Neutral citation [2011] CAT 12

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1118/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

27 April 2011

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
DR ADAM SCOTT OBE TD
MARCUS SMITH QC

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) GMI CONSTRUCTION HOLDINGS PLC
(2) GMI CONSTRUCTION GROUP PLC

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 12 and 13 July 2010

JUDGMENT

APPEARANCES

Mr. Aidan Robertson QC (instructed by McCormicks Solicitors) appeared for the Appellant.

Ms. Kelyn Bacon and Mr. Tony Singla (instructed by the Office of Fair Trading) appeared for the Respondent.

I. INTRODUCTION

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

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

3. One of the addressees of the Decision was GMI Construction Group plc ("GMI Construction"). Until 6 February 2005, GMI Construction did not have an ultimate parent company. From 7 February 2005, GMI Construction became a wholly owned subsidiary of GMI Construction Holdings plc ("GMI Holdings"), also an addressee of the Decision. These companies are described in Decision/II.551-567 (pp119-121). We shall refer to GMI Construction and GMI Holdings collectively as "GMI".

4. The Decision found that GMI had committed two infringements of the Chapter I prohibition ("the Infringements").

5. Both the Infringements concern "cover pricing". This is not the first occasion on which the Tribunal has had to consider cover pricing. The issue arose also in *Apex Asphalt Paving Co Limited v Office of Fair Trading* [2005] CAT 4 and in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11. The practice has, of course, now been the subject of consideration in other appeals arising out of the Decision (see, for example, *Kier Group plc and others v OFT* [2011] CAT 3, *GF Tomlinson Building Limited and others v OFT* [2011] CAT 7 and *Barrett*

Estate Services Limited and others v OFT [2011] CAT 9. Cover pricing occurs where one of those invited to tender for a construction contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is tendering for that contract (Company B). Company B will be seeking to win the contract and will have reached a view as to its own tender price. Indeed it may already have submitted its own tender to the client. The cover price which it provides to Company A will be at a level sufficiently high to ensure that Company A does not win. This price is submitted to the client by Company A as though it is a genuine tender. It should be noted that Company B does not reveal its own tender price to Company A – the cover price is an inflated price. Clearly, cover pricing requires co-operation between two of the contractors being asked to tender: one must *want* a cover price, and another must be prepared to *give it*. In Decision/III.74 (p357), the OFT described the phenomenon in the following terms:

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

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

6. The Infringements which the OFT found that GMI had committed were as follows:

   (1) *Infringement 14.* This infringement ("Infringement 14") concerned the provision by GMI of a cover price to Irwins Limited ("Irwins") in

respect of a tender by Irwins for an office development at Lancaster Park, York (the "Lancaster Park Contract"). The client was FR Evans (Leeds) Limited ("FR Evans"). Irwins, which was also an addressee of the Decision, is described in Decision/II.747-768 (pp146-149). The date for tender return was 12 June 2000. Infringement 14 is described at Decision/IV.863-893 (pp575-581).

(2) *Infringement 228.* This infringement ("Infringement 228") concerned the provision to GMI of a cover price by a company then known as Totty Construction Group Limited ("Totty") in respect of a tender by GMI for extensions to workshops at Leeds College for Art & Design (the "Leeds College Contract"). The client was Leeds College for Art & Design ("Leeds College"). Totty, which was also an addressee of the Decision, is described in Decision/II.1056-1058 (pp191-192). The date for tender return was 20 June 2005. Infringement 228 is described at Decision/IV.6364-6394 (pp1539-1544).

7. In the case of Infringement 14, a penalty of £1,749,824 was imposed. In the case of Infringement 228, a penalty of £2,760 was imposed. The relevant part of the Decision dealing specifically with the penalties imposed on GMI is at Decision/VI.490-492 (p1761).

8. GMI appeals in respect of the OFT's findings on both Infringements on the following grounds:

(1) As regards both Infringements, that the OFT erred in fact by finding that GMI had engaged in bid rigging through cover pricing contrary to the Chapter I prohibition.

(2) That the overall penalty of £1,752,584 had been calculated arbitrarily, was excessive, disproportionate and unjust and should be reduced.

9. We consider, in Section IV, the OFT's findings that GMI breached the Chapter I prohibition in respect of Infringements 14 and 228. Before this, however, we describe, in Section II, the nature of the Chapter I prohibition and the jurisdiction of the Tribunal; and, in Section III, we briefly consider questions relating to the burden and standard of proof.

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

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

> "(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –
>
> (a) may affect trade within the United Kingdom, and
>
> (b) have as their object or effect the prevent, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part.
>
> (2) Subsection (1) applies, in particular, to agreements, decisions or practices which –
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
>
> (3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.
>
> (4) Any agreement or decision which is prohibited by subsection (1) is void.
>
> (5) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).
>
> (6) Subsection (5) does not apply where the context otherwise requires.
>
> (7) In this section 'the United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.
>
> (8) The prohibition imposed by subsection (1) is referred to in this Act as 'the Chapter I prohibition'."

11. As has been described, the OFT has imposed penalties in respect of the Infringements. The OFT's jurisdiction to do so arises out of subsection 36(1) of the 1998 Act. By subsection 36(3), the OFT may only impose a penalty if it is satisfied that the infringement has been committed intentionally or negligently by the undertaking.

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

> "46 Appealable decisions
>
> (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the OFT —
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> …
>
> (i) as to the imposition of a penalty under section 36 or as to the amount of any such penalty,
>
> …"

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

> "…(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
>
> (a) remit the matter to the OFT,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) …
>
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or

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

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

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

…"

III. BURDEN AND STANDARD OF PROOF

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

14. As regards the standard of proof, there was no issue before us that this is the civil standard of proof, on the balance of probabilities: *Napp* at paragraph [109]; *JJB Sports plc v Office of Fair Trading* [2004] CAT 17 at paragraph [204].

15. There has, in recent years, been a great deal of debate as to whether, in serious cases, there is a "heightened standard" of civil proof. We consider that this debate has been laid to rest in a series of decisions of the House of Lords, in particular, *Re H (Minors)* [1986] AC 563 at 586; *Re D (Northern Ireland)* [2008] 1 WLR 1499 at paragraph [28]; *Re B* [2009] 1 AC 11 at paragraph [13].

IV. LIABILITY

(1) An overview of the evidence relied upon by the OFT

16. In the case of Infringement 14, the OFT found that GMI had provided a cover price to Irwins in June 2000 respect of the Lancaster Park Contract. This finding was based on the following material:

(1) *A tender register found by the OFT during a search of Irwins premises.* Irwins' tender register (the "Irwins Tender Register"), which consisted of a ledger compiled by hand, contained an entry for the Lancaster Park Contract. The OFT relied upon the annotations "cover" and "GMI", which appear under different columns in the entry for the Lancaster Park Contract.

(2) *Irwins' form of tender for the Lancaster Park project.* FR Evans required a form of tender to be completed by participating tenderers. The form completed by Irwins (the "Irwins Tender Form") contained the annotation "GMI" in the top left hand corner of the document, on which the OFT relied.

(3) *The schedule of covers.* As part of its leniency application, Irwins provided the OFT with a list of the tenders in respect of which it had obtained cover prices (the "Covers Taken List", which was OFT Document A0718).[1] This list included, at item 19, the Lancaster Park Contract, and noted that a cover price had been provided by GMI. An identified contact was one John Naylor.

(4) *The list of competitors' contact details.* These were provided by Irwins to the OFT (the "Directory", which was OFT Document A0715), also as part of its leniency application. The Directory included the name and telephone number of Mr John Stephen Naylor, the estimating director of GMI.

(5) *The OFT interview with Mr Nelson of Irwins.* As part of its investigation, the OFT conducted an interview with Mr Ivan Peter Nelson, the estimating director of Irwins. The interview was conducted on 8 March 2007, and was recorded on three tapes and transcribed (respectively "OFT Nelson Interview 1", "OFT Nelson Interview 2" and "OFT Nelson Interview 3").

17. In paragraph 13 of its Defence on Liability, the OFT contended:

> "The OFT's case is therefore based upon two contemporaneous documents both implicating GMI, as well as corroborating evidence from the author of both of the documents confirming that cover was taken from GMI for this project, and leniency evidence from Irwins giving the name and telephone number of the GMI contact from whom cover was obtained for this tender. This evidence, taken together, clearly meets the standard of proof…"

[1] Irwins also produced a "Covers Given List", which was OFT Document A0717. This document is not relevant (save as background) because Infringement 14 concerns a cover taken by Irwins, not given.

18. In the case of Infringement 228, the OFT found that GMI had received a cover price in June 2005 from Totty in respect of the Leeds College Contract. This finding was based on the following material:

(1) *Totty's tender summary sheet.* Totty's tender summary sheet ("the Totty Tender Summary Sheet") is a computer-produced form containing various details regarding the Leeds College Contract. The Totty tender summary sheet contains a box headed "Competition", setting out what Totty evidently regarded as its competition for the tender. At number (5) in the list, appears (in handwriting) the entry "GMI (cover) £4,795", on which the OFT relied.

(2) *A general explanation regarding Totty's participation in cover pricing.* This explanation was provided by Totty's parent company, Propencity Group Limited ("Propencity").

(3) *An interview with Martin Miller of Propencity*. This interview was conducted by the OFT on 8 May 2007, and was recorded and transcribed on a single tape (the "OFT Miller Interview"). According to the OFT's Defence on Liability (paragraph 18(c)) "[Mr Miller] confirmed that he was responsible for the Leeds College tender, that he was the author of the handwritten reference to GMI on Totty's summary sheet, that this annotation was made prior to the tender date, and that GMI received a cover from Totty for this tender."

19. In paragraph 18 of its Defence on Liability, the OFT contended:

> "The OFT's case is therefore based on an unambiguous contemporaneous document stating that Totty gave a cover price to GMI and containing the specific price so given ("£4795"), which is consistent with the tender price known to have been submitted by GMI (£4,795,210), and which is corroborated by interview evidence from the author of the contemporaneous document. This evidence, taken together, clearly meets the standard of proof set out above."

(2) A summary of GMI's contentions

20. GMI contended that in the case of each of the Infringements, the evidence adduced by the OFT was insufficient to justify a finding of infringement on

the part of GMI. A number of specific challenges were made in respect of this evidence.

21. But GMI did not simply seek to attack the sufficiency of the OFT's evidence. GMI adduced positive evidence of its own, in particular regarding GMI's policy on cover pricing. This evidence primarily (though not exclusively) came from two officers of GMI, Mr Naylor (already mentioned in paragraphs 16(3) and 16(4) above) and Mr David James Shann (the chief executive and former managing director of GMI).

22. Mr Naylor's evidence was contained in an affidavit dated 26 June 2008 and in a witness statement dated 28 April 2010. The former document was – as its date indicates – made in response to the OFT's allegations against GMI during the course of the OFT's investigation. During the hearing before us on 12 July 2010 Mr Naylor was produced as a witness and was cross-examined by counsel representing the OFT, Ms Kelyn Bacon.

23. Mr Shann's evidence was contained in an affidavit dated 26 June 2008 (which was subject to minor corrections and clarifications in the witness box: Transcript - 12 July 2010, pp22-23). Again, as the date of the affidavit makes clear, this evidence was in response to the OFT's allegations against GMI during the course of the OFT's investigation. Mr Shann, too, was produced as a witness and was cross-examined by Ms Bacon on 12 July 2010.

24. Mr Naylor and Mr Shann both gave evidence that it was GMI's policy not to engage in cover pricing, and that GMI had not (and could not have) committed the Infringements.

25. We shall consider first the evidence adduced by GMI as regards its policy of not engaging in cover pricing. Thereafter, we shall consider the evidence in relation to Infringements 14 and 228.

(3) GMI's policy regarding cover pricing

26. It was the consistent evidence of GMI's witnesses that it had a general policy of not engaging in cover pricing. Thus, for example, Mr Shann stated in paragraph 4 of his affidavit:

"[GMI] have never felt it necessary to have a system in place that recorded projects where invitations to tender were declined. It is difficult to assess the number of declined tender invitations occurring within a given year but it has always been our policy to return documents where, for whatever reason, we feel unable to submit a tender. Because most of our employees have been with us for many years, this policy is engrained in the minds of our employees."

27. In other words, unlike a number of other contractors, GMI consciously did not engage is cover pricing, but (instead of seeking a cover price and tendering) straightforwardly informed those clients who were inviting GMI to tender that GMI was, on this occasion, unable to tender.

28. Mr Naylor and Mr Shann were asked about this policy in cross-examination. Mr Naylor's evidence was that he was aware of the practice of cover pricing in the construction industry (Transcript – 12 July 2010, p4), but that GMI did not do so (Transcript – 12 July 2010, p7). At Transcript – 12 July 2010, pp7-8, Mr Taylor's evidence was as follows:

"**Q (Ms Bacon)**	So, just to sum up, Mr Naylor, your evidence is that these might have been reasons why other companies turned down work, or took a cover price, but they were not reasons why you would ever take a cover price.
A (Mr Naylor)	That's basically correct, yes.
Q (Ms Bacon)	I understand that you now have a strict procedure in place at GMI to prevent disclosure of information to competitors at any time during the estimating procedure.
A (Mr Naylor)	We have a procedure whereby in-house we have some forms we fill in as tender documents come in which are anti-collusion forms, we don't discuss tenders with other contractors. We don't have a written policy as such. We've had myself, Gerry Peacock and Jim Shann for well over 20 years who work together, so we didn't feel the need to put anything in writing because we spoke to each other every day, we had regular meetings, we would be in each other's office every day and we didn't feel that a written policy was particularly necessary. The paper work is a little more abundant nowadays, so we have one or two forms that we now fill in as tenders come in just to confirm what we have been doing for 20-odd years.
Q (Ms Bacon)	So from what I understand you have just said there was no written policy before this procedure was put in place as a result of the OFT's investigation?
A (Mr Naylor)	No, we didn't feel it necessary to have a written policy for the reasons I've just explained.
Q (Ms Bacon)	You had not received any competition compliance training, had you?

A (Mr Naylor)	I haven't received any competition compliance training, no; we didn't feel it was necessary.
Q (Ms Bacon)	So it is fair to say that until this written procedure was put in place there was not a formal cover pricing policy in place at GMI?
A (Mr Naylor)	The cover pricing policy at GMI was that we didn't do it, basically from probably the mid-90s onwards, approximately. Gary Peacock, who was my senior estimator, discussed everything with me, I knew what he was doing every day in terms of tendering. I in turn discussed everything with Jim Shann, my managing director, so we were very happy that all three of us were all in tune, and we knew that cover pricing was not an issue with ourselves."

29. Understandably, given the number of jobs for which GMI had been asked to tender over the years, and the fact that GMI kept no record of tender invitations with which GMI did not proceed or where GMI was unsuccessful, Mr Naylor was unable to articulate clearly how GMI's policy of not participating in the provision or receipt of cover prices came to be. But Mr Naylor's evidence was that, as GMI established its reputation, it developed a standing amongst its clients based upon its own, genuine, estimates, and it was disinclined either to receive or to provide cover prices (Transcript – 12 July 2010, pp9-10):

"**Q (Ms Bacon)**	…you accept that when you joined there were reasons why GMI would take cover prices?
A (Mr Naylor)	Yes, early days we weren't the company we are today, obviously, we were trying to get a foothold in the market as time went on we developed a very strong client base, and we got more into negotiated work, and in fact I think in around about the year 2000, probably nearly 70 per cent of our work was negotiated. We had built up a very good reputation over a number of years as a company and -
Q (The President)	What date did you say that was again, Mr Naylor?
A (Mr Naylor)	Around about 2000.
Q (The President)	That was the 70 per cent figure was around then?
A (Mr Naylor)	I think the figures are in the documents, but I suspect it was in the order of probably late 60s, 70 per cent, and that figure has increased; in the subsequent years that figure increased, because as a company we had a good reputation, we were non-adversarial, we were good

builders and people wanted us to work for them. So basically, cover pricing was no longer an issue from the early days it wasn't, we just developed our client base as best we could, and very successfully.

Q (Ms Bacon) Can you give the Tribunal an idea of how frequently, for example, how many times a year you would take cover prices when you were doing so, say, in the late 1980s or early 1990s?

A (Mr Naylor) It is a bit difficult to be specific, I would think probably in a year maybe between half a dozen and a dozen times maybe, probably less than that to be honest. That was in the early days into the 80s into the 90s we developed, Jim Shann acted as a "gatekeeper" – is the word we have used – to filter tenders through so it was no longer an issue, it was only when we were setting out as a company and we were trying to establish ourselves in the market.

Q (Ms Bacon) Can I ask you now about giving cover prices, because you have just given evidence about taking cover prices? Of the tenders that you priced up, approximately how often would somebody ring you up and ask for a cover price? Was it every tender? Was it every other? Was it maybe every three or four, or less frequently?

A (Mr Naylor) It was fairly infrequent to be honest we were never really part of the cover giving and taking culture as a company. I have never been one for discussing too much with other contractors, only to a limited degree, I always felt it was better to do my own price and rise or fall by that. I found it a distraction talking to other contractors and still do. So we were never part of a sort of circle of contractors who used to ring each other up on a regular basis, and so it is difficult to put a number on that. I cannot put a specific number on that but it was very limited."

30. As Mr Naylor noted in evidence (Transcript – 12 July 2010, p11), there tends to be an inter-relationship between the taking of covers and the provision of covers: "I mean, if you don't ring people up and ask for covers, which we didn't, then people are less inclined to ring you and ask for a cover. So we very much kept ourselves to ourselves as contractors, and we didn't really get involved in that".

31. Mr Shann's evidence was similar (Transcript – 12 July 2010, pp25-26):

"**Q (Ms Bacon)** I understand that you [ie GMI] now have a strict compliance policy that prohibits any discussion of prices with a competitor, either before or after a bid?

A (Mr Shann) I can't honestly answer that question, because I am not

involved in the company any more. I am a non-executive chief executive. I have stayed on the company to maintain our relationship with existing clients. I've not been party to what has happened in the last two years.

Q (Ms Bacon) Can I ask you about the time that you were intimately involved with tendering then. Is it right to say that there was not any compliance policy before the OFT investigation?

A (Mr Shann) There wasn't any compliance policy in place, no, it was an unwritten policy.

Q (Ms Bacon) Is it fair to say that estimators might have given cover prices from time to time?

A (Mr Shann) Not with GMI, no.

Q (Ms Bacon) Are you saying that throughout the time that you were at GMI estimators were never giving cover prices?

A (Mr Shann) No, that's not particularly what I'm saying. In the earlier part of GMI, Gilman Construction and GMI, when we first formed the company, like most new companies, it would be a single tender situation trying to get more work in, and I would think – I can't think of a specific incident – but I would think it is very likely that, yes, we would have given or taken covers in the early 80s – early to mid-80s.

Q (Ms Bacon) When do you say that that stopped?

A (Mr Shann) I would think around the early to mid-90s.

Q (Ms Bacon) Do you accept that in some cases estimators might have given a cover price without telling you?

A (Mr Shann) I would say it's inconceivable at GMI that that would have happened.

Q (Ms Bacon) Was there any specific written prohibition on giving cover prices?

A (Mr Shann) There wasn't any written documents. GMI wasn't run as a company where we had written policies. We'd all work together for a long, long time. The estimating department was specifically opposite my office in GMI. John and myself had worked together for – well, we have done now for 28 years. We have only one other estimator, Gary Peacock, who's been there for 20 years. We didn't need written documents. We spoke every day. If I was in the office we would have conversations about the tenders.

Q (Ms Bacon) Did you ever specifically prohibit your two estimators from giving a cover price?

A (Mr Shann) It was agreed in principle that we wouldn't give – as the company progressed from the early 80s to the 90s, it became apparent that with the type of jobs we were chasing there was no need for us to give cover prices or take cover prices.

Q (Ms Bacon)	On jobs where you have given a cover price, such as, as you say, a single stage tender with a bill of quantity supplied by the client, is there anything that would have stopped one of the two estimators from giving a cover price?
A (Mr Shann)	We just wouldn't have done it. It just wasn't in our policy at the time. It would have served no purpose to have helped our competitors. Why would we want to do that? Why would we assist them in putting in prices when they're competing against us?"

32. We found Mr Naylor and Mr Shann to be honest witnesses, who did their best, when giving evidence, to assist the Tribunal with their recollection. We accept their evidence that GMI had a policy (albeit unwritten) against taking or giving cover prices from at least the mid-1990s.

33. This policy manifested itself in at least two ways; first, in the facts relating Alleged Infringement 101, which was not included in the Decision, because no infringement of the Chapter I prohibition was found by the OFT (see Decision/IV.2901 (p923)). Alleged Infringement 101 concerned a tender for Centurion Park, York. The client was KeyLand Gregory Limited. This was a company with whom GMI had dealt over a number of years. GMI was asked to tender. So too, was Irwins. Just before the closing date for tenders, Mr Naylor received a telephone call from Mr Nelson, asking for a cover price. Mr Naylor's evidence (as set out in paragraphs 7 to 9 of his affidavit) was as follows:

> "7. On or about 27 March 2002, the day before the closing date for tenders, I received an unsolicited telephone call from Mr Peter Nelson of Irwins. He said that Irwins had been invited to tender but were unable to complete their tender in time. He asked if GMI would give him a price for the job which he could then tender above rather than offend KeyLand Gregory by not tendering at all. The giving of such information to another contractor in such circumstances was not a practice that either I nor GMI were in the habit of doing. I told Mr Nelson that I would need to discuss the matter with the Managing Director, James Shann.
>
> 8. I spoke to Mr Shann and explained the details of the telephone call that I had received from Mr Nelson. He told me he would consider the matter and come back to me.
>
> 9. Subsequently, Mr Shann spoke to me and informed me that he had discussed the matter with the client, Barry Gregory of Keyland Gregory Limited who had instructed Mr Shann that GMI could give a price (a "cover" price) to

> Irwins. I telephoned Mr Nelson and gave him a price. I only did this in the knowledge that the client had instructed us to do so."

34. Mr Shann's evidence was to similar effect. In paragraph 26 of his affidavit, he stated:

> "I was concerned that if Irwin's did not tender by the deadline then the tender process might be delayed. In addition, and in any event, I took the view that the appropriate action was to speak to Barry Gregory to tell him of this approach. I called him to seek his instructions. I explained to Mr Gregory the details of the approach that we had received from Peter Nelson regarding this tender. I also confirmed that GMI was going to submit a tender which we regarded as highly competitive. Mr Gregory said that there would be other tenderers as well and, if he was not happy with the initial tenders, he could always seek further prices post-tender. He said that, in all these circumstances, he was relaxed about the matter and we could give a "cover" to Irwins. Accordingly, I told John Naylor that he could speak to Peter Nelson and give him details of a price above which Irwins could tender. I only did this on the instructions of Mr Gregory. If Mr Gregory had not wished GMI to provide such a price to Mr Nelson then under no circumstances would we have done so."

35. In cross-examination, this version of events was not challenged by the OFT (see Transcript – 12 July 2010, p12 (cross-examination of Mr Naylor); Transcript, - 12 July 2010, p26 (cross-examination of Mr Shann)). During Ms Bacon's cross-examination of these witnesses, a further motivation for informing Keyland Gregory Limited of Irwins' approach emerged. In the words of Mr Naylor (at Transcript – 12 July 2010, p12), "[w]e felt it was probably an opportunity to put down Irwins a little because they, at the time, were trying to work for this particular client and for whatever reason Mr Nelson felt he was incapable of giving a price. So I went to see Jim [ie Mr Shann] and Jim decided to speak to the client." This was also Mr Shann's evidence (Transcript – 12 July 2010, pp28-29).

36. In other words, GMI used the fact that Irwins had approached them for a cover price for its own commercial advantage, by reporting the fact to Keyland Gregory Limited and so damaging Irwins' standing with Keyland Gregory Limited. After all, the whole point of getting a cover price is to provide a simulacrum of a real tender in order to deceive the client; and GMI's disclosure of Irwins' need for a "cover" can hardly have enhanced Irwins' standing with Keyland Gregory Limited. It seems to us unlikely that a

company that saw exposing cover pricing as a commercial weapon, would expose itself to that weapon being used against it.

37. The second way in which GMI's policy of not seeking cover prices was manifested was in its approach to tender invitations where it was not minded to tender; this was to decline to participate and to return the tender documents, rather then pretend to participate through cover pricing. Mr Shann's affidavit states:

> "5. Although we do not keep records of tenders returned as a matter of course, my secretary has searched through our IT system, files and typing records available, to help us substantiate this particular point and has found 24 letters…Whilst not a complete record (because we do not keep a complete record), the letters…clearly demonstrate our policy to return documents.
>
> 6. We have contacted Leeds City Council Procurement Department regarding the system operated by themselves for selective tendering of building projects. We are on the approved list of Leeds City Council and we have, over the years, carried out projects for them. In principle, the Council's system is simple – they have an approved list of contractors and companies that are approached on a rotation basis. The initial approach is made by telephone and over the past several years, has been to either myself or John Naylor, the Estimating Director. The Procurement Officer will outline the project in brief detail, tender period, projected value and other relevant information, at which point one either agrees to tender or declines. Occasionally we will agree to tender at this point but will then return the papers to the Council at a later stage. We have not kept any record of these conversations. The Council Procurement Department has a computerised system which records contractors invited to tender in the first instance together with a note of either their acceptance or the fact that they declined to tender or returned the papers.
>
> 7. The Council Procurement Department has provided GMI's solicitors with an extract of the records held on this system which relate to GMI…The extract shows that Leeds City Council invited GMI to submit a tender in respect of 67 jobs between 2 January 2002 and 22 January 2008. Of these, GMI declined 50 and returned the papers in relation to 2. Clearly this demonstrates GMI's policy of declining tenders where, for whatever reason, we feel unable to submit a tender."

38. Again, this evidence was not challenged by the OFT in cross-examination of Mr Shann; although it is fair to say that Ms Bacon sought to reduce its significance by pointing out that this material principally evidenced GMI's policy of declining to tender at the outset, and did not particularly relate to a case where GMI had begun the process of putting together a tender, which it then found itself in difficulty completing. According to the OFT, this is what

happened in the case of Infringement 228: the OFT contended that GMI began work on a tender (having sent out sub-contract inquiries), found that it could not complete the tender in time, and so sought a cover price. This point is considered further in relation to Infringement 228.

39. On the basis of the evidence before us we find that, at the time of both Infringements, GMI had a clear and settled policy neither to give nor to take covers.

(4) Infringement 14

40. In the case of Infringement 14, much of the evidence relied upon by the OFT (summarised in paragraph 16 above) was provided after the event. The contemporary documents were Irwins Tender Register (paragraph 16(1) above); and the Irwins Tender Form (paragraph 16(2) above).

41. It was very clear from the interview of Mr Nelson conducted by the OFT that Mr Nelson had no specific recollection of his involvement in the covers that Irwins had either provided to, or taken from, others. Asked (OFT Nelson Interview 2, pp2*ff*) as to how the Covers Taken List and the Covers Given List had been compiled, Mr Nelson had this to say:

"**Q (OFT)**	I just want to have a quick look at the leniency schedules that you've sent in, um, our document reference A0717 [ie the Covers Given List] and A0718 [ie the Covers Taken]. Um, you can have a look at this copy if you haven't got a copy.
A (Mr Nelson)	Is this the one? This one?
Q (OFT)	No, no, the schedules that you sent in.
A (Mr Nelson)	Oh, right.
Q (OFT)	A0717 is headed covers given and so basically it lists all the information on covers that Irwins have given. Yeah? Is that correct?
A (Mr Nelson)	Oh, yeah, I did give cover prices.
Q (OFT)	[laughs] Okay. On what basis were these admissions made? Um, I mean, I know you can't, I doubt you can recollect all those back to 2000. Did you look through the tender register to…?
A (Mr Nelson)	I just looked in the tender register, really.
Q (OFT)	Yeah?
A (Mr Nelson)	Yeah.

Q (OFT)	Okay. And was that the, the only document or contemporaneous document that you could check…?
A (Mr Nelson)	Yeah. Of the one given I'd probably look at the tender record and the, ah, summary.[2]
Q (OFT)	The tender summary. Yeah, we've got some of these here.
A (Mr Nelson)	Yeah, that's really the only way to do it and memory. Well, even from memory, I certainly, I couldn't remember, from between now and…
Q (OFT)	Yeah.
A (Mr Nelson)	Since when
Q (OFT)	[laughs]
A (Mr Nelson)	So, ah, yeah, so that's really, ah…
Q (OFT)	Okay. And I think that all the headings are pretty self-explanatory [ie of the Covers Given List]. We've got the year. Um, tender reference is the reference that you gave the tender, the description, the client, the date. Is that the date of the tender? Date of return?
A (Mr Nelson)	Yeah.
Q (OFT)	Yeah. And the value, would that be the, um
A (Mr Nelson)	Yeah.
Q (OFT)	…the current price you submitted.
A (Mr Nelson)	Yes.
Q (OFT)	For that contract. Cover to and then you list, um, other contractors' names.
A (Mr Nelson)	Yeah.
	…
Q (OFT)	…And the same again for document A0718 headed covers taken. Um, have these all been, um, accumulated from the tender register and the tender summaries?
A (Mr Nelson)	I think they've all come from that part, yeah.
Q (OFT)	So, it's all coming from a contemporaneous document that Irwins have had somewhere or provided to us etc.
A (Mr Nelson)	Yeah.
Q (OFT)	Yeah. Okay. Lovely. And the headings are always the same, I assume. They're all made the same.
A (Mr Nelson)	Yeah, very similar, and there are the figures highlighted. It just reflects access from the, ah, tender register, really.
Q (OFT)	Yeah. So under covers taken and under the value column, that would have been…The figure in, in the value column would have been the figure you were, you were

[2] It is not clear to us what the "summary" was. In any event, no such document was relied upon by the OFT in this case.

	given.
A (Mr Nelson)	Tender.
Q (OFT)	And you submitted it.
A (Mr Nelson)	Or submitted. I'm not sure if they were all given to me. In most cases they wouldn't be far away.
Q (OF)	Yeah.
A (Mr Nelson)	I might have added a wee bit on if I thought…
Q (OFT)	Yeah.
A (Mr Nelson)	…it wanted a bit more but…"

42. This exchange makes clear that whilst Mr Nelson might very well have a general recollection of providing and giving covers, he had no *precise* recollection of taking (or providing) a *specific* cover. This has a number of consequences:

(1) The impact of Mr Nelson's evidence lay not in any statements from his own recollection that Irwins had taken a cover on a specific occasion. As we have noted, Mr Nelson simply did not have that kind of recall, which we find entirely unsurprising given the elapse of time.

(2) The importance of Mr Nelson's evidence lay in his ability to explain *contemporary* documents, which might, themselves, provide evidence as to covers taken by Irwins.

(3) It goes without saying that documents created after the event – such as the Covers Taken List – cannot properly be regarded as evidence with any independent probative value. Such a document was compiled by reference to the contemporary evidence – specifically, the Irwins Tender Register. Whilst documents such as the Covers Taken List might well provide a helpful distillation of information contained within the Irwins Tender Register, such documents can do nothing more than that. This is easily tested: assume an error in the Irwins Tender Register. Such an error would be replicated in a schedule compiled from the register (such as the Covers Taken List). The two documents cannot sensibly be treated as distinct pieces of evidence. It may very well be that the schedule of covers can be used perfectly

properly as an *admission* by a guilty party (i.e. Irwins) of an infringement of the Chapter I prohibition. But that is not how the schedule of covers was used in this case: it was used instead as a document purportedly pointing to the *guilt of a third party* (i.e. GMI), who had nothing to do with the compilation of the document. For this purpose we consider the schedule to be without value.

43. The crucial documents were, therefore, the contemporary documents, together with Mr Nelson's explanation of them. We consider this evidence in the following paragraphs.

44. We begin with the Irwins Tender Register. The Irwins Tender Register was completed by hand, and comprised ten handwritten columns across both pages of the ledger. The columns in the Irwins Tender Register were unlabelled. In his interview with the OFT, Mr Nelson provided the following explanation (OFT Nelson Interview 1, pp6-8):

"**Q (OFT)**	…Um, what internal forms would be completed on receipt of a tender?
A (Mr Nelson)	I have a book which you've seen.
Q (OFT)	A tender register.
A (Mr Nelson)	Yeah.
Q (OFT)	Yeah. Okay. We've got a copy [of] it here.
A (Mr Nelson)	So, I fill that in.
Q (OFT)	Yeah. Okay.
A (Mr Nelson)	As it arrives, give it a number and off we go.
Q (OFT)	I've got a couple, um, or three example pages from document A0339. Um, is that the tender register you're talking about?
A (Mr Nelson)	Yeah.
Q (OFT)	Yeah? Okay. Um, so the very first column where there's a date…
A (Mr Nelson)	That's the day it arrives.
Q (OFT)	That's the date the tender arrives. Okay. The second column…
A (Mr Nelson)	…is roughly what its about.
Q (OFT)	Okay. So, it'll be the name of the contract or…
A (Mr Nelson)	Yeah.
Q (OFT)	…a description.

A (Mr Nelson) [unclear] building work.

Q (OFT) Aha.

A (Mr Nelson) And then I'll input the, ah, the, ah [clears throat], client and then…That's not particularly a good one but usually the quantity surveyor or where it's arrived from or the quantity surveyor and the architect.

Q (OFT) So that's in the third column.

A (Mr Nelson) Quantity surveyor and architect.

Q (OFT) Mmh-hh

A (Mr Nelson) Depending on who sent it, if it comes from an architect, then the architect has to be first but really…

…

Q (OFT) Um, the fourth column, um…

A (Mr Nelson) …is what, bill of quantities, plan and spec [unclear]. Just really the type of document.

Q (OFT) Okay. So P&S means planning…

A (Mr Nelson) Plan and Spec.

Q (OFT) B&Q, bill of tender. Um…

A (Mr Nelson) And there's the mark up in that little column.

Q (OFT) In the fifth column is the mark-up. That's your percentage mark-up.

A (Mr Nelson) Yeah.

Q (OFT) And also, there's um, you put C's in there.

A (Mr Nelson) Yeah, which you know about.

Q (OFT) What does the C mean?

A (Mr Nelson) That's when we didn't do it, when we'd sort of taken a cover.

Q (OFT) Right. So a C in that column would indicate you took cover.

A (Mr Nelson) Yeah.

Q (OFT) Um, one, two three, four, five, six, in the sixth column…

A (Mr Nelson) …is the price.

Q (OFT) Okay. And also…

A (Mr Nelson) Or if I'd returned it, I'd put returned.

Q (OFT) In the seventh, the seventh column is the…

A (Mr Nelson) …date it was due.

Q (OFT) …date it was due. Eighth column is blank usually. Is there normally anything in there? No? [laughs]. Um, this column, the ninth column?

A (Mr Nelson) It is really who, who originally got the enquiry. That column's got wider now. I, I usually put in that column

	who's the actual estimator that's priced it.
Q (OFT)	Okay. Okay. So, and that would normally be…
A (Mr Nelson)	It don't appear to be in there but I might put in the letters of say John Bray or somebody…and then that column would be the guy that originally got the telephone call or brought the enquiry in. That's our marketing guy.
Q (OFT)	Oh, so in the ninth column it's the, whoever got the initial enquiry, yeah?
A (Mr Nelson)	Yeah.
Q (OFT)	Okay.
A (Mr Nelson)	And…
Q (OFT)	And in the final column?
A (Mr Nelson)	It's just notes, really, which you'll see in there. It's just if I find out various people that happen to be in for the tender or…
Q (OFT)	So you'd note competition in the final column or…
A (Mr Nelson)	…anything else I might think of…
Q (OFT)	Aha.
A (Mr Nelson)	…that might be of use."

45. In summary, therefore, the Irwins Tender Register comprised:

(1) Column (1): Tender number and date received.

(2) Column (2): Project.

(3) Column (3): Client.

(4) Column (4): Type of works.

(5) Column (5): Percentage profit differential. Also, according to Mr Nelson. This is where a "C" would be inserted, indicating where a cover price was taken by Irwins.

(6) Column (6): Amount tendered by Irwins.

(7) Column (7): The date the tender was due.

(8) Column (8): Whether the tender was won or lost.

(9) Column (9): The estimator.

(10) Column (10): Competition/notes.

Not all columns were completed in all cases.

46. Mr Nelson agreed that most of the tender register was compiled by him (OFT Nelson Interview 1, p8). He was not asked about how the "C" in column 5 denoting a cover was taken identified the party providing the cover. This is a matter to which we return below.

47. In the case of the Lancaster Park Contract, the Irwins Tender Register recorded as follows:

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
0500053 24 May	Proposed Offices Development Lancaster Park York	FR Evans (Leeds) Ltd Richard Boothroyd Associates Kilmartin Plowman & Partners	BQ Cover		1248665	Fri 9 June		IPN	GMI

For the avoidance of doubt, the numbering of the columns is our own.

48. As regards this entry, Mr Nelson's interview transcript records as follows (OFT Irwins Interview 2, pp 22*ff*):

"**Q (OFT)**	…The next one is an office development at Lancaster Park dated the 9th of the 6th 2000. Um, can you recall anything about that contract?
A (Mr Nelson)	Yeah. This, this will be one that we have absolutely no chance whatever of getting it.
Q (OFT)	No? Why's that?
A (Mr Nelson)	No chance of getting this job at all. Looking at that list, I don't recall it but I can just see from there now, if I came in now and I knew the competition, I would say that GMI would get that, without even trying. They get 90% of Evans work do all their design and build work.
Q (OFT)	Oh, okay. Fair enough.
A (Mr Nelson)	That is a good enough reason for saying that you will have no chance whatever…
Q (OFT)	Okay.
A (Mr Nelson)	…there. And there, there the other guys are, even if they submitted a price, would be asked if they wanted to just

	lower it below mine. So that, that's a definite one where we'll have said you'd be just providing a check price on whatever price, really.
Q (OFT)	Yeah. And again, that entry, is that your handwriting?
A (Mr Nelson)	Yes, it is.
Q (OFT)	Um, here there's…There's not a C, one, two, three, four, in, in the fourth column of this one but it does say cover.
A (Mr Nelson)	Yeah, that's it. There you go. There you go. [laughs]
Q (OFT)	That explains it then.
A (Mr Nelson)	I'm getting a bit more explicit there.
Q (OFT)	[laughs]. So does cover mean…
A (Mr Nelson)	[unclear] pretty obvious with that one, that one there.
Q (OFT)	Okay.
A (Mr Nelson)	And that, that's a case there where, you know, GMI would just have that deal.
Q (OFT)	Mmh-hh. So, G…Who are GMI? Is it abbreviation for anything?
A (Mr Nelson)	No. It's got GMI plc.
Q (OFT)	Okay. Any names? Um, the individual contact, ah, is John Nayler [?]. Who's John Nayler?
A (Mr Nelson)	Yeah, he's their estimator director, I think.
Q (OFT)	At GMI, okay.
A (Mr Nelson)	[unclear]
Q (OFT)	Oh, okay.
A (Mr Nelson)	That's how I know…
Q (OFT)	Yeah.
A (Mr Nelson)	…we didn't have a chance in a million, you know, really, in winning that.
Q (OFT)	[laughs]
A (Mr Nelson)	If we'd gone in at half price, they'd still got it.
Q (OFT)	Yeah. Um, and the date of return was the 9th of June 2000?
A (Mr Nelson)	Yeah.
Q (OFT)	Um, and from that, again, there's no indication that you gave a cover price to anybody else.
A (Mr Nelson)	No, we wouldn't have done that."

49. GMI made a number of comments calling into question the credibility of Mr Nelson. It was suggested that this was demonstrated by the inaccuracy of Mr

Nelson's statement that GMI got all of FR Evans' work. The problem is that Mr Nelson was not called as a witness, and it is very difficult, therefore, to gauge his credibility. He may very well have thought that GMI would definitely get this work, and so sought a cover for a tender in which he believed Irwins would never succeed. There is simply no way of knowing. Nor is it at all clear from the interview transcript whether Mr Nelson was asserting an actual recollection of having taken a cover from GMI. If he were to be taken as so asserting, then we would be minded to prefer the clear evidence of GMI that no cover was ever given by GMI. Mr Naylor and Mr Shann gave evidence, were cross-examined and appeared to us to be witnesses of truth, whereas Mr Nelson did not give evidence, and so his credibility could not be assessed.

50. But the thrust of the OFT's case (so it seems to us) turned on *system*. The crucial question relates to what the Irwins Tender Register tells us, read in the light of Mr Nelson's explanation. As to this:

(1) Even on Mr Nelson's explanation, the entry for the Lancaster Park Contract was atypical. Instead of a "C" in column (4) (not column (5) it is to be noted), the word "cover" was inserted. Although it may fairly be said that "cover" is actually rather more explicit than the letter "C", that is not the point: the point is that, when one is considering evidence of system and of its reliability, consistency matters greatly.

(2) Secondly, at no point in his evidence to the OFT did Mr Nelson explain the linkage between column (4) and column (10). Of course, it may be argued that where there is only one contractor identified in the latter column, this contractor must have provided the cover. But this begs a vital question: it assumes that the purpose of the last column is to identify who provided the cover. But according to the transcript of the interview that was *not* the point of the last column. In the words of Mr Nelson, the last column was "just notes really, which you'll see in there. It's just if I find out various people that happen to be in for the tender or anything else I might think of".

(3) This point is illustrated by GMI's analysis of the Irwins Tender Register, where it was found that there were 130 entries which had a "C" in either the fourth or the fifth column, of which 41 had two or more competitors noted in the final column, the majority of which had no means of distinguishing between one competitor and the other. There were six, exceptional, cases, where there was an asterisk or underlining differentiating one name from another; but such features were no part of Mr Nelson's general explanation. In cases where there was no "C", it was not the case that the last column was left unused: there were 40 instances where one competitor was noted; and 105, where two or more were noted.

(4) There seems to have been no clear linkage in the Irwins Tender Register between "C" and the entry in the last column, so as to indicate that was identifying the entity providing the cover. The last column seems only to have been concerned with general market intelligence.

(5) This is emphasised by the fact that the "cover' in this case was written in pencil, with the words "GMI" in ink. Whilst hardly conclusive, this very much suggests that the entries were made at different times, which again undercuts the likelihood of a link between the two entries. This lack of consistency can also be seen in the case of Alleged Infringement 101 (Centurion Park, York), to which we refer at paragraph 33 above. In his skeleton argument, Mr Robertson QC for GMI noted (accurately) that:

> "64. In the Centurion Park entry on the Tender Register, GMI's name appears in the final column alongside two other contractors. Then Mr Nelson has added GMI again, this time in brackets and in a different coloured pen, which he has also used to insert the cover price. This shows that GMI was noted twice in the final column, first as one of the three competitors identified by Mr Nelson, and then again later – but specifically identified through the use of brackets – as the cover price supplier.
>
> 65. The Centurion Park entry thus demonstrates that a simple reference to a name in the final column in a case where cover was taken does not raise any presumption that the name was the supplier of the cover price…"

51. In conclusion, therefore, we find the Irwins Tender Register equivocal and uncompelling as evidence of GMI having provided a cover to Irwins. As Ms Bacon noted (Transcript – 12 July 2010, p70), "[u]nfortunately Mr Nelson does not seem to have had any kind of consistent system".

52. The other contemporary document is the Irwins Tender Form. This is a proforma issued by FR Evans to each person tendering for the work, to be completed by them. The OFT relied upon the handwritten note "GMI" underlined, written on the top-left-hand corner of the document.

53. By itself, this entry says nothing about cover pricing. Its significance was explained by Mr Nelson to the OFT (OFT Nelson Interview 2, p23:

"**Q (OFT)**	…Next we've got the form of tender for that contract, A0838. Um, just confirm to me…
A (Mr Nelson)	It's my writing, yeah.
	…
Q (OFT)	…there's a reference to GMI in the top left-hand corner.
A (Mr Nelson)	There you go, yeah.
Q (OFT)	Yeah. So you've jotted that down to remind yourself that your getting cover from GMI or…?
A (Mr Nelson)	Just about filled it in, probably to put that in afterwards, I'm thinking, yeah.
Q (OFT)	Yeah. Okay. Okay. Um, is that your handwriting and your signature?
A (Mr Nelson)	Yeah."

54. Read generously, Mr Nelson's answers might - just about - qualify as a statement that the reference to GMI was indeed an *aide-memoire* to Mr Nelson that GMI had provided cover in respect of this tender, albeit that those answers were made in response to flagrantly leading questions.

55. Given that Mr Nelson had no specific recollection of the tender for the Lancaster Park Contract, we do not believe that he can have had any recollection of what he meant or thought when he wrote "GMI" on the Irwins Tender Form. This, we suspect, explains the vagueness – or, as GMI would have it, meaninglessness – of his response "There you go, yeah". In the light

of what Mr Nelson is recorded as saying in the OFT Nelson Interview 2, pages 22*ff* (see paragraph 48 above), the notation "GMI" might be just as likely to be Mr Nelson noting his view of who was bound to win the tender, or whom he might consider approaching for a cover, or both.

56. In any event we do not consider the Irwins Tender Form, either on its own or in combination with the Irwins Tender Register, to be credible evidence of a Chapter I infringement in this case. Having considered the OFT's evidence as a whole, it is our conclusion (even before turning to consider the evidence adduced by GMI), that the OFT has quite simply failed to discharge the burden of proof resting on it.

57. We are fortified in that conclusion by the evidence of Mr Naylor and Mr Shann. For the reasons given in paragraphs 26 to 39 above, we accept that at the material time GMI had a settled policy not to give or to take cover prices. Mr Naylor had no recollection of ever being telephoned by Mr Nelson in connection with the Lancaster Park Contract (Transcript – 12 July 2010, pp15-16). This is probably because the telephone call was never made. *Had* Mr Nelson telephoned Mr Naylor, and *had* he asked for a cover price, then we believe Mr Naylor and Mr Shann when they say that either no cover would have been provided at all or only with client consent (as in the case of Centurion Park): Transcript – 12 July 2010, pp15-16 (evidence of Mr Naylor); p27 (evidence of Mr Shann).

(5) Infringement 228

58. In the case of Infringement 228, we refer to paragraph 18 above, where we have summarised the OFT's finding, and the evidence it relied upon. The OFT found that GMI had received a cover price from Totty. As Propencity's general explanation makes clear, this (from Totty's point of view) is certainly plausible: Totty did participate in cover pricing.

59. The question is whether, in this specific instance, GMI asked for and received a cover price. On this narrow question, the Totty Tender Summary Sheet, and the explanation given for it by Mr Miller of Propencity, are crucial.

60. The Totty Tender Summary Sheet comprises a computerised form. Totty clearly maintained details of tenders on computer. However, at some point in time, the form was printed out, for there are various handwritten annotations. It appears that the form was not printed out before 20 June 2005, this being the date the form was revised ("REVA 20.6.05"). On that basis it would follow that the handwritten annotations were written at some time on or after that date, which was the tender date. (Although the tender return date is recorded on the form as 22 June 2005, this appears to have been an error, as no-one has suggested that the return date was other than midday on 20 June 2005.)

61. The Totty Tender Summary Sheet contained a box entitled "Competition", which stated:

"Competition:

1) Totty Construction.

2) Quarmby SP

3) NewCon

4) Interverve

5) [in handwriting] GMI (cover) £4,795."

62. The original of the Totty Tender Summary Sheet was not produced before us. This was unfortunate, for GMI suggested that the handwritten annotations referred to in the previous paragraph might have been written at different times. It was suggested that "GMI cover" might have been written on one occasion, and "£4,795" on another. Without the original, this was, of course, impossible to verify. Since it was the OFT's responsibility to produce this document, Ms Bacon very properly conceded that we should proceed on this basis (Transcript – 12 July 2010, p75).

63. Mr Martin Miller was a bid manager at Totty, and he was interviewed by the OFT on 8 May 2007. His evidence regarding the Totty Tender Summary Sheet was as follows (OFT Miller Interview, pp10*ff*):

"**Q (OFT)**	This is a public job, which obviously you wouldn't have been involved with after the reorganisation when you became…
A (Mr Miller)	Right.

Q (OFT) Uh, commercial bid manager, but it's just to ask you whether you know anything about this job and it's the Leeds College of Art and Design, the 15th of June 2005, and it's OFT document reference A2463, and it's just whether you are aware of that.

A (Mr Miller) Yes, that was one of my tenders.

Q (OFT) It was?

A (Mr Miller) Yes.

Q (OFT) Okay, can you recall anything about that?

A (Mr Miller) Yeah, an extremely awkward job to price, but after going what we thought was quite competitive, we ended up missing out on the job, by quite a considerable margin, which, uh, was a shock for us. I know it's the tender number C7002, which, although it was a public job, that came into the commercial division. We must have had time for it. I notice when we'd, spoken with DLA Piper before, um that the GMI cover was down on this tender, and I can't remember for the life of me ever speaking to GMI. It's not a company that I've spoken to in the past, and I don't know any of the estimators there. That's not to say that one of our other estimators or, or directors hadn't received a phone call. But yes, I do remember that, that they got a cover price from ourselves.

Q (OFT) Who did, sorry?

A (Mr Miller) GMI.

Q (OFT) Yeah. Is that your handwriting?

A (OFT) That's my handwriting, yes.

Q (OFT) And that's the handwriting that says GMI open brackets 'cover' close brackets, and then the price.

A (Mr Miller) A figure of 4795, yes.

Q (OFT) What about the handwriting further down that says TCG?

A (Mr Miller) This was some feedback. The, uh, the quantity surveyor that sent this job out, we had worked with on numerous occasions before, and we always ask for feedback once we've put tenders in. Generally they don't give it, but that was the feedback that we got, Totty's were in at 4.6 million, and 2 other companies were in, one at 4.2 and one at 3.8.

Q (OFT) So that was post-tender?

A (Mr Miller) Yes.

Q (OFT) And that's your handwriting there?

A (Mr Miller) It is, yes.

Q (OFT) Uh, but when you put GMI cover, was that written down pre-tender?

A (Mr Miller) Yes, pre tender date, yes.

Q (OFT)	And are you happy to confirm looking at that document, that you gave GMI a cover price, and that was the figure you gave them?
A (Mr Miller)	I can't recall who gave GMI the cover price. As I've said before, I don't know anybody at GMI, and you tend not to give a cover out if you don't know anybody. So whether one of the other estimators at the time, Steve Rhodes or Justin Goodyear had spoken to them, but although I wrote the figure on there, I can't recall making the phone call to GMI.
Q (OFT)	Okay, but looking at that document and what you recall about this job, you are happy to confirm that whether it was that you specifically made the phone call [overtalking]
A (Mr Miller)	Yes, GMI received a cover from Totty Construction, yes.
Q (OFT)	And that that would have been written pre tender, before the tender went in?
A (Mr Miller)	It would, as soon as we'd got our figure, then we would have decided what figure to give GMI.
Q (OFT)	And as you told us before, the actual exchanging of the cover price over the phone, there will be an initial contact and the actual cover price would go over the day before or the morning of the, the contract?
A (Mr Miller)	Yes."

64. Although the facts relating to the Infringement were in dispute, neither Mr Miller nor any other witness was called by the OFT to give evidence before us, so the above exchange represented the only explanation of the Totty Tender Summary Sheet. We venture the following points. On the basis of that record of interview, Mr Miller had an actual recollection of the tender in question and it is his handwriting on the document. But on the same basis, it also seems clear that Mr Miller did not, himself, provide a cover to GMI: we find his inability to recollect that he had ever spoken to GMI, combined with his positive statement that he knew no-one at GMI, extremely persuasive on this point.

65. It follows, therefore, that Mr Miller must have been recording what *someone else* had told him. Moreover, there is a troubling tension between his assertion (in response to a leading question by the interviewer) that "GMI received a cover from Totty Construction" and his vagueness about the actuality and possible source of that cover: "That's not to say that one of our other estimators or, or directors hadn't received a phone call." The most, we think, Mr Miller

could have said is that someone else in Totty – someone he was now incapable of identifying – must have informed him that they had provided GMI with a cover price.

66. Equally, we find his assertion (again in response to leading questions by the interviewer) that he would have written the words "GMI cover £4,795" before the tender due date a little too emphatic. It appears from the transcript that Mr Miller was speaking of his usual practice. We do not believe that he was saying that he had a positive recollection of writing these words before the tender went in.

67. Nevertheless, the Totty Tender Summary Sheet, read with that which Mr Miller's is recorded as having said in interview, represents some evidence pointing towards the fact that GMI did seek a cover, as the OFT alleges.

68. Mr Naylor's evidence on this point, in his affidavit, was as follows:

> "13. GMI was invited to tender in respect of this project. I was asked by the Managing Director at the time, Jim Shann, to undertake the estimating procedure with my colleague, Senior Estimator Gary Peacock. As is normal, this commenced with sending out sub-contract and material inquiries, Unfortunately, we do not as a matter of routine retain records in relation to tenders that we decline or in which we are not successful. However, I understand that Jim Shann has been able to obtain records from two of the sub-contractors that we approached in relation to this tender, John Atkinson Ceilings Limited and Cover Structure Limited and that these companies have been able to provide evidence that confirms we asked them to price the project...
>
> 14. Upon receiving sub-contract and material prices we completed the estimating procedure and submitted our tender by the closing date.
>
> 15. For the avoidance of doubt I am confident that GMI completed the estimating procedure for this tender and following completion of this procedure submitted a bona fide tender.
>
> 16. Following submission of our tender Jim Shann and I discussed that it would be useful to obtain feedback in relation to this tender. We discussed which company would be a good comparable and, as we knew Totty would be submitting a bid we decided to contact Totty. I did not know anybody at Totty. However, I recall speaking to a member of the estimating team of Totty and exchanging details of the prices we had each tendered. As a result of this call I

recall thinking that we would be unlikely to win the tender and informed Jim Shann accordingly."

69. Mr Naylor was cross-examined on this point by Ms Bacon, and gave evidence consistent with what he had said in his affidavit. Mr Shann too was asked about this in cross-examination and did not recall speaking to Mr Naylor about approaching Totty for feedback (Transcript – 12 July 2010, pp18-20 (Mr Naylor) and pp30-31 (Mr Shann)).

70. In addition there was documentary evidence before us showing that GMI had approached named sub-contractors with a view to pricing the tender, and were in receipt of formal confirmation of sub-contractors' quotations for the project in question dated as late as 16 June 2005 (the return date being midday 20 June). Therefore GMI clearly *began* the process of putting together a tender. It was the OFT's hypothesis that having done so GMI found itself in difficulty with timing, and sought at the last minute (and contrary to GMI's general policy) to get a cover price. This is, of course, a perfectly possible scenario: but there is scant evidence to support it.

71. We are left with two plausible but contradictory versions of possible events. Ultimately we are not persuaded that the version put forward by the OFT is more likely than not to be correct. In fact, for the following reasons, we consider that GMI's version of events is to be preferred:

(1) As we noted in paragraph 32 above, we found Mr Naylor an honest and credible witness. He claimed a positive recollection of speaking to Totty after tenders had been submitted, and we believe him. Moreover, we consider that if – as the OFT suggested – GMI had commenced the tender process, but then abandoned it mid-way in favour of obtaining a cover (and in clear breach of GMI's policy) then Mr Naylor and Mr Shann would have spoken about this at the time; and the matter would have stuck in their minds rather clearly, and they would have remembered it. The OFT's case effectively requires us to reject the sworn evidence of Mr Naylor and Mr Shann, tested in cross-examination, on the strength of the Totty Tender Summary Sheet and

what Mr Miller is recorded as having said in interview about it. We are not prepared to do so.

(2) The Totty Tender Summary Sheet raises rather more questions than it answers. As we have described, the handwritten entry relating to GMI recorded what Mr Miller appears to have been told by *someone else* whose identity he cannot now remember. It is eminently possible that there was a miscommunication somewhere down the line, so that Mr Naylor's post-tender inquiry was misrecorded as a pre-tender request for a cover.

(6) Conclusion

72. For the reasons we have given, we allow GMI's appeal against the OFT's findings of liability in respect of both Infringements. It follows that those findings and the penalties imposed in respect of them must be set aside.

V. PENALTIES

73. In the light of our conclusion on liability, it is unnecessary to consider the grounds of appeal in relation to the penalties imposed by the OFT.

VI. POSTSCRIPT: THE OFT'S EVIDENCE

74. Difficult and important questions arise in relation to the "evidence" adduced by the OFT. There is no indication that the transcripts of Mr Nelson's and Mr Miller's interviews with the OFT were reviewed by and attested to by them. Certainly they did not endorse the transcripts with a statement of truth or even sign them.

75. More fundamentally, we do not consider that material contained in transcripts of interview – even if reviewed and attested – is a satisfactory means of evidencing alleged infringements in cases of this kind, particularly where important facts are in dispute. It is one thing to use a transcript of interview as evidence of relevant admissions by the interviewee; it is quite another thing to attempt to use it as evidence against a third party. In paragraph 81 of the Tribunal's decision in

Argos Limited v The Office of Fair Trading [2003] CAT 16, the Tribunal observed that "notes of interview are not, in our view, satisfactory substitutes for witness statements". We agree. A witness statement will set out the relevant facts, will be attested to by the witness by way of a statement of truth, and will enable the witness to be exposed to cross-examination should the accuracy and/or truth of those facts be disputed. This is not to say that relevant interview transcripts cannot or should not be put before the Tribunal in support of a witness statement. It is simply that they are not a substitute for it.

76. We do not therefore agree with the suggestion in numbered paragraph 2 of the OFT's letter to the Tribunal dated 6 August 2010, and referenced to *inter alia* this appeal, that the preparation of a witness statement in circumstances such as the present would be "a complete triumph of form over substance". (An extract from the letter is quoted at paragraph 54 of the Tribunal's judgment in *AH Willis & Sons Ltd v OFT* [2011] CAT 13.) Where crucial facts are disputed it may in certain cases, and depending upon what if any other evidence is available, be very difficult to resolve the issues in the absence of evidence from a witness who has been deposed in the ordinary way and whose assertions are available to be tested in cross-examination by those who dispute them. Where central issues of fact cannot be resolved, the outcome may have to turn on the burden of proof. It is therefore all the more important from the OFT's perspective that there should be probative evidence before the Tribunal. Thus, even if the OFT has not obtained witness statements in order to fortify its own decision-making process, once it becomes clear that there is a material dispute as to the facts on which its decision was based, the OFT should consider to what extent such statements are necessary or desirable in order to support those facts in an appeal, subject always to the provisions of rule 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372). It is, of course, not normally the role of the Tribunal to decide whether and if so which witnesses should be deposed or called to give evidence by any party. We should add in regard to these matters that we are in entire agreement with the comments of the Tribunal at paragraphs 108 to 110 of its judgment in *Durkan Holdings Limited and others v OFT* [2011] CAT 6.

The President | Adam Scott | Marcus Smith QC

Charles Dhanowa
Registrar

Date: 27 April 2011