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IN THE COMPETITION

Case Nos. 1277/1/12/17

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 July 2017

Before:

THE HONOURABLE MRS JUSTICE ROSE
(Chairman)
DR CATHERINE BELL CB
MARGOT DALY

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) BALMORAL TANKS LIMITED
(2) BALMORAL GROUP HOLDINGS LIMITED

Appellants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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HEARING

APPEARANCES

Robert O'Donoghue QC and Zac Sammour (instructed by K&L Gates) appeared on behalf of the Appellants (Balmoral).

Rob Williams and James Bourke (instructed by CMA Legal) appeared on behalf of the Respondent (Competition & Markets Authority).

1 THE CHAIRMAN: Yes, Mr. Williams.

2 MR WILLIAMS: Madam, before I begin my opening submissions, the Tribunal just raised an
3 important practical matter with us, which is that apparently there is not a set of bundles for
4 the witnesses. I thought I had better mention that now, so we do not go further into the day
5 and find that we do not have bundles in place. I think we had assumed that in producing the
6 bundles the appellants would provide a set but that message has not filtered through.

7 THE CHAIRMAN: I very much hope this is not going to hold things up.

8 MR WILLIAMS: No, no. Obviously we do not need the authorities bundle for that purpose.

9 THE CHAIRMAN: No, but the witness presumably will be taken to the documents.

10 MR WILLIAMS: Exactly. I do not know if the appellants have any proposals.

11 MR. O'DONOGHUE: We have a spare clean copy available in court now, Madam.

12 THE CHAIRMAN: Good.

13 Yes.

14
15 Opening submissions by MR WILLIAMS

16 MR WILLIAMS: Madam, this case is, at its core, about what happened at the meeting on 11 July
17 2012; what did the parties discuss and what information did they exchange.

18 The CMA found on the facts that the information exchange included, firstly, complaints
19 between direct competitors about specific low price levels in the market and the need to
20 stabilise prices; leading on from that to discussion about current and future pricing; and
21 ultimately a discussion of target price bands.

22 If the Tribunal accepts that case on the facts, we say that the exchanges which took place at
23 the meeting are clearly an object infringement of competition law on well-established
24 principles. The Tribunal will obviously consider the discussions in their wider market
25 context but this is not a case, in our submission, where the Tribunal is faced with difficult
26 questions about the nature of the object case.

27 The finding of infringement is based on an exchange of information at one meeting, and that
28 feature of case was fully factored into the CMA's assessment. This is a market in which the
29 parties were engaged in regular bids to contractors for the types of tanks which were
30 discussed at the meeting. It is straightforward to see how the exchanges which took place
31 were very likely to damage competition and, indeed, there is evidence that they did affect
32 competition almost immediately, which is proof of the general point.

1 The key question for the Tribunal is what happened, and in that regard the case is unusual
2 because the Tribunal has a virtually complete record of what happened, both in the
3 recording and in transcript form.

4 The CMA was made aware of the meeting by a leniency and immunity applicant, CST, and
5 was able to make arrangements to record the meeting. The result of that is that the focus of
6 the debate is narrowed --

7 THE CHAIRMAN: CST arranged for the meeting to be recorded?

8 MR WILLIAMS: No, CST notified the CMA.

9 THE CHAIRMAN: I see.

10 MR WILLIAMS: The result of that is that the focus of the debate is narrowed from what was said
11 at the meeting to what do the exchanges mean.

12 The CMA's case is straightforward: the exchanges mean what they say. It is a matter of
13 record that Mr. Joyce did not leave the meeting having said that he did not want to allocate
14 customers, which was the cornerstone of the main cartel; instead, he stayed at the meeting
15 for over two hours, and during that period all of the parties discussed their concerns about
16 the pricing on the market, leading to a discussion of current and future pricing, and target
17 prices.

18 Balmoral's appeal has not provided a coherent explanation as to how and why that exchange
19 of pricing information happened, and there are two general points to make about Balmoral's
20 attempts to explain the meeting.

21 The first is its claim that the discussion at the meeting was only backward looking. In our
22 submission, it is clear that the discussion was not backward looking but it was about
23 stabilising prices, with a view to achieving better prices.

24 As we have said in our submissions, there is the obvious point that you cannot set a target in
25 the past but there is plenty more to indicate the discussion was forward looking.

26 If the Tribunal accepts that part of our case, and rejects Balmoral's case that the discussion
27 was just about historic information, we say that does cut through the appeal.

28 The second general point is that Balmoral has rewritten the script of the meeting to depict
29 Mr. Joyce as a passive participant in a failed cartel meeting. In fact, we say he was central
30 to the meeting in lots of ways. He opened up a discussion about prices hitting rock bottom
31 and the need to stabilise prices. He identified the price bands, which became the focus of
32 the discussion, and he referred to them as "bands". He proposed using those bands as a
33 target to keep tabs on where the parties were pricing, and he talked about targeting the
34 upper ends of the bands.

1 So the objective evidence shows Mr. Joyce actively contributing to the meeting in all of
2 those ways and in engaging in a discussion which was useful and of interest to everyone
3 involved.

4 We will invite the Tribunal to base its decision principally on that objective evidence and
5 not Balmoral's reinterpretation of the meeting after the event.

6 Having said that, the Tribunal does also have the evidence of Mr. Snee, who was present at
7 the meeting. His evidence essentially confirms the CMA's findings based on the objective
8 record and shows that the impact of the meeting on those involved was indeed as it appears
9 to be from the contemporaneous evidence. We say that is valuable corroborative evidence.
10 The CMA understands the strength of feeling within Balmoral about this decision.

11 Balmoral evidently and understandably feels that it did the right thing in rejecting the
12 opportunity to join the main cartel, and for what it is worth the CMA agrees with that. It is
13 also clear that Balmoral feels aggrieved by the decision given its co-operation in the
14 criminal investigation. But neither of those points addresses the question for the Tribunal on
15 this appeal, which is whether the evidence of the meeting supports the findings made in the
16 decision.

17 We would add that Balmoral was aware of the ongoing civil investigation when it co-
18 operated with the CMA, so there is really no question of its assistance having been obtained
19 under false pretences. That has not been suggested, but just to be clear about that.

20 The CMA's case is that while Balmoral did not join the main cartel, it did cross what is in
21 competition law terms a clear red line, it discussed current and future prices with direct
22 competitors, and the reason that the CMA has taken enforcement action is that it came into
23 possession of what it regards as clear evidence of that infringement.

24 Turning briefly then to penalty. Balmoral argues that it should not have been fined at all or,
25 alternatively, that the fine should have been lower. The essence of our response to this
26 appeal is that Balmoral has not seen the wood for the trees. It has been treated leniently in
27 relation to the penalty because of the mitigating circumstances Balmoral relies on. Using
28 any of the metrics one would usually use to assess the proportionality of the penalty, the
29 fine is at the very low end of the spectrum for an object infringement by an undertaking
30 with a turnover running to hundreds of millions of pounds. As we pointed out in our
31 submissions, it is 0.1% of that turnover or two days of profit in the previous financial year.
32 The statutory purpose of a fine under the Competition Act is to reflect the seriousness of the
33 infringement and to deter anti-competitive conduct. Balmoral has been found to have
34 committed an object infringement of competition law, and there is a need to deter conduct

1 of that nature. Its unwillingness to get involved in a further infringement is commendable,
2 but it does not mean that it did not commit the infringement the CMA found nor that it
3 should not be fined for what it did.

4 That is a brief overview of the CMA's position. The rest of my opening is going to be in
5 five sections. First of all I am going to deal with some of the legal principles, to set the
6 framework for the rest of the discussion. Then I am going to outline the CMA's finding in
7 the decision, which I am going to do using section 4 of the decision, which we did not look
8 at yesterday. Then I am going to address you on the purpose of the meeting, which is a
9 theme running through the case. Then I am going to come to some of the other key areas of
10 dispute in relation to the infringement. Finally, penalty, and we will see how we are doing
11 for time in relation to how much detail I go into for penalty.

12 I am going to focus on four cases on the law. The first is *T-Mobile*, which we did look at
13 yesterday so I will try and take that as quickly as possible, and the other three are *Dole* in
14 the Court of Justice and two general court decisions on the exchange of pricing information,
15 *Tate & Lyle* and *Phillips*.

16 *T-Mobile* is at tab 30 in authorities bundle 3. We saw the facts yesterday, so I think we can
17 go straight to paragraph 25. Quite a lot of the principles here are basic fundamental
18 principles, so I was going to take this quite quickly but please do say if I am going too
19 quickly.

20 One can see from paragraph 25 that the court has already provided, this is referring to past
21 cases, a number of criteria on the basis of which it is possible to ascertain whether an
22 agreement or concerted practice is anti-competitive.

23 Then just running through the next few paragraphs, you see 26 sets out the classic test for a
24 concerted practice following *Suiker Unie*, substituting practical co-operation for the risks of
25 competition.

26 Paragraph 27 makes the point Mr. O'Donoghue made yesterday, which is that the
27 assessment needs to be made in the legal and economic context, and you can see towards
28 the bottom of 27:

29 "… the intention of the parties is not an essential factor in determining whether a
30 concerted practice is restrictive, there is nothing to prevent the Commission … [or the
31 courts] from taking it into account …"

32 I can skip over the next few paragraphs because they deal with object, and the law has
33 moved on a bit, through *Cartes Bancaires*. I will come back to that in *Dole*.

1 Picking it up again at 32 -- again, I will not read these out but these are very important
2 general principles concerning the exchange of information. One can see the familiar
3 principles that an undertaking must, in 32, determine independently the policy which he
4 intends to adopt on the common market. Then in 33 the well-known formulation about
5 strictly precluding direct in and indirect contact, and so on.

6 At 34, there is specific reference to oligopolistic markets, and the exchange of information
7 appreciably impairing competition because it enables traders to know the market positions
8 and strategies of their competitors, and this is such a market.

9 Then 35, again a very important principle; the theory of harm here is a reduction in or
10 removing the degree of uncertainty in the operation of market. We do stress it is a
11 reduction, or it can be a reduction, rather than removal of uncertainty.

12 Then moving on to 44, and this is just for context, really. You can see the second question
13 considered by the court, this is the fourth line, is whether the national court is required to
14 apply the presumption of a causal connection in the court's case law. That is the second
15 question, and the answer to that is yes.

16 At 51 --

17 THE CHAIRMAN: This was the point that it was a substantive rule of EU law, not just a
18 procedural point.

19 MR WILLIAMS: Exactly. Yes, that is right.

20 I will not go through that. I think that is now well-established. But you can see at 51 this
21 picks up the formulation of the presumption of causal conduct as per *Anic*, which Mr.
22 O'Donoghue showed you yesterday at paragraph 121. The reference here is for *Hüls* but it
23 is the same point. You can see three lines up it says:

24 "That is all the more the case where the undertakings concert together on a regular
25 basis over a long period."

26 So the presumption is stronger where it is over a longer period.

27 The third question then starts at 54. Please do say if I am taking it too quickly.

28 THE CHAIRMAN: No, no.

29 MR WILLIAMS: The third question at 54, the question is whether there is in all cases a
30 presumption of causal connection between the concerted practice and the market's conduct,
31 even if the concerted action is the result of a single meeting. So it is actually quite a narrow
32 question in one sense; it is all about whether the presumption arises in relation to single
33 meetings.

34 You then see the submissions of the parties. It is then picked up at 58:

1 "It is evident from 162 of *Hüls* and 121 of *Anic* [which is what we saw yesterday]
2 that the court found the presumption applied only where there was concerted action
3 and where the undertaking concerned remained active on the market. The addition of
4 the words 'particularly when they concert together on a regular basis', far from
5 supporting the argument there was a presumption only if they meet regularly must
6 necessarily be interpreted to mean that the presumption is more compelling."

7 That is just really to reinforce that point. Mr. O'Donoghue took you to that case last, but
8 actually the sequence of the authorities is the other way round; *Anic* comes first and then it
9 is reinterpreted in *T-Mobile*.

10 Then 60. I think did you look at these yesterday. The point is made in 60 that the number,
11 frequency and form of the meetings depends on the subject matter of the concerted action
12 and the particular market conditions. The court then gives examples of two infringements
13 which are at opposite end of the spectrum and says it all depends, if I can put it that way.
14 Paragraph 61 is an important paragraph because it says what matters is not so much the
15 number of meetings held as whether the meeting or meetings which took place afforded
16 them the opportunity to take account of the information exchange, and so on. So in fact
17 there is not a different test or a different principle for single meetings, one just has to look at
18 the infringement in context and see whether the parties had the opportunity to substitute
19 practical co-operation for the risks of competition.

20 I have already made the point that in this case there is evidence that the information was
21 taken into account.

22 The court's conclusion is at 62. I will not read it to you, but you can see that actually it
23 applies quite a low threshold test because the presumption applies as long as (a) there is
24 consultation, and (b) the undertaking remains active on the market, which is a very low test.
25 Can I ask you to move to bundle 2, tab 13, for *Dole* in the Court of Justice.

26 You saw the facts yesterday again. The concern related to an exchange of information
27 relating to price setting factors and price trends. I can pick it up at 105, which is page 14 of
28 21.

29 You see at the bottom, the argument that is made is that the General Court erred in its legal
30 characterisation of the facts and it says the exchange of information cannot be regarded as
31 capable of removing uncertainty as to the intended conduct.

32 Jumping ahead, the findings of the court start at 111. You can see at paragraph 113 that the
33 court's discussion here now launches off from *Cartes Bancaires*, which is now probably the

1 most recent and leading case on the object principle, so this case is post *Cartes Bancaires*, it
2 is applying *Cartes Bancaires*

3 Then after that we see the same principles as we saw in *T-Mobile* so I will not go through
4 that.

5 We can jump ahead I think to 129, where the court applies the principles. It says:

6 "As observed by the Advocate General [and I will take you to that in just a minute], it
7 is apparent that pre-pricing communications were exchanged."

8 That is the factual observation. At 130, this is probably the most important point for present
9 purposes:

10 "The quotation prices were relevant to the market concerned, since on the one hand
11 market signals, market trends or indications as to the intended development of banana
12 prices could be inferred from those quotation prices, which were important for the
13 banana trade."

14 Then there is the stronger case in the last sentence, which Mr. O'Donoghue flagged
15 yesterday, where in some cases there was a formula actually linking the price to the
16 quotation price. But the first category is a softer link.

17 If I could then ask you, the Advocate General's opinion in *Dole* is at the very back of the
18 sixth authorities bundle, because it was left out in the first instance. It is in bundle 6, tab 59.
19 I can pick it up at 113, which is page 14 of 28. You can see at the end of 113 Advocate
20 General Kokott says:

21 "It is in fact sufficient for a finding of an anti-competitive object that information is
22 exchanged between competitors about factors relevant to their respective pricing
23 policy or generally to their conduct on the market."

24 Then she says in 114 that is the situation here.

25 THE CHAIRMAN: What is 97? *Suiker Uni*, *Deere* and *T-Mobile*, yes.

26 MR WILLIAMS: Yes, we looked at that point in *T-Mobile* actually.

27 THE CHAIRMAN: Yes.

28 MR WILLIAMS: Then 115 and 116 are findings we already saw in the court's judgment, because
29 they were cross-referred to.

30 Paragraph 117:

31 "I would add that from a business perspective it would make little sense to fix
32 quotation prices in the first place and exchange information with competitors about
33 their continued development, if the undertakings own quotation prices and the

1 information obtained were not to be factored into the respective undertakings' future
2 conduct on the market and the prices actually applied by them."

3 That is not really a legal point but it is a sanity check which says you have to ask yourself:
4 why are these people having this discussion, why are they exchanging this information if it
5 is not useful to them or they are not going to be able to do anything with it?

6 Paragraph 119:

7 "Indeed, such an exchange of information between competitors about price relevant
8 factors is blatantly contrary to the requirement of independence, which is a key feature
9 of the market conduct of undertakings operating within a system of effective
10 competition. Consequently, and without requiring any further explanations, the
11 exchange of information alone reveals in itself a sufficient degree of harm for the
12 object test to be satisfied."

13 Then 120 is dealing with an argument based on the *Asnef-Equifax* case, and the Advocate
14 General here is drawing a contrast between two situations. I can pick it up in "The effect of
15 an exchange", halfway through, on the right-hand side of that line, if you can see that.

16 THE CHAIRMAN: Yes.

17 MR WILLIAMS: "The effect of an exchange of information such as that at issue here, which
18 essentially relates to the factors relevant to the setting of expected quotation prices and
19 price trends, is exactly the opposite: by means of that exchange the undertakings involved
20 disclose to their competitors at least to some extent their intended conduct on the market
21 and sensitive information connected to their future price ideas. This is quite obviously
22 capable of removing uncertainties ..." and so on.

23 Then you see at 121 and 122 an argument that the discussion is mere gossip; and the point is
24 made in 122 that this argument is unsuccessful from a legal standpoint because it is
25 irrelevant whether the exchange of information about price-related factors constituted the
26 main purpose of the contact or simply took place in the context of a framework under the
27 contact which had no unlawful object.

28 That is part of the general point we make about subjective purpose. I will not labour the
29 legal point. We have also dealt with it in our defence, paragraph 95, and there we refer to
30 *General Motors* and *IAZ* but that is a well-established principle.

31 While we are on *Dole* I will just deal briefly with the general court decision. I will not ask
32 you to take it out.

33 Mr. O'Donoghue took you to 373, and the point that was made there, in our submission, was
34 that a single meeting would not be enough to sustain an infringement which involved co-

1 ordinating a weekly cycle of setting prices. We say that does not have anything in common
2 in this case. The CMA has explained what the theory of harm is and the impact on regular
3 tender processes.

4 *Tate & Lyle* is at tab 27 in bundle 3. I will take this really very quickly, because there is a
5 discrete point in this.

6 I was trying to speed up for the Tribunal but I have been asked to slow down a bit for the
7 transcriber.

8 THE CHAIRMAN: *Tate & Lyle* , paragraph --

9 MR WILLIAMS: I was going to briefly show you the facts because you did not see this one
10 yesterday.

11 Paragraph 6. The context here is that there had been a previous infringement of abnormally
12 low pricing and undertakings to the Commission in connection with that conduct.

13 You can see at 9 and 10 that after those undertakings British Sugar had announced the end
14 of the price war, but I think that is to do with the abnormally low pricing point, and the
15 meetings followed up -- you can see in paragraph 10 -- at meetings where British Sugar
16 gave information to all the participants concerning its future prices.

17 The particular point we take from *Tate & Lyle* is dealt with at 59 and 60. You can see at 59
18 it says:

19 "British Sugar and Napier Brown maintain that the price information envisaged by
20 British Sugar was known by the latter's customers before it was notified to the
21 participants at the meeting and therefore it did not reveal to its competitors
22 information they could not gather on the market."

23 That is dealt with in 60. There are three parts to the response, I only want you to look at the
24 first two:

25 "Even if established, that has no relevance in the circumstances of this case."

26 It says:

27 "Even if British Sugar did notify its customers individually and on a regular basis of
28 the prices that it intended to charge, that fact does not imply that at that time those
29 prices constituted objective market data that was readily accessible."

30 That is point 1. Moreover, it is undisputed that the meetings in question were preceded by
31 the release onto the market.

32 THE CHAIRMAN: No, they preceded the release.

33 MR WILLIAMS: I am sorry, exactly.

1 Secondly, and this is an important point, the organisation of the disputed meetings allowed
2 the participants to become aware of that information more simply, rapidly and directly than
3 they would via the market.

4 So it is a practical point, that even in a market where there is a reasonably high degree of
5 transparency, you would not expect that to give competitors the same level of insight as a
6 direct conversation between competitors.

7 So I am pleased to be able to -- I am sorry, I am not pleased to be able to say. The last
8 authority is in a different bundle, it is volume 2. Sorry for jumping around. Tab 24 at the
9 back of volume 2.

10 THE CHAIRMAN: Bundle 2?

11 MR WILLIAMS: Authorities bundle 2, yes.

12 THE CHAIRMAN: Yes.

13 MR WILLIAMS: You can see at paragraph 2 this is a concerted practice involving the exchange
14 of commercially sensitive information in relation to smart chips. I wanted to pick up the
15 discussion at paragraph 50, which shows what the issue is.

16 Just to explain the reason for taking you to this case, it is because it is probably the case
17 which has the most parallels on the facts. Of course the Tribunal will apply principles, but
18 it is useful to see a case which has some similar factual features.

19 You can see at 50:

20 "The applicants argued that the information exchanged during the sporadic and
21 incidental contact that they were engaged with were not overall competitively
22 sensitive and did not remove strategic uncertainty."

23 Then you can see at the bottom they said it was all mere gossip.

24 If we can pick up the discussion then at 63. This makes, in our submission, the
25 uncontroversial point:

26 "The provision of sensitive business information such as an exchange of future price
27 increases has an anti-competitive effect, in as much as the independence of the
28 undertakings concerned in their conduct is modified as a result."

29 This is general principle. Down at 66 there is reference to the Commission's horizontal
30 guidelines, which we have made reference to in the decision and in the defence and I think
31 in the skeleton argument. You can see that is relied on by the court here as part of the legal
32 framework. It starts off as guidance but it is used by the court here.

33 Then 73 of the guidance, which is in paragraph 66:

1 "Exchanging information on individualised intentions concerning future conduct
2 regarding prices or quantities is particularly likely to lead to a collusive outcome.
3 Informing each other about such intentions may allow competitors to arrive at a
4 higher price level without incurring the risk of losing market share or triggering a
5 price war."

6 Then further down in 74:

7 "Information exchanges between competitors of individualised data regarding
8 intended future prices or quantities should therefore be considered a restriction by
9 object."

10 As for the application of that on the facts, the end of 67 sets out the appellant's argument.

11 You can see three lines up:

12 "Second, the information exchange was not precise, confidential or strategic.

13 "Third, the bilateral contacts did not have an object of restricting competition."

14 The issue is then further formulated in 76, in terms of the object test. You can see at the end
15 there "whether the information exchange revealed by its nature a sufficient degree of harm
16 to competition".

17 Then just to explain what is happening in 77 and 78, without taking you through them
18 because they are quite dense paragraphs, a point is taken that the Commission has
19 erroneously taken into consideration either one or two meetings. You can see at the end of
20 78 the court says:

21 "Only if the information exchanges during the five other meetings did not constitute a
22 restriction in competition would it be appropriate to find that the Commission had
23 erred."

24 Then at 81 the discussion starts at the first anti-competitive meeting on 26 September 2003.
25 There is a discussion at the meeting both in relation to prices and quantities. We can go
26 straight to 84, which deals with price. It says:

27 "Moreover, as regards the prices of the products in question, the applicants and
28 Samsung discussed at the very least the price that the customer, Schlumberger, had
29 requested for them for 2004, and the intention of Samsung and the applicant not to
30 offer the price requested, namely 80 cents, and the applicant's intent not to offer for
31 that product a price under \$1. Such an exchange of information relating to the future
32 pricing strategy of the undertaking in general and of the customer in particular is
33 capable of affecting normal competition."

1 In 85 they find that that is detailed and individualised information, not general information,
2 which satisfies the relevant legal test.

3 At 91, again I will not ask you to read but the point that is made there is a point that it does
4 not actually matter if the information is inaccurate, because an exchange of even inaccurate
5 information between competitors can distort competition.

6 Then 92, the applicants put forward three main arguments aimed at establishing that the
7 information exchanged on prices were generic, imprecise or even inaccurate. That is
8 rejected in 97 and 98, and you can see in the middle of 97 it says:

9 "They do not contest that they informed the applicants of the prices that it was
10 charging to the customer and of the fact that it considered that the price requested was
11 too low."

12 Thereby, they became at the very least acquainted with the strategic information.

13 Then 98 that was competitively sensitive information.

14 At 103 is echoes of the *Tate & Lyle* point, so I will not ask you to read that, but it is similar
15 to that point.

16 Then an important point at 104:

17 "In the light of the foregoing considerations it must be held that the first plea, that the
18 Commission is was wrong to find that the unlawful practices in question did not
19 constitute a restriction of competition by object, must be rejected as unfounded. The
20 mere finding that the information exchanged at the meeting of 26 September 2003
21 between the applicants, and in particular that relating to future capacities and prices,
22 was, on account of its very object, capable of influencing the conduct on the market."

23 That is sufficient for the view to be taken that that is an object infringement.

24 Although there was more than one meeting, they deal with the first meeting. That is
25 sufficient to support an object finding in itself. Then they go on to deal with the other
26 meetings too.

27 In relation to the other meetings, I just wanted to show you 121 to 123. This is dealing with
28 I think the third meeting, on or around 18 or 20 November. You get that from 116. There
29 is a debate about whether the applicants were present at the meeting, there is a conclusion at
30 120.

31 At 121:

32 "Second, insofar as the applicants contest the anti-competitive nature of the
33 information exchange during the meeting between themselves and Renesas, the court
34 observes that it is apparent from the internal notes of Renesas that the applicants in

1 Renesas informed each other about their commercial strategy vis-a-vis some of their
2 products' expected profitability, of the fact that manufacturing at full capacity and that
3 the applicants did not intend to engage in price battles either for the non-sim chips, in
4 particular because there was no fund below a certain price in order to preserve their
5 profit margins."

6 So stabilising prices, price battles.

7 As I say, I have shown you that case because there are in some respects strong parallels with
8 our case, where there was, on any view, discussion of specific prices for specific customers
9 which were regarded as too low, and the fact that, certainly in our submission, the
10 participants did not want to engage in a price battle or price war.

11 Just to deal with one other legal issue, and I will not ask you to take these authorities out but
12 I will make the point. One of Balmoral's arguments concerns mistrust between the
13 participants in the meeting. We deal with this in our skeleton at paragraph 68, where we
14 cite authority that it is recognised that cartels frequently operate in an atmosphere of
15 mistrust, and the reference we give is the *Fapricela* case at tab 15. *Fapricela*, at paragraph
16 278, and I have restrained myself, because I really did want to take you to paragraph 279,
17 which has an excellent quote which says:

18 "Internal conflicts, rivalry and treachery are a feature of all cartels."

19 That observation was made in the context of penalty, but the point is mistrust does not show
20 that there is not collusion, it is par for the course.

21 There is a related point, which we also make in our skeleton argument, at paragraph 69, that
22 an undertaking can be party to an infringement whilst pursuing its own agenda, and even
23 pursuing an aggressive policy which is counter to the aims of the cartel.

24 We say that applies equally to an information exchange. The authority we have cited is the
25 *Tokai Carbon* case. It is at tab 32 but I will not ask you to take it out. There is some quite
26 strong language there about *Tokai Carbon* or the applicant deceiving the other parties to the
27 infringement, but nevertheless it has managed to use the collusion to its own advantage.

28 Again, we say that is a well-established principle.

29 This is linked to a general point we have made in our skeleton argument about the theory of
30 harm in these cases. It is clear that the economic harm which arises does not depend on the
31 elimination of all competition between the participants or the elimination of uncertainty, but
32 on the softening or distortion of competition which arises when confidential information is
33 exchanged and uncertainty is reduced between competitors. That is our response to what

1 we call the "all or nothing" argument that Balmoral makes, which says: we were a
2 competitor, therefore there cannot be an infringement.

3 Evidence and proof; this is dealt with in our skeleton argument. Again, I will not take up
4 time on it. It is in our skeleton at paragraphs 38 and 40, where we refer to the *Tesco* case,
5 which is at tab 51, paragraphs 88 and 128 in particular.

6 There is a particularly important point in 128, which is the importance of objective evidence
7 as a means of testing the veracity of witness evidence. What the Tribunal says there, or the
8 principle it applies, is that where there is a conflict between the objective evidence and the
9 witness evidence, the Tribunal takes the approach which anchors the evaluation of the
10 evidence in the objective facts, the objective evidence, taking account of the witnesses'
11 incentives in giving evidence and so on. That is very much the approach we ask the
12 Tribunal to take here.

13 That takes me to the decision. If I could ask you to take out core bundle, tab 8, please. I am
14 sure you are familiar with the decision, so I will show you a few aspects of the structure and
15 then move into section 4.

16 The Tribunal will have seen there is an introduction and executive summary.

17 Section 2 deals with the factual background. There is a useful section about the industry,
18 starting at 2.1. You may have seen this, but at 2.5 the CMA deals particularly with the
19 schools tank and the 135.

20 Then there are a whole series of issues where no challenge is raised, so there is the relevant
21 market for the purposes of the penalty, the undertakings involved and the description of the
22 process.

23 I do just have to pick up one point at paragraph 299. This is about leniency. One of the
24 points that Mr. O'Donoghue made yesterday was that neither of the leniency applications
25 dealt with the information exchange, but I just wanted to make the obvious point that the
26 first and predominant leniency application was from CST, which was not at the meeting, so
27 although it knew about --

28 THE CHAIRMAN: I doubt that would have stopped you from finding that they were parties to it
29 if you -- so in your --

30 MR WILLIAMS: Sorry, I beg your pardon. There is CST, which notified the CMA of the
31 meeting. There is Galglass, which did not attend the meeting but information was fed back
32 to it. The point I am making here is just that the first leniency application was from CST,
33 which did not attend the meeting and was not involved with it in any way, so obviously its

1 leniency application could not have extended to what was said at the meeting. As I say, it is
2 a very basic point and I do not want to labour it.

3 THE CHAIRMAN: Were CST found to be parties to the information exchange?

4 MR WILLIAMS: No. They had applied for leniency already. They notified the CMA that a
5 meeting was due to take place. The meeting was recorded. It was due to be attended by
6 Mr. Stringer of Galglass, as well as the three parties that were there, and CST then was not
7 found to be a party to the information exchange, because that infringement only happened at
8 that meeting and they were not involved, I think it is fair to say, anyway.

9 I am sorry, perhaps I am not explaining myself. The application was in the May and the
10 meeting was in the July. Sorry, I am complicating a simple point, I think.

11 Mr. O'Donoghue said it was notable.

12 THE CHAIRMAN: I remember what he said. I think the point he was making was that none of
13 them treated the information exchange as a separate infringement from the overall cartel,
14 but you are saying that it had not occurred, in fact, at the time.

15 MR WILLIAMS: I am saying it had not occurred, and then they did not go either. So they could
16 never have done that really. Sorry, I do not want to labour a point in passing.

17 Section 3 then deals with the factual background. Mr. O'Donoghue showed that to you
18 yesterday, so I will not go into that. It is in three sections. There is Balmoral's entry into
19 the market, which is essentially everything up to the meeting. That starts at 3.3. The
20 discussion of the meeting starts at 3.32. Then there is contact afterwards, starting at 3.75.
21 Then just moving into the legal assessment in section 4, there is not a formal dispositive
22 part in CMA decisions, Madam, as you know, but 4.2 and 4.4 do contain a summary of the
23 infringement in the context of the legal assessment.

24 Then we get to the legal components of the infringement. You can see at 4.5 we start with
25 concerted practice and then we move on to object. Really those are the issues that are in
26 focus on the appeal.

27 The findings on concerted practice start on 4.13. The finding is that as a result of the
28 exchange of current pricing and future pricing intentions the parties reduced uncertainty in
29 relation to their intended conduct on the market, and substituted practical co-operation, et
30 cetera.

31 Then 4.14 relies on the direct contact at the meeting and also deals with the position of Mr.
32 Stringer, who did not attend the meeting but was informed after the event.

33 Paragraph 4.17 deals with the single meeting point. The point that is essentially made is that
34 if the parties had been trying to fix prices for specific bids on an ongoing basis, that would

1 have needed more than one meeting, but a reduction in uncertainty in relation to market
2 pricing could take place at one meeting and indeed it did.

3 You saw the two ends of the spectrum in *T-Mobile*. This case involves a single parameter of
4 competition price, so that puts it at the simpler end of the spectrum.

5 Mr. O'Donoghue placed a lot of emphasis on the objective of the other participants to get
6 back to something as close to the cartel as possible, but that was not the infringement that
7 was found.

8 As I said at the beginning, the regular nature of the tenders here means that competition can
9 be distorted at any point in time and even for a short period.

10 The decision then moves on to distancing, which we can skip over. We say that is very
11 straightforward because there is nothing that one can describe as distancing from the
12 information exchange as opposed to from the cartel.

13 Then 4.29 and following deal with conduct on the market, and there are two components of
14 that; there is evidence of specific conduct on the market, plus the presumption which the
15 CMA does not accept has been rebutted, and I will come back to both of those points.

16 We can then move forward to object.

17 THE CHAIRMAN: As far as Balmoral is concerned, is it the presumption that you rely on? Do
18 you accept that you have to show that it affected Balmoral's conduct, even if only through
19 the presumption, or do you say it is enough if we are satisfied that it affected the conduct of
20 other participants in the cartel?

21 MR WILLIAMS: The latter, because what is required is conduct on the market so that the
22 exchange moves simply from an exchange between the parties to actual conduct on the
23 market, and we say that conduct by any one of the cartel would suffice. Of course, one
24 should not see that simply as Mr. Snee's conduct, because it is conduct consequent on an
25 exchange with Balmoral, so he is using the information he is provided with by Balmoral.
26 There is a related point which we have not emphasised, because we do not think we need to
27 emphasise it, but it is right to say also that the authorities do support the view that a one-
28 way information exchange is enough to support an infringement, and it must follow from
29 that that conduct on one side suffices to complete the concerted practice.

30 In relation to object, the analysis, the assessment starts at 4.45 and you can see the way in
31 which that is put at 4.45 and 4.46, which echoes some of points that you have seen already.
32 If I could just pick it up on page 80, over the page, four lines down. The point is made that
33 the information was used by Mr. Snee, and I will come back to that. Then it says:

1 "It reduced uncertainty as to the party's future conduct on the market and highlighted
2 to Franklin Hodge, Kondea and Galglass that there would be less downward pressure
3 on their prices than they might otherwise have as expected. As such, the exchange of
4 this information can be regarded by its nature as injurious to the proper functioning of
5 normal competition."

6 We say that is very consistent with the principles I have shown you in the case law about
7 independence in relation to pricing policy.

8 Then, 4.47 and 4.48 deal with an important point. Mr. O'Donoghue said yesterday that the
9 existence of the cartel is not taken into account in the assessment of the information
10 exchange.

11 That is not right. The point that is made in these paragraphs is that when they exchanged
12 information at the meeting, all of the parties knew that they were acting against the
13 background of the cartel. So although Balmoral had injected new competition into the
14 market, that competition was fragile. In that context, any anti-competitive contact with the
15 one remaining competitor who was not in the cartel was especially likely to harm
16 competition. So that is part of the objective context and it was taken into account in the
17 assessment of the infringement.

18 Paragraphs 4.49 to 4.51 deal with subjective purposes, first those of Balmoral's competitors
19 and then Balmoral. I am going to come back to that shortly, but 4.51 picks up on the theme
20 that Mr. Joyce wanted to see prices stabilise and he did not want prices to hit rock bottom.
21 It says at the end that Mr. Joyce said in interview that Balmoral was trying to avoid a price
22 war.

23 Mr. O'Donoghue said yesterday that it is common ground that Balmoral had a singular
24 purpose, but that is not common ground. You can see that it is not common ground in the
25 context of legal assessment of the object of the infringement, because part of its purpose at
26 least is to get prices stabilised and to avoid a price war. That was the CMA's finding, I
27 should say.

28 The point is that it is common ground that the entry of Balmoral into the market had
29 reinjected a new level of price competition, but what the Tribunal may have already seen,
30 and certainly will see, is that that competition had driven prices low and threatened the size
31 of the market, and that is an important part of the market context too.

32 Paragraphs 4.52 and following address a series of Balmoral's arguments about the nature of
33 the information, which actually mirror in many ways the issues on appeal.

1 Then 4.53 deals with types of tank. Here the point is made the exchange related to two
2 types of tank which were amongst the most popular sizes and, in any event, because we are
3 dealing with an object infringement there is no need to show that the restriction is
4 appreciable, although in our submission it is appreciable.

5 There is another point on this, which is linked to the previous point about stabilising prices,
6 which is that again the Tribunal will see that for the 135 and the schools tank the parties
7 were particularly concerned about low prices for those tanks. The prices were described by
8 Mr. Dean at the meeting as "artificially low", which I think actually means the opposite of
9 that. I think it actually means relatively competitive and not artificially high; they were
10 prices where the cartel had not managed to achieve the higher prices that they wanted. So it
11 is a slightly confusing expression, but I think it actually means the opposite really of what it
12 says.

13 We will also see again, if the Tribunal has not already seen, that Mr. Joyce shared their
14 concerns, particularly about the low price for the 135 tank.

15 Paragraph 4.54 and following deal with the nature of the exchanges, and here we get to the
16 price bands and targets.

17 Paragraph 4.55 makes the practical point that because costs and prices tended to vary,
18 information about the price bands was more useful than suggesting that there was a sort of
19 single price.

20 Just to pick up at 4.56, it says at the first line:

21 "The price bands served as targets for the parties to stick within."

22 It was suggested yesterday that the CMA is in some way backing off its findings in relation
23 to this. That is not right. The CMA found that the parties discussed target prices, and it is
24 in the nature of a target price that you aim for them, that is what you are going to aim to do.
25 That is not the same as saying that the parties reached an agreement that they would stick
26 within the bands. The CMA did not find such an agreement. One can debate whether it
27 could have found such an agreement but it did not find that, but it is in the nature of the
28 target that you aim for it. So it is wrong to say we have changed our position about that.
29 At 4.57 we come to the argument that the information exchanged was historic. I have said
30 that is squarely an issue on the appeal. Our answer is three-fold. 4.58, some of the
31 information was clearly current. 4.59, some of it was explicitly forward looking. 4.60,
32 although there is some discussion about past prices, that is still commercially sensitive,
33 because the context in which it was used was a discussion of forward looking prices. I will
34 show you an example of that in a little while.

1 So the point about discussing past prices is to contrast them with the prices that were
2 regarded as acceptable.

3 Paragraph 4.64 picks up Mr. Snee's view that the information was commercially sensitive
4 and he was trying to find out information about Balmoral's pricing policy.

5 Then 4.65 and following deal with some further points about usefulness of the information.
6 There is an important point at 4.65 itself, which is the argument that the bands were too
7 broad to be of use; and the point that is made there, at the end of the paragraph, is that the
8 lower end of the range effectively indicated a price floor.

9 The point that is made there is it does not necessarily matter whether there was room for
10 manoeuvre within the bands; the point is that the bottom end of the band indicates a lower
11 end of the prices that the parties are aiming for, and that is in itself anti-competitive.

12 Paragraph 4.68 is the argument about the transparency of the market. I have already
13 anticipated that in the *Tate & Lyle* case, which you can see is referred to in footnote 399
14 there.

15 After that you have appreciability, effect on trade, exemption, and none of that is
16 challenged. As I say, the focus of the appeal is on concerted practice and object.

17 The grounds of appeal are actually expressed principally with reference to object, but I
18 think we have treated those issues as effectively running together.

19 That is a brief run through on the CMA's positive case as set out in the decision.

20 I now want to move to the purpose of the meeting, because it is an overarching theme of
21 Balmoral's appeal that its sole purpose in attending the meeting was to reject the cartel, to
22 cut off contact and to make clear that it intended to compete aggressively.

23 Part of our response to that argument is based on the legal principles I have already shown
24 you, Madam. It places too much emphasis on subjective intention and not the objective
25 evidence. It is not a necessary part of an object infringement to prove any particular
26 subjective intention; a party can infringe competition law believing they are doing the right
27 thing, or in this case believing they are drawing the line in the right place, and indeed a
28 party can have a benign subjective purpose and an anti-competitive object at the same time.
29 So whether there is an object infringement is assessed objectively and not subjectively.

30 But there is also the factual question, and the CMA's position is that Balmoral has built its
31 appeal on an incomplete view of Mr. Joyce's purpose at the meeting.

32 It is clearly right to say that Balmoral did not want to get involved in customer allocation. It
33 is also true that Balmoral had competed aggressively on price in the run-up to the meeting,
34 with considerable success. That competition was, to a large degree, on price. There is no

1 question that Balmoral did well out of that competition. But there was a downside. Price
2 competition reduced the size of the market and as a result there was less value in the market
3 for everyone than there might have been, and that includes Balmoral.

4 Mr. Joyce does go a long way to recognise that context in his --

5 THE CHAIRMAN: Is your assumption, then, that this market is not one that can expand if prices
6 are reduced? There is a fixed volume for the market, so a reduction in price simply means
7 that the total market is smaller in value because it does not prompt more people to decide to
8 install water sprinkler tanks than would otherwise have to. Is that how the market works?

9 MR WILLIAMS: The way you put the question to me, I have not thought about the case in that
10 way before, but it is obviously right to say that the nature of the product is such that one
11 installs a tank in a building..

12 THE CHAIRMAN: It is not price elastic.

13 MR WILLIAMS: That is right. It is not like going to the cinema, where if it is cheaper you
14 might go more often. You do not put in more sprinkler tanks than you need to, I would
15 imagine. I do not mean to give evidence.

16 THE CHAIRMAN: You do not put more sprinkler tanks in the building, but would more
17 buildings have sprinkler tanks if they were cheaper? It does not seem that the people at the
18 meeting thought that that was a likely outcome, but is that your assessment?

19 MR WILLIAMS: I do not want to give a definitive answer on that point. The point is that these
20 products, it is a legal requirement to install them.

21 THE CHAIRMAN: Are they competing with some other fire suppression method which does not
22 require sprinkler tanks?

23 Anyway, it may be useful to have --

24 MR WILLIAMS: Perhaps I can come back to you on that.

25 THE CHAIRMAN: Yes. I think your assumption, I think what you are getting to is to say they
26 came to the meeting in the assumption or in the belief that they would all earn less revenue
27 if prices dropped, because it would not be compensated for by an expansion of the volume
28 of the market.

29 MR WILLIAMS: The point I was making is that what one sees from the discussion at the
30 meeting is that the parties are talking about a reduction in price, and a reduction in the size
31 of the market as a result of that.

32 So it was really a factual observation, that that is the way in which the discussion unfolded.

33 THE CHAIRMAN: Yes, a reduction in the value of the market.

1 MR WILLIAMS: Yes, and we will see that when we come to look at the transcript in more detail.

2 As I say, I am basing my submissions on the factual picture that we see from the transcript.

3 I will not ask you to turn it up, I will just read it to you. But as I say, Mr. Joyce goes a long
4 way to acknowledge this picture in paragraph 54 of his first witness statement, where he
5 says:

6 "Due to the artificial prices that the cartel had managed to keep in the years preceding
7 our entry, the market was fluctuating in 2012 and customers were encouraging
8 something of a battle on prices between Balmoral and the competitors. I said that in
9 time I hoped that battle would ease off and competition would be fought on other
10 fronts, such as quality and customer service."

11 We can debate the exact message that was communicated, but that is recognising that there
12 is downward pressure on prices driven by competition.

13 As I say, we will obviously explore that with Mr. Joyce in due course. For now I want to
14 show you some of his interviews with the OFT before the decision was taken, because I
15 want you to see this material and I am not going to be able to put it all to Mr. Joyce.

16 If I can ask you to take out defence bundle tab 12, and if I can turn to page 88, please. This
17 is bundle pagination 88 in the bottom right-hand corner.

18 You can see at the top of page 88 it says -- this is the OFT's interview on 10 December
19 2013. Are you with me, Madam?

20 THE CHAIRMAN: Yes.

21 MR WILLIAMS: "Why then did you accept the invitation to the meeting on 11 July?"

22 At the top of the page.

23 THE CHAIRMAN: Yes.

24 MR WILLIAMS: Skipping over the next paragraph:

25 "So I went to the July meeting primarily [at the bottom of the page] I suppose in some
26 way to say, you know, Balmoral was a professional company, but from my point of
27 view as well, I don't want us to be involved, I don't want us to start a price war, I don't
28 want us as a company err ... how do I end that contact bearing in mind that I have
29 been talking to them. So that was kind of the crux of it ... for me."

30 Over again at page 90, in line with the hole-punch-ish it says:

31 "Um, I'm trying to think again in my mind now."

32 It says:

33 "... in my mind now, we then -- Nigel ... started talking about divvy up, we could
34 divvy up customers. I think I said to him it's not Balmoral's style, we don't operate like

1 that as a company, and we want to be a professional, credible player, it's not in our
2 interests to go out there and start a price war, we will be competitive, and that was
3 some of key points that were discussed."

4 Then 104 in the middle of the page:

5 "I know we'll come on to it, er ... but during the course of that meeting were you being
6 offered 25% of the market?

7 "Answer: No, no. Not in that context."

8 Perhaps I can pick it up:

9 "[I said] 'Look guys ... when there's four credible players in the market if you push
10 beyond a certain share you develop a price war, unless you're going to come up with
11 something that is completely unique ..."

12 Over the page at 106, just above the hole-punch on the left-hand side:

13 "It's the evidence you can give us as to what you were being offered that's of interest
14 to us."

15 He says:

16 "Divvying up customers. Just to put it in context, I said a lot but not anything that
17 gave any clue about Balmoral's strategy in the business, but they are strong
18 competitors and I said at the outset we don't want to create a price war. So we kind of
19 chatted about two sizes of tank, which I said were common knowledge."

20 I think there are three more references. 122 -- perhaps just to put this in context, you can
21 see at the bottom of 121 they are talking about a particular part of the transcript where Mr.
22 Joyce says:

23 "I thought let's see if the guys still want to have a chat."

24 Then line 13 or 14:

25 "What I'm really saying there, I come back to my general point about we're in a price
26 war, there has to be sensible competition. You want strong players at the table and
27 prices are heading to be an unsustainable level."

28 There is a follow-up question. Over the page:

29 "As I say, we're not going out there to be the cheapest. It's not arrogant that it will
30 come in and they will roll over. I believe a level of discussion with competitors is
31 okay but we're not strolling in there to try and take all the work."

32 The last two references are 128 -- and this is responding to a question about something that
33 Mr. Snee says:

1 "He's saying it's going to be a complicated picture. What I say is well, you know, as I
2 say, if part of our objective is not to have a price war, you know, we want sensible
3 pricing, that's not too much to expect."

4 133 -- actually, perhaps I can skip over that one and go to 137. The context you can pick up
5 on page 136, the middle of the page. You then see:

6 "We can always pick up the phone and have a chat about it, see where we are."

7 He says:

8 "What do you mean by that?"

9 On the right-hand side, middle of the page:

10 "What I mean by that, I've said about being a credible player. I object to the price war
11 again. We don't want to start a price war, we want to be sensible. We're a strong
12 company, we're not going to shake them out on price, let's go and compete. What I
13 mean by that is pick up the phone, why not pick up the phone. I don't want to say
14 Balmoral is misbehaving but the bottom line is that we have to go in there and
15 sensibly compete."

16 I have shown you those references because, as I say, I will not be able to show them all to
17 Mr. Joyce in cross-examination. I did want you to see the strong and consistent message
18 that Mr. Joyce is volunteering that he had the object of avoiding or stopping or not starting a
19 price war. In our submission, this fits squarely with the points he puts across very clearly at
20 the meeting about stabilising prices and prices not hitting rock bottom.

21 So it is true that at the time of the meeting Mr. Joyce wanted to compete, but he wanted to
22 compete sensibly. In other words, at prices which he did not think were unpalatably or
23 unsustainably low. It is interesting, because although Mr. Joyce does the phrase "mixed
24 message", and one can understand why he says that, our position is that the message was
25 not mixed, because what Mr. Joyce wanted was clear enough, he did not want to allocate
26 customers, he did want continuing competition but he wanted it at sensible prices.

27 So although it has been repeatedly suggested by Balmoral that there is an incongruity in the
28 CMA's case, in our submission that argument is built up from a partial view of Mr. Joyce's
29 motivations and objectives at the meeting. If one starts from the position that he attended
30 the meeting with the conscious or subconscious aim of preventing a price war, then the
31 exchange of information which the CMA found is not hard to understand.

32 Mr. O'Donoghue said yesterday that the argument defies common sense because Balmoral
33 had been doing so well out of competition. We do not agree with that, but the point comes
34 from Mr. Joyce and not from us.

1 I emphasised that point because it makes sense of the events of the meeting in a way that
2 Balmoral's case really does not. It explains why Mr. Joyce stayed at the meeting for two
3 hours and why he discussed pricing, having made it clear he did not want to join the cartel,
4 and why he did not leave or steer the matter back to sport or industry standards or at least
5 object to the discussion on price, which on his case are the very sorts of contact that he says
6 he objected to.

7 That is Mr. Joyce's purpose. What was the purpose on the other side of the table?

8 There is no question that the initial purpose of Mr. Snee and Mr. Dean was to try and get
9 Balmoral to join the cartel. The argument that was made yesterday, and I think which has
10 been made throughout, is that that was the only purpose and the whole of the meeting was
11 about recruitment to the cartel and it failed. The argument was made yesterday that the
12 CMA has misread the transcript.

13 In the course of argument yesterday, Madam, you said that depends in part on what is meant
14 by the cartel and rejection of the cartel. If I can respectfully say so, that is exactly right.

15 If I could just ask you to look at paragraph 337 of the decision.

16 THE CHAIRMAN: Can I put the transcript away?

17 MR WILLIAMS: You can, Madam, yes.

18 Tab 8, paragraph 337:

19 "However, the audio-visual recording of the meeting demonstrates that although
20 Balmoral Tanks refused to take part in any allocation of customers, Mr. Joyce
21 exchanged information regarding current pricing and future pricing intentions with the
22 other attendees."

23 As you said yesterday, Madam, it is the customer allocation arrangements that were
24 specifically rejected, and that finding is in no way inconsistent with Balmoral going on to
25 engage in an exchange of confidential price information.

26 THE CHAIRMAN: I think what Mr. O'Donoghue was suggesting was that the finding that they
27 were not involved at all in the main cartel is inconsistent with the finding that they were
28 involved in price signalling for the purpose of market sharing, because the main cartel is not
29 simply the gold and silver customers, it is also market sharing.

30 MR WILLIAMS: I think --

31 THE CHAIRMAN: Is there an incongruity between you giving them an absolute clean bill of
32 health so far as the main cartel was concerned, and yet finding them guilty of this
33 infringement, which is not actually separate from the cartel, it is perhaps an alternative
34 mechanism for market sharing.

1 MR WILLIAMS: That is the way it is put. It is put that the conduct at the meeting was
2 unavoidably linked to market sharing.

3 THE CHAIRMAN: Yes.

4 MR WILLIAMS: Yes, and that was, I think, on paragraph 3.10 of the decision, which sets out a
5 particular statement by Mr. Snee of his aims at the meeting. As you say, Madam, what is
6 said is that Mr. Snee continued to pursue that aim through the meeting.

7 The answer to the argument is that it again mixes up subjective purpose and object. It does
8 not matter, for the CMA's findings, how far the exchange of information at the meeting was
9 or was not linked in Mr. Snee's mind to an ultimate aim of securing market shares. What
10 matters is whether, objectively analysed, the information shows an exchange of confidential
11 pricing information; because that was the infringement found by the CMA.

12 THE CHAIRMAN: Yes, I can see that in the general run of cases. But the question is whether
13 there is a problem for you, in this case, that you have found that they never became
14 members of the main cartel.

15 MR WILLIAMS: Yes, and we have also not found, in the context of this infringement, that they
16 participated in an exchange which resulted in market sharing or that it was part of the
17 infringement that --

18 THE CHAIRMAN: But if it was, is your decision still sustainable?

19 MR WILLIAMS: When you say "if it was", Madam ...

20 THE CHAIRMAN: If the objective reason for the exchange of pricing information was as a less
21 good but better than nothing way of arriving at market sharing, is it inconsistent for you to
22 find that that was an infringement when you have found that they were not ever parties to
23 the main cartel, which was a market sharing cartel?

24 MR WILLIAMS: It is not inconsistent for this reason, that the infringement found in the decision
25 is an exchange of confidential pricing information which reduced uncertainty in relation to
26 market conduct.

27 That theory of harm, if I can put it that way, holds irrespective of whether some of the
28 participants at the meeting had as their ultimate preferred outcome the sharing of the market
29 between the participants equally.

30 THE CHAIRMAN: Does it still hold good if that was the intention of all of the participants in the
31 meeting?

32 MR WILLIAMS: I think one has to -- the position on the facts is this, Madam, that there is a
33 discussion at the meeting of price information, and it is information of the nature which I
34 have described; current pricing information, forward looking pricing information. Some of

1 those at the meeting had been involved in a longstanding cartel, the objective of which and
2 the outcome of which was to allocate the market between them so that they had equal
3 market shares.

4 In that context, it is not surprising that at various points in the discussion, the discussion of
5 pricing information circled back to the question of what the implications of certain pricing
6 practices would be for the market shares of the participants.

7 So that was discussed and it was discussed between all of the participants in the meeting,
8 and we will see that when we come to look at the transcript. It was not a one-sided
9 discussion. But the question for the Tribunal is whether the information exchange caused
10 the harm to competition which the CMA found in the decision, and it does not matter if that
11 discussion was to some degree subjectively motivated on the part of some or all of the
12 participants by a preferred outcome in which the participants in the arrangements would end
13 up with equal market shares.

14 THE CHAIRMAN: I see. What you are saying is that they exchanged information with the
15 intention that they would all use that information in their subsequent conduct on the market,
16 and that is enough for you. Whether they were going to use that information simply to raise
17 prices or as a tool for arriving at equal market shares, you say does not matter.

18 MR WILLIAMS: No, we say one has to look at it objectively. Objectively, was there an
19 exchange of pricing information?

20 THE CHAIRMAN: I do not think we are in an objective and subjective point here. At least, I am
21 not. Perhaps it is a difference between the effect, the direct and then the ultimate indirect
22 purpose of the exchange of the information.

23 MR WILLIAMS: That is right. The theory of harm that is found is a reduction in uncertainty in
24 relation to pricing. Our point is that an exchange of information which had that
25 consequence occurred, and that is sufficient to establish the infringement that is found.
26 One can see in the factual context that there were wider discussions of the implication for
27 market shares, and that may or may not have been part of the motivation of some of the
28 participants; but that in fact the exchange which took place had the impact on competition
29 that is set out in the decision, regardless, as you have said, Madam, of whether there were
30 further or indirect possible effects in relation to market shares.

31 We do not need to show that there was an agreement or a concerted practice in relation to
32 market shares to demonstrate harm to competition.

33 THE CHAIRMAN: No, it is not what you need to show, it is rather the opposite. It is whether
34 there is an inconsistency in your stance towards Balmoral in the two decisions that you

1 took. If there were, where that will get us I am not quite sure, but I am just exploring
2 whether there is and I think you are explaining why you say there is not.

3 MR WILLIAMS: Yes, we say there is not. I will just take instructions on that, Madam.

4 THE CHAIRMAN: Would that be a convenient moment for us to have our five minute break?

5 MR WILLIAMS: Yes, of course.

6 (11.50 am) (A short break)

7 (11.55 am)

8 THE CHAIRMAN: Yes.

9 MR WILLIAMS: Following on from the discussion we were having before the short break,
10 Madam, we were talking about an argument Mr. O'Donoghue set out yesterday.

11 As I understood it yesterday, there was a second part of that argument, which was that
12 Balmoral cannot be treated as having infringed competition law just because it was offered
13 inducements to join the cartel. We did not get the transcript until this morning, so I did not
14 get the chance to look back at how that was put. I just say that before I deal with the
15 argument.

16 As we understood the argument, it was that essentially Balmoral was a passive recipient of
17 information at the meeting and that that cannot be enough to establish an infringement.
18 Leaving aside one-way information exchange infringements, we say that the premise of that
19 argument is wrong. Balmoral was not passive at the meeting, for all of the reasons I set out
20 in my opening remarks.

21 I was going to take you to pages 39 and 40 of the transcript but I am thinking you have
22 probably seen those previously and we will look at them again in the course of the hearing.
23 But in the course of that exchange, one can see -- I will not ask you to take it out, I will just
24 make broad observations for now -- the price bands effectively become targets, at the top of
25 page 40, and we say that Mr. Joyce plays a central role in that because he says:

26 "We can always pick up the phone and have a chat about it, see where we are, make it
27 clear where the bands are. If you go outside that band on the low side then I would
28 like to think it will not be driven by us."

29 Then the discussion continues, Mr. Snee asks:

30 "What were we saying on the school tanks, was it 9.5 or 10.5?"

31 Mr. Joyce says:

32 "That is on average where the price should have been."

33 They then carry on talking about those products. On the right-hand side, Mr. Joyce says:

34 "9.5/10.5, it is a target."

1 We do say it is really a rewriting of the script to say that Mr. Joyce is a passive participant
2 in these exchanges.

3 It is right to say at this point that in his evidence provided for the criminal proceedings Mr.
4 Snee did say he thought Mr. Joyce was somewhat passive at the meeting, but the CMA's
5 view was that that point was not borne out by the objective evidence of the transcript. That
6 is recorded at decision 3.60 and the Tribunal will have to make up its mind about that in due
7 course.

8 Turning then to address some of Balmoral's other arguments. I have covered the purpose of
9 the meeting. I have covered argument that the CMA's case contains a sort of basic
10 incongruity, because we say there is nothing incongruous about a party wanting to compete
11 but wanting sensible competition. Our case does not depend on why Mr. Joyce may have
12 drawn the line where he did, it depends on what happened at the meeting.

13 There is a further point, which was a main strand of Balmoral's notice of appeal but I do not
14 think it was explicitly referred to yesterday, and this is the argument that at the discussions
15 at the meeting, Balmoral was fobbing off its competitors.

16 It is clear that Balmoral says the information was historic, but I do not think Mr.
17 O'Donoghue referred specifically to "fobbing off" yesterday.

18 The primary and short answer to this case is that the exchange was not a worthless exchange
19 of historic information, and Balmoral's written skeleton argument realistically
20 acknowledges that it is critical to its appeal to show that the information discussed was
21 historic because, as we have seen, case law takes a very strict view of the disclosure of
22 forward looking pricing information; and we say the same thing applies to current pricing
23 information.

24 When I showed you the decision, I showed you the three parts of our case in relation to that;
25 explicit references to current prices, explicit references to forward looking prices, and the
26 use of past prices to inform where prices ought to be.

27 In our submission, it is hard to see the answer to these points given the clear language of the
28 exchanges, and Balmoral has not provided one. The closest we have is paragraph 133 of
29 Balmoral's skeleton argument, where it says that these were "merely aspirational prices for
30 an ideal world".

31 That is the reference, but I was not going to turn it up.

32 In our submission, that is seeking to draw a distinction where there is not one. These parties
33 competed in the real world and they were talking about prices in the real world, and there
34 was clearly a real problem with low prices on these two tanks and the parties discussed what

1 to do about it. To say this was just a sort of expression of vague aspiration is, in our
2 submission, really not engaging with the evidence.

3 As I say, if the Tribunal accepts that the information exchange was not historic, then we say
4 that really does cut through the appeal.

5 Balmoral makes a related argument, which is that the information was not likely to harm
6 competition because it only told the participants what they already knew from customers
7 and from market intelligence.

8 There are two answers to that point. One flows from the previous discussion; the argument
9 based on transparency depends on the discussion being backward looking. If the discussion
10 was not just backward looking, obviously that was not information that one could get from a
11 customer.

12 The second point we have seen in *Tate & Lyle*, which was that discussions between direct
13 competitors would clearly provide better, clearer information than a supplier can get on the
14 grapevine. That is the legal position, and Mr. Snee confirms that that was the position on
15 the facts at paragraph 24 of his statement.

16 I mentioned the fobbing off argument a few minutes ago, and the main answer to it is that
17 Mr. Snee and Mr. Dean were not being fobbed off with worthless information, but I do want
18 to flag why Balmoral needs to make the argument. It makes the argument because it starts
19 from the proposition that Mr. Joyce attended the meeting with the sole purpose of cutting
20 off the contact, and then he did not do that. Even on Balmoral's case, there is no getting
21 away from the fact that he stayed for a long time in the meeting and talked about pricing.

22 In his submissions yesterday Mr. O'Donoghue criticised the finding in paragraph 4.23 of the
23 decision, which was then carried into our defence, which says that Mr. Joyce stayed at the
24 meeting for over an hour after rejecting the cartel. I think his argument is that Mr. Joyce
25 was rejecting the cartel throughout. But I think the CMA's point is so basic that Balmoral is
26 missing it; it is just saying that if Balmoral wanted to reject the cartel and cut off the
27 contact, it did not need to stay for the whole of the meeting and talk about pricing.

28 That long discussion is obviously, on any view, very hard to explain on Balmoral's case. So
29 the purpose of the fobbing off argument is to explain why Mr. Joyce did not do what he
30 says he wanted to do. He says in his second statement it was a deliberate piece of tact to
31 manage the situation.

32 The observation we make is that if you do not start from Balmoral's premise that Mr.
33 Joyce's only purpose in being at the meeting was to kill the contact, you do not have the

1 same difficulty of trying to explain a long discussion of pricing information as some sort of
2 elaborate bluff. If Mr. Joyce wanted to avoid a price war, then the discussion makes sense.
3 We also make the point in our defence that the argument is actually counter-intuitive,
4 because it seems to involve saying that Mr. Joyce set about cutting off the contact by giving
5 the impression that he was happy to have a discussion, and offering further phone calls,
6 making notes, and so on.

7 In our submission, this has all the hallmarks of an ex post facto rationalisation, and we will
8 invite the Tribunal to take the approach taken in the *Tesco* case which I have mentioned,
9 and to attach weight to the objective evidence of what happened, and not Mr. Joyce's
10 rationalisation of the meeting after the event.

11 The last key point Balmoral makes about the nature of the information is that it was too
12 generic to be useful, because it is said that these products were more complicated than that.
13 That is not an answer to the points we make about specific low prices, following in line with
14 the *Philips* case about saying "We do not want to offer this price to this customer", it is not
15 an answer to communicating that you do not want a price war.

16 Dealing with the argument in relation to the bands, the first and obvious point to make is
17 that no one at the meeting seemed to think that the information exchange was useless. The
18 transcript records a discussion between three managing directors who know their businesses
19 well. They discussed prices for a long period, asking questions where they need to, and the
20 suggestion that the information is generic and useless is just not consistent with what
21 happened, it is not consistent with how Mr. Joyce conducted himself and it is not consistent
22 with how Mr. Snee conducted himself immediately after meeting when he used the
23 information.

24 The second point is that these are not really such complex products that the exchange was of
25 no value. They are largely standardised products with a core cost -- Mr. Snee says that in his
26 witness statement at paragraph 24 -- although that is obviously in dispute. The CMA found
27 there was a degree of variation across the products, but that was catered for within the
28 bands. The Tribunal will obviously hear from the witnesses about this.

29 Thirdly, this is linked to the last point, the objective of the parties and the infringement
30 found by the CMA was not fixing a single price point, it involved pushing prices up from
31 particular low levels to a level which was seen as more sustainable and more sensible. Seen
32 in that light, the parties did not need to be exact about which price related to exactly which
33 specification; what they were trying to do was to move prices to a more acceptable band.

1 Balmoral has made a further argument that the meeting cannot have restricted competition
2 because Mr. Joyce did not have access to pricing information and does not have influence
3 over pricing.

4 There are a number of responses to this argument.

5 First, it is a fact that Mr. Joyce did exchange pricing information, which he does not say was
6 wrong or nonsensical, he says it was an average. So as far as we can see, the point about
7 him not having access to information is a red herring, because he did have access to
8 information and he did discuss it. As we saw in *Philips*, even if the information had been
9 wrong, that would not stop it distorting competition.

10 Secondly, Mr. Joyce did not need to be at the coalface, pricing bids every day, to take the
11 view that prices would ideally be pushed up, which we say was clearly his view as
12 expressed at the meeting.

13 Thirdly, and standing back, he is the managing director. The sales team report to him, and
14 the idea that he could not find out about pricing or influence prices is, in our submission,
15 quite extreme and, we would say, unreal.

16 The final point is that even if Mr. Joyce says he could not influence prices, one can
17 establish an information exchange based on the flow of information from him to others; and
18 we saw that did happen.

19 This leads us into the topic of conduct on the market. Balmoral is pursuing the argument
20 that it can rebut the presumption of conduct in part because of the points we have just been
21 looking at. Madam, we have already dealt with our main response to this, which is that is
22 not a case in which we need to rely on the presumption of conduct, because there is
23 evidence of direct conduct on the market.

24 We did ask you to look at parts of the recording where this happened. I do not know if you
25 had a chance to look at that.

26 THE CHAIRMAN: These are Mr. Snee's phone calls after Mr. Dean and Mr. Joyce had left?

27 Yes, we did watch those.

28 MR WILLIAMS: You have seen Mr. Snee saying that he wants to use the information, going
29 below them but not crazily below, just sneaking below them, and so on.

30 That goes to two issues. The first is why an exchange at a single meeting was likely and
31 sufficient to harm competition in this case. The regular nature of bids meant that no sooner
32 had the meeting ended, that competition was distorted. That means the principles set out in
33 *T-Mobile* are clearly satisfied. Secondly, as I have said, it is evidence of actual conduct on

1 the market, and it is confirmed by Mr. Snee at paragraphs 27 and 28 of his witness
2 statement.

3 Having said that, we do also rely more generally on the presumption. Balmoral says that it
4 priced below the band which Mr. Snee bid for. We say that does not rebut the presumption.
5 Just as Mr. Snee wanted to sneak in under Balmoral, what we also see is that Balmoral bid
6 at a level which meant that it would sneak in under Franklin Hodge even if Franklin Hodge
7 priced within the bands. The fact is that once Mr. Joyce had discussed the bands with Mr.
8 Snee and Mr. Dean, he could not unknow what he knew, and he could not fail to be
9 reassured by the discussion, even if all it told him was that Balmoral's pricing strategy was
10 likely to remain on track.

11 In addition to those points, there is a dog which has not barked in this part of the case,
12 which is Mr. Dean. Mr. Dean received the information. He is presumed to have used it.
13 There is no evidence at all that Kondea did not take it into account in deciding where to
14 price, whether immediately afterwards or at a later point; and the same point applies to
15 Galglass, which received the information immediately after the meeting. So we say
16 whichever way you look at it, the requirement for conduct is satisfied.

17 Continuing with events after the meeting. There is a suggestion at paragraph 100 of
18 Balmoral's skeleton argument that it is devastating for the CMA's case that there is evidence
19 from after the meeting that Franklin Hodge knew that it still had to compete with Balmoral.
20 Mr. O'Donoghue showed you paragraph 3.102 of the main cartel decision yesterday, which
21 went to that point.

22 The point is not devastating. It is based on the same premise as much of Balmoral's
23 skeleton argument, which is that the CMA has found that after the meeting there would be
24 no competition with Balmoral, and that clearly is not the basis of the infringement found.
25 The CMA in fact expressly found that there was continuing competition but found that there
26 was nonetheless an object infringement, for all the reasons I have been describing. So there
27 is no inconsistency.

28 In much the same vein, Mr. O'Donoghue made a number of points yesterday about what
29 happened on the market in the longer term, that Balmoral's share of the market continued to
30 grow and how prices continued to develop. The Tribunal will not need me to labour that
31 point, but this is an object case, it is not an effects case, and points about what happened in
32 the market in the months after the infringement are not relevant, and they are no answer to
33 the direct evidence of conduct immediately afterwards.

1 There is one last topic on infringement which I need to deal with briefly, which is the
2 relevance of the criminal proceedings. We have dealt with this in some detail in our
3 defence, paragraphs 80 to 89, and I am not sure that we completely understand the position
4 that is taken about the criminal proceedings. Mr. O'Donoghue was clear yesterday he is not
5 running an abuse of process or an estoppel point, yet he says, I think, there is a difficulty
6 with the decision sitting alongside the evidence that was given in the criminal proceedings.
7 In our submission, there is no legal basis for saying there is a relevant inconsistency
8 between these two different matters, but there is not any factual discrepancy either.
9 Mr. O'Donoghue showed you the criminal transcript yesterday, and you will remember that
10 what it showed was Mr. Joyce describing the various prices he had referred to as "market
11 prices", prices that had been reached in the market by this time, so they were current prices.
12 So they were current prices, were not historic prices, and that, as a first point, is
13 inconsistent with Balmoral's case that the information was just historic and worthless. But
14 our case is that the parties had a discussion, and we will see it when we look at the
15 transcript, they start with current prices or recent prices which are too low, which they do
16 not like, and they contrast those with other current prices, recent prices, which they regard
17 as acceptable. Then the discussion uses that information, and those price points then feed
18 into the bands. So we say, leaving aside the legal point, that there really is not a factual
19 discrepancy either, for those reasons.

20 There is a more general point which we made in the defence, which is about what was being
21 tried in the criminal proceedings. Those proceedings were about whether the cartelists were
22 involved in market sharing or price fixing and whether Mr. Dean and Mr. Stringer had been
23 dishonest. That is what the judge and indeed Mr. Joyce in giving his evidence was dealing
24 with. None of those matters are in issue here. Conversely, what is in issue here could never
25 have formed the basis of the cartel offence, which as a minimum required price fixing.
26 So the proceedings were just concerned with different questions, and it is really wrong to try
27 and find consistency or inconsistency in the evidence given at a trial which was addressing
28 different issues.

29 I am not sure whether it is suggested that the OFT should have been cross-examining Mr.
30 Joyce in relation to the evidence he gave looking down the road in relation to the civil
31 proceedings. As I say, the focus of those proceedings was on a different set of questions,
32 that is what the evidence went to, and one cannot glean the answer to the present case from
33 that evidence.

1 If you want a sense of how remote from these issues the criminal proceedings were, there is
2 a quote at paragraph 87 of our defence where Judge Goymer said that:

3 "Mr. Joyce attended the meeting as an information gathering exercise and there is
4 absolutely nothing wrong with companies meeting together to discuss the state of the
5 market, even to discuss price."

6 I am not making a criticism of those observations but they were just dealing with a
7 completely different matter.

8 Those are my opening submissions on the infringement.

9 I just want to have a final word about embroidering the decision, which Mr. O'Donoghue
10 referred to yesterday. Mr. O'Donoghue criticised paragraph 46 of our skeleton argument for
11 referring to parts of the transcript which he says aren't cited in the decision. I can't say that I
12 went back and checked that, but paragraph 46 of our skeleton argument is a response to
13 points made in Balmoral's skeleton, which we say are Balmoral's -- we have described it as
14 a "reconstruction" of the meeting. So it is rebuttal material. Of course, we are not just here
15 to defend a decision, we are here to meet Balmoral's case. To do that, we should obviously
16 be entitled to refer to parts of the evidence which are relevant to that rebuttal case, whether
17 or not they are specifically referred to in the decision.

18 We do not accept the criticism of paragraph 46, and when I come to cross-examine Mr.
19 Joyce I cannot be limited to just relying on those parts of the transcript which are cited in
20 the decision as part of the CMA's positive case. Balmoral has said on more than one
21 occasion that the transcript needs to be read as a whole, the meeting needs to be viewed as a
22 whole, and obviously we agree with that, and we should be and are entitled to use the
23 material in that way.

24 THE CHAIRMAN: Right, but you do accept that as far as the infringement is concerned, the case
25 as to whether the infringement exists has to stand or fall on those parts of the transcript and
26 other evidence that were included and were relied upon in the decision, in the relevant
27 paragraphs of the decision?

28 MR WILLIAMS: Yes, we say that the evidence in the decision supports the decision, but we
29 equally say if Mr. Joyce says "At the meeting this is my purpose, this is what I was trying to
30 achieve", I am entitled to take into account other parts of the meeting and say, "Can we talk
31 about this page and what was going on here?". That is not embroidering the decision, that is
32 merely trying the issues as they develop on this appeal.

33 THE CHAIRMAN: But what you cannot do is say, "All right, even if the passages that we have
34 quoted in the decision do not support the finding of infringement, there are other parts of the

1 decision that we could have quoted in the decision but did not which support the
2 infringement".

3 MR WILLIAMS: We are not seeking to embellish the finding as to what the core items of current
4 and future pricing information were discussed, and so on. We are not seeking to embellish
5 that. Obviously in the course of cross-examination there may be other parts of the transcript
6 --

7 THE CHAIRMAN: I understand the distinction, yes.

8 MR WILLIAMS: The Tribunal may find they illuminate the bits that we have relied on. As I
9 say, the decision sets out the core evidence in relation to those issues.

10 That brings me to penalty. We have provided a full submission in our defence, where we
11 cover the statutory provisions, the law relating to penalties, including the tribunals case law,
12 the CMA's guidance, the decision on penalty in this case and the grounds of appeal. We
13 have set that out very fully, so anything I do not say now is there in writing in the defence,
14 supplemented by our skeleton argument.

15 The legal framework, the Tribunal will appreciate, is found in the Competition Act,
16 supported by the CMA's penalties guidance. There is no question that this case crossed the
17 threshold for imposing a penalty, which is the intention or negligence test; and the
18 discussion of the statutory provisions in the defence boils down to the key point that in
19 fixing a penalty the CMA must have regard to the seriousness of the infringement and the
20 need to deter the undertaking concerned and other undertakings from entering into the
21 infringement, that is section 36(7A).

22 Before that section existed, those were the objectives of imposing a penalty under the
23 Tribunal's guidance, and the Tribunal will have applied those principles in the past. Now
24 they are mandatory statutory considerations for the CMA, which in my submission comes
25 to the same thing. They are not statutory considerations for the Tribunal, but the authorities,
26 including authorities that you, Madam, decided, established that the Tribunal will apply the
27 same principles. That is paragraph 204(e) of our defence.

28 It is an important point in the context of this case that the ultimate question for the Tribunal
29 is the overall justice of the penalty. That is clearly established in the case law; see defence
30 paragraph 204(f).

31 We do not downgrade the importance of the CMA's methodology, but we do say that an
32 attack on the individual stages is secondary, in this context, to the overall justice of the
33 penalty, and we say that is particularly important factor in this case where there really is a
34 risk of not, as I said at the beginning, seeing the wood for the trees.

1 I am only going to focus on the points that Mr. O'Donoghue addressed yesterday, which I
2 think are not all of the points that have been covered in writing.

3 The first point is it is said that the CMA has discriminated against Balmoral by fining
4 Balmoral and not the other participants.

5 As a preliminary point, it was said yesterday that the CMA deals with this in paragraph 1.5
6 of the decision and not elsewhere. That is not right. The point is also dealt with at
7 paragraphs 5.51 and 5.52 of the decision, as referred to in paragraph 2.29 of our defence.
8 So the suggestion this is all ex post facto reasoning is wrong.

9 The reason why the CMA did not fine the other participants is not that they did not deserve
10 to be fined for the information exchange infringement, it is not that the infringement did not
11 deserve a fine, it is that they had been fined for the main cartel, which was a second
12 infringement on the same market at the same time, including the meeting. That penalty was
13 set by reference to the same turnover on the market, on the basis of a higher seriousness
14 percentage, it was top of the range for seriousness, 30%, plus a 7.75 multiplier for duration.
15 There is also the point that Mr. O'Donoghue made yesterday that the fines for two out of the
16 three other cartelists reached the statutory cap at one stage in the calculation.

17 So the question arose for the CMA: was it necessary and proportionate for the statutory
18 purpose to impose another penalty on the basis of that same turnover on the same market at
19 the same time, and the CMA found not. That decision is not actually challenged, because
20 Balmoral does not seek to level the other participants up, it wants to level down to zero.

21 As we have explained in our written submissions, discrimination is treating similar cases
22 differently without objective justification, and one can see very clearly that the CMA's
23 reasons for not imposing a fine on the other cartelists do not apply to Balmoral, so they are
24 not in relatively similar positions and there was no discrimination.

25 Alternatively, if there were prima facie discrimination, the CMA says the discrimination
26 was objectively justified because it was entitled, and indeed required under the Competition
27 Act, to decide whether a second fine was necessary for the statutory purposes, including
28 deterrence, and it concluded that it would not impose another fine, and we say that
29 conclusion is reasonable.

30 That is the answer to the discrimination case. Balmoral says that the argument is contrary to
31 the CMA's case that there were two separate infringements, but there are two separate
32 questions. First, are there two separate infringements? Secondly, was it reasonable and
33 appropriate for the CMA to decide not to fine the main cartelists again, having regard to the
34 points that I have made?

1 We say the answer to that is yes, and there is not any inconsistency between the two
2 decisions, but we also say that there is in fact no discrimination.

3 We note in passing that the logic of the argument is that the CMA should fine the cartelists.
4 It does not suggest that Balmoral should not have been fined or it should have been fined
5 less. So we say that Balmoral's fine stands.

6 Coming then to the level of the fine, I have made the point that this is a case where it is
7 important to see the overall justice of the penalty clearly at the front of one's mind. The
8 reasons for that can be seen in the discussion at step 4 of the penalty calculation which is in
9 the decision at 5.43 and following. This is on page 104. Actually one can see at the top of
10 the page that the penalty at step 3 was 130,000, which as the Tribunal knows was the
11 ultimate penalty.

12 One then comes to step 4 and 5.43 explains that the penalty can be adjusted to achieve the
13 object of specific deterrents, that is relating to the particular undertaking in question, having
14 regard to appropriate indicators of the size and the financial position of the undertaking as
15 well as of any other relevant circumstances. You see in the last lines of 5.43 at step 4:

16 "The CMA will assess whether in its view the overall penalty is appropriate in the
17 round and adjustments may be up or down."

18 544:

19 "Increases to the penalty at step 4 will generally be limited to situations in which an
20 undertaking has a significant proportion of its turnover outside the relevant market."

21 We can move on and skip from there I think to 5.46 where we see:

22 "Balmoral Tanks is part of a larger undertaking with approximately 85% of its
23 turnover in the financial year ending 31 March 2015 generated outside Balmoral
24 Tanks."

25 Just to interject there, the Tribunal will probably have seen from the written submissions,
26 but when one is dealing with the step 1 turnover, that is the turnover at the time of the
27 infringement, whereas when one is dealing with deterrence at step 4 one deals with the up-
28 to-date figures because that gives you a more accurate reflection of the position at the time
29 that the penalty is imposed. So those principles are covered in our defence.

30 If you could look at footnote 469 to 5.46 you can see at the bottom --

31 MS. DALY: Where is that again?

32 MR WILLIAMS: We were in 5.46 and the footnote at the end of that paragraph, 469, actually
33 gives you the turnover figures for Tanks and for the group. You can see that it is 21 million

1 for Tanks as opposed to over 136 million for the whole undertaking. That is how the CMA
2 concludes that 85% of the turnover is outside the relevant markets.

3 So 5.47:

4 "Given the size and financial position of Balmoral the CMA would normally be
5 considering a significant uplift to ensure the penalty was sufficient to deter the
6 undertaking and others were breaching competition law in the future."

7 So the point is that 130,000 in the context of this business is nowhere near the penalty that
8 one would normally impose.

9 5.48:

10 "However in the light of the particular circumstances of this case, the CMA does not
11 propose to apply an uplift at the end of step 3 having regard to ..."

12 Then one sees four bullet points. The first is the refusal to join the cartel and more
13 generally the pro-competitive effect of Balmoral's entry into the market which is bound to
14 have played at least some part in the collapse of the main cartel. I think it was suggested
15 yesterday that Balmoral caused the end of the cartel but the cartel ended with the
16 inspections, but the CMA acknowledges the contribution.

17 The second bullet point:

18 "Balmoral did not instigate the meeting and attended with the intention of making
19 clear that it was not interested in allocating customers or market sharing."

20 Three is the fact that the information exchange infringement was confined to a single
21 meeting. Four is the time and resources incurred by Balmoral in relation to the criminal and
22 civil investigations as well as the fact that Mr. Joyce had been arrested at one point
23 previously.

24 So you can see the logic. It is perhaps best captured in 5.50 where the CMA sets out a
25 number of metrics for looking at the proportionality of the penalty. They are expressed in
26 different ways, but one can see that in terms of turnover it is 0.1% of the turnover in the last
27 financial year, and a slightly higher percentage, but barely higher, over a 3-year period:
28 0.2% of net assets and less than 0.5% of profit after tax for the last financial year which, as
29 we have said, roughly turns out to two days profits at 365 days. So that is really the wood
30 for the trees point.

31 The result is a modest penalty in absolute terms and one which is very modest when seen in
32 the context of Balmoral's business, that is Balmoral the undertaking and not Balmoral
33 Tanks, given that it was an object infringement relating to pricing information.

1 In our submission, unless Balmoral can disturb the reasoning that I have just shown you it
2 has no basis for challenging the level of the penalty and, in our submission, it has not really
3 taken that reasoning on. It has focused on the individual stages. I have already explained
4 why as a matter of law that does not get Balmoral over the line.

5 Nevertheless to deal briefly with the individual steps that Mr. O'Donoghue referred to
6 yesterday. The first was turnover. The purpose of identifying turnover at step 1 is to
7 ascertain the real economic situation of the undertaking when the infringement was
8 committed. That is *Kier*, paragraph 138 at tab 48, and *Eden Brown*, paragraph 44 at tab 45,
9 both as discussed in the defence at 257.

10 Usually the CMA, in accordance with its guidance, uses the previous year's accounts
11 because that is verified material, but the CMA can depart from that approach where there is
12 good reason to do so.

13 Here, using that material, had an obvious deficiency because Balmoral supplied its first tank
14 in February 2012 so its accounts to March 2012 were just two months of activity.

15 By July 2012, which is the date of the meeting, the point of the infringement which is the
16 relevant point really if one is assessing the real economic situation of the undertaking when
17 the infringement is committed, the business had grown very rapidly. Specifically the
18 galvanised steel tank business had grown very rapidly. The Tribunal has already heard all
19 about that.

20 The relevant figures are in paragraph 210 of the defence. Balmoral's turnover to March
21 2012 was just under £20,000, and for the full year to March 2013, which is the year during
22 which the infringement was committed, it was ten times that; it was nearly £2 million.

23 Although the meeting occurred in the second of those years CMA did not use the higher
24 turnover. It created a 12-month period July to July and ending with July 2012 which took
25 account of the period prior to February 2012 during which Balmoral made no sales.

26 Balmoral said yesterday that does not make any sense. But in fact what it is doing is
27 heavily skewing down the turnover value by taking into account seven months of inactivity.
28 So it was a conservative and favourable approach.

29 So the result was a figure of £802,588 rather than the 2 million value for the entire year in
30 which the infringement occurred.

31 As I have said, although that was very favourable to Balmoral it did have the virtue of
32 recognising that Balmoral had been a new entrant in that period. So it did not exaggerate its
33 economic presence either.

1 So the CMA made a principled adjustment to Balmoral's turnover so that it complies with
2 the *Kier* test of real economic situation, but it did so in a way that is favourable to Balmoral.
3 In our submission Balmoral really has no basis for complaint about that.

4 Duration: the CMA used the multiplier of one for a part-year infringement which is the
5 approach it says it will take in its guidance absent exceptional circumstances. The reference
6 for that is defence bundle, tab 14, paragraph 212.

7 The reason for taking that approach is that otherwise penalties may be pro-rated down to
8 nothing for a short infringement and as a result they will not have the necessary deterrent
9 effect. That is dealt with in decision paragraph 5.34.

10 The good sense of that guidance is demonstrated by the facts of this case which, as the
11 Tribunal has seen, the starting point in this case was 130,000. It was a bit more than that at
12 step 2. I beg your pardon, it was a bit more than that before the discounts at step 3. It is
13 144,000, but it was not materially higher.

14 One can see if one started to pro-rate that figure for duration at step 2 it would pro-rate that
15 sum down to a sum which would really be trivial for an undertaking on the scale of
16 Balmoral. It really would not register if one starts discounting down 144,000.

17 So that is the sense in the guidance. The CMA did not make an adjustment. It also took the
18 position fairly that the effect on the market was not necessarily limited to the absolute
19 immediate aftermath of the meeting. So the case that Balmoral puts that the duration of the
20 infringement should be measured in minutes, we do not accept that.

21 Just standing back, Balmoral says this is an exceptionally short infringement. To put it in
22 context, if one takes bid rigging, for example, and that involves a distortion of competition
23 principally for one tender, in duration terms that might be very short. The Tribunal
24 obviously has dealt with many of these cases in construction appeals, but no one suggested
25 that bid rigging was so exceptionally short that the multiplier should be reduced. It was
26 regarded as a serious infringement and the multiplier of one stood.

27 So we say that it is wrong to say that this case is as exceptional as Balmoral says. The
28 Tribunal has experience of dealing with cases where the distortion of competition is
29 concentrated on a particular event. It does not follow from that that one starts to pro-rate
30 the duration down.

31 Apart from that point the duration was taken into account at step 1 in dealing with the
32 seriousness percentage of 18%. It was also, as you have seen, treated as a mitigating
33 consideration at step 4.

1 The CMA was not required to make a reduction at step 2 as well. If it had it would just
2 have left a tiny penalty which then would have had to have been uplifted at a subsequent
3 stage. We say this is not reverse engineering: these are the principles underpinning the
4 statutory framework, but it is also the principles established by the guidance.

5 So that is another point of the same nature, we say, where Balmoral focuses on the logic of
6 a single step but does not look at the position in the round.

7 Finally co-operation. Balmoral was given a 15% discount for co-operation. Its case is that
8 it should be given a leniency level discount of 50% even though it did not apply for
9 leniency and in fact continues to deny the infringement. The CMA does not accept that.

10 Leniency is an important regime which has its own particular benefits and it provides high
11 levels of discount to incentivise the admission of infringement and assistance with
12 investigations. Balmoral did not apply for leniency. It did not meet the conditions for
13 leniency. Significantly it didn't even report the meeting even though its own case is that it
14 was approached to join a cartel at the meeting. Mr Joyce was then arrested and he co-
15 operated thereafter. But if one is seeking to draw analogies with leniency we say that is an
16 important point.

17 So Balmoral is in a different position from a leniency applicant. It did not warrant the
18 higher levels of discount that leniency attracts. To put this in context Franklin Hodge
19 received a 30% discount for leniency for meeting all of the conditions of leniency. That is
20 why we say seen in that light the 15% discount for co-operation is reasonable.

21 Those are my opening submissions, Madam. I have somewhat unhelpfully finished at a
22 quarter to 1.

23 THE CHAIRMAN: You have. The next step is then to call Mr. Joyce.

24 MR WILLIAMS: It did occur to me, as I saw the time, that one approach -- it is very much a
25 matter for the Tribunal -- would be to rise now and come back at a quarter to 2. But again it
26 is very much a matter for you.

27 THE CHAIRMAN: Yes. I think that might be a better idea. So we will come back at quarter to 2
28 then. Thank you.

29 (12.45 pm) (The short adjournment)

30 (1.45 pm)

31 THE CHAIRMAN: Yes.

32 MR. O'DONOGHUE: If it pleases the Tribunal, I will call Mr. Joyce. MR. ALLAN PETER
33 JOYCE (sworn)

34 Examination-in-chief by MR O'DONOGHUE

1 THE CHAIRMAN: Sit down, Mr. Joyce.

2 MR. O'DONOGHUE: There should be available in front of you six separate bundles. If I can ask
3 you to turn up something called the core trial bundle, and to turn to tab 2 of that bundle,
4 please. Can I ask you to turn to the last page of that tab, page 14.

5 A. Okay.

6 Q. Do you have that? Is that your signature at the bottom of the page?

7 A. Yes.

8 Q. Can you confirm the date of the signature, please?

9 A. 20 February 2017.

10 Q. Thank you. Is this your first statement?

11 A. Yes.

12 Q. Are its contents true to the best of your knowledge and belief?

13 A. Yes.

14 Q. Thank you. Can I now ask you to turn to the next tab, tab 3 of the same bundle. Again, can
15 you please turn to the last page of that bundle, which is page 10.

16 A. Okay.

17 Q. Can I ask you to confirm if that is your signature?

18 A. Yes.

19 Q. Is this your second statement?

20 A. Yes.

21 Q. Can you please confirm for the record the date of that statement?

22 A. 25 April 2017.

23 Q. Are the contents of the second statement true to the best of your knowledge and belief?

24 A. Yes.

25 MR. O'DONOGHUE: Thank you. If you wait there, there may be some questions for you.

26 Cross-examination by MR WILLIAMS

27 MR WILLIAMS: I am going to start by asking you a few questions about your entry in the
28 galvanised steel tank market. You were offering quotes from late 2011.

29 A. Yes.

30 Q. As a new entrant, you wanted to gain a share quickly and you were told by the board to do
31 that.

32 A. No, not quickly. Go and develop the product range, yes.

33 THE CHAIRMAN: You need to speak up, Mr. Joyce.

34 A. Okay, I will move that over.

1 THE CHAIRMAN: I am not sure that amplifies, it just records, so you need to keep up your
2 voice, please.

3 MR WILLIAMS: I was just picking up paragraph 13 of your witness statement.

4 A. Okay.

5 Q. Which you might just want to look at.

6 A. Which one?

7 THE CHAIRMAN: Which witness statement?

8 MR WILLIAMS: The first witness statement.

9 A. Okay.

10 Q. It says:

11 "We began quoting in October 2011, with the first tank delivered in February 2012.
12 As a new entrant in the market we were determined to gain market share quickly.
13 Those were the clear instructions of the board."
14 I was just putting that to you.

15 A. Okay, sure.

16 Q. To do that, you competed aggressively on price.

17 A. Well, we compete on many things, not just on price, yes.

18 Q. Again, just turn over the page in that first witness statement. You say at paragraph 17:
19 "Our success was largely down to the Balmoral brand and the pricing strategy pursued
20 by Norman Ross."
21 So you competed aggressively on price, as well as on the basis of your brand.

22 A. Yes, as I say in 14, compete on price, quality and customer service.

23 Q. You were successful, because you did take share away from your competitors, did you not?

24 A. Yes.

25 Q. What you did not know when you entered the market was that you were competing with a
26 cartel.

27 A. No.

28 Q. When you combine that with your aggressive pricing and the fact that their prices were
29 inflated, the result is that in general terms you were the cheapest.

30 A. Well, you get into the market, you compete against what the prices are there, yes. Whatever
31 price is in the market is what you compete against, yes.

32 Q. Yes, but you were pricing aggressively and they were a cartel.

33 A. What does "aggressively" mean? I am not quite sure. You know, I think you compete
34 enough to win the work. That is what you do.

1 Q. Okay. Can I ask you to take out supplemental bundle 2. Tab 19. You will see this is a
2 witness statement from Mr. Milne which he provided in relation to the criminal proceedings
3 which you were involved in some time ago.

4 A. Yes.

5 Q. If you could turn over to paragraph 41 of that.

6 A. Paragraph ...?

7 Q. Paragraph 41.

8 A. Paragraph 41. Yes.

9 Q. What he says is:

10 "It was not our ethos to be the cheapest in the market but to establish ourselves and to
11 take as much as we could of the market, hence the reason for investing so much.
12 However, we were the cheapest and our sales team did negotiate with customers."
13 So do you agree with Mr. Milne?

14 A. Agree what, sorry?

15 Q. Do you agree with Mr. Milne that when you entered the market you were the cheapest?

16 A. Okay.

17 Q. When you did that, the other suppliers reacted. They did not just continue to price in the
18 way that they had for many years.

19 A. No, they were competing.

20 Q. So by the time we get to the meeting in July, that we are going to come on to in a bit, in fact
21 there is more aggressive price competition between you and the other suppliers.

22 A. There is competition in the market, yes.

23 Q. Talking then about specific tanks, for certain applications the tanks came in more or less
24 standard sizes. I am only making this point because we are going to come back to it. For
25 supermarkets it was 135 and for schools it was 27 to 30.

26 A. Yes.

27 Q. Ish.

28 A. Ish.

29 Q. Would you agree that those were some of the most popular sizes of tank?

30 A. Would I agree now or did I agree in July 2012?

31 Q. Would you agree in July 2012?

32 A. It was industry standard. Those tanks were deemed to be popular sizes, but for us at that
33 time we had not sold that many.

34 Q. No. There was a high demand for them.

1 A. No, I had not seen the high demand at that stage yet from Balmoral. We had actually only
2 sold one 135 tank in July 2012.

3 Q. There was a high demand in the market.

4 A. How would I know if I have not seen it?

5 Q. Could you pass Mr. Joyce defence bundle, tab 11.
6 This is a transcript of an interview you gave to the OFT in November 2012. Can you turn to
7 page 52.
8 Can you see the first thing you say there, "From that meeting", can you see that, on page
9 52?

10 A. Page 52. What line is it?

11 Q. At the top it says:
12 "... that was 19 grand for a supermarket tank."

13 A. Yes.

14 Q. A bit further down:
15 "From that meeting I am saying the supermarket tank was about 19,000.
16 "Question: Right. When you say about them discussing the volume tanks, is that the
17 volume as in sales as opposed to volume as in liquid?
18 "Answer: Yes. You get lots of one-offs but the supermarket and the schools are the
19 higher number by demand."
20 That is what you told the OFT at the time.

21 A. Okay, yes.

22 Q. That was in November 2012.

23 A. Yes.

24 Q. Is it fair to say that in November 2012 your view at that time was that that size of tank was
25 the highest in the market?

26 A. I do not know if I can put it that way. Sorry, I cannot get my head round it, because we had
27 not sold that many. All I can say is that there would have been quotations for 135s and
28 school tanks; and 135s was not the only size of supermarket tank we buy.

29 Q. Would you agree they were important products for a business trying to penetrate the sector?

30 A. All the tanks are important products, yes.

31 Q. So most of your immediate business was for FS contractors, fire suppression contractors, is
32 that right?

33 A. Yes, who were our customers prior to Balmoral entering the galvanised sprinkler tank
34 market.

1 Q. The big ones included Tyco and Compco?
2 A. Yes.
3 Q. For those bid contractors, would you agree you were largely competing on price?
4 A. Some. I would not say they were all just on price, no.
5 Q. Could you take out supplemental bundle 1. Let me put it this way, would you agree that for
6 Hall and Kay, Tyco and Compco competition was essentially on price?
7 A. Yes, you could be the cheapest, if you cannot build the tank you will not win the work,
8 yes? So you have to be competitive on price but you need a back up and a service to
9 support the price.
10 Q. Everyone you were competing with could build the tank.
11 A. Everyone we were competing with yes. But there would be a restricted resource in tank
12 installation. You know, it is quite difficult because a lot of this stuff is subcontracted, so
13 everybody would be competing for the same subcontractors. So price was one element of
14 it. You have to be competitive or you are not going to be in the market.
15 Q. Can I ask you to look at supplemental bundle 1, tab 3, please. Can you read paragraph 12,
16 please. (Pause)
17 A. Correct.
18 Q. This is the view of Mr. John Moores from Hall and Kay. I do not know if you know him.
19 A. I do not, no.
20 Q. His view was that the decision who to go with was based solely on price.
21 Could you turn on to tab 5, please. This is a statement from Ian Monks of Tyco. Do you
22 know him?
23 A. I have met Ian before, yes.
24 Q. Could you read paragraph 6, please?
25 A. Okay.
26 Q. There is another similar statement by Mr. Baker of Compco, but I do not want to labour the
27 point. Do you agree that from the perspective of your biggest customers price was the most
28 important factor in deciding who won these bids? Because you could all deliver the
29 product.
30 A. Price was an important factor, yes. But they do mention service again in there, do they not?
31 Q. In your statement you describe how prices are worked out in Balmoral. If I can summarise
32 the position, you have an estimating system which estimates the costs, and then you apply a
33 margin to that.
34 A. That is correct.

1 Q. There was an authorised margin which you say in your statement was 10%.

2 A. For me. I authorise quotes below a 10% margin.

3 Q. Yes, but you also made the decision that 10% was the threshold.

4 A. Of course, yes.

5 Q. In your statement you say that the sales team had an annual target margin for the galvanised

6 tanks as well.

7 A. It is a budget margin, yes.

8 Q. Right, and did you set that?

9 A. Yes, we set the budgets.

10 Q. As managing director, if you wanted to increase the margin on a tank or the target margin,

11 that was your decision, you could instruct that?

12 A. No. Norman Ross was the sales director, who operated with those authority levels. He had

13 a discount authorisation level, the sales manager had a level and the sales co-ordinator

14 would have a level. So there is multiple levels of authorisation on pricing tanks.

15 Q. Did you make the decision as to at what levels the authorisations would be set?

16 A. In conjunction with Norman, yes.

17 Q. Did you also make the decision about what the target margin for the year would be?

18 A. Again in conjunction with the sales team, yes.

19 THE CHAIRMAN: In conjunction with what?

20 A. The sales director.

21 THE CHAIRMAN: Mr. Ross.

22 A. Mr. Ross.

23 MR WILLIAMS: The reporting line was from the sales team to Norman Ross, and Norman Ross

24 to you.

25 A. Yes.

26 Q. So Mr. Ross essentially answered to you.

27 A. Yes.

28 Q. In your statement you explain that pricing individual jobs then was down to the individual --

29 sorry, down to the sales team, managed by Norman Ross.

30 A. Yes.

31 Q. Would you agree that at that time you ran the business, and the sales team were working

32 for you?

1 A. I ran the business. I was the managing director of the business, yes. The sales team did not
2 work for me. Norman Ross reported to me, as did the manufacturing director, as did the
3 design director, as did a number of other people.

4 Q. But they worked for you in the sense they were answerable to you.

5 A. Who, Norman?

6 Q. All of them.

7 A. No, he is a sales director. He does -- he runs his team the way he runs his team. He does
8 his performance appraisals, he does his budgets, he sets individual budgets. He gives me an
9 overall budget, and he then splits that budget between the sales team.

10 Q. Are you saying that Mr. Ross wasn't answerable to you?

11 A. No, I never said that. You said: are the sales team answerable to me? I said they are not.
12 Mr. Ross reports to me, and the sales team reports to him.

13 Q. So the reporting line goes straight through to you.

14 A. Yes.

15 Q. I think you have already said this, but if a particular bid fell outside the authority that you
16 granted, then you had to approve the quote?

17 A. Yes.

18 Q. So you were not involved in pricing every bid, but you set the framework for pricing,
19 including the target margins, and you did have to approve some prices.

20 A. Yes.

21 Q. I think you have said previously that some of your early prices were not very well informed.

22 A. Probably not, yes.

23 Q. So as you moved into 2012 is it fair to say you were still getting a feel for the galvanised
24 steel tank market?

25 A. The beginning of 2012 we had just actually moved factory, yes. We bought a factory in
26 South Wales. I think it is quite important to put this into context. We then relocated our
27 GRP manufacturing facility from Aberdeen to South Wales. We then relocated our hot
28 press steel manufacturing from another facility in South Wales over to the new facility. We
29 then launched the new product with galvanised cylindrical tanks and recruited somewhere
30 in the region of 50 people inside six months. So yes, it was difficult times.

31 Q. Right, but your prices were evolving as you went through 2012?

32 A. Absolutely. Our costs were evolving as well as our prices.

1 Q. When you were getting that feel for the market, I expect you had more internal discussions
2 with Norman Ross about pricing than you would have done in relation to, say, GRP, where
3 you had been in the market for some time?

4 A. It is a new product, yes, there would be some discussions. Yes.

5 Q. Can I ask you to look at supplemental bundle 2, tab 21, please. This is an email exchange
6 which you are not involved in initially but you were copied in later on. Have you seen this
7 for a long time? Obviously it dates back five years.

8 A. Yes, I remember some of it. Yes.

9 Q. Perhaps if we can just talk through it.

10 A. Yes.

11 Q. We can see on the top of page 3 there is an email from Reg Beaumont, who is at Tyco, he
12 was one of your contacts at Tyco.

13 A. Yes.

14 Q. He says:
15 "As you are aware ..."
16 He is the main contractor. You are the subcontractor here, effectively.

17 A. Tyco, correct, yes.

18 Q. He says:
19 "As you are aware, we have been up against it from day one on this project. You have
20 already assisted us and now we have had to amend the order. Please can you
21 consider further assistance and agree a total of ..." 4,700.

22 THE CHAIRMAN: 47,000.

23 MR WILLIAMS: I am so sorry, 47,000.

24 There is then an email from John Slawicz.

25 A. Yes.

26 Q. To Norman Ross. You can read it for yourself, but he says he has amended the order but I
27 think he picks up some sort of discrepancy in the spreadsheet calculation.

28 A. Yes.

29 Q. Is that right?

30 A. Yes.

31 Q. Then above that Norman Ross emails you, and he says:
32 "Allan, stealth beginning to cause me problems."

33 A. Yes.

34 Q. I do not know what that means. Could you explain that?

1 A. Because it was a new product we had -- as part of a cost structure -- I cannot remember the
2 terminology. "Stealth" would be Norman's terminology. I think it was an investment charge
3 which would cover the investment that we had made into the product.

4 Q. Is it an additional margin?

5 A. It was an additional cost, yes. Not an additional margin. We knew from the offset that we
6 were starting a factory from scratch. It would be highly unlikely that we would be getting
7 everything correct from day one, so we had our investment charge in there.

8 Q. Right, so it was almost like a margin for error.

9 A. Yes.

10 Q. If we then go up a bit, you reply and you say:
11 "Norman, perhaps the plan should be to stop the guys looking at costs, albeit not
12 easy."

13 A. Yes.

14 Q. "Looking at your email the other day to Bill regarding costs, it is the same issue."

15 A. Yes.

16 Q. "I think we have to cover the cylindrical stealth as an additional percentage cost,
17 representing the fact that we are starting from scratch with the manufacturing base and
18 essentially building it up."
19 That is your suggestion as to how you build the price up.

20 A. Yes.

21 Q. Norman replies and he says:
22 "In light of the bun fight information I think we should now remove the stealth
23 altogether."
24 He wanted to take out that margin for error.

25 A. Sure.

26 Q. He says:
27 "If we feel we need something, I would add 7% to all sheet prices, which I think will
28 equate to 3% overall."
29 You reply:
30 "Big step at this stage. Suggest this is better discussed when you come up tomorrow."

31 A. Yes.

32 Q. This looks like really quite granular input into the pricing of this bid by you.

33 A. I think it looks like professional management to me. Managing your costs, that is part of the
34 job is to manage the costs.

1 Q. It was not a criticism. I was just saying we had talked a bit about how prices were
2 established within Balmoral. That is an example that the CMA has on its file --

3 A. Yes.

4 Q. -- and one can see you paying quite close attention to the way the price is built up, and when
5 Mr. Ross suggested it was done in a particular way, you said "Let us talk further about this".

6 A. There is two things; there is cost and there is price. I am influencing cost. The market
7 influences the price, yes? Not Balmoral. The customer influences the price. We have to
8 take care of our own costs.

9 THE CHAIRMAN: Can I be clear that I understand what is happening here.
10 Is what is happening that the customer asks you to reduce the price?

11 A. Yes.

12 THE CHAIRMAN: Somebody then goes through the costs stack and says, "We cannot go down
13 to that level because that is at or below our costs", effectively, or "It is below our acceptable
14 margin".

15 A. Yes, below the salesman's authorisation level, so he needs the sales director to approve it.

16 THE CHAIRMAN: Right, and Mr. Ross is saying the reason there is this problem is because of
17 the stealth element in the cost stack.

18 A. Yes.

19 THE CHAIRMAN: That is starting to cause problems --

20 A. Yes.

21 THE CHAIRMAN: -- ie because it is making it look less profitable, so that the salesman has to
22 come back.

23 A. Yes.

24 THE CHAIRMAN: Right. So the debate is, "Well, should we remove that", in which case the
25 costs will appear to be less and then the margin will appear to be bigger, and then you will
26 be able to win the contract at that price, is that what is happening?

27 A. Yes, you would win the contract at a bigger margin than you were, based on that cost
28 structure.

29 THE CHAIRMAN: Yes, because you have taken that stealth element out. Right.

30 MR WILLIAMS: I think you said this is you managing the cost, not the price.

31 A. Yes.

32 Q. I think I am right in saying, am I not, that this conversation is all about how you build up the
33 price, is it not, by adding percentages on to the cost base?

1 A. I think the conversation starts with Mr. Beaumont saying, "Can you give me the tank", or
2 the order, it may be multiple tanks, "for 47,000". The price has already been asked for.
3 What I am saying, in order to meet 47,000, do we understand the costs?

4 Q. But you were involved in the process of making sure that that price was the right price for
5 the business.

6 A. The right margin for the business, the right cost margin, yes.

7 Q. The point I am making is really that this is what you would expect, which is a discussion
8 between a managing director and a sales director about pricing strategy, and the way you
9 build your prices up when you have entered a new sector.

10 A. Pricing strategy? Again, I am not being evasive here, it is broad statement "pricing
11 strategy". When you said a minute ago that the whole market just depends on price, well,
12 so what is the point of having a strategy if it is only price that wins the order?

13 Q. Can you look at paragraph 34 of your first witness statement, please. Do you want to just
14 read that to yourself? (Pause)

15 A. "In arriving at those findings", is that the ...

16 Q. Paragraph 34:
17 "Even if for some bizarre reason ..."
18 Your first witness statement. Have you got the core bundle there?
19 What is the name of the bundle you have got there? If you turn to the front, it will tell you.

20 A. Core trial bundle.

21 Q. Are you at tab 2 of that?

22 A. Sorry, I was at tab 1. Yes.

23 Q. Do you want to read paragraph 34:
24 "Even if for some bizarre reason ..."

25 A. Okay.

26 Q. I think this is suggesting that you could not ask your own sales team for pricing information
27 without arousing suspicion. Is that what you are saying?

28 A. I would not interfere with the pricing, I think that is what I meant to be saying. I did not
29 have day-to-day involvement in the pricing, that was left to Norman.

30 Q. When in the last few lines you say:
31 "They would have questioned why I needed that specific information and I would
32 have had no good answer to give them."
33 You are not saying there that it would be suspicious for you to ask for information about the
34 prices you had been charging?

1 A. No, but I would not be going to instruct them in terms of how to sell tanks and price tanks.
2 Q. But you are the managing director of a business that has recently started supplying this new
3 product. It is natural that you want to stay abreast of pricing.
4 A. We sell tanks every day, yes. We put quotes out every day. We have price authorisation
5 bands for that reason, I do not need to know about it every day.
6 Q. You are saying it is not natural for you to want to stay abreast of pricing?
7 A. Not every day, no.
8 Q. I did not say every day. I said it is natural for you to want to stay abreast of pricing.
9 A. Yes, and I would see that through invoicing, I would see that in monthly management
10 accounts, I would see it in the gross margin of each tank product. I would see it on a regular
11 basis.
12 Q. I want to move on now to a meeting you had with Mr. Dean in January 2012. This is dealt
13 with in your witness statement in the criminal proceedings. I do not know if you can
14 remember that.
15 A. I do remember it. 6 January 2012.
16 Q. Yes. We have got both the note of the meeting and your witness statement where the whole
17 thing is set out. Would it be more useful for you to see the note or the witness statement, do
18 you think?
19 A. It depends what you are going to ask me, I suppose.
20 Q. That is a fair point. Let us start in the note itself then. It is supplemental bundle 2.
21 Tab 34. Do you want to look over it to refresh your memory?
22 A. No, that is okay.
23 Q. You said in your criminal witness statement that at one stage you thought this meeting
24 might be to do with Mr. Dean joining Balmoral.
25 A. Yes.
26 Q. But we can see from the note that that was not discussed.
27 A. No. It was not.
28 Q. What you record is that the big three meet regularly, large accounts, Compco satisfied
29 dealing with Kondea, no charge for reported site visits. Then Mr. Dean gave you indicative
30 prices, and we can see the school tank is at number 1 and the 135 is at item 2.
31 A. Yes.
32 Q. I think you said previously that you passed that information to Mr. Ross.
33 A. I would have mentioned it to him, yes. It would not have been the first time that Mr. Dean
34 had given me some prices as well, yes. He had given me prices before.

1 Q. You passed it to Mr. Ross because it was market intelligence?
2 A. Well, market intelligence, I do not know. It is Mr. Dean telling me what he charges for
3 certain tanks.
4 Q. Did you agree that there was a culture in Balmoral of gathering market intelligence and
5 passing it on?
6 A. Culture? Our job is to understand the markets in what we compete, yes.
7 Q. So if you came into possession of information about the market like this, you would pass it
8 back to Mr. Ross.
9 A. Yes. At that stage, yes. January 2012.
10 Q. Yes. We can see here you had a discussion with Mr. Dean at the meeting, and we can see at
11 point 5 what these prices included; they were inclusive of installation, delivery and a 50-
12 millimetre ball valve.
13 A. Yes.
14 Q. There was a different price for the different size ball valves. That was enough information
15 for you to make sense of that price, for it to be intelligible?
16 A. I just noted what he told me, yes, so ...
17 Q. You had a discussion about this and you established that that is what it covered.
18 A. Yes.
19 Q. As I said, that was enough information for you to understand what he was giving you?
20 A. Okay.
21 Q. We can see actually, just in passing, that the prices in points 1 and 2, they are above the
22 bands that we are going to come and talk about later on.
23 A. Yes.
24 Q. I think Mr. Ross has said that these prices were actually too high to be useful to him at that
25 stage. We can see the 135 in particular is 19,000. Do you agree that sharing this kind of
26 information between competitors can affect their pricing in the market?
27 A. This type of information, yes.
28 Q. Moving on, at page 8 of your first witness statement you talk about your suspicions about
29 the cartel.
30 A. Yes.
31 Q. You went to a meeting on 2 May.
32 A. Yes.

1 Q. You say that the other suppliers were complaining about your prices at this meeting, but I
2 think you say later on that you did not actually learn about the cartel until the next meeting
3 in July.

4 A. Yes.

5 Q. That brings to us the meeting in July. You now know that the meeting was recorded, but
6 obviously you did not know that at the time.

7 A. Now I do.

8 Q. You did not?

9 A. No, I did not. I do now.

10 Q. As you know, we have a transcript of that meeting.

11 A. Yes.

12 Q. Can I ask you when you last read that transcript?

13 A. I looked at it over the last few days.

14 Q. Have you watched the recording recently?

15 A. No.

16 Q. Can you remember when the last time you watched the recording was?

17 A. I have not watched it.

18 Q. Never watched it?

19 A. No.

20 Q. Just to begin at the beginning, there were three of you present, you, Mr. Snee and Mr. Dean.

21 A. Yes.

22 Q. Mr. Stringer of Galglass was going to be there, but in the end he was not.
23 At your witness statement paragraph 41 you say -- perhaps you want to look at it -- that you
24 wanted to put an end to the contact from your competitors and "make it clear once and for
25 all to our competitors that Balmoral would continue to compete aggressively".

26 A. Yes.

27 Q. As you know, the CMA says that that was not the only message that you put across at the
28 meeting, and the CMA says that you did want to continue to compete, but that you also put
29 across the message that you wanted to stabilise prices; in other words, avoid a price war.
30 Do you agree that at the meeting you made that clear to your competitors?

31 A. I made lots of comments in that meeting, general comments. I did not go in there with any
32 preconceived thoughts about stabilisation or anything like that.

- 1 Q. I was not specifically asking you about your preconceived thoughts. I was asking you
2 whether you agree that at the meeting you made it clear to your competitors that you did not
3 want a price war.
- 4 A. I think fundamentally a price war -- I did mention "price war" a few times, but I have said
5 that in a number of meetings with these guys. It is not our intention to come in and start a
6 price war in the market. But that is going back to day one, not just the July meeting. So it
7 is not a new message.
- 8 Q. But you accept that you did put across the message that you did not want a price war, at that
9 meeting, as well as possibly at other meetings?
- 10 A. As I said, our strategy is not to go in there and cause a price war.
- 11 Q. And you told them that.
- 12 A. Yes, I mentioned it. It is in the transcript, is it not?
- 13 Q. Do you agree that a price war is really just price competition driving prices low?
- 14 A. I have never been involved in a price war before, so I cannot imagine a price war is healthy
15 for anybody, including customers.
- 16 Q. Do you agree that when you say you do not want a price war, what you are saying is that
17 you do not want price competition to drive prices too low?
- 18 A. No, I am not saying that. I am saying I do not want a price war, but if that is where we end
19 up, that is where we end up. That is what I am saying.
- 20 Q. Yes, but ... what you were telling your competitors was that you were happy to compete, but
21 you did not want competition to take place at prices that were too low.
- 22 A. No. I said really, again, there is -- you are coming into this meeting and you are talking as
23 if this meeting what was a one-off, yes? I had eight months, eight months of harassment
24 from these guys, yes? It was like being tracked with a tracker, yes? Everybody knew
25 exactly what was going on in this market. I just found it incredible.
- 26 So when I get to the July 11 meeting, when you say about a price war, as I said before, I did
27 not mention it in any other -- I had mentioned it so much times to them, that is how we
28 compete, we go out there and we compete aggressively and we win market share. If we end
29 up in a price war it is not really Balmoral's decision, you know. That is how companies
30 compete. Either you want to compete at a certain price or you walk away. That is your call.
31 I am not telling these guys -- I have enough trouble trying to run Balmoral Tanks. I am not
32 telling these guys how to run their business.
- 33 Q. No, you were telling them about how you wanted to run your business.

1 A. No, I was not. I just told them I do not want to have a price war. I am trying to fend them
2 off. Meanwhile, every single day Norman Ross is selling tanks. These are quotes out every
3 day. The price was dynamic. This is a snapshot in time, yes? There is no -- despite how
4 you read it word for word, there is no grand information here that people were not aware of
5 or had not been mentioned before, in their pursuit of Balmoral since day one.

6 Q. I am going to ask you to look at the transcript now, and we are going to go through it in a
7 bit of detail in places, so if you do not know what I am referring to at any point, then please
8 stop so we can be clear.

9 It is tab 10 of the core bundle. It is probably sensible for you to have tab 10 of the core
10 bundle open now.

11 Mr. Snee and Mr. Dean were there before you. You arrive at around page 5, I think. I was
12 just going to -- there is then some small talk about sport and the weather and things. I was
13 going to skip over that.

14 You start to talk about the market at page 12. That starts with volume, about halfway down
15 page 12. Again, I was not going to ask you any questions about that, but I am just trying to
16 jog your memory about how it went.

17 I was going to pick it up on page 14. About halfway down Mr. Dean says:
18 "How are things with your prices? How is your revision 7?"

19 Revision 7 was your pricing software, is that the right way to describe it?

20 A. It is our cost estimating system, yes.

21 Q. Revision 7 was your most up-to-date revision?

22 A. It would have been -- again, I had told him in probably May, I think, they were looking at
23 rev 7 as an upgrade. Part of my excuse for --

24 THE CHAIRMAN: Sorry, I did not catch that. You told them in May ...

25 A. There was a meeting on 2 May and they were having a go again about where Balmoral's
26 prices were. Where our prices were below. I said then, at that time, that we were working
27 on a new revision to our estimating system, to push back a bit.

28 MR WILLIAMS: It is effectively your most up-to-date revision, your most up-to-date prices.

29 A. It would have been, but it was still rev 6 at this point. Rev 7 had not been implemented.

30 Q. I see. You reply and say:
31 "... it's been a bit of a battle really, it's a pity Nick's not here with Tyco."
32 That is Nick Stringer from Galglass?

33 A. Yes.

1 Q. You are talking about some bids to Tyco, which we saw earlier was one of the FS
2 contractors.

3 A. Yes.

4 Q. So when you were asked about pricing, you go straight into this topic. Is it fair to say this
5 was on your mind going into the meeting?

6 A. The issue with Tyco was fairly topical, yes.

7 Q. You said "It's a pity Nick's not here", so you wanted to speak to Nick Stringer about this.

8 A. I said that. Whether I would have spoke to him, I am not sure, but that is what I said.

9 Q. Do you agree you wanted to speak to Nick Springer about this?

10 A. No, I said that at that meeting. I am not convinced I would have spoke to Nick Stringer.
11 My tactic 100% was blame the guy who is not sitting around the table. I am using Nick
12 Stringer as a way of deflecting any criticism that Balmoral is continually putting prices out
13 in the market that are really cheap.

14 Q. I think you tried to cancel the meeting beforehand.

15 A. I did.

16 Q. Was that the day before?

17 A. I think so. I cannot generally remember that far back but I think I did.

18 Q. Do you remember being told the day before that Nick Stringer would not be there?

19 A. Yes, I think he sent me a text.

20 Q. Did you want to cancel the meeting because you wanted to talk to Nick Stringer and he was
21 not going to be there?

22 A. Probably not. I cannot remember why I wanted to cancel. I probably did not even want to
23 go to the meeting.

24 Q. Just looking at the text, you say:
25 "You know, there was two big jobs we lost some five tanks. Started at 110 grand and
26 went to 103 to the boys and now I'm sure you'll say we started it ..."
27 That is driving the price down, is that right?

28 A. That was a bid that had been started at 110,000 and went down to 103.

29 Q. Yes, so it is one of the two Tyco jobs you had lost not long before this meeting.

30 A. Yes.

31 Q. You say, do you see:
32 "I guess you just can't win them all ..."
33 About six or seven lines down, six lines down:

1 "I guess you just can't win them all and I was thinking, that's exactly it. You know
2 you won't win them all back no matter how competitive you are, it won't make any
3 difference ..."

4 This is saying you can keep reducing your prices to win work but you still will not win them
5 all.

6 A. It is common sense, I would have thought, yes.

7 Q. The point you are making is that it is not worth keeping reducing your prices, because you
8 still will not win them all.

9 A. No, the point I am making is the point I actually make. We do not have all the market, yes?
10 If you have 30% market share, that means that you lose seven orders out of ten. I do not
11 get upset by losing work, as long as we are out there winning what we project in our budget
12 and we are doing what we have to do as Balmoral. We cannot win them all. It is
13 impossible.

14 Q. You were upset to have lost this bid.

15 A. No, I used Norman's feedback on Tyco as a way of pushing back these guys to say "It is you
16 guys". Everybody is out there competing now. I am re-emphasising the point it is not just
17 Balmoral that, brackets, are supposedly charging low prices.

18 Q. If we just move a bit further down, you say:
19 "... so anyway there's another three Morrisons stores come out there, which as I say
20 we deal with GRP ..."

21 So you sell GRP to Morrisons, is that right?

22 A. We do not sell anything to Morrisons. Morrisons would be the end-user. It would be to
23 Tyco.

24 Q. I understand. You say:
25 "... and the price went 14650 and we lost it, again. I was kind of hoping Nick might be
26 here, you know."

27 So it does look as though you want to talk to Nick about the 14650.

28 A. Yes, but in my understanding of that comment was to push back.

29 Q. Then you say:
30 "If you're taking 103 grand, then we're going to go back and win the next one, that's
31 what we do, there's a double blow there."

32 So you lost the first bid, you bid hard to win the second bid but you did not win that either.
33 I think that is what you are saying.

34 A. We did not, no.

1 Q. But that is what you are getting at here. When you talk about a double blow, you lost the
2 first one --

3 A. Yes, we lost two jobs to Tyco, yes.

4 Q. And because you had lost the first one, you tried hard to win the second one but you still did
5 not win it.

6 A. Not any harder. We tried hard on the first one as well as the second one.

7 Q. On the next line, after "inaudible" it says:
8 "I trust you guys ..."
9 Sorry. If we go back:
10 "I think it's quite good that we can meet and have a chat but the cards are on the table
11 ... I trust you guys because we can be frank with each other."
12 So you are creating a positive atmosphere for the discussion.

13 A. I will go back a stage again. I tried to employ Clive Dean, yes, October 2011, November.
14 We looked at his contract that he had from CTS. I even knew what Clive was paying
15 himself and his son in salary, so we had got into quite a bit of detail with Clive. So if I say I
16 can trust them, I am probably referring to the fact I have had discussions about buying his
17 company as well.

18 Q. It looks like you are saying it is good to meet so you can have a chat. It looks like you are
19 trying to encourage a positive atmosphere in the discussion.

20 A. There would be legitimate reasons for talking to competitors, yes.

21 Q. And you did generally have a good relationship with Mr. Snee and Mr. Dean?

22 A. I had not known Clive Dean that long. I only met Clive Dean in May 2011. I would not
23 call that a good relationship. It is a short period of time, eight months.

24 Q. What you previously told the OFT -- we can look at it if you need to, but you told them that
25 Nigel Snee was a professional guy, you were comfortable in his company. Clive Dean, on
26 the times you had met him, was a very professional guy, no problem. Is that a fair
27 summary?

28 A. I tried to buy his business. That is how professional he was.

29 Q. If we just move on a bit further, you say:
30 "When you were telling me yourselves about the size of this market last meeting, I
31 was kind of a bit driving down the road why are we even having this meeting, if it's
32 that small, and I know what you're saying about the prices, just talking generally 10
33 million is not that big."
34 So you are saying if the market was 10 million it would not be that big.

1 A. Their understanding of the market was 10 million, and I am saying that 10 million is not
2 that big a market, yes.

3 Q. Carry on:
4 "It's kind of I wasn't sure of the benefit of having a chat, I don't mind sort of a meeting
5 but I was thinking, we're never going to sort this out, because the market for me was
6 nae big enough, I always thought from Mr. MacLaren it was a bit bigger."
7 You have entered the market recently but it is not is a big as you thought it was, you are not
8 making as much money as you thought you would.

9 A. Not the sprinkler market, yes. The galvanised tanks can be used in other applications. So
10 the sprinkler type market, that sector would not be that big. 10 million, give or take.

11 Q. We are talking about galvanised tanks.

12 A. Yes, I know, but we did not set up the factory just to sell galvanised tanks to sprinkler
13 tanks. Yes?

14 Q. No, you are quite right. I meant the galvanised steel tank market. Quite right.

15 A. Right.

16 Q. Then you say:
17 "... I'm thinking well if Nick was here I'd say, we have made a lot of investment, it's
18 not going to be cheap ..."
19 I think you have already talked about this bit. You have recently come into the sector, you
20 bought a new plant which you use for your previous business and for your new business,
21 that is a big expense. You have bought new equipment, is that right?

22 A. Yes.

23 Q. Is that the steel punching machines?

24 A. Yes.

25 Q. That is a big outlay.

26 A. Yes.

27 Q. You have got to invest in compliance with new standards.

28 A. Yes.

29 Q. And you have taken on new personnel, at least Mr. MacLaren, although I do not think he
30 was still on the scene.

31 A. No, he had gone by then.

32 Q. The point you are making here is that you made all of those investments, it is not going to
33 be cheap, you have got to recover those investments.

34 A. It is never our style, as I said before, to be the cheapest in the market.

1 Q. Moving to the next paragraph, you say:
2 "We're going to be seen as what we are in GRP part of the landscape, that if you want
3 something that we can do them competitive."
4 So you want your customers to perceive you as competitive, pricing at the same sorts of
5 levels as your rivals.
6 A. The customers did perceive us to be competitive, yes.
7 Q. After that, you come back to the idea of not being the cheapest, you say:
8 "So it was never the plan, and it won't be the plan going forward, to be the cheapest.
9 I'm trying to think to myself with the size of market ..."
10 Let us pause there. This is looking forward rather than back.
11 A. What is, sorry?
12 Q. You are telling them that going forward you do not want to be the cheapest.
13 A. I have told them that since the first contact when I met Clive Dean in May 2011. I
14 explained to him how Balmoral do business.
15 Q. But at about this time you were the cheapest. We have seen that.
16 A. But we were not winning every order, so we could not have been the cheapest, could we?
17 You know.
18 Q. You had been winning a lot of market share by outbidding your competitors?
19 A. We were competing. There is a difference here, yes? We did not win every order, so in
20 some orders we were not the cheapest or we would have won it, according to your logic.
21 Q. All I am saying is that you have done very well winning market share by driving price low
22 and outbidding the others.
23 A. Who knows what the market share is at this point? Our benchmark is the budget we set for
24 the business. Yes? That is what we do. If we are on budget, we are doing very well. Do I
25 sit there thinking: I have got 10%, 15%, 20% every month? How would you measure the
26 market?
27 Q. The story up to this point is that you have entered the market and you have started
28 outbidding Mr. Snee, Mr. Dean and Mr. Stringer, and they would be forgiven for thinking
29 that it was your strategy to be the cheapest, because you had been outbidding them.
30 A. No. We were competing.
31 Q. This is telling them something about your market position which they would not have
32 known if you had not told them.
33 A. I had told them it before. We are not in the market to be the cheapest player. We build our
34 business around quality, service and price. And I will tell you what, service is an expensive

1 thing. It is not easy to copy service. Price is very easy to copy, you just cut your price.
2 Service is not easy to copy, because it takes investment in people and in processes.

3 Q. If you just move down in that paragraph, it says:
4 "At the end of the day ..."
5 It is about two-thirds of the way down.

6 A. Yes.

7 Q. You say:
8 "At the end of the day, it'll maybe fall a bit, find a level and settle down again and I
9 think what you've got is more ripples and Balmoral pushing in and everyone pushing
10 back."
11 What you are saying, I think, is that there has been aggressive competition, prices are going
12 to come down a bit, but then you think they are going to find a level and settle down.

13 A. I think in all markets prices will find a level, yes.

14 Q. Yes. You are telling them that you think the fierce competition is going to ease off.

15 A. I am not saying that at all.

16 Q. Is that not how price is going to settle down?

17 A. Yes. Settle down at what level? Today's level? 5% below today's level? Who knows. I
18 am not dictating what Franklin Hodge, Galglass or CST sell their tanks at. That is not my
19 business.

20 Q. I am not suggesting that you are --

21 A. You are. You are suggesting that I am telling them that my price is going to stabilise and --
22 what is the word you use -- settle down.

23 Q. I do not want to have an argument with you about it. What you are telling them here is that
24 you think prices are going to settle down, and I am saying that the way in which prices will
25 settle down will be if the competition eases off.

26 A. Prices will settle down at the level where people decide they do not want to compete at, yes.

27 Q. Yes, so competition is not going to keep driving prices lower.

28 A. It might do, and then somebody might go out of business.

29 Q. What you are telling them is that you are not going to be the cheapest and you are not going
30 to keep driving prices down.

31 A. I do not think I say I am not driving the prices down. I think I say, and I have said before,
32 that we are not going to be the cheapest because it is not our strategy to be the cheapest.

33 Q. Can we look at the bottom of page 15. You say:
34 "... we're all in the game long enough the buyer is enjoying this."

1 A. Yes.

2 Q. Over the page, Mr. Snee says:

3 "... they're throwing all this rubbish at you ..."

4 The next paragraph you say:

5 "It's like the conversation we were having about seven years ago, when the buyer had

6 the upper hand then and we were all slashing each other's throats."

7 Mr. Snee says:

8 "It's in their interests to pit us all against each other."

9 This is all quite dramatic language, but what you are really talking about here is competition

10 on price, is that right?

11 A. If you just stop there a wee minute. What happened -- I mean, you are describing exactly

12 how these guys decided to work together, yes, seven years ago?

13 Q. No. What I am saying is Mr. Snee and Mr. Dean are complaining about what happens when

14 customers use price competition to drive the price down.

15 A. Yes, so what is your reaction to that as a manufacturer, what should you do?

16 Q. Sorry, do you agree that what they are telling you is what they are talking about is: what

17 happens when customers use price competition to drive the price down?

18 A. Do you not think I would be aware of that, no?

19 THE CHAIRMAN: Your job is to answer the questions, Mr. Joyce. Just answer the question.

20 A. Okay, I do not understand the question.

21 THE CHAIRMAN: I think what Mr. Williams is putting to you is that Mr. Snee and Mr. Dean

22 were trying to compare what might happen now with what had happened seven years ago,

23 which had prompted the start of the cartel, when there was fierce price competition, which

24 the customers used to play the different manufacturers off against each other; and what they

25 are saying is that they have a concern that they are going to go back to that situation.

26 A. Okay.

27 THE CHAIRMAN: Is that what you understood them to be saying?

28 A. Yes, okay. Yes.

29 MR WILLIAMS: Because I just wanted to be clear what they are saying, because you then say:

30 "With me, if you know the people who you're dealing with, in my view the other

31 competitors, you can say no, it's just not my style ... we've all got parent companies

32 apart from [Mr. Dean] ... Everybody's got to make some money."

33 So here again I think you are telling them that you are happy to have frank exchanges with

34 them if you know the other competitors.

1 A. I do not think that is what I am saying.

2 Q. When you say "it's not my style", what you are saying is it is not your style, and it is good to
3 be able to make clear to Mr. Dean and Mr. Snee that it is not your style to start slashing
4 each other's throats on price.

5 A. As I said, it is not our style to be the cheapest. Yes? I think one of the things in running a
6 company is you have to understand the strengths and weaknesses of your competition.

7 Q. Yes, I was really focusing on the words "If you know the people you're dealing with, in my
8 view the other competitors, you can say no".

9 A. That is what I mean about the strengths and weaknesses of the other people and their
10 business, yes.

11 Q. If you know your other competitors, you can say "It is not my style, we have all got to make
12 some money"?

13 A. Yes. It is true, is it not?

14 Q. Then the next thing you say is:
15 "I think what you might find, seriously, that you will see your prices creeping up ..."
16 It is right, is it not, that their prices can only creep up if yours do? Otherwise they are going
17 to have to stay low to compete with you.

18 A. Yes, and our prices would only creep up if our costs are wrong.

19 Q. You are saying you think their prices are going to creep up.

20 A. Yes.

21 Q. I am saying their prices can only creep up if yours creep up.

22 A. Absolutely, and I am saying the driver for that is our costs.

23 Q. So you are signalling to them that your price is going to go up.

24 A. You "might" find, I am saying.

25 Q. Do you agree you are signalling to them --

26 A. No, I am not saying that. I do not agree.

27 Q. The next thing you say is:
28 "... I don't talk to the sales guys either ..."
29 It is probably easier if you read all of that, to the end of the paragraph, and then I will ask
30 you some questions about it. If you read to the end of the paragraph. (Pause)

31 A. Yes.

32 Q. The first thing you are saying is that your sales guys are going to continue to compete, they
33 are going to push on.

34 A. Okay.

1 Q. You say there is a lot of pressure internally now from Balmoral and it consists of what is
2 going on at Tyco now. Have I understood this right, that people are feeling the pressure at
3 Balmoral because Tyco -- the prices are being driven right down for Tyco?

4 A. I cannot remember the context, but go on. I am not disputing, I am just trying to get my
5 head round exactly what I meant by that, yes.

6 Q. That is fine. A bit after that you say:
7 "You know they're already, you're saying the 135 to Tyco is heading for 14 grand."
8 Is this saying that is the view in your sales team?

9 A. No. Again, I think I probably just mentioned that as a number, for no specific reason, just
10 saying if that is where we are heading, that is where we are heading, is 14 grand.

11 Q. When you say:
12 "You know they're already, you're saying ... "
13 Is that your sales team saying that? Is that the word in the sales team.

14 A. Possibly, yes.

15 Q. It does look as though you were in touch with that price and finding out what the sales team
16 thought about that price.

17 A. I would have been in touch with Norman Ross, as I said to you before, on certain prices and
18 certain customers.

19 Q. So this is a situation where price competition at Tyco is driving the price down, it is already
20 at 14650 and it is heading down to 14 grand.

21 A. Yes.

22 Q. Mr. Dean then says:
23 "... I know about that, cos I spoke to Nick ... it's traditional that we do."
24 Then Nigel says:
25 "You've always done that."
26 I do not know whether that is a reference to customers Mr. Dean would usually serve.

27 A. I do not know. I honestly cannot remember.

28 Q. Then in the next paragraph, we do not need to go through it, Mr. Dean explains that he
29 thinks that 14650 or the price for that tank was a mistake because Galglass has applied a
30 discount to that price when really it should not have applied a discount. Actually, you can
31 see about four lines up on the right-hand side it says:
32 "But the thing that he's forgot ..."
33 Do you see that?
34 Start at the bottom and four lines up on the right-hand side.

1 A. Yes.

2 Q. "But the thing that he's forgot is that the 135 tank and the school tank is the tank we've
3 always found difficult to move the price on so if you like it's artificially low ..."
4 Mr. Dean is saying that they have not been able to keep that price as high as they want.

5 A. Yes. He is obviously talking about him and Mr. Stringer.

6 Q. Yes, and you have also been expressing concern about the 14650, you think that price is too
7 low as well.

8 A. Yes. Again, to put that into context, as I said at the beginning of the discussion, Norman
9 had phoned me about the 14650 the day before the meeting, on 11 July. As I said before, I
10 used that as a push back, as far as I am concerned, in terms of, you know, you are phoning
11 me every time we win work at a certain price, when it is pretty clear now that everybody is
12 out there competing.

13 Q. I am just going to ask you that question again.
14 Do you agree that you thought that 14650 was too low for that tank?

15 A. For us I would have thought it was too low, yes.

16 Q. What has become clear at this stage is that you shared the same concern, you shared the
17 concern that 14650 is too low.

18 A. No. Again, let me clarify. Based on our knowledge, as I say, we had sold one 135 tank at
19 this stage. When we came into the market I think some of the prices were something like
20 £19,000 to £20,000, so from my limited knowledge I would have thought below 15,000
21 seems a low price.

22 Q. Can we just now move on to page 17. You say:
23 "No, what I am trying to say is he's not here, he's not here [this is Nick Stringer I
24 presume], I'm not trying to get him, I'm just saying it's, we have a chat, from Balmoral
25 looking out, what's going on? Jim is saying 'Here, I thought you were having chats'.
26 This is Jim Milne, is that right?

27 A. Yes.

28 Q. So Jim Milne, who is the chairman, is saying, "Well, what is going on with these low
29 prices? I thought we knew what the price was, because I thought you had been having chats
30 with the other suppliers".

31 A. Again, I am not -- I feel as if I am not answering your question, but the situation here, as I
32 said before, there was various meetings. Yes? Various meetings where I go to a meeting
33 and be told, numerous times, we are too cheap.

1 The only reason, primarily, up to 2 May I went to any meeting was because we bought a
2 specific product, a vortex inhibitor from Vulcan. So we had a number of conversations with
3 competitors, and the reason I went because, as I said before, we buy the vortex inhibitor
4 from Vulcan tanks. The interesting thing there is the Vulcan inhibitor was also used in our
5 GRP tanks. So I am primarily protecting Balmoral's interests on the supply of the vortex
6 inhibitor, and that is the reason I was at meetings.

7 They know I was at meetings, because they went there; and Jim knew I was at meetings.

8 The point here is that it is a roll over of four or five different discussions over a period since
9 October 2011.

10 Q. I am going to come back to the question I asked you a minute ago, but in relation to what
11 you just said, you mentioned there the vortex inhibitor.

12 A. Yes.

13 Q. That was not in issue by the time of this meeting.

14 A. No, we had got the last delivery from Vulcan in June 2012, and we had approved our own
15 vortex by that time.

16 Q. That is an old issue by this stage.

17 A. No, it is not. The only reason I was speaking to them was a vortex inhibitor.

18 Q. Not at this meeting.

19 A. Okay, I will go with the flow. I have to extract myself from these guys at this point, yes?

20 Q. When you say:

21 "Jim is saying 'Here, I thought you were having chats'."

22 Yes, what is going on here, I thought you were having chats. This is suggesting that what
23 Jim Milne has said to you is "What is going on with these prices? I thought you were
24 talking to Mr. Snee and Mr. Dean and Mr. Stringer."

25 A. Unless Mr Milne knows that Mr. Dean and Mr. Snee and Mr. Stringer are phoning me on a
26 regular basis. Again, I am pushing back here and I am trying to be vague as much as I can,
27 without saying very much.

28 Q. This is giving the impression that Mr Milne was interested in the information that you were
29 feeding back from these meetings.

30 A. It may be giving the impression but that is not the outcome.

31 Q. Then you say:

32 "... what I'm working to get is saying ..."

33 Sorry, I should go back a bit:

1 "I'm saying 'Jim, the level of detail is more ... what we're doing, it's a general chat', I
2 said, but what I'm working to get is saying, 'You're going in there and taken the
3 client. We've gone in aggressive and you've gone in more aggressive. You had last
4 shout. We didn't close it out. Fine you got the client. When the next 3 come up and
5 we're going in aggressive, why are you going in even more?'"

6 Just to unpack that a bit. When you talk about the next three, this is going back to the three
7 tanks for Tyco?

8 A. I think so, yes.

9 Q. So this is the situation where you had bid against Galglass for the first job, you did not get
10 it, gone in for the second job and you did not get it, they outbid you, and you say "When I
11 go in aggressive, why are you going in even more?" The answer to that is to outbid you on
12 price.

13 A. Sure.

14 Q. But what you are saying is, "Why would you do that? You are not going to win them all,
15 you are just driving the price down".

16 A. Yes. As I said before, I am pushing back. Yes.

17 Q. Well, you say you are pushing back. What you are saying is "Why would we compete in a
18 way which just drives the price down for us?"

19 A. No, we are already competing in a way that drives the price down.

20 Q. In the next section you say:

21 "What I'm trying to say is, the way Balmoral works is different from how you guys
22 have worked. You got a smaller business, but we start saying we won't build the
23 business, generally I have been there nearly 18 years, we won't build a business just
24 being the cheapest."

25 What you are saying is you are different from the others, you are saying you are different
26 because your strategy is not to be the cheapest.

27 A. Absolutely.

28 Q. Then you talk about GRP. I was going to skip over that, because if you look at the end of
29 the paragraph you can see that you talk about Decas, that is a GRP supplier, is that right?

30 A. It is one of our competitors, yes.

31 Q. Four lines up you say:

32 "... so the idea for us is to say get the thing stabilised ..."

33 Now we are back on to GSTs, is that right?

34 A. Yes.

1 Q. "... get the things stabilised, the boys think they're in a battle, i.e. particularly with
2 [somebody, maybe that is Tyco, I am not sure] the thing for me is to get it stabilised
3 because if we keep going even lower from my point of view as well, we are hitting rock
4 bottom rather quickly ..."

5 So you are saying that we are in a battle on price, we are in a price war, and I want to stop
6 that and get prices stabilised.

7 A. No. I am not saying that. I am saying -- first of all, I would come back and say I would not
8 know what rock bottom is, after eight months of being in the market. Rock bottom to me
9 may be different to rock bottom for somebody who has been in the market for ten years.
10 Yes? So what I am saying, as I said before about stabilising, at some point the markets all
11 stabilise. I do not know when that will be, but it is a word that I use quite a lot.

12 Q. The context here is that you are talking to your competitors about it.

13 A. Yes, in the fact that there has been harassment for eight months on prices, yes. There was
14 only one company really competing against three, all the way up to July, yes? After July,
15 there was still only one company competing against three. So stabilising comes as a natural
16 -- under a normal competitive situation, and that was not a normal competitive situation.
17 That was, in my words, a nightmare.

18 Q. But it is not a normal competitive situation to meet with your competitors and to say, "I do
19 not want a battle, I want to get prices stabilised".

20 A. Sure.

21 Q. That is not a normal competitive situation either.

22 A. Sure. But it has been, on the basis I have said before, that I was in dialogue with them for
23 many months over the supply of a specific part. Yes? All the way through that eight
24 months we were competing, and continued to compete. That is what I am saying.
25 Stabilising the market will come in due course. I do not know how long that will be, but it
26 is a phrase that I used.

27 MR WILLIAMS: Madam, I see the time. I do not know whether the shorthand writer could --

28 THE CHAIRMAN: Yes, I think so.

29 I am not quite sure what your plan is, Mr. Williams, but this is a long transcript and we are
30 so far spending about 10 or 15 minutes on each page. I would like you to think ahead as to
31 what time tomorrow morning you are going to be completing your cross-examination and
32 let me know that when we come back after the break. I do not ask you to say anything in
33 particular about that now.

34 MR WILLIAMS: No. Thank you very much.

1 THE CHAIRMAN: Mr. Joyce, you are in the middle of giving your evidence now, and that
2 means that during this break you must not have any discussions with anybody on your team
3 or anybody else about the case, so that we know that when we come back we know that
4 your evidence will not be affected by anything anybody has said to you over the break.

5 MR WILLIAMS: What time, Madam?

6 THE CHAIRMAN: Five minutes.
7 (3.00 pm) (A short break)
8 (3.10 pm)

9 MR WILLIAMS: We were not sure if you wanted to talk about timetabling now or later on,
10 Madam.

11 THE CHAIRMAN: Later on, I think.

12 MR WILLIAMS: Just to summarise where we got to before the break, Mr. Joyce, you say in your
13 statement that you went to the meeting to kill the contact from your competitors, but do you
14 agree that in fact you started a conversation about how you do not want prices to hit rock
15 bottom?

16 A. Well, yes, I do mention that. I thought I had put that into my context just before the break.

17 Q. We are on the bottom of page 17 now. You say:
18 "What I'm trying to get to is if it looks like ... Nick's saying well Tyco's my customer,
19 well that's not what I would be saying ... I don't see Compco as your customer."
20 You are saying you are not going to say you won't compete for a certain customer, you want
21 the customers to think you are competitive.

22 A. I want the customers to think I am competitive?

23 Q. You say the customers are expecting Balmoral to be competitive.

24 A. Yes. What I am saying, nobody owns the customer.

25 Q. You say over the page:
26 "... it's important to me that Tyco don't think Balmoral can't compete."
27 A. Yes.

28 Q. A bit further down on page 18, you see where the first "AJ" is, it says:
29 "We've got six guys, they need to be paid for ..."
30 Are you with me?

31 A. Yes.

32 Q. "... if they was going to be the cheapest ... salesforce, three people in terms of sales [the
33 transcript is not brilliant here], six salesmen who can go to site and technically assess it and
34 sell you a product, it's an expense needs to be covered. And there's no cover at 1 ... "

1 That might be a specific price at 14.

2 What you are saying is these low prices for the 135s, prices starting with a 14, that is too

3 low for you to cover the cost you have invested in the business.

4 A. I would not be as specific as that. I think again what I am saying as I tried to -- as I tried to

5 go through this whole transcript on the basis of saying -- I accept some of the stuff I say

6 looks a bit strange, but from my perspective, as I said to you before, it was all about almost

7 trying to meander my way through a difficult meeting. And I do not think I am making any

8 -- other than a general comment there. I mean it is just a level of detail I just would not

9 have in a meeting like that, that £14,000 would not cover my sales team. Never mind this is

10 a brand new product for us, it is not the only product that we sell. The sales team sell all

11 three products.

12 Q. It is what you say, you say there is no cover at 14.

13 A. Yes, it is what I say, and again I come back to the context. I am in a difficult meeting here,

14 in a difficult position, so I am trying to meander my way through a very difficult scenario,

15 which I do not think you appreciate.

16 Q. Would you accept you did not need to tell them, to get through the meeting, that you did not

17 have any cover for your expenses at 14 something?

18 A. Hindsight is a wonderful thing. I am not sure what I did say and what I should not have

19 said. It is pretty difficult five years later. Would I wish I had not gone to the meeting?

20 Absolutely. Do I wish I had not said some stuff? Absolutely.

21 Q. Moving on, you say:

22 "... the argument being we're in a battle already, and I said 'well I don't know why the

23 price has got to that level' ..."

24 Do you think this is talking about a conversation between you and the sales team about how

25 the prices got to that level?

26 A. I do not know.

27 Q. Then you say:

28 "... which is what I was saying to Nick last night."

29 I think that is Nick Stringer. That seems to be a reference to a conversation with Nick

30 Stringer, though no one can confirm whether that conversation happened or not, is that

31 right? You do not remember that conversation.

32 A. I do not, actually.

33 Q. You say:

34 "I thought let's see if you guys still want to have a chat."

1 So the impression you are giving is this is a conversation that you want to have with them,
2 is that right?

3 A. Yes, if you read it in the context of that, yes.

4 Q. Then you say:
5 "It's not about going out there to be the cheapest, honestly, and it's not in any shape or
6 form arrogance to think we'll come in and you guys will roll over, it's not about that
7 but we need to find a level ..."

8 This is you trying to stop the price war and find a sensible price level.

9 A. No, I think it is me again making generic comments about how markets should normally
10 work, yes. Just go out and there and compete. At the end of the day, the market will find a
11 level. I am not asking them for any favours here.

12 Q. But you are telling them that you think the price at 14 something is too low for that tank.

13 A. Absolutely. As I said before, absolutely that is what it says there. In the context of how
14 would I know it is too low? I have only sold one. It is very difficult for me to be so specific
15 on that. So I am pushing back and trying to get myself through this difficult conversation.

16 Q. A bit further down it says:
17 "I says if you think Balmoral are going to fall over and we can beat them on price
18 then you're barking up the wrong tree because we will be there as long as you'll be
19 there. We're too big a company to be shaken out of the market like that."

20 I think what this is saying is they are not going to drive you out of the market with a price
21 war.

22 A. Yes. That is me making my case, yes.

23 Q. So there is no point in having a price war, you should have a chat, find a level instead.

24 A. No, that is not what I am saying.

25 Q. The next quote, I am going to put this to you but if you have not seen the video for some
26 time then it may not mean very much to you. You say, you see it says:
27 "So it's not a question of us coming and thinking we're gonna take a 75% share of the
28 market, that's not the plan, the plan being, we'll be deemed as a credible player and
29 competitive player, competitors can be there, can be there."

30 What you are doing actually on the video at that stage is saying competitors can be there or
31 can be there. Does that make sense to you?

32 A. Yes.

33 Q. Mr. Dean says:
34 "How do we get it there?"

1 He is doing that.

2 A. Is he?

3 Q. So this is really now a conversation about how to make sure you are all competing.

4 THE CHAIRMAN: I think for the transcript what you are showing is that when Mr. Joyce says

5 "It can be there, it can be there", he is indicating first a higher level and then a lower level;

6 and when Mr. Dean says "How do we get there?" his hand is at what was the higher level.

7 A. Okay.

8 MR WILLIAMS: Thank you, Madam.

9 This is now a conversation about how to make sure you are all competing at a higher price.

10 A. I would say wishful thinking on their part, but yes.

11 Q. Moving now on to page 19, do you see in the middle it says "NS":

12 "As we know from the conversation last time, [do you see that in the middle of the

13 page] we weren't making obscene gross margins, what we expect is a cap at mid 30s

14 so, so 14650 is just unsustainable ..."

15 Mr. Snee is now playing back to you what you said a few minutes ago, which is that 14650

16 is too low for him to make any money as well. Do you agree?

17 A. That is what he is saying, yes.

18 Q. That is really the same thing that you were saying in the passage that we just looked at.

19 A. But he is talking from ten years experience of making these things, yes.

20 Q. Below that you say:

21 "As I say it does not stop there, it comes back at Nick's, my guys are expecting me to

22 support them below that ..."

23 Is that like your sales team?

24 A. Yes.

25 Q. You are talking to them about whether you are going to support them at a price lower than

26 that, and that is because you get to approve the prices at these low margins, is that right?

27 A. As I said, I would approve margins below 10%. Again I am not evading the question, I am

28 saying the scenario there is all in the context of this difficult meeting, where lots of generic

29 comments are made as far as I am concerned.

30 Q. When you say "expecting me to support them", this is them asking you to approve prices at

31 low margins.

32 A. Yes, and I cannot remember if the 14650 would have meant below 10%, which is where I

33 would have been approving, yes.

34 Q. You could say yes or no, is the point. You could say yes or no to that price.

1 A. Of course. If I had to.

2 Q. You see you say "it gets silly", and a bit further down "it's a stupid price":

3 "On the next one we try to creep it back up again."

4 What you are saying is: look, we have bid at 14650, it is too low, but next time we will try

5 and creep it back up. That is what you are saying to them.

6 A. Yes, as I said before, there is -- when you are out there pushing prices, once prices get to a

7 level it is pretty difficult to put them back up. Pretty difficult.

8 Q. What you are telling Mr. Dean and Mr. Snee is that you HAVE bid these low prices.

9 A. They knew that.

10 Q. Yes, but what you are saying here is that on the next one you are going to try and creep it

11 back up. They did not know that.

12 A. No, I think if you read that correctly it says, again it is very generic, "at least from the point

13 of view of the competitor" because we lost the tanks and we said, "Fill your boots, Mr

14 Tyco", because it is a stupid price.

15 It is another silly comment on my part but, I mean, there is nothing more to read into that.

16 Q. After that Mr. Dean says:

17 "No that's genuine overdose, because I had the conversation which I wanted to go for

18 ... about 16,000."

19 He is telling you that he wanted to be bidding 16,000 for that tank?

20 A. He is obviously talking about a conversation he has had with either Nigel or Nick, I assume.

21 Q. He is talking about his conversation with Nick Stringer, but he is saying he, Mr. Dean,

22 wanted to go for 16,000.

23 A. Yes, why did he not? I am not sure.

24 Q. I think Mr Dean did go for about 16,000.

25 A. Mr. Dean?

26 Q. Sorry, this is "CD".

27 A. Sorry, in Tyco?

28 Q. Yes.

29 A. Yes.

30 Q. Over the page there is more talk about Tyco and competition, and do you see it says:

31 "They enjoyed encouraging a bit of a bust up between you ..."

32 This is back to the slashing each other's throats again. You said:

33 "I was saying to our guys ..."

34 This is you talking to your sales guys again?

1 A. Yes.

2 Q. "... we are professional, we should be saying to these guys, you're filling your boots [Tyco is
3 doing very well out of these jobs], we're coming in aggressive on the basis of trying to
4 establish ourselves. You know this is not a sustainable price."
5 So the conversation you are having with the sales team at the time is along the lines of, "We
6 should be making it clear to Tyco this is a special offer because we are a new entrant and
7 you are not going to be getting this price going forward".

8 A. Sure, on the basis, as I said before, that our costs may have been wrong. If we are in there
9 and somebody is selling something for 20,000 and we are now selling it for 15, we should
10 try and qualify where we are going with that, yes.

11 Q. Yes, and what you are doing here is telling Mr. Dean and Mr. Snee about what you are
12 advising your sales team to do.

13 A. Yes, and I said to Mr. Dean and Mr. Snee many a time that we are the new kids on the block
14 and we are not sure what our costs are. So I am telling them what I have already told them
15 before.

16 Q. Here you are not telling them you do not know what your costs are, you are saying that you
17 will offer them a low price but make it clear to them that after that prices will go up.

18 A. It is a generic comment in the meeting again.

19 Q. It is not a generic comment, because you are talking about Tyco, are you not?

20 A. Yes, and we are saying filling your boots, you know it is not a sustainable price. If we did
21 qualify it with Tyco, which I do not think we did.

22 Q. I think we can see from the paragraph above we are talking about Reg Beaumont of Tyco.
23 The bottom of the page you are still talking about Tyco, through this page. Nigel Snee says:
24 "Well, I said to Reg ..."
25 A bit further down Mr. Dean says:
26 "I went to see Reg".
27 So it is all Tyco. Do you see Mr. Dean says:
28 "I said you might be now [this is about halfway through that quote], you get a game
29 now on any job you tendered on the higher price, but as soon as Balmoral start
30 quoting your estimators, and when it comes to you to buy there'll be no discounts."
31 Mr. Snee says:
32 "So everybody hits rock bottom."
33 This is him playing back to you your phrase about the market hitting rock bottom. Do you
34 agree?

1 A. Yes.

2 Q. Then Mr. Dean says:

3 "So you're actually worse off, you'd be better off with a higher price, and he agreed.

4 He did say though ... Balmoral seem to have swept up in Swansea."

5 At the top of page 21 you say:

6 "Even though this one did not turn up out ..."

7 That is the Tyco job you did not win, is that right?

8 A. I think that may have been one that we were promised by Tyco Swansea, yes.

9 Q. "... we quoted to the engineers in Swansea, I went off and I said to the boys ..."

10 Is this the sales team again?

11 A. Yes.

12 Q. "... you have to be careful you don't put Reg's nose out of joint in the long term. It's like key

13 account selling ..." and so on.

14 This is you advising your sales team on how to approach the customer.

15 A. Again, I mentioned it inside the meeting and it would be in the context again of saying to

16 Norman, you know, Reg is a buyer, and the buyer always likes to have the final say, and

17 Reg Beaumont had actually got us into trouble for speaking to his engineers and not coming

18 through the purchasing team. That is the point.

19 Q. The point I was making is this is another example of you talking to the sales team on how to

20 handle a customer.

21 A. Primarily Norman. I keep saying "the boys" but it would be Norman Ross.

22 Q. Moving to the bottom of that page, Mr. Snee says, next the hole-punch:

23 "... the conclusion we came to last time we had this conversation was that we ended

24 up divvying the customers, gold and silver customers ... it's going to be difficult to

25 arrange that ..."

26 Because you do not want to go down that road. You say no:

27 "... the culture in Balmoral is to put the pressure on ..."

28 Really what you are saying is it is not really an option for you to withdraw from competing

29 for certain customers.

30 A. All customers.

31 Q. Yes, it is not really an option for you to agree with Mr. Snee and Mr. Dean you are not

32 going to compete with particular customers because they are their customers.

33 A. Yes.

34 Q. Then the top of page 22, do you see it says:

1 "If I come to you with a price similar ..."
2 Do you see that three lines down?
3 A. Yes.
4 Q. "... there or thereabouts, I'll never get an opening ..."
5 So you are basically saying: look, I am a new entrant, and if I am only offering the same as
6 you I will not get a slice of the market, I am not going to get the business, so for me it is like
7 push your way in and then let things stabilise. So you are going to bid low prices to get in,
8 then you want the price to stabilise after that. But you say the real danger here is that it
9 could spin out of control, so competition could keep pushing the price down and down.
10 A. Yes, again fair enough, that is what it says.
11 Q. Mr. Snee then goes on to talk about some Compco jobs. After the bottom of the next quote
12 he says:
13 "... we were going to try and guess where you are, and we'd like the work, so we're
14 going to go and bid close to but under what you've offered, we are guessing around a
15 little bit here."
16 He says wants to bid a bit under you but he does not know what you are going to bid. Do
17 you agree?
18 A. That is what he said, yes.
19 Q. You reply and you say:
20 "Reading between the lines [this is third line], there will be a low price, maybe a
21 proper market price on the 135, anything below 15 grand is stupid. Back at where it
22 should have been about 17,500, 18,000. When we start getting below 15 and two big
23 guys are battling over Tyco at 146 and we're losing it at 146. It's bonkers."
24 So you are telling him that you do not want prices below £15,000.
25 A. Yes, I think I have covered that before, what I meant by that.
26 Q. Nigel Snee was asking you for a sense of where you may price on the 135 and you have
27 given him what he wanted.
28 A. Nigel Snee knew exactly where we were on price.
29 Q. He says "we are guessing around a bit here", so he gave you the impression that he did not
30 know where you were, and you answered his question.
31 A. Is there any common sense applied to this or is it literally word for word?
32 Q. I have only got the words to go on.
33 A. Yes, I can tell you I understood the market. Nigel Snee knew exactly what we were selling
34 tanks for.

1 Q. He does say on the next page:
2 "... that's what we thought. That's what we thought."
3 He had an idea, but you had been happy to confirm it.

4 A. I read one of Nigel's statement and he said 75% transparency in the market. Not me, him.
5 He is telling me that, yes.

6 Q. He said he had an idea, but you are happy to confirm it for him.

7 A. No, I am not happy to confirm it. It does not mean Balmoral will confirm 14.6 or 15,000,
8 does it?

9 Q. He said to you "We are going to try and bid close to you" and you answer, and you say
10 "there will be a low price, maybe a proper market price on the 135, anything below 15
11 grand is stupid". So you are happy to give him an idea that --

12 A. It might be stupid. Did I say that we won't bid: maybe we are a stupid company. I am not
13 telling Nigel Snee that we are not going to bid below 15,000.

14 Q. No, you are telling him that you think it would be stupid to price below 15,000.

15 A. Yes, and I think some of the prices flying around may be stupid. As I said before, we had
16 only made one 135 tank. Eight months before Balmoral came into the market the price was
17 18,000 to 20,000, now we are at 15. So maybe that is a bonkers price, I do not know.

18 Q. You can see then Mr. Snee says "The same goes with schools and tanks as well, we have
19 been bidding them around 9650".
20 So he moves the conversation on to schools tanks, which Mr. Dean said were the other
21 tanks that the cartel struggled to get the price up for. We saw that. Do you agree?

22 A. I see that, yes.

23 Q. He says you have been coming in below him, and you say:
24 "We sold three originally at 8.6, that was a screw up."

25 A. Yes.

26 Q. So that was a mistake, you will not be bidding that again.

27 A. We lost money on that project, 8.6.

28 Q. We see a bit below, Mr. Snee says:
29 "We went to a meeting with Compco's London lads, I got a phone call ..."
30 I think what he is saying is: when you put that price in there was a bit of reaction in the
31 market, we got a phone call back.

32 A. Yes, it was not to Compco, 8.6.

33 Q. Okay.

1 A. It was just -- it is an important point, it was a company called Hall Fire, and Clive Dean
2 phoned me inside 24 hours to tell me the price we just quoted Hall Fire, and that was in
3 October 2011.

4 Q. It is clear now you are not going to be bidding 8.6 again. You make that clear to him?

5 A. I tell him that we lost. What is the words that I used?

6 Q. You said it was a screw up.

7 A. It was a screw up, yes.

8 Q. There is a bit more chat. Mr. Snee said:
9 "The trouble is Compcgo got hold of that now but anyway. That's history."
10 Then you say:
11 "I will say that price is probably about ... the lowest one we did recently is about 9.5."
12 That is your current price for the school tank at that time.

13 A. Yes.

14 Q. That is a price it seems you are happy to offer at that time.

15 A. Yes. It would not all be 9.5, but yes.

16 Q. Then a bit further down you say:
17 "The schools and the 135s are very similar ..."
18 What do you mean by that?

19 A. I cannot remember what I mean by that, because they are not similar.

20 Q. No. Then you say "9 and a half, 10 and a half, 15 to 17."

21 A. Which was -- sorry.

22 Q. These are later referred to as the bands, aren't they?

23 A. Well, bands, yes. Or market prices.

24 Q. We can see here the bands came from you. No one else has mentioned these bands.

25 A. Yes.

26 Q. So you had a decent picture of what prices were for these two sizes of tank at that time?

27 A. As I said before, we had only sold one.

28 Q. If you see a bit further down --

29 THE CHAIRMAN: If you are moving to a different place, we are having a bit of difficulty
30 hearing you. I know it is an odd situation, Mr. Williams is asking you the questions, but
31 really we are the ones who need to hear the answers.

32 A. Okay, right.

33 THE CHAIRMAN: I am sure Mr. Williams will not think you are rude if when you are
34 answering the questions you face us a little bit more. Is that all right?

1 MR WILLIAMS: No, of course not.
2 We were talking about you having a sense of the price on those tanks.
3 A. Yes.
4 Q. You said you had only sold one. Can I ask you to take out the appeal bundle, tab E, and
5 turn to page 17. Then you will see that there the page is divided into four. You have
6 probably seen these before.
7 A. Yes.
8 Q. Then at the bottom of page 68, the bottom right-hand corner of page 17.
9 A. Yes.
10 Q. This is a whole discussion in your evidence in the criminal proceedings which related to the
11 bands. Do you want time to look at that?
12 A. Down here?
13 Q. Down here. You can see a bit above there is a discussion about 135s, 14650, so it is
14 actually a later bit of the transcript, and it says:
15 "What are you doing here?"
16 You say:
17 "Probably shadow boxing to a degree. On those two prices for those tanks, they're
18 market prices."
19 That means they are current prices at the time. Do you agree?
20 A. Yes, they would be reflected in what the quotes were, yes.
21 Q. At that time.
22 A. Yes.
23 Q. "These are what tanks are being sold for, which is from my perspective significantly less
24 than when Balmoral first came into the market, but I think we're saying with those two sizes
25 of tank it's quite easy to throw a blanket over the two prices, very easy, because they're a
26 popular size."
27 This was a while ago, but at that time at least you thought it was easy to get a sense of the
28 market prices for those, because they were popular products.
29 A. As I said, the quotations would be telling you the prices that had been quoted are
30 somewhere between 15 and 17,000 for the 135.
31 Q. When you say "easy to throw a blanket over them", do you mean easy to get your arms
32 around the price?
33 A. I cannot actually remember.
34 Q. Maybe I am not helping by putting it that way.

1 A. No, I know what you mean. The question was asked, "What do you mean by 'throwing a
2 blanket'" and I cannot actually recall the context of why I would use that phrase.

3 Q. They are popular sizes.
4 A bit further down, do you see about halfway down it says "AJ", and there is a quote
5 starting:
6 "We're selling at that price, we're now below it."

7 A. Yes.

8 Q. I think that is a reference to "15's far too low", and you are saying:
9 "We're selling at that price, we're now below it."
10 This is the same conversation, selling at 15 and selling a bit below 15. Then about four
11 lines from the bottom:
12 "We don't have it all ..."
13 Do you see that? Four lines from the bottom, about halfway across the page.

14 A. Yes, sorry.

15 Q. "We don't have it all, we've got to just make sure we're taking our share at the right price."
16 That is winning a certain proportion of the tanks on the market but at a price which is not
17 too low.

18 A. Yes. Just to qualify again, a salesman's job is to sell a tank for as high a price as he can get.
19 That is his job.

20 Q. You say:
21 "I think with this it's like trying to push and get it stabilised. For me anyway, I get a
22 much, much better feel now for the way things are settling out ..."
23 So you have a better sense of the market.

24 A. Eight months into it we are starting to get a feel for it.

25 Q. Then Mr. Dean actually follows that up and says:
26 "Do you feel you've got a better handle on market price now?"
27 You say:
28 "Yeah, absolutely ... I'm a lot closer to these customers in the terms of the fact that it's
29 just the same whether you're selling tanks, beer and probably bacon rolls."
30 So you are saying yes to his question, that you have got a handle on these prices. Do you
31 agree?

32 A. From that particular point in those particular products, yes.

33 Q. After that bacon rolls reference you say:

1 "There's never a deal on the table that can't be beaten so why do we think we're going
2 to beat everyone on price? If you went in at 14.6, you could go in at 14.5 or 14.4 if
3 you want. There isn't a deal."

4 I think you mean there is not a deal that cannot be beaten:

5 "You might even say I'll take it at less than cost just to prove a point. I mean, there's
6 no deal that can't be beaten. And if you've got that mentality then surely prices are
7 gonna ..."

8 Then you say "let it stabilise".

9 What you are saying is: look, we do not need to try and win every tank, we are more
10 interested in taking our share at a higher price.

11 A. It is a common sense approach.

12 Q. You do not want to go down the road of trying to win every bid but seeing prices down at
13 14.4.

14 A. As I said before, you cannot win every bid.

15 Q. Here what you are specifically saying is that you do not want to go down the road of seeing
16 prices down at 14.5 and 14.4.

17 A. Where do I say that, sorry?

18 Q. You say:

19 "... why do we think we're going to beat everyone on price? If you went in at 14.6,
20 you could go in at 14.5 or 14.4 if you want. There isn't a deal."

21 You are saying there is not a deal that cannot be beaten, and you are basically saying you do
22 not want that mentality, let it stabilise.

23 A. I am saying there is not a deal on the table that cannot be beaten. That is true, in anything.

24 Q. There is no point in pushing it down to 14.5 or 14.4.

25 A. As I said, it is not the manufacturer that decides that, it is the customer who will be pushing.

26 Q. On the next page, page 24, do you see you say:

27 "Well if you react to everyone you lose, you end up getting ..."

28 Mr. Snee says:

29 "Into a paranoid state."

30 So this is the same point, that you do not want to reduce your prices every time you lose a
31 tender.

32 A. I know what you are saying, and I am answering the question. As I said before, you know, I
33 do not actually see the point you are trying to make here. I am confused. I have just said
34 you cannot win every order, no matter what the price is. I am not disputing that.

1 THE CHAIRMAN: Yes, he has said this a number of times.

2 Can I just ask a question about this. You said if you are going to get 30% of the market,
3 that means that then you have to lose 7 out of 10 bids. But that assumes that you bid for
4 100% of the market, even though you know you are not going to get that. But is that how
5 you work; do you put in a bid every time somebody says that they want a tank, even though
6 you might actually not be able to make all those tanks if you won all the bids?

7 A. Sure. The question -- I suppose the real answer is you do not know which one you are
8 going to win. So if we receive the enquiry, then we will make a bid for the project.

9 THE CHAIRMAN: Right, but do you receive an enquiry for every bid that comes out?

10 A. I would not say every, but for most of the major companies, Tyco, Hall and Kay, Compco,
11 they would tend to come into us as well.

12 THE CHAIRMAN: Is it your understanding that generally the Tycos, the Compcos and the Hall
13 and Kays, they will ask all the big players to bid for every contract?

14 A. Yes.

15 THE CHAIRMAN: And everybody always puts in a bid?

16 A. Yes.

17 THE CHAIRMAN: Thank you.

18 A. Can I just say, when you put in the bid, you have what they call first time pricing. Because
19 you do not just put in a quote and somebody phones you up and says "Well done". You put
20 in a quote, somebody phones you up and says "Right, now we have got an order to place".
21 It could be that Tyco, Compco or Hall and Kay are bidding to win a fire sprinkler contract,
22 so all three of these guys are bidding to win one job. So our job is to make sure we are
23 quoting all the horses in the race. So whenever that main contractor gives one of these three
24 guys the project, you want to make sure you are in the race.

25 THE CHAIRMAN: Right, but can you tell from the bid that actually it is all the same building
26 that they are putting their bids in for?

27 A. No, because again some of it would be generic. They might tell you it is for, as has been
28 mentioned here, Morrisons superstore, they may tell you that, but not all the time.

29 THE CHAIRMAN: You would not necessarily think, "I see, they are all bidding for this same
30 contract.

31 A. They are all bidding to win Morrisons' work, yes.

32 THE CHAIRMAN: But as far as you are aware, pretty much everybody gets asked to bid on all
33 the contracts.

34 A. Yes, and then --

1 THE CHAIRMAN: But then they will come to you, once they know they are the contractor that
2 has been chosen.

3 A. Yes, if Tyco has won it, so they'll come back "We have an order to place" as we would call
4 it in this industry, "so let us talk about the real price now".

5 THE CHAIRMAN: I see. So when they first ask you for the quote they do not know they are
6 going to be doing the job.

7 A. Not all the time.

8 THE CHAIRMAN: Then when they have won down the line, they will come back to you and the
9 others, and then there will be a negotiation.

10 A. They will ask you to negotiate.

11 THE CHAIRMAN: Yes. Thank you.

12 MR WILLIAMS: Your answer to me a few moments ago was you cannot win every bid, but I
13 was making a more specific point; I was saying that the conversation that you are having
14 with Mr. Dean and Mr. Snee here is that it is not in your interests to reduce your prices
15 every time you lose a bid. That is the conversation you are having with them.

16 A. Of course.

17 Q. In this section starting:
18 "If you have the mentality ..."
19 Do you want to read that to yourself? It is a fairly long passage. (Pause)

20 A. Yes.

21 Q. Okay. What you are saying here, I think, is if there are four of you in the market that --
22 sorry, I beg your pardon. Worst case, as you say, you are looking at 25% there is four in the
23 market, there's is a figure to bear in mind. Whether you get 25, 20 or 30, there is a figure.
24 You are basically saying: look, if this market is working we will all get about 25% of the
25 market.

26 A. No, I am not saying that at all. Are you saying I am suggesting we all take 25% of the
27 market?

28 Q. No, no, I said you were saying that if the market is working we will all be getting about
29 25%.

30 A. No. I mean, again, if you finish the rest of the sentence, I say you should actually consider
31 making an acquisition. This is a general business comment about market shares, you know.

32 Q. I just want to be clear. I am not suggesting that you were --

- 1 A. But it is important. I used a lot of generic phrases through that horrible meeting. This is
2 another one. Anybody who understands marketing will know that market share beyond 40%
3 would obviously have a negative impact on price. You know, it is fact.
- 4 Q. Right, but what you say is whether you get 25 or 20 or 30, there is a figure. If you think the
5 market is worth 8 million or 10 million, if you do 2.5 million, so that is about a quarter of
6 the market, when you try and push beyond that without making an acquisition you kill the
7 whole thing.
- 8 A. Yes. It is a generic marketing statement, yes.
- 9 Q. Yes, so --
- 10 A. Sorry -- it could apply to any market.
- 11 Q. Right, but the point you are putting across is you can try and grow your share by pushing
12 the prices down but it is not going to be good for any of you.
- 13 A. No, you will grow your share, to a certain level.
- 14 Q. But you can try and grow the share by putting your prices down, but it is not going to be
15 good for you because you will just kill the thing.
- 16 A. You know, in manufacturing you can go for a lower price and high volume and you get
17 economies of scale through your manufacturing plant. So it is not always just about a low
18 price. It cannot be. What I am saying here is generically, beyond a certain level of market
19 share statistically you will see your prices dropping off, because your benefits come through
20 the manufacturing plant, not through the market price.
- 21 Q. On 25 you make the same point again, I think:
22 "When you push beyond that [when you say "that", that is 25%, you can see just
23 above], that's when people react. The same with GRP ... we know where the
24 boundaries are in the thing, you share, price, stabilise. If you want to go beyond that
25 there's two ways: either you fight and kill it or go and buy someone."
26 The flavour is, if you keep fighting on price you will end you up not making any money.
- 27 A. No, that is true. Most people, if you keep fighting on price, somebody will go out of
28 business.
- 29 Q. What you are saying is that none of you want price competition to kill profit in the market.
- 30 A. No, I am not saying that.
- 31 Q. The bottom of the page, Mr. Snee moves on to talk about an example of Hall and Kay
32 Tesco. You can see sort of he describes what happens with them. Then Mr. Dean says:
33 "It's a lot better price than 14650."
34 Mr. Snee says:

1 "It's a lot better than 14650."
2 You say:
3 "What did you say your price was there?"
4 Do you agree that you were interested in the price for that job?
5 A. I knew the price.
6 Q. But you did ask him.
7 A. Yes, I was checking he was not lying. I knew the price. I think we mentioned before
8 yesterday, we had a guy called Nick Hudec who worked for Hall and Kay who told us what
9 Franklin Hodge were charging. We had a meeting with a guy called Russell Dixon, who is
10 the managing director of Hall and Kay, who told us what Franklin Hodge were charging.
11 Q. What do you mean when you say "I was checking he was not lying"?
12 A. Exactly. I knew the price. He said what he was paying and I just checked, "What did you
13 say your price was there?"
14 Q. He had not actually said what his price was?
15 A. I knew what his price was. The emails are there, you can see. In May 2012, Russell Dixon
16 told us, the managing director of Hall and Kay, what he is paying.
17 Q. Yes, and you wanted to check what he had been bidding.
18 A. Yes, because I knew we had already given Hall and Kay a better price than Nigel had given
19 them. He says at the top of the page there, he has got the order but he is not the cheapest. It
20 tells you again that price and price alone does not win you every order.
21 Q. Do you see a bit further down Mr. Dean says:
22 "... that is still a reasonable price for a 135 tank."
23 It then says "NE" but I think that means "NS", probably it should be Mr. Snee, and he says
24 "It is."
25 So they were telling you that they thought 16,800 was a fair price for a 135.
26 A. They were.
27 Q. If we just turn back briefly to page 22, do you mind doing that? Going back to that quote:
28 Reading between the lines, there will be a low price, maybe a proper market price on the
29 135, anything below 15 grand is stupid. Back at where it should have been about 17,500,
30 18,000."
31 You are all letting each other know that you will be much happier with prices up at that sort
32 of level rather than down at 14.6.
33 A. I think every manufacturer would be happy to see the prices go up, yes. It is the way you
34 get there is the question.

1 Q. The way you are getting that here is by having a conversation with Mr. Snee and Mr. Dean.
2 A. No, the way you get there is you go out and compete.
3 Q. At the bottom of that page, 26, Mr. Dean says:
4 "The problem comes ... when like you bid it and it's happened recently on a couple of
5 times that people have no knowledge, and I know you may have run the GRP but
6 they want cylindrical pumps as well as tanks and they just send me a copy of your
7 quotes, now that's the danger of that, cos they generally still want to use us and just
8 give us last bite of the cherry."
9 This is the process of competition you describe in your statement, where there is a sharing
10 of the rival bid and they give the supplier a chance to outbid it.
11 Then Mr. Snee says -- sorry, I do not think you answered.
12 A. No, sorry, I am listening, yes.
13 Q. I think you nodded when I said that.
14 A. Okay, okay.
15 Q. Mr. Snee says:
16 "But it takes balls to say you can't move this time round."
17 What he is saying is when prices have been lower in the past, it is hard to refuse to offer
18 those low prices again. Is that right?
19 A. Yes.
20 Q. Then Mr. Dean says:
21 "If you do then you're starting the spiral."
22 You carry on:
23 "It's the same, we don't want everyone down to 14.5, to 14.4, it's a bit about accepting
24 a value of the market and the share you're aiming for. But if you don't understand the
25 two you just keep banging down doors."
26 In this conversation Mr. Dean had seen your price but you are telling him more than that,
27 you are telling him that you do not want the competition pushing prices down to 14.5 and
28 14.4 and that you would be happy winning a smaller share at a higher price.
29 A. As a manufacturer, I say again, I want the prices to be as high as they can be, but that as in a
30 fair, level competitive market. I am sitting here with two companies that have been fixing
31 prices for eight years, remember. Yes?
32 I really do not know what you expect me to say. This is an extremely difficult meeting and I
33 said at the beginning, I do say some things in here that I wish I had not, but I think through
34 the whole process it has been extremely difficult. I am not agreeing, I am just saying it

1 would be silly to have the price that low. But that is not my call. I am not asking them not
2 to go below. They can do what they like.

3 Q. You are sharing your view that 14.5 or 14.4 would be too low a price for these tanks.

4 A. Yes. I have only sold one. I have just mentioned, from where it was before, 20,000 down
5 to something like 15,000, it would suggest may that is bonkers, silly low price.

6 Q. Do you agree that if you had not had this conversation there is no way that Mr. Dean and
7 Mr. Snee would know where you thought the downward pressure on prices should stop?

8 A. He would know the next day, when we outbid them on Compco. You know, it is not -- as I
9 said before, this is a dynamic market. Tanks are quoted and won every day -- every day --
10 and every day and every time we were quoting, these guys knew where we were at.

11 Q. There has been a lot of pressure on these prices, and prices are down at at least 14650 and
12 nobody knows where that pressure is going to stop.

13 A. Yes.

14 Q. You are telling them that you do not want the price to go down to 14.5 and 14.4?

15 A. I am generally making a comment on my view, yes. That is it.

16 Q. Yes, and they did not know your view, apart from this conversation.

17 A. I had not been in the market that long, you know.

18 Q. There is about 30 minutes of discussion of other things at this point. I was going to move us
19 on to page 39.

20 Do you see at the bottom Mr. Snee says:

21 "So coming back to where we were then, it's going to be a complicated picture on the
22 pricing front ... this is like market sharing, we [are] going to have to manage it as best
23 we can I suppose, is the conclusion we're coming to."

24 So he brings it back to that topic.

25 You say:

26 "We can always pick the phone up and have a chat about it, see where we are, make it
27 quite clear where the bands are, if you go outside that band, on the low side then I'd
28 like to think it won't be driven by us."

29 You use the word "bands" here, and do you agree no one else has used the word "bands" up
30 to this point?

31 A. Yes. It is again not a word I actually use a lot. To me it is more reflective of what the
32 prices are, rather than a bands. Okay, I used the word.

33 Q. You are the one that characterises the 15 to 17, 9.5 to 10.5, as a price band for these tanks.

34 A. That is what the market were telling us at the time, yes. That was the market price.

1 Q. It was not the market price in Tyco, was it?

2 A. It was a one-off price, was it not? It only happened 24 hours before the meeting. 24 hours
3 after the meeting prices are back below 15,000.

4 Q. What you are saying here, explicitly, is:

5 "... if you go outside that band, on the low side then I'd like to think it won't be driven
6 by us."

7 So you are saying that you are not going to be the ones to drive the price below that level.

8 A. That is what that reads, yes.

9 Q. That is what it reads because that is what you said.

10 A. Yes, but again not in the context of the whole meeting, yes.

11 Q. It is you that suggests using the bands to keep tabs on prices.

12 A. It is me that suggests what the market price is at the time, yes.

13 Q. No, it is you that is suggesting that you use the bands to keep tabs on prices.

14 A. Keep tabs on prices?

15 Q. Well:

16 "... if you go outside that band, on the low side then I'd like to think it won't be driven
17 by us."

18 You are suggesting that you use the bands as a way of checking whether the price is too
19 low.

20 A. Yes, it is the market price, is it not? That is what people were buying tanks for, 15 to
21 17,000. Eight months before that it was 18 to 20,000, it is a different band.

22 Q. Can I ask you to look at paragraph 50 of your witness statement, your first witness
23 statement, which is tab 2 in the core bundle. Paragraph 50 is on page 10.

24 A. Yes.

25 Q. What you say is:

26 "The only reason I mentioned the price bands was to try and cut the conversation off.
27 I thought if I made some noncommittal and vague noises about pricing for two tank
28 sizes they might stop pushing me on the price issue."

29 You are not cutting the conversation off here; you are suggesting that you use the bands to
30 keep track of prices.

31 A. I do not believe that is what I am saying, but ...

32 Q. Do you agree that saying "pick up the phone afterwards" is the opposite of cutting the
33 conversation off?

1 A. Listen, I would see them at various meetings. I do not have a problem with people phoning
2 me. I do have a problem with people phoning me every ten minutes about the prices. That
3 is what I mean about cutting the conversation off. "Please stop calling me every five
4 minutes about the prices. Go and run your business and get on with what you do, guys."
5 Q. Do you agree that by saying "We can always pick the phone up" that is not cutting the
6 contact off?
7 A. It's impossible to cut the contact off. There might be legitimate reasons for speaking to
8 people. I just mentioned to you I tried to buy Clive Dean's company. Maybe we had not
9 given up on that option.
10 Q. Here you are not talking about that. I think what you say is:
11 "We can pick up the phone and make it clear where the bands are."
12 A. Yes.
13 Q. That is not a conversation about Clive Dean's company.
14 A. As I said earlier on, I say some things that I wish I had not, but in the context of that
15 meeting 15 to 17,000 in the context of the 135 was really what was going on at the time
16 generally. Nothing new.
17 Q. It was above 14.6, 14.5 and 14.4.
18 A. Yes, and it was 19 and 20. It is all over the place, is it not?
19 Q. It is right, is it not, that actually although you say in paragraph 50:
20 "I only mentioned the bands to cut the conversation off", you did not cut the
21 conversation off; you stayed at the meeting for another 40 minutes?
22 A. I have no idea how long I stayed in the meeting.
23 Q. We can see at the top of page 40 that it is 9.30. We know that you left at 10.08.
24 A. Yes.
25 Q. So you did not cut the conversation off. You stayed for another 40 minutes.
26 A. The conversation did get cut off thereafter. When the meeting finished there were no
27 further conversations.
28 Q. At this point you are definitely not cutting the conversation?
29 A. I cannot just stop talking. I have to find a reason to get out of the meeting. I did not even
30 actually ask for the meeting.
31 Q. Do you agree you could have said, "Look, this is not a conversation I want to have. I do not
32 want to share out customers and I do not want to talk about price either" ?
33 A. I think, as I said earlier on, we have had three or four meetings before this meeting, and I
34 have explained why I went to those meetings and I explained -- I have not explained

1 actually but I had better stop talking. I will let you ask me the questions. I am digressing
2 here and I am trying not to push in a way that ...

3 Q. The question I asked you, or the point I put to you, was to say that you could have said, "I
4 told you that I do not want to allocate customers and I do not want to talk about price
5 either", but you do not do that?

6 A. In a strange way that is exactly what happened though after the meeting. So maybe my
7 agricultural version did not read textbook style, but the objective that I went to the meeting
8 for was actually well and truly achieved, because I had next to no further contact.

9 Q. But not during the next 40 minutes though.

10 A. No, okay.

11 Q. Just coming back then to page 40 of the transcript, Mr. Snee says:

12 "You were saying earlier on on the schools, we were saying 9 and a half to 10 and a
13 half."

14 That was the bracket that you had put forward. You say:

15 "That is on average where the price should have been."

16 So it is clear you are not now talking about just what has happened in the past; you are
17 saying where you think the price should be?

18 A. I am not saying it today. I am saying that is where the prices are.

19 Q. You are saying in July 2012 that you think prices should be in that bracket.

20 A. Yes, I think they should be.

21 Q. Mr. Snee then says:

22 "And the 135s", and then he makes a joke and says "14,650" and Mr. Dean says "No"
23 and there is laughter. Then you answer:

24 "I've seen quite a few around the 15 mark and I would say 15 to the 17 mark."

25 That came from you again. You answered Nigel's question.

26 A. Yes, that is what I say "15 to 17".

27 Q. Would you agree that you are actively involved in this conversation; you are not just
28 fobbing them off?

29 A. No, I think again a 135 tank comes in many variations, yes, so 15 to 17 was the market price
30 at the time. I just mentioned that we had only sold one tank, yes, at that stage. You have
31 different standards for these tanks and you can get 135 cubic metre diameter -- sorry,
32 capacity, by using different heights and different diameters which would affect the price. If
33 I had gone in there with any objective to try and be upset by some supermarket tanks, I
34 would like to think that I would have done a better job of it than that.

1 This was a clumsy, if nothing else, difficult meeting for me. I say some things, I have said
2 before, I wish I had not in the context. But I had had eight months of grief here, and it is
3 important to keep that in mind here.

4 Q. Shall we move on to that topic of variations on tanks because we can see a little further
5 down:

6 "I would have thought a list price would have been 18 on a 135. That should be
7 around 17. That is with a ball valve -- with a ball valve should be 18."

8 You say:

9 "Is that a 50-millimetre ball valve?" and Mr. Dean says "Yes".

10 Mr. Snee says:

11 "Are these prices with or without a ball valve?"

12 Mr. Dean says:

13 "With", and Mr. Snee says "Okay".

14 This is the only point in this meeting where any of you discuss a specific variant for the
15 product; the rest of the time you are all talking in terms of headline prices.

16 A. A ball valve is not exactly a variation.

17 Q. No.

18 A. I just mentioned there is two standards, or three standards, for sprinkler tanks: LPS, 1254,
19 1276 and FM Factory Mutual, and every one of those would have an implication on the
20 cost, every one.

21 Q. Picking that up, at the time of this meeting had the 1254 not been superseded?

22 A. Yes, but at the time of the meeting I mentioned that I had Hall and Kay prices from Mr.
23 Dixon, and in Hall and Kay's email from Norman it shows that Hall and Kay were also
24 buying LPS/1254 for somewhere around about £13,500.

25 Q. But you do agree that the standard had been superseded?

26 A. No, it is still live. You can still use it. Certain people who still have 1254 can still use it.
27 1276 superseded 1254, but 1254 is still a standard that LPCB, if you had 1254 it would still
28 let you -- I think there is some date in 2018 before it is cut off.

29 Q. Can we take out bundle D at tab 7, please.

30 A. I have actually written to LPCB about the 1254 and the 1276.

31 Q. This is your witness statement in the criminal proceedings.

32 A. Where am I again, sorry?

33 THE CHAIRMAN: Bundle D.

34 MR WILLIAMS: I think it has been handed to you.

1 A. Which tab, sorry?

2 Q. It is tab 7 and then it is page 10.

3 A. Yes.

4 Q. So you describe on this page of your witness statement the various standards. Just picking
5 it up at 43 you say:

6 "Although it is not a legal requirement customers for the fire sprinkler industry will
7 only purchase tanks that have been certified by the LPCB, the UK body that provides
8 the technical industry standard, or its American equivalent Factory Mutual ..."

9 You say you had already had LPCB on your GRP for some years.

10 THE CHAIRMAN: Where are you reading from?

11 MR WILLIAMS: I am so sorry, Madam. It's bundle D, defence bundle, tab 7, page 10.

12 Do you want to read paragraph 43, Madam, which I just read out. (Pause)

13 THE CHAIRMAN: Yes.

14 MR WILLIAMS: So the LPCB is the UK body, the UK standard?

15 A. Yes.

16 Q. FM is American?

17 A. Yes.

18 Q. In the UK people mostly use LPCB. Is that right?

19 A. Mostly.

20 Q. In fact when you talk about getting certification and all the rest of it, on the rest of this page,
21 you only talk about the LPCB; you do not talk about FM?

22 A. No, but it is still a standard that people buy.

23 Q. That is because the main focus is on the LPCB in the UK?

24 A. Yes.

25 Q. In paragraph 45 you say:

26 "The current standard covering GRP and GST tanks is 1276. This superseded
27 standard LPS."

28 A. Yes.

29 Q. Then you go on to describe the process of getting certification for the 1276. So this is the
30 current standard at the time?

31 A. Yes.

32 Q. Most customers are going to want tanks built to the current standard, are they not?

33 A. Most customers. Some of the supermarkets will allow a lower spec, as I just mentioned
34 from Hall and Kay's perspective.

1 Q. The standard then had implications for the accessories, did it not?
2 A. Yes.
3 Q. If you were working to a particular standard you had to include certain accessories.
4 A. Yes.
5 Q. Can I ask you to be passed bundle S2, supplementary bundle 2, at tab 31, page 25. You will
6 be familiar with this document obviously?
7 A. Yes.
8 Q. So this is a list of accessories and ancillaries which you can provide in relation to tanks.
9 Do you see at the top it says:
10 "The following accessories will usually be installed."
11 So this is a sort of standard list.
12 A. Yes. In the standard there is a specification and a lot of detail what should be part of the
13 specification.
14 Q. I should separate out the two points. Here we are talking about what you usually supply,
15 this is your standard product. What you are saying is when you supply a tank you usually
16 include all of these things?
17 A. Yes. I would not say all, but it is a long list there, yes.
18 Q. It does say --
19 A. "Will usually".
20 Q. "The following will usually be installed". Actually most of these, or quite a lot of them at
21 least, are required by the LPCB standard, are they not?
22 A. Yes, there will be ones that will have to be in there as an LPCB specification.
23 Q. If we just go through a few of them. We have talked about the float or ball valve. That is
24 the third bullet down. You have to have one of those under the standard?
25 A. Yes. I cannot remember but, yes, go on.
26 Q. Under that there is a heater to prevent freezing.
27 A. Yes.
28 Q. That has to be in there under the standard?
29 A. Yes.
30 Q. The next one, or two of them down, a drain valve. So that is a drainage facility.
31 A. Yes.
32 Q. That has to be there under the standard. The next one is a gated ladder. That has to be there
33 under the standard. Below that there is a rigid roof. That has to be there under the standard.
34 Do you agree? Do you agree?

1 A. Yes. Again I am not sure what they mean by "rigid", even though it is our document here.
2 Q. The standard does refer to a rigid roof?
3 A. Yes, you are not allowed to see daylight coming through the tank.
4 Q. Then you have the vortex inhibitor at the top of the next page. That is required under the
5 standard. I could carry on. But pretty much most of these items are required under the
6 LPCB standard, are they not?
7 A. Yes. There is a few at the bottom like fire brigade inlets -- fire brigade connections, sorry,
8 and stuff like that would be extra.
9 Q. But most of them would be required by the standard?
10 A. The standard will tell you what to put in, yes.
11 Q. When you had this conversation at the meeting, the only question you asked was about the
12 size of the ball valve. Really that is because the information was useful; it was intelligible as
13 it was.
14 A. No, because I was not that interested in the detail.
15 Q. If you were not interested you did not need to ask:
16 "50-millimetre ball valve."
17 A. I was being nice. Nothing else. I was not that interested. Otherwise I would have also been
18 specifying the liner. You get different types of liners: PVC or EPDM. 27% difference in
19 cost for a 135-metre tank.
20 Q. Can we have a look at paragraph 33 of your witness statement, your second witness
21 statement, and pick up some of the other points that you run through?
22 You have just mentioned liners.
23 A. Yes.
24 Q. It was not normal for a customer to specify a particular liner, was it?
25 A. It helps you get the price. You can vary the price by putting in a different liner.
26 Q. That is a different question.
27 A. No, some customers will ask for PVC liners and some will ask for EPDM.
28 Q. If you look at paragraph 33, you talked about ancillaries and you say:
29 "Prices quoted for a tank size can vary significantly depending on the cost of the
30 ancillaries."
31 A. Is this the second statement?
32 Q. Yes, it is. I am sorry if you are not there. It is tab 3, paragraph 33, and it says:
33 "Prices quoted for a tank size can vary significantly depending on the cost of the
34 ancillaries."

- 1 We have looked at ancillaries just now.
- 2 Installation: for a school or a 135 you are not normally talking about a complicated
3 installation?
- 4 A. You need a set of jacks. Every tank is built from the roof and then you actually jack up the
5 roof. Then you put a ring of steel underneath and then you jack it again and you put in
6 another ring of steel. So from an insulation point of view the installer does not actually get
7 off the ground. There is no need for scaffolding. You are using a set of hydraulic jacks
8 from a health and safety perspective.
- 9 Q. Sorry, my point was not clear. That does not really differ between jobs, does not?
- 10 A. No, jacks are required for every job.
- 11 Q. I am going to come back to dimensions of a tank in a minute. Tanks can have different
12 galvanised thickness. There is a minimum thickness in the standard as well, is there not?
- 13 A. There is two for steel tanks. If you use a liner tank it is 600 grammes. If you use a mastic
14 tank it is 1200 grammes. Not many customers will use mastic tanks. Most of it will be
15 liners. Instead of having a liner you would have a mastic seal.
- 16 Q. The galvanised thickness --
- 17 A. Yes, change 1200 grammes of galvanising 600 grammes either side, if you use what you
18 call a mastic sealed tank, most customers ask you for liners and because you have a liner
19 you can reduce the galvanised thickness.
- 20 Q. It would be exceptional for a customer to ask for a thickness higher than a standard?
- 21 A. Everything is exceptional, is it not. Yes.
- 22 Q. You then say, and we have covered a few of these topics:
23 "They can be delivered ex-works, civils works."
24 So the civils, are you talking about the concrete slab there?
- 25 A. In the base, yes.
- 26 Q. Again that was not usually included in the price?
- 27 A. Sometimes, but not all of the time.
- 28 Q. But it was not usually included?
- 29 A. In eight months I am not an expert in galvanised sprinkler tanks.
- 30 Q. Then we have connection sizes including vortex dimensions. These are what components
31 that you use to connect it up?
- 32 A. Yes.
- 33 Q. That is a fairly small low cost component?
- 34 A. Sometimes it is not the cost of the connection; it is a cost to install it.

1 Q. I wanted then to come back to dimensions.
2 A. Vortex dimensions or ...
3 Q. No, the dimensions of the tank which you say varied. I think we are now in supplemental
4 bundle 2.
5 I do not know if the document that should be there is there. Have you got anything at tab
6 35, Madam?
7 THE CHAIRMAN: Yes, I have an exciting looking spreadsheet.
8 MR WILLIAMS: Have you got anything, Mr. Joyce?
9 A. Yes.
10 Q. Do you know what this document is?
11 A. It looks like Balmoral's prices.
12 Q. It is the spreadsheet that Balmoral prepared and submitted to the CMA as part of its
13 response to the statement of objections.
14 A. Yes.
15 THE CHAIRMAN: So this is not a contemporaneous document?
16 MR WILLIAMS: No, it is material Balmoral put together --
17 THE CHAIRMAN: That it prepared for the purposes of the --
18 MR WILLIAMS: -- for the CMA's purposes.
19 This spreadsheet, just to explain to the Tribunal, it is a very wide spreadsheet. You can see
20 at the top right-hand corner it goes to -- if you turn over the first page, which is a summary
21 sheet, you can see A to N across the top. Do you see that?
22 THE CHAIRMAN: Yes.
23 MR WILLIAMS: If you were to flick through to the back of the spreadsheet you will see Z and
24 AA on the right-hand side. That is because the spreadsheet is two pages of A3 wide, which
25 I appreciate is not very helpful, but if it is any consolation we are not going to go to the
26 extra width; we are only going to go to the first set of columns.
27 THE CHAIRMAN: Right, I see.
28 So you are saying that in column O, £8,000 -- I hope that is not in green because I should
29 not have said that.
30 MR WILLIAMS: No, green means Balmoral won it. The green identifies the tenders which
31 Balmoral won.
32 THE CHAIRMAN: Okay. So that £8,000 at cell 024 that is the same contract as A24.
33 MR WILLIAMS: Exactly, yes, but we do not need to go to the second lot of pages.
34 THE CHAIRMAN: Okay.

1 MR WILLIAMS: This is a bit small and unwieldy so if you will bear with me.
2 Just to explain to the Tribunal, because they will not have seen this before, on the left-hand
3 side you have the dates of the tender. Sometimes that date is a bit fluid because the tender
4 is put in and sometimes the job is won, so it is not always completely in line with what
5 other material might show. Anyway, you then have a quote number, the number of times
6 revised, whether it was invoiced, and that only applies to the ones that Balmoral won which
7 you can see in green, a job number. Then you have the client name, which is the contractor,
8 the client location, project title which will tell you the ultimate customer or some
9 information about the ultimate customer. Then you have diameter, height and capacity.
10 The number of tank quantity is the number of tanks in the order, and then the selling price.
11 I just wanted to look at the dimensions. Obviously this spreadsheet covers all of the
12 different sizes of tank.
13 So if you can start running your finger down the capacity column, you will see in line 14
14 there is a schools tank. Do you see that? It might be too small.
15 MS. DALY: It is not green.
16 MR WILLIAMS: No, it is not green, 28.5.
17 THE CHAIRMAN: In which row?
18 MR WILLIAMS: It is probably easier if you go down --
19 THE CHAIRMAN: I have that as a dairy in Aylesbury.
20 MR WILLIAMS: It is below that. It is St Columba's School, because it is a school's tank. It is
21 St Columba's School, Thurrock. It is 15, I am so sorry.
22 THE CHAIRMAN: Yes.
23 MR WILLIAMS: Mr. Joyce, can you see that?
24 A. Yes.
25 Q. The dimensions for that are 3.1 and 4.2?
26 A. Yes.
27 Q. Yes. If you can then just run your finger down to -- in fact we can just go to the next green
28 row. Can you see that the next one is 3.1 and 4.2 as well?
29 A. Yes.
30 Q. Then the next one below that is 3.1 and 4.2. Yes?
31 A. Yes.
32 Q. Then the next one, which are the next two green rows, they are 3.1 and 4.2 again, as is the
33 row underneath that. That is 3.1 and 4.2 as well. Yes?

1 If you go down again to the next 28.6, which is I think row 43, that is 3.1 and 4.2 as well.
2 One more -- I could keep going -- there is another one, Columbus School Islington, 3.1 and
3 4.2, 28.
4 Do you see that?
5 A. Mm-hmm.
6 Q. So we have just looked at a sample there. They were all exactly the same dimensions.
7 There are other examples.
8 A. Do you want to do the same on the 135s?
9 Q. Yes, we will do the same on the 135s as well. But there are other examples. I am not going
10 to put it too high. I am just putting it to you these were pretty standard. There was not a big
11 variation and it was not a big factor in affecting the cost?
12 A. Of course it is. What about transport? Do you want to talk about transport?
13 Q. We are talking about dimensions now actually.
14 A. Okay.
15 Q. Can we do the same thing for the 135s? There is variation. I could pick out some examples
16 a bit further down, but I have put the general point to you.
17 But you agree that all the examples we have just seen -- I did not stop at the second one --
18 they were all the same dimensions?
19 A. It is a small tank, 28, it is a bit difficult to change, yes. The bigger the tank the more
20 options you have got to alter the height and the diameter.
21 Q. Let us look at the 135 then. So the first one I can see is above the first green row. That is
22 6.2 and 4.9. Yes?
23 A. I see that.
24 Q. Are you with me?
25 A. Yes.
26 Q. Okay. Then the next one I can see is quite a long way down actually. It is Morrisons Plc
27 nationwide, which I think is around row 59?
28 A. Yes.
29 Q. That is 6.2 and 4.9 as well.
30 A. Yes.
31 Q. The next one is a bit further down. It is SE13522. That is 5.5 and 6.6 as opposed to 6.2 and
32 4.9. So it is a bit different but it is obviously not very different because you would not
33 expect --
34 THE CHAIRMAN: That is Tesco's Aberdeen I think.

1 MR WILLIAMS: I am so sorry, Madam, Tesco's Aberdeen. That is 5.5 and 6.6. So that is a bit
2 different from 6.2 and 4.9, but it is not a radical difference.

3 A. What do you mean by "radical"?

4 Q. It is not a big difference; it is not going to make a big difference to the cost?

5 A. Do you know about the cost? You cannot say that. You do not build tanks. There is
6 probably about 5% to 6% difference in the cost, roughly.

7 Q. If we move down again we see another example, which is another 5.5 to 6.6.

8 A. I get the point, yes. I am just saying, can we go back to 11 July 2012 and look at the
9 spreadsheet? You are looking at tanks in the future here. We are having a conversation on
10 11 July 2012.

11 Q. But these are all from 2011.

12 A. Right. What, the 135s?

13 Q. These are all from 2011, your spreadsheets?

14 A. They are quotations?

15 Q. Yes.

16 A. I am sorry, I am thinking of orders. I apologise.

17 Q. The only point I am making, Mr. Joyce, is that the dimensions for these tanks might vary a
18 bit but that did not stop you having a completely coherent conversation about the price
19 points that you were discussing at the meeting.

20 A. I talk about the price points having sold one tank, yes. I talk about the price points based on
21 what was going on in the market. I talk about the price points as a way to try and move this
22 conversation on with a bunch of competitors.

23 Q. I think the only item we have not covered is referred to in your first witness statement,
24 which is the vortex inhibitor. This is tab 2 of the bundle. We have covered most of these
25 items now. The only item I think we have not covered is vortex inhibitor suction height.

26 A. Yes.

27 Q. Am I right in thinking this is a matter of making some adjustments --

28 A. On site, yes.

29 Q. -- so you can put the vortex inhibitor at a different height?

30 A. Yes, you have to cut the pipe for --

31 THE CHAIRMAN: Sorry?

32 A. The vortex meets up with the supplier's pipework. So you have almost got to cut the height
33 of the pipe to line up with the inlet of the supplier. It can vary once you get to site. That is
34 what they are talking about; the suction pipe can vary.

1 MR WILLIAMS: It is a difference between more or less pipe; is that right?

2 A. Yes. That is not the cost.

3 Q. It is a minimal cost item?

4 A. Yes.

5 MR WILLIAMS: It is 25 past 4, Madam.

6 A. You never mentioned transport?

7 Q. Well --

8 A. You are smiling. To deliver a tank from Llantrisant into London is about £500. To deliver
9 it from Llantrisant by hiab to say Glasgow or Edinburgh is about £1,200. So the transport
10 has a big effect. Transport and installation are very costly factors when you are looking at
11 cylindrical tanks.

12 Q. The reality is that you have had a conversation with Mr. Snee and Mr. Dean for well over an
13 hour about these figures and none of you at any point ask what difference, for example,
14 transportation makes?

15 A. Because I was not interested.

16 Q. But they were interested, were they not?

17 A. No, they were not that interested. They never asked about it. They were more interested in
18 the primary objective, to talk to me about joining a cartel possibly. No? It is nice to have
19 your eyes and your ears open but it is pointless if your mind is closed to exactly what was
20 going on in this place on that day. I was there for a different purpose from these two guys,
21 an absolutely different purpose.

22 Q. They were obviously interested in your prices and if they needed to ask you questions about
23 for example transportation for the information to be useful they would have done it?

24 A. No. They already knew the prices. Okay, we are going over old ground here.

25 MR WILLIAMS: Madam, I see the time.

26 THE CHAIRMAN: Yes.

27 MR WILLIAMS: It is probably not worth going into a new topic.

28 THE CHAIRMAN: Yes, all right.

29 Thank you very much. You are going to have to come back tomorrow morning I am afraid,
30 Mr. Joyce, and what I said to you over the short break applies overnight. So you are going
31 to have to be rather anti-social, I am afraid, and not have any discussions with anybody on
32 your team or anybody else about your case. All right.

33 A. I understand.

34 THE CHAIRMAN: We will see you at 10.30 tomorrow morning.

1 Yes, Mr. Williams.

2 MR WILLIAMS: I am more than two-thirds of the way through and obviously I now have the
3 chance to look at my questions overnight.

4 THE CHAIRMAN: Right. I am expecting you to sit down at 11 o'clock tomorrow morning and
5 that will give us time to have Mr. Snee's cross-examination, because this was only supposed
6 to overrun a little bit into tomorrow morning. So bear that in mind when you are
7 considering your questions.

8 MR WILLIAMS: Madam, I might need 45 minutes. I can plan for 45 minutes. I think it is going
9 to be difficult. You have seen there is really a lot of detail even on that accessories issue
10 alone, and I do have to put the rest of the case, Madam.

11 THE CHAIRMAN: Yes.

12 MR WILLIAMS: Realistically I should be asking you for an hour.

13 THE CHAIRMAN: Mr. O'Donoghue, how long will you need with Mr. Snee?

14 MR. O'DONOGHUE: Madam, I will have some re-examination. There was an indication at the
15 pre-trial review that there was at least an expectation that Mr. Williams would finish in half
16 a day with Mr. Joyce. In fact he has had slightly more than half a day. We are in a difficult
17 position because of course Mr. Snee was at the meeting for much longer than Mr. Joyce. It
18 is bizarre and frankly unfair that we would have less time with Mr. Snee than he has with
19 Mr. Joyce. So we are concerned.

20 MR WILLIAMS: Madam, I am not seeking to limit Mr. O'Donoghue's cross-examination
21 tomorrow. I just want to put my case. I think realistically, in fairness to the CMA, I should
22 be asking you for until the shorthand writer's break tomorrow. I will do my best to cut it
23 down. I will cut it down and finish by then. But I have to put that detail. That is detail that
24 Mr. Joyce has put forward in his statement. That has taken half an hour practically. So I
25 hope I am not prolonging the cross-examination but I do have to deal with these matters.

26 THE CHAIRMAN: All right. You said that you want 45 minutes. That would be until a quarter
27 past 11. All right. I think you will have to make do with that. Thank you very much. We
28 will see you at 10.30.

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