Neutral citation [2011] CAT 14

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1124/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

27 April 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
MARCUS SMITH QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

NORTH MIDLAND CONSTRUCTION PLC

Appellant

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 9 July 2010

JUDGMENT

APPEARANCES

Mr Rhodri Thompson QC (instructed by Browne Jacobson LLP) appeared for the Appellant.

Mr David Unterhalter SC and Mr Alan Bates (instructed by the Office of Fair Trading) appeared for the Respondent.

I. INTRODUCTION

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

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

3. One of the addressees of the Decision was North Midland Construction plc ("North Midland"). The company is described in Decision/II.957-964 (pp175-176). The Decision found that North Midland had committed two infringements of the Chapter I prohibition (collectively "the Infringements").

4. Both the Infringements concern "cover pricing". This is not the first occasion on which the Tribunal has had to consider cover pricing. The issue arose in *Apex Asphalt Paving Co Limited v OFT* [2005] CAT 4 and in *Makers UK Limited v OFT* [2007] CAT 11. The practice has, of course, also now been the subject of consideration in other appeals arising out of the Decision (see, for example, *Kier Group plc and others v OFT* [2011] CAT 3, *G F Tomlinson Building Limited and others v OFT* [2011] CAT 7 and *Barrett Estate Services Limited and others v OFT* [2011] CAT 9). Cover pricing occurs where one of those invited to tender for a construction contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is

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

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

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

6. The Infringements were as follows:

   (1) *Infringement 46.* This infringement ("Infringement 46") concerned the provision, to North Midland, of a cover price by Bodill & Sons (Contractors) Limited ("Bodill") in respect of a tender by North Midland for the construction of a new house at Western Terrace, The Park, Nottingham. The client was Marsh & Grochowski. Bodill, which was also an addressee of the Decision, is described in Decision/II.218-224 (p70). The date for tender return was 22 January 2001. Infringement 46 is described at Decision/IV.1484-1526 (pp678-686).

(2) *Infringement 190.* This infringement ("Infringement 190") concerned the provision, by North Midland, of a cover price to Admiral Construction Limited ("Admiral") in respect of a tender by Admiral for civil works for Aldwarke Primary Mill, Rotherham Works. The client was Corus. Admiral, which was also an addressee of the Decision, is described in Decision/II.54-68 (pp42-43). The date for tender return was 4 May 2004. Infringement 190 is described at Decision/IV.5237-5267 (pp1338-1343).

7. In the case of Infringement 46, a penalty of £27,200 was imposed. In the case of Infringement 190, a penalty of £1,516,613 was imposed. The relevant part of the Decision dealing specifically with the penalties imposed on North Midland is at Decision/VI.575 (p1796).

8. North Midland appeals against the OFT's findings on the following grounds:

(1) As regards Infringement 46, that the OFT had adduced insufficient evidence of the facts alleged by the OFT to satisfy the burden of proof. It is to be noted that North Midland does not maintain a similar argument in respect of Infringement 190, for the reasons given in footnote 6 of its Notice of Appeal.

(2) As regards both Infringements, that neither infringement decision satisfied the requirement of appreciability of section 2 of the Competition Act 1998 ("the 1998 Act").

(3) As regards Infringement 190, that the penalty imposed by the OFT was unlawful, in that it was excessive, disproportionate, and unfair, both in itself; and when compared to other penalties imposed by the OFT on other addressees of the Decision. North Midland did not appeal in respect of the penalty imposed by the OFT in respect of Infringement 46.

9. We shall consider, first, whether the evidence relating to Infringement 46 justified a finding that North Midland did indeed breach the Chapter I prohibition (Section III). Thereafter, we shall consider whether the requirement of appreciability within section 2 of the 1998 Act has been

satisfied (Section IV). Finally, we shall consider whether the penality in relation to Infringement 190 is excessive (Section V). First, however, we describe in Section II the nature of the Chapter I prohibition and the jurisdiction of the Tribunal.

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

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

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevent, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> (3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.
>
> (4) Any agreement or decision which is prohibited by subsection (1) is void.
>
> (5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

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

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

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

11. In this case, as has been described, the OFT has imposed penalties in respect of the Infringements. The OFT's jurisdiction to do so arises out of subsection 36(1) of the 1998 Act. By subsection 36(3), the OFT may only impose a penalty if it is satisfied that the infringement has been committed intentionally or negligently by the undertaking. We will return to these and other provisions relating to penalties later in this judgment.

12. Where the OFT has found an infringement of the Chapter I prohibition, that decision is appealable to the Tribunal by virtue of section 46 of the 1998 Act. Section 46, so far as relevant, provides:

"(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(3) In this section "decision" means a decision of the OFT —

(a) as to whether the Chapter I prohibition has been infringed,

…

(i) as to the imposition of a penalty under section 36 or as to the amount of any such penalty,

…"

13. By virtue of subsection 46(5), Part I of Schedule 8 to the 1998 Act makes further provision about such appeals. Paragraph 3 of Schedule 8, as amended, includes the following:

"(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

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

(a) remit the matter to the OFT,

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

(c) …

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

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

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

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

…"

III. INFRINGEMENT 46: LIABILITY

(1) Burden and standard of proof

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

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

16. There has, in recent years, been a great deal of debate as to whether, in serious cases, there is a "heightened standard" of civil proof. We consider that this debate has been laid to rest in a series of decisions of the House of Lords (now the Supreme Court), in particular, *Re H (Minors)* [1996] AC 563 at page 586; *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, at paragraph 55; *Re D (Northern Ireland)* [2008] 1 WLR 1499, at paragraph 28; *Re B* [2009] 1 AC 11, at paragraph 13.

(2) The evidence adduced by the parties

17. At the hearing the evidence relied upon by the OFT was as follows:

(1) *A tender analysis of Marsh & Grochowski*. This tender sheet was completed after the event by the client, Marsh & Grochowski, and

submitted to the OFT in the course of its investigation. It provided the following information regarding the tender (which information is transcribed into Decision/IV.1485 (p678)):

Name of company asked to tender	**Date tender received**	**Amount of tender**	**The company that won the tender**
William Woodsend Ltd	22 January 2001	£329,200	
Robert Woodhead Ltd	22 January 2001	£324,015	
North Midland	22 January 2001	£319,988	
Craske Building Ltd	22 January 2001	£232,814	Yes
Bodill	22 January 2001	£286,395	
GF Tomlinson Building Ltd	22 January 2001	£310,483	

(2) *A contemporaneous tender sheet, compiled by Bodill.* We shall refer to this document as the "Bodill tender sheet". It comprised a pre-printed form, which was then manually completed by Bodill's employees. In this case, the Bodill tender sheet was said to have been completed by two different individuals employed by Bodill, a Mr Juris Rozentals and a Mr David Wraithe. Mr Rozentals was the chief estimator at Bodill; Mr Wraithe's role was to provide estimating support. A copy of the Bodill tender sheet is at Annex 1 to this Judgment.

(3) *An "Explanatory Note of Tender Sheet"*. This was provided by Bodill to the OFT after the event and as part of Bodill's application for leniency ("the Explanatory Note"). It is unsigned, and it is unclear who compiled it.

18. In a letter to the Tribunal dated 13 September 2010, the OFT made clear that it was also relying upon Bodills' general explanation of cover pricing (contained

in Decision IV.1492 (p680) and the transcript of the interview conducted by the OFT with Mr Rozentals.

19. Following the issue of the statement of objections in April 2008 Bodill did not submit to the OFT written or oral representations in respect of Infringement 46 (see Decision/IV.1494 (p680)), nor were witness statements from Messrs Rozentals or Wraithe put before us, nor were any other steps taken to adduce evidence from them. During its investigation the OFT interviewed Mr Rozentals in April 2007 in the presence of Bodill's solicitors. As we have noted, the transcript of that interview was one of the pieces of "evidence" relied on by the OFT to establish the involvement of North Midland in Infringement 46.

20. North Midland contended that this was insufficient to demonstrate that, on the balance of probabilities, the company had breached the Chapter I prohibition in this instance. North Midland also adduced evidence of its own. This evidence was submitted to the OFT in the course of its investigation, and was put before us. It comprised:

    (1) A signed "report" from Mr Brian Evans, chairman and previously managing director of North Midland Building Limited (a subsidiary of North Midland), dated 26 June 2008.

    (2) A short signed statement from Mr Chris Wheelhouse, a senior estimator at North Midland Building Limited, dated 25 June 2008.

    (3) A signed "report" from Mr Mike Catlin, managing director of North Midland Building Limited, dated 26 June 2008.

    (4) A signed letter from Mr Ian Rennison, managing director of LJJ Limited, a mechanical and electrical contractor, dated 10 June 2008.

21. We consider this material in greater detail below. We should note at this stage that the Tribunal did not have the benefit of any oral evidence on what proved to be difficult questions of fact. No request was made by the OFT to cross-examine Messrs Evans, Wheelhouse, Catlin and Rennison on their various statements to which we have referred above.

(3) The Bodill tender sheet and the Explanatory Note

22. The Bodill tender sheet and the Explanatory Note (as well as the general explanation contained in the Decision) need to be considered together, for the latter is said to be an explanation of the former. As can be seen from Annex 1 to this judgment, the Bodill tender sheet comprises:

(1) A box at the top of the document, which identifies the job name and number, the name of the architect, the name of the quantity surveyor and the file number.

(2) Below this box, the title "Submission Date", and room for entering that date. Here, "Monday 22nd Jan 2001" has been manually inserted.

(3) The rest of the Bodill tender sheet comprises a large box, vertically divided into two halves.

(4) The left half comprises a calendar of dates, in two columns, with manual entries. The Explanatory Note refers to this as a "[c]alendar count down from the date of receipt of tender and tender date. This information is to visually see the days available for preparing the estimate and eventual tender. The time is assessed to establish if we are able to produce an estimate in the time available".

(5) The right half of the box is itself horizontally divided. The top part is headed in print "Tenderers", and below this is a printed column of numbers from 1 to 6, with 7 added in manuscript; there is a space against each number. According to the Explanatory Note:

> "This provides space for names of other tenderers to be inserted. Usually public organisations have to obtain 5 to 6 prices – in some cases even 8. Names are inserted when intelligence from Agencies, or sub-contractors or suppliers reveal other contractors. This is carried out by telephone when enquiring of sub-contractors and suppliers if they wish to price the job, or when chasing their quotations prior to completion of the estimate. Discussion both ways with Agencies is carried out by telephone. Glenegan and A.B.I produce weekly sheets of the information or emails."

In other words, as and when Bodill obtained information as to who also might be tendering, this information would be inserted here. It is

clear that this information would generally be obtained before the deadline for the submission of tenders.

(6) In the case of the Bodill tender sheet, a list of seven names appears:

> "1. Bodill
> 2. Tomlinson
> 3. Frudd
> 4. North Mid Const.
> 5. R. Woodhead
> 6. Woodsend
> 7. Craske"

As can be seen from Annex 1 to this judgment, the Bodill tender sheet contains more information than simply these names. This information is said to relate to cover pricing, and is considered further below. We would only observe for the present that this information may have been added at the same time as the name of the contractor, or later.

(7) As regards these additional annotations, the Explanatory Note states: "the ringed letter "c" on the sheets means that we are getting or giving help – a cover price". In the case of the Bodill tender sheet, it is not alleged that a cover price was taken by Bodill but that it gave cover prices. Accordingly, the manner in which this was recorded on the Bodill tender sheet is of importance. The Explanatory Note states:

> "Giving – The ringed letter "c" against another contractor who is tendering and the words "from us" indicates that we are giving that contractor help – a cover price. The figure we have given them is then usually written on the sheet at the side of their name. [i.e. between the calendar and the printed column of numbers] Numbers 1 2 3 indicate the order in which we were approach [sic] by other contractors and the first get the lowest price etc.
>
> Generally – A ringed "c" followed by a "?" means we are not sure that a particular contractor is actually tendering or are taking a cover price from others."

According to this, therefore, against each name listed under "Tenderers", further information might appear. First, an entry of a ringed "c" – essentially identifying whether a tenderer was giving or receiving cover, or whether Bodill was not sure. And, secondly, in those cases where Bodill was giving cover, the cover given. Again, we

would observe that this information need not necessarily have been inserted at one and the same time.

(8) In the case of the Bodill tender sheet, the information was as follows:

15		15		1	BODILL
16		16			
17		17	£310400 ① 26 wks	2	TOMLINSON © FROM US
18		18			Mr THOMPSON
19		19		3	FRUDD
20		20			
21		21	£319999 ② 24 wks	4	NORTH MIDS CONST © FROM US
22	?	22	NOTTINGHAM		01623 515 008 CHRIS WHEELHOUSE
23			£324015 ③ 26 wks	5	R. WOODHEAD © FROM US
24				Ben Hunter	01623 871515 BOB JOHNSON
25			£329107 TBA	6	WOODSEND © ? FROM US
26					
27				7	CRASKE

We should stress that, typed out, the Bodill tender sheet seems much clearer than in fact it is. For instance, it is not wholly clear whether the "TBA" recorded in the entry for "Woodsend" in fact relates to the figure "£329107". Equally, it is not clear whether the "26 wks" recorded in the entry for "R Woodhead" in fact relates to the figure "£324015". And again, there is an entry "Ben Hunter" that floats under the number "5" in the printed column of numbers, which is unexplained.

(9) Finally, the bottom half of the right hand side of the table, under the top part headed "Tenderers", there is a section headed "Analysis", which need not concern us further.

23. In the light of the Explanatory Note, the Bodill tender sheet could be interpreted as indicating that North Midland received a cover price from

Bodill. The document records "© from us", and the price that formed the basis of North Midland's tender (£319,988) is very close to the cover price the Bodill tender sheet records as having apparently been given by Bodill (£319,999). Of course, it is possible (as was suggested by North Midland) that the figure on the Bodill tender sheet represented information acquired after the tenders had been submitted. On the other hand, if the £319,999 represented a post-tender figure then *(i)* it might be expected to have been accurate (and not £11 out); and *(ii)* it is questionable whether it would have appeared on the Bodill tender sheet in this form (ie as part of a sequence of three cover prices).

24. Mr Thompson QC, on behalf of North Midland, made two further points regarding the reliability of the Bodill tender sheet. First, although Frudd appeared on the Bodill tender sheet, Frudd did not in fact submit a tender, and appears not to have been asked to tender. We do not consider this to be a point of any great moment. It is perfectly consistent with faulty intelligence obtained pre-tender: Bodill may mistakenly have thought Frudd was tendering, and recorded this fact.

25. Secondly, there is a question mark lying between the two columns of the calendar of dates described in paragraph 22(4) above, at the same horizontal level as the entry for North Midland under "Tenderers". It was suggested by North Midland that this "?" was *(i)* against the North Midland entry on the Bodill tender sheet; and *(ii)* that this meant that Bodill was not sure whether North Midland was actually tendering for the job or was taking a cover price from others.

26. There is a third point. The note relating to Woodsend – "© ? from us" does not fit at all with the description of the various annotations set out in the Explanatory Note. The "?" suggests that Bodill did not know whether Woodsend was tendering or taking a cover price from someone; the "from us" suggests a cover price was being provided by Bodill. Read together, the two annotations seem inconsistent and make no sense.

27. We find these latter two points extremely difficult to deal with. As we have noted, Bodill did not submit written or oral representations in respect of Infringement 46. All that the Tribunal has had to go on is the documentary

material that we have described. The system Bodill is said to have used to record its tenders is described in the Explanatory Note (which is an after-the-event document, not in the form of a witness statement, and unattributed to any named individual) by reference to a single Bodill tender sheet. Neither North Midland nor we have been able to test the explanation in the Explanatory Note by reference to other tender sheets, nor to hear evidence from the persons who are said to have made the entries on the Bodill tender sheet – Mr Rozentals and Mr Wraithe (albeit that, in the case of the former person, we did see a transcript of interview). This is an unsatisfactory position.

28. It may well be that the Bodill tender sheet looks suspicious. It is possible that the concerns and questions that exist in respect of this document could be answered satisfactorily. But they have not been, and we therefore have concerns about the evidential value of this document.

(4) Evidence adduced by North Midland

29. We have identified the sources of evidence adduced by North Midland in paragraph 20 above. The salient points in that evidence – which were not challenged by the OFT – were as follows:

(1) North Midland had a group policy not to be involved in cover pricing (paragraph 1.01 of the report of Mr Evans, and also the report of Mr Catlin). Of course, as the OFT pointed out, a policy need not always be followed, and may not have been in this case. Nevertheless, this unchallenged evidence is entitled to some weight.

(2) More significantly, in paragraph 2.01 of his report, Mr Evans states:

> "My instructions were to bid competitively for this project [ie the construction of a new house at Western Terrace that was the subject matter of Infringement 46] for the following reasons:-
>
> a) NMB 2001 turnover - £6.5m hence size of contract deemed appropriate.
>
> b) Marsh & Grochowski were Architects with growing reputation and potential for further workload.
>
> c) Synergetic to have site adjacent to the on-going snagging and maintenance works at the major recently completed Park Gate project.

> d) See tracking of tender through NMB Board Reports. The company has formal monthly Board Meetings where performance and business related issues were discussed and recorded. The reports demonstrated that the tender was received prior to 1st December and recorded as a current tender in January report then being submitted on 22.01.01. The Board Meeting of the 8th March 2001 inferring that the result was still awaited…
>
> e) Chris Wheelhouse remembers pricing this job and 'billing' it, and recalls visiting [sic] site on at least two occasions to meet specialist trades including tower crane hire companies due to material handling problems on the site."

(3) Mr Wheelhouse's statement confirms what Mr Evans said in paragraph 2.01(e) of his report.

(4) Additionally, Mr Rennison, the managing director of LJJ Limited, a mechanical and electrical contractor, confirmed being requested to quote by Mr Wheelhouse "for M&E service works on a large house, as I remember it in the Nottingham area".

(5) Finally, Mr Catlin, of North Midland, stated:

> "Notwithstanding in respect of Allegation 46 – New Park House, The Park I do recollect that the Project was of great interest as we were working in the locality on another Project at the time. I also recall the unusual design of the building and discussions with members of the estimating department during the course of the preparation of the tender. With the company currently working on site in close proximity to the proposed development internal discussions also took in [sic] respect of potential subcontractors. The Project was an innovative design and we were keen to secure it to raise the profile of the growing company."

30. Although these statements are a little lacking in detail, and are not supported by a statement of truth, they represent an unequivocal denial of the OFT's allegations insofar as Infringement 46 is concerned. The OFT did not seek to challenge them nor to have the persons concerned made available for cross-examination nor to call evidence itself.

(5) Conclusion in respect of Infringement 46

31. The combination of that unchallenged evidence adduced by North Midland, and our unresolved concerns regarding, in particular, the Bodill tender sheet, leave us in a position where we are not satisfied on the balance of probabilities

that North Midland has infringed the Chapter I prohibition in respect of Infringement 46.

(6) Postscript: the OFT's evidence

32. Difficult and important questions arise in relation to the "evidence" adduced by the OFT. There is no indication that the transcripts of interviews with the OFT were reviewed by and attested to by the interviewees. Certainly they have not endorsed the transcripts with a Statement of Truth or even signed them.

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

34. We do not therefore agree with the suggestion in numbered paragraph 2 of the OFT's letter to the Tribunal dated 6 August 2010, and referenced to *inter alia* this appeal, that the preparation of a witness statement in circumstances such as the present would be "a complete triumph of form over substance". (An extract from the letter is quoted at paragraph 54 of the Tribunal's judgment in *AH Willis & Sons Ltd v OFT* [2011] CAT 13.) Where crucial facts are disputed it may in certain cases, and depending upon what if any other evidence is available, be very difficult to resolve the issues in the absence of evidence from a witness who has been deposed in the ordinary way and whose assertions are available to be tested in cross-examination by those who dispute them. Where central issues of fact cannot be resolved, the outcome may have

to turn on the burden of proof. It is therefore all the more important from the OFT perspective that there should be probative evidence before the Tribunal. Thus, even if the OFT has not obtained witness statements in order to fortify its own decision-making process, once it becomes clear that there is a material dispute as to the facts on which its decision was based, the OFT should consider to what extent such statements are necessary or desirable in order to support those facts in an appeal, subject always to the provisions of rule 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372). It is, of course, not normally the role of the Tribunal to decide whether and if so which witnesses should be deposed or called to give evidence by any party. We should add in regard to these matters that we are in entire agreement with the comments of the Tribunal at paragraphs 108 to 110 of its judgment in *Durkan Holdings Limited and others v OFT* [2011] CAT 6.

IV. THE REQUIREMENT OF APPRECIABILITY

(1) The parties' positions

35. In its Notice of Appeal, North Midland stated:

> "11. ...the second ground of appeal raises a fundamental defect in respect of the approach of the OFT in the [Decision], in which it has bundled together a large number of unrelated incidents, the great majority, if not all, of which are of little or no commercial or competitive significance, in that they relate to the conditions of competition on single contracts of modest value rather than the conditions of competition on any relevant market.
>
> ...
>
> 13. In order to rectify this basic error of principle, it unfortunately falls to the Tribunal to consider on a case by case basis...whether the OFT has established that the individual cases of sharing confidential pricing information that it has chosen to pursue have been shown to have any appreciable impact on competition within the United Kingdom or any part thereof."

36. North Midland contends that the OFT had failed to demonstrate any appreciable impact on competition or trade within the United Kingdom (paragraph 39 of the Notice of Appeal).

37. The OFT's response was that:

(1) As regards appreciable impact <u>on trade</u>, there was no requirement, under section 2 of the 1998 Act, that the effect on trade within the

United Kingdom must be appreciable, but that in any event "agreements and concerted practices to fix prices, share markets or rig bids, including cover pricing practices, by their very nature have an appreciable effect on…trade within the United Kingdom…" (paragraph 21 of the OFT's Defence on Liability).

(2) As regards appreciable impact on competition, it was "common ground that an agreement and/or concerted practice will fall outside the Chapter I Prohibition if its impact on competition is not appreciable" (paragraph 27 of the OFT's Defence on Liability). As regards the question of whether, in the case of the infringements found by the Decision, there was an appreciable effect on competition, the OFT contended, in its Defence on Liability:

> "28. While the OFT generally takes the view that an agreement and/or concerted practice between competing undertakings will 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% of the relevant market, it does not adopt such an approach in the case of an agreement and/or concerted practice which directly or indirectly fixes prices, shares markets or limits production. The OFT considers that such practices *by their very nature* restrict competition to an appreciable extent.
>
> 29. In particular, in the case of collusive tendering or bid rigging, any tenders submitted as a 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. Thus, the OFT's guideline states:
>
> "Collusive tendering ('bid-rigging')
>
> 3.14 Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any tender submitted as a result of collusion between prospective suppliers will almost invariably infringe Article [101] and/or the Chapter I prohibition. The OFT considers that bid-rigging agreements, by their very nature, restrict competition to an appreciable extent."
>
> …"

38. Accordingly, the following questions arise for consideration:

(1) Whether there is a requirement of appreciable impact on trade in section 2 of the 1998 Act.

(2) Whether, in this case, the requirement of appreciability has been satisfied as regards competition and (if there is such a requirement) as regards trade.

39. On the first of these points, Mr Thompson accepted before us that there was little if any distinction between the requirement of an appreciable impact on competition, and an appreciable impact on trade within the United Kingdom. At pp19-20 of the Transcript, the following exchange took place:

The President	Does this argument go to both trade and competition, or mainly to competition?
Mr Thompson	I know that Mr Bailey is an expert on this question; he has written an article on the subject. I have not taken the Tribunal to the P&S case and the dispute about Aberdeen Journals because in my submission it essentially goes to competition because I do not really think that once appreciability has been shown for competition there is much left to show about trade.
The President	They stand or fall together?
Mr Thompson	Yes, effectively they are the same thing. It is fair to say that there is not a very clear distinction in the EC case law…But I think I would accept that what I am really saying is that there is an appreciability requirement on competition and that I might be content to say that there is no separate question, if that is satisfied, about trade within the UK. There is no boundary issue. It does not matter whether it crosses the Scottish/England border or between Lancashire and Yorkshire of the kind that you have in relation to interstate trade in Europe. So to that extent, I think they are basically the same issue.

(2) EU law on appreciability

40. Section 2 of the 1998 Act is modelled upon what is now Article 101 of the Treaty on the Functioning of the European Union ("TFEU"), formerly Article 81 of the Treaty Establishing the European Community ("TEC"). The key difference between section 2 of the 1998 Act and Article 101 TFEU, for

present purposes, is that where Article 101 TFEU refers to agreements[1] "which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market", subsection 2(1) refers to agreements which "may affect trade within the United Kingdom" and which "have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom".

41. An anti-competitive agreement falls outside the scope of Article 101 TFEU if it is not capable of having an *appreciable effect* on trade between Member States or on competition within the internal market. This *de minimis* principle was established in *Völk v Vervaeke* Case 5/69, [1969] ECR 295, at paragraph 5/7:

> "If an agreement is to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between states. Moreover the prohibition in Article 85(1) is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the common market. Those conditions must be understood by reference to the actual circumstances of the agreement. Consequently an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 85(1)."

42. The appreciability requirement applies:

(1) to agreements affecting competition, in both "object" cases and "effect" cases. *Völk* was itself an "object" case.

(2) to the effect on trade between Member States.

43. However, within Article 101 TFEU, the purpose of the "effect on trade" requirement is very different from the purpose of the object/effect in relation

[1] For convenience we use the word "agreement" in this judgment to include a reference to a "concerted practice", except where it is necessary to distinguish between those two concepts for the purposes of analysis.

to "competition" requirement. The latter requirement describes the conduct that is outlawed by the provision. It is a substantive concept. The former requirement, however, is a jurisdictional one, determining whether or not (even if there is anti-competitive conduct) this is a matter of European jurisdiction. In *Hugin Kassenregister AB v Commission* Case 22/78, [1979] ECR 1869, the Court of Justice stated at paragraph 17:

> "The interpretation and application of the condition relating to effects on trade between Member States contained in Articles [101 TFEU] and [102 TFEU] must be based on the purpose of that condition which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Community law and the law of the Member States. Thus Community law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by partitioning the national markets or by affecting the structure of competition within the Common Market. On the other hand conduct, the effects of which are confined to the territory of a single Member State, is governed by the national legal order."

44. Where the effect on trade of an anti-competitive agreement or practice is felt only within a single Member State, Article 101 TFEU is not engaged, and (even though the agreement or practice in question <u>is</u> anti-competitive), the matter is left to the individual Member State.

45. It is thus clear that the role of the appreciability requirement differs according to whether one is considering the effect on trade element or the restriction of competition element:

(1) In the latter case, the effect of the requirement is to impose a *de minimis* standard aimed at ensuring that anti-competitive agreements whose distorting effects (actual or potential) are so minor as not to be appreciable, do not involve an infringement of Article 101 TFEU.

(2) In the former case, the role of the requirement is rather different. As has been seen, Article 101 is not engaged where any effect on trade is confined within a single Member State. Of course, this can be a difficult matter to determine. The appreciability requirement ensures that EU jurisdiction only exists where it is clear that there is an effect on trade <u>between</u> Member States ie where there is an appreciable

effect. The appreciability requirement serves to make clearer the distinction between EU competences and Member State competences.

(3) Appreciable effect on trade in section 2 of the 1998 Act.

46. We have already referred briefly to section 2 of the 1998 Act in paragraph 10 above. In determining questions arising under *inter alia* section 2, the OFT (and the Tribunal on appeal) are required to apply the principles laid down in section 60, which provides as follows:

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

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

48. In *Aberdeen Journals Limited v OFT* [2003] CAT 11, the Tribunal considered the requirement of appreciable effect on trade in the context of an infringement of section 18 of the 1998 Act (which contains the Chapter II prohibition):

> "459. More generally, we are not satisfied that we should read into the statutory wording of section 18(1) of the 1998 Act a requirement that the effect on trade should be appreciable. It is true that, ever since the decision of the Court of Justice in Case 5/69 *Völk v Vervaerke* [1969] ECR 295, it has been the rule that the prohibition of Article 81 of the EC Treaty applies only if there is an "appreciable" effect on competition and trade between Member States: see also Case 22/71 *Béguelin v Commission* [1971] ECR 949. The requirement that there should be an "appreciable" effect on inter-state trade is, however, largely understood as a

> jurisdictional requirement which demarcates the boundary line between the application of Community competition law and national competition law: see eg Cases C-215/96 and C-219/96 *Bagnasco v Banco Populaire di Novara* [1999] ECR I-135, a case under Articles 81 and 82, and Case 22/78 *Hugin v Commission* [1979] ECR 1869, a case under Article 82.
>
> 460. We accept the Director's submission that, since we are already dealing, under domestic law, with conduct which takes place within the United Kingdom, there is no need to import into section 18(1) of the 1998 Act the rule of "appreciability" under Community law, the essential purpose of which is to demarcate the fields of Community law and domestic law respectively. In terms of section 60(1) of the 1998 Act, that seems to us to be a "relevant difference" between the 1998 Act and the provisions of Community law."

49. Although, this decision concerned the Chapter II prohibition, the Tribunal's reasoning applies equally to the Chapter I prohibition, and it would be irrational to distinguish between the two.

50. The approach in *Aberdeen Journals* was criticised by Morritt C in *P&S Amusements v Valley House Leisure* [2006] EWHC 1510, at paragraph 22:

> "…I have considerable misgivings about the validity of the Tribunal's conclusion in the context of section 18 (Article 82) and would need much persuasion that it should be transposed into the different context of section 2 (Article 81). What is the purpose of imposing such a requirement to the application of the section at all if it does not have to be satisfied to an extent greater than the minimal? It is not permissible to deny substantive effect to an express statutory provision such as section 2(1)(a). Moreover the conclusion if applied to Article 81 and section 2 would seem to be contrary to decisions of the European Court of Justice of some standing, see for example *Völk v Vervaeke* [1969] ECR 295. Nevertheless I am considering whether the section 2 defence has any real prospect of success. Given the existence of the decision of the Competition Appeal Tribunal and the references to it without critical comment in both Chitty on Contracts 29th Ed. Vol 2 Para 42–087 and Whish on Competition Law 5th Ed. I do not consider that I should decide this application on that ground."

51. Given, first of all, that it is common ground that an appreciable effect on *competition* within the United Kingdom is required, and secondly, Mr Thompson's acceptance that the fulfilment of any corresponding requirement in relation to effect on trade would for all practical purposes stand or fall with the appreciability of any effect on competition, we will first consider whether there is an appreciable effect on competition for the purposes of section 2 of the 1998 Act.

(4) Appreciable effect on competition in the present cases

52. It is not in dispute that, as the Decision makes clear (Decision/V.8-9 (p1623)), the infringements found by the OFT are "object" infringements and not "effect" infringements:

> "V.8 …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 has as its object the prevention, restriction or distortion of competition."

53. It is also common ground that where one is concerned with an 'infringement by object' the appreciability requirement can be satisfied by *potential* as well as actual effects on competition. However, at times in its written submissions, the OFT came close to saying that the mere fact that an agreement had an anti-competitive object, rendered its impact (actual or potential) on competition *ipso facto* appreciable. One example of this is paragraph 28 of the OFT's Defence on Liability, quoted in paragraph 37(2) above. Before us, Mr Unterhalter SC, who appeared for the OFT, disavowed any such submission (Transcript, 9 July 2010, pp53-54), and we consider that he was right to do so. It is clear that an agreement having as its object a restriction of competition could nevertheless be so trifling as to fail the appreciability test. On the other hand, it may also be the case that the nature of specific collusive conduct is such that, given the individual circumstances, the potential effects on competition of the conduct in question are inherently likely to be significant. In the latter case the burden of establishing appreciability may be more easily discharged.

54. In *Apex* (above) the Tribunal described the anti-competitive nature of collusive tendering – of which cover pricing is an instance – in the following terms:

> "208. The essential feature of a tendering process conducted by a local authority is the expectation on the part of the authority that it will receive, as a response to its tender, a number of independently articulated bids formulated by contractors wholly independent of each other. A tendering process is designed to produce competition in a very structured way.
>
> 209. The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to

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

210. When the tendering process is selective rather than open to all potential bidders, the loss of independence through knowledge of the intentions of other selected bidders can have an even greater distorting effect on the tendering process. In a selective tender process the contractors invited to tender will in general be those considered most likely to have the required specialist skills. The Tribunal understands that selective tendering is commonly used by local authorities (and others commissioning construction and maintenance work). Selective tendering processes ensure that the workload involved in analysing the various bids submitted can be kept within manageable bounds.

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

…

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

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

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

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

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

55. In its recent judgment in *Kier* (above), which dealt with six appeals against penalties imposed by the OFT in the Decision, the Tribunal referred to the above passages from *Apex* and commented further on the potential effects on competition of cover pricing. In particular the practice was capable of providing an illicit advantage in relation to future tendering exercises by protecting a tenderer, who did not wish to win the work, from the risk of losing credibility by putting in an unrealistically inflated bid. As well as distorting that element of competition, cover pricing enabled the tenderer to avoid the need to make a timely decision not to bid, thereby depriving a substitute bidder of the

opportunity of making a genuine tender. There was also the risk that the number of requests for cover prices was such that the provider became aware that he faced little or no real competition, possibly giving rise to a temptation to inflate his own bid. Nor could the risk be discounted that a culture of collusion between competitors as regards cover pricing might facilitate anti-competitive cooperation in other respects. Given that the markets in question had admittedly been extremely narrowly framed in the Decision, both in product and geographical terms, any indirect harm of the kind referred to would be likely to be felt more broadly across all activities affected by the practice. (See paragraphs 96 to 110 of the judgment in *Kier*.)

56. Thus the potential effects of cover pricing extend beyond the confines of the specific contract being tendered, and into similar tendering exercises to be conducted in the future. They may also contribute to the creation of a climate of anti-competitive co-operation between contractors. We do not therefore agree with North Midland's submission that in relation to the appreciability of effects on competition an individual cover pricing arrangement should be viewed as amounting to no more than a single telephone call, with one party doing the other a favour by providing price information in respect of an isolated tender. The potential effects inherent in the conduct in question are wider and more significant than that characterisation would imply. In that regard the OFT was entitled to and did in the Decision expressly rely upon those effects: see for example Decision/III.97ff (p362), and in particular III.99 which quotes the passages from *Apex* cited above.

57. The essential facts of Infringement 190 are not in dispute. Corus Engineering Steels sought tenders for civil works for Aldwarke Primary Mill, Rotheram Works from only four companies. The work was substantial: the successful tender was in the amount of £1,390,931.00. North Midland's own tender was in the amount of £1,931,607.55 and, of course, Admiral's (the party to whom North Midland provided a cover price) tender was substantially in excess of £2 million. The details of the various tenders are set out at Decision/IV.5238 (pp1338-1339).

58. Infringement 190, therefore, concerned a closed process, confined to four selected tenderers, and the remarks made by the Tribunal in *Apex* and *Kier* are apposite. A potential consequence of North Midland's (and Admiral's) conduct was that Corus was deprived of one *genuine* tender. Had Admiral not been able to secure a cover price, it might have withdrawn, in which case Corus might well have sought a tender from someone else, who would have had the opportunity of winning the work and affecting the price paid by Corus. Alternatively Admiral might have submitted a tender "blind" in the hope of inflating the price sufficiently to be reasonably sure of losing, but in doing so it would have run the risk of damaging its credibility with Corus with the possible result that, next time, Corus might not invite Admiral to tender. These are, in our view, potential consequences of some significance, quite apart from any possible "spill over" effect into other forms of collusive conduct.

59. Furthermore, the Corus contract fell within a very narrow market, both in product and geographical terms: the "Other Industrial Buildings" in "Yorkshire & Humberside" market, as defined by the OFT in the Decision. Given the limited nature and extent of that market, the definition of which has not been challenged in this appeal, the importance of the tendered work and of the competition for it may properly be regarded as enhanced.

60. Finally, although the OFT did not attempt to calculate the market shares of the participants in the cover pricing arrangement (and there is no requirement to do so), both are substantial undertakings: North Midland had a total turnover of about £200 million in the financial year 2008, and the equivalent figure for Admiral was approximately £10 million.

61. In these circumstances, and having regard to subsection 2(7) of the 1998 Act (which requires "United Kingdom" to be understood as referring to a particular *part* of the United Kingdom in relation to an agreement intended to operate only in that part) the potential effects on competition of the cover pricing arrangement in question clearly satisfy the appreciability requirement. In our view those potential effects cannot possibly be regarded as so insignificant as not to be appreciable.

62. As we have noted, North Midland accepted that, at least in this case, there was a close nexus between appreciable effect on competition and appreciable effect on trade within the United Kngdom, in that if one was satisfied, the other was likely to be so. We agree with that assessment, and are of the view that if the appreciability requirement extends to the effect on trade within the United Kingdom (upon which it is not necessary for us to reach a conclusion) then, for the reasons we have given, it was satisfied in the case of Infringement 190. Further, had it been necessary for us to determine the position in relation to Infringement 46, we would have reached the same conclusion as to appeciability there too: we are aware of no feature relating to that allegation which would have led us to a different assessment.

(5) Conclusion in respect of Infringement 190

63. Accordingly we reject North Midland's complaint that the OFT's decision in relation to Infringement 190 is vitiated for fundamental error of law and/or failure to demonstrate an appreciable effect on competition or trade within the United Kingdom. Nor do we consider that the present case raises a question of EU law which it would be appropriate to refer to the Court of Justice pursuant to Article 267 TFEU.

VI. INFRINGEMENT 190: THE PENALTY

(1) Introduction

64. As noted earlier, in the case of Infringement 190 a penalty of £1,516,613 was imposed in respect of the provision by North Midland to Admiral of a cover price. The basic and unchallenged circumstances of the breach are set out at paragraphs 6(2) and 57 above. See also Decision/VI.575 (p1796).

65. North Midland challenges the penalty imposed on it on a number of grounds. Before examining these contentions it is appropriate to refer to the relevant statutory provisions, and to describe how the OFT went about calculating the penalties which it imposed in the Decision.

(2) Relevant statutory provisions

66. Subsection 36(1) of the 1998 Act, as amended, provides as follows:

> "On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a party to the agreement to pay to the OFT a penalty in respect of the infringement."

67. The OFT can only impose a penalty where it is satisfied that the infringement in question has been committed intentionally or negligently (subsection 36(3)). At Decision/VI.51 (p1639) the OFT concluded:

> "The OFT is therefore satisfied that each of the Parties intentionally or at the very least negligently infringed the Chapter I prohibition."

68. Subsection 36(8) of the 1998 Act provides:

> "No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)."

The relevant measure for these purposes is the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended with effect from 1 May 2004 by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259). Article 3 of the Order as amended provides as follows:

> "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year 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."

69. Section 38 of the 1998 Act, so far as relevant, provides:

> "(1) The OFT must prepare and publish guidance as to the appropriate amount of any penalty under this Part.
>
> (1A) The guidance must include provision about the circumstances in which, in determining a penalty under this Part, the OFT may take into account effects in another Member State of the agreement or conduct concerned.
>
> (2) The OFT may at any time alter the guidance.
>
> (3) If the guidance is altered, the OFT must publish it as altered.
>
> (4) No guidance is to be published under this section without the approval of the Secretary of State.
>
> (5) The OFT may, after consulting the Secretary of State, choose how it publishes its guidance.
>
> (6) If the OFT is preparing or altering guidance under this section it must consult such persons as it considers appropriate.

(7) If the proposed guidance or alteration relates to a matter in respect of which a regulator exercises concurrent jurisdiction, those consulted must include that regulator.

(8) When setting the amount of a penalty under this Part, the OFT must have regard to the guidance for the time being in force under this section.

…"

70. Pursuant to its obligation under subsection 38(1) the OFT published its Guidance as to the appropriate amount of a penalty (OFT 423, December 2004) ("the Guidance"). This replaced an earlier version and is relevant to the penalty calculations set out in the Decision. The most pertinent provisions of the Guidance are set out verbatim in Part A of the Annex to the Tribunal's judgment in *Kier*. The Guidance first refers to the "twin objectives" of the OFT's policy on penalties, namely the imposition of penalties which (1) reflect the seriousness of the infringement, and (2) will deter undertakings from engaging in anti-competitive practices. The Guidance then sets out a five-step process for calculating the level of a penalty. A fairly detailed account of how the OFT went about applying the 5 steps in the Guidance in order to arrive at the penalties imposed in the Decision, can be found at paragraphs 32 to 67 of the *Kier* judgment. For present purposes we will summarise the methodology.

(3) Calculating the level of penalty

71. *Step 1* provides for the penalty starting point by applying a percentage (not exceeding 10 per cent) reflecting the nature and seriousness of the infringement to the "relevant turnover" of the undertaking concerned (paragraphs 2.3 and 2.8). The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographical market affected by the infringement in the last financial year (paragraph 2.7).

72. The OFT decided that for "simple" cover pricing infringements the percentage starting point should be 5 per cent of an undertaking's relevant turnover, and 7 per cent for infringements involving compensation payments (Decision/VI.102-180 (pp1649-1668)). The OFT applied the starting percentage to the relevant turnover of the undertaking in the year prior to the Decision rather than the year prior to the infringement.

73. *Step 2* provides for an adjustment for the duration of the infringement, where the infringement lasts for more or less than one year. In the Decision the OFT made no adjustment for duration of any infringement, so that the penalty after Step 2 was in all cases the same as after Step 1. North Midland takes issue with this approach, contending that as the infringement consisted of the provision of information in a brief phone call, some reduction ought to have been made.

74. *Step 3* allows for adjustment for other factors and is described in paragraphs 2.11 to 2.12 of the Guidance as follows:

> "2.11 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anticompetitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article [101], Article [102], the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.
>
> 2.12 The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step."

75. The OFT made a number of adjustments at Step 3 in relation to those who have appealed against the penalties in the Decision, but the relevant one so far as the present appeal is concerned is the application of a minimum deterrence threshold ("MDT").

76. *The MDT*: The OFT was concerned that in some cases, where the infringing undertaking's turnover in the relevant market represented a low proportion of its total worldwide turnover, because the economic unit of which the infringing company formed a part may have significant activities in markets other than the relevant market, the penalty reached after Steps 1 and 2 would be small in relation to that total worldwide turnover. In order to ensure what it regarded as appropriate deterrence having regard to the overall size of the economic undertaking, at Step 3 where necessary the OFT increased the

penalty to a level equivalent to a specific proportion of the undertaking's total worldwide turnover in the last business year prior to the Decision. This represented the OFT's view of the minimum figure needed to deter the undertaking concerned and other similar sized undertakings (including those in other sectors) from engaging in unlawful behaviour of this kind (Decision/VI.238 (p1681)).

77. For all those undertakings whose infringements did not involve compensation payments (i.e. for "simple" cover pricing), the MDT was set at an amount equal to 0.75 per cent of the undertaking's total worldwide turnover in the last business year prior to the Decision. This percentage was apparently arrived at by assuming that the undertaking's turnover in the relevant market represented at least 15 per cent of its total worldwide turnover. (The figure of 15 per cent had been used in previous OFT decisions as constituting a material proportion of the undertaking's overall business.) The OFT then applied the Step 1 starting point percentage (5 per cent) to this assumed 15 per cent, resulting in the 0.75 per cent figure. In other words, the OFT considered that for each cover price infringer one of the penalties should be at least a sum representing 5 per cent of an *assumed* relevant turnover. Thus, where the MDT was applied the penalty for the particular infringement ceased to be related to actual relevant turnover and became instead entirely related to total worldwide turnover.

78. Therefore, if at the end of Step 2 no penalty for an infringing undertaking exceeded the MDT, then the MDT was applied to the infringement with the highest level of penalty after Step 2. However, it was applied no more than once per infringer (Decision/VI.214-215 (p1676)).

79. The OFT stated in the Decision that when deciding the level of adjustment at Step 3 it took into account the fact that there was general widespread ignorance about the illegality of cover pricing. For this reason it had decided to maintain the MDT at the same level as had been used in earlier OFT decisions relating to bid rigging in the roofing industry (Decision/VI.249 (p1683)).

80. *Step 4* provides a further opportunity for penalty adjustments – to take account of any aggravating or mitigating features of individual cases. Paragraphs 2.15 and 2.16 of the Guidance respectively contain a non-exhaustive list of such features.

81. *Step 5* ensures that the statutory maximum under subsection 36(8) of the 1998 Act is not exceeded. It also deals with the risk of double jeopardy in certain circumstances not relevant here.

(4) North Midland's penalty for Infringement 190

82. North Midland is a public limited company with two subsidiaries. Its principal activities are civil engineering, building and public works contracting. All its work is carried out in the UK. Its consolidated turnover for the business year ending 31 December 2008 was £202,215,000.

83. North Midland was fined £1,516,613 for providing to Admiral by telephone on 4 May 2004 a cover price for building works for which tenders had been invited by Corus. Admiral, which was also an addressee of the Decision, was not fined for this infringement having received 100 per cent immunity under the OFT's leniency arrangements by virtue of informing the OFT of the cover price before the OFT became aware of it from other sources (Decision/IV.5266-7 (p1343)).

84. North Midland's penalty was arrived at in accordance with the 5 step process as follows. First the OFT applied the Step 1 starting point of 5 per cent to North Midland's turnover in the relevant market (Other Industrial Buildings; Yorkshire and Humberside) for the year ending 31 December 2008, that being the business year preceding the Decision. The turnover in the relevant market in that year was £11,614,000, making the Step 1 penalty £580,700. No adjustment for duration was made at Step 2. At Step 3 the MDT was triggered. This was because the Step 1 figure represented less than 0.75 per cent of North Midland's total worldwide turnover in that year, which was £202,215,000. Therefore the penalty was increased to a sum equal to 0.75 per cent of that worldwide turnover, namely £1,516,613. No further adjustments were made thereafter, there being in the OFT's view no specific mitigating or aggravating factors. Nor was North Midland entitled to any discount pursuant to the OFT's

leniency arrangements or its so-called "fast track offer". North Midland did not apply for leniency, and did not accept the fast track offer. The final penalty for Infringement 190 was therefore £1,516,613. (See the table at page 1796 of the Decision, replicated in the Annex 2 to this judgment.)

(5) Grounds of appeal and defence

85. North Midland contends that the penalty of £1,516,613 is no more than an arithmetical calculation based on 0.75 per cent of North Midland's global turnover in the year preceding the Decision, and which as such reflects neither the gravity or duration of the infringement nor North Midland's turnover in any relevant market. It is argued that this mechanistic calculation is made without reference to the circumstances and justice of the case, and has resulted in a penalty which is disproportionate and excessive for a single infringement of this nature, which has not been shown to have caused any specific harm. Further, the penalty is submitted to be excessive in comparison with fines imposed for criminal activity of much greater gravity and duration, and to be unfair and discriminatory when compared to the fines imposed on other undertakings pursuant to the Decision.

86. North Midland's primary complaint is therefore that the nature and application of the MDT has resulted in a penalty which is disproportionate and excessive having regard to the facts of the specific cover pricing infringement in this case.

87. The OFT took issue with and responded to these arguments in its skeleton argument for the present appeal dated 11 June 2010, and also in the Consolidated Defence on Penalty Appeals served by the OFT in response to all such appeals from the Decision. In addition we heard oral argument from Mr Unterhalter in the present case.

88. In summary the OFT argued that where two undertakings are involved in such conduct they choose to substitute practical co-operation for the risks of competition. One is afforded a credibility advantage and costs savings to which it is not entitled. The other participant benefits from the knowledge that there is one less competitive bid in the tendering exercise in question. A potential substitute tenderer is deprived of the opportunity to submit a

competitive bid, and the client is deceived and possibly disadvantaged both as to the extent and source of the competition for his work, and as to the credibility of one of the bidders. Such factors can have a bearing both on the existing tender process and on invitations to bid for future work. Credibility of this kind can be an important aspect of competition between construction undertakings, and cover pricing therefore distorts this element of competition. The dynamics of competition are further affected because at least one tenderer knows that competition for the work will be less fierce than would otherwise be the case. In addition, the pervasive nature of cover pricing creates systemic conditions of co-operation between competitors which in turn subverts the unilateral decision-making required to ensure efficient tendering processes.

89. Thus, although there may not have been a direct inflation of prices in any particular instance, and notwithstanding that each infringement related to a single tender exercise, with no evidence of a centrally-controlled scheme, cover pricing was serious: it was an infringement "by object" and as such the OFT was not required to identify any effects on the market.

90. In support of these submissions the OFT referred us to the passages at paragraphs 250 to 251 of the *Apex* judgment which we have quoted at paragraph 54 above.

91. In relation to the complaints directed at the MDT by North Midland and other appellants, the OFT submitted that the widespread and endemic practice of cover pricing justified the imposition of penalties that would ensure an effective deterrent, both general and specific, pursuant to the objectives set out in the Guidance. In the OFT's view a penalty set by reference to around 15 per cent of an undertaking's total worldwide turnover was the minimum necessary to demonstrate to companies in this industry that the narrow market definitions adopted by the OFT did not mean that infringers would avoid a penalty with a significant impact on them. Thus, the MDT, which had been expressly approved by the Tribunal in paragraph 134 of its judgment in *Makers* (above), had been "carefully tailored" to meet the OFT's deterrence objective in relation to the infringements in question.

92. The OFT denied that the MDT was applied mechanistically and inconsistently with the Guidance's statement that an adjustment at Step 3 would be made "case by case". On the contrary it was designed to give effect to the principles set out at Step 3. It provided a means of considering whether an upward adjustment was required in order to achieve the objective of deterrence, both specific and general, having regard to the size of the undertaking being penalised, and did so in a way which was consistent *vis-à-vis* all parties subject to the Decision. If the OFT had instead sought to assess the penalty for each undertaking separately without reference to others it would have been vulnerable to allegations of inconsistency and discrimination. This was not to say that it had applied the criteria mechanistically: rather it had identified the features of the cases which were comparable and applied the penalty criteria fairly to all.

(6) Tribunal's conclusions

93. The arguments relied upon by North Midland and the responses of the OFT have recently been considered by the Tribunal in a number of other appeals from penalties imposed in the Decision. (See *Kier*, *Tomlinson* and *Barrett* (above). See also, in relation to the MDT, *Eden Brown Limited and others v OFT* [2011] CAT 8, paragraphs 81-102.)

94. In *Kier*, while acknowledging the anti-competitive effects of cover pricing, as noted at paragraphs 54 to 56 above, the Tribunal also referred to the following factors: that during its investigation the OFT was told by industry participants that cover pricing has been a long-standing and endemic practice in the construction industry; that many of the companies subject to the investigation stated that no one regarded it as improper conduct; that a principal reason given for the activity was that it enabled companies to remain on the tender lists of those involved in arranging contracts; that companies were concerned that if they did not respond to an invitation to tender, they would be regarded as being either unable to carry out the work or uninterested in doing so; that it was believed that this might well lead to their being placed at the bottom of tender lists and ultimately removed from such lists altogether. The Tribunal noted that in the Decision the OFT had accepted that this perception was

genuine and widespread, and that there may have been instances when exclusion from tender lists had materialised. The Tribunal also noted the OFT's acceptance that an additional reason to engage in cover pricing was in order to avoid wasting the time and expense required to calculate a genuine tender figure for an unwanted contract. Further, the Decision had made reference to textbooks and other material widely used in the training of industry participants which gave the impression that cover pricing was a normal and acceptable practice where a tenderer does not wish to win the work. Some of this material was still extant as late as 2006. (See paragraphs 17-19 and 103-105 of the *Kier* judgment.)

95. In *Kier* the Tribunal considered that the OFT attached insufficient weight to these mitigating factors (see paragraph 107 of *Kier*). In the light of them, together with the nature of cover pricing, the harm it was likely to cause, and the fact that construction is typically a high turnover but low margin industry, the Tribunal in *Kier* held the penalties imposed on the appellants to be excessive and disproportionate. It also held that a major cause of the excess was the way in which the MDT had been calculated and applied at Step 3, including the transition from a Step 1 penalty using turnover in the "relevant" market affected by the infringement, to a penalty based entirely on a fixed percentage of total worldwide turnover. In addition the MDT had been applied mechanistically according to a "one size fits all" approach, instead of following the Guidance which states that any adjustment at Step 3 would be made "case by case". The Tribunal stated:

> "168. In these cases the OFT did not appear to stand back and look critically at the figure produced by the MDT, or carry out a cross-check by reference to other indicators of the company's size and financial position. Indeed, the OFT do not appear to have considered on a case-by-case basis whether the Step 1 penalty needed to be increased at all. Instead, where the criteria for applicability of the MDT were satisfied the mechanism was applied as a matter of course; the product of the formula was then in each case simply adopted by the OFT as the basis for the final penalty, subject to relatively small adjustments for certain mitigating factors and, of course, for leniency/FTO…..
>
> 169. We cannot accept that in these circumstances the MDT, or the ultimate penalties of which the MDT comprised such a substantial element, were "carefully tailored" to meet the OFT's deterrence objective in relation to the infringements in question, as the OFT submits. The assumption on which the 15% is based is far too blunt an instrument to come within that description."

96. We agree with those conclusions, and we gratefully adopt the reasoning set out at paragraphs 92 to 108 and 164 to 185 of the *Kier* judgment. See also *Tomlinson* at paragraphs 118 to 119, *Eden Brown* at paragraphs 92 to 100, and *Barrett* at paragraphs 40 to 47. We are unanimously of the view that the penalty of more than £1.5 milllion imposed on North Midland in respect of Infringement 190 is excessive and disproportionate having regard to the "twin objectives" of punishment and deterrence.

97. This is not to say that we accept all North Midland's arguments.

98. North Midland argued that its penalty was excessive when compared with the fines imposed or envisaged in the criminal context for various offences resulting in death and/or injury. We were shown a number of examples, including one concerning a fine of £7.5 million imposed on a company with group turnover of about £5 billion in respect of serious breaches of the Health and Safety at Work Act 1974 over an extended period of time resulting in the Hatfield rail crash in which 4 people died and 102 were injured. We were also taken to recent guidance produced by the Sentencing Guidelines Council pursuant to section 170(9) of the Criminal Justice Act 2003 dealing with financial penalties for corporate offences. These guidelines indicate a range from £500,000 to £millions for corporate manslaughter, and from £100,000 upwards for health and safety offences causing death.

99. Like the Tribunal in *Kier* (see paragraph 314) and *Tomlinson* (see paragraphs 136 to 139), we find the circumstances with which those criminal cases and guidelines are dealing too remote from the competition regime to provide us with much assistance in the present case. We agree with the OFT that they are subject to different policy imperatives.

100. North Midland's complaint that it has been unfairly treated in comparison with other companies on whom fines have been imposed by the Decision appears to be based largely on the application of the MDT to North Midland. Therefore in view of the conclusion we have reached about the MDT and about the level of the penalty itself, the complaints about discrimination appear academic. However, we will deal with them briefly.

101. North Midland also complains that the MDT mechanism was applied without distinguishing between companies (like North Midland) which had been found to have participated in fewer than 3 infringements, and companies which had participated in more than 3. In addition, it was submitted that the penalties imposed on those with fewer than 3 infringements should have reflected the fact that the OFT considered 3 offences or more to be sufficient to establish a pattern of behaviour.

102. As to these complaints, it should first be pointed out that comparisons between individual penalties will rarely be justified as a basis for an appeal. Whilst for understandable logistical reasons all the cover pricing infringements were dealt with by the OFT in one composite decision, each of the appeals against the Decision involves largely unrelated individual infringements, and the financial and commercial circumstances of each of the addressees of the Decision are distinct. Furthermore, given the number of companies under investigation and the number of infringements suspected (over 1,000 and over 4,000 respectively by the autumn of 2006: Decision/II.1460 (p253)) the OFT was clearly justified in narrowing the proceedings ultimately to a maximum of 3 infringements per undertaking. The task for the OFT would have been insurmountable if it had been required to make findings in respect of all suspect tenders in order to establish the relative culpability (in terms of the number of breaches) of all the addressees. That was clearly not feasible, and it was virtually inevitable that some offenders would escape punishment for infringements they had committed. The OFT was entitled to limit the number of infringements it would prosecute.

103. Also misconceived is the argument that North Midland should have received an allowance for not having a "pattern of behaviour" established against it. As the OFT has submitted, no uplift in penalty was attached to a finding of 3 infringements, and the reference to such a pattern was simply part of the justification for not pursuing more than 3 infringements.

104. As to North Midland's argument that the penalty ought to have been reduced at Step 2 by reason of the short duration of Infringement 190, this too is without substance in our view. A cover price infringement is by its nature the

work of a moment – typically consisting of a request for a cover and, a little while later, the transmission of the requested cover price. To speak of this type of infringement having a duration is unhelpful. The illicit information only needs to be passed once and is normally acted on (by submitting the phoney tender price) virtually immediately. It therefore bears no relation to the operation of a cartel, whose duration is often capable of being measured. In one sense it would possible to speak of a cover price infringement as being indefinite or permanent, as its effect on the particular tendering exercise cannot be undone. At any rate the OFT was entitled to conclude that there was nothing exceptional here which justified its making a reduction on this account at Step 2.

105. Finally, in our view there is nothing in the circumstances of Infringement 190 identified in the Notice of Appeal or in North Midland's skeleton argument which sets it apart from other such infringements or raises any specific mitigation to which reference has not been made. It seems to us that it was a very typical "simple" cover pricing infringement, with all the potential to distort competition which that entails, as discussed earlier in this judgment.

(7) Tribunal's assessment of penalty for Infringement 190

106. In view of the Tribunal's conclusions at paragraph 96 above, the existing penalty imposed for Infringement 190 cannot stand and will be varied pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act. Although the Tribunal is not bound by the Guidance, we propose to approach this assessment broadly by reference to its structure whilst also having regard to our findings. This was also the course adopted by the Tribunal in the *Kier*, *Tomlinson*, *Eden Brown* and *Barrett* appeals.

107. As noted earlier, the OFT decided that for "simple" cover pricing infringements the percentage starting point at Step 1 should be 5 per cent of an undertaking's relevant turnover, and the OFT applied that percentage to the undertaking's relevant market turnover in the year prior to the Decision rather than the year prior to the infringement. (See paragraph 72 above.)

108. Some of the other undertakings who have appealed against the penalties imposed on them under the Decision have contended that the Step 1

percentage of 5 per cent was too high. Some have also challenged the use of the year prior to the decision, contending that the OFT ought to have used the year prior to the relevant infringement instead. These arguments have met with success in those cases where they were raised. (See, for example, *Kier* at paragraphs 114 to 115 and 130 to 138, and *Tomlinson* at paragraphs 84 to 113.) North Midland has at no stage sought to challenge either aspect, or to take advantage of the arguments raised in this regard by other parties. So far as the starting point percentage is concerned North Midland has expressly indicated that it takes no issue with this (see paragraph 41 of its skeleton argument). This Tribunal panel has not heard argument on these points. In these circumstances we propose to use the same Step 1 starting point as in the Decision, namely a provisional penalty of £580,700. In doing so we are aware that North Midland's relevant turnover in the year prior to the infringement (year ended 31 December 2003) was very much lower than in the year prior to the Decision (£253,000 versus £11,614,000). Such striking fluctuations in "relevant turnover" from year to year may well be the result of the admittedly very narrow market definitions adopted in the Decision. Be that as it may, the 2003 turnover would have produced an inadequate Step 1 penalty, which would have required a substantial uplift at Step 3.

109. The next stage, corresponding to Step 3, is to consider whether any adjustment upwards or downwards to the provisional penalty of £580,700 is required in order to fulfil the twin objectives of punishment and deterrence in respect of this infringement. (As already stated, we consider that there is no justification for reducing the penalty at Step 2 on account of the duration of the infringement.) For this purpose the Tribunal has regard to all relevant considerations, including the seriousness of the offence, the general mitigating features relating to cover pricing discussed earlier in this judgment, the typically slim margins in the construction industry and any factors specific to North Midland of which we have been made aware. Amongst such factors are the company's size and financial position. We must also bear in mind that the penalty is not a composite one comprising several infringements but is in respect of a single offence in 2004. In order to ensure that the penalty is

proportionate we must consider what fine is required in order to punish this company and deter it and other companies from engaging in similar practices.

110. In all the circumstances we consider that a penalty of £580,700 is unnecessarily high for the infringement committed by this company. Our unanimous conclusion is that it should be reduced to £300,000. There being no further adjustments required at Steps 4 or 5, the penalty for Infringement 190 is varied accordingly.

111. Like the Tribunal in *Kier* (see paragraph 115 of that judgment) we emphasise that the mitigating effect of the general industry uncertainty as to the legitimacy of cover pricing, and of its endemic and widespread nature, is time-limited: it would certainly not apply to such an infringement occurring now, and is difficult to see how it would extend beyond the period during which the infringements established by the Decision were committed. For example, the Tribunal's judgment in *Apex* was in 2005.

VII. CONCLUSION

112. For the reasons we have given, we unanimously conclude that:

(1) the appeal against liability in respect of Infringement 46 is allowed and the finding of liability and penalty in respect of that infringement are set aside;

(2) the appeal against liability in respect of Infringement 190 is dismissed, and the relevant finding of liability is confirmed;

(3) the appeal against the penalty imposed in respect of Infringement 190 is allowed to the extent that the penalty is varied to £300,000.

113. Subject to any representations by the parties the penalty as varied will be subject to interest at 1 per cent above Bank of England base rate from 24 November 2009 to the date of payment or the date of any relevant judgment obtained by the OFT under section 37(1) of the 1998 Act.

The President	Marcus Smith QC	Paul Stoneman

Charles Dhanowa
Registrar

Date: 27 April 2011