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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1124/1/1/09

Victoria House,
Bloomsbury Place,
London WC1A 2EB

9 July 2010

Before:

THE HONOURABLE MR. JUSTICE BARLING
(President)

PROFESSOR STONEMAN
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

NORTH MIDLAND CONSTRUCTION LIMITED

Appellant

– v –

OFFICE OF FAIR TRADING

Respondent

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HEARING

APPEARANCES

Mr. Rhodri Thompson QC (instructed by Browne Jacobson LLP) appeared on behalf of North Midland Construction Plc.

Mr. David Unterhalter SC and Mr. Alan Bates (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

1 THE PRESIDENT: Good morning, Mr. Thompson.

2 MR. THOMPSON: Good morning, sir.

3 THE PRESIDENT: I gather you are outnumbered a bit.

4 MR. THOMPSON: Yes, I am sure you have seen that before. Just in terms of the papers before
5 the Tribunal, in addition to the common papers, which I assume you have at least access to.
6 There should be a Notice of Appeal?

7 THE PRESIDENT: Yes.

8 MR. THOMPSON: The conventional pleadings plus a defence on liability from the OFT.

9 THE PRESIDENT: Yes.

10 MR. THOMPSON: And a skeleton argument from us with two annexes, one of which duplicates
11 the authorities and the other is some additional documents.

12 There is one other document which I thought it was worth handing up, which is the one
13 original document in the case, which is the memo of Mr. Shorthouse's conversation with
14 Mr. Clarkson in the Rotherham case. I thought that could conveniently go in Annex 16
15 where there is record of Mr. Clarkson's interview. Would it be convenient to hand that up?

16 THE PRESIDENT: Yes. (Handed) This is to go in Annex 16.

17 MR. THOMPSON: Sir, if you look at the Notice of Appeal you will find at the back of it
18 annexes, and there is a little gobbet of the interview with Mr. Clarkson. I thought it could
19 conveniently go in front of that. It gives the flavour of what we are actually talking about.
20 Just by way of introduction I hope that our Notice of Appeal sets our case out fairly
21 comprehensively and clearly. I am proposing to follow the same structure. There are three
22 issues. First of all, the evidence in relation to the Nottingham House decision. We say that
23 both literally and metaphorically there is a large question mark against the OFT's case on
24 this alleged infringement, so that the OFT has not discharged its burden of proof. Secondly,
25 we say there is an important issue of law in relation to appreciability in relation to both
26 infringements, and that even on the facts as alleged in the decision the OFT has not
27 demonstrated that either of the alleged episodes, the receipt of pricing information about a
28 new house in Nottingham in 2001 or the supply of such information about a mill repair in
29 Rotherham in 2004 had, or was capable of having any appreciable impact on competition on
30 any relevant UK market.
31 Thirdly, we say that the fine imposed in relation to the supply of information concerning the
32 Rotherham mill repair was far too high both absolutely and relative to other fines imposed
33 by the OFT in this case.

1 At its most general our complaint is of a form of land grab by the OFT both in relation to
2 evidence and appreciability but also in relation to its penal jurisdiction, the Tribunal in its
3 various compositions has heard a lot about the third issue here, at least for some variety and
4 we would say some importance the challenge has expanded in scope to two important issues
5 on liability and those issues obviously reinforce our concerns about the third issue, the
6 nature of the fining decisions taken in this case.

7 The other point I would make by way of introduction is that certain points are common
8 ground. First, we do not dispute that there is documentary evidence, in fact the document I
9 have just handed up, confirmed by witness evidence of the transmission of confidential
10 pricing information from North Midland to Admiral in relation to the Rotherham Mill
11 repairs case and we can see that at footnote 6 to the notice of appeal. We have ourselves
12 found no evidence to support this but we have decided not to challenge the OFT's finding
13 on that issue given the standard of proof that we recognise to exist in this jurisdiction.
14 Secondly, we do not dispute that £27,000 or thereabouts was a reasonable fine for the
15 Nottingham House case. If, contrary to our case on liability the Tribunal accepts the OFT's
16 case on the evidence and on appreciable infringement of competition.

17 Thirdly, as we understand it, the OFT does not dispute that as North Midland has confirmed
18 in witness evidence, which is to be found at annex 2 to our skeleton argument, cover pricing
19 was contrary to North Midland corporate policy and that is a point that is put out para.
20 IV.5255 of the decision. Those three issues are background common ground. I think it puts
21 in terms that the OFT does not challenge that it may have had that policy but, in my
22 submission, for present purposes that is as good a concession that we did, given where the
23 burden of proof lies.

24 I now turn to the evidence in relation to the Nottingham House decision and I will start
25 briefly with the issue of burden of proof, although I do not think there is anything between
26 the parties on this. It is not in dispute, I think, that the burden is on the OFT or that there is
27 a need for firm and convincing proof, albeit to the civil standard; nor is there a dispute that
28 the OFT is entitled to rely on certain inferences. However, the point we take is that the case
29 is not proved to sufficient standard if documents are ambiguous and if there is a plausible
30 alternative explanation. In our Notice of Appeal we rely on a quotation which I think we do
31 not actually give the reference for. The quotation is in our skeleton argument. It perhaps
32 does not matter. We have quoted it somewhere, but I note we have not given a reference.
33 This is a reference to a case in the supplemental bundle of authorities? Tab 3, paras. 68 to
34 74 at p.9 of the print-out and following. Although this is EC jurisprudence, in my

1 submission it is essentially the same issue. So, the basis position is set out at para. 68 to 70
2 in terms of the burden of proof and the presumption of innocence. Then the consequence is
3 set out at para. 71 through to 74.

4 “The Commission must show precise and consistent evidence in order to establish
5 the existence of the infringement ... to support the firm conviction that the alleged
6 infringements constitute appreciable restrictions of competition within the
7 meaning of Article 81(1) EC”.

8 That is relevant also to the second legal argument.

9 “That requirement is not satisfied, in particular where a plausible explanation can
10 be given for those alleged infringements which rule out an infringement of
11 Community rules on competition.

12 However, the Commission rightly observes that the case law, according to which
13 it is sufficient for the applicants to prove circumstances which cast the facts
14 established by the Commission in a different light and thus allow another
15 ‘plausible explanation’ of the facts to be substituted for the one adopted by the
16 Commission, is applicable only where the Commission’s reasoning is based on the
17 supposition that the facts established cannot be explained other than by concerted
18 action between undertakings. It is not, therefore, applicable where the
19 Commission’s findings are based on documentary evidence”.

20 That point is glossed in paras. 73 and 74. In particular, at para. 74 it is found that the
21 documentary evidence is ambiguous. You see that in the second line.

22 “Since the evidence calls for interpretation, the Commission’s argument is
23 unconvincing. According to the Commission, as there is documentary evidence, it
24 is not sufficient for the applicants to provide a plausible explanation. However,
25 that evidence is ‘documentary evidence’ only if the Commission’s, rather than the
26 applicants’, explanation is accepted”.

27 What they are saying, I think, is if the documentary evidence is ambiguous, then you are
28 entitled to the general question of whether you have got a plausible alternative explanation.
29 So, if there is a clear document then a plausible explanation is not good enough, but if you
30 have got an ambiguous document then, as a matter of common-sense, and there as a matter
31 of authority, the respondent is entitled to the benefit of the doubt.

32 So, we would say that that is a fairly uncontroversial approach. We have set out our
33 position on this in some detail at paras. 23 to 35 of the Notice of Appeal. We say that, first
34 of all there was a positive case from North Midland which we summarise at para. 30. The

1 evidence in relation to that is set out as annex 2 to the skeleton argument. Just for the
2 Tribunal's note, the reference I was looking for before is para. 17 of the skeleton argument
3 where we give an unattributed quote, and I think that is from *Coats*.
4 Annex 2 comprises a number of statements and reports, first of all, a signed document by
5 a Mr. Evans, signed on 26th June 2008, where he sets out, first of all, under the heading
6 "General" the group policy of North Midland, so in particular 1.01:

7 "The group policy was that in all aspects of trading the company was not to be
8 involved in the practice known as cover pricing. Similarly North Midland
9 Building Ltd's policy has been, not to take or receive cover prices, since the
10 inception of the company in 1995."

11 Then there is reference to close involvement with other tenderers also being excluded.
12 Then in relation to the specific project on the next page, section 2, Mr. Evans makes a
13 number of specific points about this project. His instructions were to bid competitively for
14 this project for the following reasons: first of all, its size, then the reputation of the
15 architects, and then:

16 "Synergetic to have site adjacent to the ongoing snagging and maintenance works
17 at the major recently completed Park Gate project."

18 So there was another project nearby which made this an attractive project for North
19 Midland.

20 Then there is reference to the tracking of the tender through the board reports. Then there is
21 reference to Mr. Wheelhouse who:

22 "... remembers pricing this job and 'billing' it, and recalls visiting site on at least
23 two occasions to meet specialist trades including tower crane hire companies due
24 to material handling problems on the site."

25 That is Mr. Evans.

26 Then Mr. Wheelhouse, himself, if you turn through you will find a statement of 25th June
27 2008, where he sets out his recollection of the project, first of all, what he did do in the first
28 paragraph, and the fact that he says:

29 "However, I do not have any recollection of taking a cover price on this project or
30 any other project during my current employment, as it is not, as I have always
31 understood to be company policy/practice to apply such methods, according to my
32 knowledge/experience.

1 As a conclusion, I can only think that this is a post contract exchange of
2 information, normally due to a late or no response from the client's representative
3 on issuing tender feedback information, as seems to be the case these days."

4 That is what Mr. Wheelhouse says about that.

5 Then the next page is Mr. Catlin, the managing director.

6 PROFESSOR STONEMAN: Before you go too far, could you explain the third paragraph. What
7 does that mean?

8 MR. THOMPSON: It is something that we see also in the evidence on which the OFT relies.

9 Apparently there is a practice after a tender has gone through where, as a sort of mopping
10 up exercise, people ring round and say, "What did you bid? What did you bid?" and they
11 keep a record for their own purposes. That seems to be the practice. I do not think it is
12 challenged, but obviously it then raises a question as to what actually happened here.

13 PROFESSOR STONEMAN: It is that just the phrase "client's representative", I am not quite
14 sure whether "client" is those asking for the tender or those giving the tender.

15 MR. THOMPSON: I think what he is saying is that the client, in this case I assume the architect,
16 if the architect does not provide the information then sometimes they will ring one another
17 after the event to see what happened. That is what the practice seems to be, that if you do
18 not get a prompt response from the client sometimes you will ring around your competitors
19 afterwards. That is the story.

20 Then there Mr. Catlin, the managing director of North Midland, and he has been managing
21 director since 2005. He also has a recollection of this project:

22 "... I do recollect that the Project was of great interest as we were working in the
23 locality on another Project at the time. I also recall the unusual design of the
24 building and discussions with members of the estimating department during the
25 course of the preparation of the tender. With the company currently working on
26 site in close proximity to the proposed development internal discussions also took
27 in respect of potential sub-contractors. The Project was an innovative design and
28 we were keen to secure it to raise the profile of the growing company."

29 Then finally there is an independent letter from a Mr. Rennison, managing director of a
30 mechanical and electrical contractor, and he recalls quoting for M&E service works on the
31 project, and it is a letter dated 10th June 2008, so that was, as it were, independent evidence
32 that this was a case where we were actually actively seeking information for the purposes of
33 tendering.

34 THE PRESIDENT: Just remind me what M&E is?

1 MR. THOMPSON: Mechanical and Engineering, I think. Electrical, I am sorry.

2 THE PRESIDENT: Mechanical and Electrical?

3 MR. THOMPSON: Yes. So that was, as it were, the positive evidence. Against that there was
4 the generic evidence from Bodill, which is set out at paras.27 to 28 and 32 to 34 of the
5 Notice of Appeal. The original documents are annexes 13 to 15 to the Notice of Appeal.
6 What seems to have happened is that the OFT spoke to two former employees, or
7 employees of Bodill – a Mr. Wraith and a Mr. Rosental – and they gave general evidence as
8 to their practice, and then the OFT applied that to specific cases by reference to the
9 information given as to their handwriting and things of that kind.
10 One finds, first of all, the general explanatory note at Annex 13.

11 THE PRESIDENT: It is not signed. You will have to look somewhere else to find out who gave
12 this.

13 MR. THOMPSON: It may be that the decision explains what it is.

14 THE PRESIDENT: I am sure it does.

15 MR. THOMPSON: I think it derives from Bodill and I can assume that Mr. Wraith and Mr.
16 Rosental vouched for its accuracy. There is a description of various things under various
17 headings, and then under the heading “Analysis” in relation to tenders it – perhaps I should
18 look at tenders:

19 “This provides space for names of other tenderers to be inserted. Usually public
20 organisations have to obtain 5 to 6 prices – in some cases even 8. Names are
21 inserted when intelligence from Agencies, or subcontractors or suppliers reveal
22 other contractors. This is carried out by telephone when enquiring of
23 subcontractors and suppliers if they wish to price the job, or when chasing their
24 quotations prior to completion of the estimate. Discussion both ways with
25 Agencies is carried out by telephone. Glenegan and ABI produce weekly sheets
26 of the information or emails. Analysis – After the tender is agreed at the Tender
27 Settlement meeting the Estimator will fill in the analysis and pass sheet for
28 filing. After the tender is submitted and tender figures are made available, the
29 Estimator may add tender figures of the other Contractors or other comments to
30 the sheet. No further action is taken from these sheets other than to monthly
31 record for Management accounts, the number of tenders submitted and the
32 number won.”

33 So that is an explanation which, I think, partly answers the point that was raised by the
34 Tribunal. Then “Notation”:

1 “The ringed letter ‘c’ on the sheets means that we are getting or giving help – a
2 cover price.”

3 Then there is explanation of Taking and Giving, and further details. Then “Generally”:

4 “A rings ‘c’ following by ‘?’ means we are not sure that a particular contractors
5 is actually tendering or are taking a cover price from others. NOTE: In
6 preparing information of the OFT we have worked from the file numbers of the
7 tender sheets. Where we have eventually received an order for a project then
8 we have either added the Contract Number at the side of the sheet or shaded the
9 details on the analysis sheets.”

10 So that is the general explanation. Then we have at tab 14, first of all, the evidence of Mr.
11 Wraith. We should have the evidence of Mr. Rosental, but I cannot see it. What they seem
12 to have done is to have coloured in various documents where they recognise their own
13 handwriting. If you turn over to the next page, this is the original document in this case, it
14 is the tender sheet. The Tribunal should see 7.

15 THE PRESIDENT: Sorry, which annex would that be in?

16 MR. THOMPSON: Annex 14.

17 THE PRESIDENT: So in mind that is the contract document for David Wraith.

18 MR. THOMPSON: Yes, and if you turn over, sir, you should see the tender sheet.

19 THE PRESIDENT: Yes, tender sheet.

20 MR. THOMPSON: There is a 69 in the bottom right hand corner.

21 THE PRESIDENT: It is in manuscript.

22 MR. THOMPSON: Yes. This is, I think, an original document as far as I understand it, or a copy
23 of an original document. You will see it is a new house at Western Terrace. The Architect
24 is Marsh & Grochowski. The date is Monday 22nd January 2001. Then you will see a list
25 of names in the right hand boxes: Bodill, Tomlinson, Frudd, North Mids, R. Woodhead,
26 Woodsend and Craske.

27 THE PRESIDENT: Yes.

28 MR. THOMPSON: Bodill was the leniency applicant, as it were informant, in this case and then
29 there was Tomlinson and Woodhead who admitted liability I think at the fast track stage.
30 Woodsend (number 6) could not find any evidence and because of the question mark at the
31 6 they were let off. Then North Mids at 4, we were found to be parties to this infringement.
32 The reference there is “North Mids Const (C) from us” and then a telephone number and
33 Mr. Wheelhouse. The point we make is that a question mark, although it is not next to the
34 C, there is a large question mark on the left hand side against our entry. As I understand it,

1 the writing for the North Midlands entry is by Mr. Rosental, and I think the question mark
2 appears to be in the same writing as the one against Woodsend. We would say that appears
3 to be a question mark from Mr. Wraith. So the question then arises what are we to make of
4 this document?

5 THE PRESIDENT: You say whose question marks they may be, is that because that is something
6 that emerges from the evidence?

7 MR. THOMPSON: There is no reference to the big question mark on the left in the Decision or
8 in any OFT document, but the question mark in the Woodsend case is apparently by Mr.
9 Wraith.

10 THE PRESIDENT: And they look, superficially, as though they are the same?

11 MR. THOMPSON: They do, they have got the same circle under the question mark sign instead
12 of a simple dot, but obviously we are not in a position to give any evidence on this. It
13 appears to us that that question mark was put there by Mr. Wraith.

14 We take the point at footnote 11 of our Notice of Appeal (I do not think it has been
15 contested by the OFT) that there has been no specific confirmation from Bodill about this
16 case. It does not appear that either Mr. Wraith or Mr. Rosental were asked in any interview
17 whether they have any recollection of this case. No further evidence has been forthcoming
18 during these proceedings. The OFT has simply taken its stand on the evidence as it stands.
19 So it appears that the OFT case turns on an interpretation of the contemporary document.
20 You will see the relevant part of the Decision appended to the Notice of Appeal at tab 1 I
21 think.

22 THE PRESIDENT: Sorry, Mr. Thompson, on the same basis that you understand that the
23 question mark next to Woodsend is by Mr. Wraith, do you have the same kind of
24 intelligence about the rest of the writing?

25 MR. THOMPSON: It may be convenient if we look at the decision, tab 1. We have not actually
26 had confirmation of this, but I take it it is correct, p.679, paras. 1488 and 1499 there is
27 evidence from Mr. Rosental – for example, in relation to Tomlinson Mr. Rosental seems to
28 have written the figure “£310,400” and 26 weeks, and Mr. Wraith seems to have written “©
29 from us Mr. Thompson.” In relation to North Midland it all seems to have been written by
30 Mr. Rosental except for the question mark on the left, which looks like Mr. Wraith. Mr.
31 Woodhead, the number, the “26 weeks” and “Ben Hunter” is Mr. Rosental, and “© from us”
32 the phone number and “Bob Johnson” is Mr. Wraith, and “Woodsend”, the number and
33 “TBA” is Mr. Rosental, and “© ? from us” is Mr. Wraith. So in every case except ours it

1 seems to be Mr. Wraith's evidence, and in relation to ours Mr. Rosental puts us down and it
2 appears that Mr. Wraith had expressed some, doubt.

3 We do say that it is really a short point, the impression. We say that our account, both as a
4 matter of general practice, which is in fact confirmed by Bodill and the uncertainty
5 apparently on the part of Mr. Wraith does raise the possibility of a plausible alternative
6 explanation which would simply be that we had bid, and because our number comes in the
7 middle of the people Mr. Wraith knew to have taken cover prices, a suspicion arose that we
8 had taken a cover price. You will see that our figure is between that of Tomlinson and
9 Woodhead. The question mark that the OFT does not mention in the decision has an
10 unknown significance, but we would say that it is at least as plausible that it expressed
11 uncertainty as to whether or not a cover price had been taken in this case, as that a cover
12 price had in fact been taken in this case.

13 The other point we take is that we do feel that we have been hard done by as against
14 William Woodsend, but although their question mark was in a different and, in a way, a
15 more conventional place, they did not in fact adduce any alternative evidence, and you find
16 that at paras. 1506 to 1507. Otherwise, we would say we were very much on par – I think
17 the OFT takes a point that our telephone number appears but I do not think it is in dispute
18 that that is in fact our switchboard telephone number, and so that would be equally
19 consistent with them seeking information from us after the event a seeking information
20 before the event, and then I think they also take the point that the number here is £11
21 different from the number that appears in the actual sheet prepared by the architect, and
22 again it appears to us that a mistake has been made somewhere, and it is not clear where
23 that mistake has been made.

24 We say that a plausible explanation is that Mr. Rosental has inferred from the figures that
25 North Midland must have taken a cover but that Mr. Wraith was doubtful, and we know that
26 all the other cases are evidenced by Mr. Wraith, and overall we say the *Coats'* standard is
27 not satisfied and that North Midland is entitled to the presumption of innocence, particularly
28 given the positive evidence we have put forward about this particular contract. It is not
29 clear what exactly happened, but we say it is clear that the case is not proved.

30 THE PRESIDENT: Your witnesses say that they have put in a genuine tender.

31 MR. THOMPSON: Yes, it is not clear what happened to this document, and why there is a
32 question mark, and who exactly did what, but given that we do not have specific evidence
33 from Mr. Wraith or Mr. Rosental we cannot take it any further.

1 PROFESSOR STONEMAN: Can you say something about the entries, 24 weeks, 26 weeks on
2 that attendance sheet? Would these be part of any cover price given? If the cover price was
3 given would the duration likely to be spent on the project to be given as well, or would this
4 likely be post-tender information, or does it not figure in any way in your explanation?

5 MR. THOMPSON: To be honest I do not know, I am not an expert, nor do we have an expert as
6 to whether or not ----

7 PROFESSOR STONEMAN: No, but it is raised in the evidence, is it not?

8 MR. THOMPSON: Yes, it is but I do not think I have any information, I certainly do not concede
9 that it is more likely to have been that information in advance than afterwards. I do not
10 concede that there was any particular significance in relation to having that figure there. I
11 think there are plenty of cases where no such duration is given. This is Mr. Evans, I do not
12 know whether you want to hear from Mr. Evans?

13 MR. EVANS: Just on the duration, it can be attractive to a client to have a 24 week programme,
14 rather than a 26 week programme, and a more expensive price on a shorter time might be
15 more attractive, that is the significance of the weeks with the price. Is that clear?

16 PROFESSOR STONEMAN: Yes, I am starting from that point but the question then is why does
17 it appear on this sheet?

18 MR. THOMPSON: Should I take instructions from Mr. Evans?

19 PROFESSOR STONEMAN: If you can, yes.

20 MR. THOMPSON: Now, or shall I come back to it – what would be the better course?

21 THE PRESIDENT: We are going to take a 10 minute break at some convenient point, between
22 half past 11 and quarter to 12, so may be you can chat then about it.

23 MR. THOMPSON: Shall I make the points on appreciability, then we can take a break?

24 THE PRESIDENT: Yes. Before you leave the documents can I just ask you – it is my fault I
25 cannot read something – I am looking at tab 12, the one with the question marks on, the
26 “TBA”, is there any information about that either in the decision or anywhere, it usually
27 means “to be advised”, or “to be agreed”, or something of that kind, does it not, but I do not
28 know whether there is anything about it that throws any light on how these things are, when
29 or how they are put down there, what time they are put down?

30 MR. THOMPSON: No, without any ill will towards Woodsend, in my reading of that it might
31 have been relied on by the OFT as saying that it was future looking rather than historic
32 looking, but it clearly did not persuade Mr. Wraith because he only put a question mark
33 against the cover price but presumably once they had lost the bid they would not have been
34 going to advise it.

1 THE PRESIDENT: But anyway there is no information.

2 MR. THOMPSON: No, I do not think so, I do not think it is referred to by the OFT.

3 THE PRESIDENT: Is that a name above “6”, is that “Ben” something?

4 MR. THOMPSON: It is said to be Ben Hunter.

5 THE PRESIDENT: He would therefore be the contact, would he? I see there is a Bob Johnson
6 there after that.

7 MR. THOMPSON: At para. 1488 Mr. Rosental reported that he gave the information “Ben
8 Hunter”.

9 THE PRESIDENT: Does it say who he was?

10 MR. THOMPSON: I cannot recall.

11 THE PRESIDENT: It probably does not matter, it is just that I could not read it on the copy I
12 have.

13 MR. THOMPSON: Yes, I do not think it is referred to specifically in relation to the point against
14 Woodhead, although ----

15 THE PRESIDENT: All right, maybe Mr. Unterhalter at some point can help on that. Nothing
16 hangs on it, I just want to know what it was. Yes, appreciability then.

17 MR. THOMPSON: I do not think anything is made of Mr. Hunter.

18 In relation to appreciability this matter was fully canvassed in the notice of appeal at paras.
19 36 to 52 and the basic point – which is familiar since the case of *Volk v Vervaecke* and also
20 the case of *Beguelin* which I think sets the matter most clearly, and which I have put at tab 1
21 of our supplementary authorities – is that both Article 101 of the Treaty on the Function of
22 the European Union (formerly Article 81 of the EC Treaty), and s.2 of the 1998 Act, are
23 subject to an appreciability requirement. The OFT accepted this point in its defence at para.
24 27 and also at para. 172 of s.3 of its Decision. But, as we understand it, from its skeleton
25 argument, it has now hardened its stance, maintaining that a requirement of appreciability
26 no longer applies in respect of object infringements. It is fairly scathing about the thought
27 that any such requirement could apply in relation to object infringements. It takes the pint
28 very shortly and effectively says that it would be absurd to have such a requirement.

29 We say that this is a manifest and obvious mis-statement of the law which goes right back
30 *Béguelin*, but since the point is taken I had better take it because if it were at least arguably
31 correct then it would certainly be a point that would warrant the consideration by the Court
32 of Justice. Certainly had a trainee advanced the proposition that the appreciability
33 requirement does not apply in object cases, it would have counted against them during my

1 training period. So, I am surprised to see it advanced by the OFT in a case where this
2 specific issue is raised.

3 The *Béguelin* case is at Tab 1 of the supplementary authorities. The paragraph where the
4 point is dealt with is paras. 16 and 17, The basic point is set out at para. 7.

5 “Article 85(1) [now Article 101] prohibits agreements which have as their object
6 or effect an impediment to competition”.

7 Then there is reference to the facts. Again, at para. 10, object or effect. Then, at paras. 16
8 and 17 the basic point is made,

9 “Finally, in order to come within the prohibition imposed by Article 85, the
10 agreement must affect trade between Member States and the free play of
11 competition to an appreciable extent.

12 In order to establish whether this is the case, these factors must be considered in
13 the light of the situation which would have existed but for the agreement in
14 question”.

15 So, it applies both to object and effect. In fact I think this is an object case as, indeed, was
16 the leading case of *Völk v. Vervaecke*. The point is confirmed repeatedly in the leading
17 textbooks. If one starts with **Bellamy & Child**, at Tab 6 of the supplementary authorities,
18 2.078 to 2.079 sets out the facts of *Völk -v- Vervaecke*. The comment at 2.079,

19 “Völk decides that if, having conducted a market analysis in accordance with
20 *Société Technique Minière*, the effect on the market is insignificant, Article 81(1)
21 does not apply even where the agreement gives rise to ‘absolute territorial
22 protection’”.

23 That is a clear object case. Then there is discussion of it at the next passage at para. 2.121.

24 “In general. An agreement falls outside Article 81(1) if it is not capable of having
25 an appreciable effect either on competition or on trade between Member States.

26 The *de minimis* principle was established by the Court of Justice in *Völk* which has
27 already been discussed, and applies to ‘object’ cases as well as to ‘effect’ cases”.

28 Then there is further discussion. I think that is probably sufficient on that point. Then if
29 you turn back a tab, a no less authoritative statement of the law, including by Mr. Nikpay,
30 who is now a senior director at the Office of Fair Trading There is, in fact, a whole section
31 at pp.227 and following on restriction by object and appreciability. It starts,

32 “An agreement which, prima facie, has as its object the restriction of competition
33 can nevertheless escape the prohibition of Article 81(1) if it has only an
34 ‘insignificant effect’ on the market or on trade”.

1 Then there is a detailed discussion. At 3.161,

2 “As for horizontal cases, it seems highly unlikely that, even if applicable, market
3 shares in this region would ever be relevant from a practical perspective: it is
4 difficult to conceive of price fixing or market sharing agreements between entities
5 with combined market shares in single digits on a properly defined market. In any
6 event, given the general tenor of the case law on cartels, it would seem
7 implausible that the European Courts would permit cartels to escape the Article 81
8 prohibition on the basis of low market shares alone”.

9 What they are saying there is that it is not credible that you could have a price fixing cartel
10 for people who had only one percent of the market because it would clearly collapse
11 immediately because it would not have any significance. But, they certainly do not say that
12 you cannot have an appreciability requirement in an object case. Then the point is
13 confirmed by Professor Whish, who is obviously also an eminent former board member of
14 the OFT, in his discussion of the *de minimis* doctrine at Tab 7. For example, on p.138, just
15 under the little quote,

16 “The *de minimis* doctrine applies both to agreements whose object and whose
17 effect is to prevent competition, which means that even horizontal restraints of a
18 clearly anti-competitive nature or export bans in a vertical agreement could fall
19 outside Article 81 because of their diminutive impact ----”

20 Then there is the other side of the coin. Even if the *de minimis* notice, which I think will be
21 familiar to the Tribunal, does not apply. Nonetheless, the appreciability requirement still
22 has to be satisfied. You see that at the bottom of the page.

23 “-- agreements above the thresholds may have only a negligible effect on
24 competition and so not be caught; another way of putting this point is that the
25 Notice establishes a ‘safe harbour’ for agreements below the thresholds, but does
26 not establish a dangerous one for agreements above it”.

27 So, the onus is still on the Commission or the OFT even where the Notice does not apply.

28 In response to this very consistent and clear case law the OFT, surprisingly to my mind,
29 relies on a recent case about object infringements concerning *Glaxo Smith Kline*. One finds
30 that at para. 10 of the skeleton. It does appear in the defence, but it is more prominent in the
31 skeleton. That is a case about the meaning of object infringement. I do not know if it is
32 necessary to turn it up. Mr. Unterhalter can take the Tribunal to it if he wants to, but the
33 simple point is that it was not a case about appreciability. The Court of Justice made no
34 finding on appreciability. The case concerned export restrictions imposed by a massive

1 supplier of pharmaceutical products. So, the requirement was obviously satisfied. The case
2 concerned an object infringement and the question of whether or not one needed to show
3 effects in addition. It was not a question about appreciability at all.

4 THE PRESIDENT: Sometimes one gets confusion, does one not, between when one has to show
5 actual effects and forgetting that one can get home on potentiality as well.

6 MR. THOMPSON: Yes.

7 THE PRESIDENT: Obviously, your case is that with an object infringement the object
8 nevertheless has to have the potential.

9 MR. THOMPSON: Yes - or not even the object. But, the contract, or the agreement, or whatever
10 it is has to be of sufficient commercial significance to have some potential impact on a
11 relevant market. Here we say the mere fact that Marsh & Growkowski may, if they had
12 known the facts, have been dissatisfied about the bidding process in this case, does not have
13 any significance for the wider building market, and likewise for the Rotherham Mill.

14 THE PRESIDENT: The argument that is raised in para.9 of the skeleton, is it not that you do not
15 have to have an appreciability, but there is an assumption in certain types of infringements
16 that it is satisfied?

17 MR. THOMPSON: The authority they rely on appears to be simply the confusion that you put to
18 me, Mr. President, namely that the question of appreciability simply does not arise where
19 you have an object infringement. In my submission, that is plainly contrary to the case law,
20 and indeed the reference that is made to two cases on which we rely, the later one, the
21 *Lubricarga*, which is almost contemporaneous with the *Glaxo SmithKline* case, was in fact
22 a case about resale price maintenance so it was an object infringement, and it was, I think,
23 within a matter of weeks of the *Glaxo SmithKline* case, so what the OFT is inviting the
24 Tribunal to do is, *sub silentio*, in a case not about appreciability, the Court of Justice
25 reversed 40 years of case law which they had re-asserted only a few weeks before. In my
26 submission, that is a very surprising submission for the OFT to make, and were it to be
27 correct, or even arguably correct, it is something the Court of Justice ought to look at. In
28 my submission, it is not arguably correct, it is obviously wrong.

29 Were the Tribunal to see any attraction in the OFT approach, then that would be a clearly
30 referable issue. It would overturn consistent case law, *Völk* and *Beguelin*, and introduce a
31 category of *per se* infringement contrary to the most fundamental features of EU
32 competition law since the 1960s, and in effect we would be back to the formalism of the
33 RTPA. If you had the right type of restriction that would be the end of it.

1 We say that the true position is as we have stated in our notice of appeal, that appreciability
2 is normally determined either by reference to market shares or by reference to the absolute
3 size of the parties involved, and you see that in *Völk* and *Miller*, the two leading cases,
4 which are summarised in **Bellamy and Child** at paras.122 to 124. I think it might be worth
5 just looking at that, because ----

6 THE PRESIDENT: You have got *Miller* in your authorities.

7 MR. THOMPSON: We have included *Miller*, yes. That was another exclusive distribution case,
8 I think, and ----

9 THE PRESIDENT: Do you want us to look at that or **Bellamy**?

10 MR. THOMPSON: I think probably **Bellamy** sets it out. The appreciability argument failed in
11 *Miller*, in that it was said that *Miller* was a big enough company ----

12 THE PRESIDENT: 2.122, is it?

13 MR. THOMPSON: Yes, 2.122. There is the well known fact that in *Völk* the products concerned
14 represented only 0.2 to 0.5 per cent of production in Germany. Obviously here nothing has
15 been proved at all about the share of either Marsh & Grakowski or North Midland, or
16 indeed Corus in the repair of steel mills. Nothing has been shown.

17 “Subsequently, in *Miller* the defendant undertaking sought to take advantage of the
18 principle in circumstances where Miller had on average about 5 per cent of the
19 total market in sound recordings Germany, with high market shares in some
20 sectors and a turnover in 1975 of DM34. The Court of Justice held:

21 ‘It is evident that Miller’s sale constitute a not inconsiderable proportion of the
22 market and that it specialises in the production of certain distinct categories for
23 which it occupies a position on the market which, if not strong, is at any rate
24 important ... it must accordingly be concluded that Miller ... is an undertaking of
25 sufficient importance for its behaviour to be, in principle, capable of affecting
26 trade.’”

27 I do not think we need to look at the actual authority. It is clearly stated that the normal test,
28 and obviously that is carried over into the *de minimis* notice, and I think the OFT follows
29 the same approach in its guidance, that the normal starting point is market shares or absolute
30 importance.

31 Then at 2.123 there are other possibilities:

32 “Undertakes with a market share of less than 5 per cent may still be caught by
33 Article 81(1) if, on the facts, a sufficiently appreciable effect can be demonstrated
34 in the light of the competitive structure of the market.”

1 So effectively they are saying that if you are below the market shares, or the importance
2 levels, then there is an onus on the OFT to show that there is something about the structure
3 of the market that demonstrates an appreciable effect.

4 PROFESSOR STONEMAN: Could I take you back to **Richard Whish**, which you were
5 referring us to a minute ago, p.140, tab 7. Half way down p.140 under (ii), having heard the
6 argument that you have just been presenting, this basically said that applies to non-hardcore
7 restrictions. If it is hardcore restrictions those arguments do not apply. Is that what that
8 part of the notice says?

9 MR. THOMPSON: What it says is that the administrative comfort given by the Commission and
10 the OFT does not apply for some quite specific hardcore restrictions. Then, as it were, you
11 are out on the open sea, you do not have the safe harbour. It then goes on:

12 “The judgment of the ECJ in *Völk v. Vervaecke* [the leading case] did concern a
13 hard-core restriction, in that the distributor was granted absolute territorial
14 protection; and ultimately it is for the Court to interpret and apply Article 81 ...”

15 PROFESSOR STONEMAN: Carry on.

16 MR. THOMPSON: All I am saying that the administrative protection does not apply, so I cannot
17 say that it would be contrary to the notice, subject to the point that the Tribunal will, of
18 course, wish to consider whether or not this particular type of conduct, namely ringing
19 somebody up and telling them a price, is actually within the scope of horizontal agreements
20 to fix prices, limit output or sales and to allocate markets or customers, given the point that I
21 will make in a moment that, in fact, there is no evidence that, for example, had Admiral
22 turned round and put in a competitive bid North Midland would have been in any position
23 to complain. All, I think, that has been shown is that North Midland did Admiral a favour
24 and gave them information. There is a question at least about whether or not it actually is a
25 hardcore infringement of the kind referred to in the notice.

26 The other point that I think emerges, particularly from *Beguelin*, is that we are looking at a
27 counterfactual analysis, so para.18 of *Beguelin*: so what difference did the conduct make?
28 We would say that nothing really has been identified here. There is no evidence of what
29 would have happened if these telephone calls had not been made, and there is at least a
30 question as to whether they made any difference at all to anything, even in relation to these
31 particular contracts.

32 Then there is the fundamental point that both object and effect cases are subject to
33 appreciability, and I have referred to *Völk*, *Beguelin*, *Miller* and indeed the *Lubricantes*
34 case, which is in French, but the relevant passage is at paras.23 to 24, at tab 114 of bundle 8,

1 but I do not think it is necessary to turn it up. We would say that if the conventional legal
2 approach is adopted, it is manifest that the OFT has not shown any appreciable effect
3 arising from either the Nottingham House case or the Rotherham Mill case, and we set that
4 out in detail at paras.37, 38, 43 and 45 of the Notice of Appeal.

5 There is one point that I should take the Tribunal to in the Decision itself, which is, first of
6 all, para.177 of III. I think it is all in our Notice of Appeal. I do not know whether it is
7 more convenient to look at that.

8 THE PRESIDENT: Yes.

9 MR. THOMPSON: It is at tab 5 p.381 para.177 the OFT appears to accept that it has the burden
10 and standard of proof in relation to appreciability and then the second sentence, it says:

11 “These representations are addressed in Section IV in the context of each
12 Infringement”

13 So the assertion seems to be that each infringement is shown to be appreciable in the
14 specific discussion. But then look at tabs 1 and 2 at what is actually shown in relation to
15 these cases, the finding in relation to the Nottingham House, the only finding on
16 consequence appears to be at p.685 para.1523. Subparagraph (a) is simply a formal finding
17 about the provision of figures. The second one is that North Midland can be presumed to
18 have taken account of the information received from Bodill, so that it would have affected
19 the price it bid in this case. And (c) is that Bodill can be presumed to have taken account of
20 the information it received. So the finding is simply limited to this bid on this one house.
21 There is no finding of any wider consequence.

22 The same is true at tab 2 para.5264. It is exactly the same, simply the provision of
23 information, Admiral taking account of it in relation to the Rotherham bid, and North
24 Midland taking account of it. So again there is no wider finding of any impact of these
25 events on any wider market.

26 The other point that might trouble the Tribunal in considering this is the question of whether
27 or not a one-off infringement could be appreciable. Happily, there is recent learning from
28 the Court of Justice on this very question which is that could in principle be sufficient. That
29 appears in the *T-Mobile* case decided last year, which is at bundle 8 tab 115 of the main
30 authorities.

31 It is rather a remarkable case. It was decided on 4th June 2009. It did concern a decision by
32 the Dutch authorities in relation to a single meeting where information was exchanged
33 about prices between mobile telephone operators. So far, that might be said to support the

1 OFT's case, but if one looks at what actually happened (I think it is sufficient to look at
2 paras.10 to 13 of the judgment) you will see that:

3 "At that time, five operators in the Netherlands had their own mobile telephone
4 network [T-Mobile, Orange, Vodafone, O2 and Telfort] In 2001, the market
5 share held by the five operators amounted, respectively, to 10.6%, 42.1%, 9.7%,
6 26.1% and 11.4%. It was unforeseeable that a sixth mobile telephone network
7 would be established because no further licences had been issued. Access to the
8 market for mobile telecommunications services was therefore possible only
9 through the conclusion of an agreement with one or more of those five
10 operators."

11 Then there was a description of what happened, and in particular (12) of the meeting where
12 information was exchanged about dealer remunerations. Then (13):

13 "By decision of 30 December 2002, the [Dutch competition authority] NMa
14 found that [these parties] had concluded an agreement with each other or had
15 entered into a concerted practice. Taking the view that such conduct restricted
16 competition to an appreciable extent and was thus incompatible with the
17 prohibition in Article 6(1) of the Ma, the NMa imposed fines on those
18 undertakings."

19 Then the scope of the reference at para.22, you will see that the issue was simply about the
20 single meeting, and no issue was taken on appreciability. But you can see that the basis for
21 a finding of appreciability was pretty well overwhelming, given that you were dealing with
22 an agreement between the monopoly suppliers of telecoms services to the Dutch market.
23 So, in my submission, it stands as the opposite extreme from the facts of this case, where
24 you have joint monopolists agreeing and even a single meeting can apply. Here, we would
25 say we are at the opposite stage: you have simply got bilateral arrangements between people
26 who have not been shown to have any market significance at all.

27 Our conclusion is that the appreciability requirement is not, and has not been shown to be,
28 satisfied. The OFT's position on the law is manifestly wrong and indefensible. It has no
29 substantive case on the facts. That is our position in relation to appreciability. Would that
30 be a convenient moment to have a break?

31 THE PRESIDENT: Yes, it would. Can I just ask you this. If we accepted your arguments on
32 this, what should we do?

33 MR. THOMPSON: The case must be annulled or set aside in relation to our two infringements.

1 THE PRESIDENT: Should we then have a stab at it, seeing whether we think there was
2 appreciability or not, or do we remit it? Think about it over ten minutes.

3 MR. THOMPSON: I would not presume to instruct the Tribunal as to its jurisdiction.

4 THE PRESIDENT: No, not instruct us, but what is your suggestion?

5 MR. THOMPSON: We would say that when you think about it, the requirement is manifestly not
6 satisfied. Whether it has any wider implications for this decision generally is not something
7 I am concerned with. In my submission, when you think about it, it is obvious that
8 appreciability has not been shown in this case. We do not even know who Marsh and
9 Growkowski are. We do not even know they ever had another tendering exercise at all.
10 The OFT just has not concerned itself with that question. Likewise Corus. So if you
11 actually thought about the issue properly you would see that the OFT has no case. That is
12 really what it comes down to. The OFT just thinks: this is a very big decision; we have
13 taken lots of decisions and it is all very important. But when they actually think about the
14 individual infringements they have not actually done their job properly. That is what it
15 comes down to.

16 THE PRESIDENT: Is it an important factor in this that there is only a single contract? In which
17 case, does it depend on the size of the contract? To what extent would that have a bearing
18 on matters?

19 MR. THOMPSON: Yes, it could do. I know there are some much larger appellants or much
20 larger addressees, and there are some much larger clients, some of whom have recurrent
21 demands. It might well be that for those people an argument like this would not get off the
22 ground. It is certainly significant that nothing has been shown about either my client or its
23 significance on the market, or about any of the customers, or indeed any of either Bodill or
24 Admiral, Nothing has been shown about their significance to any relevant UK market.

25 THE PRESIDENT: Does this argument go to both trade and competition, or mainly to
26 competition?

27 MR. THOMPSON: I know that Mr. Bailey is an expert on this question; he has written an article
28 on the subject. I have not taken the Tribunal to the *P & S* case and the dispute about
29 *Aberdeen Journals* because in my submission it essentially goes to competition because I do
30 not really think that once appreciability has been shown for competition there is much left
31 to show about trade.

32 THE PRESIDENT: They stand or fall together?

33 MR. THOMPSON: Yes, effectively they are the same thing. It is fair to say that there is not a
34 very clear distinction in the EC case law. For example, *Völk* is primarily a case about trade.

1 It has always been taken as the leading case on competition. But I think I would accept that
2 what I am really saying is that there is an appreciability requirement on competition and that
3 I might be content to say that there is no separate question, if that is satisfied, about trade
4 within the UK. There is no boundary issue. It does not matter whether it crosses the
5 Scottish/English border or between Lancashire and Yorkshire of the kind that you have in
6 relation to interstate trade in Europe. So to that extent, I think they are basically the same
7 issue.

8 THE PRESIDENT: Another way of going about this is to say every tender situation creates a
9 market, so if six are invited to tender there are six firms on the market, that market never
10 reopens and so you have each of them as potential 100 per cent market share or zero market
11 share if there are only six players on that market.

12 MR. THOMPSON: Yes. I do not think the OFT has ever sought to define – it would have quite
13 astonishing implications for the expansion of its jurisdiction if every contract could be
14 regarded as a self standing market. That is why this is actually an important point, because
15 it does effectively bring back the RTPA if the OFT were to go that far.

16 THE PRESIDENT: I am not saying every contract is a market; I am saying every bidding
17 competition is a market.

18 MR. THOMPSON: Yes, but if it only applied to bidding competitions, that would nevertheless
19 be a very startling implication, given that there is no threshold for bidding competitions and
20 none suggested by the OFT that it has looked at things above a certain value. There is no
21 basis for that in any event.

22 THE PRESIDENT: We will take a ten minute break then.

23 (Short break)

24 MR. THOMPSON: Sir, I discussed with Mr. Unterhalter, it seemed to us that it was perfectly
25 convenient for me to just plough on and for him to deal with everything, rather than for me
26 to deal with that.

27 THE PRESIDENT: As you wish.

28 MR. THOMPSON: In relation to Professor Stoneman's question I discussed it with Mr. Evans,
29 and I think it arises by reference to para. IV.1505 of the decision, which is at tab 1, p.682:

30 "North Midland has suggested there is no reason why this information (the
31 contract length of 24 weeks) would be exchanged pre-tender in the context of
32 cover pricing, the OFT notes that on the contrary, it was not uncommon for a
33 contractor to provide contract length at the same time as the cover price to its
34 competitor in order to prevent the taker of the cover price from accidentally

1 winning the contract by submitting the cover price along with a short, attractive
2 contract length.”

3 I think it is a score draw, as it were. I do not think the OFT positively denies that that
4 became uninteresting information after the event, but I think I would have to accept that in
5 some cases it is obviously an interesting information before the event, but Mr. Evans says it
6 is a relevant fact and there are two factors, price and speed, in some cases speed can be very
7 important and very interesting both before and after the event, and I think that is all I can
8 say on that.

9 If we now turn to the question of the fine imposed, as I think I said in opening, there is no
10 challenge to the £27,000 fine in relation to Nottingham if it is held that the case is
11 sufficiently proved, and you see that at tab 3 to the notice of appeal, the fine is actually a
12 very elementary exercise. Infringement 146, which is the Nottingham case, the fine comes
13 out at £27,200, and there are no adjustments at all so it just goes straight through at that
14 level.

15 THE PRESIDENT: If you lose on liability you are not challenging the fine.

16 MR. THOMPSON: We are content with that; that seems to us a proportionate fine for a case of
17 this kind if it falls within the scope of the Act at all. In relation to infringement 190 that is
18 also a simple calculation but of a different kind.

19 THE PRESIDENT: You are not quite so relaxed about that.

20 MR. THOMPSON: No, and the OFT did not consider that the £580,700 was sufficient, which to
21 us still seems a pretty stiff penalty, but they said “no, we must multiply it by three for the
22 MDT purpose, and so we say that that is too high a fine, and for what it is worth say the
23 £580,000 and we certainly say £1.5 million for Mr. Shorthouse’s telephone call is far too
24 much.

25 So the issues that I will address here are what I will call “the burden of proof” – it may
26 sound rather strange, but I will explain that in a moment, what has been shown in this case.
27 Secondly, the correct approach to discretionary fines generally; and thirdly, the place of the
28 OFT in the UK regime for deterrent penalties, that is the comparison with criminal law,
29 paras. 62 to 65 of the Notice of appeal. Then I will deal with the two specific issues;
30 equality of treatment and duration.

31 I apologise, particularly to Mr. Unterhalter, that the first three of these points are essentially
32 the same as points I took in relation to the Sol case on Tuesday, but given that this is a
33 different Tribunal I think I should make those points, even though assiduous readers of the
34 CAT transcripts may have seen some of this before.

1 The first point: the burden of proof and what has been shown, we say that a fundamental
2 defect in the overall decision, so the decision, viewed as in its full 2000 page glory, is that
3 the OFT fails to recognise the limited nature of what it has established in this case. First,
4 and this applies generally but to this case in particular, it has not established any form of
5 multilateral infringement in contrast to many of the cases that it relies on as comparators in
6 relation to fines.

7 Secondly, it has not established any form of consumer detriment in the large number of
8 individual cases that it has chosen to pursue. Each case is, in effect, treated as a *per se*
9 breach of the '1998 Act. Thirdly, it has not established any form of continuing
10 infringement. Fourthly, it has not established any meeting of minds that would have
11 precluded the recipient of the confidential information from putting in a competitive bid.
12 The OFT has simply relied on evidence of the bilateral supply of confidential pricing
13 information, sufficient in itself for the imposition of a heavy deterrent fine.

14 Fifthly, it has made no findings as to the state of mind of any of the individual addressees of
15 the decision. It treats the large number of discrete infringements as justification for a heavy
16 fine in every case. But, the fact that a practice is commonplace, such as driving above 70
17 miles an hour on the motorway may indicate a widespread feeling that the law is unrealistic
18 and not to be taken too seriously, whether rightly or wrongly, rather than as evidence of an
19 endemic practice warranting heavy fines. In such cases a rational enforcement policy
20 might well be to focus on serious breaches such as driving above 90 miles an hour rather
21 than a ferocious and indiscriminate clamp down on trivial cases. These are all important
22 factors that the Tribunal will wish to bear in mind, but the OFT is deaf to these points in its
23 pleaded case.

24 So far as the specific case of North Midland is concerned, these points are reinforced by the
25 isolated and ephemeral nature of the OFT's findings and North Midland's unchallenged
26 evidence that the policy of the company was not to engage in such practices. These points
27 are independent of, though clearly related to the issues of liability that I have already
28 addressed. The only evidence of allegedly unlawful conduct relied on by the OFT is the
29 two incidents in 2001 and 2004.

30 Finally on this point, the OFT places some reliance on the *Apex* judgment of the Tribunal
31 and, in particular, paras. 251 to 252 at tab 46 of bundle 3, pp. 94 to 95. However, the
32 summary at para. 252 in *Apex* shows that the Tribunal considered the actual facts in that
33 case with some care. Insofar as para. 251 is relied on by the OFT as a simple formula that
34 applies indiscriminately to all cases of a cover price, then North Midland respectfully

1 submits that it should be viewed with caution, and we note that the fine in Apex was, I
2 think, £35,000 which we would say is consistent with the level of the fine in the Nottingham
3 House case, which we do not challenge.

4 I turn secondly to the issue of discretion in imposing a penalty. The Tribunal will have
5 noticed two quotations at the start of the skeleton argument setting out two fundamental
6 principles derived from Greek moral philosophy and Greek mythology. To translate these
7 principles in to propositions of law, one might say that they are very early articulations in
8 Western thought of the following ideas. First, a discretionary exercise of ethical judgment
9 cannot be reduced to a system of rules however elaborate, and obviously in this case it was
10 not very elaborate at all, we simply got 0.75 per cent just by exercise of a pocket calculator,
11 and treating different cases the same can be just as unfair as treating equivalent cases
12 differently. These cases are fundamental to all the appeals before the Tribunal and the
13 decision, we would say, is radically flawed in failing to observe these basic maxims.
14 In more concrete terms, and as explained in detail in the notice of appeal in skeleton
15 argument, the fining mechanism used by the OFT is intrinsically incapable of generating
16 fair results in that it is a system of rules - not the application of judgment to the particular
17 facts. The elaborate nature of the OFT's fining machine in some cases, though not in this
18 one, does not change that basic fact.

19 So far as the point about the Bed of Procrustes is concerned, the adjustments made by the
20 OFT bear a marked resemblance to this mythical villa with adjustments up and down being
21 made not to reflect differences between individual cases, but to fit all the cases into a pre-
22 ordained framework.

23 Turning to the role of the Tribunal, it is clear from the *Napp* judgment, approved by the
24 Court of Appeal in *Replica Kits*, that the Tribunal is exercising an independent discretion on
25 a case by case basis. In some cases, of which *Replica Kits* is an example, the Tribunal will
26 no doubt wish to form an overview of a multi-lateral infringement. Here, by contrast, the
27 Decision concerns hundreds of essentially unrelated bilateral infringements. In those
28 circumstances, although there is a common element in the character of the conduct
29 involved, the Tribunal's role is to set the individual fines at a level that it considers fair in
30 the individual case. Its role is not, contrary to the OFT's apparent understanding, to
31 sanction or to amend in some way the elaborate mechanism devised by the OFT.

32 The third issue - penalties for breaches of the 1998 Act as part of the British penal justice
33 system is, in a way, quite a radical submission. I know it has been mentioned by one or two
34 other appellants. Although I, and others, appearing before the Tribunal in these appeals,

1 have been, and will undoubtedly continue to be, strongly critical of the Decision, its highly
2 unusual character and the multiplicity of appeals to which it has given rise offer the
3 Tribunal what is likely to be a unique opportunity to set the OFT's fining policy on a more
4 rational and lawful basis. The Tribunal will be aware that the approach of the OFT in this
5 and other cases has given rise to widespread concern that the OFT has lost its bearings and
6 appears to be adopting an increasingly arbitrary and unprincipled approach to its
7 jurisdiction. One sees that if you compare this case with the recent *Tobacco* case, which I
8 think has recently been published, from which you see that Shell (who I think has a global
9 turnover of something over \$400 billion) has emerged with a fine of £3.5 million, whereas I
10 think the MDT approach used in this case for the telephone call would have -- That is for a
11 two-year infringement which is held to be very serious -- If this approach had been applied
12 to Shell I think they would have walked away with a £2 billion fine. So, it is very difficult
13 to see how a rational fining policy could treat small companies in the UK building trade so
14 much more severely for ephemeral infringements than it has treated much larger companies
15 for much longer infringements.

16 In assisting the OFT to get back on track I would respectfully submit that a valuable source
17 of guidance is to be found in the long-established and common-sense principles adopted
18 under the English criminal law which, like competition law, is centrally concerned with
19 issues of punishment and deterrence. However, in accordance with common-sense and the
20 considerations which I have just mentioned in relation to discretion, the criminal law uses a
21 broad set of discretionary principles including, where appropriate, guidance as to tariff
22 penalties - not a baroque fining machine of the kind devised by the OFT in this case. As the
23 most obvious comparator to the present situation we provided the Tribunal with both case
24 law of the Court of Criminal Appeals and very recent and authoritative and administrative
25 guidance to the criminal courts in respect of corporate crime resulting in death to members
26 of the public, i.e. the most serious form of corporate crime. We say this is of value for two
27 reasons: first to confirm the obviously flawed approach of the OFT in its Decision and,
28 secondly, to indicate the absurdly over-inflated level of penalty imposed by the OFT in
29 these, relatively speaking, trivial and fleeting infringements of the 1998 Act.

30 The OFT is understandably keen to protect its own little bailiwick, but it has offered no
31 principled reason why that should be condoned by the Tribunal or the higher appellate
32 courts as necessary or desirable. North Midland would respectfully submit that there is no
33 sound reason why the OFT should have such an exorbitant fining jurisdiction.

1 If we look briefly at the cases, the first one is at Bundle 2, Tab 26. This is a case in the
2 Court of Criminal Appeals from 2000 dealing with, unfortunately, the death of a welder in a
3 silo operated by a pet food manufacturer. One sees the facts in the headnote. The
4 unfortunate fate of one of two technicians who went into a silo to repair a stirrer for which
5 they would use a welder which would heat the relevant parts to a high temperature. That is
6 in the middle of the first main paragraph.

7 “In the course of carrying out this process, one of the technicians apparently
8 suffered an electric shock”.

9 That was fatal to him. Then the findings which form the basis for the prosecution and the
10 conviction are towards the bottom of that paragraph.

11 “There was no system in place which alerted the technicians to the risks inherent
12 in their activities. The system had been in operation for there years before the
13 factory came into the ownership of the appellant company about three months
14 before the accident. The underlying cause of death was that welding with a
15 potentially lethal voltage was taking place in a confined, conductive and damp
16 environment. No proper assessment of risk associated with the activity had been
17 done and no steps had been taken to avoid it”.

18 There was an initial fine of £600,000. Then, on appeal, that was reduced to £250,000. The
19 Statements of Principle are summarised in the holding, and in particular in the middle of the
20 first main paragraph,

21 “The reported cases showed that fines in excess of £500,000 tended to be reserved
22 for those cases where major public disaster occurred, where breaches of the law
23 put large numbers of the public at risk of serious injury or worse”.

24 Then, towards the bottom,

25 “The court took into account the financial position of the appellant company who
26 had a substantial business with a considerable turnover generating pre-tax profits
27 of £40 million. Taking those factors into account the court considered that the
28 appropriate fine was £250,000”.

29 Then in terms of the reasoning, I would refer the Tribunal first of all to the reference to the
30 principles in the judgment of Judge Walsh on the next page in the first main paragraph. He
31 refers to principles set out in the Court of Criminal Appeals in a case called *Howe*
32 *Engineering*, and reference to aggravation and mitigation which is obviously familiar. One
33 sees that in that whole paragraph.

1 Then, in more detail, at pp. 4 through to the end of the judgment at p.6, and if you see the
2 third paragraph on p.4,

3 “The breaches had been going on for a considerable time . . . When sentencing,
4 the trial judge said that this was a very serious matter ... When one looks, he said,
5 at the aggravating features --”

6 Then, at the bottom, mitigating features and then the summary of the level of fines is on
7 pp.5 to 6, and in particular about two-thirds of the way down there is the reference picked
8 up in the headnote about ‘fines in excess of £500,000 tend to be reserved for a major public
9 disaster’. There is then the summary of the aggravating and mitigating factors. Then, over
10 the page there is reference to the financial strength of the company.

11 That was the approach that was taken in 2000. That needs to be seen in the light of more
12 recent high authority from the Lord Chief Justice, as he then was, which is in Bundle 4, Tab
13 59. Again, I will take this swiftly. Apart from the odd coincidence of the identity of the
14 party as against one of the addressees of the Decision, this is a case which concerned the
15 Hatfield Rail Disaster, which one sees at para. 1, in which 102 passengers were injured and
16 four lost their lives. In summary, the trial judge, Mackie, J., found this to be a very serious
17 infringement of the relevant legislation with a number of aggravating features, and
18 obviously the consequences being particularly disastrous. I think he also describes it as one
19 of the most serious cases of corporate negligence that he has had the misfortune to see.

20 The facts go through in some detail up to para. 21, but I think the statements of principle --
21 You will recall that there was reference to the *Howe* principles in the earlier judgment, and
22 they are set out at length at para. 22. In particular, sub-paragraphs (8), (10), and (11) set out
23 principles relevant to the fining of businesses.

24 “The Defendant’s resources and the effect of a fine on its business are important.
25 Any fine should reflect the means of the offender, and the court should consider
26 the whole sum it is minded to order the defendant to pay including any order for
27 costs.

28 (10) Above all the objective of the fine imposed should be to achieve a safe
29 environment for the public and bring that message home, not only to those who
30 manage a corporate defendant, but also to those who own it as shareholders”.

31 So, that is the approach. There is obviously a strong deterrent element there. Paragraph 25
32 sets out the grounds of appeal and then paras. 26 through 30 deal with the gravity of the
33 infringement. Then there is an issue in relation to comparison between *Balfour Beatty* and
34 *Railtrack* which is dealt with at paras. 31 to 38, and then the size of the fine is considered at

1 paras. 39 and 40. Then the court's decision is para. 40 through to the end of the judgment.
2 I draw in particular the attention of the Tribunal to paras. 42 to 44 - the characterisation of
3 the infringement and at the end of para. 42 the reference to deterrence and the approach of
4 the criminal courts there. Then, paras. 47 and 48 where the issue of proportionality and
5 discrimination is considered.

6 So, in my submission that is all helpful and useful guidance in relation to how a discretion
7 should be exercised to mark not only the disapproval of the court, but also to deter such
8 conduct in the future. In my submission, many of the considerations are recognisable, not
9 only from the OFT Guidelines, but from any reasonable exercise of discretion in this type of
10 area.

11 I do not know if the Tribunal has behind Tab 59, Tab 59A. That is simply a record of a
12 recent case where a fine was imposed on a company called Serco, who were responsible for
13 the Docklands Light Railway. I simply include it because it is in a regulatory field, brought
14 by the ORR, and where the fine of, I think, £450,000 is imposed for a negligence causing
15 death. Obviously, if you again compared that to the sort of fines we have here, I
16 understand, I think in another case in which Mr. Robertson was appearing, he indicated that
17 Serco's turnover was some £4 billion, and so an MDT fine on Serco would have been at the
18 level of £30 million. So, again, out by a very substantial factor from the approach that the
19 OFT has adopted in this case.

20 The final document I would like to show the Tribunal is the recent guidelines where these
21 cases are drawn together by the body responsible for issuing guidance to the criminal
22 courts. That is right at the back of Bundle 12 of the authorities - Tab 180. It is a guidance
23 document produced in February of this year. I think it is the first such guidance produced
24 pursuant to s.170(9) of the Criminal Justice Act 2003. (After a pause): Sorry. It is the
25 first guideline in relation to corporate offences. It relates to corporate manslaughter and
26 health and safety offences causing death. It is explained in the Foreword that,

27 "This the first offence guideline relating to sentencing organisations rather than
28 individuals, and concerns sentencing for offences where the most serious form of
29 harm was caused, the dealt of one or more persons.

30 The guideline takes a different form from that used for most other offences. It sets
31 out the key principles relevant to assessing the seriousness of the range of offences
32 covered which may involve a wide variation in culpability. Principles concerning
33 the assessment of financial penalties are also provided and consideration is given

1 to the additional powers available to a court imposing sentence for these
2 offences”.

3 I draw the Tribunal’s attention, first of all, to the contents page, factors likely to affect
4 seriousness, financial information, size and nature of organisation and level of fines. I think
5 those are the three principal relevant sections. I would draw the Tribunal’s attention in
6 particular to para.6 through to 9, issues relevant to gravity. It is fair to say that some of
7 these issues are obviously specific to Health & Safety, but many of them, in my submission,
8 are essentially readily transferable and indeed are similar to those identified by the OFT in
9 relation to gravity and indeed the EC Commission, such as the involvement of senior
10 officials, how systemic the issue was. Then 7 and 8 set out aggravating and mitigating
11 factors, some of which obviously are only relevant to death, but some of which are similar
12 to those you would find in the OFT and Commission guidelines, and the issues of principle,
13 in my submission, are essentially common.

14 In relation to financial information, one finds 15 to 16 setting out issues in relation to
15 turnover and profit and I know that the Tribunal has heard submissions from some
16 appellants in relation to that issue and the appropriate way that that should be dealt with a
17 fining case.

18 Then in terms of (d), level of fines, para.22 states that fines must be punitive and sufficient
19 to have an impact on the defendant, and then sets out indicators about the level of fines
20 which are somewhat above the *Friskies* case, as footnote 8 points out, but, in my
21 submission, are consistent with the approach of the Court of Criminal Appeals in *Balfour*
22 *Beatty*.

23 In my submission, this is something that the Tribunal should have in mind. We say it is
24 notable thought culpability, duration, aggravation, mitigation and financial strength are all
25 issues that are common to this regime and to the Competition Act regime.

26 We also say it is notable that it is at least arguable that the culpability, duration and gravity,
27 including consumer harm, are all much greater – I think it is more than arguable, it is clear –
28 than in this case, whereas the fines are in general set at a much lower level.

29 I should make clear that I am not saying that fines for abuse of dominance, for example, or
30 for a major multilateral cartel are subject to this approach or that they should be lower than
31 they are. There are obviously some very big players in the market and some very big
32 market consequences, although I note that the Court of Appeal reduced fines in the *National*
33 *Grid* case on specific facts. We do say that the issues of principle are common, the ones I
34 have already mentioned, and the underlying issues of proportionality and equal treatment

1 are also common. Perhaps most importantly, the need for judgment and the disapproval of
2 using any particular factor as decisive, in my submission, is highly relevant to this appeal.
3 We would also say that the level of penalty is here obviously inconsistent with that
4 approach and with principle and far too high.

5 Sir, those are the points we would make. I do not want to do Mr. Unterhalter out of his
6 time, but I think he essentially took two points against this approach when I put it forward
7 before, essentially that our case was too broad or too high level; and secondly, that there
8 was a difference here because one was dealing with multilateral infringements rather than
9 unilateral breaches of Health & Safety.

10 We would certainly accept that guidelines and principles of this kind must be applied
11 broadly and by reference to individual facts, but we would say that that has been approach
12 of the CAT since *Napp*, and is also consistent with the EU approach. We still say that it
13 reinforces the point that an individual assessment is needed, and that essential issues of
14 gravity, duration, aggravation, mitigation and deterrence are the guiding lights common
15 both to the 1998 Act and to a criminal fining approach, and we also say it gives an
16 important sense check on the level of fines in this case.

17 So far as the point that this concerns multilateral rather than unilateral cases, there is one
18 main answer, which is that we would say that it was wrong, as a matter of fact, that the OFT
19 guidelines apply as much to unilateral as to multilateral infringements, and they relate to
20 individual culpability. Indeed, the gateway requirement for a fine under the 1998 Act is
21 negligence or intention, which are subjective concepts entirely familiar to the criminal law.

22 Can I now turn to the two individual issues relevant to my clients, first of all, equality of
23 treatment: we say that the fining methodology used by the OFT has a perverse bias in
24 favour of those with multiple infringements and against those with fewer than three
25 infringements. As we note in para.68 of the notice of appeal, there are four addressees of
26 the decision, Balfour Beatty, Bodill, Strata and Thomas Vale, who have 20 or more
27 infringements identified, but they received a fine on the same basis as North Midland, in
28 that only one MDT is imposed, and only three infringements are fined, regardless of how
29 many there are.

30 Secondly, we make the point that the OFT based its decision to pursue individual cases on a
31 pattern of behaviour evidenced by at least three proven instances, and that is at para.1470 of
32 section II of the decision, which we have put in annex 3 of the notice of appeal. North
33 Midland has only two instances, and only one, of course, if our points on the evidence in
34 relation to the Nottingham case are accepted, and the OFT does not dispute that our

1 corporate policy was opposed to cover pricing, and we say that our fine should be reduced
2 to reflect these facts, and in particular that there was no pattern of behaviour in relation to
3 our cases as against many of the other addressees of the decision. If one looks at it in public
4 law terms we would say that the OFT could not simply ignore material factors relevant to its
5 discretion and the effect of its fining machine is to effectively disable it from taking those
6 sort of issues into account, because you get your 0.75 per cent regardless. There is no room
7 really for that sort of factor to be taken into account.

8 Then the final point is just a short point on duration, which we set out at paras.77 and 78 of
9 our notice of appeal. The only evidence we have is the evidence of this document that I
10 handed up of a scrappy telephone note which indicates that Mr. Shorthouse told Mr.
11 Clarkson of a price at some point on 4th May 2004, the day of the tender. There is no
12 evidence of any wider agreement on price, and no evidence of any knock-on effects if one
13 takes the *Beguelin* approach and looks at the counterfactual for what would have happened.
14 We are told that Admiral was too busy to price, and so it is difficult to know what would
15 have happened, whether they would have just put in a random price or whether they would
16 have dropped out, but the duration of any effect on competition, in our submission, was
17 very short, given that we were miles higher in any event and came third and Admiral came
18 fourth, and so the effect of any infringement was minimal, in terms of time as well as
19 substance.

20 We refer in this respect to *Aberdeen Journals*, which is at bundle 2, tab 37, and the fining
21 discussion is quite short and towards the end of judgment. It starts at p.137, and then at
22 p.140 there are findings in relation to duration, which goes through to para.477. They find a
23 one month duration at para.477. At p.143 there is a summary of the role of the Tribunal,
24 para.489 is a convenient summary of the approach, the Tribunal makes up its own mind and
25 adopts a broad brush approach with each case dependent on its own circumstances.

26 Then in relation to duration the findings are at paras.498 and 499. The Tribunal notes:

27 “... that Step of the Director’s *Guidance* permits the Director to increase the
28 starting point under Step 1 to take into account the duration of the infringement, in
29 particular where the infringement has lasted more than one year. However, there is
30 no comparable provision in the *Guidance*, at least explicitly, enabling the Director
31 to take into account a duration of less than one year. Although in this case the
32 short duration may be partly taken into account, indirectly, in the reduction of the
33 penalty for mitigating factors made by the Director under Step 4, we think some

1 more explicit recognition should be made of the fact that the infringement in this
2 case, as found by the Director, lasted only for one month.

3 In all those circumstances, and looking at the matter in the round, we think it right
4 to reduce the penalty imposed on Aberdeen Journals to £1,000,000, a reduction of
5 just under 25 per cent.”

6 We address the implications of this reasoning at para.83 of our notice of appeal, and we say
7 that if a one month duration warranted a 25 per cent reduction then we should have at least a
8 50 per cent reduction for duration. It is arguable that the duration of the infringement was
9 limited to the period of a phone call, in that there is no evidence of any actual impact, and
10 there is certainly none of any impact outside the tender exercise itself. Paragraph 83 of the
11 notice of appeal sets that out at slightly greater length and suggests that that, in itself, would
12 justify a reduction of the fine to £758,306.50, one half of the fine imposed by the OFT.

13 PROFESSOR STONEMAN: If I may interrupt there, I do have some problems in actually
14 understanding what is meant by the “duration of the infringement”. You say that it is the
15 five minutes it took to make a phone call. I could say it is the lifetime of the building that
16 was put up at a higher price than it might otherwise have been put up. How do you grasp
17 the idea of the duration of an infringement in a bid rigging process?

18 MR. THOMPSON: I think one needs to look at the individual facts. There are cases, or at least
19 the Tribunal has indicated that there are cases, as a matter of principle, where bid rigging
20 can have widespread implications which last for a period of months or even years in that the
21 people who are carrying on collusive activities are permitted to stay in the game, as it were,
22 and will, from time to time, take a cover price and there is a systematic distortion of what is
23 going on.

24 There are other cases, and we would say that these are notable cases, where really nothing
25 can be inferred about any wider implication. All you have is a case where the number three
26 bidder tells the number four that they are going to bid at £2.1 million, or if they bid above
27 £2.1 million they will be all right. The phone goes down, they do bid above £2.1 million,
28 neither of them get the bid. The actual bid that wins is £1.2 million, and if you ask the
29 *Beguelin* question, what difference did that make, a pretty feeble answer comes back. There
30 is nothing really that you can say.

31 Given that the burden of proof is on the OFT, how can you justify hitting someone with an
32 enormous fine when really nothing has been shown? All that has been shown is that
33 something which might have had an implication has been done, and so you impose a fine
34 because you say that is a bad thing to have done, this is potentially very bad, rather like

1 somebody driving at 90 miles an hour, but if nothing has actually happened or nothing can
2 be shown to have happened that is obviously relevant as against someone who has ploughed
3 in the in the back and killed 20 people on a bus.

4 At the level of fining, in my submission, it is relevant to show what actually has followed
5 from any infringement, and here all we say is that nothing has really been shown to have
6 followed.

7 PROFESSOR STONEMAN: Yes, but that is getting away from the point. When we are talking
8 about events, bidding competitions, does it make any sense to talk about duration? If we are
9 talking about discrete events, how does that translate into durations?

10 MR. THOMPSON: I thought I had been answering the question. I obviously have not.

11 PROFESSOR STONEMAN: Your answer has really not got to the heart of what I was saying.

12 MR. THOMPSON: I do not think it is the duration of the building. I do not think you will get a
13 bigger fine if your building was going to stand 100 years than if it was a pavilion for the
14 Olympic Games and was going to be knocked down in a month's time. I think it is the
15 effect on competition and I think that is the point that is made in *Aberdeen Journals* that
16 predatory pricing, even if it only lasts for a month, is still a serious infringement because if
17 you drive somebody out with your predatory pricing, that effect could last for years, or
18 indefinitely. If, every time somebody comes in you bang your prices down and they go out,
19 that can have a major economic effect, even though each individual incident may be very
20 short. But here, you have still got to look and see, and all we have is Mr. Shorthouse and
21 Mr. Clarkson, a price going in, somebody else winning the bid and that is it, nothing else
22 has been shown. That is obviously partly the appreciability point again. But in my
23 submission it is also relevant to the level of fine that should be imposed, and the duration of
24 any infringement.

25 PROFESSOR STONEMAN: Earlier you were perhaps playing on our sympathies by describing
26 North Midland as a small Midlands building company, I believe. With the figures in front
27 of me, I understand that their turnover in the year ended December 2008 – the group to
28 which they belong – was £200 million. This is on Notice of Appeal tab 3 in the fining
29 schedule. A company with £202 million turnover does not sound to me like a small
30 building company. Could you explain to me?

31 MR. THOMPSON: I cannot remember exactly what words I used. It obviously is as big as it is.
32 The reason why its fine is what it is is because it is 0.75 per cent of its global turnover.

33 PROFESSOR STONEMAN : Is it a small building company or not?

1 MR. THOMPSON: Unfortunately, I have not got the table of where it sits. That is largely
2 reflected in the absolute level of fines. I do not know where it sits in the threshold of
3 building companies. But it is true that £1.5 million equates to £200 million in turnover.
4 That is how big it is.

5 May I simply say by way of conclusion the OFT challenges North Midland and the
6 appellants to propose an alternative methodology that would be fairer than the approach
7 actually adopted. I think a number of appellants have questioned whether this is a fair
8 challenge to put to an individual appellant. I would make the following observations. First
9 of all, we accept (as I have indicated) that £27,000 is a fair level of penalty, if its points on
10 our evidence and appreciability are rejected in relation to the Nottingham House decision.
11 We would consider that a similar fine in relation to the other case would be equally
12 appropriate for an ephemeral infringement with no apparent impact on competition.
13 Alternatively, as I have just indicated, we consider that at least a 50 per cent reduction for
14 duration would be appropriate.

15 However, our main submission is that this is a case for the exercise of discretion by the
16 Tribunal. If that approach were adopted we are confident that a fair and reasonable
17 outcome would be achievable without difficulty, and a much lower level of fine would be
18 considered appropriate.

19 In the *Sol* case I did suggest the possibility of a tariff penalty, which would be, from the
20 implication of what I have suggested, in the £25,000 to £50,000 infringement, although it
21 could obviously be uplifted or reduced, for example, for recurrent infringements or if there
22 were aggravating features such as compensation payments. Mr. Unterhalter, perhaps
23 understandably, criticised this as a *volte face*. But we submit that that would be a way, a
24 pragmatic form, of equality which is familiar from summary criminal offences where it is
25 not thought cost effective to go into detail of hundreds or thousands of minor offences – the
26 most notorious being parking fines. But I think it is more consistent with my case in
27 general and with that of the appellants that the numbers are not so huge here that the
28 Tribunal could not reach a reasoned view on its conventional broad brush basis and impose
29 a fine in the light of these specific facts about the company and the infringements involved.
30 Sir, those are the points I wanted to make, unless there are further questions. I am happy to
31 hand the floor to Mr. Unterhalter.

32 THE PRESIDENT: Thank you very much, Mr. Thompson. Mr. Unterhalter, are you happy to
33 have a quarter of an hour now?

34 MR. UNTERHALTER: We would like to open the batting, if we could.

1 THE PRESIDENT: Right.

2 MR. UNTERHALTER: Might we proceed immediately to the first point on liability, and the
3 question as to whether the evidence provides sufficient to meet the burden addressed upon
4 the OFT. In order to commence that analysis, may I ask that you turn to tab 12 of the
5 Notice of Appeal which is simply, in my version at any rate, a slightly clearer version of an
6 identical document to which my learned friend took you. It is the tender sheet that Bodill
7 comments on. May I ask you to consider what is contained on that tender sheet in the light
8 of the full explanation and summary that is given to that document in the Decision and the
9 treatment of the matter at Part IV para.229 and thereafter.

10 This is the portion of the Decision where the interviews from the transcripts with Bodill are
11 to be found. It gives an explanation of the tender sheet and some of the evidence that was
12 procured for the purposes of understanding the tender sheet.

13 May I take you first to the document at tab 12, just to examine some of its features. The
14 first is that you will see in the large square block under the month entry of Monday 22nd
15 January 2001, a listing in blocks from 15 down to 31 and then from 1 to 22. The
16 explanation that is given of that is that that reflects the number of days to the final date on
17 which the tender must be submitted. That has some significance in that the location of the
18 question mark, which is really at the heart of what the appellant wants to say renders this
19 document ambiguous is located, as it were, within the counting of the calendar days. What
20 one sees immediately to the right of those days is a block numbered 1 to 7 and that deals
21 with the tenderers.

22 What the evidence indicates from those who drew up this document, (and this, we would
23 want to indicate, is not simply a question general explanatory material) those could identify
24 their handwriting were identifying it in respect of this tender and this document, not only by
25 way of the general means by which cover pricing took place, but as I shall show you, what
26 is listed in this part of the document are those parties whom, through market intelligence or
27 other kinds of contact, were indicated as those who were seeking to tender for the job. One
28 can see why that is so, because if one looks at the names, some will be familiar (Bodill,
29 Tomlinson), and then one sees Frudd. Frudd does not appear as one of the parties who
30 actually tendered. There were six parties who tendered but Frudd was not one of them.
31 So just as to an assessment of probabilities (which will be the ultimate task of the Tribunal)
32 it would be something of a curiosity if this was an ex post effort to determine who had
33 tendered and at what level that a party that had not tendered was listed in the list of
34 tenderers. The explanation, as one will see from Bodill, is: on the contrary, that what is

1 being compiled here are those who appear to be interested in tendering on the basis of
2 market information, often through subcontractors and the like, and sometimes because
3 phone calls are being made to procure a cover price.

4 One sees that in respect of Tomlinson there, as opposed to Frudd which was simply one of
5 those indicated to be a potential tenderer, a common form of notation. Next to Tomlinson
6 there is the “c from us” and Mr. Thompson, and then again one sees similar notations in
7 respect of North Midland, Woodhead (again with contact numbers) and Woodsend “c ?
8 from us”.

9 The question mark, and this was the basis upon which that particular infringement was
10 ultimately not pursued by the OFT, was that because the evidence of the people from Bodill
11 was to the effect that where a question mark was inserted in that form in respect of a cover
12 price, what it indicated is some doubt in respect of a cover price having been granted. So
13 there is neither facially, in how one reads this document, nor against the explanation to
14 which I shall come in a moment, any reason to think that the hanging question mark which
15 is to be seen to the left of the document and next to the 22nd of the month, has any bearing
16 on the question as to whether there was a doubt as to whether North Midland did or did not
17 seek a cover price.

18 Then, reading further, one sees seventh in the list is Craske. There there is no reference to a
19 cover price. Indeed, that was the party to whom the tender was awarded. So if one has
20 regard to the decision (at Part IV from para.1484 but particularly at 1485) one will see there
21 is a summary given of those who tendered and the outcome of the tender.

22 THE PRESIDENT: I am sorry, can you give me a page, Mr. Unterhalter?

23 MR. UNTERHALTER: Yes, it is page 678.

24 THE PRESIDENT: Thank you.

25 MR. UNTERHALTER: If one has some regard to the amount of the tender and one compares the
26 amounts that are indicated – and here, perhaps I could direct your attention under tab 12 to
27 the middle column – one sees that there is a listing from 1 to 3, and then there is a fourth
28 entry. One sees the numbers there indicated increase in value. So one starts with the first
29 which has got the round circled item next to Tomlinson and that is £310,400. Then one sees
30 £319,999 which is North Midland, and then it goes up to £324,015 under 3. That too is a
31 matter upon which the witnesses who were interviewed by the OFT explained that that
32 sequencing has a significance in and of itself which is that when it is decided what cover
33 price to give, the keenest price, as it were, is given to the first party that sought a cover

1 price. One sees that reflected in the ascending values of cover prices that is reflected in that
2 middle column.

3 If one then looks, for example, at North Midland, one sees how very closely correlated the
4 actual price is that was tendered - £319,988 – and the cover that was given to them,
5 £318,999. Similarly, in respect of Tomlinson one sees there is just a very small increment
6 of £83 in respect of the correlation between these two. One can see similarly that there is
7 little variation between the amount tendered and the cover prices indicated in respect of the
8 other parties.

9 That, taken together suggests that there is a method behind what is represented here that is
10 not simply brushed off by way of saying: “There is a question mark, and there is some
11 requirement that the treatment of that question mark for the purposes of the way in which
12 Woodsend was dealt with must apply with equal force to North Midland”, and that is
13 because there is (i) no spatial relationship which suggests an identity of treatment, just as a
14 matter of the construction of the document facially, but if one then goes to see what is said
15 both as to method and as to the fact that this document is itself precisely indicated as one
16 that was completed by the two persons who came to give evidence, there is therefore both a
17 general explanation which coheres with what is seen on the document, and any
18 identification of this document having been filled out by the two persons. All of that taken
19 together we submit gives rise to a very strong case as to what happened here and why it was
20 that there was in fact a cover that was given to North Midland and it led to them making the
21 tender that they did.

22 Could I then just refer you to some of what is said by the persons who were interviewed by
23 the OFT and that should be seen alongside the explanatory note which is at tab 13 of the
24 notice of appeal. This explanatory note was provided by the solicitors of Bodill, and then
25 the two persons, Mr. Rosental and Mr. Wraith came in and addressed that document, and
26 then spoke to the specifics of the tender which we have just been through.

27 If I can refer you to Part IV, and the treatment of this matter commences at para. 229, p.442
28 of the decision. It indicates who was interviewed, so it is Messrs. Bodill, Rosental and
29 Wraith. Then at para. 230:

30 “A tender sheet was completed for each contract for which Bodill was invited to
31 tender. DW explained that ‘*In 99% of the cases*’, he would prepare the tender
32 sheet. On the few occasions when DW did not prepare the tender sheet it would
33 be completed by either JR or AB. When preparing the tender sheet DW would
34 write on the tender sheet the date of the tender submission, a calendar countdown

1 to indicate the number of days that Bodill had to price the job, the name of the job,
2 architect and quantity surveyor.”

3 So there is an identification of those calendar days which is where the question mark is
4 located, and then: “Each tender sheet was given an in house File Number.” Then para. 231:

5 “Bodill stated that the tender sheet included a section headed ‘Tenderers’ which
6 provided space to insert the names of other companies tendering for the contract.”

7 THE PRESIDENT: When it says “Bodill” there does it mean “Mr. Bodill”, or does it mean
8 “someone at Bodill”?

9 MR. UNTERHALTER: I think it is simply referring to the firm itself; this is the manner in which
10 they did things.

11 THE PRESIDENT: Someone stated it but it does not say to whom they refer.

12 MR. UNTERHALTER: That statement is drawn from the explanatory note, if one has regard to
13 the footnote, so that is part of what is contained in that explanatory note.

14 “Initially, DW would enter the names of any competitors he knew were going for
15 the job in this section against the numbers 1 to 6.”

16 -which is exactly the account that I have sought to summarise for your purposes.

17 “As the job progressed DW along with AB and JR would also fill in names of
18 other tenderers when this information was forthcoming. DW said that *‘a lot of it*
19 *is my writing but, the other two would put on as well if they received information.’*

20 These names were inserted when intelligence was obtained by staff in the
21 estimating department, during the tender process. Bodill stated that this
22 intelligence was obtained by telephone when asking sub-contractors and suppliers
23 if they wished to price the tender, or when chasing quotations prior to completion
24 of the estimate. RB stated that Bodill may also have found out about other
25 companies tendering for particular tenders through organisations such as the
26 Builders Confederation ...”

27 So there is an assemblage of market intelligence, as it were, from different sources to try
28 and complete as full a view as possible as to who is tendering and that is the listing that
29 takes place.

30 Then there is an account that is given of Bodill giving cover prices at para. 232:

31 “In statements provided to the OFT as part of its leniency application and
32 confirmed in the subsequent interviews with the OFT, all of Bodill’s employees
33 involved in the preparation of tenders confirmed the procedures followed for all
34 tenders.”

1 - and then it explains how the process would work for tenders that Bodill wanted to win,
2 and there is an explanation there.

3 “233. In tenders where Bodill was giving a cover price, Bodill stated that the
4 ringed letter ‘C’ against another company who was tendering and the words ‘from
5 us’ indicated that Bodill was giving that company a cover price. The figure Bodill
6 gave that company as a cover price was usually written on the tender sheet beside
7 their name. The numbers ‘1’, ‘2’, and ‘3’ indicated the order in which Bodill was
8 approached by the other companies for ac over price and the first to approach
9 would get the lowest price and so on.”

10 - precisely the ordering that I sought to indicate to you.

11 “If a competitor wanted Bodill to provide a cover price the phone call would be
12 directed to the estimator dealing with that job and AB explained that, *‘so it’s put
13 through to me, I’d say, yes, Okay, we’ll contact you nearer... nearer the date’*.
14 JR explained that at the tender adjudication meeting, *‘we settle the tender, and
15 then we would fill in the tender sum analysis’* and that between the tender
16 adjudication meeting and the submission of tender, *‘we would put in any figures
17 that, we would give in as help’*. AB confirmed that at the tender adjudication
18 meeting it was decided what price Bodill was going in at and he confirmed that
19 the cover prices would be annotated on the tender sheet between the tender
20 adjudication meeting and the actually submission of the tender.

21 234. AB further explained that DW would normally have made the phone calls to
22 a competitor to provide the cover price, *‘purely because the estimator normally
23 hand delivers the tender ... so David would be in the office and we’d say, can you
24 just ring this through to so and so’*. DW confirmed that the relevant would tell
25 him the cover price to give the following tender”

26 - and so on and so forth.

27 So there is a very clear system at work here, which both explains the notations and the
28 document, the tender sheet at tab 12, it explains the compilation of prospective tenderers, all
29 of which is intended to inform the decision as to what level Bodill itself will tender at, but
30 then having made that determination they then have had indications of who seeks a cover
31 price, or who has sought a cover price and they are then rung round in ascending order by
32 value those who come in are then given a price as one sees.

33 We submit that on that evidence as to how Bodill proceeded, and the confirmation of the
34 entries that are reflected in the tender sheet, that is a very powerful set of indications that

1 North Midland was indeed given a cover price, and one sees the correlation between that
2 price and the tender that was submitted by North Midland.

3 Would this be a convenient time?

4 THE PRESIDENT: Thank you very much. 2 o'clock.

5 (Adjourned for a short time)

6 MR. UNTERHALTER: If I may then continue to indicate why the burden of proof was amply
7 met in this case in our submission.

8 The second category of evidence that was important for the OFT in making a determination
9 in this matter was, of course, that two of the other parties that are indicated on the tender
10 sheet - that is to say, both Tomlinson and Woodhead themselves confirmed that in respect
11 of this bid they had in fact received a cover price. Those matters are dealt with in the
12 Decision at IV.1496 where Tomlinson's position is dealt with and then, at 1499 where
13 Woodhead is dealt with. Although they cannot cast specific light on the matter they accept
14 that in respect of these matters they were engaged in bid rigging activities on this tender, but
15 cannot recall details of the other party or parties involved.

16 There are then admissions from others who had received cover prices that they in fact did
17 so. It is hard to understand that the notations which appear on the tender sheet which have a
18 repetitive form of notation, as explained in the explanatory note. In respect of Tomlinson
19 the notation appears, in respect of Woodhead it appears. The contact person is mentioned in
20 both instances; but North Midland, where an identical notation is utilised, it is said by
21 North Midland that, no, this is in all likelihood post-tender information that was procured by
22 Bodill. That is the second category of evidence which, in our submission, is important in
23 confirming what was happening in this case. Of course, it has the consequence that at least
24 three of the parties who were tendering were then influenced by cover pricing which is a
25 significant feature for what had occurred to the authenticity of the bidding process, a matter
26 to which I shall return.

27 As against the evidence that Bodill has given, both to explain the sheet itself and what lies
28 behind it and the confirmation of the notations that are made there by those who wrote
29 them, we have the account that is offered by North Midland, and that is to be found perhaps
30 most helpfully in the annex to our learned friend's skeleton argument, where the various
31 statements are captured. My learned friend took you to those, but in essence they really
32 amount to three propositions, and perhaps I could ask you to turn up Mr. Evans's statement.
33 In essence, there is a very generalised claim here that cover pricing was not part of the
34 policy of this undertaking.

1 THE PRESIDENT: Are you going to be more specific as to where it is?

2 MR. UNTERHALTER: I am sorry, it is an annex to the skeleton. It is annex 2 to the skeleton.

3 There will one see Mr. Evans's statement that was made available. Under "General", which
4 is item 1, is a very general account that this was not part of the policy of the company.

5 Plainly the OFT is no position to suggest that it was a matter of policy of the company, but
6 the fact is that there are many policies in companies which are simply not adhered to for a
7 variety of reasons and this is simply another instance, we would submit, of that possibility.

8 We submit that nothing on the probabilities really turns the matter in favour of this
9 appellant simply because there is a policy. It is something easily said, but the real question
10 is how is that policy enforced, and was it enforced in the particular instances that are
11 relevant here?

12 As to what is then said concerning the particulars of this tender, it is suggested that there
13 were reasons why this was an occasion where indeed the company wanted to bid. It tracks
14 some of the reasons why that was so. Among the things that is said is that under (e):

15 "Chris Wheelhouse remembers pricing this job and 'billing' it, and recalls visiting
16 the site on at least two occasions to meet specialist trades including tower crane
17 hire companies ..."

18 and the like.

19 Of that matter the OFT considered that in coming to its decision and what it said of that is
20 that there are instances in which an undertaking may commence preparations for a tender,
21 but that does not mean that it follows through and actually puts in a genuine unilateral bid.
22 It may choose for a whole variety of reasons to do otherwise. Whilst it may well be that
23 they set upon starting to bid as if it was going to be a genuine unilateral bid that does not
24 mean that it was taken to finality.

25 Then could I ask you to turn the page, there is note from Mr. Wheelhouse himself and he
26 says in the second paragraph:

27 "However, I do not have any recollection of taking a cover price on this project or
28 any project during my current employment, as it is not, as I have always
29 understand to be company policy/practice to apply such methods according to my
30 knowledge/experience.

31 As a conclusion, I can only think that this is a post contract exchange of
32 information."

1 I have dealt with the suggestion that, of the probabilities, is it a post contract exchange of
2 information? On the probabilities, given all the detail that is contained in the document,
3 that is not a plausible suggestion, and it is offered as no more than a speculation.

4 May I return to what Mr. Wheelhouse says in his second paragraph. There he is affirming
5 that this was no part of what he did. In that regard, could I ask you to turn up Section IV
6 para.5244 p.1340. This is the portion of the Decision where the second of the infringements
7 is being considered, that is infringement 190, which is the cover pricing as between Admiral
8 and North Midland. You will see that at p.133.

9 May I just read to you what the witness evidence from Admiral was. It says this:

10 “AC confirmed in his interview that it was his handwriting on the handwritten
11 document and that, *‘it was the back of a telephone pad, by the look of it, that I*
12 *took a message on, from Martin Shorthouse, who I suspect had given me a ring*
13 *to tell me what our figure was on that particular contract.’* AC also confirmed
14 in respect of Martin Shorthouse at North Midlands, *‘Yes, he’s the guy that I*
15 *always spoke to.’* AC confirmed that ‘NMC’ on the document stood for ‘*North*
16 *Midland Construction*’.”

17 In our submission, what this testimony tends to indicate is that far from this practice being
18 one that as a matter of policy was never given effect to within North Midland, it appears
19 that there was somebody who was spoken to, “I always spoke to”, and therefore the
20 indication is that whatever more senior management may have thought, there appears to
21 have been something more than a single instance or two of cover pricing going on within
22 this undertaking.

23 In our submission, that is relevant context for an assessment of the probabilities in the
24 statements that are made and are perhaps all too easily made, to suggest that this practice
25 was simply not followed. We know that cover pricing is something that was endemic in
26 this industry. It was done on the basis of telephone calls and approaches of a kind that are
27 described in the Bodill evidence. In our submission, that does very little to alter the overall
28 probabilities.

29 So when it comes finally to a consideration of what is the case that suggests an alternative
30 explanation that is plausible for the consideration of the Tribunal, it really is a hanging
31 question mark which is situated in the wrong place and tells no apparent story in relation to
32 cover pricing where there is a particular form of notation which is relevant. Even in that
33 regard it is, perhaps in our submission, worth reflecting, that in the explanatory note there is
34 reference to what the question mark means when it is connected to a circled C. That

1 appears under tab 13 of the Notice of Appeal, but one can see under “Generally” a ringed C
2 followed by a question mark means:

3 “We are not sure that a particular contractor is actually tendering or taking a
4 cover price from others.”

5 That appears to be the key to a particular form of notation with the question mark.

6 THE PRESIDENT: It indicates a ringed C can be associated with something that is not a cover
7 price.

8 MR. UNTERHALTER: It means that it reflects uncertainty that a particular contractor is actually
9 tendering, or are taking a cover price from others, in other words that somebody else is
10 giving them a cover price, there is that possibility. In other words it is possible that one
11 gives a cover price but one learns that they are actually not after all going to tender, that is
12 one possibility. Alternatively, that they have received a cover price from another party
13 because all of this of course is intended to be information that is compiled for the purposes
14 of trying to work out what your opposition is in the market and what are they likely to be
15 doing in respect of tendering that is about to happen. Again, it is all consistent with the fact
16 that this is not an *ex post* recitation of prices. One or the other observations that the OFT
17 makes on the probabilities is that it would be peculiar if we were simply tabulating the
18 prices that were in fact offered because what is reflected here is not consistent with the
19 actual prices that were offered. There are variances, and those variances really are much
20 more obviously explained by the fact that cover prices were given, and then when it came to
21 actually tendering there was some slight variations as between the cover and the actual price
22 that was put up by way of that tender.

23 So there is the hanging paragraph on the one hand, and then there are these rather general
24 and bland statements as to policy and the fact that there were reasons why this could have
25 been a contract that this undertaking would have wanted to tender on, not that it did and that
26 it can be said with absolute clarity that this was the result of unilateral tendering, but simply
27 that there are factors that would have made it the kind of contract that was worth tendering
28 for.

29 PROFESSOR STONEMAN: Can I pick up on a couple of things? One is that on this tender
30 sheet to which you have just been referring do you have an explanation for the question
31 mark between the two 22s?

32 MR. UNTERHALTER: No, we do not.

33 PROFESSOR STONEMAN: The other point is that you said a little while ago in this quote from
34 AC “Martin Shorthouse, yes, he is the guy that I always spoke to”.

1 MR. UNTERHALTER: Yes.

2 PROFESSOR STONEMAN: It does not say that he is the guy he always spoke to about tender
3 cover prices.

4 MR. UNTERHALTER: It is true.

5 PROFESSOR STONEMAN: There could have been a lot of conversation between these
6 companies, they could have a lot of conversation after the bids are closed – “Who won it?”
7 – and as you have already shown us there is a lot of conversation – “Who is in the tendering
8 process?”

9 MR. UNTERHALTER: Just to be clear, we are not saying that it is conclusive evidence, it is
10 simply that it is said in the context of specific questioning concerning cover pricing. So in
11 other words: “This is the person that I am usually dealing with”, now we would accept ----

12 PROFESSOR STONEMAN: I am not sure it says that actually.

13 MR. UNTERHALTER: But in general terms we would accept that that person may have been a
14 contact for a whole variety of purposes not solely cover pricing. It is simply that
15 contextually what seems to be indicative from that quotation is that it is specifically in the
16 context of referring to cover prices, “Yes, that is my person on the side”, we do not place
17 huge emphasis on it, it is simply another part of the evidence that you would have regard to
18 for the purposes of considering what inferences are to be drawn from it.

19 THE PRESIDENT: You say “evidence”, and I have made this point before but I just make it
20 again for the record, and no particular point seems to be taken by Mr. Thompson about it,
21 we do not actually have any evidence – what one would normally call evidence – from
22 anyone at Bodill in fact, or for Midland ** for that matter. You have your summary which
23 sometimes just refers to “Bodill” the company stating things, it does not say who actually in
24 the company said them. We have recorded statements in the decision, we have some notes
25 of interview on one matter, unsigned, we do not know whether they have been checked or
26 verified by the person for whom the interview was being recorded. We do not have any
27 witness statements signed with statements of truth or anything of that kind. Speaking for
28 myself, I do not find that this is a very safe way to proceed - even when you are taking
29 administrative decisions. I would have thought that when you have got a leniency applicant
30 there, he is willing, for all sorts of reasons, to be forthcoming. The safest thing would be to
31 have taken a witness statement from him and got him to confirm it with a signature, and get
32 him to confirm things. Because half the things in the interview are very leading questions
33 and in some cases the answer is a ‘Yes’ to very leading questions. I am making this as a
34 general comment really. But, it applies, to some extent, in this case too. I just make that

1 point in case there is anything you want to say about it. I am not inviting any submissions,
2 but ----

3 MR. UNTERHALTER: If I could make a very few brief submissions about this? The first is
4 that this evidence is assembled in an administrative process. Hence it is neither, and nor is
5 it intended to be, a highly formal procedure.

6 THE PRESIDENT: You say that, but you have given a warning that they can be prosecuted if
7 they say anything that is untrue. You give them a caution at the beginning of the
8 interviews.

9 MR. UNTERHALTER: Yes. That is so.

10 THE PRESIDENT: That sounds quite formal to me.

11 MR. UNTERHALTER: It is intended to do two things: the first is that it is intended to ensure that
12 those who answer tell the truth. The second thing that it is intended to do is to ensure that
13 there is an ability to go back and forth in questioning in a way that is somewhat exploratory,
14 which is relevant to an investigative process rather than a formal forensic process that might
15 be more applicable in other settings. So, whilst we recognise that one has to yield up
16 evidence that has value, we submit the value in the testimony is that those who know the
17 consequences of untruths, and therefore it has inherent reliability, it lacks without question
18 some of the formal guarantees that would be more applicable to a different forensic process.
19 That is our first submission.

20 Our second submission is that for the purposes of the Tribunal its jurisdiction for the
21 purposes of considering these questions is still to determine as an appellate Tribunal
22 whether an error has been made in respect of what the OFT has done in respect of its
23 assessment of the evidence before it. In other words, it is not that this becomes the forum
24 for proof de novo of liability questions, but the issue remains what can one say of the
25 evidence that is served before the OFT with such frailties as it may have had.

26 THE PRESIDENT: Yes and no. There is no opportunity for a defendant, as I were, for a suspect,
27 whatever you want to call them, to cross-examine any witnesses at an administrative stage.
28 This, in fact is the only forum where, actually, the evidence can be tested by anyone other
29 than the judge and prosecutor. Plus, you accept, and rightly so, that the burden remains on
30 you at the appeal stage to satisfy the balance of probabilities. Thirdly, we are dealing here
31 with something which is not trivial - these are serious matters as witnessed by the level of
32 fines. So, I am not suggesting for one moment that you should not do the interviews in the
33 way that you do them. I just wonder whether it has not been a rather unfortunate shortcut,
34 perhaps because of the volume of cases, that you have not, as it were, at the end of the

1 interview sought to encapsulate in a statement - that the person concerned can concentrate
2 his mind and sign, having read it through, or even get him to sign the interview notes. It
3 just seems very odd.

4 MR. UNTERHALTER: I do not think that we would want to suggest that it could not have been
5 done. It plainly could have. We would submit though that it does not fundamentally affect
6 the reliability of the evidence because ultimately I have indicated the circumstances in
7 which this testimony is extracted and why there are reasons to suppose that it is true and
8 then one assesses it all together to see. But, just a propos of the point that is put concerning
9 the rights of confrontation and where can that take place, in our submission this indeed is
10 the place where such rights can be exercised. So, it is not part of this appellant's concern
11 that it wishes to exercise those rights. Just answering the point more generally, were there
12 to be an appellant that says, "I did not enjoy rights of confrontation in the administrative
13 process. I was simply allowed to respond to evidence that was presented to me", they could
14 come, in our submission, before the Tribunal and say ----

15 THE PRESIDENT: You would have the problem then that you would be producing witness
16 statements arguably for the first time in the Tribunal, and then there would be a question
17 mark as to whether you were gilding the lily, elaborating -- The witness was dealing, as it
18 were, with matters which added to what was, as it were, in the bundle of evidence at the
19 administrative stage. Would it not be a better policy if you took those statements at the
20 administrative stage and had regard to them yourselves in making your administrative
21 decision? As I say, these are quite general comments, but because the procedure applies
22 here and in some of the other cases that we have been dealing with, I thought it was right
23 just to mention it so that you could make those replies.

24 MR. UNTERHALTER: Those are our submissions. As to this appellant it raises a substantiality
25 point - not a point around the particular form of the statements, but because it itself relies
26 upon unsworn testimony -- That is what one has to then weigh. Their statements that are
27 signed have no inherently greater value because of the form that they take than do those
28 statements that were extracted by way of interviews by the OFT. That is the scheme of
29 evidence which, in our submission, would be considered.

30 I do not want to unduly prolong this treatment, but there is a very full consideration that is
31 then given by the OFT to all of the factors that it considered to be relevant, including, at
32 IV.1504 -- I will just mention the relevant paragraph numbers -- where Midland's defence,
33 as it were, on the facts is dealt with. Then there is a treatment of specifics of what appears
34 on the tender sheet, which is at 1511, and the notations and what this says as to the manner

1 in which cover pricing was taking place. I shall not read it all, but in essence it puts
2 together the evidence, taking the documentary evidence together with the testimony it has
3 received through the interviews that it has done with Bodill, with the confirmation of the
4 two leniency parties and it says that all of that taken together against these rather
5 generalised comments by the appellant before you simply does not dislodge the case that
6 has been made in any way.

7 As to the question of the burden of proof, it is largely a matter that is common ground as
8 between the parties, but there is perhaps something to be said at one point as far as that is
9 concerned, which is that ultimately the question is, was it more likely than not that cover
10 pricing took place on this particular occasion. That is the ultimate burden. There is
11 discussion as to, what are the background probabilities against which one makes that
12 assessment? We do submit that in an industry where this practice was endemic the
13 background probability is that it is not, as it were, an exotic form of conduct where one say,
14 “Well, it requires something to establish that such an unusual course of conduct was
15 pursued. On the contrary, to use the analogy which was given in one of the cases as to the
16 probabilities of seeing an animal in Regent’s Park, is it a lion or an Alsatian, the fact is that
17 this is a fairly common or garden domestic animal that we are dealing with here, given the
18 nature of cover pricing and its endemic nature in this nature. We would submit that is a
19 relevant background consideration in the assessment of probabilities.

20 We would submit that on the conspectus of all of this evidence the civil burden is amply
21 discharged and what is put up against it simply does not rebut the evidence in its detail that
22 establishes clearly what has happened here. So we do submit that on this liability question
23 the appeal should not succeed.

24 Could I then move to the question of appreciability. Our learned friend, as it were, posits
25 that our position is that we simply that where there is an infringement by object there is no
26 requirement of any consideration of appreciability. That is not our submission. There are
27 considerations as to appreciability which differ when the infringement is one by object. By
28 that we mean to say this: quite clearly there is a distinction between an infringement by
29 object and an infringement by effect. It would be a very strange consequence if the doctrine
30 of appreciability ended up collapsing any practical distinction between those two species of
31 infringement. We submit that when one has regard to the kind of infringement that is
32 constituted by an infringement by object then one can understand appreciability within its
33 proper context – that is by reference to the particular kind of infringement that one is
34 concerned with. Therefore, in our submission, the case law which gives various

1 formulations both to the doctrine and how it should be applied is simply one which allows
2 that in the case of an infringement by object there are either certain presumptions or there
3 are judgments to be made of potentiality that are relevant to the question of appreciability. I
4 think the burden of what our learned friend wants to submit on this score is that you move
5 from an object infringement to a consideration of the effects that must exist either in the
6 market or by reason of the size of the relevant undertaking in the market, as a matter of
7 shares or the like. We submit that no such consideration is required. Once one is dealing
8 with an infringement by object, then one is concerned with whether that infringement by
9 object can potentially do certain things in the market. Therefore, it is a consideration of
10 what can potentially be done. That is the fundamental of what we want to submit to you is
11 the correct construction as to how appreciability is considered in relation to an object
12 infringement.

13 It then does not collapse the distinction between an object infringements and an effects
14 infringement, and it allows for a contemplation as to whether the kind of object
15 infringement that one is concerned with has the potential to do certain things in the market
16 of an appreciable kind or not. Therefore, one retains both the concept of appreciability
17 without the conceptual confusion of allowing an object to simply become necessarily an
18 effects based judgment in every instance.

19 In our submission, that conception seems to square with our understanding of the case law.
20 Perhaps I could very briefly take you to some of the decisions. The first is the *Miller* case,
21 which our learned friend referred to, and is in the supplementary bundle of authorities at tab
22 2. Could we refer you to p.3 of that case. There is the passage at para.6 that says:

23 “Although the applicant does not dispute that these facts are substantially correct it
24 nevertheless maintains that they cannot have appreciability affected trade between
25 Member States in view of the insignificance of the undertaking on the market in
26 sound recordings, the nature of its products, which are chiefly intended for the
27 German speaking public, and the nature of its customers.”

28 So there is the claim around appreciability. Then one sees how the court deals with that,
29 and at para.7 the following is said:

30 “In this connexion it must be held that, by its very nature, a clause prohibiting
31 exports constitutes a restriction on competition, whether it is adopted at the
32 instigation of the supplier or of the customer since the agreed purpose of the
33 contracting parties is the endeavour to isolate a part of the market.

1 Thus the fact that the supplier is not strict in enforcing such prohibitions cannot
2 establish that they had no effect since their very existence may create a 'visual and
3 psychological' background which satisfies customers and contributes to a more or
4 less rigorous division of the markets.

5 The market strategy adopted by a producer is a frequently adapted to the more or
6 less general preferences of his customers.

7 Consequently Miller's statement that the disputed prohibitions originated in the
8 wishes of its co-contractors rather than its own unilateral and premeditated
9 strategy, even if it is correct, cannot allow its behaviour to escape the prohibitions
10 contained in Article 85(1) of the Treaty."

11 That is how in the *Miller* case the question of appreciability is dealt with. We would also
12 submit ----

13 THE PRESIDENT: There is a bit more about it actually beyond that. It is with that background,
14 and it is turning then to inter-Community trade because it says, "Miller relies upon its weak
15 position on the market in question". This is what one so frequently finds in these cases,
16 they elide from competition to trade, and so on.

17 MR. UNTERHALTER: Yes.

18 THE PRESIDENT: Then it goes on to consider the argument that it is too weak to have any
19 effect. There is quite a lot of discussion on it.

20 MR. UNTERHALTER: In our submission, there is agreement between the parties which is
21 reflected. If one turns on the next page, 5, para.15:

22 "In prohibiting agreements which may affect trade between Member States and
23 which have as their object or effect ... does not require proof that such agreements
24 have in fact appreciably affected such trade, which would moreover be difficult in
25 the majority of cases to establish for legal purposes, but merely requires that it be
26 established that such agreements are capable of having that effect."

27 THE PRESIDENT: It sounds as though there is not a lot between you. Some of the confusion is
28 about whether you have to prove an actual effect as opposed to a potential effect.

29 MR. UNTERHALTER: Yes, and perhaps where the disagreement may become larger – I know
30 not – is what does it take to actually show that potential? At least in our understanding of
31 the matter, it is very often the object as situated against the background within which the
32 particular agreement occurs which will simply show you what its potential is, and I am
33 going to indicate precisely how the OFT understood the cover pricing by object in relation
34 to the way this practice was situated in the relevant market. So to judge it against the

1 context, in our submission, little has to be done, and it is certainly not about judging actual
2 effects; it is simply saying, “Of this practice, by way of object, what can reasonably
3 hypothesise to be the capacity or potential for harm in this practice”.

4 THE PRESIDENT: There is a dispute about that, is there?

5 MR. THOMPSON: It was really the way I was putting the OFT’s skeleton argument that made
6 me think that they were going off on a frolic, but it is really the end of paras.10 and 15 of
7 *Miller* where they talk about the importance of *Miller* on the market as being a decisive
8 reason why appreciability applies, which is a rather different emphasis from that which
9 Mr. Unterhalter put to the Tribunal. It is pretty old stuff and I am assuming that he does not
10 really dispute it.

11 MR. UNTERHALTER: Perhaps where the difference lies is that there are no absolute
12 requirements as to what one has to do in order to show appreciability. It is not that you
13 necessarily need to go into the market and see what is the size of this undertaking in the
14 market itself, the question is, what, and is the case in this instance, is the nature of the
15 practice and what one can consider to be its potential for harm in the market to distort
16 competition?

17 THE PRESIDENT: If you have got something which tries to create absolute territorial protection,
18 by its very nature it is likely, if it has a big capacity, to create distortions.

19 MR. UNTERHALTER: It is a matter I shall come on to, but in any event in this decision there
20 were very narrow markets that were defined. Consequently, if one engages in the exercise
21 and one says, “In relatively narrow markets is a practice of this kind likely to, might it
22 possibly have harmful effects.” It is not terribly difficult to see why these practices are
23 corrosive and have all sorts of consequences which the OFT dealt with in its Decision,
24 because our learned friend (and this was a large part of the theme which he developed in his
25 argument) said this is a once off bilateral telephone conversation; what is the harm because
26 ultimately a competitive bid wins the tender at the end of the day and that is really the end
27 of it? That is a strong part of what is being suggested about this practice. In our
28 submission, that is quite a wrong view, quite a wrong headed view, as to what cover pricing
29 does and what its potential for harm is. I shall come to the treatment of that matter in a
30 moment.

31 It might also be helpful, again because the area of difference is not that significant, to turn
32 up the fourth case which is at volume 5 tab 67. The statement of the proposition in the
33 judgment which appears on p.302 para.5/7 says:

1 “If an agreement is to be capable of affecting trade between Member States it
2 must be possible to foresee with a sufficient degree of probability on the basis
3 of a set of objective factors of law or of fact ...”

4 So it seems to combine a rather wide ranging enquiry which could be a matter of law, that
5 one actually examines the conduct and says that as a matter of law this is so serious that we
6 will presume the consequences; but it could be a matter of fact and it seems to deal with
7 foreseeability. In other words, what are the foreseeable consequences of the conduct?

8 None of that connotes anything to do with an actual consideration.

9 THE PRESIDENT: They are talking there specifically about the effect on trade between states.
10 They go on to talk about competition, do they not?

11 MR. UNTERHALTER: It continues:

12 “... that the agreement in question may have an influence, direct or indirect,
13 actual or potential, on the pattern of trade between Member States in such a way
14 that it might hinder the attainment of the objectives of a single market between
15 States. Moreover the prohibition ... is applicable only if the agreement in
16 question also has as its object or effect the prevention, restriction or distortion
17 of competition within the Common Market. Those conditions must be
18 understood by reference to the actual circumstances of the agreement.”

19 It is hard to understand why the rather flexible notion of capability, which seems to be at the
20 heart of the test that is laid out here, would be different for trade between Member States as
21 opposed to the consideration of competition.

22 THE PRESIDENT: I know there has been discussion about this. There is a sense that it was very
23 much a jurisdictional thing and therefore it could be looked at in a slightly more conceptual,
24 lofty level, a slightly easier threshold, a more theoretical threshold. There is a hint of that in
25 some of the case law, whereas when you get down to competition it is absent law.

26 MR. UNTERHALTER: It is certainly a position that has been reflected, but in our submission
27 there is no reason in principle to adopt a different position as to how one would understand
28 capability in relation to an object infringement. It seems to allow for the same
29 considerations of law or fact, possibility, foresight, and it is therefore a very general,
30 flexible test which is intended to capture the many different circumstances in which
31 infringements may take place, either by object or effect.

32 THE PRESIDENT: You have got to read on to the end of the paragraph. They do put a little bit
33 of flesh on the otherwise pretty dry bones in their next bit.

34 MR. UNTERHALTER: Yes.

1 “Consequently, an agreement falls outside the prohibition ... when it has only
2 an insignificant effect on the markets, taking into account the weak position
3 which the persons concerned have on the market of the project in question.”

4 True enough. The question there is whether that is a positive test or whether it is simply a
5 way of looking at the question of potentiality or capacity. In our submission, to try to retain
6 some conceptual coherence in this field, because the ultimate test (in a sense) for the
7 Tribunal is to keep object and effect infringements sufficiently distinct and coherent as
8 types of infringement, and not have a test for appreciability to be so exacting as to its
9 requirements that that distinction is then blurred to the point of --

10 THE PRESIDENT: You clearly cannot be required to show any actual effects. I think that is the
11 real point, is it not? That is a given and I do not think that Mr. Thompson is suggesting
12 otherwise.

13 MR. UNTERHALTER: Then the question is: what is necessary to show a capacity to have that,
14 and must that be done necessarily by reference to what is the significance of this particular
15 undertaking in the relevant market? Our submission on this score is that it suffices that
16 what has happened is that this is an undertaking operating in this instance on a relatively
17 small market where there are features about cover pricing that have quite significantly
18 harmful consequences, and they are not confined (as my learned friend has sought to
19 characterise them) to the simply, bilateral exchange of information. I will come to that
20 later.

21 It is also our submission that although our learned friend would say of quite a significant
22 number of cases that these did not involve appreciability and consequently they do not say
23 anything as to what has to be shown by way of appreciability in relation to object
24 infringements, we for our part do not accept that treatment of a number of cases. Perhaps I
25 can just mention them very briefly. *Apex* and *Makers* are both cases by object where no
26 treatment at all is specifically given to appreciability. So our learned friend says of that:
27 that just shows that those cases were not concerned with appreciability. But if it is a
28 necessary part of what has to be shown in order to be satisfied that an infringement and
29 liability can arise, then somewhere in the analysis of the practices there has to be some
30 conception of appreciability. Otherwise, one has to read this record of cases on the basis
31 that they simply did not grapple with the issue, and there is a huge lacuna that exists in the
32 analysis.

1 We submit that that simply is not the case. Briefly, in the *Apex* decision volume 3 tab 46
2 para.210 – the analysis starts a little bit earlier but it is considering the nature of the
3 tendering process. What is said there is that:

4 “When the tendering process is selective rather than open to all potential
5 bidders, the loss of independence through knowledge of the intentions of other
6 selected bidders can have an even greater distorting effect on the tendering
7 process. In a selective tender process the contractors invited to tender will in
8 general be those considered most likely to have the required specialist skills.
9 The Tribunal understands that selective tendering is commonly used by local
10 authorities ... Selective tendering processes ensure that the workload involved
11 in analysing the various bids submitted can be kept within manageable bounds.
12 (211) Accordingly, since the selective tendering process by its nature has a
13 restricted number of bidders, any interference with the selected bidders’
14 independence can result in significant distortions of competition.”

15 In our submission, that is the sort of treatment which analyses what sort of process one is
16 concerned with. What does cover pricing do and with what consequences as a matter of
17 capacity or potential? So it is really the risk to an independent and competitive tendering
18 process that is necessarily part of this practice. That is given full expression to at that
19 portion of the decision. Again, I shall not trouble you with the lengthy quotations, but there
20 is a further detailed consideration of these matters from para. 250 and in particularly para.
21 251 which explain what have been referred to as the “*Apex*” factors, and consequently what
22 cover bidding can do in respect of its anti-competitive object or effect.

23 So at para. 251 there is again a very full recitation of what is at stake in cover pricing, and
24 what its anti-competitive consequences are. We submit that that treatment fully satisfies any
25 appreciability requirement, and it is very much based upon the postulative potentiality and
26 capacity. *Makers* is very much to like effect.

27 If I could finally mention two cases which our learned friend again has sought to
28 distinguish on the basis – the first of them – that on his conception of the case it is simply
29 not a case which deals with appreciability, but it is the *GlaxoSmithKline* case upon which
30 we have placed some reliance, and I would just take you to the relevant passage – it is in
31 vol.8, tab 117 – in particular para. 55 where one reads from the second sentence:

32 “According to settled case-law since the judgment in [*LTM*] the alternative nature
33 of that condition, indicated by the conjunction ‘or’, leads first to the need to
34 consider the precise purpose of the agreement, in the economic context in which

1 hit is to be applied. Where, however, the analysis of the content of the agreement
2 does not reveal a sufficient degree of harm to competition, the consequences of the
3 agreement should then be considered and for it to be caught by the prohibition it is
4 necessary to find that those factors are present which show that competition has in
5 fact been prevented, restricted or distorted ...”

6 - and then these are the interesting words:

7 “... to an appreciable extent.”

8 Our learned friend says that is just telling you something about how an effects-based
9 infringement is assessed, but implied in this paragraph is that if you are dealing with an
10 object based infringement, one will look at it in its context, and that will suffice, depending
11 on the analysis of the object as to appreciation.

12 THE PRESIDENT: “Where, however, the analysis of the content of the agreement does not
13 reveal a sufficient degree of harm to competition ...”

14 MR. UNTERHALTER: Yes.

15 THE PRESIDENT: So is that saying everything? Is that saying that in an object case you do not
16 even need to think about it, or is it saying that in an object case you think about it in the
17 context of the agreement and you do not need to look at actual effects?

18 MR. UNTERHALTER: In our submission that would be correct. In other words, if one looks at
19 the specifics of the agreement, understood in its context, and one says that one can discern
20 harmful effects to competition from that consideration then that will suffice.

21 THE PRESIDENT: In other words, potential effect is enough?

22 MR. UNTERHALTER: Indeed.

23 THE PRESIDENT: I am not sure, is it really going much further than just the difference between
24 potential and actual?

25 MR. UNTERHALTER: It may be that ultimately there is nothing more to be said for this
26 proposition than that, but it seems to be different ways of getting at the same proposition
27 which is that you can examine an agreement, you can see what its terms are, you can situate
28 the agreement within its relevant context and that may show you that it has the potential to
29 be harmful. If that does not show you that it has that potential then you may need to go to
30 do what is then suggested at para. 55 and, in our submission, to like effect is *T-Mobile*,
31 because our learned friend says of that: “Of course there was appreciability because that
32 involved the four or five leading mobile operators in the Netherlands”. But what is
33 significant in our submission about these cases is that when it comes to the treatment of the
34 issue it is either so obvious that it does not need to be said, which would be something of an

1 oddity if it is a separate requirement that must be met and demonstrated in every case or, as
2 I think we would put the matter, it is very often the case that by reason of the object
3 analysis that is undertaken the potential for harm is manifest in the analysis of object, and
4 therefore no one need to say “Right, we have done the analysis of object, so we are now
5 going to consider the same issue effectively from an appreciability point of view”, because
6 many of these questions are connected questions and so one does not see the separate
7 treatment precisely because of the connectedness to the appreciation of the object, and its
8 potential by way of meeting the appreciability standard.

9 Therefore, thereto in *T-Mobile*, the analysis (paras. 29 to 32), a similar offering is made
10 which shows how there is potential harm which can be understood in that instance, because
11 there was simply an exchange of information and no one actually acted on it by way of
12 putting contracts into the market at those prices.

13 There is one final authority that we wanted to draw your attention to in the event that you
14 would find it of assistance – we have provided a copy of this decision. It is a decision of
15 the General Court in the *BPB* matter. I have asked that the case be placed before you.

16 There is at para. 90 another treatment of this matter which, in our submission, is consistent
17 with what we say the law requires in this regard:

18 “In this respect, for the purposes of applying Article 81(1) EC, it is sufficient that
19 the object of an agreement should be to restrict, prevent or distort competition
20 irrespective of the actual effects of that agreement. Consequently, in the case of
21 agreements reached at meetings of competing undertakings, that provision is
22 infringed where those meetings have such an object and are thus intended to
23 organise artificially the operation of the market. In such a case, the liability of a
24 particular undertaking in the infringement is properly established where it
25 participated in those meetings with knowledge of their object, even if it did not
26 proceed to implement any of the measures agreed at those meetings. The greater
27 or lesser degree of regular participation by the undertaking in the meetings and of
28 completeness of its implementation of the measures agreed is relevant not to the
29 establishment of its liability but rather to the extent of that liability and thus to the
30 severity of the penalty. Undertakings which conclude an agreement whose
31 purpose is to restrict competition cannot, in principle, avoid the application of
32 Article 81(1) EC by claiming that their agreement was not intended to have an
33 appreciable effect on competition.”

1 In our submission what that is in effect saying is that once one has established the object in
2 the context of what is a meeting to discuss matters that really go to the heart of what should
3 not be discussed as between competitors, the nature of that conduct is so egregious that it
4 takes very little to see its potential for harm, irrespective of whether it is acted on outside
5 the meeting once the exchange has taken place.

6 THE PRESIDENT: I do not know whether that is a reference back to the specific argument that
7 was being raised, that they did not intend to appreciably affect competition. It is a curious
8 way of phrasing it because whether they intended to appreciably affect competition is not
9 normally an issue in these cases, it is a question of whether you had the capacity to.

10 MR. UNTERHALTER: Indeed.

11 THE PRESIDENT: It may be that one has to read the arguments and see what was being put – I
12 am afraid we have not done that. We will have a look at it anyway.

13 MR. UNTERHALTER: There are therefore, in our submission, different ways in which the same
14 proposition has been cast, but it all seems to conduce ultimately to the same proposition,
15 which is more or less where I began. I shall not repeat that submission because it seems
16 really to go to how you show appreciability rather than what the test of appreciability is.
17 There, perhaps, there is some measure of difference between us.
18 If I could, in that regard, just refer you to a number of passages in the Decision? This matter
19 is considered in two places. The first is in respect of the infringements there is a
20 consideration of what cover pricing is - as to its seriousness and its implications and
21 potential effect. It is considered again under seriousness for the purposes of fining. But,
22 perhaps if I could first refer you to Part III.97. Just to see the context of this, if one turns
23 back to p.361 one sees, 'Cover bidding as a form of concerted practice'. The reference is to
24 *Apex* again, the treatment of which we have already considered, and the principles in *Apex*
25 which are referred to again at para. 95. There is again a recitation of the *Apex* factors under
26 the object of cover bidding. There one sees the four factors at para. 99:

27 "Having rejected *Apex*'s argument that the object of its conduct was to remain on
28 its customers' tender list, the CAT went on to conclude that the submission of a
29 cover bid has an anti-competitive object or effect in that:

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

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

