorkshire & Humberside	East Midlands	East Midlands
Total turnover yr end	30/11/2008	30/11/2008	30/11/2008
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	30/11/2008	30/11/2008	30/11/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
	[C]		
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-	-
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	-25%	-25%	-25%
Final gross penalty		£38,617	
Final penalty after leniency/fast track		£28,963	

VI.543. [...] [C]

Party 55: J J McGinley together with its former ultimate parent company McGinley Holdings

VI.544. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 43	Infringement 91	Infringement 97
Infringement date		17/01/2001	19/12/2001	07/02/2002
Product market		Public Housing	Public Housing	Public Housing
Geographic market		South East	South East	South East
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
			[C]	
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£977,201	
Final penalty after leniency/fast track			£732,901	

VI.545. In accordance with paragraph VI.58 above, the OFT is basing its penalty calculations for this Party on the consolidated turnover of both (i) the Participant Company (J J McGinley) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (McGinley Holdings) that ultimately controlled the Participant Company at the time of the Infringements together with its current wholly/majority owned subsidiaries.

VI.546. [...] [C]

VI.547. [...] [C]

VI.548. [...] [C]

Party 56: John Cawley

VI.549. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 55	Infringement 56	Infringement 171
Infringement date		27/04/2001	27/04/2001	12/11/2003
Product market		Education	Education	Health
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-65%	-65%	-65%
Final gross penalty			£15,646	
Final penalty after leniency/fast track			£5,476	

VI.550. [...] [C]

Party 57: John Sisk together with its ultimate parent company Sicon

VI.551. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 166
Infringement date		01/10/2003
Product market		Office
Geographic market		West Midlands
Total turnover yr end		31/12/2008
Total worldwide turnover		[C]
Relevant turnover yr end		31/12/2008
Relevant turnover		[C]
Step 1 starting point		5%
Penalty after step 1		[C]
Duration multiplier		1
Penalty after step 2		[C]
Penalty as % of total t/o		[C]
MDT to apply		[C]
Penalty after step 3		[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-
	Directors	-
	Compliance	-[5-10%]
	Cooperation	-
Total step 4 adjustment		[C]
Penalty after step 4		[C]
% of total turnover		[C]
% of pre 1/5/04 turnover		[C]
Penalty after step 5		[C]
Leniency/fast track		-25%
Final gross penalty		£8,255,503
Final penalty after leniency/fast track		£6,191,627

VI.552. All turnover figures for this Party are in Euros and have therefore been converted into pounds sterling using the average European Central Bank exchange rate for 2008, to be found at www.ecb.int/stats/exchange/eurofxref/html/index.en.html.

Party 58: K J Bryan

VI.553. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 34	Infringement 38	Infringement 133
Infringement date		05/12/2000	15/12/2000	19/12/2002
Product market		Office	Education	Entertainment (inc Leisure)
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/07/2008	31/07/2008	31/07/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/07/2008	31/07/2008	31/07/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£23,930	
Final penalty after leniency/fast track			£23,930	

VI.554. [...] [C]

VI.555. [...] [C]

Party 59: Kier together with its ultimate parent company Kier Group

VI.556. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 77	Infringement 162	Infringement 235
Infringement date		01/10/2001	08/08/2003	19/09/2005
Product market		Education	Education	Distribution
Geographic market		East of England	Yorkshire & Humberside	East of England
Total turnover yr end		30/06/2008	30/06/2008	30/06/2008
Total worldwide turnover		£2,332,400,000	£2,332,400,000	£2,332,400,000
Relevant turnover yr end		30/06/2008	30/06/2008	30/06/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£17,894,438	
Final penalty after leniency/fast track			£17,894,438	

Party 60: Lemmeleg together with its ultimate parent company Rok

VI.557. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step	Infringement 138	Infringement 159	Infringement 162
Infringement date	12/02/2003	28/07/2003	08/08/2003
Product market	Office	Entertainment (inc Leisure)	Education
Geographic market	Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end	31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover	[C]	[C]	[C]
Relevant turnover yr end	31/12/2008	31/12/2008	31/12/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3	[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	[C]	[C]
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	-25%	-25%	-25%
Final gross penalty		£1,849	
Final penalty after leniency/fast track		£1,387	

VI.558. As discussed in paragraph II.888 of the Company Profiles section above, Rok would not normally be held directly liable for any Infringements committed by Lemmeleg that occurred prior to the acquisition of Lemmeleg by Rok, in circumstances where the acquired subsidiary, Lemmeleg, remained in existence. However, Lemmeleg has nil turnover, as its business is accounted for in the accounts of Rok Building Limited, a wholly-owned subsidiary of Rok. The penalty calculation is therefore based on the element of Rok's turnover that relates to the business carried on by Lemmeleg.

VI.559. [...] [C]

Party 61: Lindum together with its ultimate parent company Lindum Group

VI.560. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of two of its Infringements. In its response to the Statement, it made a fresh admission in relation to its one remaining Infringement. This Party was not involved in any compensation payments.

Penalty step		Infringement 37	Infringement 182	Infringement 189
Infringement date		13/12/2000	25/02/2004	27/04/2004
Product market		Education	Private Housing	Places of Worship
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/11/2008	30/11/2008	30/11/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/11/2008	30/11/2008	30/11/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-[10-15%]	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	0%	-25%
Final gross penalty			£652,317	
Final penalty after leniency/fast track			£496,017	

Party 62: Linford together with its ultimate parent company F & E V Linford

VI.561. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 63	Infringement 96
Infringement date		29/06/2001	07/02/2002
Product market		Private Housing	Education
Geographic market		East Midlands	East Midlands
Total turnover yr end		30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	0%
Final gross penalty		£359,714	
Final penalty after leniency/fast track		£359,714	

VI.562. [...] [C]

VI.563. [...] [C]

Party 63: Loach

VI.564. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 54	Infringement 66	Infringement 143
Infringement date		27/04/2001	13/07/2001	14/04/2003
Product market		Office	Education	Education
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty			£78,205	
Final penalty after leniency/fast track			£46,923	

VI.565. [...] [C]

Party 64: Lotus

VI.566. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 62	Infringement 157	Infringement 237
Infringement date		06/06/2001	21/07/2003	14/11/2005
Product market		Retail	Entertainment (inc Leisure)	Education
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		30/06/2008	30/06/2008	30/06/2008
Total worldwide turnover		£31,420,621	£31,420,621	£31,420,621
Relevant turnover yr end		30/09/2007	30/09/2007	30/09/2007
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£1,054,749	
Final penalty after leniency/fast track			£791,062	

VI.567. Lotus was only able to provide a total turnover figure to the OFT for the 9 month period to 30 June 2008, because it is in administration. In accordance with paragraphs VI.254 and VI.374 above, the OFT has therefore used this figure and multiplied it by 12/9 in order to arrive at a full year's turnover figure.

VI.568. Lotus was unable to provide any relevant turnover figures to the OFT for its most recent business year as all of its relevant records have been destroyed or were impossible to access. Lotus was, however, able to provide relevant turnover figures for its business year ending 30 September 2007. In accordance with paragraph VI.99 above, the OFT is therefore using a proxy figure for Lotus's relevant turnover figures, based on the percentage of total turnover represented by Lotus's relevant turnover in its business year ending 30 September 2007, applied to Lotus's most recent total turnover figure calculated as described in the preceding paragraph. The OFT is then applying the starting point of 5 per cent to this proxy figure.

VI.569. [...] [C]

[...] [C]

Party 65: Milward

VI.570. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 120	Infringement 134	Infringement 136
Infringement date		20/09/2002	24/01/2003	05/02/2003
Product market		Education	Education	Public Housing
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£68,766	
Final penalty after leniency/fast track			£68,766	

VI.571. [...] [C]

VI.572. [...] [C]

Party 66: Bluestone together with its ultimate parent company Morgan Sindall

VI.573. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 206	Infringement 239	Infringement 243
Infringement date		26/10/2004	14/12/2005	21/02/2006
Product market		Office	Education	Office
Geographic market		Yorkshire & Humberside	London	Yorkshire & Humberside
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-100%	-100%
Final gross penalty			£19,197,368	
Final penalty after leniency/fast track			£286,593	

VI.574. The penalties for Infringements 239 and 243 are reduced to nil as these are But For Infringements.

Party 67: North Midland

VI.575. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 46	Infringement 190
Infringement date		22/01/2001	04/05/2004
Product market		Private Housing	Other Industrial Buildings
Geographic market		East Midlands	Yorkshire & Humberside
Total turnover yr end		31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-	-
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	0%
Final gross penalty		£1,543,813	
Final penalty after leniency/fast track		£1,543,813	

Party 68: PDH together with its ultimate parent company G Hurst & Sons

VI.576. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 40	Infringement 70
Infringement date		21/12/2000	15/08/2001
Product market		Public Housing	Public Housing
Geographic market		East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	[5-10%]
	Compliance	-	-
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	0%
Final gross penalty		£1,289	
Final penalty after leniency/fast track		£1,289	

VI.577. [...] [C]

Party 69: P Casey together with its ultimate parent company The Casey Group

VI.578. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step	Infringement 64	Infringement 162	Infringement 225	
Infringement date	09/07/2001	08/08/2003	08/06/2005	
Product market	Education	Education	Public Housing	
Geographic market	North West	Yorkshire & Humberside	Yorkshire & Humberside	
Total turnover yr end	31/07/2008	31/07/2008	31/07/2008	
Total worldwide turnover	£44,773,139	£44,773,139	£44,773,139	
Relevant turnover yr end	31/07/2008	31/07/2008	31/07/2008	
Relevant turnover	[C]	[C]	[C]	
Step 1 starting point	5%	5%	5%	
Penalty after step 1	[C]	[C]	[C]	
Duration multiplier	1	1	1	
Penalty after step 2	[C]	[C]	[C]	
Penalty as % of total t/o	[C]	[C]	[C]	
MDT to apply		[C]		
		[C]		
Penalty after step 3	[C]	[C]	[C]	
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	
	Directors	-	-	
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment	[C]	[C]	[C]	
Penalty after step 4	[C]	[C]	[C]	
% of total turnover	[C]	[C]	[C]	
% of pre 1/5/04 turnover	[C]	[C]	n/a	
Penalty after step 5	[C]	[C]	[C]	
Leniency/fast track	-25%	-25%	-25%	
Final gross penalty		£382,930		
Final penalty after leniency/fast track		£287,197		

VI.579. [...] [C]

VI.580. The Casey Group was incorporated on 12 June 2001 and therefore had nil turnover in the business year of P Casey preceding the date of the first Infringement, that is, the year ending 31 July 2000. By virtue of the dual check against The Casey Group's total turnover, carried out at step 5 of the penalty calculation and discussed in paragraph VI.370 above, The Casey Group's liability for the portion of the total penalty attributable to Infringement 64 is therefore reduced to nil. P Casey is therefore solely liable for the penalty imposed in respect of Infringement 64. Both P Casey and The Casey Group remain jointly and severally liable for the remainder of the total penalty, that is, the penalties imposed in respect of Infringements 162 and 225.

Party 70: P Waller

VI.581. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 67	Infringement 147	Infringement 163
Infringement date		25/07/2001	13/05/2003	05/09/2003
Product market		Education	Health	Public Housing
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty			£94,815	
Final penalty after leniency/fast track			£56,889	

Party 71: Pearce together with its parent Pearce Group and their former ultimate parent company Crest Nicholson

VI.582. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In response to the Statement, Crest Nicholson made a fresh admission in relation to this Party's Infringement, but neither Pearce nor Pearce Group made any admission. This Party was not involved in any compensation payments.

Penalty step		Infringement 75
Infringement date		18/09/2001
Product market		Education
Geographic market		West Midlands
Total turnover yr end		31/10/2008
Total worldwide turnover		[C]
Relevant turnover yr end		30/06/2008
Relevant turnover		[C]
Step 1 starting point		5%
Penalty after step 1		[C]
Duration multiplier		1
Penalty after step 2		[C]
Penalty as % of total t/o		[C]
MDT to apply		[C]
Penalty after step 3		[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-
	Directors	-
	Compliance	-[5-10%]
	Cooperation	-
Total step 4 adjustment		[C]
Penalty after step 4		[C]
% of total turnover		[C]
% of pre 2004 turnover		[C]
Penalty after step 5		[C]
Leniency/fast track		0%
Final gross penalty		£5,188,846
Final penalty after leniency/fast track		£5,188,846

VI.583. In accordance with paragraph VI.58 above, the OFT is basing its penalty calculation for this Party on the consolidated turnover of both (i) the Participant Company (Pearce and Pearce Group) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Crest Nicholson) that ultimately controlled the Participant Company at the time of the Infringements together with its current wholly/majority owned subsidiaries.

VI.584. Pearce and Pearce Group's most recent business year was the 14 month period to 30 June 2008. Consistent with paragraphs VI.96, VI.254 and VI.374 above, the OFT has therefore used this figure and multiplied it by 12/14 in order to arrive at a full year's turnover figure. Crest Nicholson's most recent business year was the 12 month period ending 31 October 2008.

VI.585. [...] [C]

Party 72: Peter Baines

VI.586. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 45	Infringement 66	Infringement 93
Infringement date		19/01/2001	13/07/2001	21/12/2001
Product market		Entertainment (inc Leisure)	Education	Health
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	[5-10%]	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£41,492	
Final penalty after leniency/fast track			£31,119	

VI.587. [...] [C]

Party 73: Phoenix

VI.588. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 183	Infringement 198	Infringement 229
Infringement date		05/03/2004	08/07/2004	24/06/2005
Product market		Education	Education	Education
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/05/2009	31/05/2009	31/05/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/05/2009	31/05/2009	31/05/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
[C]				
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty			£151,755	
Final penalty after leniency/fast track			£91,053	

VI.589. [...] [C]

VI.590. [...] [C]

Party 74: Propensity together with its wholly owned subsidiary companies Jackson, Totty, Totty Building, and Propensity Limited

VI.591. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step	Infringement 138	Infringement 213	Infringement 235
Infringement date	12/02/2003	15/12/2004	19/09/2005
Product market	Office	Warehousing	Distribution
Geographic market	Yorkshire & Humberside	Yorkshire & Humberside	East of England
Total turnover yr end	30/06/2008	30/06/2008	30/06/2008
Total worldwide turnover	[C]	[C]	£108,847,000
Relevant turnover yr end	30/06/2008	30/06/2008	30/06/2008
Relevant turnover	[C]	[C]	[C]
Step 1 starting point	5%	5%	5%
Penalty after step 1	[C]	[C]	[C]
Duration multiplier	1	1	1
Penalty after step 2	[C]	[C]	[C]
Penalty as % of total t/o	[C]	[C]	[C]
MDT to apply		[C]	
	[C]		
Penalty after step 3	[C]	[C]	[C]
Step 4	Instigator	-	-
Aggravating/ Mitigating Factors	Directors	-	[5-10%]
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment	[C]	[C]	[C]
Penalty after step 4	[C]	[C]	[C]
% of total turnover	[C]	[C]	[C]
% of pre 1/5/04 turnover	[C]	n/a	n/a
Penalty after step 5	[C]	[C]	[C]
Leniency/fast track	-50%	-50%	-100%
Final gross penalty		£348,469	
Final penalty after leniency/fast track		£98,042	

VI.592. [...] [C]

VI.593. In respect of Infringements 138 and 213, at the time of these Infringements the ultimate parent of the Participant Company Totty Building was Propensity Group. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for these Infringements on the consolidated turnover of both (i) the Participant Company (Totty Building) together with its current wholly/majority owned subsidiaries and (ii) the former parent company (Propensity Group) that ultimately controlled the Participant Company at the time of the Infringement together with its current wholly/majority owned subsidiaries.

VI.594. In respect of Infringement 235, at the time of this Infringement the ultimate parent of the Participant Company Jackson was Propensity Group. In accordance with paragraph VI.58 above, the OFT is therefore basing its penalty calculation for these Infringements on the consolidated turnover of both (i) the Participant Company (Jackson) together with its current wholly/majority owned

subsidiaries and (ii) the former parent company (Propensity Group) that ultimately controlled the Participant Company at the time of the Infringement together with its current wholly/majority owned subsidiaries.

VI.595. The penalty for Infringement 235 is reduced to nil.

VI.596. By virtue of the check against Propensity Group's total turnover in its last business year, carried out at step 5 of the penalty calculation and discussed in paragraph VI.369 above, Propensity Group's liability for the penalties imposed in respect of Infringements 138 and 213 is reduced to nil. Totty Building is therefore solely liable for the penalties imposed in respect of these two Infringements.

Party 75: Quarmby together with its ultimate parent company St James Securities

VI.597. This Party did not apply for leniency or accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 6	Infringement 214	Infringement 233
Infringement date		03/03/2000	23/12/2004	08/08/2005
Product market		Private Housing	Education	Private Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£881,749	
Final penalty after leniency/fast track			£881,749	

VI.598. The last business year for St James Securities was the 12 month period ending 31 March 2009. Although Quarmby's business year runs from 1 October to 30 September, the OFT has obtained relevant turnover figures from Quarmby for the 12 month period ending 31 March 2009 since these represent the relevant turnover of its ultimate parent St James Securities for that period.

VI.599. [...] [C]

Party 76: Quarmby (Special Projects) together with its ultimate parent company Justgrade

VI.600. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 159	Infringement 242
Infringement date		28/07/2003	13/02/2006
Product market		Entertainment (inc Leisure)	Private Housing
Geographic market		Yorkshire & Humberside	East Midlands
Total turnover yr end		31/03/2008	31/03/2008
Total worldwide turnover		£9,626,514	£9,626,514
Relevant turnover yr end		31/03/2008	31/03/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	[5-10%]	-
	Compliance	-	-
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a
Penalty after step 5		[C]	[C]
Leniency/fast track		0%	0%
Final gross penalty		£114,679	
Final penalty after leniency/fast track		£114,679	

VI.601. [...] [C]

Party 77: R Durnnell together with its ultimate parent company Durnnell Holdings

VI.602. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.*

Penalty step		Infringement 155	Infringement 191	Infringement 239
Infringement date		11/07/2003	14/05/2004	14/12/2005
Product market		Public Housing	Education	Education
Geographic market		London	South East	London
Total turnover yr end		31/12/2007	31/12/2007	31/12/2007
Total worldwide turnover		£47,745,432	£47,745,432	£47,745,432
Relevant turnover yr end		31/12/2007	31/12/2007	31/12/2007
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
		[C]		
Penalty after step 3		[C]	[C]	[C]
		[C]		
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£725,379	
Final penalty after leniency/fast track			£544,034	

VI.603. [...] [C]

VI.604. [...] [C]

* The following table reflects a revision of this Party's penalty issued on 4 November 2009, in order to correct an administrative error in the Decision as issued on 21 September 2009.

Party 78: R G Carter and R G Building together with their ultimate parent company R G Holdings

VI.605. This Party did not apply for leniency or accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 202	Infringement 210	Infringement 222
Infringement date		27/08/2004	03/12/2004	04/04/2005
Product market		Entertainment (inc Leisure)	Education	Private Housing
Geographic market		East of England	East Midlands	East of England
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£2,981,580	
Final penalty after leniency/fast track			£2,981,580	

Party 79: Richardson Projects

VI.606. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 176	Infringement 179	Infringement 225
Infringement date		28/01/2004	09/02/2004	08/06/2005
Product market		Public Housing	Entertainment (inc Leisure)	Public Housing
Geographic market		Yorkshire & Humberside	North West	Yorkshire & Humberside
Total turnover yr end		31/08/2008	31/08/2008	31/08/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/08/2008	31/08/2008	31/08/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£794,329	
Final penalty after leniency/fast track			£595,747	

VI.607. [...] [C]

Party 80: Robert Woodhead together with its ultimate parent company Woodhead Holdings

VI.608. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 46	Infringement 78	Infringement 178
Infringement date		22/01/2001	08/10/2001	30/01/2004
Product market		Private Housing	Public Housing	Education
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/10/2008	31/10/2008	31/10/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/10/2008	31/10/2008	31/10/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	[5-10%]	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£548,793	
Final penalty after leniency/fast track			£411,595	

VI.609. [...] [C]

Party 81: Robinson & Sawdon

VI.610. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 192	Infringement 236	Infringement 238
Infringement date		14/05/2004	07/11/2005	28/11/2005
Product market		Health	Education	Education
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£230,214	
Final penalty after leniency/fast track			£172,661	

VI.611. [...] [C]

Party 82: Shaylor

VI.612. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 44	Infringement 173	Infringement 216
Infringement date		19/01/2001	11/12/2003	14/02/2005
Product market		Health	Health	Health
Geographic market		West Midlands	West Midlands	West Midlands
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		£34,684,000	£34,684,000	£34,684,000
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£424,774	
Final penalty after leniency/fast track			£318,580	

VI.613. [...] [C]

Party 83: Simons and Wrights (Lincoln) together with their ultimate parent company Simons Group

VI.614. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 59	Infringement 141	Infringement 218
Infringement date		08/05/2001	03/03/2003	26/02/2005
Product market		Education	Public Housing	Education
Geographic market		Yorkshire & Humberside	East Midlands	Yorkshire & Humberside
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty			£1,397,808	
Final penalty after leniency/fast track			£838,685	

VI.615. [...] [C]

Party 84: Sol together with its ultimate parent company Barkbury

VI.616. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 142	Infringement 156	Infringement 187
Infringement date		07/03/2003	15/07/2003	16/04/2004
Product market		Education	Education	Education
Geographic market		West Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C] 0
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
[C]				
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-45%
Final gross penalty			£3,337,640	
Final penalty after leniency/fast track			£1,835,702	

VI.617. [...] [C]

VI.618. [...] [C]

Party 85: Speller-Metcalfe

VI.619. This Party did not apply for leniency but did accept the OFT's Fast Track Offer.
This Party was not involved in any compensation payments.

Penalty step		Infringement 107	Infringement 217
Infringement date		29/04/2002	15/02/2005
Product market		Education	Education
Geographic market		West Midlands	West Midlands
Total turnover yr end		31/03/2008	31/03/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/03/2008	31/03/2008
Relevant turnover		[C]	[C]
Step 1 starting point		5%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
		[C]	
Revised pen. after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a
Penalty after step 5		[C]	[C]
Leniency/fast track		-25%	-25%
Final gross penalty		£519,677	
Final penalty after leniency/fast track		£389,758	

VI.620. [...] [C]

VI.621. [...] [C]

Party 86: Stainforth

VI.622. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all three of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 21	Infringement 165	Infringement 195
Infringement date		25/08/2000	24/09/2003	14/06/2004
Product market		Places of Worship	Private Housing	Private Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		£19,244,316	£19,244,316	£19,244,316
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-[10-15%]
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£156,737	
Final penalty after leniency/fast track			£156,737	

Party 87: Strata

VI.623. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 221	Infringement 225	Infringement 227
Infringement date		01/04/2005	08/06/2005	13/06/2005
Product market		Entertainment (inc Leisure)	Public Housing	Public Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
			[C]	
Revised pen. after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-45%	-45%
Final gross penalty			£1,258,700	
Final penalty after leniency/fast track			£692,285	

VI.624. [...] [C]

VI.625. [...] [C]

VI.626. [...] [C]

Party 88: T & C Williams

VI.627. This Party applied for and was granted leniency. This Party was not involved in any compensation payments.

Penalty step		Infringement 180	Infringement 213	Infringement 242
Infringement date		09/02/2004	15/12/2004	13/02/2006
Product market		Health	Warehousing	Private Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	East Midlands
Total turnover yr end		30/06/2009	30/06/2009	30/06/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/06/2009	30/06/2009	30/06/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-40%	-40%	-40%
Final gross penalty			£146,610	
Final penalty after leniency/fast track			£87,966	

VI.628. [...] [C]

Party 89: T Denman

VI.629. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all three of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 52	Infringement 79	Infringement 86
Infringement date		17/04/2001	23/10/2001	03/12/2001
Product market		Public Housing	Education	Health
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-[10-15%]
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£90,521	
Final penalty after leniency/fast track			£90,521	

Party 90: Thomas Fish together with its ultimate parent company Fish Holdings

VI.630. This Party applied for and was granted leniency. This Party was involved in a compensation payment.

Penalty step		Infringement 89	Infringement 126
Infringement date		11/12/2001	04/11/2002
Product market		Office	Education
Geographic market		East Midlands	East Midlands
Total turnover yr end		31/03/2008	31/03/2008
Total worldwide turnover		[C]	[C]
Relevant turnover yr end		31/03/2008	31/03/2008
Relevant turnover		[C]	[C]
Step 1 starting point		7%	5%
Penalty after step 1		[C]	[C]
Duration multiplier		1	1
Penalty after step 2		[C]	[C]
Penalty as % of total t/o		[C]	[C]
MDT to apply		[C]	
Penalty after step 3		[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]
	Cooperation	-	-
Total step 4 adjustment		[C]	[C]
Penalty after step 4		[C]	[C]
% of total turnover		[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]
Penalty after step 5		[C]	[C]
Leniency/fast track		-40%	-40%
Final gross penalty		£283,552	
Final penalty after leniency/fast track		£170,131	

VI.631. Thomas Fish was only able to provide turnover figures to the OFT for the 9 month period to 30 June 2008, since it went into administration on 21 April 2008. In accordance with paragraphs VI.96, VI.254 and VI.374 above, the OFT has therefore used these figures and multiplied them by 12/9 in order to arrive at a full year's turnover figures.

VI.632. As this Party was involved in at least one Infringement involving a compensation payment, the MDT at step 3 is set at 1.05 per cent of total turnover in its last business year. For the Infringement that was a compensation payment, the starting point is set at 7 per cent of total turnover in its last business year.

Party 91: Thomas Long together with its ultimate parent company Radford

VI.633. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of two of its Infringements. In its response to the Statement, it made fresh admissions in relation to its one remaining Infringement. This Party was not involved in any compensation payments.

Penalty step		Infringement 30	Infringement 116	Infringement 127
Infringement date		24/11/2000	02/08/2002	13/11/2002
Product market		Public Housing	Public Housing	Public Housing
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		£11,738,142	£11,738,142	£11,738,142
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-[10-15%]	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	0%	-25%
Final gross penalty			£255,364	
Final penalty after leniency/fast track			£210,095	

VI.634. [...] [C]

Party 92: Thomas Vale together with its ultimate parent company Thomas Vale Holdings

VI.635. This Party applied for and was granted leniency. This Party was not involved in compensation payments.

Penalty step		Infringement 30	Infringement 107	Infringement 197
Infringement date		24/11/2000	29/04/2002	07/07/2004
Product market		Public Housing	Education	Police/Fire & Rescue
Geographic market		East Midlands	West Midlands	West Midlands
Total turnover yr end		31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2009	31/03/2009	31/03/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-50%	-50%	-50%
Final gross penalty			£2,040,945	
Final penalty after leniency/fast track			£1,020,473	

Party 93: Thorndyke

VI.636. This Party did not apply for leniency and did not accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 17	Infringement 32	Infringement 54
Infringement date		02/08/2000	27/11/2000	27/04/2001
Product market		Office	Office	Office
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/12/2004	31/12/2004	31/12/2004
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/12/2004	31/12/2004	31/12/2004
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	[5-10%]	[5-10%]
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£173,560	
Final penalty after leniency/fast track			£173,560	

VI.637. Thorndyke was unable to provide turnover figures to the OFT for its most recent business year because it went into liquidation on 21 January 2006. Thorndyke was only able to provide a total turnover figure to the OFT for the business year ending 31 December 2004. Consistent with paragraphs VI.254 and VI.374 above, the OFT has therefore used this figure in its penalty calculations.

VI.638. Thorndyke informed the OFT that all of its records had been destroyed or were impossible to access and that it was therefore unable to provide any relevant turnover figures. In accordance with paragraph VI.98 above, the OFT is therefore using a proxy figure of 2.9 per cent for Thorndyke's relevant turnover figures, and applying this percentage to Thorndyke's most recent total turnover figure before applying the starting point of 5 per cent.

VI.639. [...] [C]

Party 94: Try Accord and Galliford Construction together with their ultimate parent company Galliford Try

VI.640. This Party did not apply for leniency but it did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 42	Infringement 142	Infringement 186
Infringement date		12/01/2001	07/03/2003	23/03/2004
Product market		Education	Education	Education
Geographic market		London	West Midlands	East Midlands
Total turnover yr end		30/06/2009	30/06/2009	30/06/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/06/2009	30/06/2009	30/06/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£11,111,105	
Final penalty after leniency/fast track			£8,333,329	

Party 95: W R Bloodworth

VI.641. This Party applied for and was granted leniency. This Party was not involved in compensation payments.

Penalty step		Infringement 114	Infringement 140	Infringement 143
Infringement date		08/07/2002	03/03/2003	14/04/2003
Product market		Police/Fire & Rescue	Places of Worship	Education
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		31/03/2008	31/03/2008	31/03/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/03/2008	31/03/2008	31/03/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-35%	-35%	-35%
Final gross penalty			£16,699	
Final penalty after leniency/fast track			£10,854	

VI.642. [...] [C]

Party 96: Wiggett

VI.643. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all three of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 140	Infringement 171	Infringement 193
Infringement date		03/03/2003	12/11/2003	28/05/2004
Product market		Places of Worship	Health	Office
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		30/11/2008	30/11/2008	30/11/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/11/2008	30/11/2008	30/11/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4	Instigator	-	-	-
Aggravating/ Mitigating Factors	Directors	[5-10%]	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-[10-15%]
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£15,923	
Final penalty after leniency/fast track			£15,923	

Party 97: Wildgoose

VI.644. This Party applied for and was granted leniency. This Party was involved in compensation payments.*

Penalty step		Infringement 136	Infringement 158	Infringement 159
Infringement date		05/02/2003	25&30/07/2003	28/07/2003
Product market		Public Housing	Entertainment (inc Leisure)	Entertainment (inc Leisure)
Geographic market		East Midlands	East Midlands	Yorkshire & Humberside
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply		[C]		
		[C]		
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	20%	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-50%	-50%	-50%
Final gross penalty			£562,388	
Final penalty after leniency/fast track			£281,194	

VI.645. [paragraph deleted]

VI.646. As this Party was involved in at least one Infringement involving a compensation payment, the MDT at step 3 is set at 1.05 per cent of total turnover in its last business year.

VI.647. In accordance with paragraphs VI.294 to VI.299 above, Wildgoose receives a 20 per cent uplift for instigation and participation in compensation payment activity with a third party in Infringement 158.

* The following table reflects a revision of this Party's penalty issued on 5 November 2009, in order to correct an administrative error in the Decision as issued on 21 September 2009.

Party 98: William Sapcote together with its ultimate parent company Sapcote Holdings

VI.648. This Party did not apply for leniency but did accept the OFT's Fast Track Offer in respect of two of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 100	Infringement 106	Infringement 197
Infringement date		25/02/2002	26/04/2002	07/07/2004
Product market		Education	Office	Police/Fire & Rescue
Geographic market		West Midlands	West Midlands	West Midlands
Total turnover yr end		31/03/2006	31/03/2006	31/03/2006
Total worldwide turnover		£41,330,094	£41,330,094	£41,330,094
Relevant turnover yr end		31/03/2006	31/03/2006	31/03/2006
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	-
	Compliance	-	-	-
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	-25%	-25%
Final gross penalty			£435,826	
Final penalty after leniency/fast track			£342,601	

VI.649. William Sapcote was unable to provide turnover figures to the OFT for its most recent business year because it went into administration on 15 October 2007. William Sapcote was only able to provide a total turnover figure to the OFT for the business year ending 31 March 2006. Consistent with paragraphs VI.254 and VI.374 above, the OFT has therefore used this figure in its penalty calculations.

VI.650. William Sapcote informed the OFT that all of its records had been destroyed or were impossible to access and that it was therefore unable to provide any relevant turnover figures. In accordance with paragraph VI.98 above, the OFT is therefore using a proxy figure of 2.9 per cent for William Sapcote's relevant turnover figures, and applying this percentage to William Sapcote's most recent total turnover figure before applying the starting point of 5 per cent.

VI.651. [...] [C]

Party 99: William Woodsend

VI.652. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to two of its Infringements. This Party was not involved in any compensation payments.

Penalty step		Infringement 126	Infringement 129	Infringement 204
Infringement date		04/11/2002	25/11/2002	21/10/2004
Product market		Education	Public Housing	Office
Geographic market		East Midlands	East Midlands	East Midlands
Total turnover yr end		30/09/2008	30/09/2008	30/09/2008
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		30/09/2008	30/09/2008	30/09/2008
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		0%	0%	0%
Final gross penalty			£53,970	
Final penalty after leniency/fast track			£53,970	

Party 100: Willmott Dixon together with its ultimate parent company Willmott Dixon Limited

VI.653. This Party did not apply for leniency or accept the OFT's Fast Track Offer. In its response to the Statement, however, it made fresh admissions in relation to all of its Infringements. This Party was not involved in any compensation payments.

Penalty step	Infringement 181	Infringement 212	Infringement 243	
Infringement date	20/02/2004	14/12/2004	21/02/2006	
Product market	Education	Education	Office	
Geographic market	East Midlands	East Midlands	Yorkshire & Humberside	
Total turnover yr end	31/12/2008	31/12/2008	31/12/2008	
Total worldwide turnover	[C]	[C]	[C]	
Relevant turnover yr end	31/12/2008	31/12/2008	31/12/2008	
Relevant turnover	[C]	[C]	[C]	
Step 1 starting point	5%	5%	5%	
Penalty after step 1	[C]	[C]	[C]	
Duration multiplier	1	1	1	
Penalty after step 2	[C]	[C]	[C]	
Penalty as % of total t/o	[C]	[C]	[C]	
MDT to apply		[C]		
Penalty after step 3	[C]	[C]	[C]	
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	
	Directors	-	-	
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-[10-15%]	-[10-15%]	-[10-15%]
Total step 4 adjustment	[C]	[C]	[C]	
Penalty after step 4	[C]	[C]	[C]	
% of total turnover	[C]	[C]	[C]	
% of pre 1/5/04 turnover	[C]	n/a	n/a	
Penalty after step 5	[C]	[C]	[C]	
Leniency/fast track	0%	0%	0%	
Final gross penalty		£4,534,760		
Final penalty after leniency/fast track		£4,534,760		

VI.654. [...] [C]

Party 101: Wright (Hull) together with its ultimate parent company T Wright Holdings

VI.655. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 194	Infringement 206	Infringement 230
Infringement date		11/06/2004	26/10/2004	25/07/2005
Product market		Health	Office	Private Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		28/02/2007	28/02/2007	28/02/2007
Total worldwide turnover		£19,457,233	£19,457,233	£19,457,233
Relevant turnover yr end		28/02/2007	28/02/2007	28/02/2007
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£706,564	
Final penalty after leniency/fast track			£529,923	

VI.656. Wright (Hull) was unable to provide turnover figures to the OFT for its most recent business year because it is in administration. Wright (Hull) was only able to provide turnover figures to the OFT for the business year ending 28 February 2007. Consistent with paragraphs VI.95, VI.254 and VI.374 above, the OFT has therefore used these figures in its penalty calculations.

Party 102: Wygar together with its ultimate parent company Wygar Holdings

VI.657. This Party did not apply for leniency but did accept the OFT's Fast Track Offer. This Party was not involved in any compensation payments.

Penalty step		Infringement 74	Infringement 88	Infringement 90
Infringement date		07/09/2001	05/12/2001	17/12/2001
Product market		Health	Health	Health
Geographic market		West Midlands	West Midlands	West Midlands
Total turnover yr end		31/01/2009	31/01/2009	31/01/2009
Total worldwide turnover		[C]	[C]	[C]
Relevant turnover yr end		31/01/2009	31/01/2009	31/01/2009
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		[C]	[C]	[C]
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-25%	-25%	-25%
Final gross penalty			£90,503	
Final penalty after leniency/fast track			£67,877	

VI.658. [...] [C]

Party 103: York House

VI.659. This Party applied for and was granted leniency. This Party was not involved in compensation payments.

Penalty step		Infringement 195	Infringement 211	Infringement 233
Infringement date		14/06/2004	08/12/2004	08/08/2005
Product market		Private Housing	Public Housing	Private Housing
Geographic market		Yorkshire & Humberside	Yorkshire & Humberside	Yorkshire & Humberside
Total turnover yr end		31/12/2007	31/12/2007	31/12/2007
Total worldwide turnover		£43,231,849	£43,231,849	£43,231,849
Relevant turnover yr end		31/12/2007	31/12/2007	31/12/2007
Relevant turnover		[C]	[C]	[C]
Step 1 starting point		5%	5%	5%
Penalty after step 1		[C]	[C]	[C]
Duration multiplier		1	1	1
Penalty after step 2		[C]	[C]	[C]
Penalty as % of total t/o		[C]	[C]	[C]
MDT to apply			[C]	
			[C]	
Penalty after step 3		[C]	[C]	[C]
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	[5-10%]	[5-10%]	[5-10%]
	Compliance	-[5-10%]	-[5-10%]	-[5-10%]
	Cooperation	-	-	-
Total step 4 adjustment		[C]	[C]	[C]
Penalty after step 4		[C]	[C]	[C]
% of total turnover		[C]	[C]	[C]
% of pre 1/5/04 turnover		n/a	n/a	n/a
Penalty after step 5		[C]	[C]	[C]
Leniency/fast track		-45%	-100%	-100%
Final gross penalty			£931,525	
Final penalty after leniency/fast track			£239,525	

VI.660. York House was unable to provide turnover figures to the OFT for its most recent business year because it is in administration. York House was only able to provide sufficiently robust turnover figures to the OFT for the business year ending 31 December 2007. Consistent with paragraphs VI.95, VI.254 and VI.374 above, the OFT has therefore used these figures in its penalty calculations.

VI.661. [...] [C]

VI.662. [...] [C]

VI.663. The penalties for Infringements 211 and 233 are reduced to nil as these are But For Infringements.

E. Payment of penalty

VI.664. The OFT therefore requires the Parties to pay the penalties set out in the following table. In each case, as noted in paragraphs VI.61 and VI.62 above, where a Party comprised two or more legal entities at the time of an Infringement those entities are jointly and severally liable for the payment of the entire penalty for that Infringement, unless either:

- (a) for a particular Infringement one or more of the legal entities comprising that Party was neither the Participant Company nor its ultimate parent at the time of the Infringement; or
- (b) liability is limited as discussed in paragraph VI.381 above by virtue of a Party comprising two or more legal entities which now constitute two separate undertakings, and the penalty constitutes more than 10 per cent of the total turnover in the last business year of one of those legal entities; or
- (c) a new admission was made by one of the legal entities but not by the other.

Each of these circumstances is highlighted in the table below where it applies.

VI.665. The penalties will become owed to the OFT in their entirety on 24 November 2009, with the exception of the penalty imposed on R Durtnell together with its ultimate parent company Durtnell Holdings which will become owed to the OFT in its entirety on 6 January 2010, and the penalties imposed on E Manton and Wildgoose which will become owed to the OFT in their entirety on 7 January 2010, and must be paid to the OFT by close of banking business on that date, unless the Party has elected to accept the OFT's offer of additional time to pay the penalty.⁸⁷⁷⁰ If either the penalty is not paid or acceptance of the time to pay offer is not received within this deadline, and either an appeal against the imposition or amount of that penalty has not been made or such an appeal has been made and determined in the OFT's favour, the OFT may commence proceedings to recover the amount as a civil debt.

Party	Penalty pre-discount	Penalty payable
A H Willis	£120,018	£120,018
ARG	£20,213	£12,128
Ackroyd & Abbott together with its subsidiary Ackroyd & Abbott Construction	£49,581	£49,581
Adam Eastwood together with its controlling party Eastwood Foundation	£12,298	£2,006
Admiral together with (for infringements from 31 October 2003) its ultimate parent company A C Holdings	£116,414 Admiral only (Infs 53, 136): £31,646 Admiral and A C Holdings (Inf 214): £84,767	£17,406 Admiral only: £17,406 Admiral and A C Holdings: £0
Allenbuild and Bullock together with the current ultimate parent company of Allenbuild and the former ultimate parent company of Bullock, Renew	£4,730,575 Bullock and Renew (Inf 39): £4,070,249 Allenbuild and Renew (Infs 137, 204): £660,326	£3,547,931 Bullock and Renew: £3,052,687 Allenbuild and Renew: £495,245

⁸⁷⁷⁰ Details of how to pay or to accept the offer of additional time to pay will be notified in the letter accompanying this Decision.

Party	Penalty pre-discount	Penalty payable
Apollo together with its former ultimate parent company Apollo Group	£2,150,536	£2,150,536
Arthur M Griffiths	£313,218	£203,592
B & A	£18,224	£18,224
Baggaley & Jenkins	£192,203	£144,153
BBCL and BBRL (for infringements from 2000 onwards) and Mansell (for infringements from 19 December 2003), together with their current ultimate parent company Balfour Beatty plc. For infringements involving Mansell prior to 19 December 2003, Mansell and its former ultimate parent company Mansell plc	£10,394,008 Mansell and Mansell plc are jointly and severally liable for the entire penalty	£5,197,004 Mansell and Mansell plc are jointly and severally liable for the entire penalty
Ballast Nedam as the ultimate parent company of its dissolved subsidiary Ballast	£11,110,821	£8,333,116
Beaufort together with its ultimate parent company Beaufort Holdings	£111,604	£83,703
Bodill	£109,695	£54,848
Bowmer & Kirkland together with its subsidiary BKPS	£9,782,543 Bowmer & Kirkland only (Infs 18, 85): £951,317 Bowmer & Kirkland and BKPS (Inf 134): £8,831,226	£7,574,736 Bowmer & Kirkland only: £951,317 Bowmer & Kirkland and BKPS: £6,623,420
Bramall and Frank Haslam Milan together with their current ultimate parent company Keepmoat	£5,848,183 Bramall and Keepmoat (Infs 57, 179): £1,557,383 Frank Haslam Milan and Keepmoat (Inf 123): £4,290,800	£455,235 Bramall and Keepmoat: £455,235 Frank Haslam Milan and Keepmoat: £0
C J Ellmore	£295,979	£295,979
Caddick together with its ultimate parent company Caddick Group	£521,764	£391,323
Mowlem	£11,311,460	£5,375,689
Clegg together with its ultimate parent company D E Clegg	£709,449	£359,967
Connaught together with its ultimate parent company Connaught plc	£5,568,868	£5,568,868
Crown Point as the ultimate parent company of its dissolved subsidiary Greenwood, for Greenwood's infringements after 11 June 2002	£3,571	£3,571
Davlyn	£112,179	£72,916
Derwent Valley together with its ultimate parent company Chevin	£44,577	£24,517
Dukeries	£99,778	£99,773

Party	Penalty pre-discount	Penalty payable
Durkan and Durkan Limited, together with the former ultimate parent company of Durkan and the current ultimate parent company of Durkan Limited, Durkan Holdings	£7,862,496 Durkan and Durkan Holdings (Infs 135, 240): £4,378,512 Durkan Holdings alone (Inf 240): £189,269 Durkan Limited and Durkan Holdings (Inf 220): £3,294,715	£6,720,551 Durkan and Durkan Holdings: £3,283,884 Durkan Holdings alone: £141,952 Durkan Limited and Durkan Holdings: £3,294,715
E Manton	£156,867	£117,650
E Taylor, trading as Carmalor	£59,261	£59,261
F Parkinson together with its ultimate parent company Mowbray	£232,147	£174,110
Francis together with its ultimate parent company Barrett	£530,238	£530,238
Frudd	£109,794	£65,876
GAJ together with its current ultimate parent company GAJ Holdings	£146,244	£109,683
G Carter	£91,466	£91,466
G F Tomlinson together with its ultimate parent company G F Tomlinson Group	£1,692,359	£1,269,270
G G Middleton	£0	£0
G & J Seddon together with its ultimate parent company Seddon	£2,022,195	£1,516,646
GMI together with (for infringements after 6 February 2005) its current ultimate parent company GMI Construction Holdings	£1,752,584 GMI only (Inf 14): £1,749,824 GMI and GMI Construction Holdings (Inf 228): £2,760	£1,752,584 GMI only: £1,749,824 GMI and GMI Construction Holdings: £2,760
Geo Houlton together with its ultimate parent company Geo Houlton Holdings	£353,990	£265,492
Greswolde together with its ultimate parent company Mantisson	£224,746	£168,559
Hall	£359,511	£269,634
Harlow & Milner	£163,289	£23,170
Harold Adkin	£7,914	£5,936
Haymills together with (for infringements prior to 26 May 2004) its former ultimate parent company Corringway and (for infringements after 26 May 2004) its current ultimate parent company Haymills Group	£1,041,921 Haymills and Corringway (Infs 103, 119): £1,026,123 Haymills and Haymills Group (Inf 232): £15,797	£781,440 Haymills and Corringway: £769,593 Haymills and Haymills Group: £11,848
Henry Boot together with its ultimate parent company Henry Boot plc	£4,009,881	£1,074,441
Herbert Baggaley together with its ultimate parent company Baggaley Group	£360,079	£198,043
Hill	£5,808	£5,808
Hobson & Porter	£1,044,558	£574,507

Party	Penalty pre-discount	Penalty payable
Holroyd together with (for infringements prior to 30 March 2005) its former ultimate parent company Holderness and (for infringements after 30 March 2005) its current ultimate parent company Holroyd Group	£200,784 Holroyd and Holderness (Infs 31, 125): £179,026 Holroyd and Holroyd Group (Inf 231): £21,759	£200,784 Holroyd and Holderness: £179,026 Holroyd and Holroyd Group: £21,759
Interclass together with its ultimate parent company Interclass Holdings	£619,207	£464,406
Interserve together with its ultimate parent company Interserve plc	£14,841,000	£11,634,750
Irwins and Jack Lunn together with their ultimate parent company Jack Lunn Holdings	£572,605 Jack Lunn and Jack Lunn Holdings (Infs 205, 241): £535,003 Irwins and Jack Lunn Holdings (Inf 231): £37,602	£314,933 Jack Lunn and Jack Lunn Holdings: £294,252 Irwins and Jack Lunn Holdings: £20,681
J Harper together with their ultimate parent company Harper plc	£950	£713
J H Hallam together with its ultimate parent company Hallam	£653,796	£359,588
J J & A R Jackson	£38,617	£28,963
J J McGinley together with its former ultimate parent company McGinley Holdings	£977,201 J J McGinley and McGinley Holdings: £301,320 J J McGinley alone: £675,881	£732,901 J J McGinley and McGinley Holdings: £225,990 J J McGinley alone: £506,911
John Cawley	£15,646	£5,476
John Sisk together with its ultimate parent company Sicon	£8,255,503	£6,191,627
K J Bryan	£23,930	£23,930
Kier together with its ultimate parent company Kier Group	£17,894,438	£17,894,438
Lemmeleg together with its ultimate parent company Rok	£1,849	£1,387
Lindum together with its ultimate parent company Lindum Group	£652,317 Lindum Group only (Inf 37): £619,867 Lindum and Lindum Group (Infs 182, 189): £32,451	£496,017 Lindum Group only: £464,900 Lindum and Lindum Group: £31,117
Linford together with its ultimate parent company F & E V Linford	£359,714	£359,714
Loach	£78,205	£46,923
Lotus	£1,054,749	£791,062
Milward	£68,766	£68,766
Bluestone together with its ultimate parent company Morgan Sindall	£19,197,368	£286,593
North Midland	£1,543,813	£1,543,813
PDH together with its ultimate parent company G Hurst & Sons	£1,289	£1,289

Party	Penalty pre-discount	Penalty payable
P Casey together with its current ultimate parent company The Casey Group	£382,930 P Casey and The Casey Group: £323,382 P Casey alone: £59,548	£287,197 P Casey and The Casey Group: £242,537 P Casey alone: £44,660
P Waller	£94,815	£56,889
Pearce together with its parent Pearce Group and their former ultimate parent company Crest Nicholson	£5,188,846 Pearce, Pearce Group and Crest Nicholson: £4,369,555 Pearce and Pearce Group: £819,291	£5,188,846 Pearce, Pearce Group and Crest Nicholson: £4,369,555 Pearce and Pearce Group: £819,291
Peter Baines	£41,492	£31,119
Phoenix	£151,755	£91,053
Propensity together with its wholly owned subsidiary companies Jackson, Totty, Totty Building and Propensity Limited	£348,469 Totty Building (Infs 138, 213): £196,083 Jackson (Inf 235): £152,386 Propensity: £0	£98,042 Totty Building: £98,042 Jackson: £0 Propensity: £0
Quarmby together with its ultimate parent company St James Securities	£881,749	£881,749
Quarmby (Special Projects) together with its ultimate parent company Justgrade	£114,679	£114,679
R Durnnell together with its ultimate parent company Durnnell Holdings	£725,379	£544,034
R G Carter and R G Building together with their current ultimate parent company R G Holdings	£2,981,580 R G Carter and R G Holdings (Inf 202): £677,778 R G Building and R G Holdings (Infs 210, 222): £2,303,802	£2,981,580 R G Carter and R G Holdings: £677,778 R G Building and R G Holdings: £2,303,802
Richardson Projects	£794,329	£595,747
Robert Woodhead together with its ultimate parent company Woodhead Holdings	£548,793	£411,595
Robinson & Sawdon	£230,214	£172,661
Shaylor	£424,774	£318,580
Simons and Wrights (Lincoln) together with their ultimate parent company Simons Group	£1,397,808 Simons and Simons Group (Infs 59, 218): £1,207,814 Wright (Lincoln) and Simons Group (Inf 141): £189,993	£838,685 Simons and Simons Group: £724,689 Wright (Lincoln) and Simons Group: £113,996
Sol together with its ultimate parent company Barkbury	£3,337,640	£1,835,702
Speller-Metcalf	£519,677	£389,758
Stainforth	£156,737	£156,737
Strata	£1,258,700	£692,285
T & C Williams	£146,610	£87,966
T Denman	£90,521	£90,521
Thomas Fish together with its ultimate parent company Fish Holdings	£283,552	£170,131

Party	Penalty pre-discount	Penalty payable
Thomas Long together with its ultimate parent company Radford	£255,364	£210,095
Thomas Vale together with its ultimate parent company Thomas Vale Holdings	£2,040,945	£1,020,473
Thorndyke	£173,560	£173,560
Try Accord and Galliford Construction together with their ultimate parent company Galliford Try	£11,111,105 Try Accord and Galliford Try (Inf 42): £10,416,750 Galliford Construction and Galliford Try (Infs 142, 186): £694,356	£8,333,329 Try Accord and Galliford Try: £7,812,563 Galliford Construction and Galliford Try: £520,768
W R Bloodworth	£16,699	£10,854
Wiggett	£15,923	£15,923
Wildgoose	£562,388	£281,194
William Sapcote together with its ultimate parent company Sapcote Holdings	£435,826	£342,601
William Woodsend	£53,970	£53,970
Willmott Dixon together with its ultimate parent company Willmott Dixon Limited	£4,534,760	£4,534,760
Wright (Hull) together with its ultimate parent company T Wright Holdings	£706,564	£529,923
Wygar together with its ultimate parent company Wygar Holdings	£90,503	£67,877
York House	£931,525	£239,525



Simon Williams
Senior Director

21 September 2009

**Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX**

ANNEX A – NAVIGATION TABLE

A guide to the paragraphs in which the case against each Party may be found in relation to each of the Infringements

- A.1. The Navigation Table below details the paragraphs in which the case against each Party may be found in relation to each relevant Infringement. The Parties are listed in alphabetical order and against each Party is listed the Infringement(s) in respect of which the OFT has found that Party to have engaged in bid rigging activities, together with references to the relevant paragraphs in section IV.D above describing that Infringement and the relevant paragraphs in section IV.C above describing the cover pricing activities of the leniency Party(ies) involved in that Infringement, where applicable.
- A.2. The Navigation Table also sets out in respect of each Infringement,
- (a) for a leniency Party, whether: (i) it will receive full 100 per cent immunity for that Infringement (because it is a But For Infringement for that Party); or (ii) it will receive its allocated leniency percentage deduction from any penalty for that Infringement (because it is a Not But For Infringement for that Party); or (iii) it will receive no penalty for that Infringement (because the Infringement is not amongst the most recent three Not But For Infringements for the Party); and
 - (b) for a non-lenience Party, whether it will receive a 25 per cent deduction from any penalty for that Infringement (because it has accepted the OFT's Fast Track Offer in respect of that Infringement) or alternatively will not be entitled to any deduction from penalty for that Infringement (because it has not accepted the OFT's Fast Track Offer in respect of that Infringement).
- A.3. The word 'Infringement' has been abbreviated to 'Inf.' in column one for reasons of brevity.
- A.4. The Party(ies) are identified by reference to all parts of the infringing Party. For details as to which part of the Party is the Participant Company for a particular Infringement, reference should be made to that specific Infringement. For details as to which part(s) of the Party is liable for a particular Infringement, reference should be made to the Penalty tables and accompanying paragraphs.

Party 1: A H Willis (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
188	16/04/2004	Willington Down Farm, Didcot	No discount	IV.5182 – IV.5214	Mansell	IV.470 – IV.502
215	28/01/2005	14 Redlands Road, University of Reading	No discount	IV.6018 – IV.6049	Mansell	IV.470 – IV.502
224	27/05/2005	Refurbishment, 12 & 16 Redlands Road, Reading	No discount	IV.6244 – IV.6291	Mansell	IV.470 – IV.502
Party 2: ARG (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
9	11/04/2000	Residential Training Centre, Ollerton	Leniency discount	IV.841 – IV.862		IV.174 – IV.181
133	19/12/2002	Hill Crescent Changing Block	Leniency discount	IV.3611 – IV.3640		IV.174 – IV.181
207	11/11/2004	Fire Reinstatement Works at 63 Westgate, Mansfield	Leniency discount	IV.5761 – IV.5783		IV.174 – IV.181
Party 3: Ackroyd & Abbott together with its subsidiary Ackroyd & Abbott Construction (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
47	31/01/2001	Environmental Works at Burley Lodge, Leeds	No discount	IV.1527 – IV.1559	Henry Boot, Strata	IV.363 – IV.374, IV.617 – IV.634
124	15/10/2002	Dronfield Gorsey Brigg Primary School Extension	No discount	IV.3449 – IV.3473	Sol	IV.593 – IV.616

227	13/06/2005	Burngreave Facelifts 2005/06 - Contract 1	No discount	IV.6342 – IV.6363	Strata	IV.617 – IV.634
Party 4: Adam Eastwood together with its controlling party the Eastwood Foundation (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
50	30/03/2001	12 Self-Contained Flats, Castle Street, Mansfield Woodhouse	Leniency discount	IV.1612 – IV.1636	Bodill	IV.159 – IV.165, IV.229 – IV.242
108	15/05/2002	Office Block, Sherwood Rise, Nottingham	Leniency discount	IV.3094 – IV.3120	Herbert Baggaley	IV.159 – IV.165, IV.375 – IV.390
116	02/08/2002	45 Modernisations, Highbury Vale, Nottingham	But for - 100% immunity	IV.3233 – IV.3262	Mansell	IV.159 – IV.165, IV. IV.470 – IV.502
Party 5: Admiral together with (for infringements from 31 October 2003) its ultimate parent company A C Holdings (5 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
53	19/04/2001	Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire	Leniency discount	IV.1663 – IV.1699	Bodill	IV.166 – IV.173, IV.229 – IV.242
136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	Leniency discount	IV.3745 – IV.3813	Derwent Valley, Wildgoose	IV.166 – IV.173, IV.303 – IV.325, IV.726 – IV.742
180	09/02/2004	Construction of a New Two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield	But for - 100% immunity	IV.4967 – IV.4997	T & C Williams	IV.166 – IV.173, IV.635 – IV.649
190	04/05/2004	Civil Works for Aldwarke Primary Mill, Rotherham Works	But for - 100% immunity	IV.5237 – IV.5267		IV.166 – IV.173
214	23/12/2004	Humanities Research Institute, University of Sheffield	But for - 100% immunity	IV.5980 – IV.6017		IV.166 – IV.173

Party 6: Allenbuild and Bullock together with the current ultimate parent company of Allenbuild and the former ultimate parent company of Bullock, Renew (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
39	20/12/2000	Saxton Gardens Phase 2	Fast track discount	IV.1304 – IV.1336	Carillion, Henry Boot	IV.503 – IV.516, IV.363 – IV.374
137	07/02/2003	Flats Refurbishment, 110 and 124 Sycamore Road, Burton-on-Trent	Fast track discount	IV.3814 – IV.3846	Thomas Vale	IV.689 – IV.717
204	21/10/2004	New Build of Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	Fast track discount	IV.5644 – IV.5692	Bodill, Herbert Baggaley	IV.229 – IV.242, IV.375 – IV.390
Party 7: Apollo together with its former ultimate parent company Apollo Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
154	08/07/2003	Re-roofing and External Repairs, 242-254 Banbury Road, Oxford	No discount	IV.4230 – IV.4270	Mansell	IV.470 – IV.502
199	08/07/2004	External Refurbishment, Sutton Court Shops, Hillingdon	No discount	IV.5489 – IV.5520	Mansell	IV.470 – IV.502
203	09/09/2004	Mount Pleasant, Phase 4, Window Replacement, Redecorations, Internal Improvements, Bracknell	No discount	IV.5607 – IV.5643	Mansell	IV.470 – IV.502
Party 8: Arthur M Griffiths (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
49	16/03/2001	New Build of a Medical Centre, Two-Storey Doctors Surgery, Pharmacy and Dental Surgery, Car Park and Landscaping at the New Medical Centre, Lawley, Telford	Leniency discount	IV.1582 – IV.1611	Thomas Vale	IV.182 – IV.188, IV.689 – IV.717
209	03/12/2004	Extensions and Alterations at Bleakhouse School, Oldbury, West Midlands	Leniency discount	IV.5805 – IV.5835	Thomas Vale	IV.182 – IV.188, IV.689 – IV.717
244	09/06/2006	Extension to Tipton and Coseley Building Society, Tipton	Leniency discount	IV.6803 – IV.6837	Thomas Vale	IV.182 – IV.188, IV.689 – IV.717

Party 9: B & A (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
95	04/02/2002	Five No. Health Centres, Primary Care Trust (East), East Midlands	No discount	IV.2734 – IV.2756	J H Hallam	IV.420 – IV.430
229	24/06/2005	Alterations to Law Faculty Offices, Fielding Johnson Building, University of Leicester	No discount	IV.6392 – IV.6420	Phoenix	IV.527 – IV.536
Party 10: Baggaley & Jenkins (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
61	29/05/2001	Fire Safety Works to Two Tower Blocks at Gleadless & Jordonthorpe Sheffield	Fast track discount	IV.1889 – IV.1907	Strata	IV.617 – IV.634
65	09/07/2001	Consolidation Works at Fairham Community College, Clifton, Nottingham	Fast track discount	IV.1992 – IV.2032	Bodill	IV.229 – IV.242
112	31/05/2002	Winthorpe Road Estate Repairs, Newark	Fast track discount	IV.3151 – IV.3175	Frudd	IV.335 – IV.351
Party 11: BBCL and BBRL (for infringements from 2000 onwards) and Mansell (for infringements from 19 December 2003) together with their current ultimate parent company Balfour Beatty plc. For infringements involving Mansell prior to 19 December 2003, Mansell and its former ultimate parent company Mansell plc (30 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
22	07/09/2000	Refurbishment 73 Wates Houses, Windsor	But for - 100% immunity	IV.991 – IV.1011		IV.470 – IV.502
30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	No penalty	IV.1080 – IV.1119	Bodill, Thomas Vale	IV.470 – IV.502, IV.229 – IV.242, IV.689 – IV.717
36	08/12/2000	Summerhill Terrace, Birmingham	But for - 100% immunity	IV.1225 – IV.1247		IV.189 – IV.203
42	12/01/2001	Uxbridge College, Academy Building	But for - 100% immunity	IV.1391 – IV.1412		IV.470 – IV.502

43	17/01/2001	Prebendal Estate, Phase 3, 52 Housing Refurbishments, Aylesbury	But for - 100% immunity	IV.1413 – IV.1434		IV.470 – IV.502
48	09/02/2001	Herschel Grammar School, Music and Drama Block, Slough	But for - 100% immunity	IV.1560 – IV.1581		IV.470 – IV.502
69	13/08/2001	Stoke Poges School	But for - 100% immunity	IV.2138 – IV.2158		IV.470 – IV.502
75	18/09/2001	Refurbishment, Wattville Thomas J&I School, Handsworth	But for - 100% immunity	IV.2241 – IV.2293	Thomas Vale	IV.189 – IV.203, IV.689 – IV.717
89	11/12/2001	Extension to Offices, Meadow House, Bath Street, Mansfield	Leniency discount	IV.2576 – IV.2629	Herbert Baggaley, Thomas Fish	IV.470 – IV.502, IV.375 – IV.390, IV.650 – IV.688
91	19/12/2001	Repairs to 13 Wimpey No-Fines Houses, High Wycombe	But for - 100% immunity	IV.2658 – IV.2680		IV.470 – IV.502
97	07/02/2002	Refurbishment 92 Dwellings, Mandeville Road Housing Estate, Aylesbury	But for - 100% immunity	IV.2801 – IV.2822		IV.470 – IV.502
100	25/02/2002	New Classrooms, Heart of England School, Balsall Common, Solihull	But for - 100% immunity	IV.2876 – IV.2901		IV.189 – IV.203
104	22/04/2002	Alterations to Café and Conservatory Extension, Burton College	Leniency discount	IV.2953 – IV.2997	Wildgoose	IV.470 – IV.502, IV.726 – IV.742
116	02/08/2002	45 Modernisations, Highbury Vale, Nottingham	Leniency discount	IV.3233 – IV.3262	Adam Eastwood	IV.470 – IV.502, IV.159 – IV.165
123	11/10/2002	External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View	But for - 100% immunity	IV.3405 – IV.3448	Frank Haslam Milan	IV.470 – IV.502, IV.326 – IV.334
128	22/11/2002	Sports Hall Extension at Robert Atkinson Youth & Community Centre, Thornaby	But for - 100% immunity	IV.3560 – IV.3584		IV.470 – IV.502
135	27/01/2003	17/18 Dover Street London	But for - 100% immunity	IV.3680 – IV.3744		IV.470 – IV.502
154	08/07/2003	Re-roofing and External Repairs, 242-254 Banbury Road, Oxford	But for - 100% immunity	IV.4230 – IV.4270		IV.470 – IV.502
155	11/07/2003	Mount Pleasant, Greenford, External Remedial Work (Phase 2)	But for - 100% immunity	IV.4271 – IV.4294		IV.470 – IV.502
181	20/02/2004	New Sports Centre, Jubilee Campus, Nottingham	But for - 100% immunity	IV.4998 – IV.5027		IV.470 – IV.502
187	16/04/2004	Amalgamation Of Portland / Hartland Schools	But for - 100% immunity	IV.5142 – IV.5181	Sol	IV.470 – IV.502, IV.593 – IV.616
188	16/04/2004	Willington Down Farm, Didcot	But for - 100% immunity	IV.5182 – IV.5214		IV.470 – IV.502
199	08/07/2004	External Refurbishment, Sutton Court Shops, Hillingdon	But for - 100% immunity	IV.5489 – IV.5520		IV.470 – IV.502
203	09/09/2004	Mount Pleasant, Phase 4, Window Replacement, Redecorations, Internal Improvements, Bracknell	But for - 100% immunity	IV.5607 – IV.5643		IV.470 – IV.502
208	12/11/2004	Refurbishment 10/12 Bowden Road, Sunninghill	But for - 100% immunity	IV.5784 – IV.5804		IV.470 – IV.502
215	28/01/2005	14 Redlands Road, University of Reading	But for - 100% immunity	IV.6018 – IV.6049		IV.470 – IV.502
220	29/03/2005	External Structural Refurbishment Works, 13 – 42 Claremont Close, London	But for - 100% immunity	IV.6159 – IV.6193		IV.470 – IV.502

224	27/05/2005	Refurbishment, 12 & 16 Redlands Road, Reading	But for - 100% immunity	IV.6244 – IV.6291		IV.470 – IV.502
234	24/08/2005	Hillside Primary School, Classroom Extension	But for - 100% immunity	IV.6535 – IV.6557		IV.470 – IV.502
240	02/02/2006	Redevelopment and Refurbishment of 45 – 46 South Molton Street, London	But for - 100% immunity	IV.6685 – IV.6711		IV.189 – IV.203

Party 12: Ballast Nedam as the ultimate parent company of its dissolved subsidiary Ballast (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
41	11/01/2001	Chilwell T.A. Centre, Garage and Workshop	Fast track discount	IV.1362 – IV.1390	Sol	IV.593 – IV.616
47	31/01/2001	Environmental Works at Burley Lodge, Leeds	Fast track discount	IV.1527 – IV.1559	Henry Boot, Strata	IV.363 – IV.374, IV.617 – IV.634
48	09/02/2001	Herschel Grammar School, Music and Drama Block, Slough	Fast track discount	IV.1560 – IV.1581	Mansell	IV.470 – IV.502

Party 13: Beaufort together with its ultimate parent company Beaufort Holdings (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
34	05/12/2000	Civic Accommodation, County Hall, Nottingham	Fast track discount	IV.1167 – IV.1203	Bodill, Loach	IV.229 – IV.242, IV.453 – IV.469
66	13/07/2001	New Assembly Hall, Seeley Church Primary School Nottingham	Fast track discount	IV.2033 – IV.2076	Bodill, Loach	IV.229 – IV.242, IV.453 – IV.469
152	27/06/2003	Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield	Fast track discount	IV.4194 – IV.4229	Derwent Valley	IV.303 – IV.325

Party 14: Bodill (35 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
17	02/08/2000	Internal Redecoration of King Edward Court, Nottingham	But for - 100% immunity	IV.894 – IV.915		IV.229 – IV.242
30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	But for - 100% immunity	IV.1080 – IV.1119	Mansell, Thomas Vale	IV.229 – IV.242, IV.470 – IV.502, IV.689 – IV.717
32	27/11/2000	Alterations to Reception at King Edward Court, Nottingham	No penalty	IV.1141 – IV.1166		IV.229 – IV.242
34	05/12/2000	Civic Accommodation, County Hall, Nottingham	But for - 100% immunity	IV.1167 – IV.1203	Loach	IV.229 – IV.242, IV.453 – IV.469
38	15/12/2000	Fresh Start Phase 5, River Leen School, Bulwell, Nottingham	But for - 100% immunity	IV.1268 – IV.1303		IV.229 – IV.242
40	21/12/2000	Upgrade of Six Gregory Flats, Phase 4, Kipling Close, Worksop, Notts	But for - 100% immunity	IV.1337 – IV.1361		IV.229 – IV.242
45	19/01/2001	Rock City, Talbot Street, Nottingham	But for - 100% immunity	IV.1462 – IV.1483		IV.229 – IV.242
46	22/01/2001	New House At Western Terrace, The Park, Nottingham	But for - 100% immunity	IV.1484 – IV.1526		IV.229 – IV.242
50	30/03/2001	12 Self-Contained Flats, Castle Street, Mansfield Woodhouse	But for - 100% immunity	IV.1612 – IV.1636	Adam Eastwood	IV.229 – IV.242, IV.159 – IV.165
52	17/04/2001	New Build Extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire	But for - 100% immunity	IV.1637 – IV.1662		IV.229 – IV.242
53	19/04/2001	Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire	But for - 100% immunity	IV.1663 – IV.1699	Admiral	IV.229 – IV.242, IV.166 – IV.173
54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	But for - 100% immunity	IV.1700 – IV.1739	Loach	IV.229 – IV.242, IV.453 – IV.469
55	27/04/2001	Alteration and Extension to Front Entrance, Cantrell Primary School, Bullwell, Nottingham	But for - 100% immunity	IV.1740 – IV.1775	John Cawley	IV.229 – IV.242, IV.441 – IV.452
56	27/04/2001	Mobile Classroom Replacement, Cantrell Primary School, Bullwell, Nottinghamshire	But for - 100% immunity	IV.1776 – IV.1811	John Cawley	IV.229 – IV.242, IV.441 – IV.452
65	09/07/2001	Consolidation Works at Fairham Community College, Clifton, Nottingham	But for - 100% immunity	IV.1992 – IV.2032		IV.229 – IV.242
66	13/07/2001	New Assembly Hall - Seeley Church Primary School, Nottingham	But for - 100% immunity	IV.2033 – IV.2076	Loach	IV.229 – IV.242, IV.453 – IV.469
70	15/08/2001	Brick Cladding and Associated Works, 15 Cornish Dwellings, Phase 7, Milton Drive, Worksop, Notts	But for - 100% immunity	IV.2159 – IV.2183		IV.229 – IV.242
78	08/10/2001	15 Dwellings, Station Rd Kimberly Phase 2	But for - 100% immunity	IV.2314 – IV.2345	Strata	IV.229 – IV.242, IV.617 – IV.634

80	01/11/2001	Upgrade of Four Bungalows, Doncaster Road, Costhorpe, Nottinghamshire	No penalty	IV.2372 – IV.2396		IV.229 – IV.242
82	20/11/2001	Crown Premises Inspection Group ('CPIG') Repair Work – HMP Nottingham	But for - 100% immunity	IV.2397 – IV.2433	Herbert Baggaley	IV.229 – IV.242, IV.375 – IV.390
86	03/12/2001	Trustwide Fire Improvements at Various Sites, Leicestershire and Rutland Healthcare NHS Trust	But for - 100% immunity	IV.2524 – IV.2548		IV.229 – IV.242
114	08/07/2002	Conversion & Extension of CCTV Control Room, Beeston Police Station, Nottinghamshire	No penalty	IV.3176 – IV.3203	W R Bloodworth	IV.229 – IV.242, IV.718 – IV.725
115	12/07/2002	Classroom & Dining Room Refurbishment, Shirebrook School, Shirebrook, Nottinghamshire	No penalty	IV.3204 – IV.3232		IV.229 – IV.242
127	13/11/2002	Refurbishment of 27 Empty Council-Owned Properties, Major Works Phase 1, Citywide Properties, Nottingham	Leniency discount	IV.3536 – IV.3559		IV.229 – IV.242
129	25/11/2002	Re-Building of Eight Newland Properties, Bilborough, Nottingham	But for - 100% immunity	IV.3585 – IV.3610		IV.229 – IV.242
141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, London Road, Newark, Nottinghamshire	But for - 100% immunity	IV.3948 – IV.3985	Wrights (Lincoln)	IV.229 – IV.242, IV.567 – IV.592
159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	But for - 100% immunity	IV.4440 – IV.4488	Wildgoose	IV.229 – IV.242, IV.726 – IV.742
160	01/08/2003	Refurbishments at Sneinton Corporate Properties, Nottingham City Council	Leniency discount	IV.4489 – IV.4513		IV.229 – IV.242
163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	But for - 100% immunity	IV.4552 – IV.4590	Frudd, P Waller	IV.229 – IV.242, IV.335 – IV.351, IV.517 – IV.526
171	12/11/2003	Alterations to Ward C31 and C32 to Form a Women's Centre, Queens Medical Centre, Nottingham	But for - 100% immunity	IV.4739 – IV.4775	John Cawley	IV.229 – IV.242, IV.441 – IV.452
184	05/03/2004	Butlers Hill Infant & Nursery School, Hucknall, Nottingham	But for - 100% immunity	IV.5092 – IV.5115		IV.229 – IV.242
193	28/05/2004	Refurbishment of Sure Start, St Anne's Metrazone, Ransom Road, Nottingham	But for - 100% immunity	IV.5316 – IV.5338		IV.229 – IV.242
196	30/06/2004	Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop	But for - 100% immunity	IV.5402 – IV.5427		IV.229 – IV.242
198	08/07/2004	Alterations & Refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham	But for - 100% immunity	IV.5460 – IV.5488	Phoenix	IV.229 – IV.242, IV.527 – IV.536
204	21/10/2004	New Build of Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	Leniency discount	IV.5644 – IV.5692	Herbert Baggaley	IV.229 – IV.242, IV.375 – IV.390

Party 15: Bowmer & Kirkland together with its subsidiary BKPS (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
18	11/08/2000	Superstore, Retail Units and Petrol Filling Station, St Andrew's Retail Park, Small Heath, Birmingham	No discount	IV.916 – IV.941	Sol	IV.593 – IV.616

85	03/12/2001	New Press Foundations & Associated Alteration Works – Derby Daily Telegraph, Derby	No discount	IV.2482 – IV.2523	Herbert Baggaley	IV.375 – IV.390
134	24/01/2003	Classroom Extension and Interior Alterations, Crich Fritchley Primary School	Fast track discount	IV.3641 – IV.3679	Derwent Valley	IV.303 – IV.325

Party 16: Bramall and Frank Haslam Milan together with their ultimate parent company Keepmoat (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
57	30/04/2001	Early Excellence Centre, Aughton Nursery School	Leniency discount	IV.1812 – IV.1840	Wildgoose	IV.243 – IV.273, IV.726 – IV.742
123	11/10/2002	External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View	But for - 100% immunity	IV.3405 – IV.3448	Mansell	IV.326 – IV.334, IV.470 – IV.502
179	09/02/2004	Beacon Resource Centre, Cromwell Road, Charlestown, Salford	But for - 100% immunity	IV.4932 – IV.4966		IV.243 – IV.273

Party 17: C J Ellmore (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
7	08/03/2000	Guiseley School, Fieldhead Road, Guiseley, Leeds	No discount	IV.790 – IV.819	Strata	IV.617 – IV.634
94	23/01/2002	Proposed Club Fandango, Morley, Leeds	No discount	IV.2706 – IV.2733	Irwins	IV.408 – IV.419
105	23/04/2002	Alterations and Extensions to Haigh Hall Medical Centre	No discount	IV.2998 – IV.3031	Irwins	IV.408 – IV.419

Party 18: Caddick together with its ultimate parent company Caddick Group (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
35	08/12/2000	Proposed Extension, Milford Sports Club	Fast track discount	IV.1204 – IV.1224	Strata	IV.617 – IV.634

205	25/10/2004	Residential Developments, Napier Street, Sheffield	Fast track discount	IV.5693 – IV.5722	Jack Lunn	IV.431 – IV.440
211	08/12/2004	New Build Extra Care Housing Development, Huddersfield Road, Mirfield	Fast track discount	IV.5875 – IV.5910	Hobson & Porter, York House	IV.391 – IV.407, IV.743 – IV.751

Party 19: Carillion JM Limited ('Mowlem') (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
27	16/10/2000	Proposed Police Station, Spennymoor	But for - 100% immunity	IV.1035 – IV.1053		IV.503 – IV.516
39	20/12/2000	Saxton Gardens Phase 2	Leniency discount	IV.1304 – IV.1336	Henry Boot	IV.503 – IV.516, IV.363 – IV.374
210	03/12/2004	Three New Community Sports Complexes, Lincolnshire	Leniency discount	IV.5836 – IV.5874		IV.503 – IV.516

Party 20: Clegg together with its ultimate parent company D E Clegg (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
139	28/02/2003	Factory and Offices, Haydock	Leniency discount	IV.3877 – IV.3910		IV.274 – IV.292
168	21/10/2003	Ashgate Hospice, Old Brampton, Chesterfield	Leniency discount	IV.4668 – IV.4710	Herbert Baggaley	IV.274 – IV.292, IV.375 – IV.390
212	14/12/2004	Gotham Primary School, Gotham, Nottingham	But for - 100% immunity	IV.5911 – IV.5943		IV.274 – IV.292

Party 21: Connaught together with its ultimate parent company Connaught plc (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
22	07/09/2000	Refurbishment, 73 Wates Houses, Windsor	No discount	IV.991 – IV.1011	Mansell	IV.470 – IV.502

123	11/10/2002	External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View	No discount	IV.3405 – IV.3448	Frank Haslam Milan, Mansell	IV.326 – IV.334, IV.470 – IV.502
175	22/12/2003	Refurbishment of Silverwood Flats	No discount	IV.4855 – IV.4878	Henry Boot	IV.363 – IV.374

Party 22: Crown Point as the ultimate parent company of its dissolved subsidiary Greenwood, for Greenwood's infringements after 11 June 2002 (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
29	08/11/2000	Refurbishment of a House, 143 Sneinton Dale, Sneinton, Nottingham	No penalty	IV.1054 – IV.1079		
68	30/07/2001	Pre-War Improvements 2001/02 - Replacement Kitchens, Swadlincote	No penalty	IV.2105 – IV.2137	Derwent Valley	IV.303 – IV.325
118	06/09/2002	Internal Alterations to Workshops, West Nottinghamshire College, Derby Road, Mansfield	No discount	IV.3263 – IV.3290		
133	19/12/2002	Hill Crescent Changing Block	No discount	IV.3611 – IV.3640	ARG	IV.174 – IV.181
158	25&30/07/2003	North Lodge and Cricket Pavilion, Queen's Park, Chesterfield	No discount	IV.4347 – IV.4439	Wildgoose, Herbert Baggaley	IV.726 – IV.742, IV.375 – IV.390

Greenwood has been under the ownership of and ultimately controlled by Crown Point since 11 June 2002. The OFT is therefore addressing this Statement to Crown Point only in respect of those tenders involving Greenwood which are dated after 11 June 2002. Consequently the OFT does not intend to take any action against either Greenwood or Crown Point for the two tenders dated 8/11/2000 and 30/7/2001, for which Greenwood is mentioned solely due to the fact that it was a counter-party to cover pricing on those tenders.

Party 23: Davlyn (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
72	24/08/2001	Proposed IT Suite, Rawdon Street, Derby, Indian Community Centre & DTC	Leniency discount	IV.2184 – IV.2213	Derwent Valley	IV.293 – IV.302, IV.303 – IV.325
84	30/11/2001	Inclusion Unit Extension, St Benedict Catholic School & Performing Arts College	Leniency discount	IV.2455 – IV.2481	Derwent Valley	IV.293 – IV.302, IV.303 – IV.325
164	22/09/2003	Fire Damage, Stenson Fields, Derby	Leniency discount	IV.4591 – IV.4616	Derwent Valley	IV.293 – IV.302, IV.303 – IV.325

Party 24: Derwent Valley together with its ultimate parent company Chevin (11 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
68	30/07/2001	Pre-War Improvements 2001/02 - Replacement Kitchens, Swadlincote	No penalty	IV.2105 – IV.2137		IV.303 – IV.325
72	24/08/2001	Proposed IT Suite, Rawdon Street, Derby, Indian Community Centre & DTC	No penalty	IV.2184 – IV.2213	Davlyn	IV.303 – IV.325, IV.293 – IV.302
84	30/11/2001	Inclusion Unit Extension, St Benedict Catholic School & Performing Arts College	No penalty	IV.2455 – IV.2481	Davlyn	IV.303 – IV.325, IV.293 – IV.302
93	21/12/2001	Waverley Street Clinic, Derby	No penalty	IV.2681 – IV.2705		IV.303 – IV.325
110	30/05/2002	Fire Damage Refurbishment, 22 Midlame Gardens, Bulwell	No penalty	IV.3121 – IV.3150		IV.303 – IV.325
120	20/09/2002	Refurbishment of Changing Rooms, St Benedict School, Derby	No penalty	IV.3317 – IV.3350		IV.303 – IV.325
134	24/01/2003	Classroom Extension and Interior Alterations, Crich Fritchley Primary School	No penalty	IV.3641 – IV.3679		IV.303 – IV.325
136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	No penalty	IV.3745 – IV.3813	Admiral, Wildgoose	IV.303 – IV.325, IV.166 – IV.173, IV.726 – IV.742
144	14/04/2003	Two Wheelchair Bungalows, Howden Road, Leicester	Leniency discount	IV.4040 – IV.4070		IV.303 – IV.325
152	27/06/2003	Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield	Leniency discount	IV.4194 – IV.4229		IV.303 – IV.325
164	22/09/2003	Fire Damage, Stenson Fields, Derby	Leniency discount	IV.4591 – IV.4616	Davlyn	IV.303 – IV.325, IV.293 – IV.302
Party 25: Dukeries (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
144	14/04/2003	Two Wheelchair Bungalows, Howden Road, Leicester	No discount	IV.4040 – IV.4070	Derwent Valley	IV.303 – IV.325
160	01/08/2003	Refurbishments at Sneinton Corporate Properties, Nottingham City Council	No discount	IV.4489 – IV.4513	Bodill	IV.229 – IV.242

207	11/11/2004	Fire Reinstatement Works At 63 Westgate, Mansfield	Fast track discount	IV.5761 – IV.5783	ARG	IV.174 – IV.181
Party 26: Durkan and Durkan Limited together with the former ultimate parent company of Durkan and the current ultimate parent company of Durkan Limited, Durkan Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
135	27/01/2003	17/18 Dover Street London	Fast track discount	IV.3680 – IV.3744	Mansell	IV.470 – IV.502
220	29/03/2005	External Structural Refurbishment Works, 13 – 42 Claremont Close, London	No discount	IV.6159 – IV.6193	Mansell	IV.470 – IV.502
240	02/02/2006	Redevelopment and Refurbishment of 45 – 46 South Molton Street, London	Fast track discount	IV.6685 – IV.6711	Balfour Beatty	IV.189 – IV.203
Party 27: E Manton (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
53	19/04/2001	Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire	Fast track discount	IV.1663 – IV.1699	Admiral, Bodill	IV.166 – IV.173, IV.229 – IV.242
68	30/07/2001	Pre-War Improvements 2001/02 - Replacement Kitchens, Swadlincote	Fast track discount	IV.2105 – IV.2137	Derwent Valley	IV.303 – IV.325
Party 28: E Taylor (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
29	08/11/2000	Refurbishment of a House, 143 Sneinton Dale, Sneinton, Nottingham	No discount	IV.1054 – IV.1079		
115	12/07/2002	Classroom & Dining Room Refurbishment, Shirebrook School, Shirebrook, Nottinghamshire	No discount	IV.3204 – IV.3232	Bodill	IV.229 – IV.242
141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, London Road, Newark, Nottinghamshire	No discount	IV.3948 – IV.3985	Bodill, Wrights (Lincoln)	IV.229 – IV.242, IV.567 – IV.592

Party 29: F Parkinson together with its ultimate parent company Mowbray (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
128	22/11/2002	Sports Hall Extension at Robert Atkinson Youth & Community Centre, Thornaby	Fast track discount	IV.3560 – IV.3584	Mansell	IV.470 – IV.502
139	28/02/2003	Factory and Offices, Haydock	Fast track discount	IV.3877 – IV.3910	Clegg	IV.274 – IV.292
221	01/04/2005	Extension and Refurbishment at Oaklands Sports Centre, York	Fast track discount	IV.6194 – IV.6214	Strata	IV.617 – IV.634
Party 30: Francis together with its ultimate parent company Barrett (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
69	13/08/2001	Stoke Poges School	No discount	IV.2138 – IV.2158	Mansell	IV.470 – IV.502
208	12/11/2004	Refurbishment 10/12 Bowden Road, Sunninghill	No discount	IV.5784 – IV.5804	Mansell	IV.470 – IV.502
234	24/08/2005	Hillside Primary School, Classroom Extension	No discount	IV.6535 – IV.6557	Mansell	IV.470 – IV.502
Party 31: Frudd (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
112	31/05/2002	Winthorpe Road Estate Repairs, Newark	Leniency discount	IV.3151 – IV.3175		IV.335 – IV.351
163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	Leniency discount	IV.4552 – IV.4590	Bodill, P Waller	IV.335 – IV.351, IV.229 – IV.242, IV.517 – IV.526
178	30/01/2004	William Sharp Comprehensive School, Bilborough, Nottingham	Leniency discount	IV.4898 – IV.4931		IV.335 – IV.351

Party 32: GAJ together with its current ultimate parent company GAJ Holdings (1 Infringement)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
174	22/12/2003	Unit 1, Dutton Road, Alderman's Green Industrial Estate, Coventry	Fast track discount	IV.4825 – IV.4854	Thomas Vale	IV.689 – IV.717
Party 33: G Carter (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
82	20/11/2001	Crown Premises Inspection Group ('CPIG') Repair Work – HMP Nottingham	No discount	IV.2397 – IV.2433	Bodill, Herbert Baggaley	IV.229 – IV.242, IV.375 – IV.390
147	13/05/2003	New Extension and Alterations to Building to Form a Veterinary Surgery, 36 Clipstone Road West, Mansfield	No discount	IV.4117 – IV.4142	P Waller	IV.517 – IV.526
169	28/10/2003	Assessment Centre HMYOI Glen Parva, Leicester	No discount	IV.4711 – IV.4738	Herbert Baggaley	IV.375 – IV.390
Party 34: G F Tomlinson together with its ultimate parent company G F Tomlinson Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
46	22/01/2001	New House At Western Terrace, The Park, Nottingham	Fast track discount	IV.1484 – IV.1526	Bodill	IV.229 – IV.242
187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Fast track discount	IV.5142 – IV.5181	Mansell, Sol	IV.470 – IV.502, IV.593 – IV.616
201	30/07/2004	E-Centre Office Development - Sherwood Energy Village, Ollerton	Fast track discount	IV.5521 – IV.5562	Herbert Baggaley	IV.375 – IV.390

Party 35: G G Middleton (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
149	23/06/2003	Ward Refurbishment, Calow	Fast track discount	IV.4143 – IV.4165	Henry Boot	IV.363 – IV.374
156	15/07/2003	Redhill Comprehensive - New Sixth Form Block	Fast track discount	IV.4295 – IV.4325	Sol	IV.593 – IV.616
187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Fast track discount	IV.5142 – IV.5181	Mansell, Sol	IV.470 – IV.502, IV.593 – IV.616
Party 36: G & J Seddon together with its ultimate parent company Seddon (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
23	15/09/2000	New Pavilion and Facilities, Pole Lane, Unsworth Cricket Club	Fast track discount	IV.1012 – IV.1034	Strata	IV.617 – IV.634
39	20/12/2000	Saxton Gardens Phase 2	Fast track discount	IV.1304 – IV.1336	Carillion, Henry Boot	IV.503 – IV.516, IV.363 – IV.374
176	28/01/2004	Group Repair Scheme, Phase 29, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley	Fast track discount	IV.4879 – IV.4897		
Party 37: GMI together with (for infringements after 6 February 2005) its current ultimate parent company GMI Construction Holdings (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
14	12/06/2000	Office Development at Lancaster Park, York	No discount	IV.863 – IV.893	Irwins	IV.408 – IV.419
228	20/06/2005	Extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds	No discount	IV.6364 – IV.6391	Propensity	IV.537 – IV.566

Party 38: Geo Houlton together with its ultimate parent company Geo Houlton Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
83	28/11/2001	Business Centre Extension and New Training Centre, Driffield	Fast track discount	IV.2434 – IV.2454	Strata	IV.617 – IV.634
194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	Fast track discount	IV.5339 – IV.5365	Hobson & Porter	IV.391 – IV.407
226	08/06/2005	New Library, Centurian Way, Brough	Fast track discount	IV.6320 – IV.6341	Hobson & Porter	IV.391 – IV.407
Party 39: Greswolde together with its ultimate parent company Mantisson (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
20	18/08/2000	Mason House, Shirley	Fast track discount	IV.942 – IV.969	Thomas Vale	IV.689 – IV.717
58	08/05/2001	The Toll House, Stratford-upon-Avon	Fast track discount	IV.1841 – IV.1866	Thomas Vale	IV.689 – IV.717
102	15/04/2002	Centre for Organic Horticulture Phase 1, Ryton Organic Gardens, Coventry	Fast track discount	IV.2902 – IV.2928	Thomas Vale	IV.689 – IV.717
Party 40: Hall (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
122	25/09/2002	Reception and Office Extension at St Anne's Community Special School, Welton, Brough	Fast track discount	IV.3377 – IV.3404	Hobson & Porter	IV.391 – IV.407
172	05/12/2003	Alterations to Building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull	Fast track discount	IV.4776 – IV.4797	Hobson & Porter	IV.391 – IV.407
236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Fast track discount	IV.6580 – IV.6606	Hobson & Porter	IV.391 – IV.407

Party 41: Harlow & Milner (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
138	12/02/2003	Chapelton Partnership Office Refurbishment, Sheffield	But for - 100% immunity	IV.3847 – IV.3876	Propensity	IV.352 – IV.362, IV.537 – IV.566
237	14/11/2005	Whetley Primary School Refurbishment	But for - 100% immunity	IV.6607 – IV.6634		IV.352 – IV.362
241	13/02/2006	29 Houses, Rosemount Clifton Villas	Leniency discount	IV.6712 – IV.6742	Jack Lunn	IV.352 – IV.362, IV.431 – IV.440
Party 42: Harold Adkin (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
118	06/09/2002	Internal Alterations to Workshops, West Nottinghamshire College, Derby Road, Mansfield	Fast track discount	IV.3263 – IV.3290		
152	27/06/2003	Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield	Fast track discount	IV.4194 – IV.4229	Derwent Valley	IV.303 – IV.325
196	30/06/2004	Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop	Fast track discount	IV.5402 – IV.5427	Bodill	IV.229 – IV.242
Party 43: Haymills together with (for infringements prior to 26 May 2004) its former ultimate parent company Corringway and (for infringements after 26 May 2004) its current ultimate parent company Haymills Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
103	16/04/2002	Refurbishment of Psychiatric Services, Wards S2 & S3, Addenbrookes Hospital, Cambridge	Fast track discount	IV.2929 – IV.2952	Propensity	IV.537 – IV.566
119	16/09/2002	Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk	Fast track discount	IV.3291 – IV.3316	Propensity	IV.537 – IV.566
232	29/07/2005	New Build Agricultural Building, Crowe Hall, Stutton	Fast track discount	IV.6471 – IV.6496	Propensity	IV.537 – IV.566

Party 44: Henry Boot together with its ultimate parent company Henry Boot plc (4 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
39	20/12/2000	Saxton Gardens Phase 2	But for - 100% immunity	IV.1304 – IV.1336	Carillion	IV.363 – IV.374, IV.503 – IV.516
47	31/01/2001	Environmental Works at Burley Lodge, Leeds	Leniency discount	IV.1527 – IV.1559	Strata	IV.363 – IV.374, IV.617 – IV.634
149	23/06/2003	Ward Refurbishment, Calow	But for - 100% immunity	IV.4143 – IV.4165		IV.363 – IV.374
175	22/12/2003	Refurbishment of Silverwood Flats	But for - 100% immunity	IV.4855 – IV.4878		IV.363 – IV.374
Party 45: Herbert Baggageley together with its ultimate parent company Baggageley Group (12 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
82	20/11/2001	Crown Premises Inspection Group ('CPIG') Repair Work – HMP Nottingham	No penalty	IV.2397 – IV.2433	Bodill	IV.375 – IV.390, IV.229 – IV.242
85	03/12/2001	New Press Foundations & Associated Alteration Works – Derby Daily Telegraph, Derby	No penalty	IV.2482 – IV.2523		IV.375 – IV.390
89	11/12/2001	Extension to Offices, Meadow House, Bath Street, Mansfield	No penalty	IV.2576 – IV.2629	Mansell, Thomas Fish	IV.375 – IV.390, IV.470 – IV.502, IV.650 – IV.688
98	20/02/2002	Conversion of Davers Steel Building, Sheffield	No penalty	IV.2823 – IV.2875	Wildgoose	IV.375 – IV.390, IV.726 – IV.742
108	15/05/2002	Office Block, Sherwood Rise, Nottingham	No penalty	IV.3094 – IV.3120	Adam Eastwood	IV.375 – IV.390, IV.159 – IV.165
140	03/03/2003	Alterations to Newhall Methodist Church, Swadlincote Derbyshire	But for - 100% immunity	IV.3911 – IV.3947	W R Bloodworth	IV.375 – IV.390, IV.718 – IV.725
146	12/05/2003	Construction of Four-Storey Lift Tower, Burton College	Leniency discount	IV.4071 – IV.4116	Wildgoose	IV.375 – IV.390, IV.726 – IV.742
158	25&30/7/2003	North Lodge and Cricket Pavilion, Queen's Park, Chesterfield	Leniency discount	IV.4347 – IV.4439	Wildgoose	IV.375 – IV.390, IV.726 – IV.742
168	21/10/2003	Ashgate Hospice, Old Brampton, Chesterfield	Leniency discount	IV.4668 – IV.4710	Clegg	IV.375 – IV.390, IV.274 – IV.292

169	28/10/2003	Assessment Centre HMYOI Glen Parva, Leicester	But for - 100% immunity	IV.4711 – IV.4738		IV.375 – IV.390
201	30/07/2004	E-Centre Office Development - Sherwood Energy Village, Ollerton	But for - 100% immunity	IV.5521 – IV.5562		IV.375 – IV.390
204	21/10/2004	New Build of Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	But for - 100% immunity	IV.5644 – IV.5692	Bodill	IV.375 – IV.390, IV.229 – IV.242

Party 46: Hill (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
67	25/07/2001	Robert Mellors Primary School, Nottingham	No discount	IV.2077 – IV.2104	P Waller	IV.517 – IV.526
110	30/05/2002	Fire Damage Refurbishment, 22 Midlame Gardens, Bulwell	No discount	IV.3121 – IV.3150	Derwent Valley	IV.303 – IV.325
184	05/03/2004	Butlers Hill Infant & Nursery School, Hucknall, Nottingham	No discount	IV.5092 – IV.5115	Bodill	IV.229 – IV.242

Party 47: Hobson & Porter (11 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
122	25/09/2002	Reception and Office Extension at St Anne's Community Special School, Welton, Brough	But for - 100% immunity	IV.3377 – IV.3404		IV.391 – IV.407
162	08/08/2003	Nursery at Westfield Primary School, York	No penalty	IV.4514 – IV.4551	Strata	IV.391 – IV.407, IV.617 – IV.634
172	05/12/2003	Alterations to Building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull	No penalty	IV.4776 – IV.4797		IV.391 – IV.407
192	14/05/2004	New Lift Shaft Coniston House, Willerby	But for - 100% immunity	IV.5290 – IV.5315		IV.391 – IV.407
194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	No penalty	IV.5339 – IV.5365		IV.391 – IV.407
211	08/12/2004	New Build Extra Care Housing Development, Huddersfield Road, Mirfield	No penalty	IV.5875 – IV.5910	York House	IV.391 – IV.407, IV.743 – IV.751
218	26/02/2005	Fire Refuge, Wilberforce Building, Hull University	No penalty	IV.6104 – IV.6132	Simons	IV.391 – IV.407, IV.567 – IV.592
226	08/06/2005	New Library, Centurian Way, Brough	No penalty	IV.6320 – IV.6341		IV.391 – IV.407

230	25/07/2005	34 Residential Apartments at 71-75 Wright Street, Hull	Leniency discount	IV.6421 – IV.6445		IV.391 – IV.407
236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Leniency discount	IV.6580 – IV.6606		IV.391 – IV.407
238	28/11/2005	Calder Link Building, University of Hull	Leniency discount	IV.6635 – IV.6658		IV.391 – IV.407

Party 48: Holroyd together with (for infringements prior to 30 March 2005) its former ultimate parent company Holderness and (for infringements after 30 March 2005) its current ultimate parent company Holroyd Group (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
31	27/11/2000	New Church Blacker Road	No discount	IV.1120 – IV.1140	Strata	IV.617 – IV.634
125	28/10/2002	New Office Block and Refurbishment of Warehouse, Doncaster	No discount	IV.3474 – IV.3496	Irwins	IV.408 – IV.419
231	29/07/2005	Phase 3 Office Development, Park Lane, Allerton Bywater	No discount	IV.6446 – IV.6470	Irwins	IV.408 – IV.419

Party 49: Interclass together with its ultimate parent company Interclass Holdings (2 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
75	18/09/2001	Refurbishment, Wattville Thomas J&I School, Handsworth	Fast track discount	IV.2241 – IV.2293	Balfour Beatty, Thomas Vale	IV.189 – IV.203, IV.689 – IV.717
150	25/06/2003	Two Gates Primary School, Tamworth	Fast track discount	IV.4166 – IV.4193	Thomas Vale	IV.689 – IV.717

Party 50: Interserve together with its ultimate parent company Interserve plc (2 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
27	16/10/2000	Proposed Police Station, Spennymoor	No discount	IV.1035 – IV.1053	Carillion	IV.503 – IV.516

36	08/12/2000	Summerhill Terrace, Birmingham	Fast track discount	IV.1225 – IV.1247	Balfour Beatty	IV.189 – IV.203
Party 51: Irwins and Jack Lunn together with their ultimate parent company Jack Lunn Holdings (11 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
14	12/06/2000	Office Development at Lancaster Park, York	No penalty	IV.863 – IV.893		IV.408 – IV.419
62	06/06/2001	General Building/Fit-out of John Street Market, Bradford	No penalty	IV.1908 – IV.1929		IV.408 – IV.419
94	23/01/2002	Proposed Club Fandango, Morley, Leeds	No penalty	IV.2706 – IV.2733		IV.408 – IV.419
105	23/04/2002	Alterations and Extensions to Haigh Hall Medical Centre	No penalty	IV.2998 – IV.3031		IV.408 – IV.419
125	28/10/2002	New Office Block and Refurbishment of Warehouse, Doncaster	No penalty	IV.3474 – IV.3496		IV.408 – IV.419
157	21/07/2003	Refurbishment to Allerton Bywater, Miners' Welfare Centre	No penalty	IV.4326 – IV.4346		IV.408 – IV.419
165	24/09/2003	Residential Development, Stanningley Road, Leeds	No penalty	IV.4617 – IV.4638		IV.408 – IV.419
182	25/02/2004	Apartment Development, Speculation Street, York	No penalty	IV.5028 – IV.5062		IV.431 – IV.440
205	25/10/2004	Residential Developments, Napier Street, Sheffield	Leniency discount	IV.5693 – IV.5722		IV.431 – IV.440
231	29/07/2005	Phase 3 Office Development, Park Lane, Allerton Bywater	Leniency discount	IV.6446 – IV.6470		IV.408 – IV.419
241	13/02/2006	29 Houses, Rosemount Clifton Villas	Leniency discount	IV.6712 – IV.6742	Harlow & Milner	IV.431 – IV.440, IV.352 – IV.362
Party 52: J Harper together with its ultimate parent company Harper plc (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
121	23/09/2002	Residential Development, Elmdale, Herefordshire	Fast track discount	IV.3351 – IV.3376	Thomas Vale	IV.689 – IV.717

219	28/02/2005	Eight New Dwellings, Appletree Close, Holt Heath, Worcestershire	Fast track discount	IV.6133 – IV.6158	Thomas Vale	IV.689 – IV.717
Party 53: J H Hallam together with its ultimate parent company Hallam (6 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
63	29/06/2001	13 Flats Charnwood House, Brant Hill Road, Woodhouse Eaves, Leicestershire	100% immunity	IV.1930 – IV.1968		IV.420 – IV.430
79	23/10/2001	Fullhurst Community College, Phase C, Braunstone, Leicester	But for - 100% immunity	IV.2346 – IV.2372		IV.420 – IV.430
95	04/02/2002	Five No. Health Centres, Primary Care Trust (East), East Midlands	Leniency discount	IV.2734 – IV.2756		IV.420 – IV.430
96	07/02/2002	Sir John Moore Primary School, Appleby Magna, Derbyshire	Leniency discount	IV.2757 – IV.2800		IV.420 – IV.430
183	05/03/2004	Conversion for Audio Visual Services, 12 Chiswick Road, University of Leicester	Leniency discount	IV.5063 – IV.5091	Phoenix	IV.420 – IV.430, IV.527 – IV.536
186	23/03/2004	Buswells Lodge Primary School, Beauville Drive, Beaumont Leys, Leicester	But for - 100% immunity	IV.5116 – IV.5141		IV.420 – IV.430
Party 54: J J & A R Jackson (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
8	14/03/2000	Four Flats at Viking Way, Kiveton Park	Fast track discount	IV.820 – IV.840	Strata	IV.617 – IV.634
9	11/04/2000	Residential Training Centre, Ollerton	Fast track discount	IV.841 – IV.862	ARG	IV.174 – IV.181
80	01/11/2001	Upgrade of Four Bungalows, Doncaster Road, Costhorpe, Nottinghamshire	Fast track discount	IV.2372 – IV.2396	Bodill	IV.229 – IV.242

Party 55: J J McGinley together with its former ultimate parent company McGinley Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
43	17/01/2001	Prebendal Estate, Phase 3, 52 Housing Refurbishments Aylesbury	Fast track discount	IV.1413 – IV.1434	Mansell	IV.470 – IV.502
91	19/12/2001	Repairs to 13 Wimpey No-Fines Houses, High Wycombe	Fast track discount	IV.2658 – IV.2680	Mansell	IV.470 – IV.502
97	07/02/2002	Refurbishment 92 Dwellings, Mandeville Road Housing Estate, Aylesbury	Fast track discount	IV.2801 – IV.2822	Mansell	IV.470 – IV.502
Party 56: John Cawley (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
55	27/04/2001	Alteration & Extension to Front Entrance, Cantrell Primary School, Bullwell, Nottinghamshire	Leniency discount	IV.1740 – IV.1775	Bodill	IV.441 – IV.452, IV.229 – IV.242
56	27/04/2001	Mobile Classroom, Cantrell Primary School, Bullwell, Nottinghamshire	Leniency discount	IV.1776 – IV.1811	Bodill	IV.441 – IV.452, IV.229 – IV.242
171	12/11/2003	Alterations to Ward C31 and C32 to Form a Women’s Centre, Queens Medical Centre, Nottingham	Leniency discount	IV.4739 – IV.4775	Bodill	IV.441 – IV.452, IV.229 – IV.242
Party 57: John Sisk together with its ultimate parent company Sicon (1 Infringement)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
166	01/10/2003	Waterfront Business Park, Merry Hill	Fast track discount	IV.4639 – IV.4667	Thomas Vale	IV.689 – IV.717

Party 58: K J Bryan (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
34	05/12/2000	Civic Accommodation, County Hall, Nottingham	No discount	IV.1167 – IV.1203	Bodill, Loach	IV.229 – IV.242, IV.453 – IV.469
38	15/12/2000	Fresh Start Phase 5, River Leen School, Bulwell, Nottingham	No discount	IV.1268 – IV.1303	Bodill	IV.229 – IV.242
133	19/12/2002	Hill Crescent Changing Block	No discount	IV.3611 – IV.3640	ARG	IV.174 – IV.181
Party 59: Kier together with its ultimate parent company Kier Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
77	01/10/2001	New Primary School, Riverside Development, Oundle Road, Peterborough	No discount	IV.2294 – IV.2313	Propensity	IV.537 – IV.566
162	08/08/2003	Nursery at Westfield Primary School, York	No discount	IV.4514 – IV.4551	Hobson & Porter, Strata	IV.391 – IV.407, IV.617 – IV.634
235	19/09/2005	Adnams Distribution Centre, Reydon, Southwold	No discount	IV.6558 – IV.6579	Propensity	IV.537 – IV.566
Party 60: Lemmeleg together with its ultimate parent company Rok (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
138	12/02/2003	Chapelton Partnership Office Refurbishment, Sheffield	Fast track discount	IV.3847 – IV.3876	Harlow & Milner, Propensity	IV.352 – IV.362, IV.537 – IV.566
159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	Fast track discount	IV.4440 – IV.4488	Bodill, Wildgoose	IV.229 – IV.242, IV.726 – IV.742
162	08/08/2003	Nursery at Westfield Primary School, York	Fast track discount	IV.4514 – IV.4551	Hobson & Porter, Strata	IV.391 – IV.407, IV.617 – IV.634

Party 61: Lindum together with its ultimate parent company Lindum Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
37	13/12/2000	Extension to Vermuyden School, Centenary Road, Goole	Fast track discount	IV.1248 – IV.1267	Strata	IV.617 – IV.634
182	25/02/2004	Apartment Development, Speculation Street, York	No discount	IV.5028 – IV.5062	Jack Lunn	IV.431 – IV.440
189	27/04/2004	Salvation Army Halls, Doncaster	Fast track discount	IV.5215 – IV.5236	Strata	IV.617 – IV.634
Party 62: Linford together with its ultimate parent company F & E V Linford (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
63	29/06/2001	13 Flats Charnwood House, Brant Hill Road, Woodhouse Eaves, Leicestershire	No discount	IV.1930 – IV.1968	J H Hallam	IV.420 – IV.430
96	07/02/2002	Sir John Moore Primary School, Appleby Magna, Derbyshire	No discount	IV.2757 – IV.2800	J H Hallam	IV.420 – IV.430
Party 63: Loach (4 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
34	05/12/2000	Civic Accommodation, County Hall, Nottingham	No penalty	IV.1167 – IV.1203	Bodill	IV.453 – IV.469, IV.229 – IV.242
54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	Leniency discount	IV.1700 – IV.1739	Bodill	IV.453 – IV.469, IV.229 – IV.242
66	13/07/2001	New Assembly Hall - Seeley Church Primary School Nottingham	Leniency discount	IV.2033 – IV.2076	Bodill	IV.453 – IV.469, IV.229 – IV.242
143	14/04/2003	Refurbishment Work and an Extension to 144 Sneinton Dale, Sneinton, Nottingham	Leniency discount	IV.4010 – IV.4039	W R Bloodworth	IV.453 – IV.469, IV.718 – IV.725

Party 64: Lotus (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
62	06/06/2001	General Building/Fit-out of John Street Market, Bradford	Fast track discount	IV.1908 – IV.1929	Irwins	IV.408 – IV.419
157	21/07/2003	Refurbishment to Allerton Bywater Miners' Welfare Centre	Fast track discount	IV.4326 – IV.4346	Irwins	IV.408 – IV.419
237	14/11/2005	Whetley Primary School Refurbishment	Fast track discount	IV.6607 – IV.6634	Harlow & Milner	IV.352 – IV.362
Party 65: Milward (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
120	20/09/2002	Refurbishment of Changing Rooms, St Benedict School, Derby	No discount	IV.3317 – IV.3350	Derwent Valley	IV.303 – IV.325
134	24/01/2003	Classroom Extension and Interior Alterations, Crich Fritchley Primary School	No discount	IV.3641 – IV.3679	Derwent Valley	IV.303 – IV.325
136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	No discount	IV.3745 – IV.3813	Admiral, Derwent Valley, Wildgoose	IV.166 – IV.173, IV.303 – IV.325, IV.726 – IV.742
Party 66: Bluestone together with its ultimate parent company Morgan Sindall (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
206	26/10/2004	Incubator Office Units, Colburn	Leniency discount	IV.5723 – IV.5760		IV.204 – IV.228
239	14/12/2005	Sydenham High School	But for - 100% immunity	IV.6659 – IV.6684		IV.204 – IV.228
243	21/02/2006	Digital Media Centre, Barnsley	But for - 100% immunity	IV.6771 – IV.6802		IV.204 – IV.228

Party 67: North Midland (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
46	22/01/2001	New House At Western Terrace, The Park, Nottingham	No discount	IV.1484 – IV.1526	Bodill	IV.229 – IV.242
190	04/05/2004	Civil Works for Aldwarke Primary Mill, Rotherham Works	No discount	IV.5237 – IV.5267	Admiral	IV.166 – IV.173
Party 68: PDH together with its ultimate parent company G Hurst & Sons (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
40	21/12/2000	Upgrade of Six Gregory Flats, Phase 4, Kipling Close, Worksop, Notts	No discount	IV.1337 – IV.1361	Bodill	IV.229 – IV.242
70	15/08/2001	Brick Cladding and Associated Works, 15 Cornish Dwellings, Phase 7, Milton Drive, Worksop, Notts	No discount	IV.2159 – IV.2183	Bodill	IV.229 – IV.242
Party 69: P Casey together with its ultimate parent company The Casey Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
64	09/07/2001	Priestnall CDT Extensions and Alterations	Fast track discount	IV.1969 – IV.1991	Strata	IV.617 – IV.634
162	08/08/2003	Nursery at Westfield Primary School, York	Fast track discount	IV.4514 – IV.4551	Hobson & Porter, Strata	IV.391 – IV.407, IV.617 – IV.634
225	08/06/2005	Swinnow Flats, Energy Efficiency Works	Fast track discount	IV.6292 – IV.6319	Strata	IV.617 – IV.634

Party 70: P Waller (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
67	25/07/2001	Robert Mellors Primary School, Nottingham	Leniency discount	IV.2077 – IV.2104		IV.517 – IV.526
147	13/05/2003	New Extension and Alterations to Building to Form a Veterinary Surgery, 36 Clipstone Road West, Mansfield	Leniency discount	IV.4117 – IV.4142		IV.517 – IV.526
163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	Leniency discount	IV.4552 – IV.4590	Bodill, Frudd	IV.517 – IV.526, IV.229 – IV.242, IV.335 – IV.351
Party 71: Pearce together with its parent Pearce Group and their former ultimate parent company Crest Nicholson (1 Infringement)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
75	18/09/2001	Refurbishment, Wattville Thomas J&I School, Handsworth	No discount	IV.2241 – IV.2293	Balfour Beatty, Thomas Vale	IV.189 – IV.203, IV.689 – IV.717
Party 72: Peter Baines (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
45	19/01/2001	Rock City, Talbot Street, Nottingham	Fast track discount	IV.1462 – IV.1483	Bodill	IV.229 – IV.242
66	13/07/2001	New Assembly Hall - Seeley Church Primary School Nottingham	Fast track discount	IV.2033 – IV.2076	Bodill, Loach	IV.229 – IV.242, IV.453 – IV.469
93	21/12/2001	Waverley Street Clinic, Derby	Fast track discount	IV.2681 – IV.2705	Derwent Valley	IV.303 – IV.325

Party 73: Phoenix (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
183	05/03/2004	Conversion for Audio Visual Services, 12 Chiswick Road, University of Leicester	Leniency discount	IV.5063 – IV.5091	J H Hallam	IV.527 – IV.536, IV.420 – IV.430
198	08/07/2004	Alterations & Refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham	Leniency discount	IV.5460 – IV.5488	Bodill	IV.527 – IV.536, IV.229 – IV.242
229	24/06/2005	Alterations to Law Faculty Offices, Fielding Johnson Building, University of Leicester	Leniency discount	IV.6392 – IV.6420		IV.527 – IV.536
Party 74: Propensity together with its wholly owned subsidiary companies, Jackson, Totty, Totty Building, and Propensity Limited (11 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
77	01/10/2001	New Primary School, Riverside Development, Oundle Road, Peterborough	But for - 100% immunity	IV.2294 – IV.2313		IV.537 – IV.566
103	16/04/2002	Refurbishment of Psychiatric Services, Wards S2 & S3, Addenbrookes Hospital, Cambridge	But for - 100% immunity	IV.2929 – IV.2952		IV.537 – IV.566
119	16/09/2002	Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk	But for - 100% immunity	IV.3291 – IV.3316		IV.537 – IV.566
138	12/02/2003	Chapelton Partnership Office Refurbishment, Sheffield	Leniency discount	IV.3847 – IV.3876	Harlow & Milner	IV.537 – IV.566, IV.352 – IV.362
191	14/05/2004	The Orchard Development, The Grovelands, Bedales School, Petersfield, Hampshire	But for - 100% immunity	IV.5268 – IV.5289		IV.537 – IV.566
202	27/08/2004	Alterations and Extension to Norwich Cinema City, St Andrews Street, Norwich	But for - 100% immunity	IV.5563 – IV.5606		IV.537 – IV.566
213	15/12/2004	New Warehouse, Green Road, Penistone, Sheffield	Leniency discount	IV.5944 – IV.5979	T & C Williams	IV.537 – IV.566, IV.635 – IV.649
222	04/04/2005	Refurbishment of Old Hall, Dessingham, Kings Lynn, Norfolk	But for - 100% immunity	IV.6215 – IV.6243		IV.537 – IV.566
228	20/06/2005	Extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds	100% immunity	IV.6364 – IV.6391		IV.537 – IV.566
232	29/07/2005	New Build Agricultural Building, Crowe Hall, Stutton	But for - 100% immunity	IV.6471 – IV.6496		IV.537 – IV.566
235	19/09/2005	Adnams Distribution Centre, Reydon, Southwold	But for - 100% immunity	IV.6558 – IV.6579		IV.537 – IV.566

Party 75: Quarmby together with its ultimate parent company St James Securities (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
6	03/03/2000	Conversion of Offices to Flats, 2 Water Lane, Leeds	No discount	IV.755 – IV.789	Strata	IV.617 – IV.634
214	23/12/2004	Humanities Research Institute, University of Sheffield	No discount	IV.5980 – IV.6017	Admiral	IV.166 – IV.173
233	08/08/2005	Eastbrook Hall, Little Germany, Bradford	No discount	IV.6497 – IV.6534	York House	IV.743 – IV.751
Party 76: Quarmby (Special Projects) together with its ultimate parent company Justgrade (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	No discount	IV.4440 – IV.4488	Bodill, Wildgoose	IV.229 – IV.242, IV.726 – IV.742
242	13/02/2006	Brookfield Manor, Hathersage	No discount	IV.6743 – IV.6770	T & C Williams	IV.635 – IV.649
Party 77: R Durtnell together with its ultimate parent company Durtnell Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
155	11/07/2003	Mount Pleasant, Greenford, External Remedial Work (Phase 2)	Fast track discount	IV.4271 – IV.4294	Mansell	IV.470 – IV.502
191	14/05/2004	The Orchard Development, The Grovelands, Bedales School, Petersfield, Hampshire	Fast track discount	IV.5268 – IV.5289	Propensity	IV.537 – IV.566
239	14/12/2005	Sydenham High School	Fast track discount	IV.6659 – IV.6684	Bluestone	IV.204 – IV.228

Party 78: R G Carter and R G Building together with their ultimate parent company R G Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
202	27/08/2004	Alterations and Extension to Norwich Cinema City, St Andrews Street, Norwich	No discount	IV.5563 – IV.5606	Propensity	IV.537 – IV.566
210	03/12/2004	Three New Community Sports Complexes, Lincolnshire	No discount	IV.5836 – IV.5874	Carillion	IV.503 – IV.516
222	04/04/2005	Refurbishment of Old Hall, Dessingham, Kings Lynn, Norfolk	No discount	IV.6215 – IV.6243	Propensity	IV.537 – IV.566
Party 79: Richardson Projects (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
176	28/01/2004	Group Repair Scheme, Phase 29, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley	Fast track discount	IV.4879 – IV.4897		
179	09/02/2004	Beacon Resource Centre, Cromwell Road, Charlestown, Salford	Fast track discount	IV.4932 – IV.4966	Bramall	IV.243 – IV.273
225	08/06/2005	Swinnow Flats, Energy Efficiency Works	Fast track discount	IV.6292 – IV.6319	Strata	IV.617 – IV.634
Party 80: Robert Woodhead together with its ultimate parent company Woodhead Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
46	22/01/2001	New House At Western Terrace, The Park, Nottingham	Fast track discount	IV.1484 – IV.1526	Bodill	IV.229 – IV.242
78	08/10/2001	15 Dwellings, Station Rd Kimberly Phase 2	Fast track discount	IV.2314 – IV.2345	Bodill, Strata	IV.229 – IV.242, IV.617 – IV.634
178	30/01/2004	William Sharp Comprehensive School, Bilborough, Nottingham	Fast track discount	IV.4898 – IV.4931	Frudd	IV.335 – IV.351

Party 81: Robinson & Sawdon (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
192	14/05/2004	New Lift Shaft Coniston House, Willerby	Fast track discount	IV.5290 – IV.5315	Hobson & Porter	IV.391 – IV.407
236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Fast track discount	IV.6580 – IV.6606	Hobson & Porter	IV.391 – IV.407
238	28/11/2005	Calder Link Building, University of Hull	Fast track discount	IV.6635 – IV.6658	Hobson & Porter	IV.391 – IV.407
Party 82: Shaylor (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
44	19/01/2001	Hospital Street, Dudley Road	Fast track discount	IV.1435 – IV.1461	Thomas Vale	IV.689 – IV.717
173	11/12/2003	18-bed Ward Extension, Beynon Centre, New Cross Hospital	Fast track discount	IV.4798 – IV.4824	Thomas Vale	IV.689 – IV.717
216	14/02/2005	New Education Centre, George Eliot Hospital, Nuneaton	Fast track discount	IV.6050 – IV.6076	Thomas Vale	IV.689 – IV.717
Party 83: Simons and Wrights (Lincoln) together with their ultimate parent company Simons Group (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
59	08/05/2001	Alterations, Improvements & Extension, Burnholme College, York	Leniency discount	IV.1867 – IV.1888	Strata	IV.567 – IV.592, IV.617 – IV.634
141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, London Road, Newark, Nottinghamshire	Leniency discount	IV.3948 – IV.3985	Bodill	IV.567 – IV.592, IV.229 – IV.242
218	26/02/2005	Fire Refuge, Wilberforce Building, Hull University	Leniency discount	IV.6104 – IV.6132	Hobson & Porter	IV.567 – IV.592, IV.391 – IV.407

Party 84: Sol together with its ultimate parent company Barkbury (7 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
18	11/08/2000	Superstore, Retail Units and Petrol Filling Station, St Andrew's Retail Park, Small Heath, Birmingham	No penalty	IV.916 – IV.941		IV.593 – IV.616
41	11/01/2001	Chilwell T.A. Centre, Garage and Workshop	No penalty	IV.1362 – IV.1390		IV.593 – IV.616
124	15/10/2002	Dronfield Gorsey Brigg Primary School Extension	No penalty	IV.3449 – IV.3473		IV.593 – IV.616
126	04/11/2002	25 Stoney Street, Nottingham	No penalty	IV.3497 – IV.3535	Thomas Fish	IV.593 – IV.616, IV.650 – IV.688
142	07/03/2003	New Judo Hall Walsall Campus	Leniency discount	IV.3986 – IV.4009		IV.593 – IV.616
156	15/07/2003	Redhill Comprehensive - New Sixth Form Block	Leniency discount	IV.4295 – IV.4325		IV.593 – IV.616
187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Leniency discount	IV.5142 – IV.5181	Mansell	IV.593 – IV.616, IV.470 – IV.502

Party 85: Speller-Metcalf (2 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
107	29/04/2002	Gas Training Centre, Evesham College	Fast track discount	IV.3062 – IV.3093	Thomas Vale	IV.689 – IV.717
217	15/02/2005	Replacement Primary School, Elbury Mount, Worcester	Fast track discount	IV.6077 – IV.6103	Thomas Vale	IV.689 – IV.717

Party 86: Stainforth (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
21	25/08/2000	Proposed St Vincents Parish Centre at Crookes, Sheffield	No discount	IV.970 – IV.990	Strata	IV.617 – IV.634
165	24/09/2003	Residential Development, Stanningley Road, Leeds	No discount	IV.4617 – IV.4638	Irwins	IV.408 – IV.419
195	14/06/2004	Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds	No discount	IV.5366 – IV.5401	Strata, York House	IV.617 – IV.634, IV.743 – IV.751
Party 87: Strata (20 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
6	03/03/2000	Conversion of Offices to Flats, 2 Water Lane, Leeds	No penalty	IV.755 – IV.789		IV.617 – IV.634
7	08/03/2000	Guiseley School, Fieldhead Road, Guiseley, Leeds	No penalty	IV.790 – IV.819		IV.617 – IV.634
8	14/03/2000	Four Flats at Viking Way, Kiveton Park	No penalty	IV.820 – IV.840		IV.617 – IV.634
21	25/08/2000	Proposed St Vincents Parish Centre at Crookes, Sheffield	No penalty	IV.970 – IV.990		IV.617 – IV.634
23	15/09/2000	New Pavilion and Facilities, Pole Lane, Unsworth Cricket Club	No penalty	IV.1012 – IV.1034		IV.617 – IV.634
31	27/11/2000	New Church Blacker Road	No penalty	IV.1120 – IV.1140		IV.617 – IV.634
35	08/12/2000	Proposed Extension, Milford Sports Club	No penalty	IV.1204 – IV.1224		IV.617 – IV.634
37	13/12/2000	Extension to Vermuyden School, Centenary Road, Goole	No penalty	IV.1248 – IV.1267		IV.617 – IV.634
47	31/01/2001	Environmental Works at Burley Lodge, Leeds	No penalty	IV.1527 – IV.1559	Henry Boot	IV.617 – IV.634, IV.363 – IV.374
59	08/05/2001	Alterations, Improvements & Extension, Burnholme College, York	No penalty	IV.1867 – IV.1888	Simons	IV.617 – IV.634, IV.567 – IV.592
61	29/05/2001	Fire Safety Works to Two Tower Blocks at Gleadless & Jordonthorpe Sheffield	No penalty	IV.1889 – IV.1907		IV.617 – IV.634

64	09/07/2001	Priestnall CDT Extensions and Alterations	No penalty	IV.1969 – IV.1991		IV.617 – IV.634
78	08/10/2001	15 Dwellings, Station Rd Kimberly Phase 2	No penalty	IV.2314 – IV.2345	Bodill	IV.617 – IV.634, IV.229 – IV.242
83	28/11/2001	Business Centre Extension and New Training Centre, Driffield	No penalty	IV.2434 – IV.2454		IV.617 – IV.634
162	08/08/2003	Nursery at Westfield Primary School, York	No penalty	IV.4514 – IV.4551	Hobson & Porter	IV.617 – IV.634, IV.391 – IV.407
189	27/04/2004	Salvation Army halls, Doncaster	No penalty	IV.5215 – IV.5236		IV.617 – IV.634
195	14/06/2004	Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds	No penalty	IV.5366 – IV.5401	York House	IV.617 – IV.634, IV.743 – IV.751
221	01/04/2005	Extension and Refurbishment at Oaklands Sports Centre, York	Leniency discount	IV.6194 – IV.6214		IV.617 – IV.634
225	08/06/2005	Swinnow Flats, Energy Efficiency Works	Leniency discount	IV.6292 – IV.6319		IV.617 – IV.634
227	13/06/2005	Burngreave facelifts 2005/6 - contract 1	Leniency discount	IV.6342 – IV.6363		IV.617 – IV.634

Party 88: T & C Williams (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
180	09/02/2004	Construction of a New Two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield	Leniency discount	IV.4967 – IV.4997	Admiral	IV.635 – IV.649, IV.166 – IV.173
213	15/12/2004	New Warehouse, Green Road, Penistone, Sheffield	Leniency discount	IV.5944 – IV.5979	Propensity	IV.635 – IV.649, IV.537 – IV.566
242	13/02/2006	Brookfield Manor, Hathersage	Leniency discount	IV.6743 – IV.6770		IV.635 – IV.649

Party 89: T Denman (3 Infringements)

Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
52	17/04/2001	New Build Extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire	No discount	IV.1637 – IV.1662	Bodill	IV.229 – IV.242
79	23/10/2001	Fullhurst Community College, Phase C, Braunstone, Leicester	No discount	IV.2346 – IV.2372	J H Hallam	IV.420 – IV.430

86	03/12/2001	Trustwide Fire Improvements at Various Sites, Leicestershire and Rutland Healthcare NHS Trust	No discount	IV.2524 – IV.2548	Bodill	IV.229 – IV.242
Party 90: Thomas Fish together with its ultimate parent company Fish Holdings Limited (2 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
89	11/12/2001	Extension to Offices, Meadow House, Bath Street, Mansfield	Leniency discount	IV.2576 – IV.2629	Herbert Baggaley, Mansell	IV.650 – IV.688, IV.375 – IV.390, IV.470 – IV.502
126	04/11/2002	25 Stoney Street, Nottingham	Leniency discount	IV.3497 – IV.3535	Sol	IV.650 – IV.688, IV.593 – IV.616
Party 91: Thomas Long together with its ultimate parent company Radford (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Fast track discount	IV.1080 – IV.1119	Bodill, Mansell, Thomas Vale	IV.229 – IV.242, IV.470 – IV.502, IV.689 – IV.717
116	02/08/2002	45 Modernisations, Highbury Vale, Nottingham	No discount	IV.3233 – IV.3262	Adam Eastwood, Mansell	IV.159 – IV.165, IV.470 – IV.502
127	13/11/2002	Refurbishment of 27 Empty Council-Owned Properties, Major Works Phase 1, Citywide Properties, Nottingham	Fast track discount	IV.3536 – IV.3559	Bodill	IV.229 – IV.242
Party 92: Thomas Vale together with its ultimate parent company Thomas Vale Holdings (24 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
20	18/08/2000	Mason House, Shirley	But for - 100% immunity	IV.942 – IV.969		IV.689 – IV.717
30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Leniency discount	IV.1080 – IV.1119	Bodill, Mansell	IV.689 – IV.717, IV.229 – IV.242, IV.470 – IV.502

44	19/01/2001	Hospital Street, Dudley Road	But for - 100% immunity	IV.1435 – IV.1461		IV.689 – IV.717
49	16/03/2001	New Build of a Medical Centre, Two-Storey Doctors Surgery, Pharmacy and Dental Surgery, Car Park and Landscaping at the New Medical Centre, Lawley, Telford	But for - 100% immunity	IV.1582 – IV.1611	Arthur M Griffiths	IV.689 – IV.717, IV.182 – IV.188
58	08/05/2001	The Toll House, Stratford-upon-Avon	But for - 100% immunity	IV.1841 – IV.1866		IV.689 – IV.717
74	07/09/2001	Toxicology Laboratory, City Hospital, Birmingham	But for - 100% immunity	IV.2214 – IV.2240		IV.689 – IV.717
75	18/09/2001	Refurbishment, Watville Thomas J&I School, Handsworth	But for - 100% immunity	IV.2241 – IV.2293	Balfour Beatty	IV.689 – IV.717, IV.189 – IV.203
88	05/12/2001	Renal Dialysis Unit, City Hospital, Birmingham	But for - 100% immunity	IV.2549 – IV.2575		IV.689 – IV.717
90	17/12/2001	Diabetes Centre, City Hospital, Dudley Road, Birmingham	But for - 100% immunity	IV.2630 – IV.2657		IV.689 – IV.717
102	15/04/2002	Centre for Organic Horticulture Phase 1, Ryton Organic Gardens, Coventry	But for - 100% immunity	IV.2902 – IV.2928		IV.689 – IV.717
106	26/04/2002	International House, Elmdon Trading Estate, Birmingham	But for - 100% immunity	IV.3032 – IV.3061		IV.689 – IV.717
107	29/04/2002	Gas Training Centre - Evesham College	Leniency discount	IV.3062 – IV.3093		IV.689 – IV.717
121	23/09/2002	Residential Development, Elmdale, Herefordshire	But for - 100% immunity	IV.3351 – IV.3376		IV.689 – IV.717
137	07/02/2003	Flats Refurbishment, 110 and 124 Sycamore Road, Burton-on-Trent	But for - 100% immunity	IV.3814 – IV.3846		IV.689 – IV.717
150	25/06/2003	Two Gates Primary School, Tamworth	But for - 100% immunity	IV.4166 – IV.4193		IV.689 – IV.717
166	01/10/2003	Waterfront Business Park, Merry Hill	But for - 100% immunity	IV.4639 – IV.4667		IV.689 – IV.717
173	11/12/2003	18-bed Ward Extension, Beynon Centre, New Cross Hospital	But for - 100% immunity	IV.4798 – IV.4824		IV.689 – IV.717
174	22/12/2003	Unit 1, Dutton Road, Alderman's Green Industrial Estate, Coventry	But for - 100% immunity	IV.4825 – IV.4854		IV.689 – IV.717
197	07/07/2004	Extension, Sutton Coldfield Police Station	Leniency discount	IV.5428 – IV.5459		IV.689 – IV.717
209	03/12/2004	Extensions and Alterations at Bleakhouse Junior School, Oldbury, West Midlands	But for - 100% immunity	IV.5805 – IV.5835	Arthur M Griffiths	IV.689 – IV.717, IV.182 – IV.188
216	14/02/2005	New Education Centre, George Eliot Hospital, Nuneaton	But for - 100% immunity	IV.6050 – IV.6076		IV.689 – IV.717
217	15/02/2005	Replacement Primary School, Elbury Mount, Worcester	But for - 100% immunity	IV.6077 – IV.6103		IV.689 – IV.717
219	28/02/2005	Eight New Dwellings, Appletree Close, Holt Heath, Worcestershire	But for - 100% immunity	IV.6133 – IV.6158		IV.689 – IV.717
244	09/06/2006	Extension to Tipton and Coseley Building Society, Tipton	But for - 100% immunity	IV.6803 – IV.6837	Arthur M Griffiths	IV.689 – IV.717, IV.182 – IV.188

Party 93: Thorndyke (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
17	02/08/2000	Internal Redecoration of King Edward Court, Nottingham	No discount	IV.894 – IV.915	Bodill	IV.229 – IV.242
32	27/11/2000	Alterations to Reception at King Edward Court, Nottingham	No discount	IV.1141 – IV.1166	Bodill	IV.229 – IV.242
54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	No discount	IV.1700 – IV.1739	Bodill, Loach	IV.229 – IV.242, IV.453 – IV.469
Party 94: Try Accord and Galliford Construction together with their ultimate parent company Galliford Try (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
42	12/01/2001	Uxbridge College, Academy Building	Fast track discount	IV.1391 – IV.1412	Mansell	IV.470 – IV.502
142	07/03/2003	New Judo Hall Walsall Campus	Fast track discount	IV.3986 – IV.4009	Sol	IV.593 – IV.616
186	23/03/2004	Buswells Lodge Primary School, Beauville Drive, Beaumont Leys, Leicester	Fast track discount	IV.5116 – IV.5141	J H Hallam	IV.420 – IV.430
Party 95: W R Bloodworth (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
114	08/07/2002	Conversion and Extension of a CCTV Control Room at Beeston Police Station, Nottinghamshire	Leniency discount	IV.3176 – IV.3203	Bodill	IV.718 – IV.725, IV.229 – IV.242
140	03/03/2003	Alterations to Newhall Methodist Church, Swadlincote Derbyshire	Leniency discount	IV.3911 – IV.3947	Herbert Baggaley	IV.718 – IV.725, IV.375 – IV.390
143	14/04/2003	Refurbishment Work and an Extension to 144 Sneinton Dale, Sneinton, Nottingham	Leniency discount	IV.4010 – IV.4039	Loach	IV.718 – IV.725, IV.453 – IV.469

Party 96: Wiggett (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
140	03/03/2003	Alterations to Newhall Methodist Church, Swadlincote Derbyshire	No discount	IV.3911 – IV.3947	Herbert Baggaley, W R Bloodworth	IV.375 – IV.390, IV.718 – IV.725
171	12/11/2003	Alterations to Ward C31 and C32 to Form a Women’s Centre, Queens Medical Centre, Nottingham	No discount	IV.4739 – IV.4775	Bodill, John Cawley	IV.229 – IV.242, IV.441 – IV.452
193	28/05/2004	Refurbishment of Sure Start, St Anne’s Metrazone, Ransom Road, Nottingham	No discount	IV.5316 – IV.5338	Bodill	IV.229 – IV.242
Party 97: Wildgoose (7 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
57	30/04/2001	Early Excellence Centre, Aughton Nursery School	But for - 100% immunity	IV.1812 – IV.1840	Bramall	IV.726 – IV.742, IV.243 – IV.273
98	20/02/2002	Conversion of Davers Steel Building, Sheffield	But for - 100% immunity	IV.2823 – IV.2875	Herbert Baggaley	IV.726 – IV.742, IV.375 – IV.390
104	22/04/2002	Alterations to Café and Conservatory Extension, Burton College	But for - 100% immunity	IV.2953 – IV.2997	Mansell	IV.726 – IV.742, IV.470 – IV.502
136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	Leniency discount	IV.3745 – IV.3813	Admiral, Derwent Valley	IV.726 – IV.742, IV.166 – IV.173, IV.303 – IV.325
146	12/05/2003	Construction of Four-Storey Lift Tower, Burton College	But for - 100% immunity	IV.4071 – IV.4116	Herbert Baggaley	IV.726 – IV.742, IV.375 – IV.390
158	25&30/07/2003	North Lodge and Cricket Pavilion, Queen’s Park, Chesterfield	Leniency discount	IV.4347 – IV.4439	Herbert Baggaley	IV.726 – IV.742, IV.375 – IV.390
159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	Leniency discount	IV.4440 – IV.4488	Bodill	IV.726 – IV.742, IV.229 – IV.242

Party 98: William Sapcote together with its ultimate parent company Sapcote Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
100	25/02/2002	New Classrooms, Heart of England School, Balsall Common	No discount	IV.2876 – IV.2901	Balfour Beatty	IV.189 – IV.203
106	26/04/2002	International House, Elmdon Trading Estate, Birmingham	Fast track discount	IV.3032 – IV.3061	Thomas Vale	IV.689 – IV.717
197	07/07/2004	Extension, Sutton Coldfield Police Station	Fast track discount	IV.5428 – IV.5459	Thomas Vale	IV.689 – IV.717
Party 99: William Woodsend (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
126	04/11/2002	25 Stoney Street, Nottingham	No discount	IV.3497 – IV.3535	Sol, Thomas Fish	IV.593 – IV.616, IV.650 – IV.688
129	25/11/2002	Re-Building of Eight Newland Properties, Bilborough, Nottingham	No discount	IV.3585 – IV.3610	Bodill	IV.229 – IV.242
204	21/10/2004	New Build of Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	No discount	IV.5644 – IV.5692	Bodill, Herbert Baggaley	IV.229 – IV.242, IV.375 – IV.390
Party 100: Willmott Dixon together with its ultimate parent company Willmott Dixon Limited (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
181	20/02/2004	New Sports Centre, Jubilee Campus, Nottingham	No discount	IV.4998 – IV.5027	Mansell	IV.470 – IV.502
212	14/12/2004	Gotham Primary School, Gotham, Nottingham	No discount	IV.5911 – IV.5943	Clegg	IV.274 – IV.292
243	21/02/2006	Digital Media Centre, Barnsley	No discount	IV.6771 – IV.6802	Bluestone	IV.204 – IV.228

Party 101: Wright (Hull) together with its ultimate parent company T Wright Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	Fast track discount	IV.5339 – IV.5365	Hobson & Porter	IV.391 – IV.407
206	26/10/2004	Incubator Office Units, Colburn	Fast track discount	IV.5723 – IV.5760	Bluestone	IV.204 – IV.228
230	25/07/2005	34 Residential Apartments at 71-75 Wright Street, Hull	Fast track discount	IV.6421 – IV.6445	Hobson & Porter	IV.391 – IV.407
Party 102: Wygar together with its ultimate parent company Wygar Holdings (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
74	07/09/2001	Toxicology Laboratory, City Hospital, Birmingham	Fast track discount	IV.2214 – IV.2240	Thomas Vale	IV.689 – IV.717
88	05/12/2001	Renal Dialysis Unit, City Hospital, Birmingham	Fast track discount	IV.2549 – IV.2575	Thomas Vale	IV.689 – IV.717
90	17/12/2001	Diabetes Centre, City Hospital, Dudley Road, Birmingham	Fast track discount	IV.2630 – IV.2657	Thomas Vale	IV.689 – IV.717
Party 103: York House (3 Infringements)						
Inf. Number	Infringement Date	Infringement Name	Leniency / fast track discount / no penalty (see paragraph VI.386)	Paragraph References for Infringement	(Other) Leniency Party(ies) Involved In Infringement	Paragraph References for Leniency Party section
195	14/06/2004	Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds	Leniency discount	IV.5366 – IV.5401	Strata	IV.743 – IV.751, IV.617 – IV.634
211	08/12/2004	New Build Extra Care Housing Development, Huddersfield Road, Mirfield	But for - 100% immunity	IV.5875 – IV.5910	Hobson & Porter	IV.743 – IV.751, IV.391 – IV.407
233	08/08/2005	Eastbrook Hall, Little Germany, Bradford	But for - 100% immunity	IV.6497 – IV.6534		IV.743 – IV.751

ANNEX B – LIST OF MARKETS AFFECTED BY EACH OF THE INFRINGEMENTS

A.5. The table below sets out the relevant product market(s) and the relevant geographic market(s) into which the OFT considers each of the Infringements falls. As described Section VI (Enforcement) above, the starting point for determining the level of penalty for each of the Infringements has been calculated having regard to the seriousness of the Infringement and the relevant turnover of the Party. The ‘relevant turnover’ is the turnover of the Party in the relevant product market(s) and relevant geographic market(s) affected by the Infringement in the last business year prior to issue of the Decision. The OFT’s proposed definition of relevant product markets and relevant geographic markets is set out in the Definition of Relevant Markets section above.

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
A H Willis	188	16/04/2004	Willington Down Farm, Didcot	Private Housing	South East
	215	28/01/2005	14 Redlands Road, University of Reading	Private Housing	South East
	224	27/05/2005	Refurbishment 12 & 16 Redlands Road, Reading	Private Housing	South East
ARG	9	11/04/2000	Residential Training Centre, Ollerton	Office	East Midlands
	133	19/12/2002	Hill Crescent Changing Block	Entertainment (inc Leisure)	East Midlands
	207	11/11/2004	Fire Reinstatement Works At 63 Westgate, Mansfield	Retail	East Midlands
Ackroyd & Abbott	47	31/01/2001	Environmental Works at Burley Lodge, Leeds	Public Housing	Yorkshire & Humberside
	124	15/10/2002	Dronfield Gorsey Brigg Primary School Extension	Education	East Midlands
	227	13/06/2005	Burngreave facelifts 2005/6 - contract 1	Public Housing	Yorkshire & Humberside
Adam Eastwood	50	30/03/2001	12 Self Contained Flats, Castle Street, Mansfield	Public Housing	East Midlands
	108	15/05/2002	Office Block, Sherwood Rise, Nottingham	Office	East Midlands
	116	02/08/2002	45 Modernisations, Highbury Vale, Nottingham	Public Housing	East Midlands
Admiral	53	19/04/2001	Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire	Education	East Midlands
	136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	Public Housing	East Midlands
	180	09/02/2004	New Two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield	Health	Yorkshire & Humberside

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Admiral	190	04/05/2004	Civil Works for Aldwarke Primary Mill, Rotherham Works	Other Industrial Buildings	Yorkshire & Humberside
	214	23/12/2004	Humanities Research Institute, University of Sheffield	Education	Yorkshire & Humberside
Allenbuild/Bullock	39	20/12/2000	Saxton Gardens Phase 2	Public Housing	Yorkshire & Humberside
	137	07/02/2003	Flats Refurbishment 110 & 124 Sycamore Road Burton on Trent	Public Housing	West Midlands
	204	21/10/2004	Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	Office	East Midlands
Apollo	154	08/07/2003	Reroofing and external repairs, 242-254 Banbury Road, Oxford	Office	South East
	199	08/07/2004	External Refurbishment, Sutton Court Shops, Hillingdon	Retail	London
	203	09/09/2004	Mount Pleasant, Phase 4, window replacement, redecorations, improvements, Bracknell	Private Housing	London
Arthur M Griffiths	49	16/03/2001	New Build of a Medical Centre at the New Medical Centre, Lawley, Telford	Health	West Midlands
	209	03/12/2004	Extensions and Alterations at Bleakhouse Junior School, Oldbury, West Midlands	Education	West Midlands
	244	09/06/2006	Extension to Tipton and Coseley Building Society, Tipton	Office	West Midlands
B & A	95	04/02/2002	5 No. Health Centres, Primary Care Trust (East), East Midlands	Entertainment (inc Leisure)	East Midlands
	229	24/06/2005	Alterations to Law Faculty Offices, Fielding Johnson Building, University of Leicester	Education	East Midlands
Baggaley & Jenkins	61	29/05/2001	Fire Safety Works to Two Tower Blocks at Gleadless & Jordonthorpe Sheffield	Public Housing	Yorkshire & Humberside
	65	09/07/2001	Consolidation Works at Fairham Community College, Clifton, Nottingham	Education	East Midlands
	112	31/05/2002	Winthorpe Road Estate Repairs, Newark	Public Housing	East Midlands
Balfour Beatty and Mansell	22	07/09/2000	Refurbishment, 73 Wates Houses, Windsor	Public Housing	South East
	30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Public Housing	East Midlands
	36	08/12/2000	Summerhill Terrace, Birmingham	Private Housing	West Midlands
	42	12/01/2001	Uxbridge College, Academy Building	Education	London
	43	17/01/2001	Prebendal Estate, Phase 3, 52 Housing Refurbishments Aylesbury	Public Housing	South East

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Balfour Beatty and Mansell	48	09/02/2001	Herschel Grammar School, music and drama room	Education	South East
	69	13/08/2001	Stoke Poges School	Education	South East
	75	18/09/2001	Refurbishment, Watville Thomas J&I School, Handsworth	Education	West Midlands
	89	11/12/2001	Extension to Offices, Meadow House, Bath Street, Mansfield	Office	East Midlands
	91	19/12/2001	Repairs to 13 Wimpey No-Fines Houses, High Wycombe	Public Housing	South East
	97	07/02/2002	Refurbishment 92 Dwellings, Mandeville Road Housing Estate	Public Housing	South East
	100	25/02/2002	New Classrooms, Heart of England School, Balsall Common	Education	West Midlands
	104	22/04/2002	Alterations to Café and Conservatory Extension, Burton College	Education	West Midlands
	116	02/08/2002	45 Modernisations, Highbury Vale, Nottingham	Public Housing	East Midlands
	123	11/10/2002	External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View	Public Housing	North East
	128	22/11/2002	Sports Hall Extension at Robert Atkinson Youth & Community Centre, Thornaby	Entertainment (inc Leisure)	North East
	135	27/01/2003	17/18 Dover Street London	Office	London
	154	08/07/2003	Reroofing and external repairs, 242-254 Banbury Road, Oxford	Office	South East
	155	11/07/2003	Mount Pleasant Greenford, External remedial work (Phase 2)	Public Housing	London
	181	20/02/2004	New sports centre, Jubilee Campus, Nottingham	Education	East Midlands
	187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Education	East Midlands
	188	16/04/2004	Willington Down Farm, Didcot	Private Housing	South East
	199	08/07/2004	External Refurbishment, Sutton Court Shops, Hillingdon	Retail	London
	203	09/09/2004	Mount Pleasant, Phase 4, window replacement, redecorations, improvements, Bracknell	Private Housing	London
	208	12/11/2004	Refurbishment 10/12 Bowden Road, Sunninghill	Public Housing	South East
	215	28/01/2005	14 Redlands Road, University of Reading	Private Housing	South East
	220	29/03/2005	External Structural Refurbishment works, 13 – 42 Claremont Close, London	Public Housing	London
224	27/05/2005	Refurbishment 12 & 16 Redlands Road, Reading	Private Housing	South East	

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Balfour Beatty and Mansell	234	24/08/2005	Hillside Primary school, classroom extension	Education	South East
	240	02/02/2006	Redevelopment and Refurbishment of 45 – 46 South Molton Street, London	Public Housing	London
Ballast Nedam	41	11/01/2001	Chilwell TA Centre, Garage and Workshop	Defence	East Midlands
	47	31/01/2001	Environmental Works at Burley Lodge, Leeds	Public Housing	Yorkshire & Humberside
	48	09/02/2001	Herschel Grammar School, music and drama room	Education	South East
Beaufort	34	05/12/2000	Civic Accommodation, County Hall, Nottingham	Office	East Midlands
	66	13/07/2001	New Assembly Hall - Seeley Church Primary School Nottingham	Education	East Midlands
	152	27/06/2003	Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield	Public Housing	East Midlands
Bodill	17	02/08/2000	Internal Redecoration of King Edward Court, Nottingham	Office	East Midlands
	30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Public Housing	East Midlands
	32	27/11/2000	Alterations to Reception at King Edward Court, Nottingham	Office	East Midlands
	34	05/12/2000	Civic Accommodation, County Hall, Nottingham	Office	East Midlands
	38	15/12/2000	Fresh Start Phase 5, River Leen School, Bulwell, Nottingham	Education	East Midlands
	40	21/12/2000	Upgrade of Six Gregory Flats, Phase 4, Kipling Close, Worksop, Nottinghamshire	Public Housing	East Midlands
	45	19/01/2001	Rock City, Talbot Street, Nottingham	Entertainment (inc Leisure)	East Midlands
	46	22/01/2001	New House At Western Terrace, The Park, Nottingham	Private Housing	East Midlands
	50	30/03/2001	12 Self Contained Flats, Castle Street, Mansfield	Public Housing	East Midlands
	52	17/04/2001	Extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire	Public Housing	East Midlands
	53	19/04/2001	Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire	Education	East Midlands
	54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	Office	East Midlands
	55	27/04/2001	Extension to Front Entrance, Cantrell Primary School, Bullwell, Nottinghamshire	Education	East Midlands
	56	27/04/2001	Mobile Classroom Replacment, Cantrell Primary School, Bulwell, Nottinghamshire	Education	East Midlands
	65	09/07/2001	Consolidation Works at Fairham Community College, Clifton, Nottingham	Education	East Midlands
	66	13/07/2001	New Assembly Hall - Seeley Church Primary School Nottingham	Education	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Bodill	70	15/08/2001	15 Cornish Dwellings, Phase 7, Milton Drive, Worksop, Nottinghamshire	Public Housing	East Midlands
	78	08/10/2001	15 Dwellings, Station Rd Kimberley Phase 2	Public Housing	East Midlands
	80	01/11/2001	Upgrade of Four Bungalows, Doncaster Road, Costhorpe, Nottinghamshire	Public Housing	East Midlands
	82	20/11/2001	Crown Premises Inspection Group ('CPIG') Repair Work – HMP Nottingham	Prisons	East Midlands
	86	03/12/2001	Fire Improvements at Various Sites, Leicestershire and Rutland Healthcare NHS Trust	Health	East Midlands
	114	08/07/2002	Conversion & Extension of CCTV Control Room, Beeston Police Station, Nottinghamshire	Police/Fire & Rescue	East Midlands
	115	12/07/2002	Classroom & Dining Room Refurbishment, Shirebrook School, Shirebrook, Nottinghamshire	Education	East Midlands
	127	13/11/2002	Refurbishment of 27 Empty Council-Owned Properties, Major Works Phase 1, Nottingham	Public Housing	East Midlands
	129	25/11/2002	Re-Building of Eight Newland Properties, Bilborough, Nottingham	Public Housing	East Midlands
	141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, Newark, Nottinghamshire	Public Housing	East Midlands
	159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	Entertainment (inc Leisure)	Yorkshire & Humberside
	160	01/08/2003	Refurbishments at Sneinton Corporate Properties, Nottingham City Council	Public Housing	East Midlands
	163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	Public Housing	East Midlands
	171	12/11/2003	Alterations to Ward C31 and C32, Queens Medical Centre, Nottingham	Health	East Midlands
	184	05/03/2004	Butlers Hill Infant And Nursery School Hucknall Nottingham	Education	East Midlands
	193	28/05/2004	Refurbishment of Sure Start, St Anne's Metrazone, Ransom Road, Nottingham	Office	East Midlands
	196	30/06/2004	Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop	Retail	East Midlands
	198	08/07/2004	Alterations and Refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham	Education	East Midlands
204	21/10/2004	Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	Office	East Midlands	
Bowmer & Kirkland	18	11/08/2000	Superstore, Retail Units and Petrol Filling Station, Small Heath, Birmingham	Retail	West Midlands
	85	03/12/2001	New Press Foundations & Associated Alteration Works – Derby Daily Telegraph, Derby	Other Industrial Buildings	East Midlands
	134	24/01/2003	Classroom Extension and Interior Alterations, Crich Fritchley Primary School	Education	East Midlands
Bramall and Frank Haslam Milan	57	30/04/2001	Early Excellence Centre, Aughton Nursery School	Education	Yorkshire & Humberside
	123	11/10/2002	External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View	Public Housing	North East
	179	09/02/2004	Beacon Resource Centre, Cromwell Road, Charlestown, Salford	Entertainment (inc Leisure)	North West

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
C J Ellmore	7	08/03/2000	Guiseley School Fieldhead Road Guiseley Leeds	Education	Yorkshire & Humberside
	94	23/01/2002	Proposed Club Fandango, Morley, Leeds	Entertainment (inc Leisure)	Yorkshire & Humberside
	105	23/04/2002	Alterations and Extensions to Haigh Hall Medical Centre	Health	Yorkshire & Humberside
Caddick	35	08/12/2000	Proposed Extension, Milford Sports Club	Entertainment (inc Leisure)	Yorkshire & Humberside
	205	25/10/2004	Residential Development Napier St Sheffield	Private Housing	Yorkshire & Humberside
	211	08/12/2004	New Build Extra Care Housing Development, Huddersfield Road, Mirfield	Public Housing	Yorkshire & Humberside
Carillion JM Limited ('Mowlem')	27	16/10/2000	Proposed police station, Spennymoor	Police/Fire & Rescue	North East
	39	20/12/2000	Saxton Gardens Phase 2	Public Housing	Yorkshire & Humberside
	210	03/12/2004	Three New Community Sports Complexes, Lincolnshire	Education	East Midlands
Clegg	139	28/02/2003	Factory and Offices, Haydock	Other Industrial Buildings	North West
	168	21/10/2003	Ashgate Hospice, Old Brampton, Chesterfield	Health	East Midlands
	212	14/12/2004	Gotham Primary School Gotham Nottingham	Education	East Midlands
Connaught	22	07/09/2000	Refurbishment, 73 Wates Houses, Windsor	Public Housing	South East
	123	11/10/2002	External Fabric Overhaul of 194 Dwellings at Ferguson Lane, Whickham View	Public Housing	North East
	175	22/12/2003	Refurbishment of Silverwood Flats	Public Housing	Yorkshire & Humberside
Crown Point	29	08/11/2000	Refurbishment of a House, 143 Sneinton Dale, Sneinton, Nottingham	Public Housing	East Midlands
	68	30/07/2001	Pre-War Improvements 2001/02 - Replacement Kitchens, Swadlincote	Public Housing	East Midlands
	118	06/09/2002	Internal Alterations to Workshops, West Nottinghamshire College, Derby Road, Mansfield	Education	East Midlands
	133	19/12/2002	Hill Crescent Changing Block	Entertainment (inc Leisure)	East Midlands
	158	25/07/2003	North Lodge and Cricket Pavilion, Queen's Park, Chesterfield	Entertainment (inc Leisure)	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Davlyn	72	24/08/2001	Proposed IT Suite, Rawdon Street, Derby, Indian Community Centre & DTC	Office	East Midlands
	84	30/11/2001	Inclusion Unit Extension, St Benedict Catholic School & Performing Arts College	Education	East Midlands
	164	22/09/2003	Fire Damage, Stenson Fields, Derby	Other Industrial Buildings	East Midlands
Derwent Valley	68	30/07/2001	Pre-War Improvements 2001/02 - Replacement Kitchens, Swadlincote	Public Housing	East Midlands
	72	24/08/2001	Proposed IT Suite, Rawdon Street, Derby, Indian Community Centre & DTC	Office	East Midlands
	84	30/11/2001	Inclusion Unit Extension, St Benedict Catholic School & Performing Arts College	Education	East Midlands
	93	21/12/2001	Waverley Street Clinic, Derby	Health	East Midlands
	110	30/05/2002	Fire Damage Refurbishment, 22 Midlame Gardens, Bulwell	Public Housing	East Midlands
	120	20/09/2002	Refurbishment of Changing Rooms, St Benedict School, Derby	Education	East Midlands
	134	24/01/2003	Classroom Extension and Interior Alterations, Crich Fritchley Primary School	Education	East Midlands
	136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	Public Housing	East Midlands
	144	14/04/2003	Two Wheelchair Bungalows, Howden Road, Leicester	Public Housing	East Midlands
	152	27/06/2003	Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield	Public Housing	East Midlands
164	22/09/2003	Fire Damage, Stenson Fields, Derby	Other Industrial Buildings	East Midlands	
Dukeries	144	14/04/2003	Two Wheelchair Bungalows, Howden Road, Leicester	Public Housing	East Midlands
	160	01/08/2003	Refurbishments at Sneinton Corporate Properties, Nottingham City Council	Public Housing	East Midlands
	207	11/11/2004	Fire Reinstatement Works At 63 Westgate, Mansfield	Retail	East Midlands
Durkan	135	27/01/2003	17/18 Dover Street London	Office	London
	220	29/03/2005	External Structural Refurbishment works, 13 – 42 Claremont Close, London	Public Housing	London
	240	02/02/2006	Redevelopment and Refurbishment of 45 – 46 South Molton Street, London	Public Housing	London

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
E Manton	53	19/04/2001	Classroom Extension, Sudbury Primary School, Ashbourne, Derbyshire	Education	East Midlands
	68	30/07/2001	Pre-War Improvements 2001/02 - Replacement Kitchens, Swadlincote	Public Housing	East Midlands
E Taylor	29	08/11/2000	Refurbishment of a House, 143 Sneinton Dale, Sneinton, Nottingham	Public Housing	East Midlands
	115	12/07/2002	Classroom & Dining Room Refurbishment, Shirebrook School, Shirebrook, Nottinghamshire	Education	East Midlands
	141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, Newark, Nottinghamshire	Public Housing	East Midlands
F Parkinson	128	22/11/2002	Sports Hall Extension at Robert Atkinson Youth & Community Centre, Thornaby	Entertainment (inc Leisure)	North East
	139	28/02/2003	Factory and Offices, Haydock	Other Industrial Buildings	North West
	221	01/04/2005	Extension and Refurbishment at Oaklands Sports Centre, York	Entertainment (inc Leisure)	Yorkshire & Humberside
Francis	69	13/08/2001	Stokes Poges School	Education	South East
	208	12/11/2004	Refurbishment 10/12 Bowden Road, Sunninghill	Public Housing	South East
	234	24/08/2005	Hillside Primary school, classroom extension	Education	South East
Frudd	112	31/05/2002	Winthorpe Road Estate Repairs, Newark	Public Housing	East Midlands
	163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	Public Housing	East Midlands
	178	30/01/2004	William Sharp Comprehensive School, Bilborough, Nottingham	Education	East Midlands
GAJ	174	22/12/2003	Unit 1, Dutton Road, Alderman's Green Industrial Estate, Coventry	Other Industrial Buildings	West Midlands
G Carter	82	20/11/2001	Crown Premises Inspection Group ('CPIG') Repair Work - HMP Nottingham	Prisons	East Midlands
	147	13/05/2003	36 Clipstone Road West, Mansfield	Health	East Midlands
	169	28/10/2003	Assessment Centre HMYOI Glen Parva, Leicester	Prisons	East Midlands
G F Tomlinson	46	22/01/2001	New House At Western Terrace, The Park, Nottingham	Private Housing	East Midlands
	187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Education	East Midlands
	201	30/07/2004	E-Centre Office Development - Sherwood Energy Village, Ollerton	Office	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
G G Middleton	149	23/06/2003	Ward refurbishment, Calow	Health	East Midlands
	156	15/07/2003	Redhill Comprehensive - New Sixth Form Block	Education	East Midlands
	187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Education	East Midlands
G & J Seddon	23	15/09/2000	New Pavilion and Facilities, Pole Lane, Unsworth Cricket Club	Entertainment (inc Leisure)	North West
	39	20/12/2000	Saxton Gardens Phase 2	Public Housing	Yorkshire & Humberside
	176	28/01/2004	Group Repair Scheme, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley	Public Housing	Yorkshire & Humberside
GMI	14	12/06/2000	Office Development at Lancaster Park, York	Office	Yorkshire & Humberside
	228	20/06/2005	Extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds	Education	Yorkshire & Humberside
Geo Houlton	83	28/11/2001	Business Centre Extension and New Training Centre, Driffield	Office	Yorkshire & Humberside
	194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	Health	Yorkshire & Humberside
	226	08/06/2005	New Library, Centurian Way, Brough	Office	Yorkshire & Humberside
Greswolde	20	18/08/2000	Mason House, Shirley	Private Housing	West Midlands
	58	08/05/2001	The Toll House, Stratford-upon-Avon	Private Housing	West Midlands
	102	15/04/2002	Centre for Organic Horticulture Phase 1, Ryton Organic Gardens, Coventry	Office	West Midlands
Hall	122	25/09/2002	Reception and Office Extension at St Anne's Community Special School, Welton, Brough	Education	Yorkshire & Humberside
	172	05/12/2003	Alterations to Building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull	Other Industrial Buildings	Yorkshire & Humberside
	236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Education	Yorkshire & Humberside
Harlow & Milner	138	12/02/2003	Chapelton Partnership Office Refurbishment, Sheffield	Office	Yorkshire & Humberside
	237	14/11/2005	Whetley Primary School Refurbishment	Education	Yorkshire & Humberside
	241	13/02/2006	29 Houses Rosemount Clifton Villas	Public Housing	Yorkshire & Humberside
Harold Adkin	118	06/09/2002	Internal Alterations to Workshops, West Nottinghamshire College, Derby Road, Mansfield	Education	East Midlands
	152	27/06/2003	Demolition and Redevelopment, 57 and 59 Mayfield Street, Kirkby-In-Ashfield	Public Housing	East Midlands
	196	30/06/2004	Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop	Retail	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Haymills	103	16/04/2002	Refurbishment of Psychiatric Services, Wards S2 & S3, Addenbrookes Hospital, Cambridge	Health	East of England
	119	16/09/2002	Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk	Health	East of England
	232	29/07/2005	New Build Agricultural Building, Crowe Hall, Stutton	Private Housing	East of England
Henry Boot	39	20/12/2000	Saxton Gardens Phase 2	Public Housing	Yorkshire & Humberside
	47	31/01/2001	Environmental Works at Burley Lodge, Leeds	Public Housing	Yorkshire & Humberside
	149	23/06/2003	Ward refurbishment, Calow	Health	East Midlands
	175	22/12/2003	Refurbishment of Silverwood Flats	Public Housing	Yorkshire & Humberside
Herbert Baggaley	82	20/11/2001	Crown Premises Inspection Group ('CPIG') Repair Work – HMP Nottingham	Prisons	East Midlands
	85	03/12/2001	New Press Foundations & Associated Alteration Works – Derby Daily Telegraph, Derby	Other Industrial Buildings	East Midlands
	89	11/12/2001	Extension to Offices, Meadow House, Bath Street, Mansfield	Office	East Midlands
	98	20/02/2002	Conversion of Davers Steel Building, Sheffield	Office	Yorkshire & Humberside
	108	15/05/2002	Office Block, Sherwood Rise, Nottingham	Office	East Midlands
	140	03/03/2003	Alterations to Newhall Methodist Church, Swadlincote Derbyshire	Places of Worship	East Midlands
	146	12/05/2003	Construction of Four-Storey Lift Tower, Burton College	Education	West Midlands
	158	25/07/2003	North Lodge and Cricket Pavilion, Queen's Park, Chesterfield	Entertainment (inc Leisure)	East Midlands
	168	21/10/2003	Ashgate Hospice, Old Brampton, Chesterfield	Health	East Midlands
	169	28/10/2003	Assessment Centre HMYOI Glen Parva, Leicester	Prisons	East Midlands
	201	30/07/2004	E-Centre Office Development - Sherwood Energy Village, Ollerton	Office	East Midlands
204	21/10/2004	Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	Office	East Midlands	
Hill	67	25/07/2001	Robert Mellors Primary School, Nottingham	Education	East Midlands
	110	30/05/2002	Fire Damage Refurbishment, 22 Midlame Gardens, Bulwell	Public Housing	East Midlands
	184	05/03/2004	Butlers Hill Infant And Nursery School Hucknall Nottingham	Education	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Hobson & Porter	122	25/09/2002	Reception and Office Extension at St Anne's Community Special School, Welton, Brough	Education	Yorkshire & Humberside
	162	08/08/2003	Nursery at Westfield Primary School, York	Education	Yorkshire & Humberside
	172	05/12/2003	Alterations to Building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull	Other Industrial Buildings	Yorkshire & Humberside
	192	14/05/2004	New Lift Shaft Coniston House, Willerby	Health	Yorkshire & Humberside
	194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	Health	Yorkshire & Humberside
	211	08/12/2004	New Build Extra Care Housing Development, Huddersfield Road, Mirfield	Public Housing	Yorkshire & Humberside
	218	26/02/2005	Fire Refuge, Wilberforce Building, Hull University	Education	Yorkshire & Humberside
	226	08/06/2005	New Library, Centurian Way, Brough	Office	Yorkshire & Humberside
	230	25/07/2005	34 Residential Apartments, 71-75 Wright Street, Hull	Private Housing	Yorkshire & Humberside
	236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Education	Yorkshire & Humberside
	238	28/11/2005	Calder Link Building, University of Hull	Education	Yorkshire & Humberside
Holroyd	31	27/11/2000	New Church Blacker Road	Places of Worship	Yorkshire & Humberside
	125	28/10/2002	New Office Block and Refurbishment of Warehouse, Doncaster	Office	Yorkshire & Humberside
	231	29/07/2005	Phase 3 of an Office Development, Park Lane, Allerton Bywater	Office	Yorkshire & Humberside
Interclass	75	18/09/2001	Refurbishment, Watville Thomas J&I School, Handsworth	Education	West Midlands
	150	25/06/2003	Two Gates Primary School, Tamworth	Education	West Midlands
Interserve	27	16/10/2000	Proposed police station, Spennymoor	Police/Fire & Rescue	North East
	36	08/12/2000	Summerhill Terrace, Birmingham	Private Housing	West Midlands
Irwins and Jack Lunn	14	12/06/2000	Office Development at Lancaster Park, York	Office	Yorkshire & Humberside
	62	06/06/2001	General Building/Fit-out of John Street Market, Bradford	Retail	Yorkshire & Humberside
	94	23/01/2002	Proposed Club Fandango, Morley, Leeds	Entertainment (inc Leisure)	Yorkshire & Humberside
	105	23/04/2002	Alterations and Extensions to Haigh Hall Medical Centre	Health	Yorkshire & Humberside

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Irwins and Jack Lunn	125	28/10/2002	New Office Block and Refurbishment of Warehouse, Doncaster	Office	Yorkshire & Humberside
	157	21/07/2003	Refurbishment to Allerton Bywater Miners' Welfare Centre	Entertainment (inc Leisure)	Yorkshire & Humberside
	165	24/09/2003	Residential Development, Stanningley Road, Leeds	Private Housing	Yorkshire & Humberside
	182	25/02/2004	Apartment Development, Speculation Street, York	Private Housing	Yorkshire & Humberside
	205	25/10/2004	Residential Development Napier St Sheffield	Private Housing	Yorkshire & Humberside
	231	29/07/2005	Phase 3 of an Office Development, Park Lane, Allerton Bywater	Office	Yorkshire & Humberside
	241	13/02/2006	29 Houses Rosemount Clifton Villas	Public Housing	Yorkshire & Humberside
J Harper	121	23/09/2002	Residential Development, Elmdale, Herefordshire	Public Housing	West Midlands
	219	28/02/2005	Eight new dwellings, Appletree Close, Holt Heath, Worcestershire	Public Housing	West Midlands
J H Hallam	63	29/06/2001	13 Flats Charnwood House, Brant Hill Road, Woodhouse Eaves	Private Housing	East Midlands
	79	23/10/2001	Fullhurst Community College, Phase C, Braunstone, Leicester	Education	East Midlands
	95	04/02/2002	5 No. Health Centres, Primary Care Trust (East), East Midlands	Entertainment (inc Leisure)	East Midlands
	96	07/02/2002	Sir John Moore Primary School, Appleby Magna, Derbyshire	Education	East Midlands
	183	05/03/2004	Conversion for Audio Visual Services, 12 Chiswick Road, University of Leicester	Education	East Midlands
	186	23/03/2004	Buswells Lodge Primary School, Beauville Drive, Beaumont Leys, Leicester	Education	East Midlands
J J & A R Jackson	8	14/03/2000	Four Flats at Viking Way, Kiveton Park	Public Housing	Yorkshire & Humberside
	9	11/04/2000	Residential Training Centre, Ollerton	Office	East Midlands
	80	01/11/2001	Upgrade of Four Bungalows, Doncaster Road, Costhorpe, Nottinghamshire	Public Housing	East Midlands
J J McGinley	43	17/01/2001	Prebendal Estate, Phase 3, 52 Housing Refurbishments Aylesbury	Public Housing	South East
	91	19/12/2001	Repairs to 13 Wimpey No-Fines Houses, High Wycombe	Public Housing	South East
	97	07/02/2002	Refurbishment 92 Dwellings, Mandeville Road Housing Estate	Public Housing	South East

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
John Cawley	55	27/04/2001	Extension to Front Entrance, Cantrell Primary School, Bullwell, Nottinghamshire	Education	East Midlands
	56	27/04/2001	Mobile Classroom Replacment, Cantrell Primary School, Bulwell, Nottinghamshire	Education	East Midlands
	171	12/11/2003	Alterations to Ward C31 and C32, Queens Medical Centre, Nottingham	Health	East Midlands
John Sisk	166	01/10/2003	Waterfront Business Park, Merry Hill	Office	West Midlands
K J Bryan	34	05/12/2000	Civic Accommodation, County Hall, Nottingham	Office	East Midlands
	38	15/12/2000	Fresh Start Phase 5, River Leen School, Bulwell, Nottingham	Education	East Midlands
	133	19/12/2002	Hill Crescent Changing Block	Entertainment (inc Leisure)	East Midlands
Kier	77	01/10/2001	New primary school, Riverside Development, Oundle Road, Peterborough	Education	East of England
	162	08/08/2003	Nursery at Westfield Primary School, York	Education	Yorkshire & Humberside
	235	19/09/2005	Adnams Distribution Centre, Reydon, Southwold	Distribution	East of England
Lemmeleg	138	12/02/2003	Chapelton Partnership Office Refurbishment, Sheffield	Office	Yorkshire & Humberside
	159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	Entertainment (inc Leisure)	Yorkshire & Humberside
	162	08/08/2003	Nursery at Westfield Primary School, York	Education	Yorkshire & Humberside
Lindum	37	13/12/2000	Extension to Vermuyden School, Centenary Road, Goole	Education	Yorkshire & Humberside
	182	25/02/2004	Apartment Development, Speculation Street, York	Private Housing	Yorkshire & Humberside
	189	27/04/2004	Salvation Army halls, Doncaster	Places of Worship	Yorkshire & Humberside
Linford	63	29/06/2001	13 Flats Charnwood House, Brant Hill Road, Woodhouse Eaves	Private Housing	East Midlands
	96	07/02/2002	Sir John Moore Primary School, Appleby Magna, Derbyshire	Education	East Midlands
Loach	34	05/12/2000	Civic Accommodation, County Hall, Nottingham	Office	East Midlands
	54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	Office	East Midlands
	66	13/07/2001	New Assembly Hall - Seeley Church Primary School Nottingham	Education	East Midlands
	143	14/04/2003	Refurbishment Work and an Extension to 144 Sneinton Dale, Sneinton, Nottingham	Education	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Lotus	62	06/06/2001	General Building/Fit-out of John Street Market, Bradford	Retail	Yorkshire & Humberside
	157	21/07/2003	Refurbishment to Allerton Bywater Miners' Welfare Centre	Entertainment (inc Leisure)	Yorkshire & Humberside
	237	14/11/2005	Whetley Primary School Refurbishment	Education	Yorkshire & Humberside
Milward	120	20/09/2002	Refurbishment of Changing Rooms, St Benedict School, Derby	Education	East Midlands
	134	24/01/2003	Classroom Extension and Interior Alterations, Crich Fritchley Primary School	Education	East Midlands
	136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	Public Housing	East Midlands
Morgan Ashurst formerly known as Bluestone	206	26/10/2004	Incubator Office Units, Colburn	Office	Yorkshire & Humberside
	239	14/12/2005	Sydenham High School	Education	London
	243	21/02/2006	Digital Media Centre, Barnsley	Office	Yorkshire & Humberside
North Midland	46	22/01/2001	New House At Western Terrace, The Park, Nottingham	Private Housing	East Midlands
	190	04/05/2004	Civil Works for Aldwarke Primary Mill, Rotherham Works	Other Industrial Buildings	Yorkshire & Humberside
PDH	40	21/12/2000	Upgrade of Six Gregory Flats, Phase 4, Kipling Close, Worksop, Nottinghamshire	Public Housing	East Midlands
	70	15/08/2001	15 Cornish Dwellings, Phase 7, Milton Drive, Worksop, Nottinghamshire	Public Housing	East Midlands
P Casey	64	09/07/2001	Priestnall CDT extensions and alterations	Education	North West
	162	08/08/2003	Nursery at Westfield Primary School, York	Education	Yorkshire & Humberside
	225	08/06/2005	Swinnow Flats, Energy Efficiency Works	Public Housing	Yorkshire & Humberside
P Waller	67	25/07/2001	Robert Mellors Primary School, Nottingham	Education	East Midlands
	147	13/05/2003	36 Clipstone Road West, Mansfield	Health	East Midlands
	163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	Public Housing	East Midlands
Pearce	75	18/09/2001	Refurbishment, Watville Thomas J&I School, Handsworth	Education	West Midlands
Peter Baines	45	19/01/2001	Rock City, Talbot Street, Nottingham	Entertainment (inc Leisure)	East Midlands
	66	13/07/2001	New Assembly Hall - Seeley Church Primary School Nottingham	Education	East Midlands
	93	21/12/2001	Waverley Street Clinic, Derby	Health	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Phoenix	183	05/03/2004	Conversion for Audio Visual Services, 12 Chiswick Road, University of Leicester	Education	East Midlands
	198	08/07/2004	Alterations and Refurbishment of D Floor Labs, Phase 3, Queens Medical Centre, Nottingham	Education	East Midlands
	229	24/06/2005	Alterations to Law Faculty Offices, Fielding Johnson Building, University of Leicester	Education	East Midlands
Propensity	77	01/10/2001	New primary school, Riverside Development, Oundle Road, Peterborough	Education	East of England
	103	16/04/2002	Refurbishment of Psychiatric Services, Wards S2 & S3, Addenbrookes Hospital, Cambridge	Health	East of England
	119	16/09/2002	Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk	Health	East of England
	138	12/02/2003	Chapelton Partnership Office Refurbishment, Sheffield	Office	Yorkshire & Humberside
	191	14/05/2004	The Orchard Development, The Grovelands, Bedales School, Petersfield, Hampshire	Education	South East
	202	27/08/2004	Alterations and Extension to Norwich Cinema City, St Andrews Street, Norwich	Entertainment (inc Leisure)	East of England
	213	15/12/2004	New Warehouse, Green Road, Penistone, Sheffield	Warehousing	Yorkshire & Humberside
	222	04/04/2005	Refurbishment of Old Hall, Dessingham, Kings Lynn, Norfolk	Private Housing	East of England
	228	20/06/2005	Extensions to Workshops, Leeds College of Art & Design, Blenheim Walk, Leeds	Education	Yorkshire & Humberside
	232	29/07/2005	New Build Agricultural Building, Crowe Hall, Stutton	Private Housing	East of England
	235	19/09/2005	Adnams Distribution Centre, Reydon, Southwold	Distribution	East of England
Quarmby	6	03/03/2000	Conversion of offices to flats, 2 Water Lane, Leeds	Private Housing	Yorkshire & Humberside
	214	23/12/2004	Humanities Research Institute, University of Sheffield	Education	Yorkshire & Humberside
	233	08/08/2005	Eastbrook hall, Little Germany, Bradford	Private Housing	Yorkshire & Humberside
Quarmby (Special Projects)	159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	Entertainment (inc Leisure)	Yorkshire & Humberside
	242	13/02/2006	Brookfield manor Hathersage	Private Housing	East Midlands
R Durnell	155	11/07/2003	Mount Pleasant Greenford, External remedial work (Phase 2)	Public Housing	London
	191	14/05/2004	The Orchard Development, The Grovelands, Bedales School, Petersfield, Hampshire	Education	South East
	239	14/12/2005	Sydenham High School	Education	London

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
R G Carter, R G Building and R G Construction	202	27/08/2004	Alterations and Extension to Norwich Cinema City, St Andrews Street, Norwich	Entertainment (inc Leisure)	East of England
	210	03/12/2004	Three New Community Sports Complexes, Lincolnshire	Education	East Midlands
	222	04/04/2005	Refurbishment of Old Hall, Dessingham, Kings Lynn, Norfolk	Private Housing	East of England
Richardson Projects	176	28/01/2004	Group Repair Scheme, 2 to 8 Bronte Street and 7 Beeches Road, Lawkholme, Keighley	Public Housing	Yorkshire & Humberside
	179	09/02/2004	Beacon Resource Centre, Cromwell Road, Charlestown, Salford	Entertainment (inc Leisure)	North West
	225	08/06/2005	Swinnow Flats, Energy Efficiency Works	Public Housing	Yorkshire & Humberside
Robert Woodhead	46	22/01/2001	New House At Western Terrace, The Park, Nottingham	Private Housing	East Midlands
	78	08/10/2001	15 Dwellings, Station Rd Kimberley Phase 2	Public Housing	East Midlands
	178	30/01/2004	William Sharp Comprehensive School, Bilborough, Nottingham	Education	East Midlands
Robinson & Sawdon	192	14/05/2004	New Lift Shaft Coniston House, Willerby	Health	Yorkshire & Humberside
	236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Education	Yorkshire & Humberside
Robinson & Sawdon	238	28/11/2005	Calder Link Building, University of Hull	Education	Yorkshire & Humberside
Shaylor	44	19/01/2001	Hospital Street, Dudley Road, Birmingham	Health	West Midlands
	173	11/12/2003	18 bed ward extension, Beynon Centre, New Cross Hospital	Health	West Midlands
	216	14/02/2005	New Education Centre, George Eliot Hospital, Nuneaton	Health	West Midlands
Simons and Wrights (Lincoln)	59	08/05/2001	Alterations, Improvements & Extension, Burnholme College, York	Education	Yorkshire & Humberside
	141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, Newark, Nottinghamshire	Public Housing	East Midlands
	218	26/02/2005	Fire Refuge, Wilberforce Building, Hull University	Education	Yorkshire & Humberside
Sol	18	11/08/2000	Superstore, Retail Units and Petrol Filling Station, Small Heath, Birmingham	Retail	West Midlands
	41	11/01/2001	Chilwell TA Centre, Garage and Workshop	Defence	East Midlands
	124	15/10/2002	Dronfield Gorse Brigg Primary School Extension	Education	East Midlands
	126	04/11/2002	25 Stoney Street, Nottingham	Education	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Sol	142	07/03/2003	New Judo Hall, Walsall Campus	Education	West Midlands
	156	15/07/2003	Redhill Comprehensive - New Sixth Form Block	Education	East Midlands
	187	16/04/2004	Amalgamation Of Portland / Hartland Schools	Education	East Midlands
Speller-Metcalf	107	29/04/2002	Gas Training Centre - Evesham College	Education	West Midlands
	217	15/02/2005	Replacement primary school, Elbury Mount, Worcester	Education	West Midlands
Stainforth	21	25/08/2000	Proposed St Vincents Parish Centre at Crookes, Sheffield	Places of Worship	Yorkshire & Humberside
	165	24/09/2003	Residential Development, Stanningley Road, Leeds	Private Housing	Yorkshire & Humberside
	195	14/06/2004	Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds	Private Housing	Yorkshire & Humberside
Strata	6	03/03/2000	Conversion of offices to flats, 2 Water Lane, Leeds	Private Housing	Yorkshire & Humberside
	7	08/03/2000	Guiseley School Fieldhead Road Guiseley Leeds	Education	Yorkshire & Humberside
	8	14/03/2000	Four Flats at Viking Way, Kiveton Park	Public Housing	Yorkshire & Humberside
	21	25/08/2000	Proposed St Vincents Parish Centre at Crookes, Sheffield	Places of Worship	Yorkshire & Humberside
	23	15/09/2000	New Pavilion and Facilities, Pole Lane, Unsworth Cricket Club	Entertainment (inc Leisure)	North West
	31	27/11/2000	New Church Blacker Road	Places of Worship	Yorkshire & Humberside
	35	08/12/2000	Proposed Extension, Milford Sports Club	Entertainment (inc Leisure)	Yorkshire & Humberside
	37	13/12/2000	Extension to Vermuyden School, Centenary Road, Goole	Education	Yorkshire & Humberside
	47	31/01/2001	Environmental Works at Burley Lodge, Leeds	Public Housing	Yorkshire & Humberside
	59	08/05/2001	Alterations, Improvements & Extension, Burnholme College, York	Education	Yorkshire & Humberside
	61	29/05/2001	Fire Safety Works to Two Tower Blocks at Gleadless & Jordonthorpe Sheffield	Public Housing	Yorkshire & Humberside
	64	09/07/2001	Priestnall CDT extensions and alterations	Education	North West
	78	08/10/2001	15 Dwellings, Station Rd Kimberley Phase 2	Public Housing	East Midlands
83	28/11/2001	Business Centre Extension and New Training Centre, Driffield	Office	Yorkshire & Humberside	

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Strata	162	08/08/2003	Nursery at Westfield Primary School, York	Education	Yorkshire & Humberside
	189	27/04/2004	Salvation Army halls, Doncaster	Places of Worship	Yorkshire & Humberside
	195	14/06/2004	Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds	Private Housing	Yorkshire & Humberside
	221	01/04/2005	Extension and Refurbishment at Oaklands Sports Centre, York	Entertainment (inc Leisure)	Yorkshire & Humberside
	225	08/06/2005	Swinnow Flats, Energy Efficiency Works	Public Housing	Yorkshire & Humberside
	227	13/06/2005	Burngreave facelifts 2005/6 - contract 1	Public Housing	Yorkshire & Humberside
T & C Williams	180	09/02/2004	New Two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield	Health	Yorkshire & Humberside
	213	15/12/2004	New Warehouse, Green Road, Penistone, Sheffield	Warehousing	Yorkshire & Humberside
	242	13/02/2006	Brookfield manor Hathersage	Private Housing	East Midlands
T Denman	52	17/04/2001	Extension, Dowager House at Belvoir Rest Home, Widmerpool, Nottinghamshire	Public Housing	East Midlands
	79	23/10/2001	Fullhurst Community College, Phase C, Braunstone, Leicester	Education	East Midlands
	86	03/12/2001	Fire Improvements at Various Sites, Leicestershire and Rutland Healthcare NHS Trust	Health	East Midlands
Thomas Fish	89	11/12/2001	Extension to Offices, Meadow House, Bath Street, Mansfield	Office	East Midlands
	126	04/11/2002	25 Stoney Street, Nottingham	Education	East Midlands
Thomas Long	30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Public Housing	East Midlands
	116	02/08/2002	45 Modernisations, Highbury Vale, Nottingham	Public Housing	East Midlands
	127	13/11/2002	Refurbishment of 27 Empty Council-Owned Properties, Major Works Phase 1, Nottingham	Public Housing	East Midlands
Thomas Vale	20	18/08/2000	Mason House, Shirley	Private Housing	West Midlands
	30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Public Housing	East Midlands
	44	19/01/2001	Hospital Street, Dudley Road, Birmingham	Health	West Midlands
	49	16/03/2001	New Build of a Medical Centre at the New Medical Centre, Lawley, Telford	Health	West Midlands
	58	08/05/2001	The Toll House, Stratford-upon-Avon	Private Housing	West Midlands
	74	07/09/2001	Toxicology Laboratory, City Hospital, Birmingham	Health	West Midlands
	75	18/09/2001	Refurbishment, Watville Thomas J&I School, Handsworth	Education	West Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Thomas Vale	88	05/12/2001	Renal Dialysis Unit, City Hospital, Birmingham	Health	West Midlands
	90	17/12/2001	Diabetes Centre, City Hospital, Dudley Road, Birmingham	Health	West Midlands
	102	15/04/2002	Centre for Organic Horticulture Phase 1, Ryton Organic Gardens, Coventry	Office	West Midlands
	106	26/04/2002	International House, Elmdon Trading Estate, Birmingham	Office	West Midlands
	107	29/04/2002	Gas Training Centre - Evesham College	Education	West Midlands
	121	23/09/2002	Residential Development, Elmdale, Herefordshire	Public Housing	West Midlands
	137	07/02/2003	Flats Refurbishment 110 & 124 Sycamore Road Burton on Trent	Public Housing	West Midlands
	150	25/06/2003	Two Gates Primary School, Tamworth	Education	West Midlands
	166	01/10/2003	Waterfront Business Park, Merry Hill	Office	West Midlands
	173	11/12/2003	18 bed ward extension, Beynon Centre, New Cross Hospital	Health	West Midlands
	174	22/12/2003	Unit 1, Dutton Road, Alderman's Green Industrial Estate, Coventry	Other Industrial Buildings	West Midlands
	197	07/07/2004	Extension, Sutton Coldfield Police Station	Police/Fire & Rescue	West Midlands
	209	03/12/2004	Extensions and Alterations at Bleakhouse Junior School, Oldbury, West Midlands	Education	West Midlands
	216	14/02/2005	New Education Centre, George Eliot Hospital, Nuneaton	Health	West Midlands
	217	15/02/2005	Replacement primary school, Elbury Mount, Worcester	Education	West Midlands
	219	28/02/2005	Eight new dwellings, Appletree Close, Holt Heath, Worcestershire	Public Housing	West Midlands
244	09/06/2006	Extension to Tipton and Coseley Building Society, Tipton	Office	West Midlands	
Thorndyke	17	02/08/2000	Internal Redecoration of King Edward Court, Nottingham	Office	East Midlands
	32	27/11/2000	Alterations to Reception at King Edward Court, Nottingham	Office	East Midlands
	54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	Office	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Try Accord and Galliford Construction	42	12/01/2001	Uxbridge College, Academy Building	Education	London
	142	07/03/2003	New Judo Hall, Walsall Campus	Education	West Midlands
	186	23/03/2004	Buswells Lodge Primary School, Beauville Drive, Beaumont Leys, Leicester	Education	East Midlands
W R Bloodworth	114	08/07/2002	Conversion & Extension of CCTV Control Room, Beeston Police Station, Nottinghamshire	Police/Fire & Rescue	East Midlands
	140	03/03/2003	Alterations to Newhall Methodist Church, Swadlincote Derbyshire	Places of Worship	East Midlands
	143	14/04/2003	Refurbishment Work and an Extension to 144 Sneinton Dale, Sneinton, Nottingham	Education	East Midlands
Wiggett	140	03/03/2003	Alterations to Newhall Methodist Church, Swadlincote Derbyshire	Places of Worship	East Midlands
	171	12/11/2003	Alterations to Ward C31 and C32, Queens Medical Centre, Nottingham	Health	East Midlands
	193	28/05/2004	Refurbishment of Sure Start, St Anne's Metrazone, Ransom Road, Nottingham	Office	East Midlands
Wildgoose	57	30/04/2001	Early Excellence Centre, Aughton Nursery School	Education	Yorkshire & Humberside
	98	20/02/2002	Conversion of Davers Steel Building, Sheffield	Office	Yorkshire & Humberside
	104	22/04/2002	Alterations to Café and Conservatory Extension, Burton College	Education	West Midlands
	136	05/02/2003	Pitched Roof Conversion, 1-15 Pankhurst Place, Clay Cross	Public Housing	East Midlands
Wildgoose	146	12/05/2003	Construction of Four-Storey Lift Tower, Burton College	Education	West Midlands
	158	25/07/2003	North Lodge and Cricket Pavilion, Queen's Park, Chesterfield	Entertainment (inc Leisure)	East Midlands
	159	28/07/2003	Norfolk Heritage Park Bowls Pavilion, Sheffield	Entertainment (inc Leisure)	Yorkshire & Humberside
William Sapcote	100	25/02/2002	New Classrooms, Heart of England School, Balsall Common	Education	West Midlands
	106	26/04/2002	International House, Elmdon Trading Estate, Birmingham	Office	West Midlands
	197	07/07/2004	Extension, Sutton Coldfield Police Station	Police/Fire & Rescue	West Midlands
William Woodsend	126	04/11/2002	25 Stoney Street, Nottingham	Education	East Midlands
	129	25/11/2002	Re-Building of Eight Newland Properties, Bilborough, Nottingham	Public Housing	East Midlands
	204	21/10/2004	Four Office Units, The Glade Business Centre, Phase 2, Bestwood, Nottingham	Office	East Midlands

Name of Party	Infringement			Infringement relevant product market	Infringement relevant geographic market
	No.	Date	Infringement name		
Willmott Dixon	181	20/02/2004	New sports centre, Jubilee Campus, Nottingham	Education	East Midlands
	212	14/12/2004	Gotham Primary School Gotham Nottingham	Education	East Midlands
	243	21/02/2006	Digital Media Centre, Barnsley	Office	Yorkshire & Humberside
Wright (Hull)	194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	Health	Yorkshire & Humberside
	206	26/10/2004	Incubator Office Units, Colburn	Office	Yorkshire & Humberside
	230	25/07/2005	34 Residential Apartments, 71-75 Wright Street, Hull	Private Housing	Yorkshire & Humberside
Wygarr	74	07/09/2001	Toxicology Laboratory, City Hospital, Birmingham	Health	West Midlands
	88	05/12/2001	Renal Dialysis Unit, City Hospital, Birmingham	Health	West Midlands
	90	17/12/2001	Diabetes Centre, City Hospital, Dudley Road, Birmingham	Health	West Midlands
York House	195	14/06/2004	Design and Build 54-Bed Accommodation, The Old Vicarage, St Marks Road, Leeds	Private Housing	Yorkshire & Humberside
	211	08/12/2004	New Build Extra Care Housing Development, Huddersfield Road, Mirfield	Public Housing	Yorkshire & Humberside
	233	08/08/2005	Eastbrook hall, Little Germany, Bradford	Private Housing	Yorkshire & Humberside

ANNEX C – LIST OF PARTIES WHOSE COMPANY DIRECTORS THE OFT CONSIDERS WERE INVOLVED IN ONE OR MORE OF THE INFRINGEMENTS

- A.6. As noted in Section VI (Enforcement) above, the OFT considers that the involvement of company directors in the Infringements is an aggravating factor at step 4 of the penalty calculation. The tables below contain a list of the Parties whose company directors the OFT considers were involved in one or more of the Infringements.
- A.7. The first table, headed ***List of Parties whose directors the OFT considers were involved in every one of that Party’s Infringements, by virtue of their knowledge of cover pricing within the company as described in the relevant part of Section IV.C relating to that Party***, contains a list of Parties in respect of which the OFT has evidence of general director involvement in bid rigging activities for all instances of bid rigging. For these Parties, the OFT is applying an adjustment at step 4 of the penalty calculation to all of the Infringements in respect of which the OFT is imposing a penalty.
- A.8. The second table, headed ***List of Parties whose directors the OFT considers were involved in one or more specific Infringements***, contains a list of Parties in respect of which the OFT has evidence of specific director involvement in bid rigging activities in relation to particular Infringement(s). For these Parties, the OFT is applying an adjustment at step 4 of the penalty calculation to the specific Infringements listed in that table in respect of which the OFT is imposing a penalty.
- A.9. Note that where a party is listed in the second table in relation to a specific Infringement as well as more generally in the first table, the OFT is applying only one adjustment at step 4 of the penalty calculation for each such Infringement.

List of Parties whose directors the OFT considers were involved in every one of that Party’s Infringements, by virtue of their knowledge of cover pricing within the company as described in the relevant part of Section IV.C relating to that Party

Name of Party	Director identified	Evidence ref. no(s).
ARG	Allan Russell Gregory, Andrew Eato	11113 p.10 & 13, 13125 p.5 & 6
Adam Eastwood	Adrian Tranter	11094, p.4 & 5
Admiral	Andrew Clarkson, Stephen Henry Savage, Keith Edwin Roebuck	13299, p.11
Bodill	Richard Bodill	0864 p.6
Bramall	David Prescott (from 1 September 2003)	11167 p.6 & 7

Clegg	Simon Blackburn, Peter Warren, Jonathan King	13277 p.9, 13278 p.5 & 6
Derwent Valley	David Stone	13478 p.5 & 6, 13477 p.2, 13478 p.7
Frank Haslam Milan	David Mellor (from 1 April 2003), Mark Davis (from 2001 to 1 April 2003 and 1 November 2005 to 2006)	12855 p.4 & 11, 12857 p.13
Frudd	David Frudd, Jenna Frudd, Andrew Smith	3990 p.3, 6352 p.3, 13104 p.4 & 5, 13115 p.12.
Harlow & Milner	Richard Milner	12731 p.4 & 5
Henry Boot	Michael Douglas Mosley (from 1 August 2001)	11215 p.7 & 9
Herbert Baggaley	Herbert Howard Baggaley	3906 p.4 & 5
Hobson & Porter	David Watson, Ian Gibbins, Russell John Horner	11230 p.3, 11231 p.4 , 5, 9 & 13, 11229 p.6 & 8
Irwins	Ivan Peter Nelson	11253 p.5, 10 & 16, 11254 p.1 & 2
J H Hallam	Richard Marlow Blount, John Clifford Hallam, Richard Marvin Hallam, Christopher John Hallam, Robert Sheldon Hefford	12757 p.5, 8 to 10
Jack Lunn	Stephen Bradbury (from 1 March 2004)	11289 p.5 & 7, A0673 p. 9
John Cawley	Nicholas John Greene, Richard Charles Greene	11297 p.7 & 18, 11304 p.4, 11298 p.3
Loach	Kenneth Alfred Tyler, Andrew Robert Arbon Davis (from 1 April 2003)	11322 p.2, 11312 p.7 & 9, 11322 p.5
P Waller	Phillip Waller, Hilary Jane Waller	6367 p.8 & 13, 6366 p.3
Phoenix	Michael Roy Williamson	11328 page 13

Propensity	Philip Ryder (Totty Building from 4 th April 2003), Bernard Francis Clarke (Jackson)	11349 p.8 & 9, 11353 p.6 & 9, 11344 p.8
Simons/Wrights (Lincoln)	Colin Sargeant (Wrights (Lincoln) and Simons from the 1 st April 2004), Roger Alan Hall (Wrights (Lincoln) and Simons), Arthur John Fox (Wrights (Lincoln) up to 11 April 2003 only), Andrew John Rowe (Wrights (Lincoln) up to 30 April 2003 only)	B3580 p.10, 12 & 16, 12816 p.4, 6 & 10, 13131 p. 7 & 8, 12777 p. 3
Sol	Adrian George Whiteside	6381 p.4 & 5
Strata	Douglas Page (up to 30 April 2000 only), John McCredie (up to 31 October 2001 only), Julian Martin Kawecki	13156 p.4 & 5, 11380 p. 5
T & C Williams	Brian Barker	12762 p.11
Thomas Fish	Peter Donald Woodhouse	6355 p.10, 13 & 15, 13313 p.5, 13315 p.4
W R Bloodworth	Stewart David Bloodworth	6348 p.14
Wildgoose	Brian Bennett, Graham Barber	14263 p.2, 5 & 8, 14261 p.3, 14259 p.2
York House	Robert Andrew Bruce, Arthur Richardson (from 1 st January 2005)	11467 pages 6, 8. 11466 pages 9, 10.

List of Parties whose directors the OFT considers were involved in one or more specific Infringements

Infringement			Name of Party	Director Identified	Evidence Ref. No(s).
Number	Date	Name			

50	30/03/2001	12 Self-Contained Flats, Castle Street, Mansfield Woodhouse	Adam Eastwood	Adrian Tranter	0531, 11095 p.14
180	09/02/2004	Construction of a New Two-storey Medical Centre at Harborough Avenue Medical Centre, Sheffield	Admiral	Andrew Clarkson	5201, 13299 p.33 & 37
190	04/05/2004	Civil Works for Aldwarke Primary Mill, Rotherham Works	Admiral	Andrew Clarkson	5203, 13299 p. 38 & 39
214	23/12/2004	Humanities Research Institute, University of Sheffield	Admiral	Andrew Clarkson	5205, 13299 p.43 & 44
244	09/06/2006	Extension to Tipton and Coseley Building Society, Tipton	Arthur M Griffiths	Gary James Wildsmith	5938, p.2, 13292, p.7 & 8, p.17, 13291, p.13, 13865, p.15 & 16
34	05/12/2000	Civic Accommodation, County Hall, Nottingham	Beaufort	Michael Thomas Tomsett	0520
66	13/07/2001	New Assembly Hall – Seeley Church Primary School, Nottingham	Beaufort	Michael Thomas Tomsett	0559, 0861
135	27/01/2003	17/18 Dover Street, London	Durkan	David Alan Fraher, Colin Simmons	B4036, B4038, 6140, 6141
139	28/02/2003	Factory and Offices, Haydock	F Parkinson	Allan Graham Hollick	4480, 4461 p.2, 13276 p.16
122	25/09/2002	Reception and Office Extension at St Anne's Community Special School, Welton, Brough	Hall	Charles Norman Abbott	A1397, 13878, A1349, 13882 p.3
241	13/02/2006	29 Houses, Rosemount Clifton Villas	Harlow & Milner	Richard Milner	12733 p.19, 12731 p.21-24

118	06/09/2002	Internal Alterations to Workshops, Rooms 25 and 29, West Nottinghamshire College, Derby Road, Mansfield	Harold Adkin	Ian Barrington Douglas	2621, 2624 p.1
196	30/06/2004	Retail Fish Shop & Print Workshop, Whaley Thorns, Worksop	Harold Adkin	Ian Barrington Douglas	0741, 1564
85	03/12/2001	New Press Foundations & Associated Alteration Works – Derby Daily Telegraph, Derby	Herbert Baggaley	Richard Ian Baggaley	6371 p.8
146	12/05/2003	Construction of Four-Storey Lift Tower, Burton College	Herbert Baggaley	Richard Ian Baggaley	6372 p.20, 6371 p.6
184	05/03/2004	Butlers Hill Infant & Nursery School, Hucknall, Nottingham	Hill	Eric Geoffrey Wilkinson	0726
122	25/09/2002	Reception and Office Extension at St Anne's Community Special School, Welton, Brough	Hobson & Porter	Ian Gibbins	13882 p.3
172	05/12/2003	Alterations to Building, Universal Milling Technology, Sutton Fields Industrial Estate, Hull	Hobson & Porter	Ian Gibbins	11231, p.11 & 12
194	11/06/2004	Extension and Refurbishment and Works at Malton, Norton and District Hospital	Hobson & Porter	Russell John Horner	11229, p.15
218	26/02/2005	Fire Refuge, Wilberforce Building, Hull University	Hobson & Porter	Ian Gibbins	11231 p.15,
226	08/06/2005	New Library, Centurian Way, Brough	Hobson & Porter	David Watson	11230 p.11
236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Hobson & Porter	Russell John Horner	11229 p.19
14	12/06/2000	Office Development at Lancaster Park, York	Irwins	Ivan Peter Nelson	11254 p.22&23
94	23/01/2002	Proposed Club Fandango, Morley, Leeds	Irwins	Ivan Peter Nelson	11254 p.13 & 14

105	23/04/2002	Alterations and Extensions to Haigh Hall Medical Centre	Irwins	Ivan Peter Nelson	11255 p.6
125	28/10/2002	New Office Block and Refurbishment of Warehouse, Doncaster	Irwins	Ivan Peter Nelson	11255 p.11&12
231	29/07/2005	Phase 3 Office Development, Park Lane, Allerton Bywater	Irwins	Ivan Peter Nelson	11255 p.13&14
96	07/02/2002	Sir John Moore Primary School, Appleby Magna, Derbyshire	J H Hallam	Richard Marlow Blount	5052
186	23/03/2004	Buswells Lodge Primary School, Beauville Drive, Beaumont Leys, Leicester	J H Hallam	Richard Marlow Blount	5109
205	25/10/2004	Residential Developments, Napier Street, Sheffield	Jack Lunn	Stephen Bradbury	11290 p.10&11
55	27/04/2001	Alteration and Extension to Front Entrance, Cantrell Primary School, Bullwell, Nottingham	John Cawley	Nicholas John Greene	0542
56	27/04/2001	Mobile Classroom Replacement, Cantrell Primary School, Bullwell, Nottingham	John Cawley	Nicholas John Greene / Richard Charles Greene	0541, 11304 p.11, 11305 p.9
133	19/12/2002	Hill Crescent Changing Block	K J Bryan	John David Bryan	2528, 13423 p.22
70	15/08/2001	Brick Cladding and Associated Works, 15 Cornish Dwellings, Phase 7, Milton Drive, Worksop, Notts	PDH	Graham Peter Rye	0567
67	25/07/2001	Robert Mellors Primary School, Nottingham	P Waller	Philip Waller / Hilary Jane Waller	3622 p.111, 4038 p.205, 4038 p.206, 13285 p.4
163	05/09/2003	Environmental Improvements to 26 Houses, Pearmain Drive Estate, Nottingham	P Waller	Hilary Jane Waller	0700, 3624, p.131, 6366 p.4

66	13/07/2001	New Assembly Hall – Seely Church Primary School Nottingham	Peter Baines	Stephen Baines	0559
159	28/07/2003	Norfolk Heritage Park, Bowls Pavilion, Sheffield	Quarmby (Special Projects)	Martyn Paul Senyk	0691
78	08/10/2001	15 Dwellings, Station Road, Kimberley Phase 2	Robert Woodhead	Robert Eric Johnson	0580
192	14/05/2004	New Lift Shaft, Coniston House, Willerby	Robinson & Sawdon	Robert Wilson Sawdon	A1349 p.2, 10818 p.6, 10187 p.2
236	07/11/2005	New Build Nursery, Bridlington Sure Start at Bridlington Nursery School	Robinson & Sawdon	Charles Frederick Robinson	A1347 p.1, 10818 p.10 & 16, 10817 p.2
238	28/11/2005	Calder Link Building, University of Hull	Robinson & Sawdon	Charles Frederick Robinson	A1347 p.1, 10818 p.10 & 16, 10817 p.2
141	03/03/2003	Refurbishment & Extensions to St Catherine's Cottages, London Road, Newark, Nottinghamshire	Simons / Wrights (Lincoln)	Arthur John Fox (Wrights)	0666, 13406, B4278 p.1
30	24/11/2000	Environmental Improvements, Pearmain Drive, Nottingham	Thomas Long	Richard Alan Manning	0517
32	27/11/2000	Alterations to Reception at King Edward Court, Nottingham	Thorndyke	Ian Barrie Thorndyke	0518
54	27/04/2001	Toilet Refurbishment – CPS, King Edward Court, Nottingham	Thorndyke	Ian Barrie Thorndyke	0544
140	03/03/2003	Alterations to Newhall Methodist Church Swadlincote Derbyshire	Wiggett	Paul Wiggett	3905 p.47, 11317 p.25

98	20/02/2002	Conversion of Davers Steel Building, Sheffield	Wildgoose	Brian Bennett	0361, 3895 p.7, 14263 p.13, 6330 p.62, 14273 p.3, 14270 p.3&4
104	22/04/2002	Alterations to Café and Conservatory Extension, Burton College	Wildgoose	Brian Bennett	4514, 4513, 14269 p.1,2,3, 6330 p.72 & 73, B4120 p.3
146	12/05/2003	Construction of Four-Storey Lift Tower, Burton College	Wildgoose	Brian Bennett / Eric Alan Clarke	14263, p.14, 6330 p. 64 & 65, 14271 p.2, 6313 p.11 & 12, 14270 p.4, 6372 p.20
158	25&30/07/03	North Lodge and Cricket Pavilion, Queen's Park, Chesterfield	Wildgoose	Brian Bennett / Eric Alan Clarke / Graham Barber	12860 p.4,8,9, 13442 p.12, 13443 p.4, 13450 p.11&12
100	25/02/2002	New Classrooms, Heart of England School, Balsall Common, Solihull	William Sapcote	Peter Ambrose Perry	3889, 11138 p.26
106	26/04/2002	International House, Elmdon Trading Estate, Birmingham	William Sapcote	Peter Ambrose Perry	11419 p.11-14
126	04/11/2002	25 Stoney Street, Nottingham	William Woodsend	Thomas Richard Scothorne	4169 p.32, 11368 p.19 & 20, 4358 p.3, 4361 p.2

ANNEX D – ANNEXES TO DEFINITION OF RELEVANT MARKETS

- A.10. This annex contains Annexes D(1) to D(5) of the Definition of Relevant Markets section. As noted in paragraph II.1607 above, the data analysis for the OFT's Construction Database was carried out in relation to the Alleged Infringements in the Statement. These annexes have not therefore been amended from the equivalent annexes included in the Statement.

- % Commercial Construction – construction work for offices, shops, entertainment venues, schools, colleges, university, hospitals and agricultural premises.
- % Industrial Construction – construction work for warehouses, oil, steel, coal factories and other industrial sectors.
- % Other (please specify).....

4. Please fill in the table below to show for each category of work you undertake the proportion that is new build and the proportion that is repair, maintenance and improvement work.

Type of Construction work	% New Build	% Repair, Maintenance and Improvement
Private Sector Housing		
Public Sector Housing		
Infrastructure		
Commercial Construction		
Industrial Construction		
Other- please specify		

5. Please explain to what extent the company is structured to reflect the categories of work that it undertakes.

6. Please indicate (by marking with an x) the length of time you consider you would need to commence operations in another category of work (amongst the ones listed in question 3).

- less than a year
- more than a year

Please explain what factors would influence the time required to start up operations and provide an estimate of the likely costs.

7. Please indicate (by marking with an x) the sectors your company operates in.

- | | | |
|---|---|---|
| <input type="checkbox"/> Education | <input type="checkbox"/> Retail | <input type="checkbox"/> Prisons |
| <input type="checkbox"/> Health | <input type="checkbox"/> Leisure | <input type="checkbox"/> Police/Fire & Rescue |
| <input type="checkbox"/> Housing | <input type="checkbox"/> Defence | <input type="checkbox"/> Distribution |
| <input type="checkbox"/> Social Housing | <input type="checkbox"/> Office | <input type="checkbox"/> Infrastructure |
| <input type="checkbox"/> Student
Accommodation | <input type="checkbox"/> Places of
Worship | <input type="checkbox"/> Warehousing |
| | | <input type="checkbox"/> Industrial Buildings |
| | | <input type="checkbox"/> Other, Specify..... |

8. Please indicate (by marking with an x) the length of time you consider you would need to commence operations in a different sector (amongst the ones listed in question 7).

- less than a year
 more than a year

Please explain what factors would influence the time required to commence operations in another sector and provide an estimate of the likely costs of commencing operations.

9. Please indicate the range of values (lowest-highest) of construction contracts that your company currently undertakes.

10. Please estimate the average value of construction contracts that your company currently undertakes.

11. Please indicate whether your company structure in any way reflects the size of contracts being undertaken.

12. Please indicate the extent to which, on large construction contracts, you take the role of lead contractor or mainly act as one of the subcontractors. What is the average value of such contracts?

13. Please explain whether there are any constraints (financial/capacity or otherwise) that would prevent you from bidding for certain types of construction contracts.

14. Please indicate how much it costs on average and the average time required to make a bid for a construction contract.

15. Please provide (on a separate sheet marked 'Confidential') a list broken down by sector, category of work and geographic location (as appropriate) of those companies who you consider to be your main competitors for construction contracts.

16. Please indicate where your head office and local offices are located (including postcodes).

17. Please provide an estimate of the proportion of your construction contracts within the following distances of your head and local offices:

Distance	Head Office	Local Offices
	% of contracts	% of contracts
25 mile radius		
50 mile radius		
75 mile radius		
100 mile radius		
200 mile radius		

18. Please explain the extent to which pricing is set on the basis of local market conditions.

Schedule B

Name of Respondent:

Name of organisation: Date:

Market Definition Questions

Please provide responses to the questions set out in Section A and Section B.

Section A

1. Please indicate (by marking with an x) whether companies that were invited to tender for the most recent suspect tender shown on Schedule A were chosen from a select list?

Yes No

If yes, please supply the select list used at the time of the suspect tender, highlighting on the list all those companies you consider could have been invited to tender for the work specified in the suspect tender. Where a select list⁸⁷⁷¹ was used for part of the selection please indicate (in the space below) the method by which additional contractors were selected to be added to the list of those invited to tender and (on a separate sheet annexed to this response) list those contractors that were added in this way.

If no, please go to question 4 below.

2. Please answer the question below in respect to the select list used for the suspect tender (by marking your answer with an x)

(a) how often were select lists typically updated.

- monthly or more often
 between six-monthly and monthly
 between annually and six-monthly
 between two and one years
 less often than every two years

⁸⁷⁷¹ A select list is a list of approved contractors from which contractors are selected to be invited to tender for a project.

- (b) on what basis were revisions made.
- regularly in line with internal policy
 - before each tender or major tenders
 - when approached by a contractor
 - irregularly but not as a result of a contractors approach
 - other (please specify)

- (c) on what basis did you choose companies to invite to tender from the select list
- on a rota basis
 - on the basis of suitability for the particular project
 - other, please specify.....

3. Please specify any other select lists for construction work you had at the time of the suspect tender.

4. **(For respondents that do not have select lists)** Please provide the following:

(a) a brief description of the process used to select those building contractors that were asked to tender for the suspect tender.

(b) (on a separate sheet annexed to this response) the 'long list' of building contractors considered for the suspect tender from which the short list of building contractors who were invited to tender were drawn.

Section B

5. Please rank in order of importance (1 being the most important, 2 the next most important, etc.) the following **criteria for drawing up a list** of building contractors who are to be **asked to tender** for a project.

- demonstrate that have already done similar type of work
- good reputation in industry
- have passed external accreditation process, (please name organisation used to accredit firms.....)
- show that they price competitively
- local firm
- other, please specify.....

6. Please rank in order of importance (1 being the most important, 2 the next most important, etc.) the following **criteria for selecting amongst bids obtained** as a result of an invitation to tender for a project.

- have already worked for you on similar project
- price competitively
- quality of bid document
- quality of bid presentations
- local firm
- other, please specify.....

7. Please indicate whether the lowest bid for the most recent suspect tender came in above the financial authority⁸⁷⁷²

- Yes No

If yes please indicate what course of action you took

- selected the same winning bidder on the same scale and timing
- re-tendered or sought additional bids from other firms
- scaled back the project
- delayed the project
- cancelled the project
- other, please specify.....

If no, please indicate in accordance with likelihood (1 being the most likely, 2 the next most likely, etc) the courses of action you would have taken if the lowest tender in the suspect tender had been 5 per cent higher than the financial authority?

- selected the same winning bidder on the same scale and timing
- re-tendered or sought additional bids from other firms
- scaled back the project
- delayed the project
- cancelled the project
- other, please specify.....

⁸⁷⁷² The financial authority is the amount of money that an organisation has allowed in respect of a particular project.

Annex D (3) – Procurement Analysis

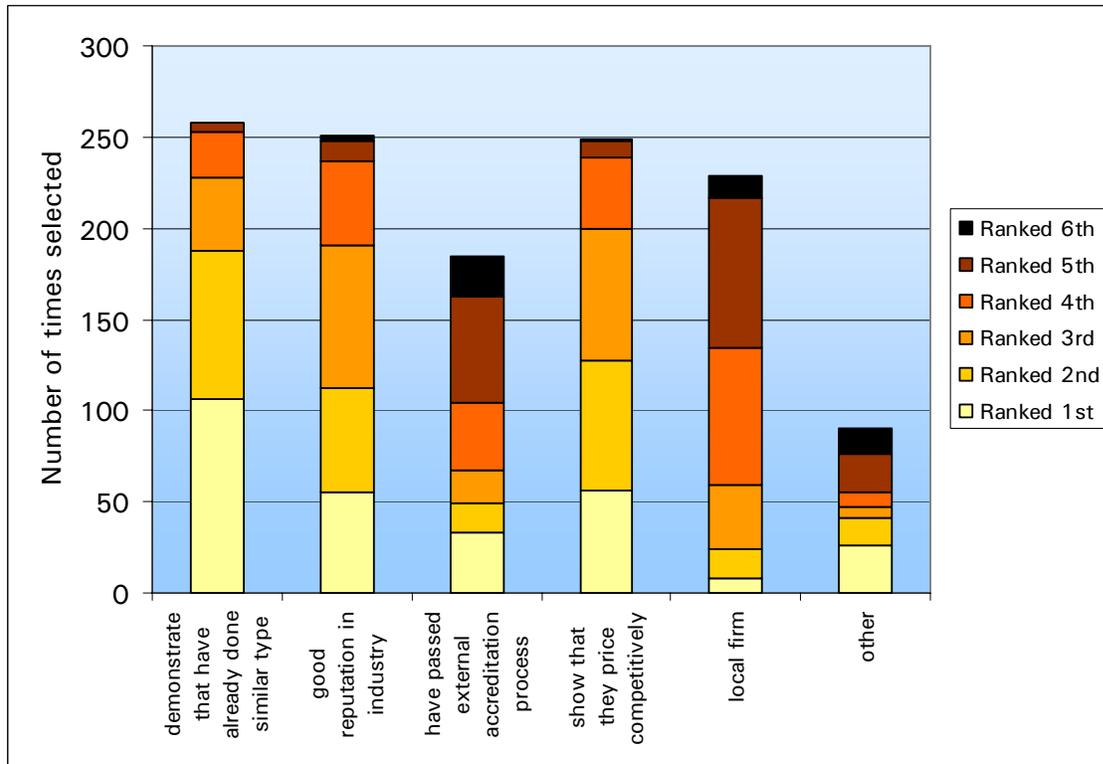
Table 1: Analysis of Criteria for selecting building contractors to tender

Response to question 5 of the Clients' Survey

Criteria	Ranked 1st	Ranked 2nd	Ranked 3rd	Ranked 4th	Ranked 5th	Ranked 6th
demonstrate that have already done similar type of work	106	82	40	25	5	0
good reputation in industry	55	57	79	46	11	3
have passed external accreditation process	33	16	18	37	59	22
show that they price competitively	56	71	73	39	9	1
local firm	8	16	35	75	83	12
Other	26	15	6	8	21	14

Source: Clients' Survey, OFT's Construction Database (2007)

Chart 3: Chart showing criteria for drawing up a list of building contractors to be asked to tender for a project



Source: Clients' Survey, OFT's Construction Database (2007)

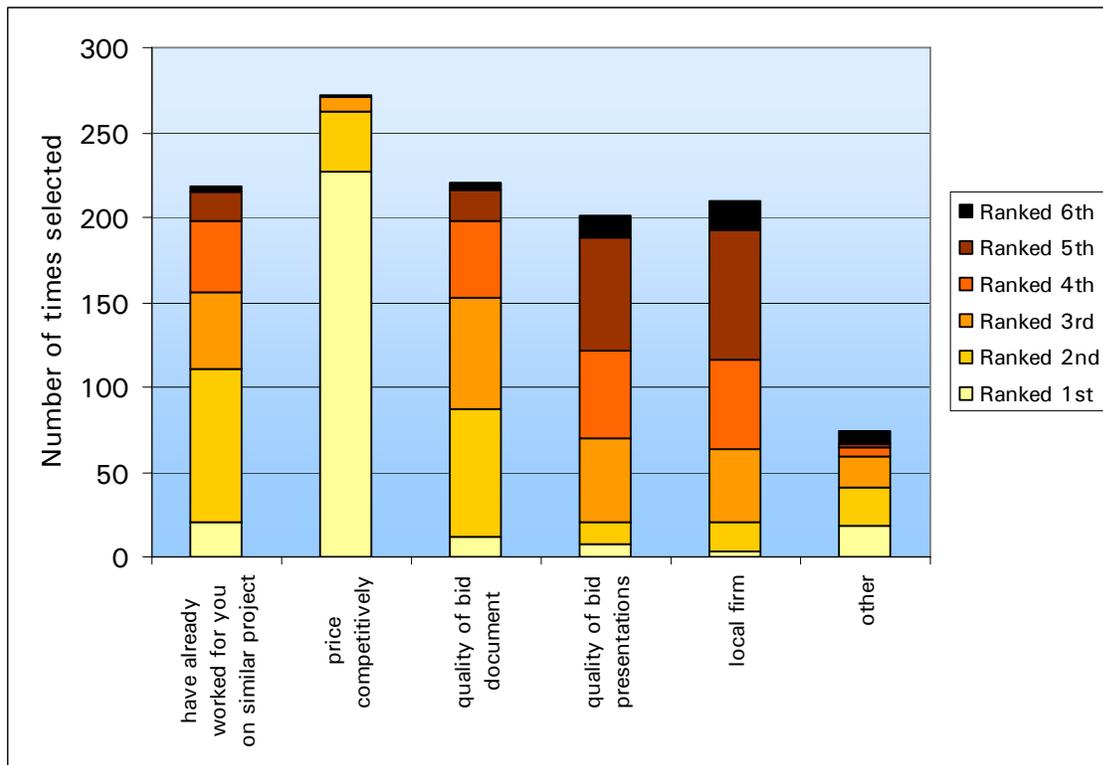
Table 2: Analysis of criteria for selecting amongst bids obtained as a result of an invitation to tender for a project

Response to question 6 of the Clients' Survey

Criteria	Ranked 1st	Ranked 2nd	Ranked 3rd	Ranked 4th	Ranked 5th	Ranked 6th
have already worked for you on similar project	20	91	45	42	17	3
price competitively	227	35	9	1	0	0
quality of bid document	12	75	66	45	18	4
quality of bid presentations	7	13	50	52	66	13
local firm	3	17	43	53	77	17
Other	18	23	18	5	3	7

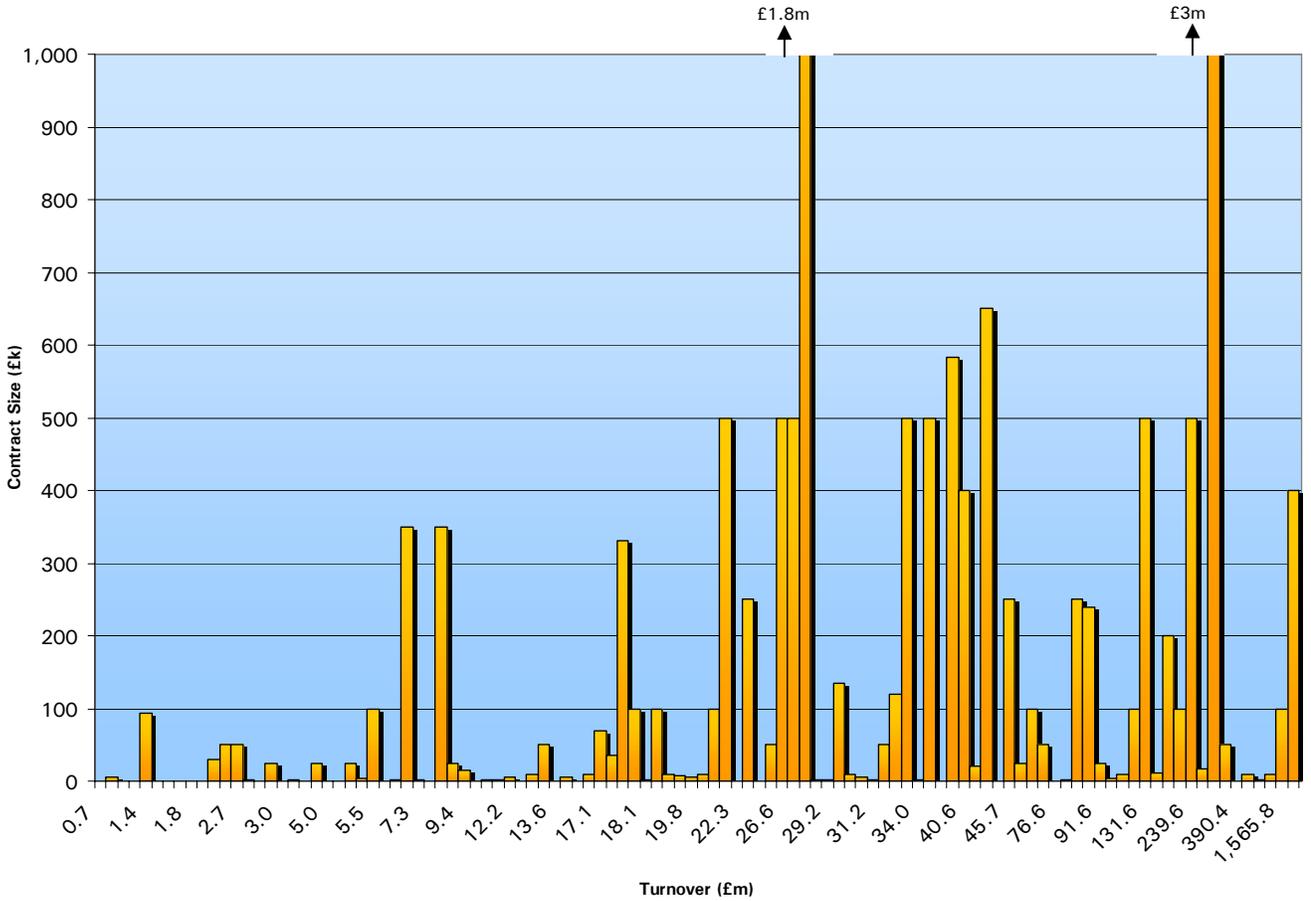
Source: Clients' Survey, OFT's Construction Database (2007)

Chart 4: Chart showing criteria for selecting amongst bids obtained as a result of an invitation to tender for a project

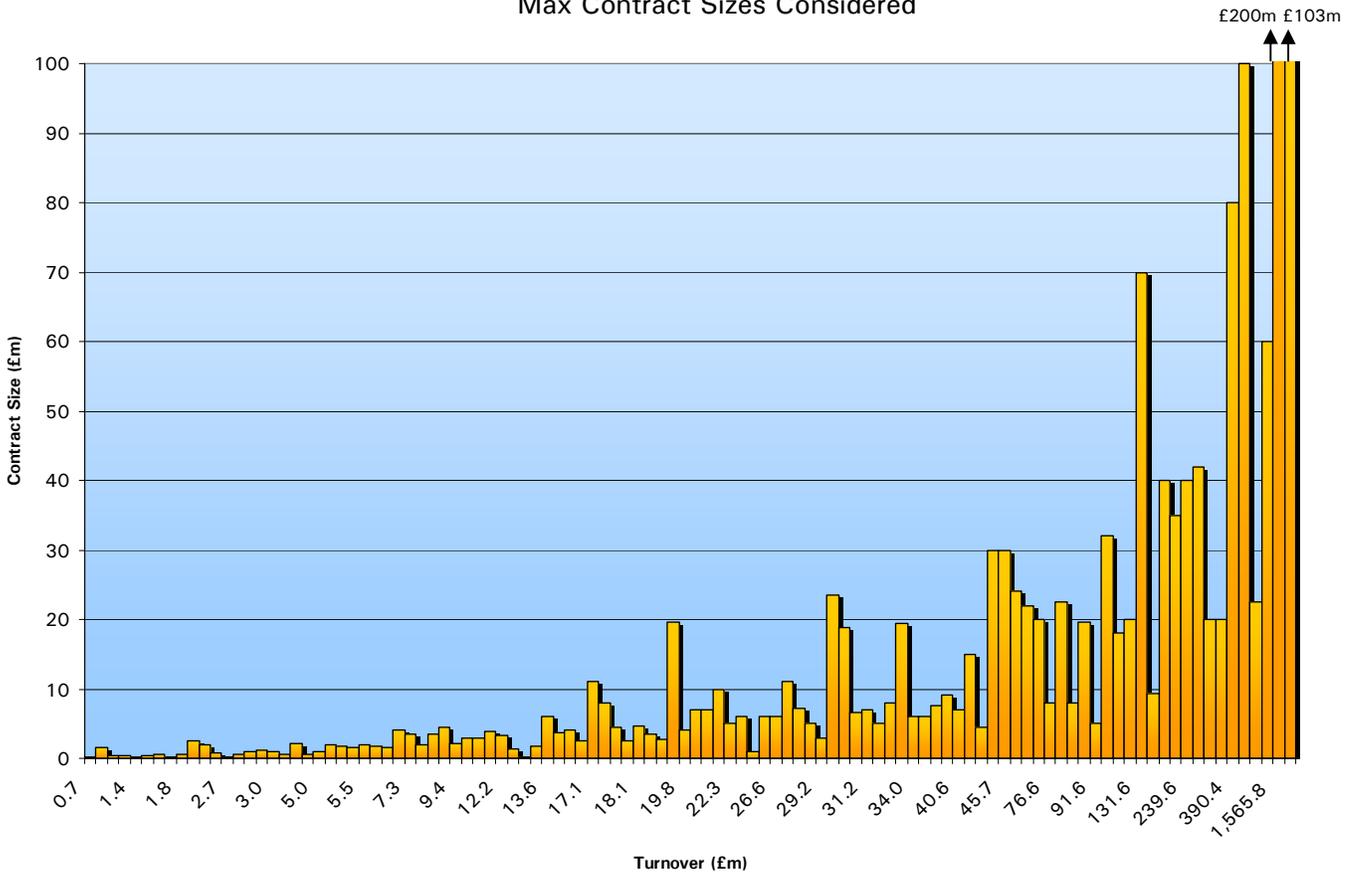


Source: Clients' Survey, OFT's Construction Database (2007)

Annex D (4)
Min Contract Sizes Considered



Max Contract Sizes Considered



Annex D (5)
[...][C]

[...]**[C]**

[...][C]

[...]**[C]**

[...][C]

[...][C]

[...]**[C]**

[...]**[C]**