
Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/1/2004

Collusive tendering in relation to contracts for flat-roofing services in the West Midlands

16 March 2004

(Case CP/0001-02)

SUMMARY

The Office of Fair Trading ('the OFT') has concluded that a number of roofing contractors, as listed in paragraphs 2 to 10 of the Decision ('the Parties'), colluded in relation to the making of tender bids in flat roofing contracts in the West Midlands thereby infringing the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 ('the Act'). The prohibition imposed by section 2(1) of the Act is referred to in the Act and in this Decision as 'the Chapter I prohibition'.

The Parties were involved in individual agreements or concerted practices each of which had as its object the fixing of prices in the market for the supply of repair, maintenance and improvement services ('RMI services') for flat roofs in the West Midlands area. When a purchaser wished to purchase RMI services for a flat roof, it typically invited a number of suitably qualified roofing contractors to submit tender bids detailing the price at which they could undertake the work specified in order to have competition for the individual contract between contractors and obtain a competitive price. The Parties' cooperation with each other in relation to the setting of tender prices had the object of preventing, restricting or distorting this competition. Different parties were involved in different numbers of contracts and the OFT has considered the collusion in relation to the tenders for each individual contract as discrete infringements.

The OFT considers that agreements or concerted practices between undertakings that fix prices by way of collusive tendering are among the most serious infringements of the Competition Act 1998. Financial penalties are therefore being imposed on all Parties, subject to the operation of the policy to give lenient treatment for undertakings coming forward with information in cartel cases.¹ In line with this policy Briggs Cladding & Roofing

¹ See the Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000.

Limited has been granted 100 per cent leniency and Howard Evans (Roofing) Limited has been granted 50 per cent leniency and the financial penalties on them are being reduced accordingly. The table in paragraph 496 below sets out the penalty for each Party.

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [...] **[C]** or by italic text in square brackets, e.g. *[more than 5 per cent]*.

Factual inaccuracies in the original decision have been amended in accordance with representations from the parties and are indicated in the text of the Decision. Additional text is contained in square brackets and is indicated by [#]. Redactions are indicated by [...] [#].

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I. THE FACTS

A. The Parties

1. Information received by the OFT (see paragraphs 22 and 23 below) indicated that the companies detailed in paragraphs 2 to 10 below were engaged in price-fixing in relation to the supply of RMI services for flat roofs in the West Midlands area.

Apex Asphalt & Paving Co. Limited ('Apex')

2. Apex is a company that specialises in asphalt and felt roof contracting. UK turnover for Apex was £[...][C] for the year ending 31 January 2003, £[...][C] for the year ending 31 January 2002 and £[...][C] for the year ending 31 January 2001.²

Briggs Cladding & Roofing Limited ('Briggs')

3. Briggs is a company that specialises in the provision of roofing services. UK turnover was £45,229,000 for the year ending 31 December 2001, £31,948,000 for the year ending 31 December 2000 and £33,530,000 for the year ending 31 December 1999. Briggs is the [...][#] subsidiary of Ruberoid plc ('Ruberoid').³ The OFT considers that Briggs is the undertaking to which this Decision is directed and which the OFT considers is a party to the infringement.

Brindley Asphalt Limited ('Brindley')

4. Brindley is a company specialising in roofing and asphalt contracting. UK turnover was £[...][C] for the year ending 30 September 2001, £[...][C] for the year ending 30 September 2000 and £[...][C] for the year ending 30 September 1999.⁴

The General Asphalte Company Limited ('General Asphalte')

5. General Asphalte is a company that specialises in the installation of asphalt flooring and paving and roofing systems. UK turnover was £[...][C] for the year ending 31 December 2001, £[...][C] for the year ending 31 December 2000 and £[...][C] for the year ending 31 December 1999.⁵

Howard Evans (Roofing) Limited ('Howard Evans')

6. Howard Evans is a company specialising in roof coverings and roof contracting services. UK turnover was £5,603,713 for the year ending 31 December 2001,

² Turnover details from Apex's letter to the OFT dated 9 July 2003.

³ Directors' report and financial statements for Briggs for the year ended 31 December 2001. A chart that Briggs provided to the OFT also shows the organisation of Ruberoid Plc and related companies in the UK. This chart shows that Ruberoid plc owns Briggs and a number of other companies.

⁴ Turnover details from Brindley's letter to the OFT dated 8 April 2003 and covering letter sent with Brindley's mitigation as to financial penalty, dated 17 December 2003.

⁵ Turnover details from General Asphalte's letter to the OFT dated 15 April 2003.

£4,216,533 for the year ending 31 December 2000 and £5,207,292 for the year ending 31 December 1999.⁶

Richard W Price (Roofing Contractors) Limited ('Price')

7. Price is a company specialising in roofing contracting. UK turnover was £[...][C] for the period ending 31 December 2001 and £[...][C] for the period ending 31 December 2000 and £[...][C] for the year ending 31 December 1999.⁷

Redbrook Mastic Asphalt and Felt Roofing Limited ('Redbrook')

8. Redbrook is a company specialising in roofing contracting. UK turnover was £[...][C] for the period ending 30 November 2002, £[...][C] for the period ending 30 November 2001 and £[...][C] for the period ending 30 November 2000.⁸

Rio Asphalt & Paving Co. Limited ('Rio')

9. Rio is a company specialising in the erection of roof coverings and frames. It is described in its abbreviated financial statements as having the principal activity of 'general asphalters'. UK turnover was £[...][C] for the period ending 31 May 2002, £[...][C] for the period ending 31 May 2001 and £[...][C] for the period ending 31 May 2000.⁹

Solihull Roofing and Building Co Limited ('Solihull').

10. Solihull Roofing is a company specialising in roof tiling, repairs and consultancy. UK turnover was £[...][C] for the period ending 31 July 2002, £[...][C] for the period ending 31 July 2001 and £[...][C] for the period ending 31 July 2000.¹⁰

B. The roofing contracting services industry in the UK - overview

11. The Parties provide flat roofing contracting services. In practice this means the supply of RMI services in relation to flat roofs.
12. There are three general types of roof that are used in the building industry – pitched, flat and metal. Pitched roofs are common in the domestic - and some sectors of the commercial - market while flat roofing tends to be more important in some areas of the commercial market and in the industrial sector.¹¹ AMA Research, a market analyst company, suggests that metal coverings compete primarily with pitched roofing

⁶ Turnover details for the years ending 31 December 2000 and 2001 from FAME (Financial Accounts Made Easy) company reports. Turnover details for the year ending 31 December 1999 from Howard Evans' audited financial statements for the year ending 31 December 2000 submitted to Companies House.

⁷ Turnover details from Price's letters to the OFT dated 19 August 2003 and 23 February 2004.

⁸ Turnover details for year ending 31 December 2002 from Redbrook's letter to the OFT dated 28 April 2003.

⁹ Turnover details from Rio's letter to the OFT dated 1 May 2003.

¹⁰ Turnover details from Solihull's letter to the OFT dated 8 May 2003 and Solihull's written representations in response to the Rule 14 Notice, dated 11 November 2003.

¹¹ A 2002 Market and Business Development ('MBD') report, 'Roofing Materials and Contracting (Industrial Report)', October 2002, paragraph 3.3.

products (primarily tiling) and reports that one of the most important markets for metal coverings is speculative new build in the industrial construction sector for low-cost, out of town factories and warehouses.¹² Flat roofs are best defined in terms of the materials employed in their construction (i.e. bituminous felts, single ply membranes, mastic asphalt). This distinction is important because many 'flat' roofing products can also be fitted at a pitched angle. Tables 1 and 2 below give the relative shares of the main different roofing types¹³:

TABLE 1: TYPE OF ROOF BY AREA (UK) (MILLION M²)

YEAR	PITCHED	FLAT	METAL	TOTAL
1997	35.7	20.6	30.2	86.5
1998	36	22.3	32.4	90.7
1999	38.3	23.1	33.7	95.1
2000	38	23	34.3	95.3
2001	39.6	27.4	40.4	107.4

TABLE 2: ROOF TYPE BY PERCENTAGE

YEAR	PITCHED	FLAT	METAL	TOTAL
1997	41	24	35	100
1998	40	25	36	100
1999	40	24	35	100
2000	40	24	36	100
2001	37	26	38	100

13. Table 3 below shows that the UK roofing contracting services industry in total was valued at £1,338m in 2001, and there has been strong market growth in general for the last few years.¹⁴

TABLE 3: TOTAL ROOF CONTRACTING EXPENDITURE¹⁵

YEAR	£M
1997	1,100
1998	1,168
1999	1,207
2000	1,303
2001	1,338

¹² Competition Commission (2001) Icopal Holding A/S and Icopal a/s: A report on the merger situation, p.65.

¹³ MBD (2002), Roofing Materials and Contracting (Industrial Report), October 2002, Table 2.

¹⁴ MBD (2002), Roofing Materials and Contracting (Industrial Report), October 2002, paragraph 7.2.

¹⁵ MBD (2002), Roofing Materials and Contracting (Industrial Report), October 2002, Table 78.

14. There is a high degree of fragmentation in the roofing contracting industry, with some 74 per cent of companies commanding a turnover of less than £250,000 in 2002. However, although only eight per cent of the industry commanded a turnover of more than £1m in both 2001 and 2002, this amounted to 445 and 475 companies respectively, including 50 companies which commanded turnovers of more than £5m in both years.¹⁶
15. The sector employs around 50,000 workers, with some 80 per cent of the contractors employing three or fewer people in 2000. At the other extreme there were eight contractors employing more than 80 people.¹⁷
16. The infringements set out in this Decision involve flat roofing contracting services, which constitute a separate activity from either metal roofing or pitched roofing contracting services (see paragraphs 12 above and 136 below for more detail on metal and pitched roofing). There is no employment breakdown available for the flat roofing contracting industry, but it is possible to estimate the level of expenditure on flat roofing contracting services by multiplying the percentage share for flat roofing in Table 2 by the total roof contracting expenditure in Table 3 for any given year.

TABLE 4: ESTIMATED FLAT ROOF CONTRACTING EXPENDITURE¹⁸

YEAR	£M
1997	262
1998	287
1999	293
2000	314
2001	341

17. The services of contractors who specialise in the repair, maintenance and improvement of flat roofing products are usually procured through a competitive tendering process, which involves local authorities and private managing agents, architects or surveyors inviting a number of contractors to submit sealed competitive bids. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently.
18. Collusive tendering eliminates competition amongst suppliers. In the industry that is the subject of this Decision there are generally three types of arrangement that can result in a pre-selected supplier winning a contract:
 - Cover bidding (also referred to as cover pricing) occurs when a supplier 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 connection with another supplier that wishes to win the

¹⁶ Statistics in this paragraph from MBD (2002), Roofing Materials and Contracting (Industrial Report), October 2002, paragraph 7.3.

¹⁷ MBD (2002), Roofing Materials and Contracting (Industrial Report), October 2002, paragraph 7.3.

¹⁸ The figures in this table have been rounded.

contract. Cover bidding gives the impression of competitive bidding, but in reality suppliers agree to submit token bids that are usually too high.

- Bid-suppression takes place when suppliers agree amongst themselves to either abstain from bidding or to withdraw bids.
- Bid-rotation is a process whereby the pre-selected supplier submits the lowest bid on a systematic or rotating basis.

19. Local authorities make it clear in their invitations to tender that any form of collusive tendering is unacceptable. For example, Coventry City Council's Standing Orders explicitly state,

"In every tender submitted to the City Council, the tenderer shall certify that the tender amount has not been fixed or adjusted by, under, or in accordance with any agreement or arrangement with any other person."¹⁹

The standard terms and conditions used by the other local authorities referred to in this Decision contain similar stipulations regarding collusion and corruption in relation to the submission of tenders.

20. The OFT also notes that, in the absence of a formal sub-contracting relationship, there is no reason why undertakings invited to participate in a single stage (or any other) competitively tendered process would need to communicate with one another in relation to the tender before returning their bids to the local authorities, the surveyors or the private agents managing the tendering process.²⁰
21. It should be noted that local authority tendering is subject to EC²¹ and UK public procurement rules.

C. Investigation and proceedings

22. Ruberoid applied in the autumn of 2001 on behalf of its subsidiary Briggs - in its capacity as Briggs' parent company²² – for leniency under the terms of the OFT's

¹⁹ 'Standing Orders and Administrative Procedures relating to contracts for supply of works and services including consultancies' – Coventry City Council and City Treasurer, May 1998.

²⁰ Statement of Ivan Jerram dated 30 April 2003. Ivan Jerram, a chartered quantity surveyor employed by Harold Crowter Associates, was engaged by the OFT to provide a technical overview of the flat roofing contracting market and to examine the technical details of each individual contract that is the subject of this Decision.

²¹ The Public Services Contracts Regulations 1993 SI 1993/3228, as amended by SI 2003/46 the Public Contracts (Works, Services and Supply) and Utilities Contracts (Amendment) Regulations 2003, implements Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, Official Journal L 209, 24/07/1992 ("the Public Services Directive 92/50"). The Public Services Directive 92/50 has been amended by Directive (97/52/EC) which is implemented by the Public Contracts (Work, Services and Supply) (Amendment) Regulations 2000 SI 2000/2009. A new Council Directive has recently been adopted on the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts, aimed at simplifying the present rules regarding the award of various types of public contracts ('the new Directive') - see Council Press Release ref 5567/04 Presse 29. However, the new Directive has not yet been published and in any event the U.K. has a period of 21 months to implement it from the date of its publication in the Official Journal.

²² See paragraph 3 above.

leniency scheme.²³ As the first party to the cartel to approach the OFT before it had started its investigation and provide evidence thereof, Ruberoid was granted 100 per cent immunity in respect of the activities of itself and its subsidiaries. The granting of leniency in a letter dated 28 February 2002, and signed by Ruberoid and the OFT, was conditional on, inter alia, Briggs providing evidence of the cartel and co-operating with the OFT throughout its investigation.²⁴ The OFT is satisfied that Briggs' has complied with its leniency conditions and accordingly the penalty calculated for it is reduced to nil.

23. Information received by the OFT suggested that Apex, Briggs, Brindley, General Asphalte, Howard Evans, James M. Green & Co. Limited ('JMG'), Geetee Investments Limited trading as 'Monarch Roofing Co' ('Monarch'), Redbrook, Rio and Solihull were engaged in various price fixing or market-sharing agreements (as particularised in the Rule 14 Notice), whereby the tender prices submitted to local authorities and private undertakings for flat roofing works were agreed amongst those who would bid prior to tenders being returned.
24. On 11 June 2002, the OFT decided that there were reasonable grounds for suspecting that a group of flat roofing contractors had been engaged in collusive tendering with the object of price-fixing or market-sharing, thereby infringing the Chapter I prohibition. The OFT then began a formal investigation under the Act.²⁵ The OFT obtained warrants from the High Court to enter and search the premises of the following undertakings under section 28 of the Act.²⁶
 - Apex
 - General Asphalte
 - Howard Evans
 - JMG
 - Rio.
25. Unannounced visits under section 27 of the Act²⁷ were carried out by OFT officials on 4 September 2002 at the premises of Brindley, Monarch, Redbrook and Solihull. OFT officials visited the premises of Rio again under section 27 of the Act, with notice, on 13 September 2002. OFT officials also visited the premises of Boothville Roofing Limited ('Boothville') and Price under section 27 of the Act on 9 October 2002.

²³ Part 2 of the Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000.

²⁴ Ibid. The conditions for leniency where a party is the first to come forward before an investigation has commenced are set out in paragraph 3.4 of OFT 423.

²⁵ Section 25 of the Act empowers the OFT to conduct an investigation if there are reasonable grounds for suspecting that the Chapter I prohibition has been infringed.

²⁶ Under section 28 of the Act, having obtained a warrant from a High Court judge, the OFT may enter and search an undertaking's premises.

²⁷ Section 27 of the Act gives powers to, among other things, enter premises without a warrant, with or without notice.

26. Notices requiring information under section 26 of the Act²⁸ were issued to various contractors and bodies that were responsible for putting contracts out to tender.
27. At various points during the OFT's investigation voluntary statements were also taken from Coventry City Council ('CCC'), Birmingham City Council ('BCC'), Dudley Metropolitan Borough Council ('DMBC'), Warwickshire County Council ('WCC') and Sandwell Metropolitan Borough Council ('SMBC').
28. Howard Evans approached the OFT with a request for leniency second, and after the OFT's investigation had begun.²⁹ Howard Evans was granted leniency in a letter dated 23 July 2002, on the same conditions as Briggs but only to the extent that any penalty would be reduced by 50 per cent. The OFT is satisfied that Howard Evans has complied with its leniency conditions and as result the penalty for Howard Evans is reduced to £45,322.31.
29. On 13 August 2003 a notice under rule 14(1) of the OFT's procedural rules³⁰ ('the Rule 14 Notice') was issued to Apex, Boothville, Briggs, Brindley, General Asphalte, Howard Evans, JMG, Monarch, Redbrook, Price, Rio and Solihull. All of these contractors chose to make written representations to the OFT in response to the Rule 14 Notice in relation to the facts and conclusions set out in the Rule 14 Notice and / or in relation to the level of penalty that the OFT might impose for the infringements alleged. Apex also made oral representations to the OFT on 19 December 2003.

D. The contracts

30. The table below sets out, for each of the infringements found by the OFT in the Legal and Economic Assessment below, the contract in question, the customer that requested work to be done, the participants in the infringement and the date that the contract in question was put out to tender.

Contract	Customer	Participants	Put out to tender
<u>BIRMINGHAM CONTRACTS:</u>			
Small Heath School	Small Heath School (Grant Maintained)	Brindley General Asphalte Howard Evans	20 June 2000

²⁸ Section 26 of the Act empowers the OFT, for the purposes of an investigation under section 25 of the Act, to require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.

²⁹ The conditions for leniency where a party approaches the OFT after the OFT starts an investigation but is not the first to come forward are set out in paragraph 3.8 of OFT 423.

³⁰ Competition Act 1998 (Director's Rules) Order 2000 SI 2000/293.

Yardley Wood Library	BCC	Briggs Brindley General Asphalte Howard Evans Redbrook	8 January 2001
Frankley Community High School	BCC	Apex Briggs	7 August 2001
Harborne Hill School	BCC	Apex Briggs	7 August 2001
<u>PRIVATE CONTRACTS:</u>			
Pallasades Shopping Centre	Donaldsons, acting for Capital and Regional Property Management	Briggs Rio Price	30 June 2000
Quasar	Mapleplan Limited	Briggs Rio	30 June 2000
<u>WARWICKSHIRE SCHOOLS:</u>	WCC		
Abbots Farm	WCC	Briggs General Asphalte Howard Evans	14 February 2001
Ashlawn School	WCC	Briggs General Asphalte	9 February 2001
Avon Valley	WCC	Briggs General Asphalte Howard Evans	6 Feb 2001
Boughton Leigh	WCC	Briggs General Asphalte Howard Evans	After 25 January 2001
Blythe Special School	WCC	Briggs General Asphalte Howard Evans	7 March 2001
Exhall Grange	WCC	Briggs General Asphalte	24 January 2001
Faraday Hall	WCC	Briggs General Asphalte Howard Evans	19 January 2001

Henry Hinde	WCC	Briggs General Asphalte Howard Evans	12 April 2001
Wheelwright Lane	WCC	Briggs General Asphalte Howard Evans	15 February 2001
<u>DUDLEY SCHOOLS:</u>			
Hob Green, Wollescote, Christchurch, Church of the Ascension	DMBC	General Asphalte Howard Evans Solihull Apex	20 March 2002

E. Evidence relied on by the OFT in relation to individual contracts

BIRMINGHAM CONTRACTS

Small Heath School

Facts

31. On 20 June 2000, Bond Foster – a firm of chartered quantity surveyors, construction cost consultants, project managers and planning supervisors acting on behalf of the governors of Small Heath School and Sixth Form College ('Small Heath School') which is grant maintained - sent out invitations to tender for works on Small Heath School to Howard Evans, General Asphalte and Brindley. The tenders had a return date of 5 July 2000.³¹
32. The contract was for the re-roofing of the kitchen/dining room block of Small Heath School. The companies invited to tender for the contract were selected on the basis of Vedag Villas' (the material supplier) recommendation of suitable contractors, Bond Foster's historical knowledge of the suitability of firms, the health and safety record of the firms and the firms' quality of workmanship.
33. The tender bids received, excluding VAT, were as follows.³²
 - Howard Evans £47,632.00
 - General Asphalte £48,981.25
 - Brindley £49,963.00
34. The tender bids submitted by all contractors exceeded the budget available for the works and Bond Foster, acting under instructions from the school governors and in

³¹ Bond Foster's 17 September 2002 response to the OFT's section 26 notice dated 13 September 2002 contains full details of selection criteria and overall tendering process.

³² Bond Foster's 17 September 2002 response to the OFT's section 26 notice dated 13 September 2002 contains document headed 'ref item G/1'.

accordance with Bond Fosters' code of practice, negotiated a substantial reduction in the scope of works with Howard Evans (the lowest tender) to bring the scheme into budget. Howard Evans and Bond Foster agreed a new tender sum of £19,725.25, based on this reduced specification. Bond Foster sent a letter awarding the contract to Howard Evans on 7 July 2000.

Evidence of agreement or concerted practice

35. The evidence in relation to this contract, set out below, consists of faxes sent from one party to the infringement to other parties to the infringement and to Bond Foster.

36. *Fax dated 3 July 2000 from Howard Evans to General Asphalte.* This fax was found by the OFT's officials on a section 28 visit to Howard Evans' premises on 4 July 2002. This fax header sheet, which notes that the fax was sent at 11:19am on 3 July 2000, states,

“FOR THE ATTENTION OF ALAN
COMPANY GENERAL ASPHALT [sic]
FAX NO. 0121-643-7134
FROM JOHN ROPER
NUMBER OF PAGES INCLUDING THIS ONE ONE
Re:- SMALL HEATH LOWER SCHOOL

YOUR PRICE £48,980.00 + VAT
INCLUDING PROVISIONAL SUMS.

REGARDS
JOHN”

(Emphasis added).

37. *Fax dated 3 July 2000 from Howard Evans to Brindley.* This fax was found by the OFT's officials on a section 28 visit to Howard Evans' premises on 4 July 2002. This fax header sheet, which notes that the fax was sent at 11:20am on 3 July 2000, states,

“FOR THE ATTENTION OF PETER BAKER
COMPANY BRINDLEY ASPHALT
FAX NO. 01902-409497
FROM JOHN ROPER
NUMBER OF PAGES INCLUDING THIS ONE ONE

MESSAGE Re:- SMALL HEATH LOWER SCHOOL

YOUR PRICE £49,780.00 + VAT
INCLUDING PROVISIONAL SUMS.

REGARDS
JOHN"

(Emphasis added).

38. *Fax dated 6 July 2000 from Howard Evans to General Asphalte.* This fax was found by the OFT's officials on a section 28 visit to Howard Evans' premises on 4 July 2002. This is a fax header sheet stating,

"...RE:- SMALL HEATH LOWER SCHOOL

BREAKDOWN AS REQUESTED

REGARDS

JOHN"

The fax header sheet states that the document consists of eleven pages including the header sheet and a breakdown.

39. *Undated breakdown of prices with hand-written script on the first page.* This breakdown was found by the OFT's officials on a section 28 visit to Howard Evans' premises on 4 July 2002. The first page of the 10 pages of the breakdown has hand-written script stating,

"GENERAL
£48,980.00"

The tenth and final page of the fax is headed "SMALL HEATH LOWER SCHOOL" and the total figure on the page is £48,980.

40. *Fax dated 6 June 2000 from Howard Evans to Brindley.* This fax was found by the OFT's officials on a section 28 visit to Howard Evans' premises on 4 July 2002. This is a fax header sheet also stating,

"...RE:- SMALL HEATH LOWER SCHOOL

BREAKDOWN AS REQUESTED

REGARDS

JOHN"

The fax header sheet states that the document consists of eleven pages including the header sheet and a breakdown. The pages of the breakdown give more detail of the costs that comprise the £49,780 + VAT price for the Small

Heath contract referred to in the 3 July fax from Howard Evans to Brindley referred to in paragraph 37 above. In relation to the date written on the fax, 6 June 2000, the author of the fax noted the possibility that this document should be dated 6 **July**, rather than 6 June, 2000.³³

41. *Fax dated 6 July 2000 from General Asphalte to Bond Foster.*³⁴ This fax gives a breakdown of the £48,981.25 + VAT tender figure for the Small Heath contract that General Asphalte had already sent to Bond Foster on a tender form dated 5 July 2000.³⁵ The printed pages consist of 11 pages the layout of which is identical to those pages on which Howard Evans wrote figures for the breakdown it sent to General Asphalte on 6 July 2000. The figures written on the printed sheets that General Asphalte sent to Bond Foster are the same as the ones on the breakdown sent from Howard Evans to General Asphalte except for the first figure on the page headed "Temporary Works"³⁶ and the figure for the first item on the page that is marked "COLLECTION" and "TOTAL: SCHEDULE OF WORKS".³⁷ General Asphalte submitted a bid of £48,981.25 to Bond Foster and Howard Evans faxed a tender price of £48,980.00 to General Asphalte. The difference between these two prices is £1.25.
42. *Fax dated 10 July 2000 from Brindley to Bond Foster.*³⁸ This fax gives a breakdown of the £49,963.00 + VAT tender figure for the Small Heath contract that Brindley had sent to Bond Foster on a tender form dated 4 July 2000.³⁹ The printed pages consist of 11 pages almost identical to those pages on which Howard Evans wrote figures for the breakdown it sent Brindley on 6 July 2000. The figures written on the printed sheets that Brindley sent to Bond Foster are the same as the ones on the breakdown sent from Howard Evans to Brindley except for one figure on the printed page numbered 3/7 in the section headed "Internal works" and one figure on the printed page numbered 3/8 in the section headed "COLLECTION", which simply summarises the cost totals for each of the preceding pages.⁴⁰ The overall difference

³³ Mr G's answer to question nine in the record of interview with him dated 3 September 2002.

³⁴ Supplied by Bond Foster in its 17 September 2002 (ref 'item D2) response to the OFT's section 26 Notice dated 13 September 2002.

³⁵ Fax supplied by Bond Foster in its 17 September 2002 (ref item 'C/2') response to the OFT's section 26 Notice dated 13 September 2002.

³⁶ The fax Howard Evans sent to General Asphalte gives a figure of £170.00 for part (a) of the temporary works while the fax General Asphalte sent to Bond Foster gives a figure of £170.50 for part (a) of the temporary works.

³⁷ The fax Howard Evans sent to General Asphalte gives a figure of £170.00 for the first item on the page that is marked "COLLECTION" AND "TOTAL SCHEDULE OF WORKS" while the fax General Asphalte sent to Bond Foster gives a figure of £171.25 for the first item on the page that is marked "COLLECTION" AND "TOTAL SCHEDULE OF WORKS".

³⁸ Supplied by Bond Foster in its 17 September 2002 (ref item 'D/3') response to the OFT's section 26 Notice dated 13 September 2002. Paragraph 31 above notes that Bond Foster set a return date of 5 July for the tender **figures**, not the breakdown of those figures. In accordance with this, Bond Foster opened the tender prices alone on 5 July. However, the detailed **breakdown** for the tender figure was submitted to Bond Foster on 10 July.

³⁹ Supplied by Bond Foster in its 17 September 2002 (ref item 'C/3') response to the OFT's section 26 Notice dated 13 September 2002.

⁴⁰ The page numbered 3/7 in the fax that Howard Evans sent to Brindley gives a figure of £2250.00 for part (f) of the internal works while the fax Brindley sent to Bond Foster gives a figure of £2435.00 for part (f) of the internal works – a difference of £185. The page headed "COLLECTION" in the two faxes summarises the

between the tender price on the breakdown that Howard Evans faxed to Brindley and the tender price on the breakdown that Brindley sent to Bond Foster is £183.⁴¹ Notably, the handwriting on the breakdown sent by cover of the fax referred to at paragraph 40 and the breakdown sent by fax from Brindley to Bond Foster on 10 July 2000 appears to be the same except for the two figures described above that are different.

43. *Letter dated 11 July 2000 from Bond Foster to Brindley.* This document was found by OFT officials on a section 28 visit to Howard Evans' premises. Bond Foster sent a letter to Brindley informing it that it was not awarded the contract. The letter stated,

“The priced schedule of works for each of the tenders received had a remarkably close similarity between the pricing of all items and each of the priced schedules. This was considered most surprising bearing in mind the nature of works and experience of the market place for such projects.”

A senior manager and member of the Howard Evans Board of Directors (hereafter referred to as Mr A)⁴² said in his interview⁴³ with the OFT of 3 September 2002 that Brindley copied the letter above to Howard Evans out of “commercial interest”.

Yardley Wood Library

Facts

44. On 8 January 2001 BCC Urban Design Department sent out invitations to tender for works on Yardley Wood Library to Howard Evans, General Asphalte, Monarch, Brindley, Redbrook and Briggs. The tenders had a return date of 24 January 2001.⁴⁴
45. The contract was for partial re-roofing works. The companies invited to tender for the contract were selected on the basis of Vedag Villas' (the material supplier) recommendation of suitable contractors.⁴⁵

total of the costs for each of the preceding pages and so the total figure for page 3/7 in the fax that Brindley sent Bond Foster is £185 more than the corresponding figure in the fax that Howard Evans sent Brindley.

⁴¹ The OFT notes that the difference between the total prices is only £183 although the difference between the totals on the breakdowns is £185. The OFT considers that the difference between the £183 and £185 is a mathematical error on the part of Brindley.

⁴² Having regard to the provisions relating to disclosure of information contained in sections 237, 238, 241 and 244 of the Enterprise Act 2002 and to the particular circumstances of this case, the OFT has withheld the names of individuals within the leniency applicant companies who provided direct evidence to the OFT in the form of interviews or witness statements.

⁴³ Mr A gave this interview voluntarily and it was arranged by Howard Evans as part of its commitment to cooperate with the OFT's investigation. Mr A was advised of his right to be represented by a legal adviser but he declined representation, although the interview took place with a solicitor from Glaisyers Solicitors (who represent Howard Evans) present. The OFT made it clear to Mr A that he could not be compelled to answer any question and that he was free to leave the interview at any time and that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by, and notes of the interview were prepared by, OFT officials and given to Mr A to verify that the interview record was a true and fair record of the evidence that was given. The record of interview was not disputed.

⁴⁴ BCC, Urban Design Department 'Checklist for the Despatch and return of Quotations', dated 8 January 2001.

46. The tenders received were as follows.⁴⁶

• Howard Evans	£41,417.00
• General Asphalte	£42,632.29
• Monarch	£45,532.00
• Brindley	£43,894.00
• Redbrook	£42,768.00
• Briggs	£44,216.00

47. The value of all the tenders exceeded the budget available for the works, but the Head of Community Libraries was able to identify additional funding from departmental revenue.⁴⁷ The contract was then awarded to Howard Evans for the sum of £41,417.00.⁴⁸ Following several variation orders, the revised contract value was £38,221.00 although Howard Evans remained the contractor appointed to carry out the work.⁴⁹

Evidence of agreement or concerted practice

Evidence from leniency applicant, Howard Evans

48. *Document entitled, "HISTORY OF CARTEL FOR BIRMINGHAM CITY COUNCIL"*. This document contains explanations from Howard Evans about its involvement in various contracts and was created in relation to Howard Evans' leniency application. It states,

"We became involved in the Cartel during the next year of 2001 in which we worked at Yardley Wood Library. The remaining quotations were all quoted properly apart from the following sites..."

49. *Documents BG21 and BG23 and an explanation of the two documents*. Documents BG21 and BG23 were found by OFT officials on a section 28 visit to Howard Evans premises on 4 July 2002. Document BG21 is a handwritten list that is headed 'Yardley Wood Library' and that contains the names and contact telephone numbers of six undertakings. BG23 is also a handwritten list that sets out the names of undertakings with a numerical figure next to each name. Howard Evans provided a document entitled, 'EXPLANATION OF BG LIST' as part of its leniency application. This document states in relation to BG21 and BG23, respectively "This [BG21] is the list of companies and contacts who were spoken to on Yardley Wood Library project and BG23 listed the prices supplied to each company." Document BG23 states the following prices that Howard Evans supplied to other companies for the Yardley Wood contract:

"General £42,632.00... Martin

⁴⁵ BCC, Urban Design Department 'Specification for Yardley Wood Library' dated 8 January 2001.

⁴⁶ BCC, Urban Design Department, 'Quotation/Tender return', undated.

⁴⁷ Memorandum from DS Lloyd, Project Control, to P Greaves, BCC Urban Design Department, dated 29 January 2001.

⁴⁸ Letter dated 29 January 2001 from Project control for this contract to Peter Greaves of the Urban Design Department Property Maintenance Division.

⁴⁹ BCC, Urban Design Department, Variation Order no 21297, dated 26 March 2001.

Bilston⁵⁰ £43,894.00... Malc
 Redbrook £42,768.00... John
 Briggs £44,210.00... [...][C]"

50. *Letter dated 28 August 2002 from Howard Evans to the OFT.* This document was created in relation to Howard Evans' leniency application. In information supplied with this letter,⁵¹ Howard Evans states,

"2. Yardley Wood Library...

a. Mr A rang various roofing contractors and asked for assistance on this project. It was a calculated guess who would have been on the tender list.

c. The following people were spoken to:-

i. General Asphalte Co. – Martin Price [sic].

ii. Brindley Asphalt – Malcolm Woffindin.

iii. Redbrook Mastic Asphalt & Felt Roofing – John Powell.

iv. Briggs Roofing & Cladding – [...][C] [sic]..."

51. *Fax from Howard Evans to John Powell at Redbrook.* This undated fax⁵² states,

"RE: YARDLEY WOOD LIBRARY

YOUR PRICE FOR WORKS AT THE ABOVE INCLUDING CONTINGENCYS [sic]

£42,768.00 + VAT".

(Emphasis added).

52. *Comparison between tender prices received by BCC and prices given by Howard Evans to undertakings.* The table below, prepared by the OFT,⁵³ compares the prices that the parties actually submitted to BCC with the prices that Howard Evans states that it sent to the parties.

Party	Price returned to BCC	Price Howard Evans gave to party

⁵⁰ Bilston is Brindley's wholly owned subsidiary, see Notes to the Abbreviated Accounts for Brindley for the year ended September 2001.

⁵¹ Howard Evans response of 28 August 2002 to the OFT's request for further information dated 19 August 2002.

⁵² Produced to OFT officials at Redbrook's premises on an OFT section 27 visit.

⁵³ The tender figures submitted by the undertakings' were taken from a document entitled, "Urban Design Department, Quotation/Tender Returns" that tabulated tender returns for the Yardley Wood Library project. This document was obtained from BCC. The figures that Howard Evans gave to the other undertakings are taken from document BG23 discussed at paragraph 49 above.

General Asphalte	£42,632.29	£42,632.00
Brindley	£43,894.00	£43,894.00
Redbrook	£42,768.00	£42,768.00
Briggs	£44,216.00	£44,210.00

The prices the parties returned to BCC are either identical or very similar to the prices that Howard Evans asked them to bid.

Evidence from leniency applicant, Briggs.

53. *Interview with Mr B on 29 August 2002.*⁵⁴ OFT officials asked Mr B,

“Did you keep any records of those contracts that were the subjects of cover prices being taken or given?”

Mr B answered,

“...Those I was involved in I kept a list... It was just a piece of paper...”

Mr B was shown a list ('the Mr B list') by the OFT official who interviewed him and asked,

“[SHOWN DOCUMENT. A4 SHEET COMMENCING JAN 2001... VALUE 20964:00]

QNB: Is this the list you have been referring to and is this your handwriting?”

Mr B responded,

“...Yes it is. The first column is the date when the tender was submitted. Second column is the client. Third column is the contract title or address. The fourth column is the tender value and the fifth is the company we covered.”

The OFT asked “When you say this [fifth] column, what do you mean?” Mr B responds,

“They are the companies who asked us for a cover price”

The OFT then asked,

“so to clarify, each price on this list was a cover price?”

Mr B responded,

“Yes”.

⁵⁴ See note 42 above. Mr B gave this interview voluntarily and it was arranged by Briggs as part of its commitment to cooperate with the OFT's investigation, which was a condition of its leniency application. Mr B was advised of his right to be represented by a legal adviser but he declined representation, although the interview took place with a solicitor from Hammonds Solicitors (who represent Briggs) present. The OFT made it clear to Mr B that he could not be compelled to answer any question and that he was free to leave the interview at any time but that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by and notes of the interview were prepared by OFT officials and given to Mr B to verify that the interview was a true and fair record of the evidence that was given. The record of interview was not disputed.

Mr B also explains in this interview that where Briggs made cover bids to assist other companies, Briggs would in some cases tender at the price that they were requested to by the company that they were covering while in other cases the other company would give a guide price and leave the actual bid price to Briggs to decide.

54. *Statement of Mr B dated 11 November 2002.*⁵⁵ Mr B states,

“To clarify information that I provided to the OFT in my interview of 29 August 2002, the document that I have marked on the reverse... comprising two pages, is a copy of the list referred to in the interview. This document was prepared by myself at the request of Mr E⁵⁶ through Mr F.⁵⁷ I recall producing the list around late 2001 or early 2002 and it is my understanding that it was a request to produce a list of jobs where Briggs had given covers to other contractors. I **compiled this list from my notes and scraps of paper that I'd kept over the 12 months in 2001**. I destroyed these scraps of paper after I'd produced the list.”

(Emphasis added).

The Mr B list contains the Yardley Wood contract. The value of the tender recorded on the Mr B list is the same as the actual value that Briggs submitted to BCC for the Yardley Wood contract.

Frankley Community High School / Harborne Hill School, Harborne

Facts

55. On 7 August 2001, BCC Urban Design Department sent out invitations to tender for re-roofing works at Frankley Community High School and Harborne Hill School. These were addressed to Apex, Briggs, Envirotek Systems Limited, SIAC Construction UK Limited, Sharkey & Co Limited and Torclad & Co Limited. The tenders had a return date of noon, 4 September 2001.⁵⁸
56. The project involved using a specific roofing system (Firestone). BCC required a manufacturer's guarantee, which in turn required installation by a Firestone approved installer. Apex and Briggs were on both the BCC and Firestone approved lists. Envirotek, Sharkey, SIAC and Torclad were Firestone approved, but not on BCC's approved list for roofing works. BCC therefore required further details of tax status, financial references and insurance from Envirotek, Sharkey, SIAC and Torclad to proceed with the tender exercise.⁵⁹

⁵⁵ This statement was given voluntarily by Mr B to clarify his interview of 29 August 2002 in relation to the Mr B list.

⁵⁶ See paragraph 110 and note 93 below.

⁵⁷ See note 42 above. Mr F is a [...] [C] at Briggs.

⁵⁸ BCC, Urban Design Department, letter dated 7 August 2001, 're; project 31856'; also BCC, Urban Design Department, letter dated 7 August 2001, 're: project 31848.'

⁵⁹ BCC, Urban Design Council, 'Tender Selection List: Frankley High School'; BCC, Urban Design Council, 'Tender Selection List: Harborne Hill School'.

57. The responses to the tender invitations were:⁶⁰

	Frankley	Harborne Hill
Apex	187,354.22	136,959.37
Briggs	Decline	Decline
Envirotek	203,010.00 (financial reference, tax and insurance details were omitted)	147,825.00 (financial reference, tax and insurance details were omitted)
SIAC	206,275.00 (incomplete tender)	150,350.00 (incomplete tender)
Sharkey	196,498.00 (incomplete tender)	140,794.25 (incomplete tender)
Torclad	198,840.00 (financial reference and insurance details were omitted)	142,656.00 (no financial reference)

58. On receipt of these final bids, officials working for BCC recommended that Apex be awarded the Frankley contract for the firm price tender sum of £187,354.22. A letter awarding the contract to Apex was sent on 1 October 2001.

59. BCC officials also recommended that Apex be awarded the Harborne Hill contract for the fixed price sum of £136,959.37. A letter awarding the contract to Apex was sent out on 23 October 2001.

Evidence of agreement or concerted practice

60. The evidence in relation to this contract, set out below, consists of faxes sent from one party to the infringement to other parties to the infringement and to BCC.

61. *Fax dated 30 August 2001 from Apex to Briggs.* This is a fax header sheet given to the OFT by solicitors for Briggs during the course of an interview with Mr C. Handwritten manuscript notes that,

"[...] [C]

**THESE ARE YOUR FIGURES INCLUSIVE OF CONTINGENCIES
FOR TWO PROJECTS WITH BIRM C.C.**

FRANKLEY = £193460.40

⁶⁰ BCC, Urban Design Council, 'Schedule of Tenders: Frankley High School'; BCC, Urban Design Council, 'Schedule of Tenders: Harborne Hill School'.

HARBORNE HILL = £144910.10

MANY THANKS AND HAVE A GOOD HOLIDAY.

BEST WISHES

[...][C]"

(Emphasis added).

One section of the fax headed "DATE/TIME" notes,

"30.8.2001

14.30".

62. *Record of interview with Mr C⁶¹ of Briggs.* An extract from the interview record of Mr C – [...][C] with Briggs at the time of the infringement - records as follows.

"...we were asked to do a cover for a couple of schools that Apex roofing knew about that were coming out to tender... The jobs or the enquiries duly hit my desk and remained there until this fax came through with our prices to put in.

63. Mr C continued,

"We were rather shocked at the value.....it's a lot of money and we looked at the specification required for the job and the roof areas involved on a roof plan that had been supplied and I went and saw my boss Mr F⁶² and we looked at it carefully together again. We didn't actually sit very comfortable with the figures that we got to submit... because it was too high... and it was duly decided that we were not gonna actually put a tender in so we didn't actually put a tender bid in at all – it was just an absolute no tender as far as we were concerned because we thought they were having a laugh with the figures... we didn't return a price at all."

64. *Details of tenders submitted to BCC.*⁶³ Tenders submitted to the council show that Apex submitted figures to BCC of £187,354.22 and £136,959.37 for Frankley High School and Harborne Hill Secondary School respectively.

⁶¹ See note 42 above. Mr C gave this interview voluntarily on 26 November 2002 and it was arranged by Briggs as part of its commitment to cooperate with the OFT's investigation. Mr C was represented at this interview by a solicitor from Hammonds Solicitors. The OFT made it clear to Mr C that he could not be compelled to answer any question and that he was free to leave the interview at any time but that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by, and notes of the interview were prepared by, OFT officials and given to Mr C and his legal adviser to verify that the interview was a true and fair record of the evidence that was given. The record of interview was not disputed.

⁶² Mr F is a [...][C] at Briggs.

⁶³ Figure for Frankley school taken from a document entitled 'Schedule of Tenders' and figure for Harborne Hill school taken from a Report on the Re-roofing at Harborne Hill Secondary School, by the General Manager, Urban Design Department, BCC.

PRIVATE CONTRACTS

Pallasades

Facts

65. On 30 June 2000, Donaldsons Chartered Surveyors – acting on behalf of Capital and Regional Property Management Limited ('CRPM'), sent out invitations to tender for works on the Pallasades Shopping Centre, Birmingham. These invitations were addressed to Hyflex⁶⁴, Price, Rio, Single Ply Roofing and David Roofing. The tenders had a return date of 21 July 2000.⁶⁵
66. The contract was part of a roof replacement programme that called for bidders to supply quotations for two flat roof overlay systems, Tremco and Novapren.⁶⁶ Tenders were received from Hyflex (19 July 2000), Price (19 July 2000), Single Ply Roofing (20 July 2000) and Rio (18 July 2000). No tender was received from David Roofing, who declined to bid due to existing work commitments. The tenders were opened on 24 July 2000 and the bids are shown below:⁶⁷
- | | |
|------------------------------------|-------------|
| • Hyflex | £770,024.00 |
| • Price | £767,411.00 |
| • Rio | £710,163.00 |
| • Single Ply Roofing (Tremco only) | £364,248.10 |
67. Because of the complexity of the bid documents and the requirement to provide two roofing options, Donaldsons conducted a further post-tender analysis. This demonstrated that the lowest Tremco based bid was provided by Single Ply Roofing.⁶⁸ The lowest Novapren based tender was submitted by Rio.
68. In the final tender report, Donaldsons noted that a Tremco based solution was more cost effective, but that there were serious reservations about Tremco's performance

⁶⁴ As set out in Hyflex Roofing's business letterhead, Hyflex is a trading style of Briggs. References to Hyflex in relation to this contract should be taken to refer to Briggs.

⁶⁵ The basis for selecting the bidders was explained as follows, 'Two contractors with previous experience of tendering and working for Donaldsons, and three new contractors with specialist knowledge and experience in the field, not having tendered previously for Donaldsons. Re-roofing programme to Pallasades Shopping Centre, Birmingham Tender Report, provided as part of Donaldsons' 9 October 2002 response to the OFT's Section 26 notice dated 13 September 2002.

⁶⁶ 'Re-roofing programme to Pallasades Shopping Centre, Birmingham Tender Report, provided as part of Donaldsons 9 October 2002 response to the OFT's Section 26 notice dated 13 September 2002.

⁶⁷ Re-roofing programme to Pallasades Shopping Centre, Birmingham Tender Report, provided as part of Donaldsons 9 October 2002 response to the OFT's Section 26 notice dated 13 September 2002.

⁶⁸ Single Ply Roofing was contacted post tender and given the opportunity to re-tender on works relating to the removal and retention of all plant and equipment. They then submitted a revised priced breakdown on 4 August 2000 confirming a tender price of £432,093.10. 'Re-roofing programme to Pallasades Shopping Centre, Birmingham Tender Report, provided as part of Donaldsons 9 October 2002 response to the OFT's Section 26 notice dated 13 September 2002. It should be noted that the figures given by each of Hyflex, Price and Rio for the contract were the sum of the individual prices for their bids for the Tremco solution and the Novapren solutions. Donaldsons 9 October 2002 response to the OFT's Section 26 notice dated 13 September 2002.

over its projected lifecycle. Donaldsons also noted that Rio had "...tendered for Donaldsons before and been successful. We have encountered no major service delivery or cost issue with this contractor." Accordingly, Donaldsons recommended the Novapren based Rio option to CRPM. Subsequently, CRPM decided not to proceed with the project and no contractor was appointed.

Evidence of agreement or concerted practice

Evidence from leniency applicant, Briggs

69. *Interview record with Mr D⁶⁹ of Briggs dated 28 August 2002.* Mr D – [...] [C] of Briggs with responsibility for the Hyflex trading style - was asked by the OFT official who interviewed him whether he had been involved in cover pricing (the question in italics in the extract below). The interview record of Mr D states,

"9. Have your (sic) personally been involved in cover pricing arrangements at Hyflex?..."

Mr D replied,

"Both Pallasades and Quasar projects. Rio had asked for a cover price."

Later in the same interview Mr D continues,

"PALLASADES SHOPPING CENTRE

...we were given just 4 days to price it. I recall I received a call on my mobile from a Mr Tierney or Mr Raseby [sic]. The call was to provide a price cover if the tender was received... I told Rio we did not have the time and it was not practical so to keep the specification. I agreed that if they provide a detailed breakdown of the work to be priced with prices, Hyflex would submit a bid. There was no other contact with Rio on my side. I assume there was a fax under my instructions. [...] [C] would have submitted the price."

70. *'Daily sales activity report' [...] [C] of Hyflex, for 'w/c 10 July'.* An entry for 12 July records,

"PALLASADES... NO SURVEY/REPORT TO FOLLOW (COVER)".

71. *Fax dated 19 July 2000 from Rio to Hyflex.* Briggs provided the OFT with this document as part of its leniency application. The fax header sheet states that the fax consisted of 16 pages.

⁶⁹ See note 42 above. Mr D gave this interview voluntarily and it was arranged by Briggs as part of its commitment to cooperate with the OFT's investigation. Mr D was advised of his right to be represented by a legal adviser but he declined representation, although the interview took place with a solicitor from Hammonds Solicitors (who represent Briggs) present. The OFT made it clear to Mr D that he could not be compelled to answer any question and that he was free to leave the interview at any time but that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by, and notes of the interview were prepared by, OFT officials and given to Mr D to verify that the interview was a true and fair record of the evidence that was given. The record of interview was not disputed.

"[...] **[C]** [sic] RATES AS REQUESTED.

REGARDS JIM"

The fax gives a breakdown for a contract. The second page of the fax begins,

"This project encompasses the complete phased overlay renewal of all roofs to the Pallasades Shopping Centre."

It should also be noted that the bottom of page 12 of the fax states,

"TOTAL FIXED PRICE

CARRIED TO FORM OF TENDER £ 770,024-00"

72. *Document for Hyflex entitled "Tender Enquiry" and dated 19 July 2000.* This is the tender document that Hyflex returned for the Pallasades contract. This document records the total fixed price tendered by Hyflex for the Pallasades roofing contract as £770,024.

Evidence from other sources

73. *Fax dated 19 July 2000 from Rio to Hyflex.* A fax identical to the fax set out at paragraph 71 above was found by OFT officials on a section 28 visit to Rio's premises on 4 July 2002.
74. *Fax dated 19 July 2000 from Rio to Price.* This document was found by OFT officials on a section 28 visit to Rio's premises on 4 July 2002. The fax header sheet notes that the fax was sent at 13:13 on 19 July 2000, that it consisted of fifteen pages and that it was sent by Jim Tierney. The fax header also notes,

"JOHN RATES AS REQUESTED

REGARDS

JIM".

The fax gives a breakdown for a contract. The second page of the fax begins,

"This project encompasses the complete phased overlay renewal of all roofs to the **Pallasades Shopping Centre.**"

(Emphasis added).

75. A page of the fax headed, "ROOF RECOVERING PLAN FOR THE PALLASADES SHOPPING CENTRE... MAIN SUMMARY" and numbered 12, notes at the bottom of the page,

"TOTAL FIXED PRICE

CARRIED TO FORM OF TENDER £ 767,411-00"

76. *Document for Price entitled "Tender Enquiry" and dated 19 July 2000.* This is the document that Price returned for the Pallasades contract. This document records the total fixed price tendered by Price for the Pallasades roofing contract as £767,411.00.
77. *Document headed "Tender Opening".* This document sets out the tender figure returns for the Pallasades contract.⁷⁰ This document shows that the bids tendered by the invited parties are as follows:
- Hyflex £770, 024.00
 - Price £767,411.00
 - Rio Asphalt £710,163.00
 - Single ply roofing (Tremco only) £364,248.10
 - David Roofing no tender.
78. *Tender Report for Pallasades Shopping Centre, written by Donaldsons.* Page 2 of this report confirms that various contractors made bids as set out in the previous paragraph.⁷¹

Quasar

Facts

79. On 14 June 2000, J Turner and Associates Limited ('J Turner'), acting on behalf of Mapleplan Limited, care of London & Cambridge Properties Ltd., sent invitations to tender for works on the Quasar Centre, Walsall. These were addressed to Chase Norton Construction Limited ('Chase Norton') and William Sapcote and Sons Limited ('Sapcote').⁷²
80. The contract was for planned maintenance works consisting of the removal of surfacing to a service yard and second floor car parking deck and the installation of a waterproof car parking deck and surfacing, using a liquid applied roofing system. Sapcote and Chase Norton were main contractors who decided to subcontract out the roofing elements of the Quasar job.
81. Sapcote invited Rio and Hyflex⁷³ to tender on 30 June 2000.⁷⁴ Hyflex returned a quote of £770,465.50 on 6 July 2000.⁷⁵ Details of the returned bid to Sapcote by Rio are unavailable. Chase Norton invited Rio to bid for the roofing work. Rio returned

⁷⁰ Donaldsons' 1 October 2002 response to the OFT's section 26 letter dated 13 September 2002.

⁷¹ Donaldsons' 9 October response to the OFT's section 26 letter dated 13 September 2002.

⁷² Letter J.H. Turner to Chase Norton, dated 14 June 2000, provided as part of Chase Norton's 8 November 2002 response to the OFT's Section 26 Notice dated 22 October 2002. Also WM Sapcote & Sons 1 November 2002 response to the OFT's Section 26 Notice dated 22 October 2002.

⁷³ See note 64 above.

⁷⁴ 'Sapcote Sub-contract Enquiry Form ', dated 30 June 2000, provided by Hyflex. Also 'Sapcote Sub-contract Enquiry Form ', dated 30 June 2000, document ref NWA 16, taken on an OFT section 28 visit to Rio.

⁷⁵ Hyflex Roofing 'Offer: 20/0064-00-c9, Quasar Centre, Walsall', dated 6 July 2000.

a tender of £692,287.30 on 7 July 2000 to Chase Norton.⁷⁶ This bid was subsequently used in Chase Norton's final return to J Turner.⁷⁷

82. Chase Norton returned a full tender price to J Turner of £768,437.00 on 14 June 2000. Sapcote also returned a tender price to J Turner, although no details of the bid remain.⁷⁸
83. J Turner notified both Chase Norton and Sapcote that Mapleplan / LCP Management had received the tenders, but that they were both over the budget allocated for the Quasar Centre. Chase Norton were then invited to discuss with J Turner ways of omitting sections of the work, changing specifications and/or looking at alternative methods in order to cut costs. Chase Norton and J Turner subsequently agreed a revised scheme and price, and the contract was awarded to Chase Norton for £609,958.70. Rio acted as the main sub-contractor on the project.⁷⁹

Evidence of agreement or concerted practice

Evidence from leniency applicant Briggs

84. *Fax dated 6 July 2000 from Rio to Hyflex.* Briggs provided this document to the OFT as part of its leniency application. The fax cover sheet states,

"To: [...][C]	From: John Sturme y
Fax: 0121-555-5862	Pages: 7
Phone: 0121-555-6464	Date: 06/07/00
Re:	cc: N/A...

- Comments

QUAZER CENTRE [sic]

Please find enclosed schedule of works **to copy**.

Main Contractor to provide :- site huts etc.

Hyflex will only take on the package if all the works are undertaken by themselves to enable a one point responsibility for the waterproofing to be maintained for the works.

Regards

John"

⁷⁶ Fax from John Sturme y (Rio) to Tiny Cotsgrave (Chase Norton) provided as part of Chase Norton's 8 November 2002 response to the OFT's Section 26 Notice dated 22 October 2002.

⁷⁷ Chase Norton's 8 November 2002 response to the OFT's Section 26 Notice dated 22 October 2002.

⁷⁸ Sapcote's 1 November 2002 response to the OFT's Section 26 Notice dated 22 October 2002.

⁷⁹ Chase Norton's 8 November 2002 response to the OFT's Section 26 Notice dated 22 October 2002.

(Emphasis added).

The first page of the schedule of works accompanying the fax cover sheet gives a summary of the prices for the detailed work that is set out later in the schedule. It notes that the total price is £770,465.50.

85. *Letter dated 6 July 2000 from Hyflex to Sapcote.* The letter states,

“Re... Quasar Centre, Walsall, carpark, Ramp & Service Yard Repairs...”

Thank you for your enquiry for roofing works at the above site, following an inspection by our Mr I. Howard we are pleased to provide you with a quotation for the work required...

For the sum of **£770,465.50**

Please note we will only take on the package if all the works are undertaken by ourselves to enable a one-point responsibility for the waterproofing to be maintained for the works.”

(Emphasis added).

86. *Letter dated 6 July 2000 from Hyflex to Chase Norton.* The letter states,

“Re... Quasar Centre, Walsall, carpark, Ramp & Service Yard Repairs...”

Thank you for your enquiry for roofing works at the above site, following an inspection by our Mr I. Howard we are pleased to provide you with a quotation for the work required...

For the sum of **£770,465.50**

Please note we will only take on the package if all the works are undertaken by ourselves to enable a one-point responsibility for the waterproofing to be maintained for the works.”

(Emphasis added).

87. *OFT interview with Mr D of Hyflex dated 28 August 2002.*⁸⁰ In interview, Mr D accepted that he had been involved in cover pricing arrangements on the Quasar project. He stated,

“I was contacted by Rio to ask if we were tendering the job... I explained that we would not be pricing the job as it was much too large. The conversation went on that Rio had done a lot of work to get the liquid specification and that if Hyflex didn't price it the specification might be changed. As liquid is our core business I agreed to submit a cover price.”

(Emphasis added).

88. *Typed undated document entitled, “REPORT INTO ALLEGED TENDERING IRREGULARITIES IN BRIGGS ROOFING AND CLADDING LIMITED.”* The document, which was prepared by [...] [C]⁸¹, notes in relation to the Quasar contract that,

⁸⁰ See note 69 above.

"From my investigation of the file and the papers supplied, it would appear that Rio provided Hyflex with a priced schedule of rates and Hyflex's tender was identical to this schedule.

In interview [Mr D] admitted that Hyflex had taken a cover price on the contract and again that in hindsight, they were wrong to do so. [Mr D] advised that the invitation was received on 30 June 2000, with a return date of 6 July 2000, giving four working days to price a large and complicated tender, which Hyflex were unable to do. Hyflex wished to retain the specification and their name on the list for future more suitable tenders; it therefore obtained pricing information from Rio, in order to submit the bid."

(Emphasis added).

WARWICKSHIRE SCHOOLS CONTRACTS

Introduction

89. The evidence in relation to all the Warwickshire schools contracts comes from interviews of leniency applicants and a number of other documents, copies of which were taken during section 27 and section 28 visits. The section headed 'Facts' below applies to all the Warwickshire school contracts. In relation to the sections below on evidence of agreements or concerted practices and analysis of evidence, the OFT has set out in detail the evidence that is common to all the school contracts at the beginning of the evidence section, once only, rather than repeating that evidence for each school. Where there is additional evidence in relation to individual contracts, this is set out in the paragraphs relating to each specific contract.

Facts

90. This section sets out the facts relating to the agreements or concerted practices on which the OFT relies.

91. The evidence here relates to contracts for 9 schools that were put out to competitive single tender by WCC over the course of 2001.

92. The contracts are detailed in table 5, below.

Table 5. Contract information: Warwickshire schools contracts

Contract	Invite date	Tender Return Date	Undertakings Invited to tender	Value of Bids Received (& Date)	Winner & Value
Abbots Farm School	14.02.01	15.03.01	General Asphalte	25,397 (09.03.01)	Howard Evans 22,884
			Howard Evans	22,844 (27.02.01)	
			Briggs	25,961 (14.03.01)	
			Apex	24,176 (07.03.01)	

⁸¹ [...] [C] Briggs, see Briggs' Directors' report and financial statements for Briggs for the year ended 31 December 2001. It should be noted that this document reports on the results of an internal investigation carried out at Briggs in relation to allegations from a Briggs employee that Briggs had been involved in anti-competitive practices in relation to roofing contracts. This internal investigation predated the OFT investigation.

Ashlawn School	09.02.01	09.03.01	General Asphalte Wedge ⁸² Briggs Apex	100,308 (09.03.01) 106,240 (08.03.01) 101,696 (08.03.01) 102,984 (08.03.01)	General Asphalte 85,072 (revised spec)
Avon Valley School	06.02.01	05.03.01	General Asphalte Howard Evans Briggs Apex	64,931 (01.03.01) 62,498 (02.03.01) 64,326 (03.03.01) 68,128 (02.03.01)	Howard Evans 62,498
Boughton Leigh School	After 25.01.01	30.03.01	General Asphalte Howard Evans Briggs Apex	117,617 (26.03.01) 124,267 (29.03.01) 114,550 (30.03.01) 123,945 (29.03.01)	Briggs 74,704 (revised tender 18.04.01)
Blythe Special School	07.03.01	06.04.01	General Asphalte Briggs Howard Evans JMG	54,580 (05.04.01) 59,120 (03.04.01) 55,879 (03.04.01) 56,623 (03.04.01)	General Asphalte 54,580
Exhall Grange School	24.01.01	21.02.01	General Asphalte Howard Evans Briggs Apex	20,923 (27.02.01) 25,564 (01.02.01) 25,557 (20.02.01) 24,103 (20.02.01)	General Asphalte 20,923
Faraday Hall	19.01.01	29.02.01	General Asphalte Howard Evans Briggs Apex	52,052 (14.02.01) 52,685 (15.02.01) 52,954 (16.02.01) 54,621 (16.02.01)	General Asphalte 52,052
Henry Hinde School (phase 1)	12.04.01	04.05.01, extended to 18.05.01	General Asphalte Briggs Howard Evans Apex	69,955 (04.05.01) 72,226 (03.05.01) 77,920 (02.05.01) 74,465 (03.05.01)	General Asphalte 69,955
Wheelwright Lane School	15.02.01	15.03.01	General Asphalte Howard Evans Briggs JMG	19,461 (09.03.01) 14,748 (26.02.01) 18,050 (14.03.01) 19,421 (09.03.01)	Howard Evans 14,748

93. The OFT considers that the following participants entered into agreements or concerted practices in relation to the tenders submitted in relation to the supply of RMI services to the schools in question.

The parties involved in the Warwickshire schools contracts

Contract	General Asphalte	Howard Evans	Briggs
Abbots Farm	X	X	X
Ashlawn	X		X
Avon Valley	X	X	X
Boughton Leigh	X	X	X
Blythe Special	X	X	X

⁸² Wedge (Wedge Felt Roofing Ltd, Nuneaton) is included in the table simply because it was on the WCC tender return forms from which this table was compiled. It has not been a subject of this investigation and the OFT makes no allegations against it.

Exhall Grange	X		X
Faraday Hall	X	X	X
Henry Hinde	X	X	X
Wheelwright Lane	X	X	X

94. The evidence for the existence of the agreements or concerted practices is described below. The evidence common to the majority of the contracts ('the common evidence') is set out first. The analysis part of this section considers in relation to each contract each item of evidence that pertains to that contract.

Evidence of agreements or concerted practices

Evidence common to all Warwickshire Schools contracts

95. *Typed undated document entitled, "HISTORY OF CARTEL FOR WARWICKSHIRE COUNTY COUNCIL"*. This document contains explanations from Howard Evans about its participation in various contracts and was created in relation to Howard Evans' leniency application. It states,

"From the 1st January 2001 to the end of that year, Howard Evans Roofing Ltd were involved in a cartel for the above client...

The cartel included the following members:

General Asphalte

Briggs..."

96. *Extract from the Mr B list.*⁸³ This extract is relevant to all the Warwickshire schools contracts (except for the Boughton Leigh School contract).

"FEB 2001	WARWICKS CO.CO	EXHALL GRANGE	25557.00	GA
	WARWICKS CO.CO	FARADAY HALL	52954.00	GA
MARCH 2001	WARWICKS CO.CO	AVON VALLEY SCH	64326	H EVANS
	WARWICKS CO.CO	ASHLAWN SCH	101696.00	
	WARWICKS CO.CO	ABBOTS FARM SCH	25962.00	H EVANS
	WARWICKS CO.CO	WHEELRIGHT LA SCH	18050.00	H EVANS
APRIL 2001	WARWICKS CO.CO	BLYTHE SPEC SCH	59120.00	GA
MAY 2001	WARWICKS CO.CO	HENRY HINDE SCH	72227.00	GA"

97. Handwritten arrows on the Mr B list demarcate the school contracts set out above from other contracts on the list. The phrase "via GA" is written next to these arrows.

⁸³ See paragraph 53 above.

98. *Interview with Mr B on 29 August 2002*⁸⁴ (see paragraph 53 above). OFT officials asked Mr B, "Did you keep any records of those contracts that were the subjects of cover prices being taken or given?"

Mr B answered,

"...Those I was involved in I kept a list... It was just a piece of paper..."

Mr B was shown the Mr B list by the OFT official who interviewed him and asked,

"[SHOWN DOCUMENT. A4 SHEET COMMENCING JAN 2001... VALUE 20964:00]

QNB: Is this the list you have been referring to and is this your handwriting?"

Mr B responded,

"...Yes it is. The first column is the date when the tender was submitted. Second column is the client. Third column is the contract title or address. The fourth column is the tender value and the fifth is the company we covered."

The OFT asked "When you say this [fifth] column, what do you mean?" Mr B responds,

"They are the companies who asked us for a cover price"

The OFT asked

"so to clarify, each price on this list was a cover price?"

Mr B responded,

"Yes".

99. *Statement of Mr B dated 11 November 2002*.⁸⁵ Mr B states,

"To clarify information that I provided to the OFT in my interview of 29 August 2002, the document that I have marked on the reverse... comprising two pages, is a copy of the list referred to in the interview. This document was prepared by myself at the request of Mr E through Mr F.⁸⁶ I recall producing the list around late 2001 or early 2002 and it is my understanding that it was a request to produce a list of jobs where Briggs had given covers to other contractors. I **compiled this list from my notes and scraps of paper that I'd kept over the 12 months in 2001**. I destroyed these scraps of paper after I'd produced the list."

Evidence of agreements or concerted practices that relate to specific contracts

Evidence obtained from Howard Evans

100. *Document reference BG26, an undated handwritten note*. This document was found by OFT officials on a section 28 visit to Howard Evans premises on 4 and 5 July 2002. The document records,

⁸⁴ See note 54 above.

⁸⁵ This statement was given voluntarily by Mr B to clarify his interview of 29 August 2002 in relation to the Mr B list.

⁸⁶ A [...] [C] at Briggs.

'Our Quote number	Date	Client	Site...
2836	16/11/00	W/Wshire CC	Ashlawn School
3846	24/9/01	" "	Henry Hinde School
3352	20/04/01	" "	Henry Hinde School

101. *Interview with Mr A on 3 September 2002.*⁸⁷ This document was created in relation to Howard Evans' leniency application. Mr A was asked by the OFT official who interviewed him if Howard Evans was involved in other contracts for WCC where Howard Evans provided a cover price to a competitor. Mr A responded,

"Probably yes. See BG 26. This list represents Warwickshire County Council contracts where I believe we provided assistance to other contractors. All the prices we submitted on BG26 were given to us by another contractor but I cannot remember specifics."

102. Mr A also stated in this interview the approximate time period within which the contact with General Asphalte took place in relation to the agreement on the three contracts for Abbots Farm, Avon Valley and Wheelwright Lane:

"...Tenders had already gone in for Wheelwright Lane and Abbots Farm when General contacted us. The call from General would have been after the 26 February but before 5 March."

103. Mr A was asked by the OFT official who interviewed him in the same interview which factors he took into account when pricing a contract. Mr A answered,

"You have to calculate the material and labour, scaffolding, whether the roof is to be stripped how many skips and many other factors including location and access. **We always do a survey.** Where a quote appears in the register we will have done a survey. This applies even if we do not win a tender. We keep a database, in effect of clients sub contractors electricians, drainage specialists etc so that we can always go back. In most cases of a cover price we would not but on occasions we would have to."

Mr A was also asked,

"If Howard Evans gave a cover price would this be recorded in the quote register?"

Mr A responded,

"No".

104. The OFT went on to ask about contacts with General Asphalte related to Warwickshire School's contracts. Mr A said,

"...Originally there were a lot of tenders out which obviously General were aware who had got what tender. **We agreed to have Avon Valley, pass the others to the remaining contractors...**"

⁸⁷ See note 43 above.

Mr A was further asked,

“So going back to the agreement that you made with General Asphalte that Howard Evans would win Avon Valley and Wheelwright Lane and Abbott's Farm would go elsewhere, to another contractor which you're not aware of.”

Mr A responded,

“Yes”.

105. Mr A stated in the document entitled, 'History of Cartel for Warwickshire County Council' (a different part of which is referred to at paragraph 95 above) that,

“It was agreed verbally with GA that we would have Avon Valley...and we would stand down on the other two. Unfortunately we had already priced these prior to this discussion so we agreed to withdraw our tenders when successful. Upon receipt of the order, Mr J Roper telephoned Tony Mann⁸⁸ to explain we had made an arithmetical error on our calculators and wished to withdraw our tender. Tony Mann was extremely surprised as we had won the tender with ourselves tendering competitively and the remaining companies providing a cartel price.”

106. *Interview with Mr A of Howard Evans on 11 February 2003.*⁸⁹ This document was created in relation to Howard Evans' leniency application. Mr A explained in this interview that, ultimately, Howard Evans was unable to withdraw its tenders for the Wheelwright Lane and Abbots Farm contracts as it had planned to do.

“(NB⁹⁰) Obviously having submitted a price, you said to us that the way the agreement was intended to work was that when Warwickshire contacted you to advise you that the contract had been secured, you would then withdraw your tenders?”

(Mr A) Yes...

(NB) So what happened. You've told us before that when you got the orders through from Warwickshire, I believe it was John Roper that phoned and spoke to Tony Mann at Warwickshire and said that Howard Evans had made an arithmetical error...

(MR A) Yes.

(NB) And wanted to withdraw the tenders. What happened then?

(MR A) Tony Mann wasn't very happy, because of the price difference between us and the other contractors. You normally expect if you're going to withdraw your tender, to have a large price difference on a large contract value. But when it's £250 on a relatively small contract, as the percentages look.

(NB) So what was the upshot of the conversation with Tony Mann?

(MR A) He wasn't very happy that we tried to withdraw a tender that in his mind obviously had been priced properly.

⁸⁸ Tony Mann is an employee of WCC who deals with tender returns.

⁸⁹ Mr A gave this interview voluntarily and it was arranged by Howard Evans as part of its commitment to cooperate with the OFT's investigation. Mr A was represented at this interview by a solicitor from Glaisyers Solicitors. The OFT made it clear to Mr A that he could not be compelled to answer any question and that he was free to leave the interview at any time but that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by, and notes of the interview were prepared by, OFT officials and given to Mr A and his legal adviser to verify that the interview was a true and fair record of the evidence that was given. The record of interview was not disputed.

⁹⁰ NB are the initials of the OFT official who conducted this interview.

(NB) And you obviously you did not go ahead and withdraw your orders?...

(MR A) No. If we'd of done that we'd have fallen out with the client which isn't the idea..."

107. *Letter from Mr A to the OFT, dated 21 February 2003.* This letter notes that, "we are also sure that we did not attend the following sites to measure the roofs

Tender no 3249	Boughton Leigh School
Tender no 3251	Blythe Special Schools
Tender nos 3072 and 4142	Faraday Hall
Tender nos 3352 and 3846	Henry Hinde School."

Evidence obtained from Briggs.

108. *Interview with Mr B on 29 August 2002.*⁹¹ This document was created in relation to Briggs' leniency application. The OFT asked in relation to the pricing of contracts when cover agreements were in place, "Did you use standard mathematical formulae [sic]?" Mr B responded,

"No...Avon Valley, Ashlawn School Abbots Farm, Wheelwright, Blythe Special School, Henry Hinde... possibly were engineered by General Asphalte plus Boughton Leigh School. All were around March 2001. General Asphalte engineered the allocation of these contracts.....I priced Boughton Leighs as I would normally. I think cost plus 25%. This was higher than if it had been priced competitively. I believe I phoned round the others with their price."

109. *Briggs internal Memorandum, sent from [...] [C] to Mr Kippen*⁹², *dated 1 February 2002. Subject 'Competition Law Issues'.* Briggs received a letter from one of its employees alleging anti-competitive activities in relation to a number of Briggs' roofing contracts. The management of Briggs carried out an internal investigation to ascertain the truth of these allegations. This memorandum from Briggs' [...] [C], to Briggs' Company Secretary, Mr Kippen, reports on the results of that internal investigation and lists contracts where the investigation concluded that there had been. The memorandum lists the following WCC school contracts where anti-competitive practices were involved.

- Exhall Grange School
- Faraday Hall
- Avon Valley School
- Ashlawn School
- Abbots Farm School
- Wheelwright Lane School
- Boughton Leigh School.

⁹¹ See note 54 above.

⁹² [...] [C] Briggs, [...] [C] above.

110. *Statement of Mr E⁹³ – a [...] [C] of Briggs - dated 29 August 2002.* This document was created in relation to Briggs' leniency application. He states,

“...I took a phone call from John Cooper [sic] of General Asphalte in relation to Warwickshire CC... I then got another phone call from John Cooper to say there were a number of jobs being retendered from the previous year for Warwickshire CC and that he wanted us to give him covers so that the previous tenders were not made to look silly... My response was that my branch was not providing a free estimating service and he said there were a couple of jobs coming out that were not tendered the previous financial year and Briggs could have one of them. I think that subsequently happened...I think the school was called Broughton and Peter would have said that job they promised has come in. When John Cooper said we could have a job, I agreed that Briggs would submit covers in respect of the others.”

111. *Document found at General Asphalte's premises during an OFT section 28 visit.* This is a list of quotations supplied. The document states,

“Warwick CC - Faraday hall - 52052.00 - covered.”

(Emphasis added).

DUDLEY SCHOOLS CONTRACTS

Hob Green, Wollescote, Christchurch and Church of the Ascension Schools

Facts

112. Dudley Property Consultancy ('DPC') - part of DMBC - sent out invitations to tender for contracts in relation to the above schools on 20 March 2002 to Howard Evans, Apex, General Asphalte, Solihull and Roofing Construction Services, with a return date of 11 April 2002.⁹⁴ However, RCS were unable to provide a quotation due to their existing workload,⁹⁵ which resulted in Monarch being sent an invitation to tender on 25 March 2002.
113. The contract was for re-roofing of flat roofs and associated building works for Hob Green and Wollescote Schools. DPC chose to use Vedag Villas approved contractors because they had been used before and found to be the best and to provide a 20 year guarantee. Consequently, DPC decided to choose five contractors that were approved by Vedag Villas and which were also on DMBC's approved contractor list.

⁹³ See note 42 above. Mr E gave this interview voluntarily and it was arranged by Briggs as part of its commitment to cooperate with the OFT's investigation. Mr E was advised of his right to be represented by a legal adviser but he declined representation, although the interview took place with a solicitor from Hammonds Solicitors (who represent Briggs) present. The OFT made it clear to Mr E that he could not be compelled to answer any question and that he was free to leave the interview at any time but that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by, and notes of the interview were prepared by, OFT officials and given to Mr E to verify that the interview was a true and fair record of the evidence that was given. The record of interview was not disputed.

⁹⁴ Tender selection list dated 20 March 2002.

⁹⁵ Letter from RCS to DPC dated 22 March 2002.

Howard Evans, General Asphalte, Solihull and Apex are all Vedag Villas approved contractors.⁹⁶

114. Every five years DMBC's approved contractors list for tenders is reviewed and firms are asked to apply or reapply for inclusion on the list. However, firms that are not on the list can apply at any time to be on the list and it generally takes four weeks to process an application.⁹⁷ There is no formal criterion for de-selection from the list. If de-selection was desired a report would need to be sent to the appropriate committee. For that to be undertaken there would have to have been a significant breach of the firm's contract. A firm would not be de-selected for not bidding for a tender. DMBC is not obliged to select the lowest priced tender. However, where the lowest priced tender is not recommended, procedures are laid down to require an explanation as to why the lowest tender has not been recommended.
115. In March 2002, DPC were notified that the Education Department had approved a budget of £430,000 for roofing work at Hob Green, Wollescote, Christchurch and Church of the Ascension Schools. The geographical location of these schools meant that DMBC decided that two contracts would be put out to tender, the first covering Hob Green and Wollescote and the second covering Christchurch and the Church of the Ascension. The roofing work in relation to each of the four schools comprised repairs to be conducted on a number of roof areas within each school from which a total price for the roofing work at each school would be calculated.
116. The following tenders were recorded as being received on 11 April 2002.⁹⁸

<u>Company</u>	<u>Hob Green and Wollescote (£)</u>	<u>Christchurch and Church of Ascension (£)</u>
Howard Evans	271,345.00	156,667.00
General Asphalte	276,380.46	161,211.62
Solihull	291,822.00	172,320.00
Apex	283,101.00	166,518.00
Monarch	299,980.00	201,655.00

Both the contract for Hob Green and Wollescote schools and the contract for Christchurch and Church of the Ascension schools were awarded to Howard Evans.

⁹⁶ Statement from Richard Sharman –a quantity surveyor employed by DPC- dated 18 February 2003.

⁹⁷ Statement from Paul Bickerdike – a building surveying manager employed by DPC- dated 7 February 2003.

⁹⁸ DPC's Tender opening report dated 11 April 2002.

Evidence of agreement or concerted practice

117. *Fax from John Roper at Howard Evans to Tony at Solihull Roofing.* This undated fax states the following.

"...YOUR PRICE INCLUDING PROVISIONAL SUMS AND CONTINGENCIES.

CHRISTCHURCH AND CHURCH OF THE ASCENSION SCHOOL

£172,320 + VAT

HOB GREEN AND WOLLESCOTE SCHOOLS

£291,822.00 + VAT..."

118. *Fax from John Roper at Howard Evans to [...] Apex.* This undated fax states the following.

"...YOUR PRICE INCLUDING PROVISIONAL SUMS AND CONTINGENCIES.

CHRISTCHURCH AND CHURCH OF THE ASCENSION SCHOOLS

£166,518 + VAT

HOB GREEN AND WOLLESCOTE SCHOOLS

£283,101.00 + VAT..."

119. *Un-headed piece of paper found at Howard Evans premises.* A handwritten note was found at the premises of Howard Evans during an OFT section 28 visit on 4 and 5 July 2002. This document sets out tender sums for General Asphalte, Apex and Solihull as follows:

Dudley	Hob Green	Christchurch
General Asphalte	276,390.00	161,211.00
Apex	283,101.00	166,518.00
Solihull	291,822.00	172,320.00

Also noted on the paper was, 'Tenders only'.

120. *Breakdown of General Asphalte's bids for the Dudley schools contracts.* OFT officials found individual pieces of paper that contained the breakdowns of General Asphalte's tender prices for each of the four Dudley schools at Howard Evans' premises. The **total** bid figure prepared by Howard Evans to give to General Asphalte to submit for the Christchurch and Church of the Ascension contract was £161,211. General Asphalte submitted a bid for the same contract at DPC's request in the amount of £161,211 – a figure identical to the figure specified by Howard Evans. The **total** bid figure prepared by Howard Evans to give to General Asphalte to submit for the Hob Green and Wollescote contract was £276,380.46. General Asphalte submitted a bid for the same contract at DPC's request in the amount of £276,390 – a figure almost identical to the figure specified by Howard Evans. Although the total figures were, respectively, identical and almost identical, the individual figures within the

breakdowns (i.e. the prices for the roof areas of each of the four individual schools) were not identical.

121. *Interview with Mr A of Howard Evans, dated 11 February 2003.*⁹⁹ When questioned on figures provided to General Asphalte, Mr A stated that the lump sum figures provided to General Asphalte, Solihull and Apex would have been sent to those companies before the tender return date.

122. *Interview with Mr G¹⁰⁰ of Howard Evans, dated 3 September 2002.* Mr G, a surveyor with Howard Evans, was asked a number of questions relating to the Dudley schools contracts and with reference to a document that was found on a section 28 visit to Howard Evans' premises by the OFT official who interviewed him. The OFT official who interviewed Mr G asked him,

"...See document RG3 – P1, which is in your handwriting?"¹⁰¹

Mr G responded,

"The figures in the box and 'tenders only'.

The OFT official then asked Mr G,

"Pages 2 and 3 (faxes to Solihull roofing and Apex)¹⁰² – is this your handwriting and did you send these faxes? If so, when?"

Mr G replied,

"Yes that is mine on both these. To the best of my knowledge I did send them. I cannot remember when I sent them. The four schools, we had done some budget pricing and kept them. I cannot remember if I spoke to General. Mr A was on holiday, I cannot remember. The figures I worked out at slightly over ours for each contractor. I cannot remember if Mr A gave me any instructions. It was all a bit of a rush. I would have sent the fax to Apex and Solihull very soon after producing the prices on the front of RG3. I may have rang to say I was faxing over but I am not sure who I spoke to. I had no further contact with Solihull or Apex. I am not aware of any other fax to General."

123. *Howard Evans' Message Book and document entitled 'Explanation of RG4 – Message Book'.* An entry in Howard Evans' Message Book dated 5 April 2002 records,

" Stan Clarke Solihull Roofing + BLDG

⁹⁹ See note 89 above.

¹⁰⁰ See note 42 above. Mr G gave this interview voluntarily and it was arranged by Howard Evans as part of its commitment to cooperate with the OFT's investigation. Mr G was advised of his right to be represented by a legal adviser but he declined representation, although the interview took place with a solicitor from Glaisyers Solicitors (who represent Howard Evans) present. The OFT made it clear to Mr G that he could not be compelled to answer any question and that he was free to leave the interview at any time but that it was a criminal offence to knowingly or recklessly provide information that is false or misleading in a material particular. The interview was carried out by, and notes of the interview were prepared by, OFT officials and given to Mr G to verify that the interview was a true and fair record of the evidence that was given. The record of interview was not disputed.

¹⁰¹ Document RG3 is a bundle of documents relating to the Dudley schools contracts that the OFT found at Howard Evans' premises.

¹⁰² The faxes are those quoted at paragraphs 117 and 118 above.

Dudley."

Howard Evans explained the meaning of this entry in a document that it gave to the OFT in connection with its leniency application. The explanation stated,

"Stan contacted us to say he could not carry out the works due to its size and complicated nature. We agreed to supply him a price, he informed us that Apex Asphalt had received the tender as well."

124. *Letter from Howard Evans to the OFT dated 28 August 2002.* This letter was created in connection with Howard Evans' leniency application. This letter states in relation to the Dudley schools contracts,

"To our knowledge [...] Apex Asphalt contacted Howard Evans Roofing Ltd office, requesting assistance at a date again we cannot recollect. We were then contacted by Alan Cooper of General Asphalt Company, who explained that due to current work commitments he could not undertake the works."

II. LEGAL AND ECONOMIC ASSESSMENT

A. Structure of this part

125. The background to the contracts and the evidence in relation to them on which the OFT relies have already been set out at paragraphs 31 to 124 above. This part begins by introducing the economic and legal framework against which the OFT has considered the evidence. The part then sets out, in relation to each contract, the OFT's initial analysis of the evidence it relies on, the Parties' representations on that evidence and analysis and finally the OFT's conclusions in relation to the contracts having considered the Parties' representations.

126. It should be noted in relation to the evidence for all the contracts analysed below that, unless specifically stated, documents quoted and analysed in this part of the Decision in relation to the individual contracts were not created in relation to a leniency application.

B. Introduction

127. Section 2(1) of the Act prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK¹⁰³ and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part I of the Act. The prohibition applies in particular to agreements, decisions or concerted practices which directly or indirectly fix selling prices.¹⁰⁴

¹⁰³ Under section 2(3) of the Act, subsection (1) applies if the agreement, decision or concerted practice is, or is intended to be, implemented in the United Kingdom and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

¹⁰⁴ Section 2(2) of the Act.

128. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently (see paragraphs 17 to 20 above). The OFT considers that any tenders submitted as the result of collusive activities which reduce the uncertainty of the outcome of the tender process are likely to have an appreciable effect on competition.¹⁰⁵

C. The relevant market

Introduction

129. The OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement is liable to affect trade in the UK and has as its object or effect the prevention, restriction or distortion of competition.¹⁰⁶ There is no such obligation in this case because it involves a series of agreements or concerted practices each of which had as its object the prevention, restriction or distortion of competition (see paragraphs 366 and 367 below). Nevertheless, market definition is the first Step in the process of assessing penalties.¹⁰⁷

130. Market definition establishes the closest substitutes to the product that is the focus of the investigation. These products are usually the most immediate competitive constraints on the behaviour of the undertaking controlling the product in question.¹⁰⁸

The relevant product market

131. Market definition usually starts with the product that is the subject of the complaint. This is the supply of RMI services for a variety of different types of flat roofs.¹⁰⁹

132. The OFT considers that a buyer requiring RMI services for flat roofs would generally consider flat roofing specialists to be competitors, irrespective of which type of flat roof the contractor specialised in.

133. Flat roofing falls into three broad categories:

- felt (also known as bituminous felt roof coverings);
- single ply membranes; and
- asphalt.¹¹⁰

¹⁰⁵ OFT Guideline 401 'The Chapter I prohibition' (March 1999), paragraph 3.14.

¹⁰⁶ Case T-62/98 *Volkswagen v Commission* [2000] ECR II 2707, 5 CMLR. 853, paragraph 230.

¹⁰⁷ OFT Guideline 423 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty' (March 2000), paragraph 2.3.

¹⁰⁸ OFT Guideline 403 'Market Definition' (March 1999).

¹⁰⁹ Statement by Ivan Jerram dated 30 April 2003, at paragraphs 10 and 11.

¹¹⁰ Liquid applied roofing systems form a further category, consisting of fluid plastic materials that are typically applied by spray or brush to the receiving surface and provide a seamless waterproof covering when they solidify; statement by Ivan Jerram dated 30 April 2003, at paragraph 21.

134. Bituminous flat roof coverings are designed to be fixed on to the surface deckings of flat roofs to protect them from the elements. They are supplied in a wide variety and combinations of materials with effective lives that range from less than 5, to over 20 years. Single ply PVC roofs accomplish the same basic function as felt, but have several advantages such as simple installation, the ability of the covering to move more freely and a low installation cost. Asphalt provides a waterproof but inflexible covering. Mastic asphalt is particularly suitable for roofs that carry pedestrians or cars, such as rooftop car parks.
135. The OFT notes that although different flat roofing materials have different specialist uses, the skills employed, and the services provided by flat roof contractors allow contractors that specialise in fitting different flat roofing materials to compete against one another for flat roof contracting work.¹¹¹
136. In addition to flat roofing specialists, there are also contractors who specialise in RMI services for pitched or metal roofing. However, the supply of RMI services provided by pitched or metal roofing specialists is likely to be qualitatively different to the supply of RMI services by flat roof specialists. This is because of a basic difference in material and technology. Therefore the OFT does not consider that the supply of RMI services for pitched and metal roofs are within the same market.
137. In summary the OFT considers that the relevant product market is the supply of RMI services for flat roofs.

The relevant geographic market

138. When defining the relevant geographic market the OFT uses a similar approach to defining the relevant product market. The complaint relates to a series of agreements centred in specific locations in the West Midlands area. These areas are Coventry, Birmingham, Warwick, Dudley and Hereford.
139. The OFT considers that a customer in the West Midlands area would typically choose from suppliers in the same area.
140. In particular, the OFT notes that many local authorities in the West Midlands operate a common standard for council contracts, organised through the West Midlands Forum. The West Midlands Forum consists of BCC, CCC, Redditch Borough Council, SMBC, Walsall Metropolitan Borough Council and Wolverhampton City Council. Any company that cannot meet the West Midlands Forum Common criteria is not recommended for inclusion on the relevant standing lists.¹¹² These common standards, and the similarity between Council standing lists and tender invitation lists used by private managing agents, is suggestive of a high degree of substitutability between flat roofing contractors in the West Midlands area.¹¹³

¹¹¹ Ibid., at paragraph 12.

¹¹² Statement dated 16 January 2003 relating to the management of lists, provided by Jean Metcalfe, Contractor Assessment Office at CCC.

¹¹³ For convenience, the West Midlands is defined in the same way that the standard Government Office of the West Midlands defines the area: "The counties of Shropshire, Staffordshire, Warwickshire and

141. Evidence from local authority standing lists and other parties indicate that the opportunity for customers to use contractors outside the West Midlands area is limited.
142. Firstly, contractors from outside the region that are not already on the approved contractor lists of West Midlands local authorities may be subject to some measure of delay because of the time needed to check that new contractors satisfy the qualification requirements that these local authorities and private managing agents set.¹¹⁴ Secondly, contractors from outside the region would be further away from the contract site in question and therefore find it harder to absorb transport costs compared to more 'local' contractors. This position has often led to regional market definitions for other types of building products.¹¹⁵ Thirdly, contractors from outside the region may have more difficulty securing local labour resources than firms already established in the region because of the shortage of skilled labour.¹¹⁶
143. Accordingly, the OFT finds that the relevant geographic market is the West Midlands.

The relevant market – conclusion

144. The OFT considers that the relevant market is the supply of RMI services for flat roofs in the West Midlands area.

D. Undertakings

145. The word “undertaking” is not defined in the Act or the EC Treaty. It is a wide term that the European Court of Justice ('the ECJ') has said covers, “any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.”¹¹⁷ The OFT considers that the Parties referred to in paragraphs 2 to 10 above all constitute undertakings for the purpose of the Act.

Worcestershire; the metropolitan districts of Birmingham, Coventry, Dudley, Sandwell, Solihull, Walsall and Wolverhampton; the non-metropolitan districts of Herefordshire, Stoke-on-Trent and Telford and Wrekin.”

¹¹⁴ The statement dated 16 January 2003 provided by Jean Metcalfe, Contractor Assessment Office at CCC, notes that West Midlands local authorities conduct checks on the financial status of new applicants for inclusion on the approved lists. The local authorities also check the new applicants' technical references and ensure that the applicants meet health and safety and equal opportunities requirements.

¹¹⁵ OFT Guideline 403 'Market Definition' (March 1999), at paragraph 4.8.

¹¹⁶ According to the Construction Industry Training Board's (CITB) Skill Survey 2001, 77 per cent of construction companies in the West Midlands said that they had experienced difficulties in recruiting skilled staff in the previous six months and 42 per cent of construction employers said that they had been unable to bid for a contract due to the shortage of skilled staff. The shortage of skilled labour is a problem across the UK as 24 per cent of construction employers nationally said that they had been unable to bid for a contract due to the shortage of skilled staff.

¹¹⁷ Case C –41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979, [1993] 4 CMLR 306, at paragraph 21. Section 60(1) of the Act sets out the principle that, so far as it is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Community law in relation to competition within the Community. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of the Act) with a view to securing that there is no inconsistency with the principles laid down by the EC Treaty and the European Court and any relevant decision of the European Court. Under section 60(3) of the Act, the OFT must, in addition, have regard to any relevant decision or statement of the European Commission.

E. Relevant case law in relation to agreements or concerted practices between undertakings

146. The OFT has found that the Parties have formed a series of agreements or concerted practices each of which had the object of fixing prices. Each of these single agreements or concerted practices has infringed the Chapter I prohibition.

147. The Chapter I prohibition, which came into force on 1 March 2000 and does not have retrospective effect, applies in respect of agreements between undertakings.

148. The Court of First Instance ('CFI') has held that,

“The concept of an agreement within the meaning of Article 85(1) [now Article 81(1)] of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.”¹¹⁸

149. An agreement does not have to be made in writing or involve legal formalities: it is sufficient for the undertakings involved to have expressed their joint intention to behave on the market in a certain way.¹¹⁹ The fact of agreement may be express or implicit in the parties' behaviour.¹²⁰ An agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct.¹²¹

150. The Chapter I prohibition also applies in respect of concerted practices.

151. The ECJ has defined 'concerted practice' as,

“...a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.”¹²²

152. Although the concepts of agreements and concerted practices are recognised as distinct from one another, they may overlap such that it is not necessary, nor may it practically be possible, to define the point at which an agreement ends and a concerted practice begins.¹²³ However, as set out in the European Commission's Decision in *Polypropylene*,¹²⁴ the important distinction is between collusive and non-collusive behaviour:

“The importance of the concept of a concerted practice does not thus result so much from the distinction between it and an 'agreement' as from the distinction

¹¹⁸ Case T-41/96 *Bayer v Commission* ('ADALAT') [2000] ECR II-3383 126 at paragraph 69. It should be noted that the ECJ upheld this judgment: joined Cases C-2/01 P and C-3/01 P *Commission v Bayer AG*, judgment of 6 January 2004.

¹¹⁹ Joined cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission* ('PVC II') [1999] ECR II-931 at paragraph 715.

¹²⁰ Commission decision (IV/32.879) *Viho/Toshiba* OJ 1991 L287/39, [1992] 4 CMLR 180 at paragraph 22.

¹²¹ Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125 at paragraph 81.

¹²² Case 48/69 *ICI Ltd. v European Commission* [1972] ECR 1969 at paragraph 64.

¹²³ Case T-7/89 *Hercules v Commission* [1991] ECR II- 1711 at paragraph 264.

¹²⁴ Commission decision *Polypropylene* OJ [1986] L 230/1, [1988] 4 CMLR 347, paragraph 87. Also *Commission v Anic Partecipazioni* [1999], note 121 above, at paragraph 108. ECR I-4125

between forms of collusion falling under Article 85(1) [now Article 81(1)] and mere parallel behaviour with no element of concertation.”

153. The CFI has stated that the concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market. This requirement of independence does not mean that undertakings may not adapt themselves intelligently to the existing and anticipated conduct of their competitors, but it does strictly preclude any direct or indirect contact between them, the object or effect of which is to influence the conduct of an actual or potential competitor, or to disclose to a competitor the course of conduct which they have decided to adopt or contemplate adopting.¹²⁵
154. The measures identified by the OFT in relation to each individual contract, and dealt with in detail at paragraphs 157 to 358 below, involved co-operation and co-ordination between the undertakings involved in each contract, the object of which was to alter or at the very least influence their conduct.
155. Whilst the concept of a concerted practice implies the existence of reciprocal contacts, the CFI has stated that “that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it”.¹²⁶

F. Analysis of evidence relied on by the OFT

156. This section sets out the OFT's conclusions on the evidence relating to each contract (see paragraphs 31 to 124 above), having considered the views of the undertakings involved in each contract.

BIRMINGHAM CONTRACTS

Small Heath School

Analysis of evidence

157. *Fax dated 3 July 2000 from Howard Evans to General Asphalt* (see paragraph 36 above). The relevant part of this fax header sheet states,

“Re:- SMALL HEATH LOWER SCHOOL

...YOUR PRICE **£48,980.00** + VAT

INCLUDING PROVISIONAL SUMS.

REGARDS
JOHN”

(Emphasis added).

¹²⁵ *Hercules v Commission* at paragraph 258. See note 123 above.

¹²⁶ Cases T-25/95 etc. *Cimentieres CBR v Commission* [2000] ECR II-491 at paragraph 1849.

The OFT considers that there is no legitimate reason for Howard Evans to send General Asphalte, or any other undertaking involved in this contract, a fax with prices relating to this contract. The OFT therefore considers that together the words, "YOUR PRICE £48,980.00 + VAT" – sent by Howard Evans to General Asphalte before General Asphalte sent its tender bid to Bond Foster – establishes that Howard Evans told General Asphalte the price that General Asphalte should bid for the Small Heath contract, rather than General Asphalte determining its own price for the contract.

158. *Fax dated 3 July 2000 from Howard Evans to Brindley* (see paragraph 37 above). The relevant part of the fax header sheet that states,

"MESSAGE Re:- SMALL HEATH LOWER SCHOOL

YOUR PRICE £49,780.00 + VAT
INCLUDING PROVISIONAL SUMS.

REGARDS
JOHN"

(Emphasis added).

The OFT finds that together the words, "YOUR PRICE £49,780.00 + VAT" – sent by Howard Evans to Brindley well before Brindley sent its tender bid to Bond Foster – establishes that Howard Evans told Brindley the price that Brindley should bid for the Small Heath contract, rather than Brindley determining its own price for the contract.

159. *Fax dated 6 July 2000 from Howard Evans to General Asphalte* (see paragraph 38 above). This is a fax header sheet stating,

"...RE:- SMALL HEATH LOWER SCHOOL

BREAKDOWN AS REQUESTED

REGARDS

JOHN"

The fax header sheet states that the document consists of eleven pages including the header sheet and a breakdown, although the breakdown was not found attached to the fax sheet. The OFT finds this fax header sheet establishes that Howard Evans gave General Asphalte a breakdown of the price that General Asphalte should bid for the Small Heath contract, rather than General Asphalte determining its own breakdown and price for the contract.

160. *Undated breakdown of prices with hand-written script on the first page* (see paragraph 39 above). OFT officials found 10 pages of a breakdown. Hand-written script on the first page states,

"GENERAL

£48,980.00"

The figure of £48,980.00 on the first page of the fax is the figure that Howard Evans sent General Asphalte to be its tender price for the Small Heath School contract in the fax considered at paragraph 157 above. Moreover, the tenth and final page of the fax is headed "SMALL HEATH LOWER SCHOOL" and the total figure on the page is £48,980. In the light of these facts, the OFT finds that this document is the breakdown for the Small Heath contract referred to in the fax header sheet considered at paragraph 159. The breakdown gives more detail of the costs that comprise the price for the Small Heath contract referred to in the 3 July 2000 fax from Howard Evans to General Asphalte referred to in paragraph 157 above. The OFT finds that this is further evidence of collusion between Howard Evans and General Asphalte in relation to the figures which General Asphalte would use as its bid for the contracts for Small Heath School.

161. *Fax dated 6 June 2000 from Howard Evans to Brindley* (see paragraph 40 above).

The fax header sheet and the accompanying breakdown give more detail of the costs that comprise the £49,780 + VAT price for the Small Heath contract referred to in the 3 July 2000 fax from Howard Evans to Brindley referred to in paragraph 158 above. In relation to the date written on the fax, 6 June 2000, the author of the fax noted the possibility that this document should be dated **6 July**, rather than 6 June, 2000.¹²⁷

162. *Fax dated 6 July 2000 from General Asphalte to Bond Foster* (see paragraph 41 above). This fax gives a breakdown of the £48,981.25 + VAT tender figure for the Small Heath contract that General Asphalte had already sent to Bond Foster on a tender form dated 5 July 2000. As noted at paragraph 41 above, **the figures** written on the printed sheets that General Asphalte sent to Bond Foster are the same as the ones on the breakdown sent from Howard Evans to General Asphalte except for two figures. Also, the total difference between the price that General Asphalte submitted to Bond Foster and the price that Howard Evans sent to General Asphalte is only £1.25. The OFT finds that the near identical content of the two breakdown documents is further evidence that Howard Evans colluded with General Asphalte to fix the tender price that General Asphalte would submit to Bond Foster for this contract. The OFT also finds that it reinforces the OFT's conclusions, in relation to the fax referred to at paragraph 157 above, that establishes collusion between Howard Evans and General Asphalte.

163. *Fax dated 10 July 2000 from Brindley to Bond Foster* (see paragraph 42 above).¹²⁸

This fax gives a breakdown of the £49,963.00 + VAT tender figure for the Small Heath contract that Brindley had sent to Bond Foster on a tender form dated 4 July

¹²⁷ See paragraph 40 and note 33 above.

¹²⁸ Supplied by Bond Foster in its 17 September 2002 response to the OFT's section 26 Notice dated 13 September 2002. It should be noted that although the breakdown for the tender figure was sent to Bond Foster on 10 July 2000, Bond Foster opened the tender prices only – but not the breakdowns, which were sent at a later date – on 5 July 2000: see note 38 above.

2000.¹²⁹ As noted at paragraph 42 above, **the figures** written on the printed sheets that Brindley sent to Bond Foster are the same as the ones on the breakdown sent from Howard Evans to Brindley except for one figure on the printed page numbered 3/7 in the section headed "Internal works" and one figure on the printed page numbered 3/8 in the section headed "COLLECTION", which simply summarises the cost totals for each of the preceding pages. Also, the overall difference between the tender price on the breakdown that Brindley submitted to Bond Foster and the price that Howard Evans sent to Brindley is £183. Notably, the handwriting on the breakdown sent by cover of the fax referred to at paragraph 161 above and the breakdown sent by fax from Brindley to Bond Foster on 10 July 2000 appears to be the same except for the two figures described above that are different. The breakdown sent from Brindley to Bond Foster appears to be a photocopy of the very breakdown that Howard Evans sent to Brindley save for the two different figures described above that appear to have been amended by hand. The OFT finds that the high degree of similarity between the two breakdown documents, and the fact that one breakdown appears to be a photocopy of the other breakdown with handwritten amendments, is further evidence that Howard Evans colluded with Brindley to fix the tender price that Brindley would submit to Bond Foster for this contract. The OFT also finds that it supports the fax referred to at paragraph 158 which establishes collusion between Howard Evans and Brindley.

164. *Letter dated 11 July 2000 from Bond Foster to Brindley* (see paragraph 43 above). Bond Foster sent a letter to Brindley informing it that it had not been awarded the Small Heath contract. The letter stated,

"The priced schedule of works for each of the tenders received had a remarkably close similarity between the pricing of all items and each of the priced schedules. This was considered most surprising bearing in mind the nature of works and experience of the market place for such projects."

Mr A said in his interview of 3 September 2002 that Brindley sent this letter to Howard Evans out of "commercial interest".¹³⁰

165. With Bond Foster's experience of work with local authority tenders, the OFT would expect Bond Foster to have a good idea of the likely extent of similarity between tender bids for local authority projects. The OFT therefore considers that the fact that Bond Foster thought the tender bids for the Small Heath contract were very similar is consistent with the existence of collusion between Howard Evans and Brindley. The OFT considers the fact that Brindley sent the 11 July 2000 letter to Howard Evans to be consistent with collusion between these parties, notwithstanding Howard Evans' explanation set out at paragraph 43 above that the letter was sent out of "commercial interest".

166. In conclusion, the OFT considers that the evidence set out at paragraphs 157 to 165 above establishes that an agreement or concerted practice to fix prices was in place

¹²⁹ Supplied by Bond Foster in its 17 September 2002 response to the OFT's section 26 Notice dated 13 September 2002.

¹³⁰ See paragraph 43 above.

between, first, Howard Evans and General Asphalte on the one hand and, second, between Howard Evans and Brindley on the other hand, in relation to the tenders submitted by each undertaking for the Small Heath School contract.

The participants' representations

Howard Evans' representations

167. Howard Evans "wholeheartedly" accepts the OFT's conclusion (set out at paragraph 166 above) that there was an agreement or concerted practice to fix prices in relation to the Small Heath School contract.¹³¹

General Asphalte's representations

168. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹³²

Brindley's representations

169. Brindley accepts the OFT's conclusion (set out at paragraph 166 above) that there was an agreement or concerted practice to fix prices in relation to the Small Heath School contract.¹³³

The OFT's conclusions

170. On the basis of the evidence analysed at paragraphs 157 to 165 above and the participants' acceptance of the OFT's conclusions, the OFT considers that an agreement or concerted practice to provide non-competitive prices was in place between, first, Howard Evans and General Asphalte on the one hand and, second, between Howard Evans and Brindley on the other hand, in relation to the tenders submitted by each undertaking for the Small Heath School contract.

Yardley Wood Library

Analysis of evidence

171. *Document entitled, "HISTORY OF CARTEL FOR BIRMINGHAM CITY COUNCIL"* (see paragraph 48 above). This document – created as part of Howard Evans' leniency application - contains explanations from Howard Evans about its participation in various contracts. It states,

"We became involved in the Cartel during the next year of 2001 in which we worked at Yardley Wood Library. The remaining quotations were all quoted properly apart from the following sites..."

172. The OFT considers that this statement establishes that Howard Evans was involved in an agreement or concerted practice that would be found to have infringed the

¹³¹ Paragraph 12 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

¹³² Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹³³ Covering letter sent with Brindley's mitigation as to financial penalty, dated 17 December 2003.

Chapter I prohibition once further details of the agreement or concerted practice and the identities of other participants were established.

173. *Documents BG21 and BG23 and an explanation of the two documents* (see paragraph 49 above). Howard Evans provided a document entitled, 'EXPLANATION OF BG LIST' as part of its leniency application. As set out at paragraph 49 above, this explanatory document states in relation to documents BG21 and BG23 (which were found on a section 28 visit to Howard Evans' premises) respectively, "This is the list of companies and contacts who were spoken to on Yardley Wood Library Project and BG23 listed the prices supplied to each company." Document BG23 is a handwritten document that states the following prices that Howard Evans supplied to other companies for the Yardley Wood contract:

"General £42,632.00
Bilston¹³⁴ £43,894.00
Redbrook £42,768.00
Briggs £44,210.00"

174. Each of the prices has a name next to it and a tick next to the name. The OFT considers that, together, these documents show that Howard Evans decided to give cover prices to General Asphalte, Bilston, Redbrook and Briggs in relation to the Yardley Wood contract. Moreover, and in the light of the participants' representations (see paragraphs 182 to 186 below) the OFT considers that these documents show that the undertakings had colluded with Howard Evans to make bids at Howard Evans' request.

175. *Letter dated 28 August 2002 from Howard Evans to the OFT* (see paragraph 50 above). This document was created in connection with Howard Evans' leniency application. Howard Evans states,

"2. Yardley Wood Library...

b. [Mr A] rang various roofing contractors and asked for assistance on this project. It was a calculated guess who would have been on the tender list.

d. The following people were spoken to:-

i. General Asphalte Co. – Martin Price [sic].

ii. Brindley Asphalt – Malcolm Woffindin.

iii. Redbrook Mastic Asphalt & Felt Roofing – John Powell.

iv. Briggs Roofing & Cladding – [...] [C] [sic]..."

The OFT considers that this extract establishes that Mr A spoke to the list of contacts set out in the document. This supports the finding that the undertakings agreed to submit to the local authority the prices that Howard Evans gave them.

176. *Fax from Howard Evans to John Powell at Redbrook* (see paragraph 51 above). This undated fax states,

¹³⁴ Bilston is Brindley's wholly owned subsidiary. See note 50 above.

"RE: YARDLEY WOOD LIBRARY

YOUR PRICE FOR WORKS AT THE ABOVE INCLUDING CONTINGENCYS
(sic)

£42,768.00 + VAT".

The fax was produced to OFT officials on a section 27 visit to Redbrook's premises.

177. The OFT considers that there is no legitimate reason for Howard Evans to send Redbrook, or any other undertaking involved in this contract, a fax with prices relating to this contract. In light of the other evidence of collusion set out and analysed above, the OFT considers the fact that the fax document was found at the premises of Redbrook provides further evidence, albeit directly in relation to Redbrook only, that Howard Evans sent prices to other parties to submit to BCC.
178. *Comparison between tender prices received by BCC and prices given by Howard Evans to undertakings* (see paragraph 52 above). The table set out at paragraph 52 above compared the actual price submitted by the parties to the prices that Howard Evans told the parties to submit. The table shows that Redbrook and Brindley submitted a price to BCC that was identical to the price Howard Evans asked them to submit. The OFT finds that this shows that Redbrook and Brindley received and used the figures that Howard Evans gave to them. The tender bids that Briggs and General Asphalte submitted were, respectively, 29 pence and £6 more than the prices that Howard Evans asked them to submit to BCC. The OFT finds that the strong similarity between the prices that Briggs and General Asphalte actually submitted to BCC and the figures that Howard Evans states that it asked them to submit to BCC establishes that General Asphalte and Briggs received these figures and used them as a basis to set their tender figures.
179. *Record of Interview with Mr B¹³⁵ dated 29 August 2002 and Mr B list*. As noted at paragraph 53 above, Mr B explains in this interview that where Briggs made cover bids to assist other companies, Briggs would in some cases tender at price they were requested to by the company they were covering while in other cases the other company would give a guide price and leave the actual bid price to Briggs to decide. Mr B's interview refers to the Mr B list and the name of the Yardley Wood Contract is included in the list. The value of the tender recorded in the Mr B list, £44,210.00, is the same as the actual value that was submitted to BCC for the Yardley Wood Contract by Briggs. The OFT considers that Briggs' admission that it gave a cover bid in the Yardley Wood contract and the fact that its tender bid was exactly the same as the price that Howard Evans asked it to submit is further evidence in support of the cartel activities described at paragraphs 171 to 178 above.
180. *Statement of Mr B dated 11 November 2002* (see paragraph 54 above). The statement was created in relation to Briggs' leniency application and the list was created as part of Briggs' internal investigation into tender irregularities. Mr B – who

¹³⁵ See note 54 above.

at the time of the infringement was [...] [C] at Briggs involved in pricing roofing contracts – stated,

“To clarify information that I provided to the OFT in my interview of 29 August 2002, the document that I have marked on the reverse... comprising two pages, is a copy of the list referred to in the interview. The document was prepared by myself at the request of Mr E through Mr F¹³⁶... **I compiled this list from my notes and scraps of paper that I'd kept over the 12 months in 2001.** I destroyed these scraps of paper after I'd produced the list.”

(Emphasis added).

181. The OFT considers that the evidence set out at paragraphs 171 to 180 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between Howard Evans and each of General Asphalte, Brindley, Redbrook and Briggs in relation to the tenders submitted for work at Yardley Wood library.

The participants' representations

Howard Evans' representations

182. Howard Evans states that it “has no adverse representations concerning the OFT's conclusions...” (set out at paragraph 181 above) in relation to the Yardley Wood Library contract.¹³⁷

General Asphalte's representations

183. General Asphalte notes that it “...cannot deny having infringed the rules of the... [Competition Act 1998]...”¹³⁸

Brindley's representations

184. Brindley accepts the OFT's conclusion (set out at paragraph 181 above) that there was an agreement or concerted practice to fix prices in relation to the Yardley Wood Library contract.¹³⁹

Redbrook's representations

185. Redbrook's response to the Rule 14 Notice¹⁴⁰ did not question the OFT's conclusion (set out at paragraph 181 above) that there was an agreement or concerted practice to fix prices in relation to the Yardley Wood Library contract.

¹³⁶ A branch manager at Briggs.

¹³⁷ Paragraph 15 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

¹³⁸ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹³⁹ Covering letter sent with Brindley's mitigation as to financial penalty, dated 17 December 2003.

¹⁴⁰ Letter from Redbrook to the OFT, dated 11 November 2003.

Briggs' representations

186. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 181) above in relation to its participation in an agreement or concerted practice to fix prices in relation to the Yardley wood Library contract.

The OFT's conclusions

187. On the basis of the evidence analysed at paragraphs 171 to 180 above and the participants' acceptance of the OFT's conclusions, the OFT considers that an agreement or concerted practice having the object of providing non-competitive prices was in place between Howard Evans and each of General Asphalte, Brindley, Redbrook and Briggs in relation to the tenders submitted by each undertaking for the Yardley Wood Library contract.

Frankley and Harborne Hill Schools

Analysis of evidence

188. *Fax dated 30 August 2001 from Apex to Briggs* (see paragraph 61 above). This fax header sheet with handwritten script on it notes,

"[...]C]

**THESE ARE YOUR FIGURES INCLUSIVE OF CONTINGENCIES
FOR TWO PROJECTS WITH BIRM C.C.**

FRANKLEY = £193460.40

HARBORNE HILL = £144910.10..."

(Emphasis added).

A section of the fax headed "DATE/TIME" notes,

"30.8.2001
14.30".

The OFT considers that there is no legitimate reason for Apex to send Briggs, or any other undertaking involved in this contract, a fax with prices relating to this contract. The OFT considers that the words, "These are your figures inclusive of contingencies for two projects with Birm C.C." and "FRANKLEY = £193460.40. HARBORNE HILL = £144910.10" show that Apex sent Briggs figures relating to the Frankley and Harborne Hill contracts. In particular, the OFT finds that the words, "These are your figures..." shows that Apex was sending Briggs figures which Briggs should submit as its tenders for the contracts such that Briggs would not win the contracts.

189. *Record of interview with Mr C of Briggs*¹⁴¹ (see paragraphs 62 and 63 above). An extract from this interview with Mr C records that,

"...we were asked to do a cover for a couple of schools that Apex roofing knew about that were coming out to tender... The jobs or the enquiries duly hit my desk and remained there until this fax came through with our prices to put in...

...We were rather shocked at the value.....it's a lot of money and we looked at the specification required for the job and the roof areas involved on a roof plan that had been supplied and I went and saw [...] [C] Mr F¹⁴² and we looked at it carefully together again. We didn't actually sit very comfortable with the figures that we got to submit... because it was too high... and it was duly decided that we were not gonna actually put a tender in so we didn't actually put a tender bid in at all – it was just an absolute no tender as far as we were concerned because we thought they were having a laugh with the figures... we didn't return a price at all."

(Emphasis added).

The OFT finds that these extracts from Mr C's interview, when considered together with the figures that Apex actually faxed to Briggs, demonstrate that Briggs received figures from Apex that Briggs had proposed to submit to BCC in relation to the Frankley and Harborne Hill contracts.

190. *Details of the tenders submitted to BCC* (see paragraph 64 above). These details show that Apex submitted figures to BCC of £187,354.22 and £136,959.37 for Frankley High School and Harborne Hill Secondary School respectively. These figures are approximately £6000 and £8000 less than the figures that Apex asked Briggs to submit to BCC. The OFT considers that the fact the figures Apex asked Briggs to submit were so much higher supports Mr C's interview statement that Briggs did not submit a tender because Briggs thought that the cover bid it was asked to submit was too high.

191. The OFT considers that the evidence set out at paragraphs 188 to 190 demonstrates that a concerted practice to provide non-competitive prices such that Briggs would not win the contracts was in place between Apex and Briggs in relation to the tenders submitted for work in relation firstly to Frankley School and secondly in relation to Harborne Hill School. The fact that Briggs did not put in a tender for the Frankley and Harborne Hill School contracts because it thought that the prices Apex gave it were too high¹⁴³ does not change the fact of the existence of the concerted practice that the OFT has found, the object of which was that Briggs would put in a bid but not win the contracts. Case law of the European Court confirms that where an agreement (and by analogy a concerted practice) has the object of restricting competition– as it does in this case (see paragraph 367 below) - an agreement (or concerted practice) does not have to be put into effect to infringe the Act.¹⁴⁴ In any event, the fact that Apex sent Briggs details of a cover price, and the evidence that Briggs did not submit any tender at all only because it considered that the cover price

¹⁴¹ See note 61 above.

¹⁴² Mr F is [...] [C] at Briggs.

¹⁴³ See paragraph 189 above.

¹⁴⁴ See for example Case C-277/87 *Sandoz v Commission* and Case 19/77 *Miller v Commission*, paragraphs 7 to 10.

was too high, shows that Apex and Briggs have knowingly substituted practical co-operation between them for the risks of competition.¹⁴⁵

The participants' representations

Briggs representations

192. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 191 above) in relation to its participation in an agreement or concerted practice to fix prices in relation to the Frankley and Harborne Hill Schools contracts.

Apex's representations

193. Apex's written representations¹⁴⁶ argued that the facts analysed at paragraphs 188 to 190 above did not prove that the infringement of the Chapter I prohibition described at paragraph 191 above took place. Apex stated,

“(a) Although it is accepted that Apex provided the figures set out in the Fax to Briggs, the OFT have failed to show that Apex provided those figures pursuant to an unlawful agreement. If the figures were provided at the request of Briggs that would clearly show that there was no bid-rigging arrangement as alleged since there is nothing unlawful about a person requesting figures from another in the circumstances. Any ambiguity in the evidence (or the inferences drawn from it) must be resolved in Apex's favour. In fact, the figures were produced at the request of Briggs.

(b) Without prejudice to (a), even if the OFT is, on the face of evidence, entitled to infer from the evidence that the figures set out in the Fax were provided to Briggs at the instigation of Apex, there was no agreement – no meeting of minds – between Apex and Briggs that Briggs would bid at prices specified by Apex.”

194. Apex's oral representations developed both these points. With regard to the first point, Apex argues that the existence of an infringement in this contract depends on whether the fax containing tender figures was sent at the instigation of Apex or at the request of Briggs. Apex argues in some detail that the fax containing the tender figures was more likely to have been sent at Briggs' request than Apex's instigation. This is contrary to Briggs' evidence that Apex asked Briggs if it would put in a cover price (see paragraph 189 above). In that context Apex argues firstly that Briggs did not want to fail to make a bid because that might make BCC less likely to invite Briggs to tender for future work. Secondly, Apex argues that Briggs' evidence that it was Apex who asked Briggs to put forward the tender figures should not be relied upon because (a) the Briggs employee that Apex speculates gave that evidence may have had his view of events coloured by previous dealings with Apex and (b) Briggs' statement that the prices Apex gave to it were too high is not credible because the prices that Apex gave to Briggs were in fact lower than all of the other tender bids submitted to BCC, save Apex's own tender bid.

¹⁴⁵ This definition of concerted practice is taken from the ECJ's definition of concerted practice in *ICI Ltd. v European Commission*. See paragraph 151 and note 122 above.

¹⁴⁶ Apex's written response to the Rule 14 Notice, dated 17 November 2003.

195. With regard to Apex's second point, that there was no 'meeting of minds' between Apex and Briggs that Briggs should submit the figures that Apex sent it, Apex argues that the application of the CFI's judgment in *Bayer v. Commission*¹⁴⁷ means that there was no 'morally binding commitment' or 'concurrence of wills' between Apex and Briggs that constituted an agreement or concerted practice. Apex further submits that the cases of *Sandoz* and *Miller* - referred to by the OFT in paragraph 191 and footnote 143 above - are not apposite in this case because there was no agreement or concerted practice in relation to the Frankley and Harborne Hill contracts whereas there were agreements in the *Sandoz* and *Miller* cases.¹⁴⁸

The OFT's conclusions

196. The OFT's conclusions in respect of each of Apex's key points are considered in turn below.

No infringement if Briggs asked Apex for figures

197. Apex argues that if it was Briggs that asked Apex for figures there was no infringement of the Act. Apex goes on to argue in some detail that it was Briggs that instigated the cover pricing arrangements and not Apex. Apex argues that Mr C's statement that Apex asked Briggs to submit a cover price is not reliable for two reasons. Firstly, Apex argues that there is the possibility that Mr C is biased because of alleged previous dealings with Apex. Secondly, Apex argues that it cannot be said that the prices that Apex gave to Briggs were higher than all the figures submitted by the other tenderers, save for Apex's own figure.

198. The OFT considers that it is immaterial to the existence of an agreement or concerted practice at which party's instigation one party sent the figures to the other. The OFT considers that there is a concerted practice between two undertakings where one undertaking has given another undertaking figures and there exists between those undertakings knowing substitution of practical co-operation between them for the risks of competition in relation to the intended use of the figures that one undertaking gave the other. By analogy, the OFT considers that there is an agreement between two undertakings where one undertaking has give another undertaking figures and there exists between those undertakings an understanding in relation to the intended use of the figures that one undertaking gave the other. Thus, the OFT considers that it is immaterial to the finding of a concerted practice in this instance whether Apex or Briggs instigated the sending of the figures. The OFT considers that there was a concerted practice between Apex and Briggs because, in relation to the intended use of the figures that Apex gave to Briggs, they knowingly substituted practical co-operation between them for the risks of competition. The intended outcome of the

¹⁴⁷ *Bayer v Commission* [2000] ECR II – 3383.

¹⁴⁸ Apex's arguments summarised from paragraphs 5.2 to 5.38 of its written response to the Rule 14 Notice, dated 17 November 2003. Apex's arguments on these two points were also made in its oral representations to the OFT on 19 December 2003: page 3, line 28 to page 9, line 7 of the transcript of these oral representations.

concerted practice was that Briggs would not win the contracts. Apex notes in its written representations,¹⁴⁹

“Apex does not deny that the prices it supplied to Briggs were higher than its own tendered prices. However, where an undertaking is seeking to put in a 'realistic' bid but not wanting to win the particular job it is inevitable that the price provided to it will be higher than the serious bidder's own tendered prices.”

The OFT considers that this extract demonstrates that the necessary knowing substitution is present in relation to the Frankley and Harborne Hill contracts because Apex gave Briggs figures expecting that Briggs would submit the prices that Apex gave to it. Moreover, as the OFT has noted above, any tenders submitted as a result of collusive activities that reduce the uncertainty of the outcome of the tender process and which mean that each economic operator has not determined its market policy independently will adversely affect the competitiveness of the tender process.¹⁵⁰

No agreement or concerted practice

199. Apex's second point argues that there was no concurrence of wills between Apex and Briggs, therefore there could be no agreement or concerted practice. Apex referred to the CFI judgment in the case of *Bayer v. Commission*¹⁵¹ in this context. The OFT considers that, despite Apex's explanation of the facts with respect to who requested the figures from whom, there is clear evidence of contact between Apex and Briggs (for example Apex's fax to Briggs, set out at paragraphs 61 and 188 above) that had the effect of influencing Briggs' conduct on the market. There was therefore a knowing substitution of practical co-operation between them for the risks of competition which constitutes a concerted practice within the meaning of the Act. The OFT does not find it necessary to determine whether there was an agreement between Apex and Briggs because it considers that there is strong evidence of at least a knowing substitution of practical co-operation between Apex and Briggs and this demonstrates a concerted practice between these participants.
200. In all the circumstances, therefore, the OFT concludes that there was a concerted practice between Apex and Briggs having the object of providing non-competitive prices in relation to the tenders submitted for work in relation to, first, Frankley School and, second, in relation to Harborne Hill School such that Briggs would put in a bid but not win the contracts. The OFT considers that the collusion relating to the contract for Frankley High School and the collusion relating to the contract for Harborne Hill School constitute a single infringement because the participants made a single collusive arrangement for both schools.

¹⁴⁹ Apex's written response to the Rule 14 Notice, dated 17 November 2003, at paragraph 5.11.

¹⁵⁰ See, respectively, paragraphs 128 and 153 above.

¹⁵¹ See note 147 above.

PRIVATE CONTRACTS

Pallasades

Analysis of evidence

201. *Interview record with Mr D of Briggs*¹⁵² *dated 28 August 2002*¹⁵³ (see paragraph 69 above). This document was created in relation to Briggs' leniency application. Mr D – [...] [C] of Briggs with responsibility for the Hyflex trading style - was asked by the OFT official who interviewed him whether he had been involved in cover pricing (the question in italics in the extract below). The interview record of Mr D states,

"9. Have your (sic) personally been involved in cover pricing arrangements at Hyflex?..."

Both **Pallasades** and Quasar projects. **Rio had asked for a cover price."**

The OFT considers that Mr D's admission establishes that Hyflex was involved in cover price arrangements in relation to the Pallasades project and indicates that Rio was another party to the arrangements.

202. Later in the same interview Mr D continues,

"PALLASADES SHOPPING CENTRE

...we were given just 4 days to price it. **I recall I received a call on my mobile from a Mr Tierney or Mr Raseby [sic]. The call was to provide a price cover if the tender was received... I told Rio we did not have the time and it was not practical so to keep the specification. I agreed that if they provide a detailed breakdown of the work to be priced with prices, Hyflex would submit a bid.** There was no other contact with Rio on my side. I assume there was a fax under my instructions [...] [C] would have submitted the price."

(Emphasis added).

The OFT considers that the words, "I agreed that if they provide a detailed breakdown of the work to be priced with prices, Hyflex would submit a bid" show that Rio and Hyflex agreed that Hyflex would submit a bid for the Pallasades contract at prices specified by Rio. The OFT considers that the reference in Mr D's statement to Mr Tierney is a reference to the Mr Tierney who is recorded as the sender of the fax referred to at paragraph 208 below on the header sheet for that fax. The OFT also considers that the reference to Mr Raseby is a reference to Mr Raithby who is a director of Rio.¹⁵⁴

203. *'Daily sales activity report' of [...] [C] of Hyflex, for 'w/c 10 July'* (see paragraph 70 above). An entry for 12 July records,

"PALLASADES... NO SURVEY/REPORT TO FOLLOW (COVER)".

¹⁵² As set out in Hyflex Roofing's business letterhead, Hyflex is a trading style of Briggs. See note 64 above. References to Hyflex in relation to this contract should be taken to refer to Briggs.

¹⁵³ See note 69 above.

¹⁵⁴ Rio's abbreviated financial accounts for the year ending 31 May 2000 show that Mr Tierney and Mr Raithby are both directors of Rio.

This entry in the daily sales activity report appears to relate to the Pallasades contract. In light of the evidence of cover pricing that has already been discussed above, the OFT considers that the words “no survey” and the placement of the word “cover” in brackets indicate that the Pallasades contract was one in which no survey was to be carried out because cover pricing arrangements were involved.

204. *Fax dated 19 July 2000 from Rio to Hyflex* (see paragraph 71 above). The fax header sheet states that the fax consisted of 16 pages.

“[...] [C] [sic] RATES AS REQUESTED.

REGARDS JIM”

The OFT considers that there is no legitimate reason for Rio to send Hyflex, or any other undertaking involved in this contract, a fax with prices relating to this contract. In the light of the evidence of an agreement or concerted practice between Hyflex and Rio to collude in the price of the bid which Hyflex submitted for the Pallasades contract, the OFT considers that these words, coming two days before the tender return date, show that Rio provided Hyflex with the rates that Hyflex should submit in its tender bid.

205. The fax gives a breakdown for a contract. The second page of the fax begins, “This project encompasses the complete phased overlay renewal of all roofs to the Pallasades Shopping Centre.” and the bottom of page 12 of the fax states,

“TOTAL FIXED PRICE

CARRIED TO FORM OF TENDER £ 770,024-00”

The OFT considers that these extracts from the same fax show that Rio was informing Hyflex that it should submit a bid of £770,024.00 for the Pallasades contract.

206. *Document for Hyflex entitled “Tender Enquiry” and dated 19 July 2000* (see paragraph 72 above). This is the document that Hyflex submitted for the Pallasades contract. This document records the total fixed price tendered by Hyflex for the Pallasades roofing contract as £770,024. The Tender Opening document and Tender Report for the Pallasades contract referred to, respectively, at paragraphs 77 and 78 above confirm that Hyflex did in fact submit a bid of £770,024 in accordance with Rio's fax. The OFT considers that this is further evidence of the collusion between Rio and Hyflex described at paragraphs 201 to 205 above.

207. *Fax dated 19 July 2000 from Rio to Hyflex* (see paragraph 73 above). This fax, found at Rio's premises, is identical to the fax discussed at paragraphs 204 and 205 above that Briggs (Hyflex's parent company) provided to the OFT. The OFT finds that this fax is Rio's copy of the fax that it sent to Hyflex and that it supports the OFT's finding of collusion between Rio and Hyflex set out at paragraphs 201 to 206 above.

208. *Fax dated 19 July 2000 from Rio to Price* (see paragraph 74 above). The fax header sheet notes that the fax was sent at 13:13 on 19 July 2000 (before the tender return

date for the Pallasades contract), that it consisted of fifteen pages and that it was sent by Jim Tierney. The fax header also notes,

"JOHN RATES AS REQUESTED

REGARDS

JIM".

209. The pages accompanying this fax header sheet give a breakdown for a contract. The second page of the fax begins, "This project encompasses the complete phased overlay renewal of all roofs to the Pallasades Shopping Centre." and a page of the fax headed, "ROOF RECOVERING PLAN FOR THE PALLASADES SHOPPING CENTRE... MAIN SUMMARY" notes at the bottom,

"TOTAL FIXED PRICE

CARRIED TO FORM OF TENDER £ 767,411-00"

The OFT considers that these extracts from the same fax show that Rio was informing Price that it should submit a bid of £767,411 for the Pallasades contract.

210. *Document for Price entitled "Tender Enquiry" and dated 19 July 2000* (see paragraph 76 above). This is the first page of the tender document that Price returned for the Pallasades contract. This document records the total fixed price tendered by Price for the Pallasades roofing contract as £767,411. The Tender Opening document and Tender Report for the Pallasades contract referred to at paragraphs 77 and 78 above confirm that Price did in fact submit a bid of £767,411 in accordance with Rio's fax. The OFT considers that this is further evidence of the collusion between Rio and Price described at paragraph 209 above.

211. The OFT considers that the evidence set out at paragraphs 201 to 210 above demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, Rio and Hyflex on the one hand and, second, between Rio and Price on the other hand, in relation to the tenders submitted for work in relation to the Pallasades contract.

The participants' representations

Rio's representations

212. Rio states in relation to providing Hyflex and Price with figures for the Pallasades contract,

"Rio accepts that it has infringed the Chapter I Prohibition in respect of the tender for the work proposed to be carried out at the Pallasades Shopping Centre... Hyflex were unable to compile a tender for the work within the tender period... Frank Lynch of Hyflex Roofing therefore, asked Rio to submit 'a detailed breakdown of the work to be priced with the prices, [then] Hyflex would submit a bid.' (OFT Notice; pg 36, 139)..."

...Mr J Price of Price Roofing telephoned Rio and asked Rio for a price for the roofing work at the Pallasades... Mr J Price asked if Rio were pricing for the works at the Pallasades and, if so, asked if Rio could supply a Price to his company for those works which they could then submit."¹⁵⁵

Price's representations

213. Price's response to the Rule 14 Notice¹⁵⁶ did not question the OFT's conclusion that there was an agreement or concerted practice to fix prices in relation to the Pallasades contract. Price stated that,

"Having visited the site and studied the tender document... we felt that the contract would be too large for us to handle...

Rio Asphalt Co Limited is a company we had known in the past... they agreed to give us a high guide figure which would be acceptable. This they did with possibly more detail than required, however, from this we were able to solve our dilemma on the tender price."

Briggs' representations

214. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 211 above) in relation to its participation in an agreement or concerted practice to fix prices in relation to the Pallasades contract.

The OFT's conclusions

215. As noted at paragraph 212 above, Rio accepted that it infringed the Act in relation to the Pallasades contract by giving both Price and Hyflex figures in relation to that contract. Notwithstanding this admission, Rio noted that it was approached by Price and Hyflex to give them cover prices. As explained at paragraph 198 above (in relation to the Frankley and Harborne Hill contracts), the OFT considers that it is immaterial to the existence of an agreement or concerted practice at which party's instigation one party sent the figures to the other. The OFT considers that there is an agreement or concerted practice between two undertakings where one undertaking has given another undertaking figures and there exists between those undertakings an understanding (in the case of an agreement) or a knowing substitution of practical co-operation between them for the risks of competition (in the case of a concerted practice) in relation to the intended use of the figures that one undertaking gave the other.

216. The OFT considers that the extract from Rio's representations set out at paragraph 212 above demonstrates that Rio gave Price and Hyflex figures on the understanding that Price and Hyflex would submit the prices that Rio gave to them or at the least that, in giving the figures, there was a knowing substitution of practical cooperation for the risks of competition. On the basis of the evidence analysed at paragraphs 201 to 210 above and the participants' admissions regarding their roles in the

¹⁵⁵ Rio's written submissions relating to the Rule 14 Notice, dated 13 November 2003, at paragraphs 4.1, 4.3 and 4.5.

¹⁵⁶ Letter from Price to the OFT, dated 9 September 2003.

arrangements for the Pallasades contract, an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, Rio and Hyflex on the one hand and, second, between Rio and Price on the other hand, for the Pallasades contract.

Quasar

Analysis of evidence

217. *Fax dated 6 July 2000 from Rio to Hyflex*¹⁵⁷ (see paragraph 84 above). Briggs provided this document to the OFT as part of its leniency application. The latter part of the fax header sheet notes,

"QUAZER CENTRE [sic]

Please find enclosed schedule of works **to copy**.

Main Contractor to provide :- site huts etc.

Hyflex will only take on the package if all the works are undertaken by themselves to enable a one point responsibility for the waterproofing to be maintained for the works..."

(Emphasis added).

This fax was sent from Rio to Hyflex in relation to the Quasar contract. The OFT considers that there is no legitimate reason for Rio to send Hyflex, or any other undertaking involved in this contract, a fax with prices relating to this contract. The OFT considers that the words, "Please find enclosed schedule of works to copy" establish, further, that the intention was for Hyflex to copy and use the figures they had been sent by Rio. The OFT considers that this is confirmed by the other evidence set out below. It should also be noted that the first page of the schedule of works accompanying the fax cover sheet gives a summary of the prices for the detailed work that is set out later in the schedule. It sets out a total price of £770,465.50.

218. *Letter dated 6 July 2000 from Hyflex to Sapcote*¹⁵⁸ (see paragraph 85 above). The letter states,

"Re... Quasar Centre, Walsall, carpark, Ramp & Service Yard Repairs..."

Thank you for your enquiry for roofing works at the above site, following an inspection by our Mr I. Howard we are pleased to provide you with a quotation for the work required...

For the sum of £770,465.50

Please note we will only take on the package if all the works are undertaken by ourselves to enable a one-point responsibility for the waterproofing to be maintained for the works."

(Emphasis added).

¹⁵⁷ As set out in Hyflex Roofing's business letterhead, Hyflex is a trading style of Briggs. See note 64 above. References to Hyflex in relation to this contract should be taken to refer to Briggs.

¹⁵⁸ Sapcote was one of the main contractors in this contract that asked Hyflex to provide a quotation for sub-contract work. See paragraphs 79 to 83 above.

The words highlighted in bold above are almost identical to the words that Rio set out in the fax it sent to Hyflex, set out and highlighted at paragraph 217 above. The OFT considers that the almost identical wording in the two documents in relation to 'one point responsibility' indicates that Hyflex saw and used the fax that Rio sent it in preparing its response to Sapcote and is therefore further proof of collusion between Rio and Hyflex in relation to the Quasar contract.

219. Moreover, Hyflex's letter to Sapcote quotes a tender price of £770,465.50, the same figure that Rio put in its fax to Hyflex as the total price.

220. *Letter dated 6 July 2000 from Hyflex to Chase Norton*¹⁵⁹ (see paragraph 86 above). This letter contains exactly the same words as the letter Hyflex sent to Sapcote, referred to at paragraph 218 above. The letter also contains the same tender price that Rio sent to Hyflex. The OFT finds that this is also further evidence of collusion between Rio and Hyflex.

221. *OFT interview with Mr D of Hyflex dated 28 August 2002*¹⁶⁰ (see paragraph 87 above). In interview, Mr D accepted that he had been involved in cover pricing arrangements on the Quasar project. He stated,

"I was contacted by Rio to ask if we were tendering the job... I explained that we would not be pricing the job as it was much too large. The conversation went on that Rio had done a lot of work to get the liquid specification and that if Hyflex didn't price it the specification might be changed. As liquid is our core business I **agreed to submit a cover price.**"

(Emphasis added).

222. *Typed undated document entitled, "REPORT INTO ALLEGED TENDERING IRREGULARITIES IN BRIGGS ROOFING AND CLADDING LIMITED"* (see paragraph 88 above). The document, which was prepared by [...] [C]¹⁶¹, notes in relation to the Quasar contract that,

"From my investigation of the file and the papers supplied, it would appear that Rio provided Hyflex with a priced schedule of rates and Hyflex's tender was identical to this schedule.

In interview¹⁶² Mr D **admitted that Hyflex had taken a cover price on the contract** and again that in hindsight, they were wrong to do so. Mr D advised that the invitation was received on 30 June 2000, with a return date of 6 July 2000, giving four working days to price a large and complicated tender, which Hyflex were unable to do. Hyflex wished to retain the specification and their name on the list for future more suitable tenders; **it therefore obtained pricing information from Rio, in order to submit the bid.**"

(emphasis added).

¹⁵⁹ Chase Norton was one of the main contractors in this contract that asked Hyflex to provide a quotation for sub-contract work. See paragraphs 79 to 83 above.

¹⁶⁰ See note 69 above.

¹⁶¹ [...] [C]. See note 81 above.

¹⁶² It should be noted that 'interview' here refers to an interview between Briggs and its employee Mr D, not an OFT interview with Mr D.

223. The OFT considers that these unequivocal statements by persons involved in making bids for the Quasar contract constitute more and separate evidence that Rio and Hyflex colluded on the amount that Hyflex should bid for the Quasar contract.

224. The OFT considers that the evidence set out at paragraphs 217 to 222 above demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between Hyflex and Rio in relation to the tenders submitted for work on the Quasar contract.

The participants' representations

Rio's representations

225. Rio accepts that it gave Hyflex a cover price to submit. However, Rio states that in its recollection it was Hyflex that asked it for a cover price, rather than it asking Hyflex to submit a price provided by Rio.¹⁶³

Briggs' representations

226. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 224 above) in relation to its participation in an agreement or concerted practice to fix prices in relation to the Quasar contract.

The OFT's conclusions

227. The OFT considers that the reasoning set out at paragraphs 198 above (in relation to the frankly and Harborne Hill contracts) applies equally here to show that it is not necessary for the OFT to determine whether Rio gave Hyflex figures at Hyflex's request or at Rio's own instigation in order to find that an agreement or concerted practice exists. On the basis of the evidence analysed at paragraphs 217 to 222 above and the participants' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between Rio and Hyflex in relation to the tenders that they submitted for work on the Quasar contract.

WARWICKSHIRE SCHOOLS CONTRACTS

Analysis of evidence common to all Warwickshire Schools contracts

228. *Typed undated document entitled, "HISTORY OF CARTEL FOR WARWICKSHIRE COUNTY COUNCIL"* (see paragraph 95 above). This document contains explanations from Howard Evans about its participation in various contracts. It states,

"From the 1st January 2001 to the end of that year, Howard Evans Roofing Ltd were involved in a cartel for the above client...

The cartel included the following members:

General Asphalte

¹⁶³ Rio's written submissions relating to the Rule 14 Notice, dated 13 November 2003, at paragraph 5.2.

Briggs...”

This extract does not refer to any specific contracts and that as such is not capable, on its own, of demonstrating collusion in relation to specific contracts. However, the OFT considers that this document supports other evidence of the involvement of General Asphalte with Briggs or Howard Evans in specific Warwickshire school contracts.

229. *Extract from the Mr B list* (see paragraph 96 above). This list sets out the following information.

FEB 2001	WARWICKS CO.CO	EXHALL GRANGE	25557.00	GA
	WARWICKS CO.CO	FARADAY HALL	52954.00	GA
MARCH 2001	WARWICKS CO.CO	AVON VALLEY SCH	64326	H EVANS
	WARWICKS CO.CO	ASHLAWN SCH	101696.00	
	WARWICKS CO.CO	ABBOTS FARM SCH	25962.00	H EVANS
	WARWICKS CO.CO	WHEELRIGHT LA SCH	18050.00	H EVANS
APRIL 2001	WARWICKS CO.CO	BLYTHE SPEC SCH	59120.00	GA
MAY 2001	WARWICKS CO.CO	HENRY HINDE SCH	72227.00	GA”

230. *Interview with Mr B dated 29 August 2002*¹⁶⁴ (see paragraph 98 above). Mr B was shown the Mr B list by the OFT official who interviewed him and asked,

“[SHOWN DOCUMENT. A4 SHEET COMMENCING JAN 2001... VALUE 20964:00]

QNB: Is this the list you have been referring to and is this your handwriting?”

Mr B responded,

“...Yes it is. The first column is the date when the tender was submitted. Second column is the client. Third column is the contract title or address. The fourth column is the tender value and the fifth is the company we covered.”

The OFT asked “When you say this [fifth] column, what do you mean?” Mr B responds,

“They are the companies who asked us for a cover price”

The OFT then asked “so to clarify, each price on this list was a cover price?” Mr B responds,

“Yes.”¹⁶⁵

231. *Statement of Mr B dated 11 November 2002* (see paragraph 99 above). Mr B states,

“To clarify information that I provided to the OFT in my interview of 29 August 2002, the document...comprising two pages, is a copy of the list referred to in the interview. The

¹⁶⁴ See note 54 above.

¹⁶⁵ Question ten and its answer on page three of the interview transcript and follow up answers to question ten on page 4 of the interview transcript

document was prepared at the request of Mr E through Mr F.¹⁶⁶ I recall producing the list around late 2001 or early 2002, and it is my understanding that it was a request to produce a list of jobs where Briggs had given covers to other contractors.”

232. The OFT considers that the Mr B list, on the one hand, and the extracts from the interview and statement, set out, respectively, at paragraphs 230 and 231 above, on the other hand, show (a) that the Mr B list is a list of specific Warwickshire school contracts where Briggs was involved in cover pricing arrangements with at least one other undertaking and (b) that the columns in the Mr B list contain the information that Mr B explains they have in the extract from his statement set out at paragraph 230 above.

Analysis relating to specific Warwickshire Schools contracts

Abbots Farm School

Analysis of evidence

233. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* Abbots Farm School is mentioned on the Mr B list and in Mr B's interview of 29 August 2002. As explained at paragraph 232 above, the OFT considers that these three documents together list specific named contracts where Briggs was involved in cover pricing arrangements with at least one other undertaking. The contract for Abbots Farm School is on the list and so the OFT considers that it was a contract that involved cover pricing arrangements between Briggs and at least one other undertaking.

234. *Interview with Mr B dated 29 August 2002*¹⁶⁷ (see paragraph 108 above). Mr B states in this interview that,

“Avon Valley, Ashlawn School, **Abbots Farm**, Wheelwright, Blythe Special School, Henry Hinde... possibly were engineered by General Asphalt [sic] plus Boughton Leigh School... General Asphalt [sic] engineered the allocation of these contracts.”

The OFT considers that this statement indicates that – in relation to all the schools mentioned in the sentence above, including Abbots Farm – General Asphalt orchestrated cover pricing agreements with Briggs.

235. *The Mr B list.* As stated at paragraph 97 above, handwritten arrows on the Mr B list demarcate the school contracts set out at paragraph 96 above from other contracts on the list. The phrase “via GA” is written next to these arrows. In light of the fact that the Mr B list tabulates contracts involving cover pricing arrangements – and Mr B's explanation at paragraph 234 above that General Asphalt engineered the allocation of these contracts – the OFT considers that the words “via GA” on the Mr B list refer to the fact that General Asphalt orchestrated the cover pricing arrangements for this contract.

236. *Price submitted by Briggs.* Further, the price of £25,962.00 recorded on the Mr B list corresponds exactly to the bid that Briggs submitted, as shown on the tender

¹⁶⁶ A [...] [C] at Briggs.

¹⁶⁷ See note 54 above.

received document. The OFT considers that this is evidence that Briggs submitted a cover bid.

237. *History of Cartel for Warwickshire County Council*. As noted at paragraph 228 above, this document contains explanations from Howard Evans about its involvement in various contracts. In relation to the contracts for Abbots Farm, Wheelwright Lane and Avon Valley, Mr A states,

“...it was agreed verbally with GA that we would have Avon Valley...and we would stand down on the other two...”

However, Mr A also explained in his 11 February 2003 interview (see paragraph 106 above) that Howard Evans did not in the end withdraw from the Abbots Farm and Wheelwright Lane contracts.

“(NB) And you obviously you did not go ahead and withdraw your orders?...”

(MR A) No. If we'd of done that we'd have fallen out with the client which isn't the idea...”

238. The OFT considers that these two statements indicate that – in relation to the Avon Valley, Abbots Farm and Wheelwright Lane contracts - Howard Evans and General Asphalte colluded in respect of these contracts rather than let the competitive tender process decide who won contracts. While it appears from this statement that Howard Evans did not withdraw its tenders from contention for the Abbots Farm and Wheelwright Lane contracts, it is sufficient for the finding of an infringement that the undertakings knowingly substituted practical co-operation between them for the risks of competition.¹⁶⁸

239. *History of Cartel for Warwickshire County Council* (see paragraph 228 above). This document also contains explanations from Howard Evans about its involvement in various contracts. It states,

“From the 1st January 2001 to the end of that year, Howard Evans Roofing Ltd were involved in a cartel for the above client...”

The cartel included the following members:

General Asphalte

Briggs...”

As noted at paragraph 228 above, the OFT considers that this document supports other evidence of the involvement of General Asphalte or Briggs with Howard Evans in specific Warwickshire School contracts. There is other evidence that Briggs and General Asphalte were involved in collusion on the Abbots Farm School contract (see paragraphs 233 to 238 above) and the OFT therefore considers that this document supports the involvement of Briggs and General Asphalte with Howard Evans in collusive arrangements in relation to the Abbots Farm School contract.

240. *Interview with Mr A of Howard Evans on 3 September 2002*¹⁶⁹ (see paragraphs 101 and 102 above). Mr A states in this interview the approximate time period within

¹⁶⁸ Case 48/69 *ICI Ltd v European Commission* [1972] ECR 1969, at paragraph 64.

¹⁶⁹ See note 43 above.

which contact with General Asphalte in relation to the agreement on the Abbots Farm, Avon Valley School and Wheelwright Lane School contracts took place,

“...Tenders had already gone in for Wheelwright Lane and Abbots Farm when General contacted us. The call from General would have been after the 26 February **but before 5 March.**”

The OFT considers that this is further evidence of collusion between Howard Evans and General Asphalte in relation to the Abbots Farm school contract.

241. *Briggs internal Memorandum, sent from [...] [C], dated 1 February 2002. Subject 'Competition Law Issues'*. The memorandum, which is detailed at paragraph 109 above, lists contracts where an internal investigation by Briggs concluded that anti-competitive practices were involved. The list mentions Abbots Farm School as a contract that involved anti-competitive arrangements. The OFT therefore considers that this is further evidence of collusion in relation to the tender that Briggs submitted for the Abbots Farm School contract.

242. The OFT considers that the evidence set out at paragraphs 233 to 241 above demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, on the one hand, General Asphalte and Howard Evans and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Abbots Farm School.

The participants' representations

General Asphalte's representations

243. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁷⁰

Briggs' representations

244. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 242 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Abbots Farm School contract.

Howard Evans representations

245. Howard Evans accepts the conclusions drawn by the OFT in relation to its participation in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁷¹

The OFT's conclusions

246. On the basis of the evidence analysed at paragraphs 233 to 241 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place

¹⁷⁰ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹⁷¹ Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Abbots Farm School.

Avon Valley School

Analysis of evidence

247. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* The OFT considers that the arguments set out at paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Avon Valley School contract.
248. *Document 'History of cartel for Warwickshire County Council' and 11 February 2003 interview with Mr A.* Paragraphs 237 and 238 above explain that these two documents indicate that there was collusion between Howard Evans and General Asphalte to allocate work in relation to the Abbots Farm, Wheelwright Lane and Avon Valley contracts. The arguments in those paragraphs apply equally here to show that there was collusion in relation to the tenders to be submitted by General Asphalte and Howard Evans for the Avon Valley School contract.
249. *Briggs internal Memorandum, sent from [...] [C], 1 February 2002. Subject 'Competition Law Issues'.* The memorandum, which is detailed at paragraph 109 above, lists contracts where an internal investigation by Briggs concluded that anti-competitive practices were involved. The memorandum lists Avon Valley School as one of the contracts that involved anti-competitive issues. The OFT considers that this is further evidence of collusion in relation to the tender submitted by Briggs in respect of the Avon Valley contract.
250. The OFT considers that the evidence referred to at paragraphs 247 to 249 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Avon Valley School.

The participants' representations

General Asphalte's representations

251. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁷²

Briggs' representations

252. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 250 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Avon Valley School contract.

¹⁷² Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

Howard Evans representations

253. Howard Evans accepts the conclusions drawn by the OFT in relation to its participation in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁷³

The OFT's conclusions

254. On the basis of the evidence analysed at paragraphs 247 to 249 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Avon Valley School.

Wheelwright Lane School

Analysis of evidence

255. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* The OFT considers that the arguments set out at paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Wheelwright Lane School contract.
256. *Document 'History of cartel for Warwickshire County Council' and 11 February 2003 interview with Mr A.* Paragraphs 237 and 238 above explain that these two documents indicate that there was collusion between General Asphalte and Howard Evans to allocate work in relation to the Abbots Farm, Wheelwright Lane and Avon Valley contracts. The arguments in those paragraphs apply equally here to show that there was collusion in relation to the tenders to be submitted by General Asphalte and Howard Evans for the Wheelwright Lane School contract.
257. *History of Cartel for Warwickshire County Council.* The OFT considers that, in conjunction with the evidence discussed at paragraphs 255 and 256 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs and General Asphalte in the Wheelwright Lane School contract for the reasons set out in paragraph 228.
258. The OFT considers that the evidence set out at paragraphs 255 to 257 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Wheelwright Lane School.

¹⁷³ Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

The participants' representations

General Asphalte's representations

259. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁷⁴

Briggs' representations

260. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 258 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Wheelwright Lane School contract.

Howard Evans representations

261. Howard Evans accepts the conclusions drawn by the OFT in relation to its participation in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁷⁵

The OFT's conclusions

262. On the basis of the evidence analysed at paragraphs 255 to 257 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Wheelwright Lane School.

Ashlawn School

Analysis of evidence

263. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* The OFT considers that the arguments set out in paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Ashlawn School contract.

264. *Price submitted by Briggs.* Further, the price of £101,696 on the Mr B list corresponds exactly to the bid that Briggs submitted, as shown on the tender received document. The OFT considers that this is evidence that Briggs submitted a cover price for the Ashlawn School contract.

265. *Briggs internal Memorandum, sent from [...] [C], 1 February 2002. Subject 'Competition Law Issues'.* The memorandum, which is detailed at paragraph 109 above, lists contracts where an internal investigation by Briggs concluded that anti-competitive practices were involved. The memorandum lists Ashlawn School as one

¹⁷⁴ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹⁷⁵ Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

of the contracts that involved anti-competitive issues. The OFT considers that this is further evidence of collusion in relation to the tender submitted by Briggs in respect of the Ashlawn School contract.

266. *Interview with Mr A on 3 September 2002*¹⁷⁶ (see paragraph 101 above). Mr A was asked by the OFT official who interviewed him if Howard Evans were involved in other contracts for WCC where Howard Evans provided a cover price to a competitor. Mr A responds,

“Probably yes. See BG 26. This list represents Warwickshire County Council contracts where I believe we provided assistance to other contractors. All the prices we submitted on BG26 were given to us by another contractor but I cannot remember specifics.”

267. *Document reference BG26, an undated handwritten note*. This document was found by OFT officials on a section 28 visit to Howard Evans premises on 4 and 5 July 2002. Part of the document notes (see paragraph 100 above),

'Our Quote number	Date	Client	Site
2836	16/11/00	W/Wshire CC	Ashlawn School
3846	24/9/01	“ ”	Henry Hinde School
3352	20/04/01	“ ”	Henry Hinde School”

(Emphasis added).

The OFT considers that BG26 and Mr A's explanation of it are further evidence of Howard Evans' involvement in cover pricing arrangements in relation to the contract for Ashlawn School

268. *History of Cartel for Warwickshire County Council*. The OFT considers that, in conjunction with the other evidence discussed at paragraphs 263 to 267 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs in the Ashlawn School contract for the reasons set out in paragraph 228.

269. The OFT considers that the evidence set out at paragraphs 263 to 268 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between General Asphalte and Briggs in relation to the tenders submitted for work at Ashlawn School.

The participants' representations

General Asphalte's representations

270. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁷⁷

¹⁷⁶ See note 43 above.

¹⁷⁷ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

"No...Avon Valley, Ashlawn School Abbots Farm, Wheelwright, Blythe Special School, Henry Hinde... possibly were engineered by General Asphalte plus **Boughton Leigh School**. All were around March 2001. General Asphalte engineered the allocation of these contracts.....I priced Boughton Leighs as I would normally. I think cost plus 25%. This was higher than if it had been priced competitively. I believe I phoned round the others with their price."

(Emphasis added)

The OFT considers that the presence of the name Boughton Leigh in this statement indicates that General Asphalte and Briggs were involved with cover pricing arrangements in relation to the Boughton Leigh School contract.

277. *Statement of Mr E – [...] [C] of Briggs - dated 29 August 2002* (see paragraph 110 above).

"...I took a phone call from John Cooper of General Asphalte in relation to Warwickshire CC... He [John Cooper] said....they were concerned that Briggs would continue to submit alternative quotes. My understanding was the other contractors must have discussed and he said he would rather have us with them than against.....I then got another phone call from John Cooper to say there were a number of jobs being re-tendered from the previous year for Warwickshire CC and that he wanted us to give him covers so that the previous tenders were not made to look silly....my response was that my branch was not providing a free estimating service and he said there were a couple of jobs coming out that were not tendered the previous financial year and Briggs could have one of them. I think that subsequently happened...**I think the school was called Boughton.**"

(Emphasis added)

278. The OFT considers that the reference to 'Broughton' in the statement extract set out in paragraph 277 above refers to the school Boughton Leigh and that the statement therefore provides further evidence of collusion between General Asphalte and Briggs in relation to the Boughton Leigh contract.

279. *Briggs internal Memorandum, sent from [...] [C], 1 February 2002, subject 'Competition Law Issues'*. The memorandum, which is detailed at paragraph 109 above, lists contracts where an internal investigation by Briggs concluded that anti-competitive practices were involved. The memorandum lists Boughton Leigh School as one of the contracts that involved anti-competitive issues. The OFT considers that this is further evidence that Briggs colluded with at least one other undertaking in relation to the Boughton Leigh contract.

280. *History of Cartel for Warwickshire County Council*. The OFT considers that, in conjunction with the other evidence discussed at paragraphs 273 to 279 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs, Howard Evans and General Asphalte in the Boughton Leigh School contract for the reasons set out in paragraph 228.

281. The OFT considers that the evidence set out at paragraphs 273 to 280 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and,

second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Boughton Leigh School.

The participants' representations

General Asphalte's representations

282. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁸⁰

Briggs' representations

283. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 281 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Boughton Leigh School contract.

Howard Evans representations

284. Howard Evans accepts the conclusions drawn by the OFT in relation to its participation in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁸¹

The OFT's conclusions

285. On the basis of the evidence analysed at paragraphs 273 to 280 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Boughton Leigh School.

Blythe Special School

Analysis of evidence

286. *Interview with Mr A on 3 September 2002*¹⁸² (see paragraph 103 above). Mr A was asked by the OFT official who interviewed him what factors are taken into account when pricing a contract. Mr A replied,

"...you have to calculate the material and labour, scaffolding...**We always do a survey. Where a quote appears in the register we will have done a survey.**"

(Emphasis added).

287. *Letter from Mr A to the OFT, dated 21 February 2003* (see paragraph 107 above). The letter notes,

"We are also sure we did not attend the following sites to measure the roofs

¹⁸⁰ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹⁸¹ Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

¹⁸² See note 43 above.

Tender no 3249 Boughton Leigh School
Tender no 3251 **Blythe Special Schools”**

(Emphasis added).

288. The OFT considers that the arguments at paragraph 277 above (in relation to the Boughton Leigh School contract) apply equally in relation to Blythe Special School to show that Howard Evans was involved with cover pricing arrangements with at least one other undertaking.
289. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* The OFT considers that the arguments set out at paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Blythe Special School contract.
290. *History of Cartel for Warwickshire County Council.* The OFT considers that, in conjunction with the other evidence discussed at paragraphs 286 to 289 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs and General Asphalte in the Blythe Special School contract for the reasons set out in paragraph 228.
291. Further, the price of £59,120 recorded on the Mr B list corresponds exactly to the submitted bid as shown on the tender received document. The fifth column of the Mr B list states, “G.A.” and Mr B explained that the fifth column of the list represented the company that Briggs provided a cover price to. The OFT considers that “G.A.” here stands for General Asphalte. In the light of these facts, the price submitted is evidence of an aspect of the cover pricing arrangement between Briggs and General Asphalte being carried out.
292. The OFT considers that the evidence set out at paragraphs 286 to 291 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Blythe Special School.

The participants' representations

General Asphalte's representations

293. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁸³

Briggs' representations

294. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 292 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Blythe Special School contract.

¹⁸³ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

Howard Evans representations

295. Howard Evans accepts the conclusions drawn by the OFT in relation to its involvement in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁸⁴

The OFT's conclusions

296. On the basis of the evidence analysed at paragraphs 286 to 291 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Blythe Special School.

Exhall Grange School

Analysis of evidence

297. *Briggs internal Memorandum, sent from [...] [C], 1 February 2002. Subject 'Competition Law Issues'*. The memorandum, which is detailed at paragraph 109 above, lists contracts where an internal investigation by Briggs concluded that anti-competitive practices were involved. The memorandum lists Exhall Grange School as one of the contracts that involved anti-competitive issues. The OFT considers that this is evidence of collusion between Briggs and at least one other undertaking in relation to the Exhall Grange contract.

298. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002*. The OFT considers that the arguments set out at paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Exhall Grange School contract.

299. *History of Cartel for Warwickshire County Council*. The OFT considers that, in conjunction with the evidence discussed at paragraphs 297 and 298 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs and General Asphalte in the Exhall Grange School contract for the reasons set out in paragraph 228.

300. The OFT considers that the evidence set out at paragraphs 297 to 299 demonstrates that an agreement or concerted practice having the object of providing non-competitive prices was in place between General Asphalte and Briggs in relation to the tenders submitted for work at Exhall Grange School.

¹⁸⁴ Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

The participants' representations

General Asphalte's representations

301. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁸⁵

Briggs' representations

302. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 300 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Exhall Grange School contract.

The OFT's conclusions

303. On the basis of the evidence analysed at paragraphs 297 to 299 above and General Asphalte's admission, OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between General Asphalte and Briggs in relation to the tenders submitted for work at Exhall Grange School.

Faraday Hall School

Analysis of the evidence

304. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* The OFT considers that the arguments set out at paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Faraday Hall School contract.

305. *Briggs internal Memorandum, sent from [...] [C], 1 February 2002. Subject 'Competition Law Issues'.* The memorandum, which is detailed at paragraph 109 above, lists contracts where an internal investigation by Briggs concluded that anti-competitive practices were involved. The memorandum lists Faraday Hall School as one of the contracts that involved anti-competitive issues. The OFT considers that this is evidence of collusion between Briggs and at least one other undertaking in relation to the Faraday Hall contract.

306. Further, the price of £52,954 recorded on the Mr B list corresponds exactly to the submitted bid by Briggs as shown on the tender received document. The fifth column of the Mr B list states, "G.A.". For the same reasons set out at paragraph 291 above, the OFT considers that this is evidence of an aspect of the cover pricing arrangement between Briggs and General Asphalte being carried out.

307. *Document found at General Asphalte's premises during a section 28 visit.* This is a list of quotations supplied (see paragraph 111 above).

"Warwick CC - Faraday hall - 52052.00 - **covered.**"

¹⁸⁵ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

(Emphasis added).

308. The OFT considers that this document refers to the fact that this contract was one for which arrangements were in place for other contractors to submit rigged prices.

309. *Interview with Mr A on 3 September 2002*¹⁸⁶ (see paragraph 103 above). Mr A was asked by the OFT official who interviewed him what factors are taken into account when pricing a contract. Mr A replied,

“...you have to calculate the material and labour, scaffolding... **We always do a survey. Where a quote appears in the register we will have done a survey.**”

(Emphasis added).

310. *Letter from Mr A to the OFT, dated 21 February 2003* (see paragraph 107 above). The letter notes that,

“we are also sure that we did not attend the following sites to measure the roofs

...Tender nos 3072 and 4142	Faraday Hall
Tender nos 3352 and 3846	Henry Hinde School.”

(Emphasis added).

The OFT considers that the arguments at paragraph 275 above (in relation to the Boughton Leigh School contract) apply equally in relation to Faraday Hall School to show that Howard Evans was involved with cover pricing arrangements with at least one other undertaking.

311. *History of Cartel for Warwickshire County Council*. The OFT considers that, in conjunction with the evidence discussed at paragraph 304 to 310 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs and General Asphalte in the Faraday Hall School contract for the reasons set out in paragraph 228.

312. The OFT considers that the evidence set out at paragraphs 304 to 311 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, on the one hand, General Asphalte and Howard Evans and, on the other hand, between General Asphalte and Briggs in relation to the tenders submitted for work at Faraday Hall School.

The participants' representations

General Asphalte's representations

313. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁸⁷

¹⁸⁶ See note 43 above.

Briggs' representations

314. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 312 above) in relation to its participation in an agreement or concerted practice having the object of providing non-competitive prices in relation to the Faraday Hall School contract.

Howard Evans representations

315. Howard Evans accepts the conclusions drawn by the OFT in relation to its participation in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁸⁸

The OFT's conclusions

316. On the basis of the evidence analysed at paragraphs 304 to 311 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Faraday Hall School.

Henry Hinde School

Analysis of evidence

317. *Evidence from the Mr B list, Mr B's interview on 29 August 2002 and Mr B's statement dated 11 November 2002.* The OFT considers that the arguments set out at paragraphs 233 to 235 above in relation to Abbots Farm School apply equally here to show that there was a cover pricing arrangement orchestrated by General Asphalte and involving Briggs in relation to the Henry Hinde School contract.

318. Further, the price of £72,227 recorded on the Mr B list corresponds exactly to the submitted bid as shown on the tender received document. The fifth column of the Mr B list states, "G.A.". For the same reasons set out at paragraph 291 above, the OFT considers that this is evidence of an aspect of the cover pricing arrangement between Briggs and General Asphalte being carried out.

319. *Interview with Mr A on 3 September 2002*¹⁸⁹ (see paragraph 101 above). Mr A was asked by the OFT official who interviewed him if Howard Evans were involved in other contracts for WCC where Howard Evans provided a cover price to a competitor. Mr A responds,

"Probably yes. See BG 26. This list represents Warwickshire County Council contracts where I believe we provided assistance to other contractors. All the prices we submitted on BG26 were given to us by another contractor but I cannot remember specifics."

¹⁸⁷ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹⁸⁸ Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

¹⁸⁹ See note 43 above.

320. *Document reference BG26, an undated handwritten note.* This document was found by OFT officials on a section 28 visit to Howard Evans premises on 4 and 5 July 2002. Part of the document notes (see paragraph 100 above),

'Our Quote number	Date	Client	Site
2836	16/11/00	W/Wshire CC	Ashlawn School
3846	24/9/01	" "	Henry Hinde School
3352	20/04/01	" "	Henry Hinde School"

The OFT considers that BG26 and Mr A's explanation of it are further evidence of Howard Evans' involvement in cover pricing arrangements in relation to the contract for Henry Hinde School.

321. *Interview with Mr A on 3 September 2002*¹⁹⁰ (see paragraph 103 above). Mr A was asked by the OFT official who interviewed him what factors are taken into account when pricing a contract. Mr A replied,

"...you have to calculate the material and labour, scaffolding... **We always do a survey. Where a quote appears in the register we will have done a survey.**"

(Emphasis added)

322. *Letter from Mr A to the OFT, dated 21 February 2003* (see paragraph 107 above). The letter notes that,

"we are also sure that we did not attend the following sites to measure the roofs

...Tender nos 3072 and 4142	Faraday Hall
Tender nos 3352 and 3846	Henry Hinde School."

(Emphasis added).

The OFT considers that the arguments at paragraph 275 above (in relation to the Boughton Leigh School contract) apply equally in relation to Henry Hinde School to show that Howard Evans was involved with cover pricing arrangements with at least one other undertaking.

323. *History of Cartel for Warwickshire County Council.* The OFT considers that, in conjunction with the evidence discussed at paragraphs 317 to 322 above, this document (referred to at paragraph 228 above) supports the involvement of Briggs and General Asphalte in the Henry Hinde School contract for the reasons set out in paragraph 228.

324. The OFT considers that the evidence set out at paragraphs 317 to 323 demonstrates that an agreement or concerted practice to provide non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Henry Hinde School.

¹⁹⁰ See note 43 above.

The participants' representations

General Asphalte's representations

325. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁹¹

Briggs' representations

326. Briggs made no representations regarding the OFT's conclusion (set out at paragraph 324 above) in relation to its participation in an agreement or concerted practice to provide non-competitive prices in relation to the Henry Hinde School contract.

Howard Evans representations

327. Howard Evans accepts the conclusions drawn by the OFT in relation to its participation in agreements or concerted practices in all the Warwickshire schools contracts in which it was involved.¹⁹²

The OFT's conclusions

328. On the basis of the evidence analysed at paragraphs 317 to 323 above and General Asphalte's and Howard Evans' admissions, the OFT finds that an agreement or concerted practice having the object of providing non-competitive prices was in place between, first, General Asphalte and Howard Evans on the one hand and, second, between General Asphalte and Briggs on the other hand, in relation to the tenders submitted for work at Henry Hinde School.

DUDLEY SCHOOLS CONTRACTS

Hob Green, Wollescote, Christchurch and Church of the Ascension Schools

Analysis of evidence

329. *Fax from John Roper at Howard Evans to Tony at Solihull.* This undated fax states the following:

"...YOUR PRICE INCLUDING PROVISIONAL SUMS AND CONTINGENCIES.

CHRISTCHURCH AND CHURCH OF THE ASCENSION SCHOOL

£172,320 + VAT

HOB GREEN AND WOLLESCOTE SCHOOLS

£291,822.00 + VAT..."

¹⁹¹ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹⁹² Paragraph 23 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

330. The OFT considers that there is no legitimate reason for Howard Evans to send Solihull, or any other undertaking involved in these contracts, a fax with prices relating to these contracts. The OFT considers that, together, the words in the quotation above in a fax sent by Howard Evans to Solihull indicate that Howard Evans told Solihull the price that Solihull should bid for the Christchurch and Church of the Ascension schools contract and for the Hob Green and Wollescote schools contract rather than Solihull independently determining its own price for the contracts.

331. *Fax from John Roper at Howard Evans to [...][C] Apex.* This undated fax states the following:

"...YOUR PRICE INCLUDING PROVISIONAL SUMS AND CONTINGENCIES.

CHRISTCHURCH AND CHURCH OF THE ASCENSION SCHOOLS

£166,518 + VAT

HOB GREEN AND WOLLESCOTE SCHOOLS

£283,101.00 + VAT..."

332. The OFT considers that, together, the words in the quotation above in a fax sent by Howard Evans to Apex indicate that Howard Evans told Apex the price that Apex should bid for the Christchurch and Church of the Ascension schools contract and for the Hob Green and Wollescote schools contract rather than Apex independently determining its own price for the contracts.

333. *Interview with Mr G of Howard Evans, dated 3 September 2002.*¹⁹³ As noted at paragraph 122 above, Mr G was asked by the OFT official who interviewed him a number of questions about documents found by OFT officials on a section 28 visit to Howard Evans' premises. In relation to the faxes quoted at paragraphs 329 and 331 above, Mr G stated,

"To the best of my knowledge I did send them. I cannot remember when I sent them. The four schools, we had done some budget pricing and kept them... The figures I worked out at slightly over ours for each contractor... It was all a bit of a rush. I would have sent the fax to Apex and Solihull very soon after producing the prices on the front of RG3."¹⁹⁴

The OFT considers that this statement is further evidence that Howard Evans colluded with each of Apex and Solihull in relation to the tender bids that each would submit for the Hob Green and Wollescote Schools contract and for the Christchurch and Church of the Ascension Schools contract.

334. *Breakdown of General Asphalte's bids for the Dudley schools contracts.* The OFT considers that the presence of General Asphalte's bids for the Dudley schools contracts at Howard Evans' premises shows that there was contact between General Asphalte and Howard Evans.

¹⁹³ See note 100 above.

¹⁹⁴ RG3 is bundle of documents relating to the Dudley schools contracts that the OFT found at Howard Evans' premises. See note 101 above.

335. The OFT considers further that the breakdown of General Asphalte's bid for the four schools found at Howard Evans's premises in document RG3 (pages 7-10), and the similarity of the *total* sum for each contract noted in RG3 (pages 7-10) to the total sums in the bid sent by General Asphalte to DPC before the tender return date, supports the OFT's finding of collusion between Howard Evans and General Asphalte.
336. *Interview with Mr A of Howard Evans, dated 11 February 2003.*¹⁹⁵ When questioned on figures provided to General Asphalte, Mr A stated that the lump sum figures provided to General Asphalte, Solihull and Apex would have been sent to those companies before the tender return date.
337. The OFT also notes that that the fax from Craig Newman at General Asphalte to Paul Rosevere at DPC timed at 16.21 on 17 April 2002, which contains General Asphalte's full breakdown of tender prices for all four schools, provides figures identical to the figures provided by Howard Evans to General Asphalte which were found at Howard Evans' premises. The OFT considers that the similarity of these two figures supports the OFT's finding of collusion between Howard Evans and General Asphalte.
338. *Howard Evans' Message Book and document entitled 'Explanation of RG4 – Message Book'* (see paragraph 123 above). An entry in Howard Evans' Message Book dated 5 April 2002 records,
"Stan Clarke Solihull Roofing + BLDG
Dudley."
Howard Evans explained the meaning of this entry in a document that it gave to the OFT in connection with its leniency application. The explanation stated,
"Stan contacted us to say he could not carry out the works due to its size and complicated nature. We agreed to supply him a price, he informed us that Apex Asphalt had received the tender as well."
- The OFT considers that the entry dated 5 April 2002 in Howard Evans' message book and the explanation of that message provides further evidence of collusion between Howard Evans and Solihull.
339. *Letter from Howard Evans to the OFT dated 28 August 2002.* This document was created in connection with Howard Evans' leniency application. This letter states in relation to the Dudley schools contracts,
"To our knowledge [...] Apex Asphalt contacted Howard Evans Roofing Ltd office, requesting assistance at a date again we cannot recollect. We were then contacted by Alan Cooper of General Asphalt Company, who explained that due to current work commitments he could not undertake the works."

In the light of the other evidence of collusion discussed at paragraphs 329 to 338 above, the OFT considers that Howard Evans' statement that [...] Apex contacted Howard Evans requesting assistance provides further evidence of collusion between Howard Evans and Apex. Also, the OFT considers that Howard Evans' statement that

¹⁹⁵ See note 99 above.

Alan Cooper of General Asphalte could not undertake works in relation to these contracts provides further evidence of collusion between Howard Evans and General Asphalte.

340. The OFT considers that the evidence set out at paragraphs 329 to 339 demonstrates that a concerted practice to provide non-competitive prices was in place between Howard Evans and each of Apex, Solihull and General Asphalte in relation to the tenders submitted for work at the Christchurch and Church of the Ascension Schools and at the Hob Green and Wollescote Schools.

The participants' representations

Howard Evans' representations

341. Howard Evans "...makes no representations concerning the OFT's conclusions..." at paragraph 340 above.¹⁹⁶

Solihull's representations

342. Solihull "...does not challenge any of..." the OFT's conclusions at paragraph 340 above.¹⁹⁷

General Asphalte's representations

343. General Asphalte notes that it "...cannot deny having infringed the rules of the... [Competition Act 1998]..."¹⁹⁸

Apex's representations

PRELIMINARY POINT MADE IN APEX'S REPRESENTATIONS

Background to the preliminary point

344. Apex's written representations in relation to the Dudley schools contracts¹⁹⁹ advanced arguments in relation to the contracts themselves and in relation to a preliminary point. The OFT addresses this preliminary point first before proceeding to consider Apex's substantive points in relation to the contracts themselves.

345. The OFT noted that Apex's written representations submitted on 17 December 2003 in response to the Rule 14 Notice did not contain representations in relation to the Dudley schools contracts. The OFT therefore contacted Apex's solicitors by telephone and brought this fact to their attention.²⁰⁰ It became apparent at that point that the OFT had inadvertently failed to include the Dudley schools contracts in a table in the Rule 14 Notice that summarised the contracts in which the OFT alleged that Apex was involved and in relation to which the OFT intended to take action ('the summary

¹⁹⁶ Paragraph 24 of Howard Evans' written response to the Rule 14 Notice, dated 10 November 2003.

¹⁹⁷ Paragraph 1(2) of Solihull's written representations in response to the Rule 14 Notice, dated 11 November 2003.

¹⁹⁸ Introduction to General Asphalte's submission of mitigating circumstances, dated 13 November 2003.

¹⁹⁹ Apex's written response to the Rule 14 Notice, dated 18 December 2003.

²⁰⁰ Note of 27 November conversation between the OFT and Apex's solicitors.

table'). Apex's solicitors stated that because the summary table did not refer to Apex in the context of the Dudley schools contracts, Apex thought that the OFT did not propose to take any action against it in relation to the Dudley schools contracts.

346. The OFT explained to Apex's solicitors that the OFT considered that because Apex's involvement in the Dudley schools contracts was described in the detailed evidence and analysis section of the Rule 14 Notice and the conclusion at the end of the evidential analysis section stated that Apex was alleged to be a party to an agreement or concerted practice in relation to the Dudley schools contracts it was clear from the Rule 14 as a whole that the OFT intended to take action against Apex in relation to the Dudley schools contracts. The OFT nevertheless gave Apex a further opportunity of 10 working days to make written representations on the allegations contained in the Rule 14 Notice in relation to the Dudley schools contracts. This was confirmed by electronic mail that the OFT sent to Apex's solicitors on the same day as the telephone conversation that discussed these matters.²⁰¹ The OFT sent a second electronic mail to Apex which reiterated the earlier electronic mail and extended the deadline for submission of these written representations to a total of 14 working days.²⁰²

Apex's representations on the preliminary point

347. Apex submits that, because the summary table did not refer to Apex in the context of the Dudley schools contracts, Apex thought that the OFT did not propose to take any action against it in relation to the Dudley schools contracts.

348. Apex states that Rule 14(3) of the OFT's procedural rules provides that the Rule 14 Notice must state the facts on which the OFT relies, the matters to which it has taken objection, the action it proposes and its reasons for it. Apex argues that the non-inclusion of the Dudley schools contracts against its name in the summary table means that the Rule 14 Notice did not set out the action the OFT proposed to take in relation to Apex's alleged involvement in the infringement relating to the Dudley schools contracts and that the OFT was therefore not entitled to take action against Apex in relation to the Dudley schools contracts.

REPRESENTATIONS ON THE DUDLEY SCHOOLS CONTRACTS

349. Apex states that it requested a price from Howard Evans because although Apex did not think that it was likely to win the contract and because it had an existing heavy estimating workload for tenders where it thought it was more likely to be successful in winning the contract, it wished to submit a tender. Apex states that it was reluctant to not send in a tender because it had been a long time since it had received a tender invitation directly from DMBC and it feared that if it did not return a tender the officers who work for DMBC might be less likely to invite Apex to tender in the future. Apex explains in detail its belief that where the discretion of an individual

²⁰¹ Electronic mail dated 27 November from the OFT to Apex's solicitors.

²⁰² Electronic mail dated 03 December from the OFT to Apex's solicitors.

Council officer is involved there is considerable scope for that officer to be influenced by the past actions of a potential contractor and the reasons for this.²⁰³

350. Apex goes on to argue that because it requested a price from Howard Evans, for Apex's benefit, there was no collusion between it and Howard Evans on the basis that there was no agreement or meeting of minds between the two undertakings that Apex would bid at prices specified by Howard Evans, and that there could therefore be no agreement or concerted practice for the purposes of the Chapter I prohibition. That said, Apex "...accepts that it requested Howard Evans to supply prices for the Dudley schools contracts rather than independently determining its own price."²⁰⁴

The OFT's conclusions

Conclusions on the preliminary point

351. The OFT has considered Apex's arguments in relation to the non-inclusion of the Dudley schools contracts in the table that summarised the infringements that the OFT alleged Apex was involved in and in relation to which the OFT intended to take action. A Rule 14 Notice shall state the facts on which the OFT relies, the matters to which it has taken objection, the action it proposes and the reasons for that action.²⁰⁵ The OFT must give the recipients of a Rule 14 Notice written notice of the period within which they may make written representations on the information contained in the Rule 14 Notice and must give them a reasonable opportunity to make oral representations on the information contained in the Rule 14 Notice.²⁰⁶

352. The OFT clearly identified the facts on which the OFT relied and the matters to which it took objection in relation to Apex's involvement in the Dudley schools contracts. It did not list Apex's name in the summary table that set out the contracts in which the OFT alleged that Apex was involved and in relation to which the OFT intended to take action.

353. In any event, the OFT takes the view that it remedied any defect in the Rule 14 Notice by notifying Apex that it intended to take action in relation to Apex's involvement in the Dudley schools contracts in the telephone conversation and the two electronic mails that are referred to, respectively, in paragraphs 345 and 346 above. The conversation and electronic mails explained that the OFT intended to make a Decision against Apex in relation to the Dudley schools contracts and offered Apex a reasonable opportunity to make both written and oral representations in relation to the Dudley schools contracts. Apex in fact made both written and oral representations on the facts and conclusions relating to the Dudley schools contracts contained in the Rule 14 Notice.

354. In those circumstances, the OFT considers that it made clear to Apex its intention to take action against Apex in relation to the Dudley schools contracts on the basis of the facts and conclusions set out in the Rule 14 Notice and gave Apex written notice

²⁰³ Apex's written response to the Rule 14 Notice, dated 18 December 2003, at paragraphs 5.1 to 508.

²⁰⁴ Apex's written response to the Rule 14 Notice, dated 18 December 2003, at paragraph 6.3.

²⁰⁵ Rule 14(3) of the OFT's procedural rules. See note 30 above.

²⁰⁶ *Ibid.*, Rule 14(7).

of a period within which it could make written representations and a reasonable opportunity to make oral representations on those facts and conclusions.

Conclusion on the contracts

355. Apex places significance on the fact that it asked Howard Evans for figures, rather than Howard Evans asking it to submit figures. The OFT has already concluded at paragraph 198 above (in relation to the Frankley and Harborne Hill contracts) that the existence of an agreement or concerted practice between two undertakings does not turn on which undertaking instigated the provision of figures. The OFT therefore considers that, in relation to the Dudley schools contracts, it is not material to the finding of the existence of an agreement or concerted practice that it was Apex who requested figures, for its own benefit, from Howard Evans.
356. As is explained at paragraph 199 above (in relation to the Frankley and Harborne Hill contracts) the OFT considers that where there is contact between two parties that influences one party's conduct on the market, there is a knowing substitution of practical co-operation for the risks of competition between those parties sufficient to constitute a concerted practice within the meaning of the Act. The OFT considers that Apex's request to Howard Evans for figures, and the fact that Howard Evans gave figures to Apex, is clear evidence of contact between Howard Evans and Apex that influenced Apex's conduct on the market and that there was therefore a concerted practice between these parties.
357. The OFT does not find it necessary to consider whether there was an agreement in relation to this contract.
358. On the basis of the evidence analysed at paragraphs 329 to 339 above and the admissions of Howard Evans, General Asphalte and Solihull, the OFT considers that there was a concerted practice to provide non-competitive prices between Howard Evans and each of General Asphalte, Solihull and Apex in relation to the tenders submitted for work at the Christchurch and Church of the Ascension Schools and at the Hob Green and Wollescote Schools. It should be noted that the OFT considers that the collusion relating to the contract for the Christchurch and Church of the Ascension School and the collusion relating to the contract for the Hob Green and Wollescote Schools constitute a single infringement because the participants made a single collusive arrangement for both contracts that DMBC put out to tender.

The OFT's conclusions on the single agreements or concerted practices

359. On the basis of the evidence and representations set out and analysed at paragraphs 157 to 358 above, the OFT finds that the Parties entered into agreements or concerted practices to fix prices through collusive tendering in relation to individual contracts as set out above.

G. Prevention, restriction or distortion of competition

Introduction - the effect of the procurement process on competition in the relevant market

360. The OFT has considered the important issue of the procurement process in the roofing contracting sector and how this affects competition within the relevant market.
361. The OFT notes that services in this market are procured through a tendering process, which involves local authorities and private managing agents, architects or surveyors inviting contractors to submit bids. Any undertaking with expertise in repairing flat roofs within a reasonable distance of the contract might feasibly tender for a contract. However, buyers (local authorities or managing agents) will usually short-list a number of firms from their standing lists of suitable contractors.
362. Where the original tendering process fails to identify a suitable contractor on the short-list, customers may consider alternative contractors. In such circumstances, different undertakings can be approached, but only if they are already included on the appropriate standing lists.²⁰⁷ Often local authorities do not look beyond their short list, (i.e. they do not consider other suppliers on the relevant standing list), even if all the original bids are deemed unaffordable or unsuitable. This is because procedures typically allow for negotiation where the buyer gets its budgeted price but compromises are made on the specification for the job.
363. Furthermore, the ability of different contractors to be included on standing lists is restricted by a number of different factors. In particular, firms would need to demonstrate:
- i. Specialist roofing skills;
 - ii. Adequate insurance coverage;
 - iii. A good health and safety record; and
 - iv. Relevant product/manufacture guarantees.
364. This suggests that, in the absence of collusion, the most effective competition in the product market would be those suppliers on the relevant standing list, and in

²⁰⁷ Statement dated 16 January 2003 provided by Jean Metcalfe, Contractor Assessment Office at CCC, relating to the management of lists. See also statement of Paul Bickerdike, Building Surveying Manager with DPC, 7 February 2003. See also statement of Stephen Vickers, General Manager of Urban Design Department of BCC, 13 January 2003. In the statement by Michael Welsby, Head of Construction Services, WCC, dated 15 January 2003, he notes that although tenders are selected from the approved list of contractors, "...we have also selected tenderers from the Construction Line database. This effectively is a database of nationally approved building contractors initiated by Government but now privatised... Whilst there has not been an exercise to invite new contractors to join our approved list for a number of years, we regularly receive applications. In these circumstances we would encourage the contractor to apply to join the Construction Line database where we would subsequently pick their name up when a suitable contract arises."

particular those on the relevant short lists for the supply of RMI services for the different types of flat roofs.

Consideration of whether the agreements or concerted practices in this case had the object or effect of preventing, restricting or distorting competition

365. Section 2(1) of the Act prohibits, inter alia, “agreements between undertakings...or concerted practices which...have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom”. Accordingly, in light of the specific wording of section 2(1), the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive effect where it is found to have as its object the prevention, restriction or distortion of competition.²⁰⁸
366. The 'object' of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it, but rather is determined by an objective analysis of its aims.²⁰⁹ This analysis should generally be carried out against the economic context in which the undertakings operate, unless, as here, the agreements are concerned with “obvious restrictions of competition such as price-fixing...”²¹⁰ The agreements or concerted practices in this case are concerned with fixing the prices at which undertakings would make bids for contracts of work and it is therefore not necessary for the OFT to undertake a detailed analysis of their economic effects.
367. If the obvious consequence of an agreement or concerted practice is to restrict or distort competition, that is its object even if the parties claim that this was not their subjective intention or that it also had other objects.²¹¹ In this case, the OFT considers that the obvious consequence of the Parties' actions in artificially setting the prices of bids for contracts was to prevent, restrict or distort competition. The OFT also notes that the European Commission and the European Court have decided that collusive tendering has the object of restricting competition.²¹² Consequently, the OFT considers that the object of the Parties' agreements or concerted practices in this case was to prevent, restrict or distort competition.

H. Appreciability

368. An agreement or concerted practice will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition

²⁰⁸ The ECJ has acknowledged this principle on many occasions in relation to the interpretation of Article 81(1). In *Consten & Grundig v Commission* [1966] ECR 299 it stated that “there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, distortion or restriction of competition.”

²⁰⁹ Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* [1984] ECR 1679, [1985] 1 CMLR 688, paragraphs 25 & 26.

²¹⁰ Cases T-374/94 etc. *European Night Services v Commission* [1998] ECR II-3141, paragraph 136.

²¹¹ Cases 96/82 etc. *IAZ v Commission* [1983] ECR 3369, [1984] 3 CMLR 276, ECJ, paragraphs 22-25.

²¹² For example *Re European Sugar Cartel* OJ [1973] L140/17, *Building and Construction Industry in the Netherlands* OJ [1992] L92/1 and *Pre-Insulated Pipes* OJ [1999] L24/1, which was substantially upheld on appeal by the CFI in Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission of the European Communities*, judgment of 20 March 2002.

in the United Kingdom. The OFT takes the view that an agreement will generally have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent, although there will be circumstances where this is not the case.²¹³ In addition, the OFT will generally regard any agreement which directly or indirectly fixes prices or shares markets as being capable of having an appreciable effect even where the combined market share falls below the 25 per cent threshold.²¹⁴

369. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders or bids independently. Any tenders submitted as the result of joint activities are likely to have had an appreciable effect on competition.²¹⁵
370. The agreements or concerted practices in this case had as their object price-fixing (see paragraphs 366 and 367 above) and there are no special circumstances to justify making an exception to the OFT's general position on appreciability. Accordingly, the OFT takes the view that the agreements or concerted practices had as their object the appreciable prevention, restriction or distortion of competition.²¹⁶

I. Effect on trade within the UK

371. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement or concerted practice operates or is intended to operate. By their very nature, agreements to fix prices prevent, restrict or distort competition and are likely to affect trade. It should be noted that, to infringe the Chapter I prohibition, an agreement does not actually have to affect trade so long as it is capable of affecting trade.²¹⁷ Effect on trade within the UK is a purely jurisdictional test to establish that the agreements or concerted practices in question have some effect in the UK, rather than a substantive competition test.²¹⁸
372. The Parties' agreements or concerted practices affected the extent to which buyers of repair, maintenance and improvement services for flat roofs in the West Midlands area were able to obtain competitive tenders for that work. The OFT therefore finds that trade within the UK²¹⁹ is likely to have been affected by the Parties' agreements or concerted practices.

²¹³ OFT Guideline 401 'The Chapter I prohibition' (March 1999), paragraphs 2.18 and 2.19.

²¹⁴ OFT Guideline 401 'The Chapter I prohibition' (March 1999), paragraph 2.20.

²¹⁵ OFT Guideline 401 'The Chapter I prohibition' (March 1999), paragraph 3.14.

²¹⁶ The OFT does not consider the agreements or concerted practices produce only insignificant effects in the sense outlined in Case 5/69 *Völk v Vervaeke* [1969] ECR 295.

²¹⁷ Section 2(1) of the Act catches agreements or concerted practices which "may affect trade".

²¹⁸ See *Aberdeen Journals v The Office of Fair Trading* [2003] CAT 11, at paragraphs 459 and 460, which deals with this point, albeit in the context of the Chapter II prohibition.

²¹⁹ Section 2(7) of the Act provides that the United Kingdom means, in relation to an agreement that operates or is intended to operate only in the United Kingdom, that part.

J. Conclusion on application of the Chapter I prohibition

373. The OFT concludes on the basis of the evidence considered above that the Parties infringed the Chapter I prohibition by forming a series of individual agreements or concerted practices each of which had as its object the fixing of prices in the market for the supply of RMI services for flat roofs in the West Midlands area.

III. DECISION

A. Agreements or concerted practices

374. The evidence set out at Part I of this Decision formed the basis of the Rule 14 Notice sent to the Parties. The OFT's assessment of the views set out in the Parties' representations to the OFT is set out in Part II of this Decision. Having considered carefully the evidence and analysed the views set out in the Parties' representations, the OFT finds that there were agreements or concerted practices between the participants in each contract particularised in Part II²²⁰ above to fix the prices of the supply of certain RMI services by collusive tendering in relation to the contracts particularised in Part II above.

375. On the basis of the evidence available, set out at paragraphs 157 to 358 above, the OFT has calculated the relevant duration for each of the infringements for the Parties. The table below shows the Parties to each infringement and that, in relation to each infringement to which this Decision applies, the duration of each infringement has been calculated by the OFT as less than a year.

INFRINGEMENT	PARTICIPANTS	DURATION OF INFRINGEMENT
Small Heath School	<ul style="list-style-type: none">• Howard Evans• General Asphalte• Brindley	July 2000
Yardley Wood Library	<ul style="list-style-type: none">• Howard Evans• General Asphalte• Briggs• Brindley• Redbrook	January 2001
Frankley and Harborne Hill Schools	<ul style="list-style-type: none">• Briggs• Apex	August 2001 to October 2001
Pallasades Shopping Centre	<ul style="list-style-type: none">• Rio• Briggs	July 2000

²²⁰ See paragraphs 157 to 358 above.

	<ul style="list-style-type: none"> • Price 	
Quasar Centre	<ul style="list-style-type: none"> • Rio • Briggs 	July 2000
Abbots Farm School	<ul style="list-style-type: none"> • General Asphalte • Briggs • Howard Evans 	February 2001 to March 2001
Ashlawn School	<ul style="list-style-type: none"> • General Asphalte • Briggs 	February 2001 to March 2001
Avon Valley School	<ul style="list-style-type: none"> • General Asphalte • Howard Evans • Briggs 	February 2001 to March 2001
Boughton Leigh	<ul style="list-style-type: none"> • General Asphalte • Howard Evans • Briggs 	January 2001 to March 2001
Blythe Special School	<ul style="list-style-type: none"> • General Asphalte • Howard Evans • Briggs 	March 2001 to April 2001
Exhall Grange School	<ul style="list-style-type: none"> • General Asphalte • Briggs 	January 2001 to February 2001
Faraday Hall School	<ul style="list-style-type: none"> • General Asphalte • Howard Evans • Briggs 	January 2001 to February 2001
Henry Hinde School	<ul style="list-style-type: none"> • General Asphalte • Howard Evans • Briggs 	April 2001 to May 2001
Wheelwright Lane School	<ul style="list-style-type: none"> • General Asphalte • Howard Evans • Briggs 	February 2001 to March 2001
Hob Green, Wollescote, Christchurch and Church of the Ascension Schools	<ul style="list-style-type: none"> • Howard Evans • Solihull • Apex General Asphalte	March 2002 to April 2002

B. Action

376. This section sets out the action that the OFT intends to take and its reasons for it.

Directions

377. Section 32(1) of the Act provides that if the OFT has made a Decision that an agreement infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. The OFT does not issue any directions in this case.

Financial Penalties

378. Section 36(1) of the Act provides that, on making a Decision that an agreement has infringed the Chapter I prohibition, the OFT may require a party to the agreement to pay it a penalty in respect of the infringement. No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act (Determination of Turnover for Penalties Order) 2000 ('the Penalties Order').²²¹ The OFT considers that the parties to each infringing agreement or concerted practice are as set out in the OFT's conclusions in relation to each infringement, set out in the OFT's analysis at paragraphs 157 to 358 above.

379. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently but is under no obligation to determine specifically whether there was intention or negligence.²²²

380. In the instant case, in relation to the local authority contracts, the Parties were required to certify that they created their tender figures on their own rather than in conjunction with another person.²²³ For the private contracts, the OFT considers that the Parties would in all likelihood have made tender applications before and either would have, or ought to have been, aware that the purpose of conducting tenders is to ensure competition in the award of contracts. The OFT considers that, in the light of these facts, the Parties could not have been unaware that the agreements or concerted practices to which they were party had the object of preventing, restricting or distorting competition. Moreover, the OFT considers that the very nature of the agreements or concerted practices was such that the Parties could not have been unaware that they had the object of preventing, restricting or distorting competition. The OFT is therefore satisfied that the Parties intentionally or negligently infringed the Chapter I prohibition.

²²¹ Section 36(8) of the Act and SI 2000/309.

²²² Section 36(3) of the Act: see *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 455.

²²³ See paragraph 19 above.

IMMUNITY FROM PENALTIES

381. Section 39(3) of the Act provides that a party to a small agreement is immune from the effect of section 36(1). This is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000,²²⁴ as an agreement between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred does not exceed £20 million.

382. However, by virtue of section 39(1)(b), a price fixing agreement may not constitute a 'small agreement' for the purposes of the Act. Accordingly, none of the Parties will benefit from immunity from penalties under section 39 (3).

CALCULATION OF THE PENALTIES – general points

383. In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act when setting the amount of the penalty.²²⁵

Step 1 - starting point

384. The starting point for determining the level of penalty is calculated by applying a percentage rate to the 'relevant turnover' of an undertaking, up to a maximum of 10 per cent. 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.²²⁶ To be consistent with the Penalties Order, the OFT considers that the last financial year is the business year preceding the date when the infringement ended.

385. The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement.²²⁷ The more serious the infringement, the higher the likely percentage rate. When making its assessment, the OFT will also consider a number of other factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties.²²⁸ The damage caused to consumers whether directly or indirectly will also be an important consideration. An assessment of the appropriate starting point is carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.²²⁹

386. The OFT has imposed a penalty on the Parties. The starting point for each penalty is based on the fact that the agreements or concerted practices in this case are related

²²⁴ SI 2000/262.

²²⁵ The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000.

²²⁶ *Ibid.*, at paragraph 2.3.

²²⁷ *Ibid.*, at paragraph 2.4.

²²⁸ *Ibid.*, at paragraph 2.5.

²²⁹ *Ibid.* at paragraph 2.6

to collusive tendering. Collusive tendering is a form of price-fixing and is one of the most serious infringements of the Chapter I prohibition. The usual starting point for each penalty in such a case is likely to be at or near 10% of relevant turnover.²³⁰

Nature of product

387. RMI services for flat roofs in the West Midlands area are 'industrial' services sold to local authorities, private managing agents, architects or surveyors. Flat roofs are one of a number of available types of roof²³¹ but because of a basic difference in materials and technology, purchasers that need RMI services carried out on flat roofs have no substitute to employing the services of a contractor that can carry out that kind of work in relation to flat roofs.

Structure of market

388. The market consists of those contractors able to supply RMI services for flat roofs in the West Midlands. As noted at paragraph 14 above, there is a high degree of fragmentation in the roofing contracting industry as a whole with some 74 per cent of companies commanding a turnover of less than £250,000 in 2002. The flat roofing market in the West Midlands is therefore likely to be fragmented. Local authorities are significant purchasers of the RMI services for flat roofs that the Parties supply. Many of the Parties told the OFT that there was perceived pressure in the industry for suppliers to put in tender bids even when suppliers did not wish to win the contract because otherwise there was the risk of not being invited to tender in the future.

Market share of undertakings involved and entry conditions

389. Although detailed statistical data about the market for RMI services of flat roofs specifically is unavailable, the OFT considers the fact that the roofing market as a whole²³² is so fragmented (see paragraph 388 above) suggests that none of the Parties has a leading market share in the market for RMI services for flat roofs (although it should be noted that Briggs is, in the roofing market as a whole, a leading player²³³). Personnel to work in the roofing industry are scarce, so it would be hard for new players to enter the market.²³⁴

Effect on competitors and third parties

390. The Parties identified in the Decision constitute a not insignificant part of suppliers of RMI services for flat roofs in the West Midlands area. Also, the Parties have made representations²³⁵ that 'cover pricing' in the sense used in this Decision (see

²³⁰ Ibid., at paragraph 2.4.

²³¹ See paragraphs 12 and 136 above.

²³² See Part II.B above for an overview of the UK contracting services market.

²³³ Mintel Roofing Materials & Contracting (Industrial Report) - UK - January 2004, paragraph 5.3.7.

²³⁴ See paragraph 142 and note 116 above.

²³⁵ For example Apex's written responses to the Rule 14 Notice, dated 17 November and 18 December 2003 and Apex's response to request for further information following oral hearing, dated 13 January 2004; Price's written representations dated 9 September 2003 [#]; Rio's written submissions relating to the Rule 14 Notice, dated 13 November 2003.

paragraph 18 above) is a widely-encountered phenomenon in the roofing industry. The Parties' infringements gave **purchasers** of flat-roofing services the impression that there was more competition in the tender process relating to a specific contract than there actually was. However, the OFT notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. The OFT considers that such infringements are not the most serious examples of collusive tendering.

391. The OFT considers that a more serious example of collusive tendering would be cartels where collusion in relation to individual contracts was part of a single overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel. Equally, the OFT considers that cartels where participants made inducements to other cartel participants to persuade them to submit false bids in order to make substantial financial gains from their activities are more serious than the type of collusive tendering in which the Parties were involved.

392. The OFT has had regard to the nature of the product, the structure of the market, the market share of the Parties, market entry conditions and the effect of the infringements on competitors and third parties, as set out in paragraphs 387 to 391 above. On the basis that the market is fragmented (see paragraph 388 above) and none of the Parties has a leading market share (see paragraph 389 above), and the fact that the Parties' infringements were - by virtue of the fact that they were individual, discrete infringements - not the most serious examples of collusive tendering, the OFT has fixed a starting point of [...] [C] per cent of relevant turnover for all the Parties.

Step 2 - adjustment for duration

393. The starting point may be adjusted to take into account the duration of the infringement for infringements which last for more than one year.²³⁶ As noted at paragraph 375 above, the duration of each of the infringements in this Decision are calculated by the OFT to be less than a year. The OFT does not therefore adjust any of the penalties in this case for duration.

Step 3 - adjustment for other factors

394. The penalty may be adjusted as appropriate to achieve policy objectives, particularly deterring undertakings (including non-infringing undertakings) from engaging in anti-competitive practices.²³⁷ The OFT considers this point in relation to each undertaking, below. It may be appropriate in this Step to make an assessment of the gain that an undertaking has made from the infringing activities. The OFT considers that it would be difficult to estimate any gain that the Parties have achieved through their actions in relation to the contracts that formed the subject matter of the infringements. Moreover, the arithmetical calculation of gain should not form the sole or even the main means of assessing the seriousness of an infringement except in the clearest

²³⁶ The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000, at paragraph 2.7.

²³⁷ Ibid., paragraph 2.8.

cases.²³⁸ Many of the Parties in their responses to requests for information and in other correspondence have stated that the practice of cover pricing is endemic in the construction industry in general including the roofing industry. As will be clear from this Decision, the OFT considers that collusive tendering is one of the most serious infringements of the Act. The OFT therefore considers that it is necessary to deter undertakings in this area from engaging in collusive tendering.

395. Where a party's relevant turnover represents a relatively low proportion of its total turnover, the OFT considers that the penalty figure reached at the end of Step 2 of the calculation procedure may not represent a significant sum for that party. In such a case the OFT considers that it is necessary to increase the party's penalty at Step 3 to give a sum that represents, for that party, a significant sum that will act as a sufficient deterrent, having regard to its total turnover. These points are considered in relation to each party, below.

Step 4 – adjustment for further aggravating and mitigating factors

396. The OFT has the power to increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.²³⁹ The OFT considers these points in relation to each undertaking, below. However, the OFT notes here that for Parties that have committed multiple infringements, the magnitude of the penalty reflects the number of infringements each party has committed by using the number of additional infringements as an aggravating factor under this Step of the penalty calculation procedure. Where an undertaking has been involved in multiple infringements that occurred in more than one financial year the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

397. The OFT may not fix a penalty that exceeds 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Penalties Order.²⁴⁰ The section 36(8) turnover is not restricted to the turnover in the relevant product market and relevant geographic market.²⁴¹ The OFT considers below, in relation to each undertaking, whether any penalty would exceed 10 per cent of the section 36(8) turnover. Also, the OFT must when setting the amount of its penalty for a particular agreement (or concerted practice) take into account any penalty or fine that

²³⁸ *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 511.

²³⁹ The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000, at paragraph 2.10.

²⁴⁰ Section 36(8) of the Act and SI 2000/309.

²⁴¹ Footnote 6 of the Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000.

has been imposed by the European Commission or by a court or other body in another Member State in respect of the same agreement (or concerted practice).²⁴²

PENALTY FOR APEX

Step 1 - starting point

398. Apex was involved in two infringements: collusive tendering in connection with the Frankley and Harborne Hill contracts – which the OFT considers came to an end in October 2001 – and collusive tendering in connection with the Dudley schools contracts – which the OFT has found came to an end in April 2002. Apex's financial year is 1 February to 31 January and so these contracts were in two financial years. As noted at paragraph 396 above, where an undertaking has been involved in multiple infringements that occurred in more than one financial year, the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point. In relation to the Frankley and Harborne Hill contracts (Apex's first infringement in time), Apex's turnover in the relevant product and geographic markets in the business year preceding the date when the infringement ended (1 February 2000 to 31 January 2001) was £[...][C].

399. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...][C] per cent of relevant turnover. The starting point for Apex is therefore £[...][C].

Step 2 – adjustment for duration

400. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

401. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is aware that the figure reached at the end of Step 2 above is a significant sum in relation to Apex because of the relatively high proportion of Apex's total turnover for the year ending 31 January 2001 (see paragraph 2 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that, in this instance, the penalty figure of £[...][C] is sufficient to act as an effective deterrent to Apex and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

²⁴² The Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty, OFT 423, March 2000, at paragraph 2.15.

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

402. As noted at paragraph 396 above, the OFT will treat multiple infringements as an aggravating factor under this Step. The OFT has decided to increase the fines for multiple infringements in this case by [...] [C] per cent where a party has committed 2 to 4 infringements and to multiply the fine by [...] [C] – which equates to a [...] [C] per cent increase in penalty - where a party has committed ten or more infringements. Apex was involved in collusive tendering in connection with the Dudley schools contracts in addition to collusive tendering in connection with the Frankley and Harborne Hill school contracts. The OFT therefore increases the penalty for Apex by [...] [C] per cent.

Mitigation

403. The OFT is aware of the remedial action taken by Apex since its discovery of the infringement. Apex has advised its directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme.²⁴³ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.

404. Apex co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Apex's penalty by [...] [C] per cent for co-operation.

405. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [*change*] [C] of [...] [C] per cent. The financial penalty will therefore be £35,922.80 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

406. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁴⁴ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁴⁵

²⁴³ Apex's written response to the Rule 14 Notice, dated 17 November 2003.

²⁴⁴ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁴⁵ Article 3(1) of the Penalties Order.

407. The applicable turnover for Apex in the year preceding the year in which the first of its infringements ended (the year ending 31 January 2001) was £[...][C]. The statutory maximum financial penalty for Apex is 10 per cent of this figure and is therefore £[...][C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Apex is therefore £35,922.80.

PENALTY FOR BRIGGS

Step 1 - starting point

408. Briggs was involved in 13 infringements. Briggs' financial year is 1 January to 31 December and so its infringements were in two financial years. As noted at paragraph 396 above, where an undertaking has been involved in multiple infringements that occurred in more than one financial year, the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point. Briggs' first infringement in time was collusive tendering in connection with the Quasar contract which the OFT considers came to an end in July 2000. Briggs' turnover in the relevant product and geographic markets in the business year preceding the date when the infringement ended (1 January 1999 to 31 December 1999) was £[...][C].

409. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...][C] per cent of relevant turnover. The starting point for Briggs is therefore £[...][C].

Step 2 – adjustment for duration

410. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

411. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. Briggs is a relatively large undertaking and the OFT considers that the figure reached at the end of Step 2 above is a relatively modest sum in relation to Briggs because of the relatively low proportion of its total turnover for the year ending 31 December 2000 (see paragraph 3 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above, for deterrence, to give a figure that represents a significant sum for Briggs, having regard to its total turnover. The OFT considers that, it is necessary, in this instance, to add £[...][C] to act as an effective deterrent to

Briggs and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £[...][C].

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

412. The OFT is aware that, in relation to at least some of the infringements, there was involvement on the part of the senior management and directors of Briggs.²⁴⁶ The OFT considers this an aggravating factor and increases the penalty by [...][C] per cent.

413. Briggs was involved in a total of 13 infringements. The OFT considers that the number of Briggs' infringements is an aggravating factor and, in accordance with paragraph 402 above, multiplies the penalty by [...][C] because Briggs falls into the category of 10 or more infringements. This equates to a [...][C] per cent increase in the penalty.

Mitigation

414. The OFT is aware of the internal investigation into anti-competitive activities undertaken by Briggs and the remedial action it has taken since its discovery of the infringement. Briggs has advised its staff, directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme.²⁴⁷ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...][C] per cent.

415. Although Briggs admitted its infringements and cooperated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for these factors.

416. The total percentage added to the penalty for aggravating circumstances is [...][C] per cent and the total percentage deducted for mitigating circumstances is [...][C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [*change*][C] of [...][C] per cent. The financial penalty will therefore be £638,051.3 subject to Step 5 and leniency.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

417. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of

²⁴⁶ See the involvement of [...][C] Briggs (see Briggs' Directors' report and financial statements for the year ending 31 December 2000), in the Pallasades contract; for example the reference at paragraph 69 above.

²⁴⁷ Briggs internal Memorandum, dated 1st February 2002. Subject 'Competition Law Issues'.

services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁴⁸ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁴⁹

418. The applicable turnover for Briggs in the year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £33,530,000. The statutory maximum financial penalty for Briggs is 10 per cent of this figure and is therefore £3,353,000. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

419. Briggs was granted total immunity from financial penalties as part of the OFT's leniency scheme. Briggs financial penalty is therefore reduced to zero.

PENALTY FOR BRINDLEY

Step 1 - starting point

420. Brindley was involved in two infringements: collusive tendering in connection with the Small Heath contract – which the OFT considers came to an end in July 2000 – and collusive tendering in connection with the Yardley Wood contract – which the OFT has found came to an end in January 2001. Brindley's financial year is 1 October to 30 September and so these contracts were in two financial years. As noted at paragraph 396 above, where an undertaking has been involved in multiple infringements that occurred in more than one financial year, the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point. In relation to the Small Heath contract (Brindley's first infringement in time), Brindley's turnover in the relevant product and geographic markets in the business year preceding the date when the infringement ended (1 October 1998 to 30 September 1999) was [...][#] £[...][C] [#].²⁵⁰

421. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Brindley is therefore [...] [#] £[...][C] [#].

²⁴⁸ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁴⁹ Article 3(1) of the Penalties Order.

²⁵⁰ [#] The starting point for Brindley has been changed from the original decision. Brindley initially provided the OFT with an incorrect figure for relevant turnover. Brindley submitted a revised figure for relevant turnover to the OFT on 22 March 2004 and, having analysed the figures submitted and the documentation the revised figures were based on, the OFT accepted that revised figure on 2 April 2004. Consequently, the starting point for Brindley and also its final penalty figure have changed from the original decision.

Step 2 – adjustment for duration

422. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

423. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is aware that the figure reached at the end of Step 2 above is a significant sum in relation to Brindley because of the [...] [#] high proportion of Brindley's total turnover for the year ending 30 September 1999 (see paragraph 4 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that, in this instance, the penalty figure of £[...] [#] [...] [C] [#] is sufficient to act as an effective deterrent to Brindley and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

424. The OFT is aware that, in relation to at least one infringement, there was involvement on the part of a director of Brindley.²⁵¹ The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

425. Brindley was involved in collusive tendering in connection with the Yardley Wood contract in addition to collusive tendering in connection the Small Heath contract. The OFT considers that the involvement in this additional infringement is an aggravating factor and, in accordance with paragraph 402 above, the OFT therefore increases the penalty for Brindley by [...] [C] per cent.

Mitigation

426. The OFT is aware of the remedial action taken by Brindley since its discovery of the infringement. Brindley's directors have taken detailed advice on the provisions of the Act, communicated knowledge of competition issues to company employees and put in place procedures to ensure that further instances of collusion do not occur.²⁵² The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.

²⁵¹ The involvement of Peter Baker - a director of Brindley (see Brindley's abbreviated accounts for the year ended 30 September 2000) - in the Small Heath contract. See paragraph 37 above.

²⁵² Brindley's letter to the OFT dated 10 March 2004.

427. Brindley co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Brindley's penalty by [...] [C] per cent for co-operation.
428. Brindley also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces Brindley's penalty by [...] [C] per cent.
429. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [change] [C] of [...] [C] per cent. The financial penalty will therefore be [...] [#] £55,540.80 [#] subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

430. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁵³ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁵⁴
431. The applicable turnover for Brindley in the year preceding the year in which the first of its infringements ended (the year ending 30 September 1999) was £[...] [C]. The statutory maximum financial penalty for Brindley is 10 per cent of this figure and is therefore £[...] [C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Brindley is therefore [...] [#] £55,540.80 [#].

PENALTY FOR GENERAL ASPHALTE

Step 1 - starting point

432. General Asphalte was involved in 11 infringements. General Asphalte's financial year is 1 January to 31 December and so its infringements were in two financial years. As noted at paragraph 396 above, where an undertaking has been involved in multiple infringements that occurred in more than one financial year, the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point. General Asphalte's first infringement in time was collusive tendering in

²⁵³ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁵⁴ Article 3(1) of the Penalties Order.

connection with the Small Heath contract which the OFT considers came to an end in July 2000. General Asphalte's turnover in the relevant product and geographic markets in the business year preceding the date when the infringement ended (1 January 1999 to 31 December 1999) was £[...][C].

433. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...][C] per cent of relevant turnover. The starting point for General Asphalte is therefore £[...][C].

Step 2 – adjustment for duration

434. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

435. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is aware that the figure reached at the end of Step 2 above is a significant sum in relation to General Asphalte because of the relatively high proportion of General Asphalte's total turnover for the year ending 31 December 1999 (see paragraph 5 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that, in this instance, the penalty figure of £[...][C] is sufficient to act as an effective deterrent to General Asphalte and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

436. The OFT is aware that, in relation to at least one infringement, there was involvement on the part of a director of General Asphalte.²⁵⁵ The OFT considers this an aggravating factor and increases the penalty by [...][C] per cent.

437. General Asphalte was involved in a total of 11 infringements. The OFT considers that the number of General Asphalte's infringements is an aggravating factor and, in accordance with paragraph 402 above, multiplies the penalty by [...][C] because General Asphalte falls into the category of 10 or more infringements. This equates to a [...][C] per cent increase in the penalty.

²⁵⁵ The involvement of Alan Cooper – General Asphalte's business letterheads note that Mr Cooper is a director of General Asphalte – in the Dudley schools contracts. See for example paragraph 124 above.

Mitigation

438. General Asphalte co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces General Asphalte's penalty by [...] [C] per cent for co-operation.
439. General Asphalte also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces General Asphalte's penalty by [...] [C] per cent.
440. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [change] [C] of [...] [C] per cent. The financial penalty will therefore be £63,192.86 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

441. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁵⁶ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁵⁷
442. The applicable turnover for General Asphalte in the year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £[...] [C]. The statutory maximum financial penalty for General Asphalte is 10 per cent of this figure and is therefore £[...] [C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on General Asphalte is therefore £63,192.86.

PENALTY FOR HOWARD EVANS

Step 1 - starting point

443. Howard Evans was involved in 10 infringements. Howard Evans' financial year is 1 January to 31 December and so its infringements were in two financial years. As noted at paragraph 396 above, where an undertaking has been involved in multiple

²⁵⁶ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁵⁷ Article 3(1) of the Penalties Order.

infringements that occurred in more than one financial year, the OFT has used the relevant turnover that relates to the first infringement in time as the basis for the starting point. Howard Evans' first infringement in time was collusive tendering in connection with the Small Heath contract which the OFT considers came to an end in July 2000. Howard Evans' turnover in the relevant product and geographic markets in the business year preceding the date when the infringement ended (1 January 1999 to 31 December 1999) was [...] [#] £[...] [C] [#].²⁵⁸

444. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Howard Evans is therefore £[...] [C].

Step 2 – adjustment for duration

445. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

446. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is aware that the figure reached at the end of Step 2 above is a significant sum in relation to Howard Evans because of the relatively high proportion of Howard Evans' total turnover for the year ending 31 December 1999 (see paragraph 6 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that, in this instance, the penalty figure of £[...] [C] is sufficient to act as an effective deterrent to Howard Evans and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

447. The OFT is aware that, in relation to at least some of the infringements, there was involvement on the part of the senior management and directors of Howard Evans.²⁵⁹

²⁵⁸ [#] The starting point for Howard Evans has been changed from the original decision. Howard Evans initially provided the OFT with an incorrect figure for relevant turnover. Howard Evans submitted a revised figure for relevant turnover to the OFT on 5 May 2004 and, having analysed the figures submitted and the documentation the revised figures were based on, the OFT accepted that revised figure on 21 May 2004. Consequently, the starting point for Howard Evans and also its final penalty figure have changed from the original decision.

²⁵⁹ Mr A, a senior manager and director of Howard Evans, was involved in the Small Heath and Yardley Wood contracts. See paragraph 50 above.

The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

448. Howard Evans was involved in a total of 10 infringements. The OFT considers that the number of Howard Evans' infringements is an aggravating factor and, in accordance with paragraph 402 above, multiplies the penalty by [...] [C] because Howard Evans falls into the category of 10 or more infringements. This equates to a [...] [C] per cent increase in the penalty.

Mitigation

449. Although Howard Evans cooperated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for cooperation.

450. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and no reduction is made for mitigating circumstances. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is an increase of [...] [C] per cent. The financial penalty will therefore be £71,020.49 subject to Step 5 and leniency.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

451. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁶⁰ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁶¹

452. The applicable turnover for Howard Evans for the year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £5,207,292. The statutory maximum financial penalty for Howard Evans is 10 per cent of this figure and is therefore £520,729.2. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty.

Leniency

453. Howard Evans was granted a 50 percent reduction from financial penalties as part of the OFT's leniency scheme. Howard Evans' financial penalty is therefore reduced to £35,510.25.

²⁶⁰ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁶¹ Article 3(1) of the Penalties Order.

PENALTY FOR PRICE

Step 1 - starting point

454. Price was involved in one infringement: collusive tendering in connection with the Pallasades contract which the OFT considers came to an end in July 2000. Price's turnover in the relevant product and geographic markets (i.e. the market for the supply of RMI services for flat roofs in the West Midlands area) in the business year preceding the date when the infringement ended (1 January 1999 to 31 December 1999) was [...] [C].

455. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Price is therefore [...] [C].

Step 2 – adjustment for duration

456. As the infringement in which Price was involved was less than one year's duration, the OFT does not propose to make any increase for duration.

Step 3 – adjustment for other factors

457. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. Price had [...] [C] in the relevant market in the relevant year and therefore its starting point, and the figure reached at the end of Step 2, is [...] [C]. In accordance with paragraph 395 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above, for deterrence, to give a figure that represents a significant sum for Price, having regard to its total turnover. The OFT considers that an increase of £[...] [C] is sufficient to act as an effective deterrent to Price and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £[...] [C].

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

458. The OFT is aware that there was involvement on the part of a director of Price.²⁶² The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

²⁶² Rio's written submissions relating to the Rule 14 Notice, dated 13 November 2003 (at paragraphs 4.5 and 4.6) and Price's written representations dated 9 September 2002 note that it was John Price, a director of Price who asked Rio for a cover price.

Mitigation

459. Price co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Price's penalty by [...] [C] per cent for co-operation.
460. Price also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces Price's penalty by [...] [C] per cent.
461. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [*change*] [C] of [...] [C] per cent. The financial penalty will therefore be £18,000 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

462. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁶³ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁶⁴
463. The applicable turnover for Price for the year preceding the year in which the infringement ended (the year ending 31 December 1999) was £[...] [C]. The statutory maximum financial penalty for Price is 10 per cent of this figure and is therefore £[...] [C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Price is therefore £18,000.

PENALTY FOR REDBROOK

Step 1 - starting point

464. Redbrook was involved in one infringement: collusive tendering in connection with the Yardley Wood contract which the OFT considers came to an end in 29 January 2001. Redbrook's turnover in the relevant product and geographic markets (i.e. the market for the supply of RMI services for flat roofs in the West Midlands area) in the

²⁶³ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁶⁴ Article 3(1) of the Penalties Order.

business year preceding the date when the infringement ended (1 December 1999 to 30 November 2000) was £[...][C].

465. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...][C] per cent of relevant turnover. The starting point for Redbrook is therefore £[...][C].

Step 2 – adjustment for duration

466. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

467. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is aware that Redbrook's turnover figure reached at the end of Step 2 above is high because Redbrook's relevant turnover is a very high proportion of its total turnover for the year ending 30 November 2000 (see paragraph 8 above). In accordance with paragraph 395 above, the OFT therefore considers that, in this instance, the penalty figure of £[...][C] is sufficient to act as an effective deterrent to Redbrook and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

468. The OFT is aware that there was involvement on the part of a senior manager of Redbrook.²⁶⁵ The OFT considers this an aggravating factor and increases the penalty by 10 per cent.

Mitigation

469. Redbrook co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Redbrook's penalty by [...][C] per cent for co-operation.

470. Redbrook also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces Redbrook's penalty by [...][C] per cent.

²⁶⁵ John Powell, a senior manager at Redbrook, was involved in the collusive arrangements for the Yardley Wood contract. See paragraph 176 above.

471. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [change] [C] of [...] [C] per cent. The financial penalty will therefore be £17,802.90 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

472. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁶⁶ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁶⁷

473. The applicable turnover for Redbrook for the year preceding the year in the infringement ended (the year ending 30 November 1999) was £[...] [C]. The statutory maximum financial penalty for Redbrook is 10 per cent of this figure and is therefore £[...] [C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Redbrook is therefore £17,802.90.

PENALTY FOR RIO

Step 1 - starting point

474. Rio was involved in two infringements: collusive tendering in connection with the Quasar contract – which the OFT considers came to an end in July 2000 – and collusive tendering in connection with the Yardley Wood contract – which the OFT also found came to an end in July 2000. Rio's turnover in the relevant product and geographic markets (i.e. the market for the supply of RMI services for flat roofs in the West Midlands area) in the business year preceding the date when the infringement ended (1 June 1999 to 31 May 2000) was £[...] [C].

475. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Rio is therefore £[...] [C].

²⁶⁶ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁶⁷ Article 3(1) of the Penalties Order.

Step 2 – adjustment for duration

476. In accordance with paragraph 393 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

477. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is aware that the figure reached at the end of Step 2 above is a significant sum in relation to Rio because of the relatively high proportion of Rio's total turnover for the year ending 31 May 2000 (see paragraph 9 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that, in this instance, the penalty figure of £[...][C] is sufficient to act as an effective deterrent to Rio and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage. The financial penalty at the end of this Step is therefore £[...][C].

Step 4 – further adjustment for further aggravating and mitigating factors

Aggravation

478. The OFT is aware that, in relation to at least one infringement, there was involvement on the part of a director of Rio.²⁶⁸ The OFT considers this an aggravating factor and increases the penalty by [...][C] per cent.

479. Rio was involved in collusive tendering in connection with the Pallasades contract in addition to collusive tendering in connection the Quasar contract. The OFT considers that the involvement in this additional infringement is an aggravating factor and, in accordance with paragraph 402 above, the OFT therefore increases the penalty for Rio by [...][C] per cent.

Mitigation

480. The OFT is aware that since the OFT's investigation began, Rio has advised its directors and staff in detail on the provisions of the Act and has committed to following a competition law compliance programme.²⁶⁹ The OFT considers that in the light of all these factors it is appropriate to reduce Rio's penalty by [...][C] per cent.

481. Rio co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Rio's penalty by [...][C] per cent for co-operation.

²⁶⁸ For example the involvement of Jim Tierney – a director of Rio (see Rio's abbreviated financial accounts for the year ending 31 May 2000) - in the Pallasades contract; see paragraph 202 and 208 above.

²⁶⁹ Rio's written submissions relating to the Rule 14 Notice, dated 13 November 2003, at section 2.

482. Rio also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces Rio's penalty by [...] [C] per cent.

483. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [change] [C] of [...] [C] per cent. The financial penalty will therefore be £45,049.68 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

484. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁷⁰ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁷¹

485. The applicable turnover for Rio for the year preceding the year in which the first of its infringements ended (the year ending 31 May 2000) was £[...] [C]. The statutory maximum financial penalty for Redbrook is 10 per cent of this figure and is therefore £[...] [C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Rio is therefore £45,049.68.

PENALTY FOR SOLIHULL

Step 1 - starting point

486. Solihull was involved in one infringement: collusive tendering in connection with the Hob Green and Wollescote and the Christchurch and Church of the Ascension contracts which the OFT considers came to an end in April 2002. Solihull's turnover in the relevant product and geographic markets (i.e. the market for the supply of RMI services for flat roofs in the West Midlands area) in the business year preceding the date when the infringement ended (1 August 2000 to 31 July 2001) was £[...] [C].

487. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 387 to 392 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Solihull is therefore £[...] [C].

²⁷⁰ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁷¹ Article 3(1) of the Penalties Order.

Step 2 – adjustment for duration

488. As the infringement in which Solihull was involved in was less than one year's duration, the OFT does not propose to make any increase for duration.

Step 3 – adjustment for other factors

489. As noted at paragraphs 394 and 395 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT considers that the figure reached at the end of Step 2 is a relatively modest sum for Solihull because of the low proportion of Solihull's total turnover for the year ending 31 July 2001 (see paragraph 10 above) that was represented by the relevant turnover taken into account in Step 1. In accordance with paragraph 395 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above, for deterrence, to give a figure that represents a significant sum for Solihull, having regard to its total turnover. The OFT considers that, it is necessary, in this instance, to add £[...][C] to act as an effective deterrent to Solihull and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £[...][C].

Step 4 – adjustment for further aggravating and mitigating factors

Aggravation

490. The OFT is aware that there was involvement on the part of the senior management of Solihull.²⁷² The OFT considers this an aggravating factor and increases the penalty by [...][C] per cent.

Mitigation

491. Solihull co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Solihull's penalty by [...][C] per cent for co-operation.

492. Solihull also accepted its participation in the infringements set out above in its representations in response to the Rule 14 Notice. In these circumstances the OFT reduces Solihull's penalty by [...][C] per cent.

493. The total percentage added to the penalty for aggravating circumstances is [...][C] per cent and the total percentage deducted for mitigating circumstances is [...][C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is a [*change*][C] of [...][C] per cent. The financial penalty will therefore be £26,606.25 subject to Step 5.

²⁷² Solihull's written representations in response to the Rule 14 Notice, dated 11 November 2003, accept that Solihull's senior management was involved in the arrangements that constitute the infringement it was involved in.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

494. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is derived from the turnover of the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings and consumers in the UK after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁷³ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date when the infringement ended.²⁷⁴

495. The applicable turnover for Solihull for the year preceding the year in which the infringement ended (the year ending 31 July 2001) was £[...][C]. The statutory maximum financial penalty for Solihull is 10 per cent of this figure and is therefore £[...][C]. The financial penalty calculated at the end of Step 4 does not exceed this amount. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements. There are no further adjustments to this penalty. The final penalty imposed on Solihull is therefore £26,606.25.

496. In conclusion, the OFT has, pursuant to section 36(1) of the Act, imposed financial penalties on the Parties as summarised in the table below.

Party	Penalty calculated at the end of Step 5	Penalty to be paid
Apex	£35,922.80	£35,922.80
Briggs	£638,051.30	£0 ²⁷⁵
Brindley	£55,540.80	£55,540.80
General Asphalte	£63,192.86	£63,192.86
Howard Evans	£71,020.49	£35,510.25 ²⁷⁶
Price	£18,000.00	£18,000.00
Redbrook	£17,802.90	£17,802.90

²⁷³ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order.

²⁷⁴ Article 3(1) of the Penalties Order.

²⁷⁵ As noted at paragraph 419 above, Briggs' financial penalty was reduced to zero because it was granted total immunity.

²⁷⁶ As noted at paragraph 453 above, Howard Evans' financial penalty was reduced to £35,510.25 because it was granted a 50 percent reduction from financial penalties as part of the OFT's leniency scheme.

Rio	£45,049.68	£45,049.68
Solihull	£26,606.25	£26,606.25

PAYMENT OF PENALTY

497. All Parties must pay their respective penalties by close of banking business on 21 May 2004. If any of the Parties fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and determined, the OFT can commence proceedings to recover the required amount as a civil debt.

John Vickers

Chairman