Neutral citation [2011] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1121/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

22 March 2011

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR JOHN PICKERING
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) DURKAN HOLDINGS LIMITED
(2) DURKAN LIMITED
(3) CONCENTRA LIMITED
(formerly DURKAN PUDELEK LIMITED)

Appellants

- v -

OFFICE OF FAIR TRADING

Respondent

Hearing dates: 19, 20, 21, 22 and 23 July 2010

JUDGMENT

APPEARANCES

Mr Mark Hoskins QC (instructed by Jones Day LLP) appeared on behalf of the Appellants.

Ms Kelyn Bacon, Mr Daniel Beard and Mr Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent.

I. INTRODUCTION

1. This is one of 25 appeals brought by undertakings in the construction industry against the Decision adopted by the Respondent ("the OFT") on 21 September 2009 called "Bid rigging in the construction industry in England" ("the Decision"). For the purposes of this judgment, references to the Decision are in the following form: "II.10-16/36", where the first reference is to the relevant paragraph number and the reference after the stroke is the page number. This example thus refers to paragraphs II.10 to 16 of the Decision, at page 36.

2. The Decision concerns the practice of cover pricing which, the OFT found, was for many years endemic in the construction industry in England. Cover pricing is described in paragraph III.74/357 of the Decision as occurring:

> "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."
>
> (See also Decision IV.7/396.)

3. The mischief in such conduct, according to the OFT, is that it gives the body seeking to place the contract a false impression of a competitive bidding process when in reality contractors have agreed to submit token bids that are usually non-competitive. Moreover, the uncompetitive bid submitted by Bidder A is set using commercially sensitive price information obtained from Bidder B, namely what price Bidder A would need to charge in order to be sure of quoting a tender price above that of Bidder B. Another aspect of bid-rigging described in the Decision occurs where Bidder B made a payment to compensate Bidder A for the fact that the latter had no prospect of winning the contract and for the costs incurred in submitting a tender.[1] This conduct was considered by the OFT to be more serious than "simple" cover pricing, thereby meriting a higher starting point for the calculation of the appropriate penalty.

[1] See Decision III.74/357; see also Decision, III.127/370 to III.157/377 regarding two types of compensation payments, with and without cover pricing.

4. It is not disputed that the practice of cover pricing constitutes an infringement of the prohibition contained in section 2(1) of the Competition Act 1998 ("the 1998 Act"). That prohibition, hereafter referred to as "the Chapter I prohibition", is expressed as follows:

> "**2 Agreements etc preventing, restricting or distorting competition**
>
> (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 prevention, restriction or distortion of competition within the United Kingdom,
>
> are prohibited unless they are exempt in accordance with the provisions of this Part."

5. Section 2(1) of the 1998 Act essentially mirrors the provisions of what is now Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") (formerly Article 81(1) of the EC Treaty), though it is limited to effects within the United Kingdom. Section 60 of the 1998 Act aims to ensure that so far as possible questions arising in the application of the Chapter I prohibition are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law:

> "**60 Principles to be applied in determining questions**
>
> (1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission."

6. Section 60 thus directs the Tribunal to apply the Chapter I prohibition consistently with the case law on Article 101 TFEU, but makes clear that this is subject to the requirement that we have regard "to any relevant differences" between the provisions concerned.

7. At the time that the infringements which are the subject of this appeal were committed, the Third Appellant was called Durkan Pudelek Limited and we shall refer to that company in this judgment as "Durkan Pudelek". The First Appellant ("Durkan Holdings") owned 51 per cent of the shares in Durkan Pudelek from the time that Durkan Pudelek was set up in 1992 until a management buy out took place in 2007. The Second Appellant ("Durkan Limited") is and was at the relevant time a wholly owned subsidiary of Durkan Holdings.

8. The OFT found that Durkan Pudelek had committed two infringements of the 1998 Act, referred to in the Decision as Infringement 135 and Infringement 240. Infringement 135 (described on page 1059 of the Decision) arose when Amsprop Investments Ltd sought tenders for new build offices at 17/18 Dover Street, London W1 in November 2002. Six companies were invited initially to tender for the work, including Durkan Pudelek and Mansell Construction Services Ltd ("Mansell"). Three of those six companies were short-listed and asked to put in a second tender. At some point during the process, Mansell and Durkan Pudelek agreed that the unsuccessful candidate would be compensated by the successful candidate for the cost of work undertaken in preparing its unsuccessful bid. A sum of £60,000 plus VAT was agreed. Mansell won the contract. Some time later, after Durkan Pudelek had chased payment, the agreed sum was paid by Mansell to Durkan Pudelek. Durkan Pudelek admitted during the course of the OFT investigation that this was a contravention of the 1998 Act.

9. Infringement 240 (described on pages 1591 *et seq*. of the Decision) arose in February 2006 following a request for tenders for the redevelopment and refurbishment of 45/46 South Molton Street, London, W1. Five companies were invited to tender. Durkan Pudelek admitted at an early stage of the OFT's investigation that it provided a cover price to one of the other bidders, though in the event a different company won the contract.

10. In respect of these two Infringements, the issue that arises in this appeal is whether the OFT was correct to find that Durkan Holdings was jointly and severally liable with Durkan Pudelek to pay the fine imposed for Infringements 135 and 240. The OFT held that Durkan Holdings was so liable because it found that at the relevant time Durkan Holdings could and in fact did exercise "decisive influence" over Durkan Pudelek, that is, a degree of control over Durkan Pudelek sufficient for them to form part of the same undertaking for the purposes of the Chapter I prohibition. Both Durkan Holdings and Durkan Pudelek dispute this finding. So far as the imposition of the penalty is concerned, the significance of the OFT's finding of decisive influence was two-fold. First, it meant that Durkan Holdings was liable for the fines imposed on Durkan Pudelek in respect of Infringements 135 and 240[2]. But it also affected the calculation of the fine. We will discuss the OFT's calculation of the fines in these cases in more detail in the context of the challenge to the level of the fines in section IV. It suffices here to note that the fine is based in part on the turnover of the undertaking concerned. If Durkan Pudelek forms part of the Durkan Holdings group, as the OFT found, then the OFT was entitled to base the fine on the consolidated turnover of the Durkan Holdings group of companies and not just on the turnover of Durkan Pudelek. This resulted in a fine that was substantially higher than would have been imposed if Durkan Holdings had succeeded in showing that it did not exercise decisive influence over Durkan Pudelek.

11. In the Decision, the OFT also found that Durkan Limited had committed an infringement, referred to as Infringement 220 (described on pages 1499 *et seq*. of the Decision). That arose in March 2005 when Newham London Borough Council sought tenders for external structural refurbishment works in Claremont Close, London, E16. Ten companies were invited to tender. The OFT found that Durkan Limited supplied a cover price to Mansell. Durkan Limited has always denied that this was the case and it now challenges the OFT's finding of infringement in this appeal. Durkan Holdings supports Durkan Limited's challenge to that finding but accepts that, if liability is confirmed, Durkan Holdings would be liable to pay any fine imposed on Durkan Limited.

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[2] In fact Durkan Holdings' liability in respect of Infringements 135 and 240 was greater than Durkan Pudelek's: see paragraph 138 of the judgment below.

12. The Appellants also challenge various aspects of the way the fines were calculated. For Durkan Holdings, the challenge to the fines for Infringements 135 and 240 are only relevant if they are unsuccessful on the control issue (section II below). For Durkan Holdings and Durkan Limited, the challenge to the fine for Infringement 220 is only relevant if their challenge on liability fails (section III below).

II. LIABILITY OF DURKAN HOLDINGS FOR DURKAN PUDELEK'S INFRINGEMENTS

13. It is important to emphasise that the addressees of the competition rules and the addressees of decisions by the OFT are not necessarily the same. The Chapter I prohibition applies to agreements and/or concerted practices between "undertakings", whereas decisions by the OFT penalising an infringement of that prohibition are addressed to persons, not least because such decisions must be enforced. For that reason in most cases in which a competition authority, such as the OFT, imposes a fine for an infringement, the question arises as to which legal entity or entities can properly be held accountable for the infringing conduct and hence liable to pay the fine.

14. The term "undertaking" in the Chapter I prohibition is taken from the corresponding prohibition in Article 101 TFEU. According to the jurisprudence of the Courts of the European Union, an "undertaking" must be understood as designating an economic unit for the purposes of competition law: Case 170/83 *Hydrotherm* [1984] ECR 2999, at paragraph 11. Undertakings have been defined by the General Court (formerly the Court of First Instance) as "economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision": see Case T-9/99 *HFB v Commission* [2002] ECR II-1487, at paragraph 54 and the case-law cited.

15. Different companies belonging to the same corporate group form a single economic entity. This means that the parent company of the group can be held liable for the infringing conduct committed by another company within the undertaking where the parent exercises "decisive influence" over the subsidiary. The question in this appeal is

what is the precise nature of the "decisive influence" test and did Durkan Holdings exercise decisive influence over Durkan Pudelek.

(a) The "decisive influence" test

16. The leading authority on this question is the judgment of the Court of Justice in Case C-97/08P *Akzo Nobel NV and Others v Commission* [2009] ECR I-8237 ("*Akzo Nobel*"). That appeal arose out of the choline chloride cartel which was the subject of a European Commission decision in 2004. The Commission's decision (OJ 2005 L 190, p. 22) was addressed to the three companies within the Akzo Nobel group that had directly participated in the cartel. The Commission also addressed the decision to Akzo Nobel NV because it found that that company was in a position to exercise decisive influence over the commercial policy of the three subsidiaries in which it held, directly or indirectly, all the shares. The General Court upheld that finding (Case T-112/05 *Akzo Nobel NV and Others v Commission* [2007] ECR II-5049).

17. On further appeal, the earlier case law was analysed by Advocate General Kokott in her Opinion given on 23 April 2009. She noted (paragraph 47) that the parties were agreed that attribution of a subsidiary company's cartel offence to its parent company must satisfy two cumulative conditions: first, the parent company must be in a position to exert decisive influence over its subsidiary and, secondly, it must actually exert that influence. The first condition would necessarily be satisfied where the subsidiary was wholly owned, directly or indirectly by the parent. The "matter of fierce dispute" in the case before her was what requirements should be applied as to proof of the second condition, namely the *actual exercise of decisive influence* by the parent company over its subsidiary. She considered that the conduct of the subsidiary on the market was not the only factor which enables the liability of the parent to be established, that is "only one possible connecting factor on which to base an attribution of responsibility to the parent company" (paragraph 87 of her Opinion). The Advocate General had been considering an argument raised by Akzo Nobel that the only relevant criterion for attributing liability to the parent is the exertion of influence on commercial policy in the narrow sense of the subsidiary's conduct on the market. In response to that argument she said this (footnotes omitted):

> "89. However, even if the autonomy of the subsidiary as regards its commercial policy in the narrower sense is examined, the decisive influence of the parent company does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct. Such instructions are merely a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy. However, autonomy of the subsidiary cannot necessarily be inferred from their absence.
>
> 90. Nor, *a fortiori*, can it depend on whether the parent company has interfered in the day-to-day business of its subsidiary, or, equally, whether anticompetitive activities engaged in by the subsidiary were attributable to an instruction from the parent company or known to the latter.
>
> 91. A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy. Thus, a single commercial policy within a group may also be inferred *indirectly* from the totality of the economic and legal links between the parent company and its subsidiaries. Conversely, the absence of such a single commercial policy as between a parent company and its subsidiary can be established only on the basis of an assessment of the totality of all the economic and legal links existing between them.
>
> 92. For example, the parent company's influence over its subsidiaries as regards corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters may have indirect effects on the market conduct of the subsidiaries and of the whole group. Moreover, as the Commission correctly points out, even a company's mere membership of a group may influence its market conduct, in relation, for example, to the question of with whom that company should actively compete.
>
> 93. In the end, the decisive factor is whether the parent company, by reason of the intensity of its influence, can direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit."

18. In its judgment, the Court of Justice considered first the nature of the test to be applied. It held (omitting the references to earlier case law):

> "58. It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (…), having regard in particular to the economic, organisational and legal links between those two legal entities (…).
>
> 59. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law …. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article [101 TFEU] enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.

> 60. In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary (…) and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (…).
>
> 61. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (…)."

19. The Court of Justice went on to state that the General Court had adopted a relatively open position as regards the kinds of evidence that a parent could adduce to rebut the presumption. The General Court had said this:

> "64. … it should be noted that, when analysing the existence of a single economic entity among a number of companies forming part of a group, the Community judicature has examined whether the parent company was able to influence pricing policy (…), production and distribution activities (…), sales objectives, gross margins, sales costs, cash flow, stocks and marketing (…). However, it cannot be inferred that it is only those aspects that are covered by the concept of the commercial policy of a subsidiary for the purposes of the application of Articles [101 and 102 TFEU] with respect to the parent company.
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> 65. On the contrary, it follows from that case-law, … that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity. It also follows that when making its assessment the Court must take into account all the evidence adduced by the parties, the nature and importance of which may vary according to the specific features of each case."

20. The Court of Justice held that:

> "74. (…) in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken not only of the factors set out in paragraph 64 of the judgment under appeal, but also of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list."

21. The Court then turned to the question of what aspects of the subsidiary's conduct on the market needed to be influenced in order for the test to be satisfied. In rejecting the narrow scope of commercial policy put forward by Akzo Nobel, the Court expressly approved the passages from Advocate General Kokott's Opinion cited above at

paragraph 73 of its judgment. The Court held that the General Court had not erred as regards the sphere in which the parent company exercises influence over its subsidiary.

22. From this we see that the EU Courts have expressed in a number of different ways the question we must ask ourselves: did the parent exercise decisive influence over the subsidiary; do the companies concerned determine their own conduct independently on the market or does the subsidiary comply with the instructions that the parent issues; can the parent direct the conduct of its subsidiary to such an extent that the two must be regarded as one economic unit? However one expresses the test, a number of points emerge:

    (a) The fact that the parent owns all the shares in the subsidiary means that it has the ability to exert influence; this does not automatically mean that it actually exerts that influence but it creates a rebuttable presumption that influence was actually exercised.

    (b) The exercise of influence can be indirect and may be established even if the parent does not interfere in the day to day business of the subsidiary and even if the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary.

    (c) It is not necessary to show that any influence was actually exercised as regards the infringement in question: one must look generally at the relationship between the two entities.

    (d) The factors to which the court may have regard, when considering the issue of decisive influence, are not limited to commercial conduct but cover a wide range as described by the Advocate General and the General Court.

23. There was some discussion before us as to whether the presumption that arises where the parent owns 100 per cent of shares in its subsidiary also arises in this case where Durkan Holdings held 51 per cent of the shares in Durkan Pudelek and if so, what role such a presumption plays where we have heard evidence and argument about whether actual decisive influence was exercised. In the event nothing turns on the existence or

operation of any presumption. We have based our findings on the evidence presented to us.

(b) Durkan Pudelek

24. The OFT set out its reasons for finding that Durkan Holdings exercised decisive influence over Durkan Pudelek in paragraphs II.399/96 to II.442/105 of the Decision. Evidence about the circumstances in which Durkan Pudelek was formed was given in witness statements from Mr Mike Pudelek and Mr Colin Simmons, respectively the Chief Executive and Managing Director of Durkan Pudelek; by Mr William Durkan; by his son, Mr Daniel Durkan and by Mr Alan Fraher. William Durkan, Daniel Durkan and Alan Fraher were all directors of both Durkan Holdings and Durkan Pudelek at the time of the infringements committed by Durkan Pudelek. They were employed by Durkan Limited, the wholly-owned subsidiary of Durkan Holdings. Alan Fraher was the Finance Director of Durkan Holdings and of Durkan Limited. He was the company secretary of Durkan Pudelek and he held the title of Finance Director of Durkan Pudelek as well, though he denied that he actually fulfilled this role for that company.

25. The arrangements for the governance of Durkan Pudelek were set out in the Subscription and Shareholders' Agreement entered into on 7 October 1992 between Durkan Holdings, Mr Pudelek and Mr Simmons ("the Shareholders' Agreement"). As we have mentioned, Durkan Holdings held a 51 per cent shareholding in Durkan Pudelek at the material time. The other 49 per cent was held from 7 October 1992 to 10 September 2007 in equal shares by Mr Pudelek and Mr Simmons.

26. Mr Pudelek and Mr Simmons told us that the purpose of setting up Durkan Pudelek was so that they could run their own business. Durkan Limited's business had been primarily in the public sector, particularly in residential building projects. Mr Pudelek and Mr Simmons had experience of working on building projects in the private sector but that experience was gained as employees in a different construction company – they had no experience of running their own business. The two men wanted to set up their own construction company working in the private sector, to build it up to a substantial company and then sell it to generate a capital sum to share among the owners. For its part, Durkan Holdings was interested in investing in a company that was active in a sector where Durkan Limited had not been focused. Durkan Holdings would provide

Mike Pudelek and Colin Simmons with the administrative support that they needed to found and build the new venture in return for a share in the capital released if the company was successful and was later sold on.

27. Mr Pudelek said that in the negotiations for the founding of Durkan Pudelek and throughout the period with which we are concerned, he and Mr Simmons were insistent that they required day-to-day control of the business and its future direction as part of their personal aspirations:

> "We required autonomy and independence that owner managers enjoyed and the prospect of fulfilling this ambition was the driving force to convince us to leave our previous employers. Post recession and operating under the "umbrella" of the Durkans, acting as "Silent Partners", investors and effectively backing our track record, contacts, drive and initiative, we set about establishing our business and we invested significantly both financially and by working incredibly long hours. …
>
> …
>
> In conclusion, Colin Simmons and I ran Durkan Pudelek. Our business was independent of Durkan Holdings. Following incorporation of our business we were not reliant on Durkan Holdings for anything. Durkan Holdings had no influence over us and did not seek to influence us."

28. Mr Simmons' evidence was to similar effect. He stressed that he and Mr Pudelek had control of the commercial operations of the business and it was their business enterprise. He said:

> "We did not defer to Durkan Holdings for our commercial strategy. We decided on our own commercial strategy and our commercial decisions were never vetoed by Durkan Holdings."

29. The Durkan Holdings directors were equally emphatic that no control was exercised. For example, Mr William Durkan said in his witness statement that he rarely attended Durkan Pudelek board meetings:

> "The reason I rarely attended Board meetings was because the factual reality was that Mike Pudelek and Colin Simmons operated the business, and my presence at any meeting would not change anything they wanted to do with the business. For me Durkan Pudelek was simply an investment opportunity."

(c) Did Durkan Holdings exercise decisive influence over Durkan Pudelek?

30. In our unanimous judgment, however, the evidence entirely convinces us that Durkan Holdings did exercise decisive influence over Durkan Pudelek. The OFT was right, therefore, to find that Durkan Holdings could be held jointly and severally liable to pay any fine imposed on Durkan Pudelek.

31. In reaching this view, we have considered three indicators of the existence of control: first, whether Durkan Holdings had decisive influence over the strategic direction of Durkan Pudelek's business; second, how far Durkan Pudelek was integrated into Durkan Holdings' corporate structure and treated as part of the Durkan Group and third, how far Durkan Holdings, through its representatives on the board of Durkan Pudelek, was involved in the running of Durkan Pudelek.

(i) Durkan Holdings' control over the strategic direction of Durkan Pudelek

32. There are three aspects of a construction company's business which can be considered important elements of its business strategy:

(a) the type of building projects the company will tender for;

(b) the profit margin it will try to achieve when tendering for projects; and

(c) its policy on key aspects of its business such as finance, health and safety and corporate governance.

33. On the first of these aspects, what kinds of building projects the company is going to pursue, we find that Durkan Holdings determined the scope of Durkan Pudelek's business when the company was first founded, making it clear to Colin Simmons and Mike Pudelek that their business must not encroach on that of the sister company, Durkan Limited.

34. The first board meeting of Durkan Pudelek took place on 5 October 1993. The minutes of that meeting show that William Durkan asked Daniel Durkan to convene a meeting between the directors of Durkan Pudelek and the directors of Durkan Limited "to ensure proper coordination of all pre-contract issues". The minutes of the following

Board meeting on 2 November 1993 record the following as being a "fair reflection" of the agreement reached on the allocation of work between Durkan Pudelek and Durkan Limited:

> "It was agreed that the meeting held earlier in the day with [the Directors of Durkan Limited] had addressed the issue of tender co-ordination as intended. The following confirms that agreement.
>
> Wherever possible Durkan [Limited] will concentrate on public sector residential opportunities and pass all other tender opportunities receive[d] by them to Durkan Pudelek Limited, save those under £150K which will be passed to Durkan Brothers Small Works department. This expedient will be reviewed by the Directors of Durkan [Limited] and Durkan Pudelek from time to time to ensure the market identity and thrust of each company is maintained."

35. Daniel Durkan, when cross examined about this minute, described this as simply an agreement to redirect tender opportunities where the person inviting the tender had been confused about which company in the Durkan group was the appropriate one to address or where the tender inquiry had accidentally come to the estimating department of the wrong company. However, we consider that the evidence establishes that, prompted by William Durkan, the directors of the two subsidiaries made a strategic commitment to operate in different spheres of work. The decision to redirect tenders accordingly flowed from this.

36. Mr Pudelek's explanation was much more convincing. He said that the Durkan Limited directors had expressed concerns to William Durkan about what they saw as competition from the new company and they were "looking to make sure that their vision of their future was unaffected in its entirety by the activities of Colin Simmons and Mike Pudelek", in other words that Durkan Pudelek would not trespass on Durkan Limited's area of business.

37. We consider that the meeting was held to allay any concerns Durkan Limited may have had about the work that the new company, Durkan Pudelek, would undertake. It was, therefore, made clear to everyone that Durkan Pudelek would be restricted to private sector work and Durkan Limited to public sector work. An inquiry which came into the "wrong" company, regardless of the intentions of the person making the inquiry, would be redirected to the other company. This was important precisely for the reason

recorded in the minute, namely to ensure that "the market identity and thrust of each of the companies [in the group] was maintained".

38. In our judgment, this is a firm indication that this key plank of Durkan Pudelek's strategic direction was determined at the outset by Durkan Holdings to ensure that its two subsidiaries did not compete for each other's business and that they presented a coherent business package to the outside world. This is entirely how one would expect the parent company to act. The Durkan Holdings directors, supported by Mr Simmons and Mr Pudelek, gave evidence that the two men had no experience and no interest in taking on public sector work. The supposed division of business between Durkan Pudelek in the private sector and Durkan Limited in the public sector came about, they said, because of these inclinations rather than because of any influence from Durkan Holdings. We do not regard that as a credible explanation. The argument that Mr Simmons and Mr Pudelek were not experienced or interested in public sector work may have been a factor in the early days of the company's existence. However, the division of work remained in place over the years despite the growth of Durkan Pudelek's business and despite the fact that there were lean times in the private sector at certain points during those years. We consider that the fact that Durkan Pudelek never took on significant amounts of public sector work indicates that the strategic scope of each subsidiary was determined by Durkan Holdings for the benefit of the group as a whole and that did not change over time. We note also that the Horvath report, discussed in paragraph 40 below, describes the Durkan Pudelek business as offering a full range of construction contract services largely to commercial and other private clients but adds "it does not compete with the Durkan Social Housing business".

39. A similar situation arose in relation to Durkan Pudelek Interiors Ltd, which was initially a subsidiary company of Durkan Pudelek but was later absorbed as an unincorporated division of Durkan Pudelek. We have seen a number of instances where the Board of Durkan Pudelek (including William and Daniel Durkan and Mr Fraher) discussed the future direction of the Durkan Pudelek business. Thus, at a meeting of the Durkan Pudelek board on 31 July 2002 attended by Daniel Durkan and Alan Fraher (but not William Durkan) we see a reference to the main concern of the shareholders being to build a business with long term value:

> "The view was also expressed that in order to grow the Group generally, it may be appropriate for the [Durkan Pudelek] group to explore the possibilities of expanding by engaging in activities such as fast-fit interiors, facilities management or other construction related activities with the objectives of not only improving the maintainable and sustainable profits but also by improving the market rating of the Group as a whole."

40. Mr Hoskins QC, on behalf of Durkan Holdings and Durkan Pudelek, relied on a report prepared by a business consultant, Robert Horvath in October 2006. The Horvath report followed the failure of a proposed management buy out by Mr Pudelek and Mr Simmons. It explored what was going wrong with the Durkan Pudelek business and what options were available for resolving it. Mr Hoskins pointed to passages in the report that referred to the company as being run as an "entrepreneurial business" and about the failure of the board to put forward "a clear strategic vision". He also drew our attention to the fact that the report criticised the board for not meeting sufficiently frequently to give the necessary guidance to the executive team. Mr Hoskins submitted that this confirmed that the business was run by Mr Pudelek and Mr Simmons and that Durkan Holdings stood back and did not get involved in the strategic direction of the company.

41. In our judgment, the Horvath report describes a company that has run out of steam and has not developed the systems and structures that are needed for it to take the next step up in size to a larger company. There are other passages in the Report that undermine the conclusions that Mr Hoskins sought to draw from the report. For example, Mr Horvath reports that there is "a significant amount of support from the Group" in terms of health and safety, finance (bonds and insurance) and buying. There is a criticism that "there is little by way of strategic leadership for the cultural, training and incentive programmes within their HR function" but this clearly shows that Durkan Pudelek, even in 2006 was benefiting from being part of the Durkan group. The report also states that the company:

> "… is aware of and tries to ensure that it is up to date socially, environmentally, legally and as part of the wider Durkan group. They are conscious of the goodwill inherent in the Durkan name and they benefit from it."

42. We do not consider that the Horvath report supports the submission that Durkan Pudelek operated independently of Durkan Holdings.

43. The second key element in a construction company's strategy is its decision as to growth, margin and rate of return targets. For a company such as Durkan Pudelek which largely engages subcontractors to perform the building work rather than employing its own labour force, an important aspect of submitting a tender is what mark-up to put on subcontractor charges.

44. On this, it is again clear from the board minutes we have seen that Durkan Holdings monitored this closely and gave clear guidance to Durkan Pudelek as to what mark ups it should pursue. The information that was provided to the Durkan Pudelek directors for most of their board meetings included spreadsheets setting out the financial results for current and completed contracts, turnover and margin figures for contracts that Durkan Pudelek was involved in and the value of inquiries received and tenders submitted.

45. In February 1995 at a Durkan Pudelek board meeting, the minutes record that William Durkan expressed concern "at the level of risk to which the Durkan Group was being exposed as a result of its involvement with Durkan Pudelek Limited". He therefore proposed that turnover "should not be increased without there being a significant contribution to the bottom line".

46. In 2004 Durkan Pudelek went through a very difficult trading period with significant undervalues and overdue retentions[3]. We were shown the minutes of a meeting of the board of Durkan Pudelek in May 2004 attended by William Durkan, Alan Fraher and Daniel Durkan, amongst others. Mr Pudelek presented a report headed "Future Modus Operandi". This report, together with an agreed action plan, set out in detail how Mr Pudelek and Mr Simmons proposed to turn round the Durkan Pudelek business. It included a description of the kinds of work that the company would pursue, and the kinds it would avoid, and a clarification of the respective roles of the different directors. The minutes of the Board meeting of May 2004 state that the Board considered that the way forward for the company was:

> "1) Turnover should comprise ideally 12/15 negotiated contracts in the range of £2m to £3m each.

[3] Overdue retentions occur when the client who is entitled to hold back payment of a proportion of the monies continues to hold that back after the contractor considers that the trigger for full payment has occurred. Undervalues occur where the client's experts certify the value of work carried out by the contractor at a lower sum than the contractor considers is correct.

> 2) Gross Profit Margin – Contracts should be accepted only where there is a clear indication that [Durkan Pudelek] is in a position to achieve a gross profit margin of 7.5% plus.
>
> 3) Commercial Management/ Cash Management – Management must seek to ensure that undervalues are not tolerated and that [Durkan Pudelek] receives its payments in accordance with the contract. This will require management being somewhat less accommodating and more commercially aware."

47. When this passage was put to Daniel Durkan he maintained that this merely recorded the words of Mike Pudelek or Colin Simmons reporting how they proposed to deal with the problems raised. He said that the rest of the board would simply have agreed and that he "merely sat there and listened to their reports". This is certainly not a natural reading of the passage and is not, in our judgment, likely to be what happened. We have no doubt that what the minutes record is the understandable dissatisfaction of the Durkan Holdings directors with the performance of their 51 per cent owned subsidiary. Mr Pudelek and Mr Simmons made their presentation to the Board and received clear guidance from the Board as to how matters should be improved.

48. Similarly, at the November 2003 Board meeting, Mr Fraher initiated a discussion about overdue retentions of about £500,000 and undervalues of about £800,000. The minutes then record:

> "AF also advised that both these significant overdue retentions and very significant gross undervalues [lead] one to question the validity and the [underlying] assumptions as to the recoverability thereof and the consequent effect on reported profit and cash flow. AF also advised that there was an urgent need to crystallize both these issues.
>
> "AF also advised that the deteriorating gross profit percentage over each of the last four periods and the reliance on the forthcoming four months to partially redeem this situation was questionable in its achievability based on the [preceding] four periods."

49. From these examples – and there are others in minutes covering the whole period – we conclude that Durkan Holdings, through its directors on the Durkan Pudelek Board, maintained a close eye on profit margins and the likelihood of them being achieved. This may not have involved direct participation in the formulation of the individual tenders – that is not what a Board of Directors is for. But this is clear evidence of decisive influence being exercised by Durkan Holdings over the Durkan Pudelek business.

50. The third key element in the strategic policy of a construction company relates to health and safety and corporate governance more generally. So far as health and safety is concerned, the Board papers show that this was determined on a group basis[4], although we accept that the particular standards to which the subsidiary had to conform may have been different depending on the nature of the work they undertook. Mr Simmons explained that until 2001, Durkan Pudelek, through the services it shared with Durkan Limited, employed an external consultant to provide inspection, management and training on health and safety issues. He was the director responsible for health and safety within Durkan Pudelek and he met on occasion with his opposite number at Durkan Limited. However at some point Mr Simmons came to the conclusion that they needed to "up their game":

> "So I was instrumental in arranging a head hunt and convincing the other people within Durkan Holdings and Durkan Limited that we needed an in-house safety manager; and I arranged a head hunt and interviewed and recruited Ian Cresswell … … I drove that because I felt that we were getting behind the game on health and safety. … And we called him the Group Safety Manager. Again we called him that for external reasons and for staff and internal employment reasons. But, each company had its own safety policy."

51. On 31 July 2002 there was a meeting of the Durkan Pudelek Board at which it was recorded that "because of the top priority being given to the implementation of a sound Health & Safety Policy within the Group" the matter was going to be discussed at a meeting of the directors of all the Durkan companies. That meeting of Group directors had in fact been held earlier that morning. The minutes of that meeting record the frustration expressed by those present that "despite our continuing investment in Health and Safety training courses, engagement of external consultants etc. etc implementation of satisfactory Health and Safety procedures were not being satisfactorily applied at site level". The Board decided that a "new initiative" was required and charged Mr Simmons and one of the directors from Durkan Limited, together with Mr Cresswell to produce some draft proposals. It was noted that "a zero tolerance policy may be required on site despite the adverse commercial considerations which may prevail in the short term".

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[4] See, for example, the minutes of the Durkan Pudelek Board meetings on 20 March 1996 and 28 November 2001. The minutes of a meeting held on 28 July 2004 are particularly telling since under the heading "Health & Safety" they state: "There then followed a discussion in relation to the implementation of a 'Group' policy. In summary, a meeting is to be convened to ensure that we implement a 'Group' policy in relation to all Health and Safety issues".

52. We have seen the papers circulated for the Durkan Pudelek Board meeting on 5 February 2003, papers which Mr Daniel Durkan accepted were typical of the kinds of report circulated in advance of Board meetings. The papers included a Report by Mr Cresswell which clearly covers the whole group, including a table showing all actual and near miss incidents for each Durkan Group company. A summary of the parts most relevant to Durkan Pudelek was also provided.

53. At a meeting on 28 July 2004 of the Durkan Pudelek Board, the minutes record:

> "There then followed a discussion in relation to the implementation of a 'Group' policy. In summary a meeting is to be convened to ensure that we implement a 'Group' policy in relation to all Health and Safety issues."

54. Again, despite Daniel Durkan's protestations, it is absolutely clear that this important element of a construction company's business was based on a policy which was devised and applied across the whole group and that health and safety incidents involving Durkan Pudelek were closely monitored by Durkan Holdings.

55. Marketing also was, to some extent at least, conducted jointly. There is a reference in the Board minutes of 8 March 1994 to the "Group's marketing strategy"; Mr Simmons and Mr Pudelek were invited to participate in a golf day organised by Durkan Limited "to help market the Company and Sister Company" (see the Board Minutes of 14 September 1994). The minutes of a meeting of the Durkan Pudelek board in February 1995 record a general understanding that marketing should be done in the name of "Durkan". The meeting of the Durkan Group Directors on 31 July 2002 expressly refers to marketing at point 12.0.

56. We were also shown the minutes of a Durkan Pudelek board meeting in March 1994 which notes:

> "[Alan Fraher] made known his view that the company should have a remuneration and reward package for staff which was not demonstrably different to that of Durkan [Limited] since this could cause problems for that company. The meeting agreed that the potential of the company must not be jeopardised by any undue influence but that such matter[s] would be treated sensitively."

57. Mr Fraher explained that the problem arose because, in order to attract the right calibre of staff, Durkan Pudelek were giving their people "fairly flashy cars", much 'flashier'

than the cars with which Durkan Limited's staff were provided. Given that these staff shared premises this might cause friction. The fact that this was an issue and that a director representing the Durkan Holdings' interests stepped in to draw it to the board's attention only makes sense on the basis that Durkan Holdings regarded both companies as part of the same organisation and the staff did too, expecting comparable conditions to be applied to their employment.

58. We therefore conclude that the strategic control of Durkan Pudelek's business lay with Durkan Holdings in relation to all three of these key elements. We reiterate that strategic control is different from day to day control. We accept Mr Simmons' and Mr Pudelek's evidence that they were in control of the day to day running of Durkan Pudelek, and it was they who went out and found work for the company. We also entirely accept that their hard work, experience and enthusiasm were in large part responsible for the initial success of the company. But there is abundant evidence before us that Durkan Holdings had a direct influence on Durkan Pudelek in respect of many, if not all, of the potential areas of influence mentioned by Advocate General Kokott in paragraph 92 of her Opinion in *Akzo Nobel*, namely "corporate policy, strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters".

(ii) Integration of Durkan Pudelek into the Durkan group

59. The second indicator as to whether a subsidiary and parent are operating independently is how far Durkan Pudelek acted as an integral part of the Durkan Holdings group. In this regard we find that there are numerous examples showing that Durkan Pudelek was treated as part of the corporate group and presented itself as such to potential clients and others.

60. Mr Pudelek explained why, when he and Mr Simmons were considering offers of capital investment, they chose the offer from William Durkan over that of a more general venture capital provider:

> "We were about creating an image that would allow us to actually build a company a lot more quickly than if I'd taken the offer from 3i's and Trillion. We had a 40 years experience within Durkans that we could draw on in terms of resources that were tried and trusted. In the early days it was a great comfort to us that we were able to actually use people."

61. In the Consolidated Financial Statement of Durkan Holdings for the year ended 31 January 2004, the Directors' Report states that the principal activities are building contract work. They then list the kinds of work they undertake, adding in parentheses the name of the subsidiary that specialises in that kind of work. Durkan Pudelek is listed as undertaking the private sector building work. We agree with the OFT that this shows that Durkan Pudelek was not regarded as being in a different position from Durkan Limited or Durkan New Homes but was being presented in effect as a division of the Durkan Group with its own specialism.

62. We were also shown print outs from the Durkan group web site from June 2007 "www.durkan.co.uk". They show that Durkan Pudelek is presented as part of the Durkan group, no different from Durkan Limited and Durkan Estates. The pages on the website that relate specifically to Durkan Pudelek are in the same format as those for the other companies although the logo is different in some respects. The links given for people who want to find out about a career in Durkan Pudelek are the general Durkan group links. Mr Pudelek accepted that it was to his advantage if people "chose to believe" that Durkan Pudelek was part of the Durkan group of companies.

63. Mr Simmons was very clear in his evidence about what they gained from their association with the Durkans. Whilst denying that the "Durkan Group" had any real existence he said:

> "It also suited our purposes to call something the Durkan group. It suited our purposes with clients to make us look better, bigger than we were; it suited our purposes with our staff as well, to show that we were bigger, better than we are, and that there's another authority above Mike Pudelek and Colin Simmons that they need to satisfy in terms of their performance. So we used the words Durkan group when in reality they were a group of individuals, employees, directors of Durkan Pudelek, Durkan Limited, Durkan Estates and New Homes under Durkan Holdings."

64. Thus, it appears to be accepted by the Appellants' witnesses that potential clients and employees were being invited to deal with Durkan Pudelek on the basis that Mr Pudelek and Mr Simmons (who had no previous experience of running their own business) were backed by the financial stability, business experience and good reputation of the established "Durkan" brand. But in fact, the witnesses claimed, this backing was not actually available to support Durkan Pudelek so that any confidence

placed in Mr Pudelek and Mr Simmons because of it would have been misplaced. We do not believe that was the case. William and Daniel Durkan and Mr Fraher were well aware that the reputation of the Durkan companies was bound up with the success of Durkan Pudelek and they acted accordingly.

65. We also heard evidence concerning intra-group transactions between Durkan Pudelek and Durkan Holdings. The main one was the management charge paid by Durkan Pudelek to Durkan Holdings for various services provided. Clause 7.3 of the Shareholders' Agreement stipulated that Durkan Holdings would provide services to Durkan Pudelek at no cost for the first year and thereafter at an annual cost equal to 5 per cent of the gross turnover of Durkan Pudelek, unless otherwise agreed by the shareholders. Durkan Holdings in fact provided these services by procuring that its subsidiary Durkan Limited, which employed the relevant personnel, provide them to Durkan Pudelek. Mr Daniel Durkan told us that a number of services were initially provided by Durkan Holdings to Durkan Pudelek including accounting and secretarial services, the buying of materials, the obtaining of bonds and insurance and IT support. In fact, it is clear from the Board minutes that nothing had been paid by Durkan Pudelek as at the end of 1994. At the meeting in January 1995, it was agreed that Mr Fraher would discuss this with Mr Pudelek and Mr Simmons because it was considered "somewhat inequitable" that Durkan Limited should have to bear all the shared overheads without a contribution from Durkan Pudelek.

66. The management charge was then renegotiated. Mr Fraher told us that he had:

> "a fairly long and heated discussion with Colin Simmons as to exactly what they would pay for, and basically, also what services they would require, because at this stage we are now into January 1995 and the business was bedding down somewhat."

67. The resulting agreement was that rather than pay a proportion of their gross turnover, as envisaged by clause 7.3 of the Shareholders' Agreement, Durkan Pudelek's contribution to common overheads would be based on dividing up the costs in proportion to the different estimates from the companies within the Durkan group as to how much turnover they would generate during the coming year. So if Durkan Pudelek predicted that they would have £10 million of turnover in a particular year and the other

companies' combined predictions were £50 million, Durkan Pudelek would be charged one sixth of the common costs.

68. Again, the fact that payment for services rendered by Durkan Limited was waived or postponed during the early years of Durkan Pudelek's existence, at least up to and including the financial year ending 31 January 1995, is evidence that the relationship between them was not simply a commercial, arm's length one. The fact that subsequently there was a renegotiation of the payment formula (because it had become clear that Durkan Pudelek did not require all the services originally offered) does not detract from this, however aggressive those negotiations were.

69. We were shown a number of transactions in the various accounts whereby payments were made between the companies in the group. For example, in Durkan Pudelek's accounts for the years ending 31 January 2001 and 2002, there were substantial payments made not only to Durkan Limited (in respect of the management charge) but to Durkan New Homes Limited, another subsidiary of Durkan Holdings. Mr Fraher could not recall the reason for these payments though he thought they might relate to a decision to move the building in which the companies were housed and which was owned by Durkan New Homes Limited into a funded unregulated retirement benefit scheme for Daniel Durkan, Colin Simmons and Mike Pudelek. In the accounts for the year ended 31 January 1997, there is reference to a substantial interest free loan having been made to Durkan New Homes Limited. Mr Fraher recalled that this, and a similar payment the following year, was not strictly speaking loans, but rather payments in respect of Durkan Pudelek's involvement in a joint venture with Durkan New Homes developing three sites. Similarly, Mr Pudelek told us that when Durkan House was purchased in about 2000, Durkan Pudelek Interiors carried out very substantial refurbishment works. This was done on an "as near as cost plus as you can get it" basis.

70. Regardless of their purpose – and we are not suggesting that there was anything improper in any of these transactions – we accept Ms Bacon's submissions on behalf of the OFT that these are the kinds of transactions that one would expect to see within a group and they are not the kind of transactions that you would expect to see if Durkan Pudelek were being operated as a autonomous company with its own entirely separate

commercial policy and independent financially from Durkan Holdings and the other subsidiaries.

71. Finally, the OFT was right to rely in the Decision on a number of overlapping directorships within the Durkan group.[5] Not only do various members of the Durkan Holdings board also sit on the Durkan Pudelek board, but Mr Pudelek and Mr Simmons were also directors of another company within the group. From January 2001 until October 2005 Mr Simmons was a director of Durkan Estates, the private residential and commercial property development arm of Durkan Holdings. Mr Simmons explained that he was not involved in the business of that subsidiary and had been appointed director as part of the arrangements for the purchase of Durkan House which was then moved into the pension plan. Mr Pudelek was a non-executive director of Durkan Limited for two or three years and of Durkan Estates, though the latter appointment was connected with the moving of Durkan House into the retirement plan. Again, there was nothing untoward in any of these appointments but they illustrate that Mr Pudelek and Mr Simmons were considered part of the family of directors of Durkan companies in a manner which is typical of subsidiaries of a corporate group and would be unusual as between independently operated companies.

(iii) Involvement of Durkan Holdings in the running of Durkan Pudelek

72. Analysis of the Shareholders' Agreement shows that Durkan Holdings held control over certain key aspects of running the Durkan Pudelek business such as signing cheques (at clause 5.1.4). Mr Pudelek described his and Mr Simmons' approach to the initial negotiations as follows:

> "We wanted control, and Tim [the chartered accountant] wanted to make sure that he did the best he could for Bill [William Durkan]. We got to the stage where we were walking away from each other over the 51 per cent because Colin and I were adamant that we had to have 50 per cent and Bill had to have 50 per cent, and it got to the stage where we had a little bit of a mentoring session with Stanley Watson who was the lawyer. Stanley said "Look, Bill won't sign anything where he doesn't have 51 per cent of it". So Colin and I just looked at this document again and said "Hey, what does 51 per cent mean in these circumstances?" We were indispensable. If you're indispensable you can afford to be magnanimous on giving Bill 51 per cent. He wasn't going to go out and get the business; he wasn't going to win the business; he wasn't going to run the business. This document gave us everything we wanted."

[5] Decision, II.407/97 and II.438/104.

73. It is thus clear that both William Durkan and Messrs Pudelek and Simmons appreciated the difference between splitting the shares exactly in half and splitting them 51:49 per cent in Durkan Holdings' favour. Certainly Mr Simmons and Mr Pudelek agreed to this because they knew that it would not interfere with the day to day control and running of the business. But the fact that the allocation of 1 per cent of the shares was such a sticking point in the negotiations shows that William Durkan was determined to maintain strategic control over the new company and Mr Pudelek and Mr Simmons realised that they were ceding that to him.

74. Clause 5.1.4 of the agreement provided that any cheques over £2,000 required a signature of a Durkan Pudelek representative and a Durkan Holdings representative. Mr Fraher told us that he was one of the signatories on behalf of Durkan Holdings and that it was invariably he who signed the cheques.

75. Daniel Durkan and Alan Fraher held executive posts in Durkan Pudelek and William Durkan was its Chairman. Despite their evidence to the contrary we find that the Board minutes show that they performed their duties seriously and conscientiously. Durkan Pudelek Board meetings took place every two months and, according to Daniel Durkan, generally lasted a couple of hours. Daniel Durkan attended every board meeting for which we have seen minutes. Mr Fraher also attended all or almost all the meetings. William Durkan travelled from Ireland to attend many of the Board meetings until about 2001 when he started to reduce the number of visits he made to London. In the first seven or eight years of Durkan Pudelek's existence William Durkan attended about 70 per cent of meetings. He told us that although the minutes describe him as chairing the meeting when he was present, he did not perform the role of a normal chairman "I did more listening, I didn't do much talking".

76. In relation to Mr Fraher's involvement in the business of Durkan Pudelek, the OFT relied particularly on his role in collecting the compensation payment from Mansell in Infringement 135. Mr Fraher and Mr Simmons went to a meeting in December 2003 with a representative of Mansell at the Swallow Hotel in Waltham Abbey. Both Mr Fraher and Mr Simmons maintained in their evidence to the Tribunal that Mr Fraher did not know either before or during the meeting the nature of the arrangement under

which the liability had arisen. Mr Fraher said he went along at Mr Simmons' request and realised that Mr Simmons was using him, vis-à-vis the representative of Mansell as:

> "a bit of a weapon: that we have a finance director and he's the bad guy who is going to get the money out of you."

77. Mr Simmons told us that there had been about a dozen meetings over the course of 15 years when he had asked Mr Fraher to come along to meet with clients who posed creditworthiness problems or owed money. It is clear to us that Mr Fraher was invited along in his capacity as Finance Director, whether of Durkan Pudelek or Durkan Holdings is not material, rather than because he was involved as an employee of Durkan Limited in providing credit control services to Durkan Pudelek. Indeed Mr Simmons accepts that he would have introduced Mr Fraher to the Mansell representative as the finance director, for the purpose of recovering the debt:

> "We used Durkan's – we used terminology like "Group", we used terminology like Alan Fraher as finance director in order to impress people and to give them greater weight externally. We might have used the term "Alan Fraher, finance director" to a member of staff to impress him internally as well but we all knew … exactly who ran the business and that was Mike Pudelek and Colin Simmons. We ran it day to day we ran it week to week and year by year."

78. We agree that this indicates that Mr Fraher did fulfil his duties as Finance Director without it being necessary for us to decide the factual dispute as to whether he knew that the payment Mansell was being chased for was in fact an unlawful compensation payment.

79. We were taken to a large number of papers relating to the Durkan Pudelek Board over a long period of time between 1992 when Durkan Pudelek was set up and 2007 when Mr Pudelek and Mr Simmons bought out the Durkan Holdings' share in the company. Durkan Pudelek's infringements took place in January 2003 and February 2006. Even though there is no evidence that the structure of management and control within Durkan Holdings and Durkan Pudelek changed between 1992 and 2007[6], we accept that one should not focus too much on the Board minutes right at the start of the enterprise given that the infringements took place some years later. Equally, it would not be right to focus just on the period of the infringements: see the Tribunal's earlier ruling on the

[6] The point was made on behalf of Durkan Holdings that their majority of directors on the board was diluted over time. The OFT countered, rightly in our view, that Durkan Holdings retained the power to pack the board with their directors if they thought their concerns were not being addressed.

disclosure of Board minutes from the start of the company's business ([2009] CAT 12). However, it is clear to us that the same inter-relationships applied in the Durkan group throughout the period.

80. Mr Daniel Durkan was taken, in cross examination, to the Agenda and Board papers prepared for a meeting of the Durkan Pudelek Board on 5 February 2003, that is, close to the time when Infringement 135 was committed. Attached to the Agenda are various reports going into considerable detail about what was happening in the Durkan Pudelek business. There was a report on current contracts which identified any delays in the completion of the works, any shortfalls in the extensions of time requested by Durkan Pudelek and granted by the client and noting the quality of the relationship between Durkan Pudelek and the client. The Board also received reports on under- and over-values on contracts, exposure to liquidated damages claims or on loss making contracts; lists about changes in personnel, and reports of any grievance or disciplinary issues arising in the period.

81. Durkan Holdings submitted that the purpose of these Board meetings was to reassure Durkan Holdings about its investment in Durkan Pudelek and not to enable Durkan Holdings to influence Durkan Pudelek's business. It was said that at the meetings, Mr Pudelek and Mr Simmons simply reported what was happening to William and Daniel Durkan and Alan Fraher. That submission is contradicted by the evidence which, as we have described, shows that the Durkan Holdings directors were active at those meetings (see, for example, paragraph 84 below).

82. Mr Fraher was taken to various instances where the Board discussed Durkan Pudelek personnel issues. At the meeting of the Durkan Pudelek Board in July 2003, they discussed an unfair dismissal claim brought by a former employee before the Employment Tribunal which was subsequently settled. Mr Fraher said in evidence that major personnel issues within Durkan Pudelek would have been highlighted at Board meetings:

> "It was incumbent on Mike and Colin to report to the board meeting every two months what was going on and this is quite normal, because the last thing you would want is the name "Durkan" dragged into a tribunal with all the adverse publicity, so with something like this it made perfect sense for them to highlight it at a board meeting and make us aware of what was going on."

83. It is important to look closely at times when the business is not flourishing as that is the time at which the parent is more likely to be seen to exercise decisive influence if it has it – when the business is going well there may be no need for the parent to intervene to challenge or redirect the way the business is being conducted by those in day to day control. This is illustrated by what happened when the viability of the business was threatened by a contract for work for the Royal Geographical Society leading to a loss to Durkan Pudelek of about £1million. That loss meant that the net worth of the company at the relevant year end was reduced to about £560,000 and it was, as Mr Fraher described it "in a perilous state".

84. As we have mentioned, Mr Fraher was finance director of Durkan Holdings, Durkan Limited and Durkan Pudelek. We see from the board minutes of November 2003 that he was sounding alarm bells because he had noticed that the contract forecasts were still indicating that Durkan Pudelek would make a margin of 6.7 per cent but there were already under-valuations of £800,000 in respect of work undertaken. Mr Fraher said, when asked about this, that Mr Simmons and Mr Pudelek did not need him to point this out to them and that he did not intervene but merely highlighted the matter so that the operational directors of Durkan Pudelek could sort it out. That may well be true but does not detract from the fact that Mr Fraher was quite rightly paying close attention to the matters that were being reported to him in his role as finance director both of Durkan Pudelek and of Durkan Holdings and raising issues of concern during the board meetings.

85. We saw various references to these continuing under-valuations in subsequent board minutes for example at the meeting in July 2005. The minutes of a meeting in September 2006 record Mr Fraher asking a series of pointed questions all of which indicate that he was sceptical about the gross profit forecasts being presented by the management; that he had concerns that large sums in overdue retentions and under-valuations were still being treated as likely to be recovered rather than being written off and that other sums were being written off in relation to a contract that had been completed six months previously. We do not accept Mr Fraher's characterisation of these points as "observations" or that he was "merely highlighting" some points. The inference to be drawn from the minute is that Mr Fraher was making it clear that he was able and willing to look behind the overly rosy picture that Mr Pudelek and

Mr Simmons were trying to present to the Board about the prospects of the Durkan Pudelek business.

86. Similarly, with the business of what was originally Durkan Pudelek Interiors Limited which was initially a subsidiary of Durkan Pudelek and later became the Strategic Projects Division of Durkan Pudelek, we have seen the minutes of a meeting of the Durkan Pudelek Board on 5 February 2003 in which the following is recorded:

> "The most worrying aspect of this Division is its lack of secured turnover at this juncture. In summary, by the end of the current week, the Division will have no work on site.
>
> ….
>
> … There was a clear indication given by AF/DGD that this Division urgently needs work in order, not only to pay its overheads, but also to return a profit for the year.
>
> AF was requested to meet with RJS and CS to discuss the budget for the current financial year and the proposed strategy envisaged by RJS in order to revitalise the business.
>
> Both AF and DGD referred to the requirement of not only the Strategic Projects Division but also [Durkan Pudelek] to contribute its budgeted share of the overheads in the current financial year. [Mike Pudelek] advised that he would be using his best endeavours to increase the turnover of [Durkan Pudelek] with appropriate margin, in order to ensure that he met his budget requirements."
>
> Note: AF refers to Alan Fraher, DGD to Daniel Durkan, CS to Colin Simmons and RJS to another Durkan Pudelek director, Mr Scott.

87. In our judgment, this records precisely the kind of "rap over the knuckles" that one would expect to see administered by the directors representing the interests of the parent company to the managers of the subsidiary when the business of the latter is in difficulties.

88. We do not accept the distinction that the Durkan witnesses sought to draw between Durkan Holdings exercising decisive influence and it taking steps to protect its investment as a majority shareholder. For example, Mr Fraher said, when considering how the Board dealt with monitoring the performance of the company against its forecasts in terms of turnover and gross profit margin that:

> "Certainly in the role as protecting the interests of Durkan Holdings, and indeed probably looking after the interests of – because our interests mirrored each other,

> because what was good for Durkan Holdings was good for Durkan Pudelek, you would obviously want to see explanations as to why you weren't achieving those margins."

89. In this case the role of Durkan Holdings went far beyond that of a "silent partner" and its interest in the success of Durkan Pudelek was bound up with the importance to the group of its brand and reputation in the market as well as simply a financial interest.

90. Similarly, with individual contracts which got into difficulties, there was detailed discussion and involvement by the Durkan Holdings Directors on the Durkan Pudelek Board concerning the amounts paid in settlement of disputes with clients and problems with late payment. For example, at a meeting in November 2006, the minutes record that the Board discussed the "abnormal contracts" and those giving cause for concern. In relation to one of the contracts, the Board agreed to spend a further sum of about £30,000 on an expert quantity surveyor's report and then reconsider its position.

91. We accept the evidence that there were other regular meetings within Durkan Pudelek at which its business was discussed. There were contract review meetings held every month and a Monday morning meeting to discuss the commercial operation of Durkan Pudelek. The Durkan Holdings directors did not attend these. Again, the fact that Durkan Holdings was not involved in the detail of the day to day running of the business does not detract from its control over the higher level strategic business decisions. The delegation of day to day operational/managerial responsibility is inevitable in a subsidiary. That does not mean that strategic decision making and control has been ceded by the parent company. The Durkan Holdings directors recognised the potential repercussions for the rest of the Durkan Group of the direction and manner in which the Durkan Pudelek business developed. Durkan Holdings was very far from ceding that kind of strategic control to Mr Pudelek and Mr Simmons.

92. Applying the test set out by the Advocate General and the Court of Justice in *Akzo Nobel* discussed in paragraphs 16 to 21 above, the economic, legal and organisational links between Durkan Pudelek and Durkan Holdings clearly demonstrate that the two companies formed part of a single economic unit. Indeed, we consider that the evidence shows that the influence was more pervasive and more direct than the case law indicates is necessary for the test to be satisfied. The intensity of Durkan Holdings'

influence was certainly sufficient to direct the conduct of Durkan Pudelek. We therefore reject this ground of appeal and uphold the OFT's finding that Durkan Holdings and Durkan Pudelek formed part of a single undertaking at the time of the infringements.

III. LIABILITY OF DURKAN LIMITED FOR INFRINGEMENT 220

93. It is common ground that the legal burden of proving the existence of an infringement of the Chapter I prohibition lies on the OFT (see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 ("*Napp*"), paragraph 95).

94. The question of the standard of proof has been considered in a number of cases. In *Napp*, at paragraph 109, and *JJB Sports plc and All Sports Limited v Office of Fair Trading* [2004] CAT 17 ("*JJB*"), at paragraph 204, the Tribunal held that the standard of proof is the civil standard of proof on the balance of probabilities. The seriousness of an infringement of the Chapter I prohibition, involving (as here) the imposition of penalties, is a factor to be taken into account in considering the probability of an infringement having occurred. We were referred by Mr Beard to the well known passage from the speech of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] 3 WLR 877 concerning the relative likelihood of coming across Alsatians and lions in Regent's Park and to a passage in the opinion of Lady Hale in *In Re B* [2008] 3 WLR 1 where she stressed that the seriousness of an allegation of misconduct is not necessarily a factor which makes it less likely that the allegation is true: context is everything. We agree with the OFT's submission that both those points are relevant here because, although the alleged infringement is a serious one, many of the addressees of the Decision asserted that this kind of conduct had been widespread in the industry and infringements have been admitted by a very large number of companies.

95. It is incumbent on the OFT to adduce precise and consistent evidence in order to establish the existence of an infringement. But it is sufficient, according to the case-law, if the body of evidence relied on by the OFT, viewed as a whole, meets that requirement: see *JJB*, at paragraph 206.

96. Because anti-competitive agreements are usually arrived at covertly, the OFT may have to rely on circumstantial evidence to establish the facts. In Joined Cases C-204/00 P etc. *Aalborg Portland v Commission* [2004] ECR I-123, at paragraphs 55 to 57 the Court of Justice considered the legal and factual context of the review of anti-competitive practices and agreements in the following terms:

> "56. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.
>
> 57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."

Those comments apply equally to the OFT's investigation in the current case.

97. In recent years an important source of evidence for the OFT has been undertakings taking advantage of the OFT's leniency programme whereby they cooperate with the OFT, in particular by providing evidence of infringement, in return for complete or partial immunity from penalty. After the launch of the investigation which led up to the Decision, a number of construction companies applied for leniency. They provided the OFT with substantial amounts of internal documentation which, they claimed, demonstrated who had provided cover prices to whom in relation to many hundreds of different tenders.

98. The evidence relied on by the OFT in respect of Infringement 220 came from Mansell, to which Durkan Limited is alleged to have supplied the cover price (see paragraph 11 above). As part of its leniency application, Mansell provided a sheet of paper referred to as a Builders' Conference Interim Job Report in respect of the tender for the refurbishment of Claremont Close ("the Claremont Close Report").

99. The Builders' Conference is a subscription organisation of which many contractors and subcontractors are members. We were told that over this period the Conference sent out to its subscribers reports on each ongoing tender competition, showing which companies have been invited to tender. The report on a particular tender shows details of the client and project manager and an estimated value for the job. For the tender

covered by the Claremont Close Report, the estimated value was £900,000. The Report then lists the main contractors who were known to have been invited to tender as at a particular date. It gives the name and address of the contractor, other contact details and the name and email address of the contact at that contractor. On the Claremont Close Report the contact given for Mansell was Peter Goodbun and for Durkan Limited was Guy Copeland. As well as Mansell and Durkan Limited there were seven other contractors listed. Below the details of the main contractors was a section indicating the subcontractors and suppliers who had also expressed an interest in providing services for the job.

100. At the hearing we queried with the parties what legitimate purpose could be served by this kind of report being provided to the subscribers to the Builders' Conference. We were told that the aim was to assist subcontractors who might wish to approach a contractor to offer their services. Be that as it may, these reports contained information which greatly simplifies and facilitates the task of anyone wishing to enter into a bid-rigging arrangement in relation to the particular job. It would be surprising if a trade association was unaware of the competition law risks created by this practice. Mr Beard, on behalf of the OFT, noted the possible concern about the way in which this system worked, but indicated that it was not part of the OFT's case that the arrangements of the Builders' Conference were themselves an infringement of the Chapter I prohibition.

101. The Mansell copy of the Claremont Close Report is date stamped as received at Mansell's office on 16 March 2005. The key points for our purposes are these:

(a) on the left hand side of the page next to the name of Durkan Limited, someone has put a handwritten cross;

(b) at the bottom of the page, someone has written "Brian Sharpe"; and

(c) next to that name, someone has written the figure "£1,306,000" and surrounded that figure with a box.

102. The bid that Mansell submitted for the project was £1,306,772; the bid that Durkan Limited submitted was £1,201,740. The winning bid was £931,031.15.

103. As well as providing documentary evidence, Mansell's legal representatives provided an explanation to the OFT about how cover pricing was carried out in general. This was relied on by the OFT to establish the following facts:

(a) the contact by Mansell with the other party would normally be made by Mansell's estimator, although the decision to take a cover would be made at a more senior level within Mansell;

(b) where Mansell had decided to seek a cover they would discover the identity of the other bidders either via subcontractors or from the Builders' Conference reports; and

(c) the exchange of cover prices was carried out by phone and not by any other medium.

104. Mansell also made their employees available to be interviewed by the OFT. On 17 April 2007 two investigators from the OFT interviewed Peter Goodbun in the presence of Mansell's solicitor. Mr Goodbun was the Estimating Manager of the Mansell office which handled the Claremont Close tender. The transcript of that interview was one of the principal pieces of evidence relied on by the OFT to establish the involvement of Durkan Limited in Infringement 220 and we will need to examine what was said in more detail later. The transcript records that Mr Goodbun was reminded at the start of the interview that it would be a criminal offence (under section 44 of the 1998 Act) for him knowingly to give false information in the course of the interview.

105. In the Decision, the OFT summarised Mr Goodbun's evidence as follows (referring to Mr Goodbun as "PG" and to the Claremont Close Report as "the Report"):

> "IV.6168 … PG explained that the handwritten notes on the Report were notes of Phil Hart ('PH'), an estimator that dealt with this tender who no longer works for Mansell. When asked to explain the handwritten notes on the Report, PG stated *'The x against the … name would indicate the name that he* [Phil Hart] *approached*

> *… the name of* [the] *individual is, i.e. Brian Sharpe at Durkan, and the figure is the figure … that would have been given to us as the guide* [on] *… which to go on'*. When asked if he knew what price Mansell submitted, PG stated *'It would have been slightly more than £1,306[000]'*.
>
> IV.6169 In respect of the decision to take a cover price from Durkan Limited, PG stated *'My decision for going to Durken* [sic] *on this one is that, with the exception of probably two others, all the others … I would have regarded as specialist contractors who in previous years have … acted as sub contractors to us* [Mansell] *in that market and have now sort of moved in to main contracting … that was the reason ... we elected to take cover on that scheme because there was just no way you were going to compete with specialist contractors'*." (emphasis and elisions in the original; footnotes omitted).

106. The Decision then records Durkan Limited's consistent denials and alternative posited explanations for the handwritten notes on the Claremont Close Report. In paragraph IV.6181/1505 of the Decision the OFT sets out its reasons for rejecting Durkan Limited's case (referring to Brian Sharpe as 'BS'):

> "In this case, the OFT considers the presence of a contemporaneous document with the name of Durkan Limited's estimator next to a figure consistent with a cover price, along with the explanation of that document by a Mansell employee and his recollection as to why Durkan Limited was approached for a cover on this tender to be sufficiently strong and compelling. The OFT notes the direct contradiction between the evidence given by PG and witness statements of Durkan Holdings and Durkan Limited employees, who deny that they engaged in bid rigging. However, unlike Durkan Holdings and Durkan Limited witness evidence, PG's evidence is underpinned by contemporaneous documentation, and is consistent with the markings made on that documentation. Additionally, the OFT notes that BS, the only Durkan Limited employee directly implicated by the contemporaneous document, has declined to sign his witness statement under a statement of truth, although he has stated through his solicitors that he agreed with it. In light of those factors the OFT considers, that, on balance, the contemporaneous evidence and explanation provided by PG should be preferred to the denial of Durkan Holdings and Durkan Limited."

107. The OFT therefore concluded that Durkan had supplied a cover price to Mansell through Brian Sharpe. A fine of £3,294,715 was imposed in respect of this infringement.

108. At the hearing before us, four witnesses from the Appellants provided statements and were tendered for cross-examination on this issue. But there was no witness statement provided by the OFT and therefore no cross-examination to test the OFT's version of events. The evidence before us comprised the Claremont Close Report, the transcript of Mr Goodbun's interview in 2007 and the account in the Decision of the information given to the OFT by Mansell's solicitors about how cover pricing worked in general.

The OFT's decision not to lodge witness statements in support of its case caused us some concern, as we made clear at the outset of the hearing in this appeal. The OFT was asking us to uphold a finding of infringement – for which it had imposed a fine of over £3 million – on the basis of a transcript of an interview with a person who was apparently not the person who had written the notes on the key contemporaneous document. Mr Beard argued that criticism of the OFT's approach to proving its case would be "a complete triumph of form over substance" and that there was no real difference between the transcript we were shown and a witness statement setting out the same facts supported by a statement of truth.

109. On 6 August 2010, after the hearings in all 25 appeals against the Decision had been completed, the OFT wrote to the Tribunal summarising its position and explaining how the transcripts had been prepared and checked for accuracy. This letter, however, misses the point. No one is suggesting that Mr Goodbun was lying in his interview or that the transcript does not fully and properly record what he said. The significance of the failure to produce a witness statement is two-fold. First, Mr Goodbun has not been pressed about any of his answers – his comments in the interview in 2007 appear to have been simply taken at face value throughout the investigation and this appeal. If, once the appeal had been lodged, the OFT had gone back to Mr Goodbun to take a witness statement they may well have filled in many of the gaps that currently exist in the account of what happened. Faced with only the transcript of the interview, we do not know, for example, whether Mr Goodbun's evidence was based on what Mr Hart had told him had actually happened or whether he was simply inferring from the marks on the document the same "facts" as any person familiar with what went on generally in the industry could infer. We do not know what Mr Goodbun's reaction would have been had he been told that Mr Sharpe vehemently denied that he had given a cover price. Mr Goodbun was not asked whether there might be an alternative explanation for the marks on the Report.

110. The second disadvantage of relying on an interview transcript is that Mr Goodbun's evidence has not been tested by cross-examination, a process which might also have generated a better understanding of the strength of the case against Durkan Limited. We reject the OFT's suggestion, made both at the hearing and in their letter of 6 August 2010, that because it was open to Durkan Limited to call Mr Goodbun as a

witness for the purposes of cross-examining him and they decided not to do so, that Durkan is somehow restricted in the extent to which it can challenge what is recorded in the transcript of his interview. It is not the task of the Appellant to supplement the evidence relied on by the OFT. Similarly, we reject the suggestion that because the Tribunal did not exercise its powers on its own initiative to call Mr Goodbun, his "evidence" is somehow immune from criticism.

111. We were shown documents from the Mansell leniency application which indicate that Mr Hart was interviewed by Mansell's solicitors. We have not seen any notes of that interview or any witness statement from Mr Hart. There has been no explanation as to why these were not forthcoming, other than that Mr Hart no longer works for Mansell.

112. We turn then to the evidence given by Mr Sharpe. Once the Appellants' appeal was lodged, Mr Sharpe did provide a signed witness statement including a statement of truth, thereby removing one of the OFT's initial causes for concern expressed in paragraph IV.6181/1505 of the Decision (quoted in paragraph 106 above). Mr Sharpe worked as an estimator for Durkan Limited for over 20 years and prepared about two or three estimates a month. He retired from Durkan Limited in 2005. In his evidence before us, he explained first how cover pricing operated when it was widespread in the industry, that is (he says) before 2004. A contractor seeking a cover price from Durkan Limited would first make contact with Guy Copeland, the estimator manager. Mr Copeland would tell the inquirer who was the Durkan Limited estimator involved on the contract. Mr Sharpe told us that estimators were not permitted to give covers without authorisation from the directors. He was therefore never able to give a cover price of his own accord; he would go to the directors and tell them that a company "needs some help on this one" and ask whether a cover should be given or not. Generally if the inquirer was a company that Durkan Limited dealt with, a cover would be given either by Mr Copeland getting back in touch with the inquirer or by Mr Sharpe doing so. Mr Copeland confirmed in his evidence that there was an understanding in the office that estimators were not free to give cover prices without coming to him. He (Mr Copeland) would then "discuss it up the line" and decide whether to give the cover price. He also told us that on the occasions before 2004 when Durkan Limited sought a cover price, he would make the necessary inquiries himself and would not delegate that task to an estimator.

113. Mr Sharpe told us that a cover figure would be given towards the end of the tender process once Durkan had worked out its own tender. This was consistent with what Mr Goodbun had said in his interview that steps to take a cover would not be made until very close to the submission of the tenders.

114. Mr Sharpe recalled that Durkan Limited's policy changed in 2004. In August 2004 a memorandum was sent round the office by Robert Clark, the managing director of Durkan Limited. We were not shown a copy of the memorandum but were told that it instructed people that cover pricing had to stop – as Mr Sharpe recalled it: "It says that from today we don't get involved in any covers or help from other companies, that's finished as far as we're concerned." He told us that Mr Clark also visited the office personally to make this clear and Mr Sharpe understood that there would be serious consequences if anyone engaged in cover pricing after that time. Mr Sharpe recognised that if he had gone against the policy he would have been sacked straight away.

115. The change in policy in 2004 was also described to us by Mr James Briggs who has worked for Durkan Limited from 1978 until the present. He said that the change was sparked by an article in a trade magazine highlighting the fact that cover pricing was illegal and that heavy fines had been imposed by the OFT in relation to cover pricing by construction and roofing companies. The article was photocopied by Mr Clark and attached to a memorandum which was circulated. A copy of the article was produced at the hearing before us. The matter was discussed at Board level and then with Mr Copeland, and the policy was cascaded down through the estimating department. He confirmed that Mr Sharpe was right to have thought that serious consequences would follow from any breach of the new policy by an estimator. Mr Briggs told us that after the change of policy was implemented in August 2004, the company did still receive a few requests for cover prices until the practice gradually died out[7]. But he was adamant that no cover price was given either in relation to the Claremont Close project or any other project after August 2004.

116. Mr Sharpe's and Mr Briggs' evidence was supported by Mr Robert Clark who also told us that when Durkan Limited submitted a tender for a project, the figures were usually

[7] Mr Copeland recalled one instance when he had been asked for a cover after August 2004 and had refused.

put together "at the last moment" so that they could be sure to have the most effective sub-contractor quotations to use in arriving at their own tender figure. Tenders were usually submitted in the morning of the final date (the deadline usually being noon on a specified day)[8] set by the client for submission unless the documents had to travel a long distance. If he was seeking a cover price he would tend to select a company of a similar size who probably had a similar overhead level to Durkan Limited. It might also depend on whether he knew any individual at that particular company.

117. Our conclusions on this evidence are as follows. Mr Sharpe struck us as an honest witness and we accept his evidence that he did not give a cover price to anyone in Mansell. This was a man who had worked for many years for Durkan Limited and was nearing retirement. He recalled the change in policy in August 2004. We accept that the change had been announced to the estimators and that Mr Sharpe had rightly concluded that he would be sacked if he acted in breach of the policy. We can see no credible reason why Mr Sharpe would have gone against that company policy and provided a cover price to Mansell. There is no evidence that he knew either Mr Goodbun or Mr Hart at Mansell, other than very distantly. When Mr Goodbun was asked in his interview by the OFT why he would have sought a cover price particularly from Durkan Limited, he did not mention that he knew Mr Sharpe or that anyone else in Mansell did.

118. The evidence was also clear that to give a cover price after August 2004, Mr Sharpe would have to have been prepared to disobey not only the new policy but also the former understanding in the office that estimators must seek the approval from more senior management before giving a cover price. It was not put to Mr Copeland in cross examination – or to any other senior Durkan Limited witness – that Mr Sharpe had in fact asked him whether he should give a cover price to Mansell. If the OFT's case is that, despite never having done so when cover pricing was permitted, Mr Sharpe decided to give a cover price without seeking approval once the practice was forbidden, we consider that is very implausible. He had nothing to gain from such an action and everything to lose. Two possible reasons why Mr Sharpe might disobey company policy were suggested by Mr Beard. First he said that there was an ingrained culture in

[8] This accorded with the finding of the OFT in paragraph IV.73/411 of the Decision that a cover was provided close to the tender deadline in many instances of cover pricing.

the industry that meant that "there was a 'you scratch my back, I'll scratch yours' approach to cover pricing". We do not see that this assists the OFT. Mr Copeland's unchallenged evidence was that he was the one who sought cover prices for Durkan Limited on the occasions before 2004 when Durkan Limited needed one. Since it was clear to Mr Sharpe that the senior management were serious about the ban on cover pricing, they would no longer be seeking covers from other contractors. There was no longer any justification therefore to provide cover prices to those other contractors.

119. Secondly, Mr Beard submitted that there were reasons why someone who had been around as long as Mr Sharpe might well provide a cover: "it had been going on for years; it was a quick phone call and no-one need find out". In our judgment that submission was not consistent with the evidence from the Durkan Limited witnesses that much more than a quick phone call was involved before August 2004 when an estimator was asked to give a cover. There was a procedure to be followed which required the request to be passed up to more senior managers and for them to indicate whether or not the cover should be given. Furthermore, the evidence of those witnesses, also not challenged by the OFT, was that even before August 2004 Durkan Limited was only involved in cover pricing infrequently. Mr Copeland said that in an office which handled about 150 projects a year, they would (before 2004) give or receive a cover in about five instances. Mr Sharpe's evidence was that before 2004 he gave a cover price about once every three or four months. We do not consider that a practice of an individual that happens at those kinds of intervals can really be treated as an "ingrained culture" or as an old habit that dies hard.

120. Given that we accept Mr Sharpe's evidence that he did not give the cover price to Mansell, what is left of the OFT's case on Infringement 220? Mr Beard argued that it was open to the OFT to ask the Tribunal to uphold the finding of infringement on the grounds that someone else in the Durkan Limited office had provided the cover price to the Mansell estimator. Mr Hoskins argued that the Decision only posits one scenario as comprising the infringement, namely that Mr Sharpe gave the cover price. He submitted that if we accepted Mr Sharpe's evidence then the appeal must be allowed in respect of Infringement 220. We have some sympathy with Mr Hoskins' submission in this regard, given that the Decision relies entirely on the annotations on the Claremont

Close Report and Mr Goodbun's interpretation of them in his interview and hence lays the responsibility for the infringement firmly at the door of Mr Sharpe.

121. However, even if it were open to the OFT now to shift its case to an allegation that someone other than Mr Sharpe gave the cover price to Mansell, we consider that the OFT has fallen far short of proving to the necessary standard that this is what happened. We do not know if Mr Hart was ever asked from whom he got a cover price. In cross examination, Mr Beard did not put to Mr Briggs, Mr Clark or Mr Copeland that any of them had given the cover price directly to Mansell. It does not appear therefore to be the OFT's case that one of them could have been responsible. We are therefore left with a proposition that some other estimator in the Durkan Limited office was approached by Mansell and gave a cover price of his own accord. Mr Beard appeared to be laying the ground for such a scenario when he elicited from Mr Copeland in cross examination that the five estimators working under him all knew what the others were doing at any time; that they worked in an open plan office and so it was possible for any one of them to find tender information lying around on a colleague's desk.

122. Such a version of events suffers from even greater implausibility than the version relying on the actions of Mr Sharpe. We were told that cover prices are sought and given very shortly – a matter of a few hours – before tenders are submitted. We agree with Mr Hoskins that the idea that someone unconnected with the Claremont Close job would covertly obtain confidential information from papers lying on a colleague's desk in order to pass it to a competitor, in contravention of company policy, thereby risking summary dismissal is inherently implausible. No possible motive for such conduct has been suggested.

123. Clearly, Mansell decided that it needed a cover price for this tender from someone. Mr Goodbun says in his statement that he instructed his estimator to seek a cover price from Durkan. It appears from the Claremont Close Report that someone at Mansell was told that Mr Sharpe was the Durkan Limited estimator for that job. What we do not know is whether the estimator tried to contact Mr Sharpe or what happened if he tried to do so. The fact that Mr Sharpe's name is written on the Claremont Close Report does not necessarily mean that someone from Mansell spoke to him, the Mansell estimator might simply have been told by someone else at Durkan that Mr Sharpe was

the estimator for this tender. The OFT has failed to establish the necessary link between the writing of the name "Brian Sharpe" on the Claremont Close Report and the writing of the figure "£1,306,000".

124. Mr Beard stressed that the evidence from Mr Copeland supported what Mr Goodbun said in his statement, namely that a company would tend to ask for a cover price from another bidder similar to it in terms of size and scope of business. It was common ground that some of the other bidders on the list on the Claremont Close Report were specialist contractors and so not suitable for this purpose. But there were other general contractors on the list, particularly Mulalley or Dew Construction. We were not provided with information to enable us to consider whether it was likely that the cover price in fact came from one of them. Another possible explanation put forward by Mr Hoskins was that the Mansell estimator had simply run out of time and had arrived at his own figure without assistance from another bidder. This is possible since there is no evidence to establish either that the two annotations on the Claremont Close Report were made at the same time or that they were made as a result of contact with someone at Durkan. Taking all these matters into account, in our judgment, the OFT has failed to establish on the balance of probabilities that the cover price came from Mr Sharpe.

125. We therefore unanimously allow Durkan Limited's and Durkan Holdings' appeal in respect of Infringement 220. This means that the fine imposed on Durkan Limited of £3,294,715 is overturned. Durkan Holdings' liability to pay that fine is similarly overturned.

IV. PENALTY

126. The challenges raised by Durkan Pudelek and Durkan Holdings to the calculation of the penalty are still relevant in respect of the penalties imposed for the other two infringements: a penalty of £947,592[9] for Infringement 135 and of £2,478,244 for Infringement 240. In the remainder of this judgment we refer to those two companies jointly as "Durkan".

[9] That is £1,263,456 minus 25 per cent for accepting the OFT's Fast Track Offer (on which see Decision, paragraph II.1481/260 to II.1487/262).

127. The OFT has a power to impose fines conferred by section 36 of the 1998 Act. That provides, so far as relevant to the present appeal:

> "**36 Penalties**
>
> (1) On making a decision that an agreement has infringed the Chapter I prohibition… the OFT may require an undertaking which is party to the agreement to pay the OFT a penalty in respect of the infringement.
>
> …
>
> (3) The OFT may impose a penalty on an undertaking … only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> …
>
> (8) No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)."

(a) The Turnover Order

128. The Secretary of State made an order for the purposes of section 36(8) in the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 309/2000) ("the Original Turnover Order"). It was amended by the Competition Act 1998 (Determination of Turnover for Penalties) Order 2004 (SI 1259/2004) which inserted a new Article 3 into the Original Turnover Order. We refer to the Order as amended in 2004 as "the Amended Turnover Order".

129. Article 3 of the Original Turnover Order provided that the turnover to which the 10 per cent maximum applied was "the applicable turnover for the business year preceding the date when the infringement ended". "Applicable turnover" was defined in article 2 of the Order as "the turnover of an undertaking for a business year determined in accordance with the Schedule to this Order". The Schedule to the Order in turn defined the applicable turnover as follows:

> "3. The applicable turnover of an undertaking, ... shall be limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings or consumers in the United Kingdom after deduction of sales rebates, value added tax and other taxes directly related to turnover.
>
> 4. Where an undertaking consists of two or more undertakings that each prepare accounts then the applicable turnover shall be calculated by adding together the

> respective applicable turnover of each, save that no account shall be taken of any turnover resulting from the sale of products or the provision of services between them."

130. The amendment made in 2004 substituted a new Article 3 which provided:

> "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it."

131. The Amended Turnover Order also amended the Schedule to the Original Turnover Order by, amongst other things, providing that the words "to undertakings or consumers in the United Kingdom" in paragraph 3 should cease to have effect.

132. Thus two important changes were made in 2004 to the way that the OFT calculates the turnover of an undertaking when ensuring that the penalty imposed does not exceed the 10 per cent maximum set by section 36(8) of the 1998 Act:

(a) the turnover to which the 10 per cent maximum applied was expanded to encompass the world wide turnover of the undertaking rather than just its turnover in the United Kingdom; and

(b) the 10 per cent cap was applied to turnover in the business year preceding the date on which the OFT's decision is taken rather than the business year preceding the date when the infringement ended.

133. Because of the significance of the second of these changes, namely the change in the relevant business year, we shall refer in this judgment to the "business year preceding the date on which the OFT's decision" is taken as the "Decision Year" and to "the business year preceding the date when the infringement ended" as the "Infringement Year".

(b) The OFT's Penalty Guidance and the application of the five steps in this Decision

134. Section 38(1) of the 1998 Act requires the OFT to publish guidance as to the appropriate amount of the penalty and, pursuant to subsection 38(8), it must have regard to that guidance when setting the amount of the penalty. In *Argos Ltd and*

Littlewoods Ltd and JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318, the Court of Appeal stated at paragraph 161 that the language of section 38(8) does not bind the OFT to follow the Guidance in all respects in every case. However, in accordance with general public law principles, the OFT must give reasons for any significant departure from the Guidance. The approach adopted by the OFT for the penalty calculations set out in the Decision is contained in the Guidance, which was published in December 2004 (OFT 423) ("the Guidance").

135. The Guidance sets out a five step process for calculating the level of the penalty to be imposed under section 36. Step 1 is the calculation of the starting point for determining the level of financial penalty which will be imposed on an undertaking. The starting point is calculated by applying a percentage determined by the nature and seriousness of the infringement to the "relevant turnover" of the undertaking that comprises the relevant single economic entity (paragraph 2.3). The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the business's last financial year (paragraph 2.7). The starting point may not exceed 10 per cent of the relevant turnover of the undertaking (paragraph 2.8).

136. In this Decision the OFT decided that the percentage starting point should be 5 per cent of an undertaking's relevant turnover for infringements involving only cover pricing and 7 per cent for those involving compensation payments (VI.168-9/1666). The OFT applied the starting percentage to the relevant turnover of the undertaking in the Decision Year rather than the Infringement Year. For the Appellants, that was the year ending 31 January 2009. Whether it was right to do so or whether it should have used the Infringement Year or some other year closer to when the infringement took place was an issue raised by Durkan and many of the other appellants challenging the Decision.

137. Step 2 provides for an adjustment for the duration of the infringement, where the infringement lasts for more or less than one year. In this case, the OFT made no adjustment for duration of the infringement so that the penalty after Step 2 was the same as after Step 1.

138. Step 3 allows for adjustment for other factors to ensure that the penalty imposed is appropriate bearing in mind the OFT's policy objectives set out in paragraph 1.4 of the Guidance, namely to impose penalties which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices. The adjustment made at Step 3 in Durkan's case was a reduction of the fine for the two infringements which were committed in the same relevant market, namely Infringements 220 and 240. The OFT was concerned to ensure that penalties imposed when added together were within a reasonable range when expressed as a percentage of total turnover. Among the many undertakings fined in the Decision, there were some "outliers" whose penalty represented a much higher percentage of total turnover than for the generality of undertakings. Because of the method used by the OFT in this Decision, this was likely to occur where an undertaking was found to have participated in more than one infringement in the same relevant market and a large proportion of its total turnover in the relevant business year was achieved in that market. For each undertaking the OFT looked at the penalty expressed as a percentage of total turnover in the Decision Year for each of the infringements committed by the undertaking and added them together[10]. If the sum of those percentages was more than 4.5, a downward adjustment would be made at Step 3 to each of the infringements in that market in order to bring the overall penalty for that undertaking to a level which the OFT considered was sufficient to ensure deterrence but which was within the range of penalties imposed on the other addressees of the Decision (VI.273/1688).

139. Step 4 of the penalty calculation deals with further aggravating and mitigating factors. Paragraphs 2.15 and 2.16 of the Guidance respectively contain a non-exhaustive list of aggravating and mitigating factors. Step 5 deals with ensuring that the statutory maximum under section 36(8) is not exceeded. In fact Durkan Holdings' liability in respect of Infringement 240 was greater than Durkan Pudelek's. This was because by the time of the Decision, Durkan Pudelek was no longer part of the Durkan group of companies and the proposed fine would have represented more than 10 per cent of its turnover calculated in accordance with the Amended Turnover Order. The fine was therefore reduced and then the 25 per cent discount for having accepted the Fast Track

[10] In the Appellants' case this sum was not the same as simply taking 4.5 per cent of global turnover because the global turnover used for the different infringements was different, that for Infringement 240 including the turnover of Durkan Pudelek.

Offer applied, making a total fine for Durkan Pudelek for Infringement 240 of £2,336,292. Durkan Holdings was liable to pay the full fine for Infringement 240, that is, £2,478,244 (being £3,304,325 less 25 per cent) (see paragraph VI.468/1750 of the Decision).

140. The application of the Guidance in relation to the infringements by the Appellants was set out in a table on page 1749 of the Decision. Because Infringement 135 involved the making of a compensation payment, the starting point used for that infringement was 7 per cent. That percentage was applied to the consolidated turnover of Durkan Holdings plus the turnover of Durkan Pudelek in the year ending 31 January 2009. Infringement 240 did not involve a compensation payment so the starting percentage was 5 per cent. That 5 per cent was applied to the relevant market turnover for that infringement, also in the year ending 31 January 2009.

141. The OFT then expressed the penalty arrived at for each of the three infringements as a percentage of the total turnover of the Durkan group for the year ending 31 January 2009 and added those three figures together. The resulting figure was substantially more than 4.5 per cent. The OFT therefore reduced the fines for Infringements 220 and 240, which both occurred in the market for public housing in London, by 50 per cent.

142. At Step 4, the penalty for Infringement 135 was then increased by 5 per cent because of the involvement of a Durkan Pudelek director in the infringement, a factor which the OFT treated as aggravating the seriousness of the infringement. Finally, for Infringements 135 and 240, Durkan was given a reduction of 25 per cent to reflect the fact that it had indicated at an early stage of the OFT's investigation that it did not intend to contest liability.

143. The resulting penalties were £947,592 for Infringement 135 and £2,478,244 for Infringement 240.

144. Durkan challenged the fines on three grounds. First they argued that the OFT had erred in applying the starting percentage to the relevant turnover of the group in the Decision Year rather than using the Infringement Year. Secondly, they argued that it was wrong to apply a higher starting percentage to Infringement 135 because although that had

involved a compensation payment, it was not paid in conjunction with a cover price. It should not, they argued, have been treated as more serious than simple cover pricing. Thirdly they submitted that they had made mistakes in the calculation of their relevant market turnover and this had accidentally inflated the figures that they had supplied to the OFT. They therefore asked the Tribunal to rule that those errors should be corrected.

(a) The OFT's use of Decision Year turnover

145. Durkan argues that the use of the Decision Year turnover for the calculation of its fines resulted in fines which are arbitrary and excessive. They are arbitrary because the amounts are determined by the date on which the OFT happened to conclude its investigation and adopt the Decision – a date which had no connection with the infringement. They were excessive because the choice of that year in Durkan's case resulted in fines which were substantially higher than they would have been if turnover in a year closer to the infringement had been used.

146. At the hearing before us, the argument developed into a submission that the OFT's interpretation of its Guidance had been wrong because the Guidance in fact pointed the OFT towards using the Infringement Year turnover at Step 1 of its calculations, not the Decision Year turnover. In the original Guidance published in 2000 ("the 2000 Guidance"), the turnover to be used at Step 1 of the penalty calculation was described in the following terms:

> "The "relevant turnover" is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year."

147. So far as Step 5 is concerned, the 2000 Guidance said (paragraph 2.13) that the final amount of the penalty may not in any event exceed 10 per cent of the "section 36(8) turnover" of the undertaking. The term "section 36(8) turnover" was defined in footnote 6 which read:

> "In this Guidance, the expression "turnover" is used in two separate contexts: "relevant turnover" used to calculate the starting point and "section 36(8) turnover" (calculated in accordance with the [Original Turnover Order] which is used in Step 5 in the adjustment of the penalty figure to prevent the maximum amount for the penalty being exceeded. The "section 36(8) turnover" of the

> undertaking is not restricted to the turnover in the relevant product and relevant geographic market."

148. The 2000 Guidance did not therefore expressly say which year was relevant for Step 5 but simply referred the reader to the Original Turnover Order which, as we have described, adopted the Infringement Year (see paragraph 129 above).

149. The OFT published a revised version of the Guidance in December 2004. That is the version that the OFT purported to apply to the penalties imposed in the Decision. In the revised Guidance, the description of the turnover used at Step 1 was as follows:

> "The **relevant turnover** is the turnover of the undertaking in the relevant product market and relevant geographic market[13] affected by the infringement in the undertaking's last business year[14]." (Emphasis in the original)

150. The first footnote in the passage referred the reader to the OFT's guidelines on the definition of relevant markets and the second stated that relevant turnover would be calculated after deduction of sales rebates, VAT and other taxes directly related to turnover.

151. So far as Step 5 was concerned, the language of the Guidance published in December 2004 reads:

> "The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide turnover of the undertaking in its last business year[20]. The business year on the basis of which worldwide turnover is determined must, as far as possible be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum."

152. Footnote 20 referred the reader to the Amended Turnover Order.

153. The December 2004 Guidance thus made clear that because of the changes made in the Amended Turnover Order, Step 5 of the Guidance would henceforward be based on Decision Year turnover. By contrast, the only change that was made to the wording relating to Step 1 was to replace the reference to "the last financial year" with a reference to the "undertaking's last business year". The question for us is whether the revised Guidance in fact changed the year to be used at Step 1 from the Infringement Year to the Decision Year.

154. The issue about the proper interpretation of Step 1 of the Guidance is one that has been raised by a number of appellants challenging the Decision. We have had the advantage of seeing the judgment of the Tribunal in *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 ("*Kier*"). We have considered the analysis set out in paragraphs 130 to 138 of that judgment. We agree that the changes made by the OFT to its Guidance issued in 2004 did not include any material change to the OFT's approach to Step 1 and did not justify the use of the Decision Year turnover rather than the Infringement Year turnover in these penalty calculations.

155. In summary, the reasons for that conclusion are as follows. First, the OFT did not flag up in the 2004 Guidance that the amendments to the Original Turnover Order had the effect that the year on which the relevant turnover for Step 1 was based was going to change. We also agree with the Tribunal in *Kier* that the use of the Infringement Year at Step 1 is more consistent with the purpose of Step 1, which is to start with a provisional penalty that reflects the harmful effects of the unlawful conduct on the product and geographical market affected by the infringement. This purpose is relevant even for infringements by object such as cover pricing and in any event, the Guidance does not indicate that a different year should be used for Step 1 depending on whether the infringement is by object or by effect.

156. We reject the OFT's argument that the change to Step 1 flows naturally from the change to Step 5 which is properly spelled out in the revised Guidance issued in 2004. There is no obvious need for symmetry between the year used for assessing the starting point for the penalty and the year used for identifying the overall statutory limit. The two categories of turnover (relevant turnover and total worldwide turnover) have different functions and are in most cases likely to be entirely different in any event. Finally, the OFT's point that data for the Infringement Year may be harder to find is unpersuasive, particularly in this case where Durkan were asked to, and did, provide those data.

157. We recognise that there may need to be some adjustment to the turnover figures from the Infringement Year in a case, as here, where there is a substantial gap between the date of the infringing conduct and the date on which the decision is adopted. Such a delay often arises where, for example, the existence of an earlier infringement is

successfully concealed by the parties or where the OFT's investigation is lengthy and complex. We would regard the Guidance as sufficiently flexible to enable the OFT to apply, after consultation, an appropriate price or cost index to make an adjustment at Step 3 in such a case in order to restate the penalty at present day values.

158. We are unanimous in concluding that, on its true interpretation, the 2004 Guidance did not change the way that Step 1 should be performed and did not introduce the Decision Year at that step. We therefore find that the OFT erred in basing the calculation of the starting point on relevant turnover in the Decision Year rather than the Infringement Year.

159. Durkan also argued that, if it was wrong on that point, then the OFT nonetheless had a discretion to use the Infringement Year in a case where the use of the Decision Year would lead to an unfair and excessive fine. Durkan submitted that its case merited such an exception because the aggregate fine imposed for the three infringements was about £6.7 million but would have been £2.4 million if the Infringement Year had been used. In the light of our finding on the proper construction of the Guidance we do not need to consider whether the changes to the level of turnover of the Durkan group between the dates of the infringements and the date of the Decision would have justified exceptional treatment.

(b) The use of the 7 per cent starting point for Infringement 135

160. As we described earlier in this judgment, Infringement 135 involved an agreement between Mansell and Durkan Pudelek that whichever of them was successful in winning the contract would pay the unsuccessful candidate £60,000 plus VAT towards the cost of work undertaken in preparing its bid. Mansell won the contract and ultimately paid the sum agreed to Durkan Pudelek. The OFT treated this as a compensation payment attracting the higher starting point of 7 per cent at Step 1 of the penalty calculation.

161. Durkan argued that because this was a "mere" compensation payment, rather than a compensation payment supporting the giving of a cover price, it should not have been treated as more serious than a cover price given without compensation. It was

discriminatory for the OFT to treat compensation payment agreements without cover price as more serious than cover pricing without compensation payments.

162. In our judgment the OFT was entirely justified in treating the making of a compensation payment in Infringement 135 as more serious than mere cover pricing even if it did not accompany a cover price. The Chapter I prohibition precludes contact between competitors which substitutes cooperation for competition. Once undertakings make covert arrangements to pay sums of money to each other, the improper relationship between them is cemented and formalised. Further, once consideration has passed from one tenderer to another, there is a greater likelihood that the price charged to the client will be inflated to take account of the need to make the illicit payment (Decision, IV.149/424). We therefore reject this challenge to the penalty for Infringement 135.

(c) Correction of the error made in reporting relevant turnover to the OFT

163. The correction sought by the Appellants relates to the turnover in the Decision Year. The point, as pleaded, arises only if we are wrong that the fine should be based at Step 1 on the Infringement Year turnover rather than the Decision Year turnover. However, it is useful for us to set out our findings on this point, to avoid a proliferation of such points being raised in the future.

164. The OFT accepted that the Tribunal can admit evidence of a mistake made by the undertaking even though that evidence only comes to light after the Decision was taken. It also accepted that we have power to adjust the penalty imposed to correct for any such mistake. The OFT did however stress that corrections should be made only in exceptional circumstances. If the undertaking concerned could reasonably have got the figures right the first time then, the OFT argued, the Tribunal should not reopen the calculation later.

165. We have seen evidence from Mr Barclay explaining how the alleged errors came about. Mr Barclay is the Group Financial Controller of Durkan Holdings and a chartered accountant. The OFT did not seek to cross examine him and has accepted both that the error made was inadvertent and that the revised figures are accurate. Nonetheless, in our judgment where, as here, the "correction" arises from a revisiting of the turnover

allocation exercise, the Tribunal must assess the nature of the error and the reasons for it in order to decide whether it is appropriate to allow the correction to be made.

166. Mr Barclay was in charge of gathering and certifying the turnover information submitted to the OFT in August 2009 and was responsible for identifying the corrections notified to the OFT in November 2009. The corrections relate to the turnover reported in the relevant market in which Infringement 240 was committed, that is public housing in London. There are six projects which he has now identified as having been allocated to the wrong market sectors. The reallocation would result in the relevant turnover for Infringement 240 in the Decision Year being reduced by £22.8 million. It would also result in the relevant turnover for Infringement 135 in the Decision Year increasing by £360,600 because one of the contracts removed from the 'public housing in London' category would be added to the 'Offices in London' category which is the relevant market for Infringement 135.

167. Of the six contracts identified, the two largest errors emerged from the fact that when Mr Barclay initially allocated contracts of the Durkan group between public and private housing he did so on the basis of the nature of the end use of the project rather than on the public or private sector nature of the client for whom the project was built. This error became apparent when he saw the Decision in which Durkan Pudelek was found guilty of an infringement in the Public Housing market. Given that Mr Barclay thought that Durkan Pudelek was not active in that market, he queried this with the then managing director of Durkan Pudelek (by this time known as Concentra Limited and independent of the Durkan group). He then became aware that the OFT's classification had been based on the identity of the client and not on the end-use of the project.

168. In our judgment, it should have been clear to Durkan Holdings in summer 2009 that the OFT classification was based on the identity of the client and not on the nature of the work. This had been expressly stated in a footnote to the Statement of Objections issued in April 2008. Even if, as Durkan Holdings argue in their letter to the Tribunal of 9 August 2010, they could not be expected to have spotted this explanation because it was "buried in one of the well over 8,000 footnotes", the point was drawn to their attention in an OFT letter in May 2009. That letter informed Durkan Holdings that a number of infringements, including numbers 220 and 240 had been reclassified from

"private housing" to "public housing" because of the definition in footnote 1927. This letter alerted Durkan Holdings to the definition to which the OFT was working. They should have appreciated by that stage at the latest that this was not the definition on which they had based their relevant turnover figures.

169. Mr Barclay's evidence was that, at the time he was carrying out the work on the turnover figures, he did not have access to the Statement of Objections and did not attend any meetings with Durkan Holdings' solicitors to discuss the analysis of the turnover. In the light of these failings we do not consider that Durkan Holdings can now complain that mistakes were made to their disadvantage.

170. The four other errors are more minor. One contract was misallocated to "public housing in London" when it ought to have been allocated to "Offices in London". Correcting this error would not appear to be to Durkan Holding's advantage since the turnover deducted from that used for Infringement 240 would be added to that used for Infringement 135 to which a starting point of 7 per cent rather than 5 per cent is applied. The other three contracts were misallocated, Mr Barclay says, because of geographical errors. In fact the correction of two of these errors would have resulted in turnover being added to the relevant turnover on which the fine for Infringement 240 is based. These more minor errors were no doubt drawn to our attention because Durkan sought to correct the two much larger errors which worked in their favour. Since we would have declined to correct the two larger errors (if they had related to the Infringement Year) it is in our view unnecessary to consider further the reasons for the more minor mistakes.

(d) The Tribunal's assessment of Durkan's penalties

171. The Tribunal's powers in relation to an appeal against penalty are set out in paragraph 3(2) of Schedule 8 to the 1998 Act. These powers include the power to impose, revoke or vary the amount of any penalty. In their skeleton argument, Durkan asked the Tribunal to assess the level of the fine to be applied, rather than remitting the matter to the OFT. They acknowledged that the Tribunal might wish to deliver judgment on the issues first and leave the parties to try to agree an appropriate level of penalty in the light of those findings. Towards the end of the hearing, the parties indicated that they were not expecting the Tribunal to recalculate the fines. However, we have concluded

that it would be better for us to arrive at a revised figure for the appropriate fine for Durkan rather than remitting the matter to the OFT. As we mentioned at the outset, this appeal is one of 25 appeals challenging the Decision. In all those other appeals, the Tribunal has recalculated the penalty and set a revised fine. Broader criticisms are made in *Kier* of the way the penalties were calculated by the OFT in the Decision, such that it would not be satisfactory for the OFT simply to reapply the methodology in the Decision to Durkan. We do not consider that we need any further evidence or other data to inform our decision as to the proportionate level of fine in this case. The just, expeditious and economical conduct of the proceedings is best achieved by the Tribunal reassessing the fines for the two remaining infringements.

172. Since we have upheld Durkan's challenge to the use of the Decision Year, we calculate the fine up to Step 2 using the turnover data for the appropriate Infringement Year. We have used the data provided by Durkan in paragraph 91 of their Notice of Appeal. For Infringement 135 which was committed in January 2003, the Infringement Year was the financial year ending 31 January 2002 and the relevant market turnover in that year was £14,316,271. For Infringement 240 which was committed in February 2006 the Infringement Year was the financial year ending 31 January 2006 and the relevant market turnover in that year was £43,929,754.

173. Having rejected Durkan Pudelek's challenge to the starting percentage for Infringement 135, we next apply the appropriate percentage to that turnover. Since there is no adjustment needed for duration, the provisional fines arrived at for step 2 are as follows:

Infringement 135	**Infringement 240**	**Total**
£1,002,139	£2,196,488	£3,198,627

174. We must then consider whether there is any adjustment needed at step 3 to ensure that these fines represent an adequate punishment for Durkan Pudelek and are sufficient to deter them and others from future infringements. We bear in mind that Durkan Holding's consolidated turnover at the year end 31 January 2009 was over £210 million. We have had regard to the following factors in assessing the need for an adjustment in this case. The relevant turnover used at Step 1 above comes from several

years ago. As we suggested earlier, the OFT might in future adopt a more formal approach to indexing the penalty, using an index which is appropriate for the particular sector concerned. In this case we have simply borne in mind, when considering the need for an adjustment at Step 3, the importance of ensuring that the fine we set acts as a deterrent in terms of today's money values.

175. Secondly, we note that many undertakings involved in the investigation submitted to the OFT that the reason why they engaged in cover pricing was a perception that if they did not respond to a prospective client's invitation to tender, they would be regarded as being either unable to carry out the work or uninterested in doing so. This could lead to their exclusion from future invitations to tender for work for that client. According to the OFT, the majority of employees interviewed in the course of the investigation could not recall any particular instance of a client removing them from a tender list as a result of their not tendering for a particular contract. The OFT has accepted however, that in certain cases such exclusion had taken place and has also accepted that the fear expressed was genuine.

176. We hope that one result of this investigation is that clients recognise that it is in their interests to remove any such perception. They have a responsibility as well as a direct interest in making sure that markets work well and are genuinely competitive. Companies invited to bid should be confident that they will not be disadvantaged in future competitions if, for good reason, they decline an invitation on occasion. If this motive for unlawful conduct is removed, it is less likely that companies will be tempted to revert to this unlawful activity. Companies in this sector must also appreciate that any future contraventions of this kind will be dealt with severely. These factors are relevant, in our judgment, to the question whether an increase in the penalty at Step 3 is nonetheless needed to ensure adequate deterrence.

177. Finally at Step 3 we have considered whether any adjustment is needed to the fine to reflect the 50 per cent reduction that the OFT granted to Durkan for Infringement 240 because the aggregate of all three fines, expressed as a percentage of turnover, was substantially higher than for most of the other undertakings fined (see paragraph 137 above). In this case, the justification for that reduction disappears because the fine for Infringement 220 has been overturned. It is not possible now to assess whether the

proposed fine for Durkan is out of line with the fines of other addressees since some of those fines will have been affected by the 25 appeals against the Decision and some have not. The calculation carried out by the OFT cannot now be replicated. Given also that the fines we propose are substantially lower than those imposed in the Decision, we do not consider that an adjustment is needed.

178. Our conclusion is therefore that there is no adjustment needed at Step 3.

179. We will increase the fine for Infringement 135 by 5 per cent to reflect the involvement of Mr Simmons as a director of Durkan Pudelek. This adjustment was made by the OFT in the Decision and has not been challenged by Durkan. Finally we apply the reduction of 25 per cent granted by the OFT for both infringements to reflect the acceptance by Durkan of the OFT's Fast Track Offer. We have then rounded down the fines to the nearest £1,000 – this avoids the appearance of a degree of precision which is inconsistent with the way in which we have in fact approached this exercise.

180. The final result is therefore that we assess the appropriate fine for Infringement 135 as £789,000 and for Infringement 240 as £1,647,000. In our judgment those figures, arrived at in the manner we have described above, constitute proportionate and reasonable penalties for the infringements Durkan has committed[11].

V. THE OUTCOME OF THE APPEAL

181. In conclusion our findings are that:

(a) Durkan Holdings exercised decisive influence over Durkan Pudelek at the time of the latter's contravention of the 1998 Act and is therefore liable, together with Durkan Pudelek, to pay the fines imposed for Infringements 135 and 240.

(b) The appeal by Durkan Limited and Durkan Holdings against the finding of liability for Infringement 220 succeeds because the OFT has failed to prove, on the balance of probabilities, that Durkan Limited was the source of the cover price used by Mansell.

[11] Since the aggregate of these penalties does not exceed 10 per cent of Durkan Pudelek's worldwide turnover, both companies are jointly and severally liable for the aggregate sum.

(c) The OFT erred in using relevant turnover from the Decision Year rather than the Infringement Year when applying Step 1 of the Guidance.

(d) The other challenges to the penalty are dismissed.

(e) The fines for which Durkan Pudelek and Durkan Holdings are jointly and severally liable are hereby varied to £789,000 for Infringement 135 and £1,647,000 for Infringement 240.

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

Vivien Rose John Pickering Michael Blair

Charles Dhanowa
Registrar Date: 22 March 2011