Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/04/2005

Collusive tendering for felt and single ply roofing contracts in Western-Central Scotland

8 July 2005

(Case CE/3344-03)

Since this decision was published, there has been an amendment to the name of one of the parties to Advanced Roofing Systems Limited.

SUMMARY

The Office of Fair Trading (‘the OFT’) has concluded that a number of roofing contractors, as listed in paragraph 1 of the Decision (each a ‘Party’, together ‘the Parties’), colluded in relation to the making of tender bids for felt and single ply roofing contracts in Western-Central Scotland thereby infringing the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 (‘the Act’).

The Parties were involved in individual agreements and/or concerted practices each of which had as its object the fixing of prices in the market for the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland. When a purchaser wished to purchase such services for a flat roof, it typically invited a number of suitably qualified 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’ co-operation and co-ordination 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 and/or concerted practices between undertakings that fix prices by way of collusive tendering (or otherwise) are among the most serious infringements of the Act. Financial penalties are therefore being imposed on all the Parties, subject to the operation of the policy to give lenient treatment for undertakings coming forward with information in cartel cases. In line with this policy Pirie Limited has been granted full immunity from penalty (in recognition of the fact that Pirie was the first party to apply for leniency and voluntarily provide information in connection with the OFT’s pre-existing investigation in this case), and W G Walker & Company (Ayr) Limited by 45 per cent. None of the other parties have applied for leniency. The table in paragraph 384 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].
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I. **THE FACTS**

A. **The Parties**

1. Information received by the OFT (see paragraph 36 below) indicated that the following companies (each a 'Party', together, the 'Parties'), described in more detail in paragraphs 2 to 17 below, engaged in price-fixing in relation to the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland:

   - Pirie Group Limited (including Pirie Limited, Pirie Group Limited and Pirie & Co (Paisley) Ltd) ('Pirie');
   - W G Walker & Company (Ayr) Limited ('Walker');
   - Advanced Roofing Systems Ltd ('Advanced');
   - Geo. Brolly & Co. (Roofing) Ltd. ('Brolly');
   - Bonnington Contracts ('Bonnington'); and
   - McKay Roofing Ltd ('McKay').

**Pirie**

2. Pirie is a group of private limited companies registered in Scotland, whose principal activities concern road surfacing, civil engineering, flooring and roofing contracts.\(^1\) At the time of the infringements, Pirie’s corporate structure was as follows:

   **Diagram 1:**

   ```
   Pirie Group Limited
   
   Pirie Limited
   Pirie & Co (Paisley) Ltd.
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3. Pirie Group Limited was purely a holding company at the time of the infringements. In 2003 Pirie Group Limited was placed in members’ voluntary

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\(^1\) See latest filed report and financial statements for the year ending 31 December 2001.
In January 2001 the felt and single ply work undertaken by Pirie & Co (Paisley) Ltd. was transferred to Pirie Limited.\(^2\) On 3 March 2005 a provisional liquidator was appointed in respect of Pirie Limited, and the company is currently in the process of being wound-up.\(^4\) Pirie Limited’s registered address is 82/84 New Sneddon Street, Paisley, Renfrewshire PA3 2BG.

4. **Pirie** applied for, and was granted, conditional leniency in accordance with the OFT’s leniency programme. As part of Pirie’s application for leniency, Pirie provided the OFT with a memorandum prepared by Mr A\(^5\), an estimator/surveyor of Pirie, sent to the OFT attached to a covering letter dated 2 December 2002.

5. **Pirie’s** turnover for financial years 1999 and 2003 was as follows:\(^6\)

   - 1999 £8,186,500
   - 2003 £7,155,915.

**Walker**

6. **Walker is** a private limited company registered in Scotland involved in the installation of roof frames and roof coverings.

7. **Walker’s** registered address is Hawkhill Works, Somerset Road, Ayr, KA8 9NF.

8. **Walker applied** for, and was granted, conditional leniency in accordance with the OFT’s leniency programme. As part of Walker’s application for leniency, Mr John Crawford Thomson and Mr James Allan Thomson, both senior managers of Walker, made witness statements in relation to Walker’s application for leniency.

9. **Walker’s** turnover for financial years 1999 and 2004 was as follows:\(^7\)

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\(^2\) By email dated 7 September 2004 addressed to the OFT, Pirie’s legal representatives stated that for commercial reasons the company name was changed to M.O.W.E Ltd at some point before it was wound up.

\(^3\) This Decision is without prejudice to the OFT’s position in relation to the possible liability of any successor of Pirie.

\(^4\) See letter dated 26 April 2005 from the liquidator, Mr Derek Forsyth of Campbell Dallas.

\(^5\) Pirie’s legal representatives, MacRoberts, made representations regarding the need for the identity of certain individuals to be anonymised. The OFT duly considered these representations and having regard to the provisions relating to the disclosure of information in Part 9 of the Enterprise Act 2002 and to the particular circumstances of this case, the OFT has withheld the names of individuals within Pirie who provided direct evidence to the OFT in the form of interviews or witness statements.

\(^6\) Financial Analysis Made Easy (‘FAME’) Report for Pirie for the years ended 31 December 1999 and 2003. Figures for the financial year ending 31 December 2004 are not available. Accordingly the 2003 financial year figures are used when calculating penalties in this Decision.

\(^7\) See financial information produced by Walker and included in the documentation submitted to the OFT, dated 20 February 2003 and 7 February 2005. Walker’s turnover figures are confidential and not available from public company information sources. Consequently, the figures are not disclosed in this Decision.
Advanced

10. Advanced is a private limited company registered in Scotland specialising in industrial roofing and cladding, flat and felt roofing solutions. Advanced’s registered address is 201 Mossend Street, Queenslie Industrial Estate, Glasgow, G33 4DJ.

11. Advanced’s turnover for financial years 2000 and 2003 was as follows:

- 2000 £[C]
- 2003 £[C].

Brolly

12. Brolly is a private limited company registered in Scotland specialising in flat and felt roofing and decking. Brolly’s registered address is 9 Peel Lane, Glasgow, G11 5LL. Information on the total turnover for Brolly is not publicly available.

13. Brolly’s turnover for financial years 2000 and 2004 was as follows:

- 2000 £[C]
- 2004 £[C].

Bonnington

14. Bonnington is a private limited company registered in Scotland specialising in flat roofs, pitched roofs and cladding. City Refrigeration Holdings (UK) Ltd (‘City’) is currently Bonnington’s parent company. Bonnington’s registered address is 567 Cathcart Road, Glasgow, G41 1HP.

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8 See the National Federation of Roofing Contractors, www.nfrc.co.uk.

9 See financial information produced by Advanced and included in the documentation submitted to the OFT, dated 26 January 2005. Advanced’s turnover figures are confidential and not available from public company information sources. Consequently, the figures are not disclosed in this Decision. Figures for the financial year ending 31 December 2004 are not available, accordingly the 2003 financial year figures are used when calculating penalties in this Decision.

10 See financial information produced by Brolly and included in the documentation submitted to the OFT, dated 31 March 2005. Brolly’s turnover figures are confidential and not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

11 See http://www.the-internet-pages.co.uk/scotland/glas/build1/bcl2.htm

12 In 1998 City acquired 75 per cent of Bonnington, and on 3 April 2003, City acquired the remaining 25 per cent of Bonnington.
15. Bonnington's turnover for financial years 2001 and 2003 was as follows:¹³

- 2001 £6,491,445
- 2003 £6,610,232.

**McKay**

16. McKay is a private limited company registered in Scotland specialising in industrial roofing and cladding, flat and felt roofing and decking. McKay's registered address is Unit 7, Old Mill Park, Kirkintilloch, Glasgow, G66 1SS.

17. McKay's turnover for financial years 2000 and 2004 was as follows:¹⁴

- 2000 £[C]
- 2004 £[C].

**B. The roofing services industry in the UK – Overview**

18. The Parties supply installation, repair, maintenance and improvement services in relation to flat roofs. In practice, this may mean the provision and management of personnel, equipment and material to facilitate the installation, repair, maintenance and improvement of flat roofs. In addition, flat roofing contractors typically fit rooflights, insulation and vapour control materials and carry out building and timber repairs as part of the job specifications for the flat roofing work they carry out. Therefore, for the purposes of this Decision, references to the installation, repair, maintenance and improvement services in relation to flat roofs includes work of this nature and other work that is reasonably incidental to this main flat roofing work.

19. There are three general types of roofs: flat, metal and pitched. Flat roofs are used in the industrial and commercial property sectors; metal roofs are also used in these sectors; pitched roofs are common in the domestic property sector and in some segments of the commercial property sector.¹⁵

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¹³ FAME online business service. Figures for the financial year ending 31 December 2004 are not available, accordingly the 2003 financial year figures are used when calculating penalties in this Decision. Figure for 2001 is for 31 March 2001 (10 month) accounts.

¹⁴ See financial information produced by McKay and included in the documentation submitted to the OFT, dated 17 March and 27 April 2005. McKay's turnover figures are confidential and not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

20. Flat roofing may be characterised in terms of the materials normally employed as coverings. The materials used for flat roof coverings fall into four broad categories:  

- bituminous felt (referred to in this Decision as felt);
- single ply PVC membranes (referred to in this Decision as ply or single ply);
- mastic asphalt; and
- liquid applied roofing systems.  

21. Bituminous felt flat roof coverings are designed to be fixed onto the surface deckings of flat roofs to protect them from the elements. They are supplied in a wide variety and combination of materials with effective lives of up to approximately 20 years.

22. Single ply PVC membrane flat roof coverings accomplish the same basic function as felt coverings, but have several advantages over felt, such as simple installation, the ability of the covering to move more freely and a low installation cost.

23. Mastic asphalt, whether of the ‘traditional’ (i.e. non-polymer modified) or the polymer modified specification, has a variety of applications in the construction industry. These specifications include roofing, flooring and paving. None of the contracts that have come to the attention of the OFT in the context of this investigation have involved tenders for the provision of such mastic asphalt services.

24. Liquid applied roofing systems form a further category of flat roof waterproofing coverings. These normally consist of fluid plastic materials that are typically applied by spray or brush to the receiving surface and which provide a seamless waterproof covering when they solidify. None of the contracts that have come to the attention of the OFT in the context of this investigation have involved tenders for the provision of such services.

25. The differences between felt and single ply flat roof coverings and mastic asphalt coverings are discussed further in the section dealing with product market definition at paragraphs 57 to 72 below.

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16 Statement by Ivan Jerram, Chartered Quantity Surveyor, dated 30 April 2003 (‘the 2003 Statement’), at paragraph 12. Ivan Jerram was initially engaged by the OFT in the context of an earlier investigation by the OFT into collusive practices (in the flat roofing sector in the West Midlands) to provide a technical overview of the flat roof coverings contracting market and to review the technical details of the relevant contracts: see Decision No CA98/1/2003 - Collusive tendering in relation to contracts for flat-roofing services in the West Midlands, March 2004 (Case CP/0001-02).

17 Deck proofing, metal, and hot melt are less commonly used types of flat roofing products. None of the infringements particularised in this Decision have involved tenders for the provision of such services.
26. While bituminous felts, single ply membranes and mastic asphalt are used in the construction of flat roofs, felt products dominate the flat roofing industry and accounted for approximately 80 per cent of the flat roofing industry from 1999 until 2003.

27. Industrial and commercial construction, where flat roofs and metal roofs are used, accounted for 74 per cent of the total roofing industry in the UK in 1999; in 2003, it accounted for 79 per cent of the total roofing industry. It is believed that this growth is due to increased construction of supermarkets, out-of-town retail parks and warehouses. Because of its significant role within the industrial and commercial sectors, the felt flat roofing segment is significant.19

28. There has been strong growth in the roofing contracting industry in the UK over the past few years with nominal growth between 1999 and 2003 taking the value of the industry to £1,625.6 million in 2003. New construction accounted for an estimated 50 per cent of the total roofing contracting industry in 2003, with a value of £807.9 million in that year. Repair and maintenance of public buildings (non-residential) accounted for 9 per cent of the roofing contracting industry in 2003, with a value of £144.8 million. The repair and maintenance of private buildings (non-residential) was valued at £326 million in 2003.

29. There is a high degree of fragmentation in the roofing contracting industry with approximately 74 per cent of companies having a turnover of less than £250,000 in 2003. Only eight per cent of the industry (470 companies) had turnovers of more than £1 million in 2002 and 2003, although 50 companies had turnovers of more than £5 million in 2002 and 60 companies had turnovers of more than £5 million in 2003.20

30. In 2002, some 69 per cent of contractors in the roofing contracting services industry employed three people at most, whilst only 13 contractors employed more than 80 people.21

C. Procurement process for flat roofing services

31. The services of contractors who specialise in the installation, repair, maintenance and improvement of flat roofs are usually procured through a competitive

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18 Mastic asphalt contracts were dealt with in the OFT’s recent decision in relation to “Collusive tendering for mastic asphalt flat-roofing contracts in Scotland” dated 15 March 2005 (‘Scottish Roofing Decision’).


21 Ibid, at paragraph 7.3.
tendering process whereby local authorities and private managing agents, architects and surveyors invite a number of contractors to submit sealed competitive bids. An essential feature of the tendering system is that prospective suppliers prepare and submit tenders or bids independently and tendering procedures are designed to provide competition in areas where it might otherwise be absent. Public authority tendering is subject to European Community22 and UK public procurement rules.

32. The Competition Appeal Tribunal ('CAT') recently made the following observations concerning the procurement process for flat roofing services23:

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

The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to certify that they have not had any contact with each other in the preparation of their bids. [...] The competitive tendering process may be interfered with if tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants."

33. In certain circumstances contractors are expressly required to confirm that no collusive co-ordination took place before the submission of the tender bids. For example in the Elizabeth Martin Clinic contract, Brolly signed a Certificate of Bona Fide Tender, see paragraph 145 below. Where work is sub-contracted, the main contractor may also require some form of non-collusion declaration to be completed.

34. Collusive tendering or bid-rigging eliminates competition amongst suppliers by fixing prices and/or sharing markets and infringes the Chapter I prohibition. There are generally four types of anti-competitive arrangements that can result in a pre-selected supplier winning a contract:


• Cover bidding (or cover pricing) occurs when a supplier submits a tender price for a contract that is not intended to win the contract but has been arrived at by arrangement with another supplier who wishes to win the 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 either to 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; and

• Market division or sharing occurs when suppliers agree amongst themselves not to compete in designated geographic regions or for specific customers or contracts.

35. The OFT notes that in the absence of a formal sub-contracting relationship, there is no legitimate 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 those managing the tendering process.24

D. Investigation and proceedings

36. In December 2001 it appeared to the OFT, from information received from Briggs in relation to another case concerning collusion amongst roofing contractors in the West Midlands,25 that roofing contractors were involved in collusive tendering in relation to contracts for the supply of installation, repair, maintenance and improvement services of mastic asphalt contracts in Scotland, which lead to the Scottish Roofing investigation and decision in March 2005.26

37. Information received during the mastic asphalt Scottish Roofing investigation indicated that Pirie, Walker, Advanced, Brolly, Bonnington and McKay were engaged in various collusive tendering agreements and/or concerted practices (as specified in paragraphs 106 to 237 below), whereby the Parties engaged in collusive tendering in relation to the tender prices submitted to local authorities and private undertakings for the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-

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25 The West Midlands case referred to is Competition Act 1998 Decision number CA98/1/2004 in case CP/0001-02, “Collusive tendering in relation to contracts for flat-roofing services in the West Midlands”, dated 16 March 2004 (the West Midlands Roofing Decision).
26 See footnote 18 above.
Central Scotland. Pirie and Walker applied for and were granted conditional leniency in accordance with the OFT’s leniency programme (see, respectively, paragraphs 4 and 8 above).

38. The evidence also indicated that some of the Parties had engaged in collusive tendering activities for other flat roof covering services in the UK, which resulted in the initiation of a further separate investigation by the OFT, which is ongoing.

39. Price-fixing and market-sharing agreements or concerted practices infringe 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’. Price-fixing may involve fixing either the price itself or of one or more of the components of a price, and may also take the form of an agreement and/or concerted practice to restrict price competition. An agreement and/or concerted practice may therefore constitute a price-fixing agreement and/or concerted practice where it restricts price competition even if it does not entirely eliminate it.27

Section 28 inspections

40. On 8 October 2002, the OFT decided that there were reasonable grounds for suspecting that a group of flat roofing contractors had been engaged in collusive tendering activities in relation to the supply of installation, repair, maintenance and improvement services for flat roofs (and other flat surfaces) in Scotland thereby infringing the Chapter I prohibition. The OFT then began a formal investigation under the Act, 28 (which ultimately resulted in the Scottish Roofing Decision). On 12 November 2002, the OFT obtained warrants from the Court of Session to enter and search the premises of Pirie and Walker under section 28 of the Act on 20 November 2002.29

Section 27 inspections

41. As a result of the above investigations into flat roofing in 2002 (West Midlands Roofing Decision) and mastic asphalt roofing in 2002 (Scottish Roofing Decision), a separate investigation was commenced, and on 9 September 2003, the OFT authorised officials to enter the premises of Rennie Roofcare Ltd (‘Rennie’),

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28 Section 25(2) of the Act (section 25, as it was at the time) empowers the OFT to conduct an investigation where it has reasonable grounds to suspect that the Chapter I prohibition has been infringed. The Act has been amended recently by SI 2004/1261 – The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004. Since this investigation took place prior to this amendment, references to the Act in this Statement refer to the Act prior to the amendments.

29 Under section 28 of the Act as it applied prior to 1 May 2004, having obtained a warrant from a High Court judge or the Court of Session, the OFT may enter and search an undertaking’s premises.
Advanced, Bonnington, Brolly and McKay under section 27 of the Act. Unannounced visits\textsuperscript{30} to these premises took place on 15 and 16 October 2003. No evidence has been obtained to show to the requisite standard that Rennie committed any infringement of the Chapter I prohibition and therefore it is not included as a Party in this Decision.

Information obtained not using formal powers

42. At various points during the OFT’s investigation, voluntary statements were also obtained from the following third parties that invited tenders for roofing work on certain contracts:

- Clydesdale Bank PLC (‘Clydesdale Bank’) on 17 December 2003;
- Renfrewshire and Inverclyde Primary NHS Trust on 25 November 2003;
- Danobe Securities Ltd on 1 December 2003;
- Argyll and Bute Council on 24 November 2003; and
- Mansell Maintenance Ltd (this company was a subsidiary of Mansell plc, which includes Mansell Construction Services, which is no longer trading) on 25 November 2003.

43. Additional information was also produced by leniency applicant Pirie:

- a memorandum prepared by Mr A, an estimator/surveyor of Pirie sent to the OFT attached to a covering letter dated 2 December 2002.

44. The OFT carried out a number of interviews during its investigation, as detailed below:

- Mr A\textsuperscript{31}, an estimator/surveyor of Pirie, on 1 April 2003;
- Mr John Crawford Thomson, a senior manager of Walker, on 26 February 2003; and
- Mr James Allan Thomson, a senior manager of Walker, on 20 November 2002.

45. On 21 January 2005 a Statement of Objections under rule 14(1) of the OFT’s procedural rules\textsuperscript{32} (‘the Statement’) was issued to all the Parties. Walker, Brolly and McKay chose to make written representations to the OFT in response to the Statement in relation to the facts and conclusions set out in the Statement and/or in relation to the level of penalty that the OFT might impose for the infringements alleged. Advanced and Bonnington wrote to the OFT but did not make any formal

\textsuperscript{30}Section 27 of the Act gives powers to enter premises without a warrant, with or without notice to require, among other matters, the production of documents.

\textsuperscript{31} See footnote 5.

written representations. Nevertheless, their comments are considered in this Decision. Pirie did not submit any written representations. None of the Parties made oral representations to the OFT.

E. The contracts

46. The table below sets out, for each of the infringements specified by the OFT in paragraphs 106 to 237 below, the contract in question, the customer/main contractor that requested the work to be undertaken, the participants in the infringement, and the date that the contract in question was put out to tender. In each case in the 'Participants' column, the contractor receiving cover bids from the other contractors in order to secure the contract is highlighted in bold.\(^{33}\)

<table>
<thead>
<tr>
<th>Contract</th>
<th>Customer/ main contractor</th>
<th>Participants</th>
<th>Put out to tender</th>
<th>Award of contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hermitage Academy</td>
<td>Argyll and Bute Council</td>
<td>Pirie</td>
<td>February 2001</td>
<td>February 2001 tender discontinued.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Brolly</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Drummond House</td>
<td>Danobe Securities Ltd</td>
<td>Brolly</td>
<td>March 2002</td>
<td>Brolly</td>
</tr>
<tr>
<td>Elizabeth Martin Clinic</td>
<td>Renfrewshire and Inverclyde Primary Care NHS Trust</td>
<td>Brolly</td>
<td>December 2000</td>
<td>Brolly</td>
</tr>
<tr>
<td>Royal Bank of Scotland</td>
<td>Mansell Maintenance Ltd</td>
<td>Bonnington Walker</td>
<td>June 2001</td>
<td>Unknown</td>
</tr>
<tr>
<td>Clydesdale Bank Castlemilk contract</td>
<td>Clydesdale Bank</td>
<td>Pirie McKay Walker</td>
<td>May 2000</td>
<td>Unknown</td>
</tr>
<tr>
<td>Clydesdale Bank Cardonald contract</td>
<td>Clydesdale Bank</td>
<td>Pirie McKay Walker</td>
<td>May 2000</td>
<td>Unknown</td>
</tr>
<tr>
<td>Clydesdale Bank Johnstone contract</td>
<td>Clydesdale Bank</td>
<td>Pirie Walker</td>
<td>May 2000</td>
<td>Unknown</td>
</tr>
<tr>
<td>Clydesdale Bank Troon contract</td>
<td>Clydesdale Bank</td>
<td>Pirie Walker</td>
<td>May 2000</td>
<td>Unknown</td>
</tr>
</tbody>
</table>

\(^{33}\) For some contracts it has not been possible to identify all the main contractors invited to tender for the main contract. In some cases this has been because the work never proceeded and therefore the paperwork relating to the contract was destroyed. In other cases it has been due to the fact that the work was completed and the paperwork is no longer available.
II. LEGAL AND ECONOMIC ASSESSMENT

A. Structure of this section

47. The background to the contracts and the evidence in relation to them on which the OFT relies are set out at paragraphs 106 to 237 below. This section begins by introducing the economic and legal framework against which the OFT has considered the evidence. The section then sets out, in relation to each infringement, the facts of each contract, the evidence, the OFT’s initial analysis of the evidence it relies on, the Parties’ representations (if any) on that evidence and analysis and finally the OFT’s conclusions in relation to the infringements having considered the Parties’ representations.

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

B. Introduction

49. 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 UK 34 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 practices which directly or indirectly fix selling prices.35

50. 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. 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.36 As noted by the CAT in Apex;

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

34 Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or 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.
35 Section 2(2) of the Act.
(a) it reduces the number of competitive bids submitted in respect of that particular tender;

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

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

(d) it gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.” 37

C. Application of Article 81 – effect on interstate trade

51. Following the entry into application of Council Regulation (EC) No 1/200338 on 1 May 2004, the OFT is required when applying national competition law to agreements and/or concerted practices between undertakings which may affect trade between Member States also to apply Article 81 EC Treaty.39 Since the infringing agreements and/or concerted practices particularised in this Decision were all terminated before 1 May 2004, however, the OFT does not consider it is under a duty to apply Article 81 to the particular circumstances of this case. Accordingly, the OFT has not considered whether trade between Member States may have been appreciably affected, and this Decision relates solely to whether the Chapter I prohibition has been infringed.

D. Application of section 60 of the Act

52. 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 and whether or not it would otherwise be required to do so) with a view to ensuring 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.

37 Apex, at paragraph 251.
E. The relevant market

i. Introduction

53. The OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and has as its object or effect the prevention, restriction or distortion of competition.\(^40\) No such obligation arises in this case because it involves agreements and/or concerted practices that had as their object the prevention, restriction or distortion of competition by way of price-fixing. Nevertheless, the OFT does define the market for the purposes of assessing the appropriate level of penalties.\(^41\)

54. The OFT notes in this context the CAT’s comments in its recent penalty judgment in the Argos Limited & Littlewoods Limited v Office of Fair Trading,\(^42\) case in which it was held that:

"In our judgment, it follows that in Chapter I cases involving price-fixing it would be inappropriate for the OFT to be required to establish the relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition. In a case such as the present, definition of the relevant product market is not intrinsic to the determination of liability, as it is in a Chapter II case. In our judgment, it would be disproportionate to require the OFT to devote resources to a detailed market analysis, where the only issue is the penalty.

[...] In our view, it is sufficient for the OFT to show that it had a reasonable basis for identifying a certain product market for the purposes of Step 1 of its calculation."

55. In order to define the market, one must first consider the competitive pressures faced by companies active in that market. A market definition is established by analysing the closest substitutes to the product that is the focus of the investigation. These products are usually the most immediate competitive

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\(^{40}\) Case C-388/00 P Volkswagen AG v Commission of the European Communities, OJ [2003] C264/04, Case T-62/98 Volkswagen AG v European Commission [2000] ECR II-2707, paragraph 230. and Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 74. These cases refined the CFI’s earlier position adopted in Case T-68/89 etc, Societa Italiana Vetro SpA etc v Commission (Italian Flat Glass) [1992] ECR II 1403, paragraph 159, drawing a distinction between cases involving abuse of dominance, where market definition is always a prerequisite to a finding of an infringement, and cases involving anti-competitive agreements, where the market need only be defined where it is impossible, without such a definition, to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

\(^{41}\) See OFT Guideline 423, ‘OFT’s guidance as to the appropriate amount of a penalty’, December 2004.

constraints on the behaviour of the undertaking controlling the product in question.  

56. The OFT is not bound by market definitions adopted in previous cases, either by itself or by other competition authorities. Sometimes earlier definitions can be informative when considering the appropriate market definition. However, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.

ii. The relevant product market

57. As noted in the industry overview section at paragraphs 18 to 30 above, flat roof coverings fall into four broad categories: felt; single ply PVC membranes; mastic asphalt; and liquid applied roofing systems. The process of defining the relevant market starts with the product that is the subject of the investigation. In this case, this is the supply of installation, repair, maintenance and improvement services for a variety of flat roof weatherproofing coverings.

58. In an earlier decision in the roofing sector, the OFT considered that the appropriate product market definition was the supply of, installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs. The OFT considered in its Statement that this was also the appropriate relevant product market definition in this case.

59. Walker made representations that, due to demand-side and supply-side substitution considerations, felt and single ply should be further sub-divided into two separate product markets of felt, on the one hand, and single ply on the other.

60. In relation to demand-side substitution, Walker argues that in certain cases due to architectural considerations, felt and single supply would not be substitutable. However, the OFT notes that Walker have not provided any evidence to corroborate this assertion. Further, the OFT notes that even if this were the case for isolated projects, it does not follow that the OFT’s approach is incorrect. In addition, Walker suggests that there is a “major safety advantage to single ply”, in

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44 Ibid, at paragraph 5.7, and Aberdeen Journals Limited v Director General of Fair Trading (No. 1) [2002] CAT 4, at paragraph 139.
45 Ivan Jerram (see footnote 16 above) made a second statement to the OFT on 5 October 2004 (‘Ivan Jerram’s 2004 statement’): see paragraph 9 of Ivan Jerram’s 2004 Statement.
46 The case referred to is the Competition Act 1998 Decision (CA98/02/2005) ‘Collusive tendering for felt and single ply flat-roofing contracts in the North East of England’ dated 16 March 2005 (‘the North East Roofing Decision’).
that felt requires the use of a naked flame for installation. The OFT does not consider this safety argument to be persuasive, because, if properly applied, there should be no safety risks in relation to the installation of felt. In this context, the OFT notes that this view is supported by the fact that the vast majority of felt flat roof coverings are indeed felt coverings (see paragraph 26 above).

61. In relation to supply-side substitution, Walker argues\(^{49}\) that most roofing contractors will either specialise in felt or single ply, and “supplies of both felt and single ply [by one company] is not common in the industry”. However, the OFT notes that Walker have not provided any statistical evidence to corroborate this assertion, and indeed the OFT observes that five of the six Parties in this Decision (some of which are relatively small undertakings) undertake the supply of felt and single ply roofing coverings, indicating that it is not as uncommon as Walker suggests for contractors to provide both types of roofing.

62. Walker further argues that “a roofing contractor cannot enter the single ply market without incurring substantial sunken costs”. According to Walker, these include specialist tooling materials of approximately £5,500 - £7,500 (for 3 employees), and a one-week training course costing approximately £1,000 per employee. The OFT agrees that certain equipment and training and qualifications are required for the provision of felt and/or single ply roofing services. However, the tooling and training costs can be obtained undertaken in a relatively short period of time (as confirmed by Walker). Further, the associated costs could be recouped within a reasonable period of time, thus enabling a roofer qualified in one type of covering to switch relatively easily and quickly to the other.

63. Walker also argues that it takes up to 3 to 5 years for a contractor to build up goodwill to supply felt and/or single ply roofing services. The OFT is not persuaded by this argument, as no evidence has been provided to corroborate this assertion. In addition, given that the Parties operate in a small regional market, with cross-selling opportunities, the OFT does not consider it would take this length of time for a contractor to become established in a different area of roofing.

64. Finally, Walker states that due to “stringent quality control procedures” a single ply installation is more expensive and therefore not substitutable with felt. Walker has not provided any cost information to support this argument, or to establish that the cost differential is significantly substantial. Although quality control standards may be more stringent for single ply services, the OFT does not consider this a sufficient basis to further sub-divide the market into felt, on the one hand, and single ply, on the other, especially given the similarities between felt and single ply, discussed below.

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\(^{49}\) Paragraph 3(b) of Walker’s representations dated 21 March 2005, in response to the Statement.
65. The OFT considers that Walker’s representations may have been based on an erroneous understanding of the hypothetical monopolist (SSNIP) test. Walker may have assumed that all (rather than a marginal number of) customers need to switch in order to widen the market definition. The OFT notes that if roofing contractors increased the price of, for example felt, above the competitive level, there would be some customers who would value the slightly different functionality of felt so highly that they would not switch. But the more important issue is whether a sufficient number of customers willing to switch to single ply (marginal customers) would make it unprofitable to raise the price of felt. A sufficiently high number of marginal customers switching would mean that felt and single ply are in the same relevant market.

66. In relation to the demand-side substitution, and in particular price, the OFT notes that one party in the North East Roofing Decision stated “a small but significant change in the price of ply will shift demand to felt”, demonstrating that they are likely to be in the same market.\(^{50}\)

67. None of the other Parties have made representations arguing for a narrower market definition. The OFT therefore considers that the prices, characteristics and usages of felt and single ply coverings are significantly similar for these types of coverings to be substitutable for the purposes of determining the relevant product market in the context of assessing the appropriate amount of a penalty in this case.

68. In addition, the OFT does not consider that felt and single ply should be further sub-divided as there are significant similarities between the characteristics and usages of felt on the one hand and single ply coverings on the other.

- Felt and single ply materials are pre-formed sheets and minimal specialist skills are required to install them;
- Felt and single ply coverings are similarly very light per square metre;
- The average service life of a felt or single ply roof are very similar;
- Felt and single ply roofs are not sufficiently durable to allow for more than occasional maintenance work or emergency exit routes.

69. On the supply side, the skills and equipment involved in supplying felt and single ply flat roof coverings overlap to a significant extent and many builders are able to install both felt and single ply flat roofs. Indeed, all but one of the Parties in this Decision supplied both felt and single ply flat roofing services. In a statement to the OFT, Ivan Jerram (chartered quantity surveyor engaged by the OFT) confirmed

\(^{50}\) See North East Roofing Decision dated 17 March 2005, paragraph 128.
that “although different types of flat roofing materials have certain specialist uses, it is technically feasible to substitute some or all types of flat roofing for one another”.\textsuperscript{51} Although training and qualifications are required for both felt and single ply roofing, the qualifications for felt and single ply are relatively similar, so that a roofer qualified in one type of covering would be readily able to switch to the other with only a relatively small amount of training.

70. Representations were also received from Walker arguing that domestic customers should be excluded from the relevant market, as none of the contacts referred above relate to domestic contacts. However, the OFT does not analyse the market in terms of those contracts in which the parties are implicated, but in relation to competitive pressures, as discussed in paragraph 55 above. On the supply-side, the OFT considers that the skills and materials required to supply roofing installation for domestic use are the same as those required for commercial use. No evidence or reasoning has been provided that would lead the OFT to alter its conclusion that based on supply-side substitutability, domestic contracts form part of the same market as commercial contracts in the maintenance, replacement installation of felt and single ply coverings for flat roofs. In addition, Walker has not provided any evidence to support its assertion that roofing contractors only specialise in either domestic or commercial contracts.

71. In addition, pursuant to an earlier decision in the roofing sector,\textsuperscript{52} the OFT is of the view that there are significant differences between the characteristics and usages of mastic asphalt on the one hand and felt and single ply coverings on the other. In relation to other types of alternative flat roofing materials, in particular deck proofing, metal, hot melt and liquid applied roofing products, the OFT has insufficient facts available to it to determine whether these products form part of the same market as felt/single ply or mastic asphalt, or whether they form one or more separate product markets. The OFT has therefore reached no firm conclusion as to the extent of the felt/single ply market, and it is not necessary for the OFT to do so in order to determine whether there has been an infringement of the Chapter I prohibition.\textsuperscript{53} For the purpose of calculating penalties, in order to avoid any detriment to the Parties due to the insufficiency of information available to the OFT, relevant turnover will be calculated on the basis of the narrow market definition of felt and single ply coverings for flat roofs. Turnover in respect of other flat roof covering types will not be included when calculating penalties.

72. In summary, for the purposes of this Decision, the OFT therefore remains of the view that on balance the relevant product market is the supply of installation,

\textsuperscript{51} Ivan Jerram’s 2003 Statement, paragraph 24. See also footnote 16.
\textsuperscript{52} In relation to mastic asphalt, see Scottish Roofing Decision dated 15 March 2005, and Ivan Jerram’s 2004 Statement. In relation to felt and single ply see North East Roofing Decision dated 17 March 2005.
\textsuperscript{53} See paragraph 53.
repair maintenance and improvement services for felt and single ply coverings for flat roofs.

iii. The relevant geographic market

73. When defining the relevant geographic market, the OFT uses a similar approach to defining the relevant product market. The investigation in this case relates to a series of individual agreements and/or concerted practices in relation to contracts for felt and single ply coverings for flat roof coverings in Western-Central Scotland, including Glasgow City Council, East and West Dunbartonshire, North and South Lanarkshire, Renfrewshire, East Renfrewshire, Argyle and Bute, North and East Ayrshire, and Inverclyde.

74. The OFT notes that there are many variables which influence a roofing contractor’s decision as to how far to travel to work on any given project, which include capacity constraints and the relative costs of contracting further away.

75. In relation to capacity constraints, variables include the amount of work a contractor has in its immediate locality at any one time, more particularly the level of definite future work in its order book and the level of prospective work gauged by the level of incoming tender invitations.

76. In relation to relative costs of contracting further away, the monetary value, duration or prestige of a prospective contract is likely to encourage travel over long distances. However, other variables which must be taken into account include travel costs, delay on getting on lists, difficulty in securing local labour, and potential costs of damaging standing relationships. For example, a roofing contractor may have longstanding business relationships as a sub-contractor to certain firms of main contractors, e.g. a roofing contractor may be engaged to provide the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs for an employer who has several buildings spread over a wide geographical area.

77. Work in large geographic or rural areas (such as some parts of Scotland) with relatively few concentrated centres of population may necessitate lengthier travel.

78. The OFT considers that a customer in Western-Central Scotland would typically invite tenders from suppliers in the same area for the majority of contracts, although it recognises that in certain circumstances customers may request and contractors may provide roofing services from outside their immediate locality. Buyers such as local authorities, colleges and main contractors seeking sub-contractors to carry out flat roofing works typically maintain lists of approved contractors (‘standing lists’) to which invitations to tender may be sent. Before a

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54 See OFT Guideline 403 ‘Market Definition’, December 2004, paragraph 4.3.
contractor is added to a standing list, a series of checks is usually carried out. These checks include reviewing the contractor’s accounts, health and safety policy and records and ensuring that the contractor is properly insured. A contractor is also usually required to provide product and workmanship guarantees. It may take a contractor up to six months to be added to a local authority’s standing list.

79. A contractor from outside the area seeking inclusion on a standing list would face delays resulting from the carrying out of the checks detailed above. In addition, such a contractor would be further from the work site than local contractors and, therefore, would have to establish a local base or travel from further away and absorb additional transport costs. This factor has often led to regional market definitions in relation to various building products. Further, contractors from outside the area may have more difficulty securing local labour resources, particularly on a temporary basis, than firms already established in the area because of the shortage of labour generally available in the UK.55

80. For these reasons, the OFT considers that a buyer in the Western-Central Scotland would usually choose a supplier with a presence in the same area and, accordingly, the OFT finds that the relevant geographic market is Western-Central Scotland.

81. Although the OFT recognises that competition does not take place according to administrative boundaries, for the purposes of calculating ‘relevant turnover’ and determining penalties, it is necessary to adopt a precise definition of the ‘Western-Central Scotland’. For the purposes of calculating turnover, the OFT considers Western-Central Scotland comprises Glasgow City Council, East and West Dunbartonshire, North and South Lanarkshire, Renfrewshire, East Renfrewshire, Argyle and Bute, North and East Ayrshire, and Inverclyde.

iv. The relevant market - conclusion

82. The OFT finds that the relevant market for the purposes of this Decision is the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland.

F. Undertakings

83. 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 held to cover “any entity

55 According to the Construction Industry Training Board’s (CITB) Skills Needs Survey, published 30 April 2003, 79 percent of construction employers nationally said that they had experienced difficulties recruiting skilled staff in the previous few months. The problem appeared to be particularly acute in relation to recruitment on a ‘project by project’ basis, which is common throughout the construction industry and is where most skills shortages occur. See www.citb.org.uk.
engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.\(^{56}\)

84. The OFT therefore considers that the Parties referred to at paragraph 1 above all constitute undertakings for the purposes of the Act.\(^{57}\)

G. Relevant case law in relation to agreements and/or concerted practices between undertakings

85. An 'agreement' does not have to be a formal written agreement to be covered by the Chapter I prohibition. The prohibition is intended to catch a wide range of agreements and/or concerted practices, including oral agreements and 'gentlemen’s agreements' as, by their nature, anti-competitive agreements are rarely in written form.\(^{58}\) This is irrespective of the manner in which the parties’ intention to behave on the market in accordance with the terms of that agreement is expressed.\(^{59}\)

86. A finding of an agreement and/or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement,\(^{60}\) the parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement that is manifestly anti-competitive does not relieve that party of responsibility for it.\(^{61}\)

87. The OFT considers that the individual infringements covered by this Decision each took the form of an agreement and/or concerted practice to fix prices, thereby infringing the Chapter I prohibition.


\(^{57}\) Case 22/71 Beguelin Import v GL Import Export [1971] ECR 949, [1972] CMLR 81. An agreement between a parent and its subsidiary company or between two companies under the control of a third will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and although having a separate legal personality, enjoys no economic independence.

\(^{58}\) See the OFT Guideline 401 'Agreements and Concerted Practices', December 2004 at paragraph 2.7. See also the judgment of the ECJ regarding gentlemen’s agreements in Case C-42/69 ACF Chemiefarma NV v European Commission [1970] ECR 661 (in particular, paragraphs 106-114). Also the European Commission in, for example, its decision in Citric Acid Cartel [2002] OJ L239/18, 6 September 2002, paragraph 137.

\(^{59}\) Joined cases T-305/94 etc. Limburgse Vinyl Maatschappij NV and others v Commission ('PVC II') [1999] ECR II-931 at paragraph 715.


i. **Agreements**

88. An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action.62

89. There is no requirement for the agreements to be legally binding or formal, nor for them to contain any enforcement mechanisms.63 An agreement may be express or implied from the conduct of the parties.64 As held by the European Court of First Instance (‘the CFI’), for an agreement to exist:

"[I]t is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way."65

90. An agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct.66

ii. **Concerted practices**

91. The Chapter I prohibition also applies in respect of concerted practices. A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice has been defined by the ECJ 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."67

92. Economic operators are required to maintain independence. This requirement of independence strictly precludes:

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"any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market." 68

93. Whilst the concept of a concerted practice implies the existence of reciprocal contracts, the CFI has held 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." 69

94. 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 70. The ECJ has stated that there is a presumption (which it is for the parties to rebut) that an undertaking which remains active on the market has taken into account information exchanged with their competitors in determining their conduct on that market 71.

95. The Commission clearly stated in the case of British Sugar 72 that, there can be a concerted practice in the absence of an actual effect on the market. In Hüls 73 the ECJ held that a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market. 74

96. All of the principles set out in paragraphs 91 to 95 above were cited with approval by the CAT in Apex. 75 In addition, the OFT has taken into account the CAT’s summary of the law relating to the notion of agreements and concerted practices set out in Replica Kits 76 and Toys. 77

72 British Sugar plc, Tate & Lyle plc, Napier Brown & Co Ltd James Budgett Sugars Ltd OJ [1999] L 76/1, [1999] 4 CMLR 1316, paragraph 95, substantially upheld on appeal to the CFI in Cases T-202/98 etc, Tate & Lyle v Commission [1975] ECR II-2035,(2001] 5 CMLR 859, and on appeal to the ECJ, Case C-359/01 P.
74 For example, where a concerted practice to fix prices in relation to the tenders submitted for a contract has been implemented but where the contract is never actually awarded.
75 Apex judgment, at paragraph 206.
76 Replica Kits, paragraphs 150-163.
iii. Agreement 'and/or' concerted practice

97. The ECJ has also confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.\(^78\) The concepts of agreement and/or concerted practice are not mutually exclusive and there is no rigid dividing line between the two, they are intended:

"to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves."\(^79\)

98. This is particularly the case in complex infringements involving a series of measures by several undertakings over a period of time which manifests itself both in agreements and/or concerted practices with a common objective. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the parties specifically constitutes an agreement and/or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

99. The CAT has confirmed most recently in its judgments in both *Replica Kits*\(^80\) and *Toys*\(^81\) that it is indeed a general principle that such a characterisation is unnecessary:

"It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other."

100. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement and/or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

iv. Burden and standard of proof

101. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp*\(^82\) that;

"95...As regards the burden of proof, the Director\(^83\) accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof

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\(^81\) *Toys*, paragraph 665.

\(^82\) *Napp Pharmaceutical Holdings Ltd v DGFT*, [2002] CAT 1 paragraphs 95 and 100. The CAT confirmed this approach in the recent *Replica Kits* judgment, at paragraph 164. See also paragraphs 928 and 931.
remains on him throughout. However, that does not necessarily prevent the operation of certain evidential presumptions...

100. In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged."

102. In considering the standard of proof required to establish the infringements outlined in this Decision, the OFT has taken note of the ruling by the CAT in the *Replica Kits* appeals.84 The CAT stated that;

"204. It also follows that the reference by the Tribunal to “strong and compelling” evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled."

103. The CAT also notes in the same judgment;

"206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in *Claymore Dairies*85 that cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see *Claymore Dairies* at [3] to [10]...86 As the Court of Justice said in Cases 204/00P etc. *Aalborg Portland v European Commission*, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:

"55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction..."

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83 References to the ‘Director’ are to the Director General of Fair Trading. As from 1 April 2003, the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.

84 *Replica Kits*, at paragraph 204. See also *Toys* judgment, at paragraphs 164 and 165.


86 See also, for example, the opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc v European Commission* [1991] ECR-II at p. 867; and *Cimenteries* (see footnote 69 above).
57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."

207. We note also that since the coming into force of the Regulation 1/2003 on 1 May 2004 the Act as amended envisages the possibility of the OFT imposing penalties for breaches of Articles 81 or 82 of the EC Treaty, as part of the European system established by that Regulation. That reinforces our view that the standard of proof we apply should not be out of line with that applied by the Court of First Instance and Court of Justice when considering an appeal against a decision of the European Commission: see Napp at [112]. In our view Aalborg Portland, cited above, confirms the approach we have adopted."

(Emphasis added).

104. In using the term ‘strong and compelling’ to describe its evidence in paragraph 258 below, the OFT has followed the same principle. The OFT considers that the evidence analysed below is sufficient to overcome the presumption of innocence to which the Parties are entitled.

H. The evidence of agreement and/or concerted practice for each individual contract and the OFT’s analysis of the evidence

105. This section sets out the evidence and OFT’s conclusions on the evidence relating to each contract, having considered the views of the undertakings involved in each contract.

i. Hermitage Academy

Facts

106. On 31 January 2001, at the request of the Education Department of Argyle and Bute Council (‘the Council’), the Property Services Department of the Council invited Pirie, Advanced, Brolly, Clark Contracts Limited and Old Mill Holdings to tender for the re-roofing of the flat roof of the main block at the Hermitage Academy.87 The Council also specified that the tenders should be based on either the Anderson waterproofing system or the Imper-Roof felt product,88 and estimated that the work would cost £78,000.

107. Up until May 2002 the Council selected contractors from its own approved contractors list.

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87 See ‘Tender Record Sheet’ produced by Alasdair Lewis, Property Services Manager of Argyll and Bute Council to support his witness statement, dated 24 November 2003.
108. The following bids were returned on the tender return date, 7 February 2001, and Mr Alasdair Lewis, Property Services Manager for the Council recommended that the contractor having submitted the lowest bid, Pirie, should be awarded the contract:89

<table>
<thead>
<tr>
<th>Contractor</th>
<th>Bid (£)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advanced</td>
<td>121,861.87</td>
</tr>
<tr>
<td>Clark Contracts Limited</td>
<td>126,620.76</td>
</tr>
<tr>
<td>Brolly</td>
<td>115,649.77</td>
</tr>
<tr>
<td>Old Mill Holdings</td>
<td>No bid returned</td>
</tr>
<tr>
<td>Pirie</td>
<td>102,124.04</td>
</tr>
</tbody>
</table>

109. The contract was subsequently re-tendered in December 200190 (due to reasons unrelated to the first tender round), where Pirie was again the preferred contractor. In any event, due to budget constraints a different specification was eventually negotiated with Pirie, and the Council confirmed the re-negotiated figure of £59,342.85 in a letter to Pirie, dated 22 January 2002.91 The infringement relates to the first tender round outlined in paragraph 108 above.

**Evidence of agreement and/or concerted practice**

110. Evidence from leniency applicant Pirie. Document entitled, “Description of works – Re-roofing works Hermitage Academy School, Helensburgh – Project No: 2995/03”.92 The document is a description of works which was faxed to Advanced and has the following handwritten note at the top:

“FAO Billy Ross A.R.S. These are your rates – 0141 774 0171”

111. The fax consists of three pages and provides a breakdown of the total rate which was £121,861.87.

112. Evidence from leniency applicant Pirie. Document entitled, “Description of works – Re-roofing works Hermitage Academy School, Helensburgh Project No:

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89 See footnote 87.
90 See the statement of Alasdair Lewis dated 24 November 2003.
91 Ibid.
The document is a description of works which was faxed to Brolly and has the following handwritten note at the top:

“Use These Rates Brolly Roofing 0141 357 5024”

113. The document consists of three pages and provides a breakdown of the total rate quoted which was £115,649.77.

114. Telephone message list - Advanced. The following messages were recorded by Advanced:

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Caller’s Details</th>
<th>For Whom</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 February 2001</td>
<td>11.25am</td>
<td>Scott Deans [Pirie] will call him on mobile</td>
<td>Billy</td>
</tr>
<tr>
<td>5 February 2001</td>
<td>4.15pm</td>
<td>Scott Deans [Pirie] will phone back</td>
<td>Billy</td>
</tr>
<tr>
<td>6 February 2001</td>
<td>12.00pm</td>
<td>Scott Deans [Pirie]</td>
<td>unknown</td>
</tr>
<tr>
<td>6 February 2001</td>
<td>4.15pm</td>
<td>Scott Deans [Pirie] - get on mobile</td>
<td>unknown</td>
</tr>
<tr>
<td>19 February 2001</td>
<td>3.30pm</td>
<td>George Brolly [Brolly]</td>
<td>unknown</td>
</tr>
</tbody>
</table>

115. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Hermitage Academy contract, as far as Mr A (an estimator of Pirie) could recall, this contract was subject to collusion. Furthermore, it was noted that Pirie was the lead contractor and that a cover price had been provided by Advanced. Pirie recorded that a quote of £102,124.04 was submitted on 6 February 2001. Pirie subsequently advised that they believed Brolly had also provided a cover price.

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93 Ibid.
94 Pre-existing document produced to the OFT by Advanced on 15 October 2003. Ref REA 2.
95 Having regard to the provisions relating to the disclosure of information in Part 9 of the Enterprise Act 2002, to the OFT Guideline 423 ‘OFT’s Guidance as to the Appropriate Amount of a Penalty’ (December 2004), 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.
96 See comment made by Mr A of Pirie, in the covering letter to the OFT dated 2 December 2002. This included a list of contracts that Mr A believed had been subject to collusion. See Appendix 2, Felt Department quotations.
97 See letter from MacRoberts Solicitors to the OFT, dated 20 July 2004.
Analysis of evidence

116. Pirie confirmed that the handwritten abbreviation, ‘A.R.S.’ on top of the undated document produced by Pirie set out at paragraph 110 above, stands for Advanced Roofing Systems, and the telephone number is the fax number for Advanced. The OFT considers that the words, “These are your rates” on top of this document establish that Pirie sent Advanced the rates Advanced was to submit to the Council for the Hermitage Academy contract. This is supported by the witness statement of Mr A, an estimator/surveyor of Pirie. Mr A noted alongside this contract that Pirie was the lead contractor and that a cover price had been submitted by Advanced.

117. Furthermore, the bid Advanced submitted for the original tender procedure was £121,861.87, which was identical to the figure Pirie sent to Advanced, details of which are set out at paragraphs 110 and 111 above.

118. The OFT considers that the words, “Use These Rates” on top of the undated document set out at paragraph 112 above establish that Pirie contacted Brolly with the figures that it should to submit to the Council for the Hermitage Academy contract. The telephone number is the fax number for Brolly. With regard to this contract, Pirie’s solicitors subsequently advised the OFT that, “My clients think that Brolly also provided cover on this contract.” Furthermore, the OFT notes that the figure Pirie sent to Brolly, which was £115,649.77, was identical to the bid received by the Council following the original tender on 7 February 2001.

119. With regard to Advanced’s telephone log which recorded several attempts by Pirie to contact Advanced on 5 and 6 February 2001, the OFT notes that this was immediately before the tender return date of 7 February 2001. As there is no obvious reason for the parties to contact each other and no credible explanation for the contact attempts recorded in the log has been advanced, the OFT believes that it is reasonable to infer based on the evidence set out above that Pirie was attempting to contact Advanced with a view to discussing the Hermitage Academy contract. The OFT therefore considers that these messages support a finding of collusion in that they show a pattern of contact very close to the tender return date.

120. With regard to Advanced’s telephone log which recorded a telephone call from Brolly, the OFT notes that this was after to the tender return date. As there is no obvious reason for the parties to contact each other and no credible explanation has been advanced, the OFT believes that it is reasonable to infer based on the

98 See footnote 96 above.
99 See footnote 92 above.
100 See footnote 97 above.
evidence set out above that Brolly was attempting to contact Advanced with a view to confirming that they had done what was agreed for this contract. The OFT therefore considers that such messages, while not necessary for a finding, further support a finding of collusion in that they show a pattern of contact very close to the tender return date.

121. The OFT 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.  

122. Case law confirms that there is no need to wait to observe the concrete effects of an agreement where it had as its object the prevention, restriction or distortion of competition. The Commission also clearly stated in *British Sugar* that there can be a concerted practice in the absence of an actual effect on the market. In applying the ruling of the CAT in *Replica Kits*, the OFT considers that the totality of the evidence shows that there has been collusion on the Hermitage Academy contract.

*The participants’ representations*

*Advanced’s representations*

123. Advanced are unable to confirm whether they provided a cover price for Pirie for this contract as the manager responsible was away on paternity leave and the contract was priced by another employee. In addition, Advanced states that any telephone calls made to competitors might have been done for other reasons than for collusion, such as providing background reports of roofers that they may wish to employ or to sell surplus materials.

*Brolly’s representations*

124. Brolly admits to providing a cover price at the request of Pirie. However, Brolly emphasises that it only received the tender information on 5 February, with a return date of 7 February 2001 and that therefore two days was insufficient time to make a site visit. In addition, Brolly states that the telephone call made to Advanced on 19 February 2001 was well after the tender return date and that the

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104 *Replica Kits*, paragraph 206.

call could have been about another matter, such as providing a reference for an employee. 106

125. No representations regarding this contract were made by Pirie.

The OFT’s conclusions

126. The OFT considers that the fact that Advanced are unable to confirm whether this contract had been subject to collusion is not sufficient to rebut the evidence in paragraphs 110 to 115 above, which clearly demonstrates that there had been an agreement and/or concerted practice between Pirie and Advanced that the latter would provide a cover price for the Hermitage Academy contract.

127. The OFT does not consider it to be a defence that Brolly did not have sufficient time to make a site visit for the Hermitage Academy contract. In particular, the fact that a firm invited to tender for a particular contract is unable, for whatever reason, to perform the services required, does not legitimise any agreement and/or concerted practice between that firm and any other undertaking to engage in collusive tendering.

128. In relation to the telephone call that took place between Brolly and Advanced on 19 February 2001, the OFT considers that even if there had been no contact between Brolly and Advanced, there is sufficient evidence to demonstrate two bilateral agreements between Pirie and Advanced, and Pirie and Brolly. In any event, Brolly admits to providing a cover price for the Hermitage Academy contract at the request of Pirie.

129. The OFT is satisfied that the evidence above meets the test set out by the CAT in Apex and Price, 107 namely that there was contact which;

(a) shows that the conduct of Pirie and Brolly, and Pirie and Advanced was not unilateral, as evidenced by the faxes sent from Pirie to the other parties in paragraphs 110 to 113 above, and Advanced’s telephone log in paragraph 114 above. In addition, the evidence from Pirie in paragraph 115 above confirms that this contract was subject to collusion. At no stage was there any resistance from Brolly and Advanced regarding the cover price arrangements, as evidenced by the subsequent conduct of the parties;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between the Pirie and Brolly, and Pirie and Advanced, as set out in


paragraphs 110 to 115 above demonstrates that the parties did not
determine their tender prices independently. The OFT considers that in
the absence of a formal sub-contracting relationship, there is no
legitimate reason why undertakings invited to participate in a
competitively tendered process would need to communicate with one
another in relation to the tender before returning their bids, or
immediately afterwards, in the circumstances. \footnote{108} No alternative credible
explanation as to why this contact took place has been advanced by the
parties; and

(c) constitutes direct contact between Pirie and Brolly, and Pirie and
Advanced, which had as its object or effect;

(i) the disclosure by Pirie to Brolly and Advanced of a course of
conduct that it was to adopt or was contemplating adopting in the
tendering process, as evidenced by the contact Pirie had with the
other parties regarding the tender rates that each would use
(paragraphs 110 and 112 above). This disclosure by Pirie meant
that Brolly and Advanced knew that Pirie would submit a lower
bid; and

(ii) influenced the conduct of Brolly and Advanced on the market. The
OFT notes that the tender prices set out in Pirie’s faxes (at
paragraphs 111 and 113) were the identical prices tendered by
Brolly and Advanced at (paragraph 108 above).

130. Accordingly, the OFT concludes that the totality of the evidence, \footnote{109} as analysed at
paragraphs 106 to 122 above, establishes that an agreement and/or concerted
practice was in place between Pirie and Advanced on the one hand, and between
Pirie and Brolly on the other, in breach of the Chapter I prohibition, which had the
object of fixing tender prices in relation to the tenders submitted by each
undertaking for the Hermitage Academy contract.

ii. **Drummond House**

**Facts**

131. Danobe Securities Ltd (‘Danobe’) own and maintain Drummond House. Danobe
has no formal tendering process for selecting contractors for any maintenance
work that is required. On this occasion, Danobe had previously used a roofing

\footnote{108} See footnote 16, ‘the 2003 statement’ of Ivan Jerram.

\footnote{109} Replica Kits, paragraph 206 and Toys, paragraphs 164-165.
contractor called EBS and asked them to provide a quote for a felt system. EBS advised that the work would cost in the region of £30,000. Following this, Danobe approached a manufacturer called Imper-Roof\textsuperscript{110} who subsequently invited Brolly, Pirie, Rennie, and Walker to tender for the re-roofing works at Drummond House on 18 March 2002, with a return date of 5 April 2002.\textsuperscript{111}

132. The following bids were received:\textsuperscript{112}

<table>
<thead>
<tr>
<th>Contractor</th>
<th>Bid (£)</th>
<th>Date received</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brolly</td>
<td>29,155.07 + VAT</td>
<td>27 March 2002</td>
</tr>
<tr>
<td>Pirie</td>
<td>31,073.79</td>
<td>29 March 2002</td>
</tr>
<tr>
<td>Rennie</td>
<td>32,395.00 + VAT</td>
<td>27 March 2002</td>
</tr>
<tr>
<td>Walker</td>
<td>30,808.16 + VAT</td>
<td>3 April 2002</td>
</tr>
</tbody>
</table>

133. Danobe awarded the contract to the contractor who had submitted the lowest bid, which was Brolly. However, the specification was subsequently renegotiated following a discussion between Brolly and John Meikle of Imper-Roof. Brolly faxed through their revised quotation of £25,046 on 10 April 2002.\textsuperscript{113} Danobe subsequently wrote to Brolly on 18 April 2002 confirming that they wanted Brolly to go ahead with the works as detailed in Brolly’s fax, dated 10 April 2002. Danobe stated that the tender price was £24,746.58 plus an allowance for the air conditioning units.\textsuperscript{114}

\textit{Evidence of agreement and/or concerted practice}

134. Evidence from leniency applicant Pirie. Fax from George Brolly Jnr of Brolly to Pirie, dated 27 March 2002.\textsuperscript{115} The fax which notes that it was sent at “11.02” states:

“Re: Drummond House, Glasgow

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\textsuperscript{110} See letter from Imper-Roof to four contractors dated 18 March 2002.

\textsuperscript{111} See witness statement of Brian Naftalin, Danobe, dated 1 December 2003 and letter from Imper-Roof to the four contractors dated 18 March 2002.

\textsuperscript{112} See letters from Walker (3 April 2002), Rennie (27 March 2002), Brolly (27 March 2002) and Pirie (29 March 2002) to Danobe Securities, produced by Brian Naftalin, Director of Danobe to support his witness statement, dated 1 December 2003.

\textsuperscript{113} See letter from Brolly to Danobe, dated 10 April 2002 and covering fax header sheet. Letter produced by Brian Naftalin to support his witness statement, dated 1 December 2003.

\textsuperscript{114} See letter from Danobe to George Brolly, dated 18 April 2002. Letter produced by Brian Naftalin to support his witness statement, dated 1 December 2003. Brolly’s ref No GBJ/NK/E1888/3376A.

\textsuperscript{115} Document produced by Pirie on 2 December 2002.
Comments:
Scott [Deans]
Please find your price for the above job, along with my own Description of Works which I will send (attached purely for information purposes)
Total Price £31073.79 + VAT
This includes the following provisional sums
Removal & re-siting of air con units £500.00
Removal & re-siting of satellite dishes £600.00
Best Regards”
[Signed - George Brolly Jnr]

135. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Drummond House contract, as far as Mr A116 (an estimator of Pirie) could recall, this contract was subject to collusion.117 Furthermore, it was noted that Brolly had been the lead contractor and that a cover price had been provided by Pirie. Pirie also noted that they were asked to stand aside.118

Analysis of evidence

136. The OFT consider that the words, “Please find your price for the above job” at paragraph 134 above, establish that Brolly calculated the tender figure that Pirie was to submit to Danobe rather than Pirie determining its own price independently. Furthermore, Mr A, an estimator/surveyor of Pirie noted that Brolly had been the lead contractor and that a cover price had been provided by Pirie.

137. The OFT also notes that the bid submitted by Pirie on 29 March 2002, £31,073.79, was identical to Brolly’s communicated bid, sent on 27 March 2002. The OFT is therefore of the view that Pirie agreed to submit the tender figure prepared by Brolly in accordance with the instructions on the covering fax set out at paragraph 134 above.

The participants’ representations

Brolly’s representations

138. Brolly admits to requesting Pirie to provide a cover price for this contract. However, Brolly emphasises that it had no way of knowing whether other

116 See footnote 95 above.
117 See footnote 96 above.
118 Ibid.
competitors would submit bids lower than theirs, and that the tender price is consistent with other similar jobs tendered for by Brolly.\textsuperscript{119}

139. No representations regarding this contract were made by Pirie.

\textit{The OFT’s conclusions}

140. In considering Brolly’s representation that not knowing whether other parties would submit lower bids, or that its bids were similar to other jobs, is a defence, the OFT has taken note of the recent ruling by the CAT in \textit{Apex}:

“206. We have considered the submissions of Apex and the OFT as to the principles of law applicable to concerted practices in the light of all the authorities cited to us. We conclude that the principles relevant to this case as derived from those authorities are as follows:

[...]

(vi) in particular, a concerted practice may arise if there are \textit{reciprocal contacts} between the parties which have the object or effect of removing or reducing uncertainty as to future conduct on the market (Suiker Unie, paragraph 175);

(vii) reciprocal contacts are established 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 (Cimenteries, paragraph 1849);

(viii) it is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, \textit{substantially reduced uncertainty} as to the conduct on the market to be expected on his part (Cimenteries, paragraph 1852);

[...]

(emphasis added)

141. Therefore, in light of the above statement by the CAT, the OFT considers that Brolly had direct contact with its competitor, Pirie, and that by the requesting Pirie to provide a cover price, Brolly disclosed its future intentions, which Pirie accepted. As a result of this contact, Brolly substantially reduced uncertainty as to its conduct on the market. The fact that Brolly did not know whether other competitors than Pirie would submit lower bids than theirs, or that their tender price was consistent with similar jobs, is therefore irrelevant.

142. The OFT is satisfied that the evidence above meets the test set out by the CAT in \textit{Apex} and \textit{Price},\textsuperscript{120} namely that there was contact which;

\textsuperscript{119} Representation of Brolly dated 21 March 2005, in response to the Statement.
\textsuperscript{120} [2005] CAT 4, paragraph 205 \textit{et seq}, 219, 229 and 242; [2005] CAT 5, paragraphs 48 \textit{et seq}.
(a) shows that the conduct of Pirie and Brolly, was not unilateral, as demonstrated by the fax sent from Brolly to Pirie in paragraph 134 above. In addition, the evidence from Pirie in paragraph 135 above confirms that this contract was subject to collusion. At no stage was there any resistance from Pirie regarding the cover price arrangements, as evidenced by its subsequent conduct;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between Pirie and Brolly, as set out in paragraphs 134 and 135 above demonstrates that the parties did not determine their tender prices independently. The OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids, or immediately afterwards, in the circumstances.121 No alternative credible explanation as to why this contact took place has been advanced by the parties; and

(c) constitutes direct contact between Pirie and Brolly, which had as its object or effect;

(i) the disclosure by Brolly to Pirie of a course of conduct that it was to adopt or was contemplating adopting in the tendering process, as evidenced by the fax sent from Brolly to Pirie regarding the tender rate that it should use (paragraphs 134 above). This disclosure by Brolly meant that Pirie knew that Brolly would submit a lower bid; and

(ii) influenced the conduct of Pirie on the market. The OFT notes that the tender price set out in Brolly’s fax (at paragraphs 134) was the identical price tendered by Pirie at paragraph 132 above).

143. Accordingly, the OFT concludes that the totality of the evidence,122 as analysed at paragraphs 131 to 137 above establishes that an agreement and/or concerted practice was in place between Brolly and Pirie, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Drummond House contract.

121 See footnote 16, ‘the 2003 statement’ of Ivan Jerram.

122 See Replica Kits, paragraph 206, and Toys, paragraph 164-165.
iii. Elizabeth Martin Clinic

**Facts**

144. In December 2000, the Renfrewshire and Inverclyde Primary Care NHS Trust (‘the Trust’) sent invitations to tender for the re-roofing of the Elizabeth Martin Clinic to Brolly, Walker, Rennie, Pirie and Hi Clad Roofing Ltd. Although the Trust has its own list of approved contractors, this is not kept up to date and the Trust therefore relies on other approved contractor lists, for example, the approved contractor list held by Scottish Health Care Supplies (‘SHS’). The Trust specified that tenders should be based on a felt roofing system and required the tenderers to submit a Certificate of Bona Fide Tender. The following bids were recorded as being received by the Trust:

<table>
<thead>
<tr>
<th>Contractor</th>
<th>Bid (£) *</th>
<th>Bid adjusted for true comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brolly</td>
<td>42,594.43</td>
<td>49,994.43</td>
</tr>
<tr>
<td>Walker</td>
<td>51,785.76</td>
<td>51,820.76</td>
</tr>
<tr>
<td>Rennie</td>
<td>52,776.55</td>
<td>52,776.55</td>
</tr>
<tr>
<td>Pirie</td>
<td>53,578.63</td>
<td>53,578.63</td>
</tr>
<tr>
<td>Hi Clad Roofing Ltd</td>
<td>50,200.05</td>
<td>50,200.05</td>
</tr>
</tbody>
</table>

*Tenderers were requested to give an optional price for a mill finished aluminium coping system in lieu of the powder coated coping system as specified.

145. Brolly was subsequently awarded the contract on 17 January 2001. The tender sum agreed was £49,994.43 + VAT, based on the original specification. Brolly had signed a Certificate of Bona Fide Tender on 18 December 2000.

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123 See fax from Canata Seggie (Chartered Architects) to John McDougall (Estates Manager for the Trust) dated 8 January 2001 attaching summary of tenders received.


125 SHS provides procurement and technical services to the NHS in Scotland and to many other private sector organisations. See www.show.scot.nhs.uk/shs/home.


127 See 'Summary of Tenders Received’, document produced by Derek Cullen, Head of Facilities, for the Trust, dated 25 November 2003. According to a letter from John McDougall, Estates Manager for the Trust, to Canata & Seggie, all bids were received by 22 December 2000.


129 See “Tender Addendum” Certificate of Bona Fide Tender signed by Brolly on 18 December 2000 and paragraph 33 above.
Evidence of agreement and/or concerted practice

146. Evidence from leniency applicant Pirie. Fax from George Brolly Snr of Brolly to Scott Deans of Pirie, dated 18 December 2000.130 The fax, which notes that it was sent at “08.57” states:

“Ref: Elizabeth Martin Clinic, Larkfield, Greenock
Scott,
These are the rates I would like you to go in at for the above, if asked for a reduction if the coping system is not polyester powder coated allow £2000.00
Thanks for your help have a nice Christmas and a good New Year
Regards”
[Signed: George Snr]

147. The fax consists of 14 pages and gives a breakdown of the total rate quoted which was, £53,578.63.

148. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. In connection with the Elizabeth Martin Clinic contract, as far as Mr A131 (an estimator of Pirie) could recall, this contract was subject to collusion.132 Furthermore, it was noted that Brolly had been the lead contractor and that a cover price had been provided by Pirie.133

149. Evidence of John McDowall, Quantity Surveyor for the Trust.134 Mr McDowall sent a fax to John Seggie of Canata & Seggie (Chartered Architects) enclosing his tender report for the Elizabeth Martin Clinic on 29 December 2000. In the covering fax Mr McDowall noted that;

“It is interesting to note that although there are ten pages of “Preliminaries” in total and numerous items within the preliminaries sections, each contractor has priced solely the same four items at an almost identical level – it looks as if it has been priced by the same person, or that they have had knowledge of each others’ prices.”

131 See footnote 95 above.
132 See footnote 96 above.
133 Ibid.
134 See fax cover sheet from John McDowall, Quantity Surveyor for the Trust to John Seggie of Canata & Seggie, dated 29 December 2000, produced by Derek Cullen, Head of Facilities for the Trust as an exhibit in support of his witness statement, dated 25 November 2003.
The four items priced comprised; temporary hoardings, safety and welfare measures, security and general matters.

**Analysis of evidence**

150. The OFT consider that the words, “These are the rates I would like you to go in at for the above” and “Thanks for your help” in the fax at paragraph 146 above suggest that Brolly calculated the tender figure that Pirie was to submit to the Trust for the Elizabeth Martin Clinic contract rather than Pirie determining its own tender figure independently. Furthermore, the words suggest that Brolly believed that Pirie had agreed to submit, or at least that Brolly were inviting Pirie to submit, a cover price in relation to the Elizabeth Martin Clinic contract. In addition, Mr A, an estimator of Pirie noted that Brolly had been the lead contractor and that a cover price had been provided by Pirie.

151. It is also noted by the OFT that the bid submitted by Pirie, which was £53,578.63 and received by the Trust by 22 December 2000, was identical to the bid that Brolly communicated to it on 18 December 2000. The OFT is therefore of the view that Pirie did submit the tender figure prepared by Brolly in accordance with the wording on the covering fax set out at paragraph 146 above.

152. The OFT also notes Mr McDowall’s observation in paragraph 149 above that, “it looks as if it has been priced by the same person, or that they have had knowledge of each others’ prices.” The OFT considers this supports the OFT’s view set out above that Pirie did not determine its own tender price independently.

**The participants’ representations**

*Brolly’s representations*

153. Brolly admits to requesting Pirie to provide a cover price for this contract. However, Brolly emphasises that it had no way of knowing whether other competitors would submit bits lower than theirs, and that the tender price is consistent with other similar jobs tendered for by Brolly. In addition, Brolly contends that the four items priced where the only relevant items for the contract.135

154. No representations regarding this contract were made by Pirie.

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The OFT’s conclusions

155. The OFT considers that Brolly not knowing whether other parties would submit lower bids, or that its bids were similar to other jobs, is not a defence, as the object of the agreement and/or concerted practice in Brolly’s request to Pirie to submit a cover price was to prevent, restrict or distort competition in contravention of the Chapter I prohibition, as discussed in paragraphs 140 to 141 above.

156. In addition, the OFT considers it unlikely that the four items priced were the only relevant items for the contract, as this is not consistent with the comment made by Mr MacDowall (Quantity Surveyor for the Trust) who stated “[i]t is interesting to note that although there are ten pages of ‘Preliminaries’ in total and numerous items within the preliminaries sections, each contractor has priced solely the same four items at an almost identical level – it looks as if it has been priced by the same person, or that they have had knowledge of each others’ prices”. Clearly Mr MacDowall had expected to see more than the four identical items being priced by all the tenderers.

157. The OFT is satisfied that the evidence above meets the test set out by the CAT in Apex and Price,\(^*\) namely that there was contact which;

(a) shows that the conduct of Pirie and Brolly, was not unilateral, as demonstrated by the fax sent from Brolly to Pirie in paragraphs 146 to 147 above, and the evidence from Pirie in paragraph 148 above confirms that this contract was subject to collusion. At no stage was there any resistance from Pirie regarding the cover price arrangements, as evidenced by its subsequent conduct;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between the Pirie and Brolly, as set out in paragraphs 146 to 148 above demonstrates that the parties did not determine their tender prices independently. Indeed, John McDowall, the Quantity Surveyor for the Trust, also suspected that the tender prices had not been prepared independently in paragraph 149 above. The OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids.\(^+\) No alternative credible explanation as to why this contact took place has been advanced by the parties; and

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\(^+\) See footnote 16, ‘the 2003 statement’ of Ivan Jerram.
(c) constitutes direct contact between Pirie and Brolly, which had as its object or effect;

(i) the disclosure by Brolly to Pirie of a course of conduct that it was to adopt or was contemplating adopting in the tendering process, as evidenced by the fax sent from Brolly to Pirie regarding the tender rate that it should use (paragraphs 146 to 147 above). This disclosure by Brolly meant that Pirie knew that Brolly would submit a lower bid; and

(ii) influenced the conduct of Pirie on the market. The OFT notes that the tender price set out in Brolly’s fax (at paragraphs 146 to 147) was the identical price tendered by Pirie (at paragraph 144 above).

158. Accordingly, the OFT concludes that the totality of the evidence, as analysed at paragraphs 144 to 152 above, establishes that an agreement and/or concerted practice was in place between Brolly and Pirie in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the contract to replace the roof car park surface at Elizabeth Martin Clinic contract.

iv. Royal Bank of Scotland

Facts

159. The OFT has been able to obtain only limited background information on the tender process for the Royal Bank of Scotland contract. According to Michael Levack, Regional Managing Director of Mansell plc this appears to be primarily due to the fact that the paperwork may have been mislaid when Mansell Maintenance Ltd ('Mansell Maintenance’), a subsidiary of Mansell plc, ceased trading in 2002. Mansell Maintenance administered the roofing contracts for the Royal Bank of Scotland. In addition, Michael Levack advised that it would be difficult to find the paperwork relating to these contracts without an order number for each contract. However, the OFT has been able to conclude from the documentation available that Mansell Maintenance sent an invitation to tender to Bonnington in June 2001.

138 Replica Kits, paragraph 206 and Toys, paragraphs 164-165.
139 See note of meeting between the OFT and with Michael Levack, Regional Managing Director of Mansell plc, dated 25 November 2003.
140 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref No. CET/10.
160. On 26 June 2001, Bonnington inserted the Royal Bank of Scotland contract into their “Enquiry Register” with an amount of £131,000. On 27 June 2001 Bonnington sent a letter to Mansell Maintenance confirming the tender in the sum of £105,099 net. The OFT does not have records of any of the other tenders submitted.

Evidence of agreement and/or concerted practice

161. Fax from Bonnington to “Mr J.” of Walker dated 25 June 2001. The fax, which notes that it was sent at “15.49” states:

“Royal Bank of Scotland
Copy of our sizes.
Any problems phone me.
I will phone on Wednesday to discuss situation.”

(Signature illegible)

The fax states that it contains 7 pages, although the other sheets were not found.

162. Fax from Bonnington to Walker. The fax, which notes that it was sent on 28 June 2001 at “07.48” states:

“John
Copy of Our Quote to Mansel [sic]”

(Signature illegible)

163. The fax consists of seven pages, including the fax cover sheet. The second page is a copy of a letter from Bonnington to Mansel [sic] Maintenance, dated 27 June 2001 setting out Bonnington’s bid for the Royal Bank of Scotland John Finnie Street Kilmarnoch contract, in the sum of £105,099.00 net. Pages three to seven provide details of the work required. Page seven states that the total for the main roof is £105,099.00, and that the external sheeting is £5,400.00. Therefore, the total quoted is £110,499.00.

164. Undated document entitled “Summary of Costs”. This handwritten summary of costs for the Royal Bank of Scotland was prepared by John Thomson, a senior

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141 Document found by OFT officials during a section 27 visit to Bonnington’s on 15 October 2003. Ref No. AKW1. Although the figure of £131,000 does not match the figure of £105,099 net in paragraph 115, if VAT is added to the net figure, then it is very close.

142 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref CET/10. “Mr J” has not been anonymised, but is a direct quote from the document.

143 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref CET/10. See footnote 140 above.

144 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref PMK/1.
manager of Walker. There is also a handwritten note attached to the bottom of the document which states:

“John, Stuart Mason never phones back, plus I can’t price the job, don’t know enough about it. R/Light etc. G. Brolly wants you to send him a cover price, he will go above us, + McKay Roofing are pricing (they want the job) plus with Stuart Mason not phoning back he obviously wants the job also.

We have to price to Mansell Maintenance don’t really see us getting the job from them.”

165. Diary entry for 18 June 2001 – Walker. The entry states:

“Ph R. Miller – Mansell Maint McKay
2 RBOS
Brolly
+ Clydesdale still boiling away”

166. Telephone Message – Walker. This message states:

“Allan
Please phone George Brolly of Brolly Roofing. 0141 334 3746 or mobile number
SPEAK TO STUART MASON”

167. Handwritten document prepared by John Thomson, a senior manager of Walker. This document states:

“Andrew Clarkson
This has not progressed. Very exp. materials
Mansell Maint – Tapered in.
Brolly will cover no need to price cheap
PL S. Mason

Bit funny – The set up
P PL R. Millar
But you might not need to price it.”

145 See letter from Biggart Baillie Solicitors, to the OFT, dated 23 July 2004, who confirmed that John Thomson wrote the upper part of the note, and that the lower part of the note was written by Mr James Allan Thomson.

146 The handwritten note on the bottom of the document was written by Mr James Allan Thomson. See footnote 145 above.

147 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref No PMK/21.

148 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref PMK/6.

149 Document found by OFT officials during a section 28 visit to Walker’s premises on 20 November 2003. Ref PMK/8.
168. The document consists of 14 pages and includes details of the costs associated with the Royal Bank of Scotland contract.

169. Evidence from leniency applicant Walker. (Statement of John Thomson, a senior manager of Walker). With regard to this contract, Mr John Thomson stated that, “….My recollection is that this job was measured by WG Walker, Mansell Maintenance Limited and Bonnington Contracts Limited. Mansell Maintenance was the client of the Royal Bank and invited WG Walker to tender. Our respective representatives met on the day on which we went to measure the roof. At this meeting we exchanged some site notes and after this there were a number of telephone calls made between WG Walker, Mansell Maintenance and Bonnington Contracts.

My brother, Mr James Allan Thomson, was contacted by G Brawley [sic] who asked us to submit a cover price. McKay Roofing, was the firm which we understood to be eager to get the job. We deliberately submitted a cover price which was higher than that of McKay Roofing.”

170. John Thomson's solicitors subsequently stated that what might have occurred is that Brolly were asked by McKay to submit a cover price and that Brolly then asked Walker to provide a cover price.

**Analysis of evidence**

171. With regard to the faxes set out at paragraphs 161 and 162 above, the OFT is of the view that Bonnington faxed Walker a copy of their rates so that Walker could submit a cover price for the Royal Bank of Scotland contract. The OFT considers 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.

172. Walker confirmed that “John” referred to in the note at the bottom of the undated document entitled “summary of costs” set out at paragraph 164 above refers to John Thomson. The OFT considers that the note suggests that Brolly had asked Walker to provide a cover price in relation to the Royal Bank of Scotland contract. This view is supported by the statement of John Thomson, that, “……James Allan Thomson was contacted by G Brawley [sic] who asked us to submit a cover price. Walker confirmed that “G Brawley” refers to Brolly.” Furthermore, Mr John

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150 See report prepared by Mr John Thomson, a senior manager of Walker, dated 20 January 2003, page 31 paragraph 8(a).
151 See footnote 145 above, paragraph 5.1.
152 See footnote 16, 'the 2003 statement' of Ivan Jerram.
153 See footnote 145 above.
Thomson stated that Walker deliberately submitted a cover price that was higher than McKay’s. The OFT considers that this suggests that Walker submitted a cover price at the request of Brolly.

173. In addition, the OFT notes the diary entry of Mr John Thomson, dated 18 June 2001, which states, “Ph R. Miller – Mansell Maint McKay, Brolly 2 RBOS+ Clydesdale still boiling away.” The OFT believes that this is a note for Mr John Thomson to phone R. Miller of Mansell Maintenance and McKay and Brolly about the Royal Bank of Scotland contract. Furthermore, Walker confirmed that the telephone message set out at paragraph 166 above is also connected with the Royal Bank of Scotland contract. The OFT also notes that reference to Brolly seeking a cover price from Walker was made in the note of John Thomson set out in the undated document set out at paragraph 164 above.

174. With regard to McKay’s involvement, the OFT is of the view that there is insufficient evidence to show that McKay was involved in an agreement or concerted practice to submit cover prices in relation to the Royal Bank of Scotland contract. Although Stuart Mason of McKay was referred to in the note written by Mr John Thomson set out at paragraph 164 above, he states, “… + McKay Roofing are pricing (they want the job) plus with Stuart Mason not phoning back he obviously wants the job also.” The OFT considers McKay may not have phoned Walker back because McKay wanted the contract and was going to submit its bid independently.

The participants’ representations

Bonnington’s representations

175. Bonnington’s liquidators commented that Mr Stuart Mason was not employed by McKay at the time of this contract, but by Bonnington. Bonnington’s liquidators also pointed out that the fax dated 27 June 2001 was sent after the tender return date. Bonnington’s liquidators conclude that the evidence surrounding 'McKay' not telephoning back at paragraph 174 above is “weak and contradictory”.

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154 Fax from Bonnington’s Liquidator, Mr Dean, received on 5 May 2005 confirmed that Mr Mason was employed from January 2001 to June 2003. In addition, McKay has confirmed that Mr Stuart Mason was employed at McKay from 22 June 1998 to 5 January 2001. See letter dated 27 April from McKay.

155 See letters from Bonnington’s Liquidator, Mr Dean, dated 1 and 4 March 2005, in response to the Statement.
176. Brolly denies collusion on this contract. Brolly claims that the Royal Bank of Scotland was an important client and therefore Brolly would not wish to promote the interests of other competitors. Brolly argues that the evidence is contradictory, as it is unclear whether Walker or Brolly is asking for a cover price. In addition, Brolly contends there is insufficient evidence to implicate Brolly on this occasion as the diary entries are speculative and the statement of Walker’s solicitors was prefaced with a note that Walker was uncertain what occurred in relation to this contract. Brolly therefore concludes that the evidence set out above is not strong and compelling.

177. No representations regarding this contract were made by any of the other Parties.

The OFT’s conclusions

178. As regards the involvement of Bonnington and Walker in the cover pricing arrangements, the OFT is satisfied that the evidence above meets the test set out by the CAT in *Apex* and *Price*, namely that there was contact which:

(a) shows that the conduct of Bonnington and Walker was not unilateral. In particular, this is reflected in the evidence of Walker (at paragraph 169 above) that this contract was subject to collusion. In addition, the fax from Bonnington to Walker dated 25 June 2001 (at paragraph 161 above), which explicitly relates to this contract, invites a telephone call if there are “any problems” and proposes further discussion “on Wednesday” (this would be Wednesday 27 June 2001). This fax dated 25 June 2001 was recovered from the premises of Walker therefore proving it was received and retained.

In relation to Bonnington’s representation concerning the fax sent to Walker on 28 June 2001 being sent after Bonnington had already sent their tender to the contractor, the OFT was unable to confirm the precise date for the tender return. Nevertheless, the OFT considers that it is irrelevant whether it was sent before or after the tender return deadline. If the fax was sent before, then it constitutes a further communication from Bonnington to Walker in relation to the Royal Bank of Scotland contract. If the fax was sent after the tender return date, then it could be regarded as confirmation from Bonnington that they did what had been agreed. In any event, the fax dated 25 June 2001 from Bonnington requesting a cover from Walker was sent one day prior to Bonnington

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inserting this contract into their enquiry ledger, and clearly establishes that Bonnington were seeking a cover price from Walker;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. It is inferred from the contacts summarised at paragraph (a) above that the purpose was to rig bids and thereby fix prices. The statement of Mr John Thomson of Walker dated 20 January 2003 (at paragraph 169 above) suggests that the purpose of the contact was to rig bids. The OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids, or immediately afterwards, in the circumstances. No alternative credible explanation as to why this contact took place has been advanced by the parties; and

(c) constitutes direct contact between Bonnington and Walker, which had as its object or effect;

(i) the disclosure to Walker of its tender details, i.e. a course of conduct that Bonnington was to adopt or was contemplating adopting in the tendering process (see paragraph 161 above); and

(ii) influenced the conduct of Walker on the market in that Walker provided a cover price, as confirmed in the statement of Mr John Thomson in paragraph 169 above.

179. In relation to the possible involvement of McKay in this contact, the OFT had previously concluded in the Statement that there was insufficient evidence to include McKay on this occasion (see paragraph 174 above). In addition, in light of the representations made by McKay and Bonnington, the OFT accepts that in June 2001, Mr Stuart Mason was not employed by McKay, but was an employee of Bonnington. Accordingly, the reference made to Stuart Mason at paragraph 166 to 167 above, did not refer to McKay.159

180. In relation to the possible involvement of Brolly in this contact, the OFT has considered Brolly’s representation that the OFT does not have strong and compelling evidence of collusion in respect of the Royal Bank of Scotland contract, and notes that the burden of proving an infringement of the Chapter I

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158 See footnote 16, 'the 2003 statement' of Ivan Jerram.

159 Letter from McKay to the OFT dated 13 May 2005 enclosing copies of Stuart Mason's summary P14 forms showing his employment dates, and letter from the liquidator of Bonnington to the OFT confirming the same employment dates.
Prohibition lies with the OFT. In considering the standard of proof required, the OFT has had regard to the recent ruling by the CAT in *Replica Kits*, which states that the criminal standard is not applicable as the standard of proof remains the civil standard, discussed in further detail in paragraphs 101 to 104 above.

181. The OFT was only able to obtain limited information with regard to this contract as the tender documents were mislaid by the contractors when the subsidiary holding the documents ceased trading in 2002. In summary, the documentary evidence implicating Brolly in this infringement is as follows:

- the undated document (paragraph 164), which states “*G.Brolly wants you to send him a cover price*”;
- the diary entry (paragraph 165), which simply states “*Brolly*”;
- the telephone message (paragraph 166), which simply states “*Please phone George Brolly of Brolly Roofing*”;
- the handwritten note (paragraph 167), which states “*Brolly will cover*”;
- the evidence of Mr Thomson of Walker (paragraph 169), which states “*my brother ... was contacted by [Brolly] who asked us to submit a cover price*”.

182. Although there are indications that Brolly did have contacts with Walker in relation to the contract, the evidence with respect to Brolly specifically is inconsistent, as it suggests that, on the one hand, Brolly asked Walker to provide a cover price, and, on the other hand, Brolly was asked to provide a cover price. In addition the evidence is gathered from one source, Walker, with no corroboration from evidence obtained from other sources. The OFT therefore considers that there is insufficient evidence to show that Brolly was party to an agreement and/or concerted practice to provide non-competitive prices in relation to the tenders submitted for the Royal Bank of Scotland contract.

183. Therefore, the OFT concludes that the totality of the evidence,160 as analysed at paragraphs 159 to 174 above, establishes that an agreement and/or concerted practice was in place between Walker and Bonnington in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking for the Royal Bank of Scotland contract.

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160 *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.
v. Clydesdale Bank

Facts

184. The OFT has been able to obtain only limited background information on the tender process for the Clydesdale Bank contracts. However, the OFT has been able to conclude from the documentation available that the Clydesdale Bank Property Department kept a list of contractors and at least three contractors would be used for each tender. The tender submissions would be opened at a formal ceremony with the contract being awarded to the lowest bidder.\(^{161}\) The only geographical restrictions placed on the choice of contractor would occur when local branch managers pressurised Head Office to give the work to local contractors who held accounts at the branch.\(^{162}\)

185. There were separate tender procedures for four contracts in relation to Clydesdale Bank:

- Castlemilk Road branch (‘Castlemilk’). This contract originally involved the re-roofing of two roofs, however, only the re-roofing of an extension roof was actually carried out;
- Cardonald Road branch (‘Cardonald’). This contract may not have been ultimately awarded;
- Johnstone branch (‘Johnstone’); and
- Troon branch (‘Troon’).

Castlemilk contract

Facts

186. Documents produced by Pirie and McKay indicate that the Castlemilk contract was put out to tender in around May 2000 and that tenders were returned in July 2000.\(^{163}\)

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\(^{161}\) See witness statement of David Craig Ferguson, dated 17 December 2003. Mr Ferguson was the Maintenance Officer for Clydesdale Bank until 2 February 2001.

\(^{162}\) Ibid.

\(^{163}\) See letters sent from Pirie to McKay, dated 17 May 2000 produced by Pirie and letters from McKay to Clydesdale Bank dated July 2000, produced to the OFT by McKay on 15 October 2003.
Evidence of agreement and/or concerted practice

187. Evidence from leniency applicant Pirie. Fax from Scott Deans of Pirie to Stuart Mason of McKay, dated 26 May 2000. The fax states:

“Subject: The Banks
These are the sums for YOU to use.
Regards”

[Signed: Scott Deans]

188. The fax consists of three pages including the fax cover sheet. The second page is a copy of a letter from Scott Deans of Pirie to Clydesdale Bank, dated 17 May 2000. The letter concerns the Clydesdale Bank, Castlemilk contract and gives a total figure for the work required based on an Andersons product specification. Pirie’s figure is deleted and replaced with the figure of £25,116.

189. Evidence from leniency applicant Pirie. Fax from Scott Deans of Pirie to Allan Thomson of Walker, dated 26 May 2000. The fax states:

“Subject: The Banks
Alan,
These are the sums for YOU to use.
Regards”

[Signed: Scott Deans]

190. The fax consists of three pages including the fax cover sheet. The second page is a copy of a letter from Scott Deans of Pirie to Clydesdale Bank, dated 17 May 2000. The letter concerns the Clydesdale Bank, Castlemilk contract and gives a total figure for the work required based on an Andersons product specification. Pirie’s figure is deleted and replaced with the figure of £26,201.

191. Letter from Stuart Mason of McKay to Clydesdale Bank PLC, dated 3 July 2000. The letter states:

“To Clydesdale Bank Plc
Re: Re-roofing Castlemilk Bank
……we now have pleasure in submitting our quotation amounting to £25,116.00 all as per attached Anderson specification……
Yours faithfully
Stuart Mason
Contracts Manager”

165 Ibid.
166 Documents produced under section 27 to the OFT by McKay on 15 October 2003. Ref NJB/12.
192. Evidence from leniency applicant Pirie. (Statement of Mr A, an estimator/surveyor of Pirie).167 When Mr A was asked by OFT officials about what could he tell the OFT about McKay, Mr A stated that;

“Well the only time it ever happened with McKay’s was we were pricing work for the Clydesdale Bank and there was a whole load of Banks come out at the one time….I think it was only three contractors or four contractors or three contractors pricing this work and there was a suggestion, the discussion over the phone of the contractors that well, there’s no point in us all going cutting our throats to pick up this work and ending up with one contractor with all the work at low prices, let’s see if we could share this about and not be silly about it…..”168

193. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. The following table is an extract from the list of contracts:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Value of contract (£)</th>
<th>Date quoted</th>
<th>Cover given to</th>
<th>Cover received from</th>
</tr>
</thead>
<tbody>
<tr>
<td>Castlemilk</td>
<td>24,453.00</td>
<td>17 May 2000</td>
<td>Pirie</td>
<td>Walker/McKay</td>
</tr>
</tbody>
</table>

In connection with the Castlemilk contract, as far as Mr A169 (an estimator of Pirie) could recall, this contract was subject to collusion with cover bids provided by Walker and McKay.170

**Analysis of evidence – Castlemilk contract**

194. The OFT considers that the evidence set out in paragraphs 187 to 191 above clearly demonstrates that Pirie asked McKay and Walker to provide cover bids in relation to the Castlemilk contracts. This view is reinforced by the evidence set out in paragraph 188 above, showing that McKay used the figure £25,116 calculated by Pirie and submitted it to Clydesdale Bank. The OFT notes that this figure is identical to the figure Pirie sent to McKay in paragraph 187 above, demonstrating that McKay agreed to submit the figures prepared by Pirie rather than determining its own price independently.

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167 See witness statement of Mr A, an estimator/surveyor of Pirie, dated 1 April 2003.
168 The OFT has considered the implication in this statement, that the infringement related to market sharing in addition to price-fixing, but has concluded that there is insufficient evidence to find an infringement of this nature in this case.
169 See footnote 95 above.
170 See footnote 96 above.
195. This view is further supported by the statement of Mr A, set out at paragraph 192 above where he noted that McKay had agreed to collude on the various Clydesdale Bank contracts. In addition the evidence set out by Pirie in paragraph 193 specifies that Pirie was the lead contractor and that cover prices had been received from Walker and McKay.

*The participants’ representations*

*McKay’s representations*

196. McKay states that in relation to this contract “Mr Stuart Mason had acted without authorisation from us.”

197. No representations regarding this contract were made by any of the Parties.

*The OFT’s conclusions*

198. The OFT has considered McKay’s representations stating that relevant employee acted without the company’s authorisation, and is of the view that this does not affect McKay’s liability. As noted by the CAT in *Toys*:

> “[i]t is trite law that the fact that an employee of an undertaking is not authorised to make an infringing agreement does not relieve the undertaking of its liability: e.g. Cases 100/80 etc. *Musique Diffusion Francaise v Commission* [1983] ECR 1825”.

199. The OFT concludes that Pirie submitted a figure to the Clydesdale Bank regarding the Castlemilk contract by letter dated 17 May 2000. Pirie then sent a copy of this letter to each of McKay and Walker, having first deleted its original tender submission and replaced the figure (in manuscript) with a higher cover price it wished McKay and Walker to use (i.e. £25,116 for McKay and £26,201 for Walker). The conclusion that these cover figures faxed to McKay and Walker were higher than Pirie’s figure submitted on 17 May 2000 is supported by the evidence in paragraph 193 which notes that Pirie’s tender figure was £24,453.

200. The OFT is, therefore, satisfied that the evidence above meets the test set out by the CAT in *Apex* and *Price*, namely that there was contact which;

(a) shows that the conduct of Pirie and McKay, and Pirie and Walker was not unilateral, as evidenced by the faxes sent from Pirie to the other parties in paragraphs 187 to 190 above. In addition, paragraph 193 above, confirms that this contract was subject to collusion. At no stage was

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172 *Toys*, paragraph 771.
there any resistance from Walker and McKay regarding the cover price arrangement, as evidenced by the subsequent conduct of the parties;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between Pirie and McKay and Pirie and Walker, as set out in paragraphs 187 to 190 above demonstrates that the parties did not determine their tender prices independently. The fact that Pirie submitted its tender price before requesting cover does not affect the OFT’s conclusions, as it coordinated the subsequent provision of cover prices which were provided. The OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids, or immediately afterwards, in the circumstances. 174 No alternative credible explanation as to why this contact took place has been advanced by the parties; and

(c) constitutes direct contact between Pirie and McKay and Pirie and Walker, which had as its object or effect;

(i) the disclosure to McKay and Walker respectively of a course of conduct that Pirie had adopted or was contemplating adopting in the tendering process, as evidenced by the contact Pirie had with the other parties regarding the tender rates that each would use (paragraphs 187 to 190). This disclosure by Pirie meant that McKay and Walker knew that Pirie would submit or had submitted a lower bid; and

(ii) influenced the conduct of McKay and Walker respectively on the market. The OFT notes that the tender prices set out in Pirie’s fax in paragraph 187, is identical to the price tendered by McKay at paragraph 191 above.

201. Accordingly, the OFT concludes that the totality of the evidence, 175 as analysed at paragraphs 184 to 195 above, establishes that an agreement and/or concerted practice was in place between between Pirie and McKay on the one hand, and between Pirie and Walker on the other, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the tenders submitted by each undertaking in relation to the Castlemilk contract at the Clydesdale Bank.


175 Replica Kits, paragraph 206 and Toys, paragraphs 164-165.
Cardonald contract

Facts

202. Documents produced by Pirie and McKay indicate that the Cardonald contract was put out to tender in around May 2000 and that tenders were returned in July 2000.\textsuperscript{176} The following tenders were returned to Clydesdale Bank in relation to the Cardonald contract:

<table>
<thead>
<tr>
<th>Contractor</th>
<th>Value of contract (£)</th>
<th>Date quoted</th>
</tr>
</thead>
<tbody>
<tr>
<td>McKay</td>
<td>£11,426 plus VAT</td>
<td>3 July 2000</td>
</tr>
<tr>
<td>Walker</td>
<td>£11,861 plus VAT</td>
<td>undated</td>
</tr>
<tr>
<td>Pirie</td>
<td>£10,625 plus VAT</td>
<td>17 May 2000</td>
</tr>
</tbody>
</table>

Evidence of agreement and/or concerted practice

203. Evidence from leniency applicant Pirie. Fax from Scott Deans of Pirie to Stuart Mason of McKay, dated 26 May 2000.\textsuperscript{177} The fax states:

“Subject: The Banks
These are the sums for YOU to use.
Regards”

[Signed: Scott Deans]

204. The third page is a copy of a letter from Scott Deans of Pirie to Clydesdale Bank, dated 17 May 2000. The letter concerns the Clydesdale Bank, Cardonald contract and gives a total figure for the work required based on an Andersons product specification. Pirie’s figure is deleted and replaced with a manuscript figure of £11,426.

205. Evidence from leniency applicant Pirie. Fax from Scott Deans of Pirie to Allan Thomson of Walker, dated 26 May 2000.\textsuperscript{178} The fax states:

“Subject: The Banks
Alan,
These are the sums for YOU to use.
Regards”

[Signed: Scott Deans]

\textsuperscript{176} See letters sent from Pirie to McKay, dated 17 May 2000 produced by Pirie and letters from McKay to Clydesdale Bank dated July 2000, produced to the OFT by McKay on 15 October 2003.

\textsuperscript{177} Document produced by Pirie on 2 December 2002.

\textsuperscript{178} Ibid.
206. The fax consists of three pages including the fax cover sheet. The third page is a copy of a letter from Scott Deans of Pirie to Clydesdale Bank, dated 17 May 2000. The letter concerns the Clydesdale Bank, Cardonald contract and gives a total figure for the work required based on an Andersons product specification. Pirie’s figure is deleted and replaced with a manuscript figure of £11,861.

207. Letter from Stuart Mason of McKay to Clydesdale Bank PLC, dated 3 July 2000. The letter states:

“To Clydesdale Bank Plc
Re: Re-roofing Cardonald Bank
……we now have pleasure in submitting our quotation amounting to £11,426.00 all as per attached Anderson specification……
Yours faithfully
Stuart Mason
Contracts Manager”

208. Evidence from leniency applicant Pirie. (Statement of Mr A, an estimator/surveyor of Pirie). When Mr A was asked by OFT officials about what could he tell the OFT about McKay, Mr A stated that:

“Well the only time it ever happened with McKay’s was we were pricing work for the Clydesdale Bank and there was a whole load of Banks come out at the one time....I think it was only three contractors or four contractors or three contractors pricing this work and there was a suggestion, the discussion over the phone of the contractors that well, there’s no point in us all going cutting out throats to pick up this work and ending up with one contractor with all the work at low prices, let’s see if we could share this about and not be silly about it…..”

209. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. The following table is an extract from the list of contracts:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Value of contract (£)</th>
<th>Date quoted</th>
<th>Cover given to</th>
<th>Cover received from</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cardonald</td>
<td>10,625.00</td>
<td>17 May 2000</td>
<td>Pirie</td>
<td>Walker/McKay</td>
</tr>
</tbody>
</table>

179 Documents produced under section 27 to the OFT by McKay on 15 October 2003. Ref NJB/8
180 See witness statement of Mr A, an estimator/surveyor of Pirie, dated 1 April 2003.
In connection with the Cardonald contract, as far as Mr A\textsuperscript{181} (an estimator of Pirie) could recall, this contract was subject to collusion with cover bids provided by Walker and McKay. \textsuperscript{182}

**Analysis of evidence – Cardonald contract**

210. The OFT considers that the evidence set out in paragraphs 203 to 206 above demonstrates that Pirie asked McKay and Walker to provide cover bids in relation to the Cardonald contract. This view is reinforced by the evidence set out in paragraph 207 above, where McKay used the figure £11,426 calculated by Pirie and submitted it to Clydesdale Bank. The OFT notes that this figure is identical to the figure Pirie sent to McKay in paragraph 203 above, demonstrating that McKay agreed to submit the figures prepared by Pirie rather than determining its own price independently.

211. This view is supported by the statement of Mr A, set out at paragraph 208 above where he noted that McKay had agreed to collude on the various Clydesdale Bank contracts. In addition the evidence set out by Pirie in paragraph 209 specifies that Pirie was the lead contractor and that cover prices had been received from Walker and McKay.

**The participants’ representations**

**McKay’s representations**

212. McKay states that in relation to this contract “Mr Stuart Mason had acted without authorisation from us.”\textsuperscript{183}

213. No representations regarding this contract were made by any of the Parties.

**The OFT’s conclusions**

214. The OFT has considered McKay’s representations stating that relevant employee acted without the company’s authorisation, and is of the view that this does not affect McKay’s liability. As noted by the CAT in *Toys*\textsuperscript{184}:

> “[i]t is trite law that the fact that an employee of an undertaking is not authorised to make an infringing agreement does not relieve the undertaking of its liability: e.g. Cases 100/80 etc. *Musique Diffusion Française v Commission* [1983] ECR 1825”.

215. The OFT concludes that Pirie submitted a figure to the Clydesdale Bank regarding the Cardonald contract by letter dated 17 May 2000. Pirie then sent a copy of

\textsuperscript{181} See footnote 95 above.

\textsuperscript{182} See footnote 96 above.

\textsuperscript{183} Representation of McKay dated 17 March 2005 in response to the Statement.

\textsuperscript{184} *Toys*, paragraph 771.
this letter to each of McKay and Walker, having first deleted its original tender submission and replaced the figure (in manuscript) with a higher cover price it wished McKay and Walker to use (i.e. £11,426 for McKay and £11,861 for Walker). The conclusion that these cover figures faxed to McKay and Walker were higher than Pirie’s figure submitted on 17 May 2000 is supported by the evidence in paragraph 202 which notes that Pirie’s tender figure was £10,625.

216. The OFT, therefore, is satisfied that the evidence above meets the test set out by the CAT in Apex and Price,\textsuperscript{185} namely that there was contact which;

(a) shows that the conduct between of Pirie and McKay, and Pirie and Walker was not unilateral, as evidenced by the faxes sent from Pirie to the other parties in paragraphs 203 to 206 above. In addition, paragraph 209 above, confirms that this contract was subject to collusion. At no stage was there any resistance from Walker and McKay regarding the cover price arrangement, as evidenced by the subsequent conduct of the parties;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between Pirie and McKay and Pirie and Walker, as set out in paragraphs 203 to 206 above demonstrates that the parties did not determine their tender prices independently. The fact that Pirie submitted its tender price before requesting cover does not alter the OFT’s conclusion as it coordinated the subsequent provision of cover prices which were provided. The OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids, or immediately afterwards, in the circumstances.\textsuperscript{186} No alternative credible explanation as to why this contact took place has been advanced by the parties; and

(c) constitutes direct contact between Pirie and McKay and Pirie and Walker, which had as its object or effect;

(i) the disclosure to McKay and Walker respectively of a course of conduct that Pirie had adopted or was contemplating adopting in the tendering process, as evidenced by the contact Pirie had with the other parties regarding the tender rates that each would use (paragraphs 203 to 206). This disclosure by Pirie meant that

\textsuperscript{185} [2005] CAT 4, paragraph 205 et seq, 219, 229 and 242; [2005] CAT 5, paragraphs 48 et seq.

\textsuperscript{186} See footnote 16, ‘the 2003 statement’ of Ivan Jerram.
McKay and Walker knew that Pirie had submitted or would submit a lower bid; and

(ii) influenced the conduct of McKay and Walker respectively on the market. The OFT notes that the tender prices set out in Pirie’s fax in paragraph 203 to 204 above, is identical to the prices tendered by McKay and Walker at paragraphs 202 above (and additionally in the case of McKay in paragraph 207 above).

217. Accordingly, the OFT concludes that the totality of the evidence, as analysed at paragraphs 202 to 211 above, establishes that an agreement and/or concerted practice was in place between Pirie and McKay on the one hand, and between Pirie and Walker on the other, in breach of the Chapter I prohibition, each of which had the object of fixing tender prices in relation to the Cardonald contract at the Clydesdale Bank.

**Johnstone contract**

**Facts**

218. The OFT has been able to obtain only limited background information on the tender process for the Clydesdale Bank contracts (including the Johnstone contract), as described in paragraph 184 above.

**Evidence of agreement and/or concerted practice**

219. Evidence from leniency applicant Pirie. Fax from Allan Thomson of Walker to Scott Deans of Pirie, dated 24 May 2000. The fax, which notes that it was sent at “10.06” states:

“Subject: Clydesdale Bank – Johnstone
High level AS spec} £27,898.00
Low level AS spec} included in above

P.C. Sum for timber repairs £4,200.00
Contract Total £32,098.00”

220. Evidence from leniency applicant Pirie. (Statement of Mr A, an estimator/surveyor of Pirie). When Mr A was asked by OFT officials about what could he tell the OFT about McKay, Mr A stated that;

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187 *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

188 *Ibid*.


190 See witness statement of Mr A, an estimator/surveyor of Pirie, dated 1 April 2003.
“Well the only time it ever happened with McKay’s was we were pricing work for the Clydesdale Bank and there was a whole load of Banks come out at the one time....I think it was only three contractors or four contractors or three contractors pricing this work and there was a suggestion, the discussion over the phone of the contractors that well, there’s no point in us all going cutting our throats to pick up this work and ending up with one contractor with all the work at low prices, let’s see if we could share this about and not be silly about it.....”

221. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. The following table is an extract from the list of contracts:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Value of contract (£)</th>
<th>Date quoted</th>
<th>Cover given to</th>
<th>Cover received from</th>
</tr>
</thead>
<tbody>
<tr>
<td>Johnstone branch</td>
<td>32,098.00</td>
<td>17 May 2000</td>
<td>Walker</td>
<td>Pirie/McKay</td>
</tr>
</tbody>
</table>

In connection with the Johnstone contract, as far as Mr A (an estimator of Pirie) could recall, this contract was subject to collusion with cover bids provided by Pirie and McKay.192

Analysis of evidence – Johnstone contract

222. With regard to the Johnstone contract, the OFT is of the view that the evidence set out in paragraph 219 above demonstrates that Walker asked Pirie to provide a cover price in relation to this contract.

223. This view is supported by the statement of Mr A, set out at paragraph 220 referring to collusion between contracts in relation to the Clydesdale Bank contracts. In addition the evidence set out by Pirie in paragraph 221 above specifies that Walker was the lead contractor and that cover prices had been received from Pirie and McKay.

224. With regard to McKay’s involvement, although there are indications that McKay did collude in the contract, there is insufficient evidence in the context of the specific circumstances of this case to establish that McKay was involved in an agreement and/or concerted practice to submit cover prices in relation to the Johnstone contract. In particular, in the Castlemilk and Cardonald contracts (paragraphs 191 and 207 above), there were letters from McKay to Clydesdale Bank which provided identical tender figures to Pirie’s fax requesting a cover price.

191 See footnote 95 above.
192 See footnote 96 above.
from McKay, which demonstrated that McKay agreed to submit a cover figure prepared by Pirie, rather than determine its own price independently. However, in relation to the Johnstone contract, there are no such letters, and therefore, the OFT is of the view that there is insufficient evidence to implicate McKay on this occasion.

_The participants’ representations_

225. No representations regarding this contract were made by any of the Parties.

_The OFT’s conclusions_

226. The OFT is satisfied that the evidence above meets the test set out by the CAT in _Apex_ and _Price_,\(^1\) namely that there was contact which;

(a) shows that the conduct of Walker and Pirie was not unilateral, as evidenced by the fax sent from Walker to Pirie in paragraph 219 above. In addition, evidence from Pirie at paragraph 221 above confirms that this contract was subject to collusion. At no stage was there any resistance from Pirie, as evidenced by its subsequent conduct;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between Walker and Pirie, as set out in paragraph 219 above demonstrates that the parties did not determine their tender prices independently. Therefore, the OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids, or immediately afterwards, in the circumstances.\(^2\) No alternative credible explanation as to why this contact took place has been advanced by the parties; and

(c) constitutes direct contact between Walker and Pirie, which had as its object or effect;

(i) the disclosure to Pirie of a course of conduct that Walker had adopted or was to adopt or was contemplating adopting in the tendering process, as evidenced by the contact Walker had with Pirie regarding the tender rates that it had used or would use (paragraph 219). This disclosure by Walker meant that Pirie knew that Walker would submit a lower bid; and

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\(^1\) [2005] CAT 4, paragraph 205 _et seq._, 219, 229 and 242; [2005] CAT 5, paragraphs 48 _et seq._

\(^2\) See footnote 16, ‘the 2003 statement’ of Ivan Jerram.
(ii) influenced the conduct of Pirie on the market. The OFT notes that Pirie submitted a cover price (see table in paragraph 221 above) in relation to this contract which is identical to the cover price provided by Walker to Pirie.

227. Accordingly, in the absence of any contradictory statement from the participants, the OFT concludes that the totality of the evidence,\textsuperscript{195} as analysed at paragraphs 218 to 224 above, establishes that an agreement and/or concerted practice was in place between Walker and Pirie, in breach of the Chapter I prohibition, which had the object of fixing tender prices in relation to the Johnstone contract at the Clydesdale Bank.

*Troon contract*

*Facts*

228. As stated above, the OFT has been able to obtain only limited background information on the tender process for the Troon branch of the Clydesdale Bank contracts. From the information available, Pirie, Walker and McKay tendered for the Troon contract at Clydesdale Bank.

*Evidence of agreement and/or concerted practice*

229. Evidence from leniency applicant Pirie. Fax from Allan Thomson of Walker to Scott Deans of Pirie, dated 24 May 2000.\textsuperscript{196} The fax, which notes that it was sent at “10.06” states:

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“Clydesdale Bank Troon
ALL for the sum of £8,100.00
We have put in a P.C. sum for rooflights [sic] repairs, however I have included this in your price of £8,100.
Any problems please phone
Allan”
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230. Evidence from leniency applicant Pirie. (Statement of Mr A, an estimator/surveyor of Pirie).\textsuperscript{197} When Mr A was asked by OFT officials about what could he tell the OFT about McKay, Mr A stated that:

“Well the only time it ever happened with McKay’s was we were pricing work for the Clydesdale Bank and there was a whole load of Banks come out at the one time….I think it was only three contractors or four contractors or three contractors pricing this work and there was a suggestion, the discussion over the phone of the contractors that well, there’s no point in us all going cutting out throats to pick up this work and ending up

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\textsuperscript{195} *Replica Kits*, paragraph 206 and *Toys*, paragraphs 164-165.

\textsuperscript{196} Document produced by Pirie on 2 December 2002.

\textsuperscript{197} See witness statement of Mr A, an estimator/surveyor of Pirie, dated 1 April 2003.
with one contractor with all the work at low prices, let’s see if we could share this about and not be silly about it…..”

231. Evidence from leniency applicant Pirie. On 2 December 2002, Pirie submitted a covering letter to the OFT along with a list of contracts. The relevant member of staff for each department subsequently examined the list and endeavoured to remember where any collusion might have taken place. The following table is an extract from the list of contracts:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Value of contract (£)</th>
<th>Date quoted</th>
<th>Cover given to</th>
<th>Cover received from</th>
</tr>
</thead>
<tbody>
<tr>
<td>Troon branch</td>
<td>8,100.00</td>
<td>17 May 2000</td>
<td>Walker</td>
<td>Pirie/McKay</td>
</tr>
</tbody>
</table>

In connection with the Troon contract, as far as Mr A198, (an estimator of Pirie), recalled this contract was subject to collusion with cover bids provided by Pirie and McKay:199

Analysis of evidence – Troon contract

232. With regard to the Troon contract, the OFT is of the view that the evidence set out in paragraph 229 above demonstrates that Walker asked Pirie to provide a cover bid in relation this contract.

233. This view is supported by the statement of Mr A, set out at paragraph 230 above, referring to collusion between contracts in relation to the Clydesdale Bank contracts. In addition the evidence set out by Pirie in paragraph 231 specifies that Walker was the lead contractor and that cover prices had been received from Pirie and McKay.

234. With regard to McKay’s involvement, although there are indications that McKay did collude in the contract, there is insufficient evidence in the context of the specific circumstances of this case to establish that McKay was involved in an agreement and/or concerted practice to submit cover prices in relation to the Troon contract. In particular, in the Castlemilk and Cardonald contracts (paragraphs 191 and 207 above), there were letters from McKay to Clydesdale Bank which provided identical tender figures to Pirie’s fax requesting a cover price from McKay, which demonstrated that McKay agreed to submit a cover figure prepared by Pirie, rather than determine its own price independently. However, in relation to the Troon contract, there are no such letters, and therefore, the OFT is

198 See footnote 95 above.
199 See footnote 96 above.
of the view that there is insufficient evidence to implicate McKay on this occasion.

**The participants’ representations**

235. No representations regarding this contract were made by any of the Parties.

**The OFT’s conclusions**

236. The OFT is satisfied that the evidence above meets the test set out by the CAT in *Apex* and *Price,*\(^{200}\) namely that there was contact which;

(a) shows that the conduct of Walker and Pirie was not unilateral, as evidenced by the fax sent from Walker to Pirie in paragraph 229 above. In addition, evidence from Pirie at paragraph 231 above confirms that this contract was subject to collusion. At no stage was there any resistance from Pirie, as evidenced by its subsequent conduct;

(b) infringes against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The contact between Walker and Pirie, as set out in paragraph 229 above demonstrates that the parties did not determine their tender prices independently. Therefore, the OFT considers that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a competitively tendered process would need to communicate with one another in relation to the tender before returning their bids, or immediately afterwards, in the circumstances.\(^{201}\) No alternative credible explanation as to why this contact took place has been advanced by the parties; and

(c) constitutes direct contact between Walker and Pirie, which had as its object or effect;

(i) the disclosure to Pirie of a course of conduct that Walker had adopted or was to adopt or was contemplating adopting in the tendering process, as evidenced by the contact Walker had with Pirie regarding the tender rates that it would use (paragraph 229). This disclosure by Walker meant that Pirie knew that Walker had submitted or would submit a lower bid; and

(ii) influenced the conduct of Pirie on the market. The OFT notes that Pirie submitted a cover price (see table in paragraph 231 above) in

\(^{200}\) [2005] CAT 4, paragraph 205 *et seq.*, 219, 229 and 242; [2005] CAT 5, paragraphs 48 *et seq*.

\(^{201}\) See footnote 16, ‘the 2003 statement’ of Ivan Jerram.
relation to this contract which was identical to the cover price
provided by Walker to Pirie.

237. Accordingly, in the absence of any contradictory statement from the participants,
the OFT concludes that the totality of the evidence,202 as analysed at paragraphs
228 to 234 above, establishes that an agreement and/or concerted practice was
in place between Walker and Pirie, in breach of the Chapter I prohibition, which
had the object of fixing tender prices in relation to the Troon contract at the
Clydesdale Bank.

I. The OFT’s conclusions on the individual agreements and/or concerted practices

238. On the basis of the facts, evidence, and representations analysed at paragraphs
106 to 237 above, the OFT finds that the Parties entered into certain individual
agreements and/or concerted practices with the object of fixing prices through
collusive tendering in relation to individual contracts as set out above.

J. Prevention, restriction or distortion of competition

i. Introduction: the effect of the procurement process on competition in the
relevant market

239. 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.

240. 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 location 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.

241. 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. 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.

202 Replica Kits, paragraph 206 and Toys, paragraphs 164-165.
242. Furthermore, the ability of different contactors to be included on standing lists is restricted by a number of different factors. In particular, firms would need to demonstrate:

- Specialist roofing skills;
- Adequate insurance coverage;
- A good health and safety record; and
- Relevant product/manufacturer guarantees.

243. 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 particular those on the relevant short lists for the supply of, installation repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland.

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

244. 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.”

245. 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.203

246. In considering whether an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it operates. The OFT’s assessment of the aims of the agreement and/or concerted practice is determined by an objective assessment of the meaning and purpose of the agreement, rather than by any consideration of the subjective intention of the Parties when entering into the agreement and/or concerted practice. In this respect the OFT takes the view that, if the obvious consequence of an agreement and/or concerted practice is to prevent, restrict or distort competition, that will be its object notwithstanding that it may have other aims as well.

203 The ECJ has acknowledged this principle on many occasions in relation to the interpretation of Article 81(1). In *Consten & Grundig v European Commission* [1996] 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.’ This was confirmed by the CAT in *Toys*, paragraph 357.
247. Section 2(2) of the Act states that the Chapter I prohibition applies, in particular, to agreements and/or concerted practices which:

“...directly or indirectly fix...selling prices...[and]...share markets or sources of supply.”

248. Accordingly, any provision in an agreement and/or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, fixes the prices at which goods or services are sold, or shares markets or sources of supply, will amount to an infringement of the Chapter I prohibition. As discussed above at paragraph 86, the fact that a party attended a meeting reluctantly, or had no intention of putting into practice any agreement (without distancing itself from the agreement), or did not, in fact, implement the agreement, is not relevant to the finding of an infringement.

249. Moreover, the CAT held in *Toys II* that:

“It is trite law that once it is shown that such agreements or practices had the object of preventing, restricting, or distorting competition, there is no need for the OFT to show what the actual effect was: see Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342 and many subsequent cases”; and

“[i]f an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability”.

250. The conduct of parties in providing, receiving and considering information as to: (a) whether or not they intended to bid; (b) whether they were amenable to submitting a cover price; and/or (c) the prices at (or above) which a cover bid should be set amounts to a concerted practice which has as its object the prevention, restriction or distortion of competition. The CAT stated in *Apex*:

“[T]he concerted practice is made out at a stage prior to consideration of whether the person receiving the price actually puts in a tender”.

251. During the course of the OFT’s investigation Walker asserted that the desire to stay on standing lists (as described at paragraph 78) was a primary consideration when submitting a cover bid. This explanation was considered and found to be immaterial by the CAT in *Apex*.

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204 See also the section in this Decision on appreciability at paragraphs 253 to 255 below.
206 *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4, at paragraph 236.
208 *Ibid*, at paragraph 250.
“The Tribunal does not accept that this explanation [i.e. to stay on tender lists] for Apex’s conduct absolves Apex of liability. Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.”

252. The OFT therefore takes the view that the agreements and/or concerted practices referred to in this Decision had as their obvious and intended consequence the fixing of prices, and, therefore, had as their object the prevention, restriction or distortion of competition.

K. Appreciability

253. An agreement and/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 in the UK. The OFT takes the view that an agreement and/or concerted practice will generally have not be an appreciable restriction of competition if the aggregate market share of the parties to the agreement and/or concerted practice does not exceed 10 per cent of the relevant market affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned).209

254. However, there will be circumstances where this is not the case. The OFT will generally regard any agreement and/or concerted practice which directly or indirectly fixes prices as being capable of having as its object or effect an appreciable restriction of competition even where the parties’ combined market share falls below the 10 per cent threshold.210

255. The agreements and/or concerted practices between the Parties referred to in this Decision were price-fixing arrangements having the object of directly or indirectly fixing prices. They are therefore considered by the OFT to have as their object an appreciable restriction of competition whether or not the Parties’ combined market share in the relevant market falls below 10 per cent. The OFT considers that collusive tendering arrangements, by their very nature, restrict competition to an appreciable extent.211 The OFT therefore takes the view that the agreements

and/or concerted practices specified in this Decision prevent, restrict or distort competition to an appreciable extent.\textsuperscript{212}

L. Effect on trade within the UK

256. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate. By their very nature, agreements and/or concerted practices to fix prices restrict competition and are likely to affect trade. It should be noted that, to infringe the Chapter I prohibition, an agreement and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade. Moreover, the effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of Community competition law and national competition law; the test is not read as importing the requirement that the effect on trade should be appreciable.\textsuperscript{213}

257. The agreements and/or concerted practices referred to in this Decision operated in a part of the UK — Western-Central Scotland — and the Parties' conduct is therefore considered by the OFT to have affected trade within the UK. The Parties' price-fixing agreements and/or concerted practices were capable of altering the structure of competition in a part of the UK by reducing and, in some instances, removing competition from the competitive tendering process.\textsuperscript{214}

M. Conclusion on application of the Chapter I prohibition

258. The OFT concludes on the basis of the strong and compelling evidence set out at paragraphs 106 to 237 above that the Parties infringed the Chapter I prohibition by forming a series of individual agreements and/or concerted practices each of which had as its object the fixing of prices, in the market for the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland.

III. DECISION

A. Agreements and/or concerted practices

259. The evidence set out at Part II of this Decision formed the basis of the Statement sent to the Parties. The OFT's assessment of the views set out in the Parties' representations to the OFT is also set out in Part II of this Decision. Having considered carefully the evidence and analysed the views set out in the

\textsuperscript{212}The OFT does not consider the agreements and/or concerted practices produce only insignificant effects in the sense outlined in Case 5/69 Völk v Vervaeke [1969] ECR 295.

\textsuperscript{213}See the final judgment of the CAT in Aberdeen Journals [2003] CAT 11, at paragraphs 459 and 460.

\textsuperscript{214}Section 2(7) of the Act catches agreements or concerted practices which "may affect trade".
representations by Walker, Advanced, Brolly, Bonnington and McKay, the OFT finds that there were agreements and/or concerted practices between the participants in each contract particularised in Part II\(^{215}\) above to fix the prices of the supply of certain flat roofing services by collusive tendering in relation to the above contracts.

260. On the basis of the evidence available, set out at paragraphs 106 to 237 above, the OFT has considered the relevant duration for each of the infringements. The OFT considers that the duration of infringements of this nature is at least from the date of initial contact between parties, alerting one another that they had been invited to tender and were either interested in winning the tender or in making bids that would ensure they would not win the tender, to the date when bids were submitted. In cases involving allocation of multiple contracts between different parties, where the dates for submission of those tenders varied, the relevant date is that for submission of the latest tender.

261. The nature of the initial contacts, which are often oral, coupled with the fact that tender documentation is not always retained beyond the end of the tender process mean that the OFT does not always have precise information as to either or both of the dates in respect of each infringement. In the cases where such information is available, the dates in question are usually separated by a matter of days or weeks. On the basis of the evidence set out at paragraphs 106 to 233 above, the OFT is aware of no evidence to suggest that the period between initial contact and submission of tender bids was, in relation to any of the infringements particularised in Part II of this Decision, greater than one year in length.

262. In any event, the OFT considers that the concept of duration is generally speaking of less significance in bidding markets compared to fixed-price markets. As the CAT stated in *Apex*\(^{216}\):

“[I]n the present case, the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderers. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified.”

263. Therefore, in the context of a tendering process the infringements had a potential continuing impact on further tendering processes by the same tenderers and once a contract had been awarded following an anti-competitive tender, the anti-competitive effect was irreversible in relation to that tender.

\(^{215}\) See paragraphs 106 to 237 above.

\(^{216}\) *Apex* judgment, at paragraph 278.
264. Certain of the Parties have made representations to the effect that the infringements were made on a 'one off' basis and were not in any way part of a pattern or standing agreement.\textsuperscript{217} The OFT notes that whilst certain of the Parties have been found to have participated in more than one of the infringements particularised in Part II above, the OFT has no evidence that these incidents of collusive tendering formed part of an overall scheme whereby contracts were allocated between members of a cartel on an ongoing basis.

265. The OFT therefore considers that each of the infringements particularised in Part II above lasted for less than one year.

B. Action

266. This section sets out the action that the OFT has decided to take and its reasons for it.

i. Directions

267. 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. As the OFT is satisfied that the infringements particularised in Part II of the Decision have come to an end, the OFT is not issuing any directions in this case.

ii. Financial penalties – general points

268. Section 36(1) of the Act provides that, on making a Decision that an agreement\textsuperscript{218} and/or concerted practice 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 1998 (Determination of Turnover for Penalties Order) 2000 as amended ('the Penalties Order').\textsuperscript{219} The OFT considers that the parties to each infringing agreement and/or concerted practice are as set out in the OFT’s conclusions in relation to each infringement, paragraphs 130, 143, 158, 183, 201, 217, 227, and 237 above.

\textsuperscript{217} For example, Brolly’s written response, dated 21 March 2005, to the Statement.

\textsuperscript{218} Section 2(5) of the Act states: “a provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, … a concerted practice (but with any necessary modifications).” As such, where this section of the Decision includes references to agreements taken from the Act or associated statutory instruments, those references should be taken to refer also to concerted practices.

269. 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.220

270. In the present case, 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 further notes that it is not uncommon for a purchaser organising a tender procedure to require the parties invited to tender to complete a detailed non-collusion statement confirming that the tender submitted is a competitive offer and that there have been no undue contacts with any competing company in connection with the tender offer, for example, the Elizabeth Martin Clinic discussed in paragraph 145 above.221 The OFT considers that, in the light of these facts and the very nature of the agreements and/or concerted practices, the Parties could not have been unaware that the agreements and/or concerted practices to which they were party 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.

IMMUNITY FROM PENALTIES

271. 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 2000,222 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.223

272. 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).224

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220 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.

221 However, the OFT does not believe that it is necessary to show that a party completed such a non-collusion statement for the OFT to find that this party infringed the Chapter I prohibition intentionally or negligently.

222 SI 2000/262.

223 See footnote 218 above.

224 See footnote 218 above.
CALCULATION OF PENALTIES – GENERAL POINTS

273. 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 for the time being in force when setting the amount of the penalty.225

Step 1 – starting point

274. The starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.226 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 business year.227 The last business year is the business year preceding the date of the Decision.228 The starting point is formulated as a percentage rate of each undertaking’s relevant turnover, up to a maximum of 10 per cent.229 Whilst the OFT is not required to formulate the starting point as a percentage rate of each undertaking’s relevant turnover, in this case a percentage rate, reflecting the seriousness of the offence and applied to each undertaking’s relevant turnover, is considered to be an appropriate way of having regard both to seriousness and the relevant turnover of each undertaking.

275. The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.230 When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration.231

Nature of infringement

276. The OFT has imposed a penalty on the Parties. The starting point for each penalty is based on the fact that the agreements and/or concerted practices in this case are related to collusive tendering. Collusive tendering is a form of price-fixing and is a very serious infringement of the Chapter I prohibition. The usual starting point

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225 The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004.
226 Ibid, at paragraph 2.3.
227 Ibid, at paragraph 2.7.
228 Penalties Order, Article 3.
229 The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, paragraph 2.8.
230 Ibid, at paragraph 2.4.
231 Ibid, at paragraph 2.5.
for each penalty in such a case is likely to be at or near 10% of relevant turnover.

277. The OFT considers that a very serious example of collusive tendering would be a cartel where collusion in relation to individual contracts was part of an overall scheme that was centrally controlled and orchestrated by the participants with on the face of it unrelated contracts allocated between members of the cartel. The OFT does not have evidence of such an overall arrangement in this case.

278. The OFT notes that certain of the instances of cover pricing dealt with in this Decision are individual, discrete infringements, whereby collusive tendering results in the submission of uncompetitive tender bids. These are considered to be less serious forms of collusive tendering.

Nature of product

279. Felt and single ply flat roofs are among a number of available types of roof coverings but because of a basic difference in materials and technology, purchasers that need services carried out on flat roofs will have only a limited ability (or none at all) to substitute to employing the services of a contractor that can carry out that kind of work in relation to other types of flat roofs.

280. The values of the contracts covered by this Decision ranged from approximately £10,000 to over £125,000. The relatively small size of many of the contracts in question is a relevant factor when assessing the seriousness of the infringement for the purposes of determining the starting point.

Structure of market

281. The market consists of contractors for the supply of installation, repair, maintenance, and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland. As noted at paragraph 29 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 mastic asphalt roofing market in Scotland is therefore likely to be fragmented.

282. Local authorities are significant purchasers of installation, repair, maintenance and improvement services for felt and single ply covering for flat roofs that the Parties supply. Some of the Parties told the OFT that there was perceived pressure in the industry for suppliers to put in tender bids even when they did not wish to win the contract because otherwise there was the risk of not being invited to tender in the future. However, a desire to maintain relationships with customers (or their

\[232 \text{Ibid, at paragraph 2.4.}\]
agents) does not diminish each supplier’s obligations to maintain independence from its competitors as a separate economic operator. All undertakings are independently free to adopt a business strategy which involves submitting bids at prices which they would not expect to win the contract. However, the Chapter I prohibition provides that contacts between competitors are prohibited where they have the object or effect of ensuring that bids submitted do not genuinely compete. In the OFT’s view the fact that the Parties may have had motives such as staying on tender lists, which led to their contact with competitors, does not in any way affect the OFT’s assessment of the seriousness of the infringements.

**Market share of undertakings involved**

283. Although detailed statistical data about the market for the supply of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs is unavailable, the OFT considers the fact that the UK roofing industry as a whole is so fragmented (see paragraph 29 above) suggests that none of the Parties has a major UK market share in the market for the supply of, installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland.

**Effect on customers, competitors and third parties**

284. The OFT, however, notes that the instances of cover pricing dealt with in this Decision are individual, discrete infringements. 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 as discussed in paragraphs 277 above. 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.

285. The Parties identified in the Decision (i.e. six roofing contactors operating in a small regional market) constitute a not insignificant part of suppliers of installation, repair, maintenance and improvement services for felt and single ply coverings for flat roofs in Western-Central Scotland. Also, the OFT has been informed in the context of a previous investigation that “cover pricing is endemic in the construction industry in general including 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. As a result it was not possible for those customers to ascertain whether the tenders received were a competitive price or not.

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233 See paragraph 251 above.

234 See paragraph 18 onwards, for an overview of the UK contracting services market.
286. Certain Parties have made representations that there was no suggestion that financial loss was caused to customers as a consequence of the infringements. The OFT notes that even if customers do not end up directly facing higher prices in the short term, the foreseeable effect of the restriction or, in some cases, complete removal of competition from the tender process will lead to consumer detriment through inefficiencies. Scarce resources are diverted from elsewhere in the public sector, lowering welfare; and in the roofing market itself, there will be less incentive to compete by lowering costs and innovating. It is not, however, possible for the OFT to quantify the amount of any loss caused to customers (and to the extent those customers are public bodies, ultimately tax payers) as a result of the collusive tendering.

287. The OFT has had regard to the nature of the product, the structure of the market, the market share of the Parties and the effect of the infringements on competitors and third parties, as set out in paragraphs 106 to 237 above. The OFT considers that (a) the market is fragmented (see paragraph 29 above); (b) none of the Parties has a leading market share (paragraph 283); and (c) the Parties' infringements were — by virtue of the fact that they were individual, discrete infringements, and that no compensation was paid by the party who won the bid to the other parties — not the most serious examples of collusive tendering. Therefore, the OFT has fixed a starting point of [C] per cent of relevant turnover for all the Parties.

**Step 2 – adjustment for duration**

288. The starting point may be adjusted to take into account the duration of the infringement.\(^{236}\) As noted at paragraph 265 above, the duration of each of the infringements in this Decision is calculated by the OFT to be less than a year. Having regard to the irreversible anti-competitive effects after a tender has been awarded (see paragraph 262 above), the OFT does not believe that the fact that the bid-rigging arrangements lasted for significantly less than one year should lead to any downward adjustment in the penalties imposed.

289. In its judgment in *Apex*,\(^{237}\) in considering the duration of collusive tendering practices similar in nature to those particularised in this Decision, the CAT stated:

“[I]n the present case the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering processes by the same tenderers. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive

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\(^{236}\) See *West Midlands Roofing Decision*, paragraph 394.

\(^{237}\) See *Apex* judgment, at paragraph 278.
tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified. We consider, therefore, that the OFT’s decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable."

290. Therefore, the OFT will not adjust any of the penalties either downwards or upwards in this case for duration.

**Step 3 – adjustment for other factors**

291. The penalty may be adjusted as appropriate to achieve policy objectives, particularly deterring undertakings (including non-infringing undertakings) from engaging in anti-competitive practices, such as collusive tendering. Considerations at this stage may include the OFT’s estimate of any economic or financial benefit made by the infringing undertakings from the infringement(s), and the special characteristics, including the size and financial position of the undertakings in question.\(^\text{238}\)

292. A number of Parties have made representations asserting a lack of financial gain from the infringements.\(^\text{239}\) However in this case, the OFT considers that it would be difficult to estimate any gain that the Parties have achieved through their collusive actions in relation to the contracts that formed the subject matter of the infringements. Potential gains may be derived not only from the contracts in question (through higher margins), but also from alterations to the ongoing relationships with customers. Moreover, the arithmetical calculation of gain should not form the sole or even the primary means of assessing the seriousness of an infringement except in the clearest cases.\(^\text{240}\)

293. As noted in paragraph 285 above, and in previous decisions of the OFT\(^\text{241}\), collusive tendering has been widespread in 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.

294. The financial penalty calculated at the end of Step 2 of the calculation procedure may represent a relatively low proportion of an undertaking’s total turnover, for example where the undertaking in question has significant operations in other

\(^{238}\) *Ibid*, paragraph 2.11.

\(^{239}\) For example, Brolly’s written representations dated 21 March 2005 in response to the Statement.

\(^{240}\) *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 511.

\(^{241}\) See the West Midlands Roofing Decision, the North East Roofing Decision, and the Scottish Roofing Decision, discussed above, see footnotes 25, 46 and 26 respectively.
markets. In such a case, the OFT considers that the penalty figure reached at the end of Step 2 may not represent a significant sum for that party, and it will therefore be necessary to increase the party’s penalty at Step 3 to arrive at a sum that represents, for that party, a significant amount that will act as a sufficient deterrent, having regard to the seriousness of the infringement(s) and the party’s total turnover. These points are considered in relation to each Party, below.

295. In relation to the size of the undertakings in question several Parties\(^2\) have submitted representations stating that it is a small company compared to some of the other Parties. The OFT recognises that some Parties are larger than others but notes that this factor will be reflected when account is taken of relevant turnover applying a percentage rate starting point as described in paragraph 274 above. In addition, for large companies for whom relevant turnover constitutes a relatively small percentage of total turnover, adjustments may be made as described in paragraph 294 above to ensure that the financial penalties represent a significant sum for such Parties. As a result, and taking into consideration the seriousness of the infringements, the OFT considers that no downward adjustment for smaller parties would be appropriate at this stage.

296. In relation to the financial position of the undertakings, the OFT notes that financial position is a relevant consideration in the context of determining whether the sum reached at the end of Step 2 is an appropriate amount for deterrence, not only in relation to the party in question but also in relation to third parties who may consider engaging in anti-competitive activities.

*Step 4 – adjustment for aggravating and mitigating factors*

297. The OFT has the power to increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.\(^2\) The OFT considers these points in relation to each undertaking, below.

298. The OFT notes here that where parties have committed repeated infringements, it constitutes an aggravating factor under this Step of the penalty calculation procedure. The magnitude of the penalty is therefore adjusted to reflect the number of infringements each party has committed. In deciding on the appropriate amount of the increase for multiple infringements, the OFT will ensure that any adjustment is fair and proportionate between all parties. When assessing the appropriate amount of the increase, the OFT therefore may have regard to both the absolute frequency of infringements by each party and the relative frequency of such infringements as between the parties in relation to the relevant market. Moreover, the OFT may also have regard to whether, in its opinion, there are

\(^{2}\) See representations received from Brolly, Advanced and Walker. Brolly argues that it is a small player in the market with a market share of less than 5%.

significant qualitative differences between discrete infringements that should be reflected in any fine set by the OFT.

299. In the circumstances of the present case, the OFT has decided to increase the fines by multiples of 10 per cent where a Party has committed 2 or more infringements, as set out in the table below:

<table>
<thead>
<tr>
<th>Number of Infringements</th>
<th>Increment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>none</td>
</tr>
<tr>
<td>2</td>
<td>10%</td>
</tr>
<tr>
<td>3</td>
<td>20%</td>
</tr>
<tr>
<td>4</td>
<td>30%</td>
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<td>5</td>
<td>40%</td>
</tr>
<tr>
<td>6</td>
<td>50%</td>
</tr>
<tr>
<td>7</td>
<td>60%</td>
</tr>
</tbody>
</table>

300. The OFT also notes that the role of an undertaking as a leader in, or an instigator of, the infringement may be an aggravating factor. However, in this case, the OFT has made no findings in relation to any of the contracts in this Decision that any Party had a role as a leader in or instigator of an infringement.

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

301. The OFT may not fix a penalty that exceeds 10 per cent of the worldwide turnover of the undertaking in its last business year, calculated in accordance with the provisions of the Penalties Order. The section 36(8) turnover is not restricted to the turnover in the relevant product market and relevant geographic market. The OFT considers below, in relation to each undertaking, whether any penalty would exceed 10 per cent of the section 36(8) turnover.

302. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per

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\(^{244}\) Ibid, at paragraph 2.15.


\(^{246}\) The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.17.
cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.\textsuperscript{247}

303. 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 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).\textsuperscript{248}

iii. **Penalty for Pirie**

**Step 1 – starting point**

304. Pirie was involved in 7 infringements:

- Hermitage Academy, which the OFT considers came to an end in February 2001;
- Drummond House, which the OFT considers came to an end in March 2002;
- Elizabeth Martin Clinic which the OFT considers came to an end in December 2000;
- Clydesdale Bank (Castlemilk contract), which the OFT considers came to an end in May 2000;
- Clydesdale Bank (Cardonald contract), which the OFT considers came to an end in May 2000;
- Clydesdale Bank (Johnstone contract), which the OFT considers came to an end in May 2000; and
- Clydesdale Bank (Troon contract), which the OFT considers came to an end in May 2000.

305. Pirie’s financial year is 1 January to 31 December. Pirie’s turnover in the relevant product and geographic markets in the last business year preceding the date of this Decision for which accounts are available (1 January to 31 December 2003) was £\textsuperscript{249}

306. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 274 to 287 above and fixed the starting point for all the Parties at [C] per cent of relevant turnover. The starting point for Pirie is therefore £[C].

\textsuperscript{247} *Ibid*, at paragraph 2.18.
\textsuperscript{248} *Ibid*, at paragraph 2.20. See also section 38(9) of the Act.
\textsuperscript{249} Figures for the financial year ending 31 December 2004 are not available. Accordingly the 2003 financial year end figures will be used when calculating penalties in this Decision.
Step 2 – adjustment for duration

307. In accordance with paragraphs 288 to 290 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

308. As noted at paragraphs 291 and 293 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 of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Pirie because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Pirie’s total turnover for the year ending 31 December 2003 (see paragraph 291 above). In accordance with paragraph 294 above, the OFT therefore considers that, in this instance, the penalty figure of £[C] is sufficient to act as an effective deterrent to Pirie 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 aggravating and mitigating factors

Aggravation

309. As noted at paragraph 298 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Pirie was involved in collusive tendering in connection with 7 infringements. The OFT therefore increases the penalty for Pirie by 60 per cent.

310. The OFT is aware that there was involvement of Mr A, a senior manager of Pirie. The OFT considers this an aggravating factor and increases the penalty by [C] per cent.

Mitigation

311. The OFT is aware of the remedial action taken by Pirie since its discovery of the infringements. Pirie 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.\footnote{Paragraph 5 of Pirie’s written representations dated January 2005, in response to the Statement.} The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [C] per cent.
312. Although Pirie co-operated 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.

313. 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 \([C]\) of \([C]\) per cent. The financial penalty will therefore be £85,774 subject to Step 5.

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

314. 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 the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.\(^{251}\) The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the Decision.\(^{252}\) The applicable turnover for Pirie in the last business year for which accounts were available (the year ending 31 December 2003) was £7,155,915. The statutory maximum financial penalty for Pirie is 10 per cent of this figure and is therefore £715,592.

315. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.\(^{253}\) The applicable turnover for Pirie in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £8,186,500. The statutory maximum financial penalty for Pirie is 10 per cent of this figure and is therefore £818,650.

316. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

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\(^{251}\) Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

\(^{252}\) Article 3 of the Penalties Order.

\(^{253}\) The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph, at paragraph 2.18.
Leniency

317. Pirie was granted a reduction of 100 per cent from financial penalties as part of the OFT’s leniency programme, in recognition of the fact that Pirie was the first party to apply for leniency and voluntarily provide information in the OFT’s pre-existing investigation in this case.\(^{254}\) Pirie’s financial penalty is therefore reduced to zero.

iv. Penalty for Walker

Step 1 – starting point

318. Walker was involved in 5 infringements:

- Royal Bank of Scotland, which the OFT has found came to an end in June 2001;
- Clydesdale Bank (Castlemilk contract), which the OFT considers came to an end in May 2000;
- Clydesdale Bank (Cardonald contract), which the OFT considers came to an end in May 2000;
- Clydesdale Bank (Johnstone contract), which the OFT considers came to an end in May 2000; and
- Clydesdale Bank (Troon contract), which the OFT considers came to an end in May 2000.

319. Walker’s financial year is 1 January to 31 December. Walker’s turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (1 January to 31 December 2004) was £[C].

320. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 274 to 287 above and fixed the starting point for all the Parties at £[C] per cent of relevant turnover. The starting point for Walker is therefore £[C].

Step 2 – adjustment for duration

321. In accordance with paragraphs 288 to 290 above, the OFT does not make any adjustment for duration.

\(^{254}\) The OFT used its discretion in granting Pirie leniency plus under paragraph 3.17 of the OFT’s guidance to the appropriate amount of a penalty (December 2004).
Step 3 – adjustment for other factors

322. As noted at paragraphs 291 and 293 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 of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Walker because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Walker’s total turnover for the year ending 31 December 2004 (see paragraph 291 above). In accordance with paragraph 294 above, the OFT therefore considers that, in this instance, the penalty figure of £\[C\] is sufficient to act as an effective deterrent to Walker 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.

323. [C]

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

324. As noted at paragraph 298 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Walker was involved in collusive tendering in connection with 5 infringements. The OFT therefore increases the penalty for Walker by 40 per cent.

325. Representations were received from Walker\textsuperscript{255} that it would be inequitable to regard the involvement of Mr James A Thomson and Mr John C Thomson as being an aggravating factor in a small business such as Walker. The OFT notes that the guidance as to the appropriate amount of penalty does not make any distinction in this regard between small or large businesses, as the OFT considers that the directors of a company, irrespective of how small or large, are at the heart of the company and have a duty to ensure that the company acts lawfully. As such, directors should make themselves aware of competition law, including the Chapter I prohibition. Accordingly, as there was involvement on the part of two directors of Walker, Mr John C Thomson and Mr James A Thomson,\textsuperscript{256} the OFT considers this to be an aggravating factor and increases the penalty by [C] per cent.


\textsuperscript{256} The OFT considers that the directors of Walker were involved as the evidence in Section II above clearly demonstrates that Mr John C Thomson and Mr James A Thomson were directly involved in the infringements.
Mitigation

326. The OFT is aware of the remedial action taken by Walker since its discovery of the infringements. Walker 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. The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [C] per cent.

327. Although Walker co-operated 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.

328. 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 [C] of [C] per cent. The financial penalty will therefore be £76,194 subject to Step 5.

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

329. 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 the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover. The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the Decision. The applicable turnover for Walker in the last business year (the year ending 31 December 2004) was £[C]. The statutory maximum financial penalty for Walker is 10 per cent of this figure and is therefore £[C].

330. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended. The applicable turnover for Walker in the business year

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257  Walker informed the OFT by letter on 20 February 2003 that Walker has put into place a competition law compliance policy.

258  Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

259  Article 3 of the Penalties Order.

260  The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph, at paragraph 2.18.
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 Walker is 10 per cent of this figure and is therefore £[C].

331. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. 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**

332. Walker was granted a reduction of 45 per cent from financial penalties as part of the OFT’s leniency programme. Walker’s financial penalty is therefore reduced to £41,907.

v. **Penalty for Advanced**

**Step 1 – starting point**

333. Advanced was involved in one infringement:

- Hermitage Academy, which the OFT considers came to an end in February 2001.

334. Advanced’s financial year is 1 August to 31 August. Advanced’s turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (1 August 2003 to 31 August 2003) was £[C].

335. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 274 to 287 above and fixed the starting point for all the Parties at [C] per cent of relevant turnover. The starting point for Advanced is therefore £[C]. The OFT notes that this contract was ultimately re-tendered, but does not consider this to affect the starting point, as the object of the collusion was the prevention, restriction or distortion of competition, in breach of the Chapter I Prohibition.

**Step 2 – adjustment for duration**

336. In accordance with paragraphs 288 to 290, above, the OFT does not make any adjustment for duration.

**Step 3 – adjustment for other factors**

337. As noted at paragraphs 291 and 293 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 of the view that the figure reached at the end of Step 2 above is not a significant sum in relation to Advanced because both that sum and the relevant turnover taken into account in Step 1 each represent a relatively low proportion of Advanced’s total turnover for the year ending 31 August 2003. In accordance with paragraph 294 above, the OFT therefore considers that, in this instance, the penalty figure of £\[C\] is insufficient to act as an effective deterrent to Advanced and to other undertakings that might consider engaging in collusive tendering.\(^{261}\) The OFT therefore proposes to increase the amount of the penalty at this stage by an additional £\[C\].

338. [C]

**Step 4 – adjustment for aggravating and mitigating factors**

**Aggravation**

339. As noted at paragraph 298 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Advanced was involved in collusive tendering in connection with only one infringement. The OFT therefore will not increase the penalty for Advanced.

340. The OFT is aware that there was involvement on the part of a director of Advanced, Mr Billy Ross, the OFT considers this to be an aggravating factor and increases the penalty by \[C\] per cent.

**Mitigation**

341. Advanced 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 Advanced’s penalty by \[C\] per cent for co-operation.

342. 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 \[C\] \[C\] per cent. The financial penalty will therefore be £1,963 subject to Step 5.

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

343. 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

\(^{261}\) See paragraph 291 above.
'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.\textsuperscript{262} The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the Decision.\textsuperscript{263} The applicable turnover for Advanced in the last business year for which accounts are available (the year ending 31 August 2003) was £[C]. The statutory maximum financial penalty for Advanced is 10 per cent of this figure and is therefore £[C].

344. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.\textsuperscript{264} The applicable turnover for Advanced in the business year proceeding the year in which the first of its infringements ended (the year ending 31 August 2000) was £[C]. The statutory maximum financial penalty for Advanced is 10 per cent of this figure and is therefore £[C].

345. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

vi. Penalty for Brolly

\textit{Step 1 – starting point}

346. Brolly was involved in 3 infringements:

- Hermitage Academy, which the OFT considers came to an end in February 2001;
- Drummond House, which the OFT considers came to an end in March 2002; and
- Elizabeth Martin Clinic, which the OFT considers came to an end in December 2000.

347. Brolly’s financial year is 1 March to 28 February. Brolly’s turnover in the relevant product and geographic markets in the last business year preceding the date of

\textsuperscript{262} Definition of ‘applicable turnover’ in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

\textsuperscript{263} Article 3 of the Penalties Order.

\textsuperscript{264} The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph at paragraph 2.18.
this Decision for which accounts are available (1 March 2003 to 28 February 2004) was £[C].

348. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 274 to 287 above and fixed the starting point for all the Parties at [C] per cent of relevant turnover. The starting point for Brolly is therefore £[C].

**Step 2 – adjustment for duration**

349. In accordance with paragraphs 288 to 290, above, the OFT does not make any adjustment for duration.

**Step 3 – adjustment for other factors**

350. As noted at paragraphs 291 and 293 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 of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Brolly because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Brolly’s total turnover for the year ending 28 February 2004 (see paragraph 291 above). In accordance with paragraph 294 above, the OFT therefore considers that, in this instance, the penalty figure of £[C] is sufficient to act as an effective deterrent to Brolly 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 aggravating and mitigating factors**

**Aggravation**

351. As noted at paragraph 298 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Brolly was involved in collusive tendering in connection with 3 infringements. The OFT therefore increases the penalty for Brolly by 20 per cent.

352. The OFT is aware that there was involvement on the part of a director of Brolly. Representations were received from Brolly\(^{265}\) that it would be inequitable to regard the involvement of directors as being an aggravating factor in a small business such as Brolly. The OFT notes that the guidance as to the appropriate amount of penalty does not make any distinction in this regard between small or large businesses, as the OFT considers that the directors of a company, irrespective of

how small or large, are at the heart of the company and have a duty to ensure that the company acts lawfully. As such, directors should make themselves aware of competition law, including the Chapter I prohibition. Accordingly, the OFT considers the director’s involvement in the infringements as an aggravating factor and increases the penalty by [C] per cent.

**Mitigation**

353. Brolly argues in its representations\(^{266}\) that there was no actual effect on the market. As discussed in paragraph 286 above, the OFT is unable to quantify the actual effect on the market. However, the OFT does not consider this to be a mitigating factor because the object of the agreement and/or concerted practice was to prevent, restrict or distort competition in contravention of the Chapter I prohibition, as set out in paragraphs 244 to 252 above.

354. Brolly 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 Brolly’s penalty by [C] per cent for co-operation.

355. The OFT is aware of the remedial action taken by Brolly since its discovery of the infringements. Brolly 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.\(^{267}\) The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [C] per cent.

356. 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 [C] of [C] per cent. The financial penalty will therefore be £22,239 subject to Step 5.

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

357. 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 the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.\(^{268}\)

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\(^{266}\) *Ibid*, paragraph 3.3.3.

\(^{267}\) *Ibid*, paragraph 3.2.

\(^{268}\) Definition of ‘applicable turnover’ in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.
The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the Decision.\footnote{269} The applicable turnover for Brolly in the last business year for which accounts were available (the year ending 28 February 2004) was £\[C\]. The statutory maximum financial penalty for Brolly is 10 per cent of this figure and is therefore £\[C\].

358. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.\footnote{270} The applicable turnover for Brolly in the business year preceding the year in which the first of its infringements ended (the year ending 28 February 2000) was £\[C\]. The statutory maximum financial penalty for Brolly is 10 per cent of this figure and is therefore £\[C\].

359. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

vii. **Penalty for Bonnington**

*Step 1 – starting point*

360. Bonnington was involved in one infringement:

- Royal Bank of Scotland, which the OFT considers came to an end in June 2001.

361. Bonnington’s financial year is 1 January to 31 December. Bonnington’s turnover in the relevant product and geographic markets in the business year preceding the date of this Decision for which accounts were available (1 January to 31 December 2003) was £\[C\].

362. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 274 to 287 above and fixed the starting point for all the Parties at [C] per cent of relevant turnover. The starting point for Bonnington is therefore £\[C\].

\footnote{269} Article 3 of the Penalties Order.

\footnote{270} The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph, at paragraph 2.18.
Step 2 – adjustment for duration

363. In accordance with paragraphs 288 to 290, above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

364. As noted at paragraphs 291 and 293 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 of the view that the figure reached at the end of Step 2 above is not a significant sum in relation to Bonnington because both that sum and the relevant turnover taken into account in Step 1 each represent a relatively low proportion of Bonnington’s total turnover for the year ending 31 August 2003. In accordance with paragraph 294 above, the OFT therefore considers that, in this instance, the penalty figure of £[C] is insufficient to act as an effective deterrent to Bonnington and to other undertakings that might consider engaging in collusive tendering.271 The OFT therefore proposes to increase the amount of the penalty at this stage by an additional £[C].

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

365. As noted at paragraph 298 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Bonnington was involved in collusive tendering in connection with only one infringement. The OFT therefore will not increase the penalty for Bonnington.

366. The OFT is not aware that there was involvement on the part of any director or senior manager of Bonnington.

Mitigation

367. Bonnington 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 Bonnington’s penalty by [C] per cent for co-operation.

368. 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

271 See paragraph 291 above.
having considered aggravating and mitigating circumstances [C] [C] per cent. The financial penalty will therefore be £45,187 subject to Step 5.

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

369. 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 the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover. The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the Decision. The applicable turnover for Bonnington in the last business year for which accounts were available (the year ending 31 December 2003) was £6,610,232. The statutory maximum financial penalty for Bonnington is 10 per cent of this figure and is therefore £661,023.

370. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended. The applicable turnover for Bonnington in the business year preceding the year in which the first of its infringements ended (the year ending 31 March 2001) was £6,491,445. The statutory maximum financial penalty for Bonnington is 10 per cent of this figure and is therefore £649,145.

371. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

viii. **Penalty for McKay**

**Step 1 – starting point**

372. McKay was involved in 2 infringements:

- Clydesdale Bank (Castlemilk contract), which the OFT considers came to an end in May 2000; and

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272 Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

273 Article 3 of the Penalties Order.

274 The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph, at paragraph 2.18.
• Clydesdale Bank (Cardonald contract), which the OFT considers came to an end in May 2000.

373. McKay’s financial year is 1 April to 31 March. McKay’s turnover in the relevant product and geographic markets in the last business year preceding the date of this Decision for which accounts were available (1 April 2003 to 31 March 2004) was £\[\text{C}\].

374. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 274 to 287 above and fixed the starting point for all the Parties at \[\text{C}\] per cent of relevant turnover. The starting point for McKay is therefore £\[\text{C}\].

**Step 2 – adjustment for duration**

375. In accordance with paragraphs 288 to 290, above, the OFT does not make any adjustment for duration.

**Step 3 – adjustment for other factors**

376. As noted at paragraphs 291 and 293 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 of the view that the figure reached at the end of Step 2 above is not a significant sum in relation to McKay because both that sum and the relevant turnover taken into account in Step 1 each represent a relatively low proportion of McKay’s total turnover for the year ending 31 March 2004. In accordance with paragraph 294 above, the OFT therefore considers that, in this instance, the penalty figure of £\[\text{C}\] is insufficient to act as an effective deterrent to McKay and to other undertakings that might consider engaging in collusive tendering.\(^{275}\) The OFT therefore proposes to increase the amount of the penalty at this stage by an additional £\[\text{C}\].

**Step 4 – adjustment for aggravating and mitigating factors**

**Aggravation**

377. As noted at paragraph 298 above, the OFT will treat multiple infringements as an aggravating factor under this Step. McKay was involved in collusive tendering in connection with 2 infringements. The OFT therefore increases the penalty for McKay by 10 per cent.

\(^{275}\) See paragraph 291 above.
378. The OFT is aware that there was no involvement on the part of any senior manager or director of McKay, as reflected in the representation made by McKay.\textsuperscript{276} The OFT will therefore not increase McKay’s penalty in this case.

\textit{Mitigation}

379. McKay 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 McKay’s penalty by [C] per cent for co-operation.

380. 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 [C] [C] per cent. The financial penalty will therefore be £27,219 subject to Step 5.

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

381. 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 the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.\textsuperscript{277} The ‘section 36(8) turnover’ is taken from the applicable turnover during the business year preceding the date of the Decision.\textsuperscript{278} The applicable turnover for McKay in the last business year for which accounts were available (the year ending 31 March 2004) was £[C]. The statutory maximum financial penalty for McKay is 10 per cent of this figure and is therefore £[C].

382. In addition, where an infringement ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.\textsuperscript{279} The applicable turnover for McKay in the business year preceding the year in which the first of its infringements ended (the year ending

\textsuperscript{276} Representation of McKay dated 17 March 2004 in response to the Statement.

\textsuperscript{277} Definition of ‘applicable turnover’ in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

\textsuperscript{278} Article 3 of the Penalties Order.

\textsuperscript{279} The OFT’s guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.18.
31 March 2000) was £[C]. The statutory maximum financial penalty for McKay is 10 per cent of this figure and is therefore £[C].

383. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

ix. Conclusion on penalties

384. 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:

<table>
<thead>
<tr>
<th>Party</th>
<th>Penalty calculated at the end of Step 5</th>
<th>Penalty to be paid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pirie</td>
<td>£85,774</td>
<td>£0&lt;sup&gt;280&lt;/sup&gt;</td>
</tr>
<tr>
<td>Walker</td>
<td>£76,194</td>
<td>£41,907&lt;sup&gt;281&lt;/sup&gt;</td>
</tr>
<tr>
<td>Advanced</td>
<td>£1,963</td>
<td>£1,963</td>
</tr>
<tr>
<td>Brolly</td>
<td>£22,239</td>
<td>£22,239</td>
</tr>
<tr>
<td>Bonnington</td>
<td>£45,187</td>
<td>£45,187</td>
</tr>
<tr>
<td>McKay</td>
<td>£27,219</td>
<td>£27,219</td>
</tr>
<tr>
<td>TOTAL</td>
<td>£258,576</td>
<td>£138,515</td>
</tr>
</tbody>
</table>

x. Payment of penalty

385. All Parties must pay their respective penalties by close of banking business on 16 September 2005. 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.

<sup>280</sup> As noted at paragraph 4 above, Pirie’s financial penalty was reduced by 100 per cent. See ‘the OFT’s guidance as to the appropriate amount of a penalty’, OFT 423, December 2004 at paragraphs 3.11 to 3.12.

<sup>281</sup> As noted at paragraph 8 above, Walker’s financial penalty was reduced by 45 per cent because it was granted leniency.