



Neutral citation [2017] CAT 23

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1277/1/12/17

Victoria House  
Bloomsbury Place  
London WC1A 2EB

6 October 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

- v -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

- and -

Heard at Victoria House on 17 to 20 July 2017

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**JUDGMENT**

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## **APPEARANCES**

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

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

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## A. INTRODUCTION

1. On 11 July 2012 three men met in a syndicate room at the Appleby Magna Best Western Hotel in Tamworth ('the 11 July Meeting'). Each of them represented a company supplying the market for cylindrical galvanised steel tanks ('CGSTs') which are used as part of a building's fire suppression sprinkler system. The men were Nigel Snee, Managing Director of the company Franklin Hodge Industries Ltd, Clive Dean, Managing Director of the company Kondea Water Supplies Ltd and Allan Joyce from the first appellant company Balmoral Tanks Ltd. Two of those companies, Franklin Hodge Industries Ltd ('Franklin Hodge') and Kondea Water Supplies Ltd ('Kondea') had for several years been parties, together with other suppliers of CGSTs, to a cartel agreement pursuant to which they regularly divided up the market by allocating customers amongst themselves and fixed the prices at which they supplied those customers. Another party to that cartel was the supplier Galglass Limited ('Galglass'). Its Managing Director, Nick Stringer, was supposed to attend the 11 July Meeting but was unable to do so because he was ill. The appellants were a new entrant to the market and since their entry about six months before they had competed vigorously with the cartel members and, unsurprisingly, won a great deal of business from them by pushing down the prices which customers had to pay for their tanks by as much as 20 per cent. The men had met together on a number of occasions over the previous six months and on those occasions, as well as in the course of many earlier phone calls, Mr Snee and Mr Dean had complained to Mr Joyce about the disruption that Balmoral Tanks was causing in the market and that Balmoral Tanks' prices were too low. It is accepted that the - or at least a - purpose of the 11 July Meeting was for Mr Snee and Mr Dean to try once again to persuade Mr Joyce of the benefits of the First Appellant joining the cartel thereby putting an end to further competition and restoring so far as possible earlier higher tank prices.
2. The meeting at the Best Western Hotel lasted about an hour and a half. At the end of the meeting, Mr Dean and Mr Joyce left Mr Snee alone in the room and Mr Snee made a number of phone calls to his colleagues in which he recounted to them what had just happened. What the three men did not know

was that all their discussions were being covertly filmed by the Respondent, the Competition and Markets Authority ('the CMA').<sup>1</sup> The meeting and those phone calls, captured in an audio-visual recording, formed the basis of an infringement decision adopted by the CMA on 19 December 2016 called "Galvanised steel tanks for water storage information exchange infringement" (CE/9691/12) ('the Information Exchange Decision'). The CMA found that at, or shortly after the meeting Franklin Hodge, Kondea, Galglass and the First Appellant shared commercially sensitive information regarding their current pricing and future pricing intentions for CGSTs. The information exchanged at the meeting (or subsequent to the meeting in the case of Galglass) related, the CMA found, both to specific contracts for which they were supposed to be putting in competing bids and to generic pricing strategies for certain types of CGSTs. The CMA decided that this was a concerted practice which had the object of preventing, restricting or distorting competition, contrary to Article 101(1) of the Treaty on the Functioning of the European Union and to the Chapter 1 prohibition, that is the prohibition contained in section 2 of the Competition Act 1998 ('the Competition Act').

3. The CMA imposed a fine of £130,000 on Balmoral. It did not impose a fine on the other parties to this concerted practice. The CMA said that was because those parties were already being fined as a result of another infringement decision adopted by the CMA also on 19 December 2016. That decision ('the Main Cartel Decision') found that between 29 April 2005 and 27 November 2012, four companies namely Franklin Hodge, Kondea, Galglass and CST Industries (UK) Limited ('CST') participated in bid rigging, price-fixing and market sharing in relation to the supply of CGSTs in the United Kingdom. The CMA found that the Main Cartel was a breach of Article 101 and the Chapter 1 prohibition because it had the object of restricting competition. The fourth party to the Main Cartel, CST, had been the whistleblower alerting the CMA to the existence of the Main Cartel when it applied in May 2012 for leniency under the CMA's leniency programme, thereby earning immunity from penalty. The penalties imposed on the parties to the Main Cartel were

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<sup>1</sup> The earlier stages of the investigation were undertaken by the Office of Fair Trading ('OFT'), the functions of which were transferred to the Competition and Markets Authority from 1 April 2014. We refer to the investigating body and the Respondent as the CMA throughout this judgment.

£2,015,135 for Franklin Hodge, £22,248 for Kondea and £587,926 for Galglass.

4. The First Appellant ('Balmoral Tanks') is based in Aberdeen and is privately owned. It was incorporated on 12 April 2006 and since 2007 it has been 100 per cent owned by the Second Appellant Balmoral Group Holdings Limited ('Balmoral Group'). The two appellants (together 'Balmoral') sell other types of tanks and have become one of Europe's leading tank manufacturers. The CMA found for the purpose of imposing the penalty that Balmoral Group is jointly and severally liable with Balmoral Tanks for the Information Exchange Infringement and for the payment of the penalty imposed by the CMA.
5. Balmoral brings this appeal under section 46 of the Competition Act challenging the CMA's finding in the Information Exchange Decision that the 11 July Meeting gave rise to a concerted practice whereby confidential information was exchanged between the alleged parties. It also challenges the CMA's decision to impose a fine on Balmoral and the amount of that fine. Balmoral contends that the CMA has fundamentally misunderstood what was happening at the meeting and has incorrectly characterised both factually and legally what took place in that syndicate room. It argues that no confidential information was disclosed; nothing was said which was useful to any of the participants. At most, there were a handful of generic remarks made by Mr Joyce as regards Balmoral's pricing. The purpose of these remarks was to fob off the cartel members during a meeting in which Mr Joyce felt intensely uncomfortable. The result of the meeting was simply to confirm to Mr Snee and Mr Dean that Balmoral refused to join the Main Cartel and had every intention of continuing to compete vigorously for business in the market.
6. Balmoral has always made it clear that this appeal is brought because of the company's real and deeply held sense of grievance at how it has been treated by the CMA. The CMA has never suggested that Balmoral was a party to the Main Cartel. Balmoral has cooperated with the CMA throughout, including as we describe below by putting forward Mr Joyce to give evidence for the prosecution in criminal proceedings brought against Mr Snee, Mr Stringer and Mr Dean. Balmoral says that the CMA was happy to benefit from that

cooperation, in particular by presenting Mr Joyce as a credible witness to wrongdoing when it suited them for the criminal prosecution and then disregard or disbelieve his evidence when it did not suit them in the civil proceedings. Further, Balmoral believes it has done everything possible to promote competition in this market for the benefit of customers. In both the Main Cartel Decision, and the Information Exchange Decision the CMA recognised that although the Main Cartel continued to operate for a few months after the 11 July Meeting, it was Balmoral's entrance into the market, competing for business and refusing to join the Main Cartel that greatly weakened the cartel by making it impossible for the cartel members to continue to operate the customer sharing and price fixing arrangement that had seriously distorted the market for years. Yet Balmoral finds itself the subject of a separate infringement decision and a penalty larger than that imposed on two of the parties to the Main Cartel. As Mr Joyce says in his witness statement in these proceedings, he regards this as completely unfair and as not being proper conduct on the part of a public body:

“68. This challenge is not about money. Balmoral fully expects its costs in bringing this challenge to far outweigh the penalty the CMA has imposed on it. The reason we are spending that money is because Balmoral takes seriously its commitment to fair and proper competition, and it treasures its hard-won reputation as a credible and professional business. This appeal is therefore personal to me and the company. I have worked for Balmoral for just over 22 years and take great pride in the service it provides and the reputation it has earned.

69. The Decision has unfairly, and wrongly, tarnished that reputation. Balmoral's hope is that, through these proceedings, it will succeed in setting the record straight and make clear that, far from engaging in anti-competitive conduct with the Cartel, Balmoral brought it to an end through fair, lawful and proper competitive practices.”

7. The CMA invites the Tribunal to uphold the Information Exchange Decision and the penalty imposed on Balmoral. It says that it has acknowledged the beneficial conduct of Balmoral by finding that it never became a party to the Main Cartel and by setting the penalty imposed for the information exchange infringement at a very low level. Without that beneficial conduct, the penalty imposed on Balmoral for this infringement would have been many orders of magnitude greater than £130,000. It says there is no doubt that the discussions at the 11 July Meeting crossed the line between anodyne discussion about

generic pricing or about the state of the market into the disclosure of future pricing intentions likely to have an effect on the prices that competitors quoted when bidding for future business.

## **B. BACKGROUND**

### **(1) Cylindrical galvanised steel tanks**

8. CGSTs are used for water storage primarily for the purposes of fire suppression, serving sprinkler systems in buildings in the UK. Sprinkler systems are usually installed at large commercial and some public-sector premises such as those of retailers, warehouse operators, office buildings and schools. The demand for these systems is driven by the requirements of the insurance industry, the recommendations and/or expectations of the Fire and Rescue Service, the Government, and property owners. CGSTs are made from flat sheets of galvanised steel, assembled on-site on foundations (usually concrete) and are lined to prevent corrosion. Accessories connect them to the sprinkler system and control water flow as they are replenished from the mains. One accessory relevant in the present case is a device known as a vortex inhibitor. A vortex inhibitor stops the pump within the tank from drawing in air if the water level gets too low and allows a safer and more efficient operation of the tank. Vortex inhibitors must be fitted to CGSTs used in a fire suppression sprinkler system.
9. Tanks can be cylindrical or rectangular in shape, with the shape generally being determined by the location of the tank. Broadly speaking, CGSTs are preferred for outdoor locations and are cheaper to produce, especially in larger sizes. The tanks are built to order to fit the requirements of the customer's specific needs, but typical volumes for CGSTs are 27-30m<sup>3</sup> (often used for schools) and 135m<sup>3</sup> (often used for supermarkets). The contractor bidding to provide the fire suppression system to a large building project will generally request bids from a number of CGST suppliers. Major fire suppression contractors – and hence the suppliers' main customers - include Tyco Fire Products Manufacturing Limited ('Tyco'), Compco Fire Systems Limited ('Compco') and Hall & Kay Fire Services Limited ('Hall & Kay'). The tank



supplier who wins the bid will then build the tank on-site, generally under the supervision of the contractor. With the exception of Kondea, the parties supplied CGSTs as part of a range of tanks made from other materials. Kondea supplied only CGSTs.

10. End-users' insurers typically require the use of certified products for fire suppression, so for most contracts for the supply of tanks used in fire suppression systems the tanks have to meet certain industry standards. In the United Kingdom, the Loss Prevention Certification Board ('LPCB') adopted the LPS 1276 standard in 2009 to implement the European Union's EN 12845 standard. The CMA found (paragraph 2.13 of the Information Exchange Decision) that as CGSTs are built to the same standards, they are a commoditised product for which the predominant parameter of competition is price, though customer service and after-care can also be factors.

**(2) Balmoral's market entry and early meetings**

11. Until Balmoral's entry into the GST market in early 2012, CST UK, Galglass and Franklin Hodge were the only UK-based, LPCB approved manufacturers of GSTs and (together with Tyco) vortex inhibitors.
12. At the time Balmoral Tanks entered the market, the Main Cartel had been in operation for some years. The CMA found in the Main Cartel Decision that the Main Cartel started at a time when competition between the parties was particularly strong, with customers playing the suppliers off against each other on quotes tendered, putting pressure on the competing manufacturers to lower prices for the CGSTs in order to retain business. Mr Snee said that manufacturers were "cutting each other's throats on price to win work with the various contractors". This was pushing margins down to single figures. As often happens, the Main Cartel was started in the fringes of meetings held for legitimate purposes to discuss LPCB standards. Mr Snee explained: (see paragraph 3.7 of the Main Cartel Decision)

"I believe it was at just such a meeting of the manufacturers, essentially arranged to discuss LPCB standards, attended by Ian Dixon of CST, Nick Stringer of Galglass and Clive Dean of Kondea, that the idea or suggestion

was made that we should stop cutting each other's throats on prices and that a sensible pricing policy for the tanks should be restored ... We agreed that we all supplied fairly identical products and therefore should be able to charge a respectable price without the necessity to fight each other for each and every contract, simply because the contractors forced us to drop our prices in order to win their work.”

13. The CMA found that while the parties to the Main Cartel met for legitimate commercial purposes, such as the development of the new LPCB tank standard and ongoing commercial supply relationships, it was clear from the witness and documentary evidence that one of the main purposes of the meetings was to discuss and agree on the allocation of customers between them and to discuss and agree on the prices of CGSTs so that each undertaking would win bids from the customers allocated to it (referred to as its gold customers) and lose bids from customers allocated to its competitors (referred to as its silver customers).
14. Balmoral Tanks obtained LPCB approval for its CGST by the end of 2011 and delivered its first certified CGST in February 2012. At the time it entered the market Balmoral did not have approval for its own vortex inhibitor and so had to acquire these from its rival CST. Balmoral received LPCB approval for its own design of vortex inhibitor in May 2012, prior to the 11 July Meeting. The last vortex inhibitors purchased from CST UK were delivered in June 2012.
15. The impact of Balmoral's entry into the market can be illustrated by the evidence in a witness statement provided in the criminal proceedings from the construction manager of Compco which is the largest independent operator in the sprinkler installation and maintenance market in the UK with an annual turnover of about £30 million. Compco's witness states that when Balmoral entered the market, they were very competitive on price and in 2012 they took about two thirds of Compco's business, all of it diverted from Franklin Hodge. He says that in 2011, Franklin Hodge was awarded £977,320 worth of business which was almost all of Compco's available work but in 2012 Franklin Hodge won only £253,800 with £660,253 going to Balmoral. He also records the price trend for the 135m<sup>3</sup> tanks. Franklin Hodge charged about £12,000 for such a tank in 2008 then, he says “the price went on a steady and steep climb to around £18,000 where it levelled until the end of 2011 to the

beginning of 2012 when Balmoral came into the market with its aggressive pricing”. Mr Snee, in his evidence in these proceedings confirmed those figures.

16. Balmoral’s conduct was discussed by the parties to the Main Cartel. They decided to try to persuade Balmoral to join the market sharing and price fixing arrangement. Mr Snee at one point tried to contact Norman Ross at Balmoral Tanks, since he was the sales director for the company. However, at a meeting in January 2012, Mr Joyce told Mr Snee that he should not try to contact Norman Ross to discuss these matters but that all discussions should be channelled through him. Mr Joyce was thereafter invited to a number of meetings with the Main Cartel members over the first half of 2012. The CMA makes clear in the Information Exchange Decision that evidence of discussions between Balmoral and the other parties before July 2012 is relevant only by way of context to the meeting in July: see paragraph 3.7 of the Information Exchange Decision.
17. Over the next few months, Mr Joyce received many complaints from the other suppliers that the prices Balmoral was charging for CGSTs were too low and that it was winning too much work. Mr Joyce knocked the complaints back by saying that the company was new to the market and did not have a firm grasp of its costs base so they were still coming to terms with their costs and what the prices for the tanks should be. Mr Joyce made a contemporaneous note of one of the meetings held in February 2012. Both Mr Stringer and Mr Dean are recorded as having confirmed that Galglass, Franklin Hodge and Kondea met regularly, and that Mr Stringer invited Balmoral to the next meeting. Balmoral declined, with Mr Joyce recording:

“obviously we are not interested in discussions of this type, but at this moment in time we continue to purchase vortex inhibitors from [CST]. If we dismiss them, we could find ourselves with no supply of vortex inhibitors. Hopefully this problem will be eliminated soon with the launch of our own product.”

In the same note, Mr Joyce continues:

“we are very uneasy about the cozy way this market appears to be working, but will continue to appear we are interested in further discussions until the launch of our own vortex inhibitor.”

He concludes his note:

“I appreciate we have no interest in any form of collusion with the other players in this market, and will ensure we never compromise our business, people or brand during any conversations with them. We can't avoid meeting them in places such as the ATCM [sc. *Association of Tank and Cistern Manufacturers*] meeting, but this will be the extent of any dialogue once we complete the testing of our own Vortex Inhibitor.”

**(3) The Meeting on 11 July 2012**

18. Mr Snee said in a witness statement made on 14 June 2014 that his agenda for the 11 July Meeting in Tamworth was first and foremost to try and get Mr Joyce and Balmoral ‘on board with some form of the arrangement’. Mr Dean, Mr Snee and Mr Stringer agreed before the Meeting that their strategy would be to explain to Mr Joyce the benefits for Balmoral of having a sensible price, so that each manufacturer could operate within the market with healthy profit margins, rather than everyone fighting to obtain a high volume of sales but with a low profit margin. The Information Exchange Decision records that Balmoral’s personnel told the CMA that the purpose of the Meeting for them was to make it clear that Balmoral would be competing for business in the CGST sector and to put an end to attempts to involve Balmoral in any anti-competitive conduct but without stopping all legitimate contact between them.
19. We consider in more detail the key points of the discussions at the Meeting below. When quoting from the transcript of the Meeting we have written out in full the prices referred to for ease of exposition. After some initial discussions about football, tennis and the traffic, Mr Snee turned the conversation to the topic of pricing. Mr Dean asked Mr Joyce about progress with the preparation and implementation of the latest revision of Balmoral Tanks’ cost analysis for the tanks.
20. The discussion then turned to the upset generated amongst the suppliers by a very low bid made by Galglass. Mr Joyce referred to a bid for 135m<sup>3</sup> tanks for three Morrisons stores tendered by Tyco, which was won by Galglass at a

price of £14,650 per tank. He told the others that he had hoped to see Mr Stringer at the Meeting so he could ‘have a wee niggie’. Mr Joyce also told the others, soon after the discussion of pricing commenced, that he thought it was quite good that they could meet and ‘have a chat but the cards are on the table’; he thought that they could be frank with each other. Mr Dean told the others that he had previously rung Mr Stringer asking to be allowed to put in a serious bid for the three Morrisons’ stores since Kondea was struggling for work. Mr Dean reported that he had told Mr Stringer that Kondea would quote £16,000 but then Galglass bid £14,600. Mr Stringer had acknowledged that this had been a mistake on Galglass’ part.

21. The men discussed the damage caused by Galglass’ bid with Mr Snee commenting: ‘As we know from the conversation last time, we weren’t making obscene gross margins, what we expect is a cap, is a cap at mid 30s so, so £14,650 is just unsustainable, I think you just said that, you can’t run a business on that can you.’
22. Mr Joyce explained to Mr Snee and Mr Dean how Balmoral Tanks approaches winning business in the market, namely by competing not solely on price but also on brand and quality. He also acknowledged that Balmoral will never succeed in expelling all of the competitors from the market by driving down price. At that point Mr Snee told Mr Joyce about the existing customer allocation agreement whereby the other suppliers divide up customers amongst themselves. Mr Snee acknowledged that Balmoral Tanks was not prepared to go down that road and commented that this would make the position more complicated going forward for the Main Cartel members. However he also recognised that ‘customers like healthy players at the table’ so that there was a limit to the amount of work that Balmoral could win by reducing its prices.
23. The information exchanged at the meeting included price bands and prices quoted for specific contracts for the supply of CGSTs for schools and 135m<sup>3</sup> CGSTs for supermarkets. This was prompted by Mr Snee mentioning that he had persuaded the buyer at Compco to allow Franklin Hodge to quote for work which meant that Mr Snee was trying to guess what price Balmoral had

already quoted. Some of Mr Joyce's response is inaudible but he does indicate clearly that he regards the price of £14,650 as unsustainable.

24. Mr Joyce also refers to prices stabilising. Given that Balmoral submits a quote for all the work on offer, it expects to lose a majority of the business because it will not always be prepared to reduce the price quoted to win a particular job. There was then a discussion about the benefits of not giving in to customer pressure to reduce a price already quoted, with Mr Snee giving a particular bid for a contract for Sainsbury's as an example. Mr Joyce asks Mr Snee directly what price Franklin Hodge bid and was told that it was £16,800.
25. After a lengthy digression about other companies and business overseas, Mr Snee brought the conversation back to pricing. He summarised the position that those taking part in the market sharing arrangement will have to try to manage things as best they can without Balmoral. Mr Joyce responded:

“We can always pick the phone up and have a chat about it see where we are, make it quite clear where the bands are, if you go outside that band, on the low side then I'd like to think it won't be driven by us.”
26. At this point a more detailed discussion of pricing bands takes place, with all the men, including Mr Joyce, writing down notes of what is said. The discussion refers to past prices seen in the market, as an indication of what the right price for a tank would be. Mr Joyce complains about the tactics of the customers as this is why they have got to have the bands to work with, to keep to the market price. The men also discussed the difficulty of increasing prices once the customer has been offered or sold a tank at a very cheap price. Mr Joyce continued to take notes, for example when Mr Dean described the evolution of Kondea's prices for schools tanks and 135m<sup>3</sup> tanks and when Mr Dean was explaining to Mr Joyce that a customer had used a low quote provided to him by Norman Ross to beat down Kondea's price for schools tanks.
27. Mr Joyce left the Meeting first, with Mr Dean leaving shortly afterwards. Mr Snee then made three phone calls when he was alone in the syndicate room. The calls were to three of Franklin Hodge's sales staff. He described to them

the outcome of the Meeting, confirming that Balmoral was not prepared to take part in market sharing or the customer allocation. He also discussed with his colleagues the price that Franklin Hodge should quote in a bid it was preparing for a large contract with Compco. He said they should quote prices just below £9,000 for tanks for schools and just below £16,000 for size 135m<sup>3</sup> tanks. He said:

“I said to him at the moment we’re being told, we’re bidding £9,650 on schools tanks and we’re told that you’re below that. He [Allan Joyce] said yes we’re coming in around £9,500, he said we’ve sold tanks to, we’re selling tanks in the market place depending on who it is between £9,500 and £10,500 with ball-valve. On the 135 we’re between £15,000 and £17,000, and that’s, now he reckons that, £15,000 and £17,000 so, and those are the bands and he’s given instructions to his sales team not to drop below £9,500 and not to drop below £15,000 for a 135, that’s what.”

28. In his second call, Mr Snee says:

“Ok brilliant, just to add in something into the spice into the soup as it were, I’m the recipient of some information this morning that, we have to take this not with a pinch of salt, but it gives us an idea of where we are, I believe Balmoral are quoting, between, of the schools tanks, quoting between £9,500 and £10,500 and that’s a big band, I think with Compco probably with more toward the £9,500 with Compco, with Compco on schools jobs. On the 135, they’re quoting between £15,000 and £17,000 so...

[...]

Well it’s a fine balancing act, it’s a judgment isn’t it, this is why I’m giving you an indication of where I think Balmoral are so we can snick in under them but not, not .... Not sort of have to discount heavily at this stage, it’s a judgment call... I think we need, I was thinking that sort of level, not crazily below them, not £8,600 but certainly £9,300.

[...]

...Well maybe £15,800, sounds like I’m splitting hairs, £15,815, £15,850 something like that so it’s under £16,000 but, you know.”

29. In the third call he says:

“As of this morning I’ve come by some information shall we say ‘in inverted commas shall we say’ that Balmoral are for schools tanks, are now quoting and these are broad bands ok but between £9,500 and £10,500 for schools tanks and I believe they are around the £9,500 figure for Compco, at the moment erm yep

[...]

And from the information I've had I think Balmoral want to be in around £16,000 on 135's. They want to be around that figure. Yeah. Yeah, yeah, but I think that Mike was just talking about £15,850. We were going to talk to Russ about it, just under the £16,000 effectively. Knowing that they're probably going to come back with some more off as well. ”

30. Later the same day Franklin Hodge submitted a revised bid to Compco, which showed the 135m<sup>3</sup> tanks being offered at a revised price of £15,850, as suggested by Mr Snee on his calls to his colleagues following the discussion with Balmoral Tanks. This job was ultimately won by Balmoral, who submitted a bid of £14,900 (£100 below the lower end of the band discussed for 135m<sup>3</sup> tanks) on 13 July 2012.
31. Mr Joyce says in his evidence that after the Meeting he continued to receive some calls and texts from the others, although these ‘began to peter out.’ He notes that there continued to be legitimate contact between the parties to the information exchange, for example in relation to industry issues addressed by the ATCM and British Automatic Fire Sprinkler Association. The CMA accepts that between July and November 2012 there was limited contact between the attendees and there is no evidence that further information was exchanged. The CMA does not find that the Information Exchange Infringement continued after July 2012: see paragraph 3.79.
32. In the Main Cartel Decision, the CMA concludes that ‘The evidence is mixed as to the cartel’s operation following the meeting on 11 July 2012’: (see paragraph 3.98 of that Decision). However it finds that despite Balmoral’s refusal to join, the Main Cartel continued to operate as between its members up until the OFT’s inspections in November 2012. The CMA records that Mr Snee’s evidence was that after the 11 July Meeting the Main Cartel ‘fizzled out’ and that they ‘effectively went back to the way things were before the agreement’ (para 3.105) but the CMA did not accept that.

## **C. THE LAW**

33. Article 101 of the Treaty on the Functioning of the European Union (‘Article 101’) provides:



“(1) The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

34. Section 2(1) of the Competition Act provides:

“(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which –

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.”

35. Most of the cases we were referred to were from the Court of Justice and the General Court in Luxembourg. Those cases are equally relevant to the assessment of the infringement under the Competition Act as under Article 101. This is because section 60 of the Competition Act provides that in determining questions arising under the Chapter 1 prohibition, the CMA and the Tribunal on this appeal are required to ensure so far as possible that questions arising under the Chapter 1 prohibition in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising under EU law. That of course includes ensuring consistency with the jurisprudence of the Court of Justice and General Court.

36. Paragraph 3 of Schedule 8 to the Competition Act provides that the Tribunal's task on this appeal under section 46 of the Competition Act is to determine the appeal on the merits by reference to the grounds of appeal set out in Balmoral's notice of appeal. We bear in mind that the legal burden of proof lies with the CMA to establish an infringement of Article 101 and of the Chapter 1 prohibition to the civil standard of balance of probabilities. We must also take account of the presumption of innocence, enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms in the context of infringements of the Competition Act resulting in the imposition of financial penalties.
37. The European Courts have consistently defined the concept of a concerted practice as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition": see for example Case 48/69 *ICI v Commission* EU:C:1972:70, paragraph 64.
38. Many of the later cases concerning the exchange of confidential information explain the borderline between permissible and impermissible conduct by citing the passage from Cases 40/73, etc *Suiker Unie v Commission* EU:C:1975:174:

"173. The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.

174. Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."

39. The European Courts have emphasised that one key aspect of the concept of a concerted practice is that in a properly functioning competitive market, competitors should not know how their competitors are likely to behave. A reduction in that uncertainty is a key part of the concept of a concerted practice. As the General Court said in Cases T-25/95 etc. *Cimenteries CBR v Commission* EU:T:2000:77:

“1849. ... the concept of concerted practice does in fact imply the existence of reciprocal contacts ... That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it ...

...

1852. ... In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market ... It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market.” (references to authorities omitted)

40. The Court of Justice has also held that, in order to establish a concerted practice, it is not enough to prove that the parties concerted together, there must also be conduct on the market pursuant to those collusive practices and ‘a relationship of cause and effect between the two’: see para 118 of Case C-49/92P *Commission v Anic Partecipazioni* EU:C:1999:356. However, there is a presumption, which can be rebutted by evidence from the participants, that where the parties taking part in collusive arrangements remain active on the market, they will take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period.
41. The strictness of the law in this regard reflects the fact that it is hard to think of any legitimate reason why competitors should sit together and discuss prices at all. This was echoed in the judgment of the CAT in the *Replica Football Kits* case, *JJB Sports v Office of Fair Trading* [2004] CAT 17, paragraph 873: “The fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition, which strictly precludes any direct or indirect contact

between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions.”.

42. Cases T-202/98 etc *Tate & Lyle* EU:T:2001:185 concerned the sugar market in the United Kingdom which was dominated by British Sugar, its main competitor being Tate & Lyle. Between 1984 and 1986 British Sugar carried on a price war which led to abnormally low prices on the industrial and retail sugar markets. British Sugar gave undertakings to the European Commission (‘the Commission’) that it would not abuse its dominant position by predatory pricing. Shortly before British Sugar gave those undertakings, a meeting took place between representatives of British Sugar and Tate & Lyle at which British Sugar announced the end of the price war. There were 18 subsequent meetings attended by the leading sugar merchants at which British Sugar gave information to all the participants concerning its future prices. British Sugar and Tate & Lyle also met on a number of occasions to discuss retail sugar prices with British Sugar giving its price tables to Tate & Lyle on three occasions.
  
43. British Sugar argued in the appeal against the Commission’s finding of infringement that they did not implement any agreement or concerted practice since their market behaviour was not influenced by the information obtained during those meetings. British Sugar, the price leader, merely made unilateral declarations as to its future pricing policy. Moreover they argued that the information they provided was already known in the market since, in addition to the market’s natural transparency, British Sugar had informally notified its customers of alterations in its prices in a systematic manner before the disputed meetings took place. Thus Tate & Lyle were aware of British Sugar’s prices before their official market release but not before British Sugar’s customers were informed of them. The General Court held that the meetings had an anti-competitive purpose. The Commission was therefore right to take the view that the purpose of the meetings was to restrict competition by the coordination of pricing policies. The General Court went on to hold that the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice (paragraph 54). There were direct contacts whereby British

Sugar informed its competitors of the conduct which it intended to adopt on the sugar market in Great Britain. By exchanging information about the prices which they intended to adopt, the undertakings not only pursued the aim of eliminating in advance uncertainty about the future conduct of their competitors but also could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which they intended to pursue on the market. The General Court rejected the argument that the price information was known to British Sugar's customers before it was notified to the participants at the disputed meetings and that therefore British Sugar did not reveal to its competitors during those meetings information which they could not already gather on the market. The General Court said:

“60. That fact, even if established, has no relevance in the circumstances of this case. First, even if British Sugar did first notify its customers, individually and on a regular basis, of the prices which it intended to charge, that fact does not imply that, at that time, those prices constituted objective market data that were readily accessible. Moreover, it is undisputed that the meetings in question preceded the release onto the market of the information that was notified of those meetings. Second, the organisation of the disputed meetings allowed the participants to become aware of that information more simply, rapidly and directly than they would from the market. Third, [...] the systematic participation of the applicant undertakings in the meetings in question allowed them to create a climate of mutual certainty as to their future pricing policies.”

44. The General Court went on to hold that there was no need to take account of the concrete effects of an agreement where it was apparent, as it was in that case, that it had as its object the prevention, restriction or distortion of competition.
45. Case C-8/08 *T-Mobile Netherlands BV v Dutch Competition Authority* EU:C:2009:343 (*T-Mobile*) concerned a meeting between five operators in the Netherlands each of which had their own mobile telephone network. Access to the market for mobile telecommunications services was only possible through the conclusion of an agreement with one or more of those five operators. On 13 June 2001 representatives of the operators held a meeting at which they discussed, amongst other things, the reduction of standard dealer remuneration for post-paid subscriptions. The discussions included the exchange of confidential information. The Dutch Competition

Authority found that the operators had concluded an agreement or entered into a concerted practice restricting competition and imposed fines. The appellate court referred questions to the Court of Justice. The Court of Justice first confirmed its earlier jurisprudence on the application of the competition rules to the exchange of information between competitors. The Court of Justice then went on:

“33. ... [I]t does, nonetheless, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such conduct is to create conditions of competition which do not correspond to the normal conditions of the marketing question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market ...”

34. At paragraph 88 et seq of [Case T-35/92 John Deere EU:T:1994:259], the Court therefore held concentrated oligopolistic market, such as the market in the main proceedings, the exchange of information was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably competition which exists between traders.

35. It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted. ...”

46. The Court of Justice went on to consider the requirement of a causal connection between the concerted practice and the market conduct of the undertakings participating in the practice. The Court of Justice held that the presumption of a causal connection formulated by the EU Courts in the application of Article 101 was an integral part of applicable EU law. The national court was therefore required, subject to the undertakings proving to the contrary, to apply the presumption of causal connection according to which where they remain active on the market, the undertakings are presumed to take account of the information exchange with their competitors (paragraph 53). Moreover, the Court of Justice held that this was the case even if the concerted action was the result of a single meeting, although it recognised that the presumption is more compelling where undertakings have concerted on a regular basis over a long period. The Court of Justice said:

“59. Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the

Treaty. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.

60. ... the number, frequency and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted actions in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

61. In those circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the marketing question.”

47. Case T-588/08 *Dole Food Company v Commission* EU:T:2013:130 (*‘Dole’*) concerned bilateral communications between suppliers of bananas. The factual background was that the three banana suppliers set their quotation prices for their respective brands each week on a Thursday morning and announced them to their customers. The prices ultimately paid by retailers and distributors for bananas, known as actual prices or transaction prices could be the result either of negotiations taking place on a weekly basis after the announcement of the quotation price or set by a pre-established pricing formula agreed between that customer and the supplier. The bilateral communications between the parties to the concerted practice usually took place on Wednesdays before the undertakings concerned set their quotation prices. They discussed banana price setting factors, that is to say factors relevant to the setting of the quotation prices for the forthcoming week. They also discussed or disclosed price trends or gave indications of quotation prices for the forthcoming week. After setting their quotation prices on the Thursday morning, the undertakings concerned exchanged their quotation prices bilaterally. This enabled them to

monitor the individual pricing decisions in fact taken and compare them to the previous pre-pricing communications. According to the Commission, the quotation prices served at least as market signals, trends and/or indications as to the intended development of banana prices and were relevant for the banana trade and the prices obtained. In some transactions moreover the actual price was directly linked to quotation prices through the operation of a formula based on the quotation prices. The Commission found that the undertakings had participated in a concerted practice and because they had remained active in the banana trade must necessarily have taken account of the information received from competitors when determining their conduct on the market. Substantial fines were imposed on those participants that were not granted immunity under the leniency regime.

48. The appellants argued that the conduct in issue consisted in “a mere exchange of information that did not form part of a broader cartel and was thus not a restriction of competition by object”. The fact that information exchange potentially reduced uncertainty over future pricing policies did not provide sufficient grounds, they argued, to classify it as a restriction of competition by object where it was not part of a broader cartel arrangement. The General Court disagreed.
49. The General Court in *Dole* agreed with the Commission’s analysis that the bilateral pre-pricing communications decreased uncertainty surrounding the future decisions of the undertakings concerned on quotation prices, which constitute announced prices and that concertation on such prices may constitute an infringement by object.
50. The dividing line between information that is confidential and that which it was not was considered by the General Court in Case T-762/14 *Koninklijke Philips NV v Commission* EU:T:2016:738 (*‘Smart Chips’*). There the appellant argued that the information the parties had exchanged was inaccurate and misleading and that it was not, overall, competitively sensitive. It did not remove strategic uncertainty to a sufficient extent to constitute a restriction of competition by object. The General Court referred to *Dole* as authority for the proposition that an exchange of information which is capable of removing



uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings in their conduct on the market must be regarded as pursuing an anti-competitive object (paragraph 62). In analysing the nature of the price information exchange in that case, the Commission had found that the parties had discussed, at the very least, the price that a named customer had requested from them for 2004, the intention of Samsung and of the applicants not to offer the price requested by that customer (that is \$0.80 per chip) and of their intention not to offer the product for a price less than \$1.0. The General Court held that such an exchange of information relating to the future pricing strategy of the undertaking in general and of a customer in particular is capable of affecting normal competition.

#### **D. THE CMA'S INVESTIGATION**

51. The CMA's investigation of the Main Cartel was prompted by the approach on 2 May 2012 from CST seeking leniency in return for providing information. The CMA opened an investigation into the conduct covered by the Main Cartel Infringement and the Information Exchange Infringement on 12 September 2012, in parallel with a related criminal investigation into whether certain individual employees of Franklin Hodge, Galglass and Kondea had committed the cartel offence contrary to section 188 of the Enterprise Act 2002 ('The Enterprise Act'). The (criminal) cartel offence was introduced by section 188 of the Enterprise Act and entered into force on 20 June 2003. Section 188 provided that an individual is guilty of an offence if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings. The six types of arrangements that fall within this offence are listed at section 188(2) and include price fixing, customer allocation and bid rigging but not information exchanges. Using its statutory powers, on 27 November 2012 the CMA carried out unannounced searches at the premises of Franklin Hodge, Galglass, Kondea and Balmoral Tanks. Later the CMA interviewed the parties' employees and seized documents and other evidence.
52. Mr Joyce was initially arrested at Glasgow airport and taken to Staffordshire where he was interviewed. The CMA decided that Mr Joyce was innocent of

any criminal activity. Mr Joyce says he was completely shocked at his arrest. Despite what Mr Joyce considered the CMA's unnecessary and heavy handed treatment of him, he agreed to assist in the prosecution of Mr Stringer and Mr Dean.

53. The criminal investigation culminated in the prosecution of three individuals. Mr Snee pleaded guilty to the cartel offence and was sentenced to 6 months' imprisonment, suspended for 12 months, and ordered to perform 120 hours of community service within 12 months.
54. The criminal trial of Mr Dean and Mr Stringer took place in June 2015 at Southwark Crown Court before His Honour Judge Goymer. The two men were acquitted. In its press release following the verdict, the CMA accepted that the jury were not persuaded that Mr Stringer and Mr Dean acted dishonestly, and that they should, therefore, be acquitted. However, the CMA noted that the case was brought under the law as it applied to conduct before April 2014, under which the cartel offence was only committed where the individuals concerned were dishonest. Following a change in the law brought about by the Enterprise and Regulatory Reform Act 2013, for conduct after 1 April 2014, it is no longer necessary for the CMA to prove individuals acted dishonestly to commit the cartel offence. The press release stated that the CMA was also conducting 'a related civil investigation' into whether businesses had infringed the Competition Act, although no assumption should be made as to whether that Act had been infringed.
55. Following the conclusion of the criminal proceedings, the CMA informed the parties that it had decided to continue its civil investigation under the Competition Act, and that it would address two separate alleged infringements, one in relation to the Main Cartel and one in respect of information exchange.
56. On 17 March 2016 the CMA entered into settlement agreements with Franklin Hodge, Kondea and Galglass under which those undertakings admitted their infringements in respect of both the Main Cartel Infringement and the Information Exchange Infringement and agreed to pay the fines the CMA

proposed to impose on them. On 26 May 2016, the CMA issued a statement of objections covering both infringements to the settling parties and CST. Balmoral made representations on several occasions in response to the statement of objections but the other parties did not.

57. Following ‘state of play’ discussions in October 2016, Balmoral was provided with a transcript of the audio-visual recording of the Meeting. There was some correspondence between Balmoral and the CMA as to the accuracy of the transcript resulting in a final version being issued later. The CMA says at paragraph 2.123 of the Information Exchange Decision:

“2.123 The CMA accepts that there are limited parts of the recording where the exact words being spoken cannot be clearly heard and that, as a result, the transcript is not a complete record of every word spoken at the meeting. However, the transcript is sufficiently complete and accurate that it can be relied on as evidence of the discussion which took place and, moreover, the nature of the discussions at the meeting is corroborated by other evidence. Any differences between the final version of the transcript and the original version or the version provided by Balmoral on 9 November 2016 are not material to the CMA’s finding of an infringement ... as set out in this decision.”

58. There are several indications in the transcript that the transcriber has not been able to catch what was said particularly in relation to Mr Joyce because he is facing away from the recording equipment, looking at Mr Snee who is directly facing the concealed camera, for almost all the meeting. These gaps are indicated in the transcript by the insertion of ‘[?]’ or ‘[inaudible]’. At the pre-trial review hearing before the Tribunal on 14 June 2017 it was agreed that the panel members would each be provided with a copy of the audio-visual recording of the Meeting together with a time-stamped copy of the transcript. Each panel member watched the recording privately and the panel convened on the morning of the first day of the hearing to watch the recording again together, outside court, with the transcript to hand. We noted that sometimes it is only one or two words that have been missed and occasionally it is a few seconds of speech. However, we are fully satisfied that the very great majority of what was said by the men at the Meeting can be heard and has been accurately transcribed. The transcript of their discussions is supplemented to some extent by Mr Snee’s description, in the phone calls he made after the others left, of what had been said.

## **E. THE CMA'S DECISIONS**

59. The CMA issued both the Main Cartel Decision and the Information Exchange Decision on 19 December 2016.
60. In both Decisions the CMA found that the relevant product market was the supply of CGSTs for water storage used in sprinkler systems and the relevant geographic market was the whole of the United Kingdom. There is no challenge to these findings in this appeal.
61. As regards the Information Exchange Infringement, the CMA found that the audio-visual recording of the Meeting demonstrates that although Balmoral refused to take part in any allocation of customers, Mr Joyce exchanged information regarding current pricing and future pricing intentions with the other attendees, including after the existence of the customer allocation arrangements was confirmed to him during the meeting.
62. The Information Exchange Decision sets out some quotations from the transcript when the three men were present. The CMA emphasises in the Information Exchange Decision, as it did in the appeal before us, that Mr Joyce remained at the meeting for over an hour after his initial refusal to join the customer allocation arrangement. In the following 14 paragraphs, the Information Exchange Decision sets out the lengthy passages from the transcript on which the CMA relies to establish the infringement, concluding with the comment that Balmoral was in fact both providing and actively seeking pricing and strategic information from its competitors that were present at the meeting, and also asking Kondea about CST's position.
63. In particular amongst quotations the CMA relies on as evidence of the Information Exchange Infringement they include:
- (1) Balmoral sharing its views on what pricing should be for specific tanks and that prices should move upwards (Transcript page 22 and 53):

“AJ ... Reading between the lines, there will be a low price, maybe a proper market price on the 135, anything below £15,000 is stupid. Back up

to where it should have been about £17,500, £18000. When we start getting below £15,000 and two big guys are battling over a Tyco at £14,600 and we're losing it at £14,600. It's bonkers. ”

At the end of the meeting Mr Joyce explains that he found the discussion to be ‘very positive’. Mr Snee then asks Mr Joyce ‘So no mark 7 price at this stage, but do you want to try to squeeze the price and get up as quickly as we can?’ Mr Joyce responds: ‘Yes, like I say the mark 7 would be in, erm, within that band. Pushing that band up, the top end rather than the bottom. ’

- (2) Mr Joyce volunteered the current prices at which Balmoral Tanks is selling school tanks and 135m<sup>3</sup> tanks (Transcript page 23):

“AJ ‘I will say that price is probably about .... the lowest one we did recently is about £9,500.

NS And that's what we thought. That's. .that's what we thought.

AJ The schools and the 135 are very similar £9,500, £10,500, £15,000 to 17,000.

NS OK.

CD I think £15,000 is far too low.

AJ No, but what I'm trying to say is ...

CD £16,000

AJ We're selling at that price, we're now below it, what I'm trying to get to say is you're hitting a level where you say, it's like GRP tanks, we know the price in the market. And I say to somebody, we've been in the game so long, why would we not know the price, quote them this price, quote them that price? If we think we've a 35% market share in GRP you say to Norman that's nearly six out of ten orders that we lose. Why do we get upset if we lose one? We don't have it all, we've got to just make sure we're taking our share at the right price. I think with this it's like trying to push and get it stabilised. For me anyway, I get a much, much better feel for the way things are settling out you know.”

- (3) The attendees provided each other with information about what their prices would be if asked to quote for a 135m<sup>3</sup> tanks in the future (Transcript page 49):

“CD What would you quote a 135 now? Not Arriva but if it just came out now.

AJ Say somewhere between £15,000 and £17,000. I wouldn't say it's always £16,000 as it has been... Some of that will be a reaction that you think what you've been told as well what other people are at now, yeah, erm, so that's why I'm saying we have taken some at a decent price. We have taken some at £15,000...but they haven't all been at £15,000.

CD What if it was just a tender at the moment, I'm just enquiring with an order to place?

AJ A one off tank, I would be surprised if it is less than £16,000. I'd say some of these things you might quote GRP tanks where someone wants a package [?] I actually give them a price for the whole lot rather than individual tank prices then that's a better way of doing it as well they might say you are a bit out on that, you're ok on that [?].

CD If you're trying to do it as a package you should only quote them 1 price, not individual prices.

AJ then you get some buyer "Do it separate", give them a chance to go to other people [?] I mean it does depend on who they are and what they've said to theirs?

CD I just mean an everyday spring comes along, for a 135 tank cos at the moment I'd be quoting similar to...

AJ [finishes CD's sentence]... £17,500.

CD May be we'll start high. Because if you start at £15,000".

- (4) Discussion about price bands for schools tanks going forward, with Mr Snee indicating that for school tanks the band was £9,500 to £10,500, Mr Dean saying that £9,500 is reasonable with the list price being £10,100: (Transcript pages 40 – 41)

"NS Cos that's kind of the target price that we were going for for schools in Scotland, was £10,100 but Barry said it in order to beat Balmoral, we're going to have to drop to around £9,900, that's what I've been told, I'm getting you straight.

AJ You see I've seen some at £10,200. I've seen £8,600 which is was a disaster.

NS Yeah we've not done £8,600

AJ I've seen below that £9,200 or £9,000 even that's low. £9,500, £10,500 is a target. If I hear anything from our guys that's anything above that will be exciting or below, that would be a concern ..."

- (5) Discussion about price bands for 135m<sup>3</sup> tanks (Transcript page 40)

"NS ... And the 135s? £14,650?

CD NO! [laughing],

AJ I've seen quite a few around about the £15,000 mark, so I'd say £15,000 to the £17,000 mark.

NS OK.

CD Well, I'd have thought a list price would have been £18,000 on a 135. That should be around about £17,000 that's with a ball-valve, with a ball valve should be about £18,000."

(6) During the Meeting, Mr Dean provided Kondea's price lists showing the strong downward progression of pricing over recent years, with a 135m<sup>3</sup> tank selling for £20,000 in January 2011, £21,000 in April 2011 but £19,000 in July 2011.

64. The CMA refers specifically to the discussions about future bids for contracts with Compco (footnotes omitted):

"3.52 Earlier in the meeting, Franklin Hodge asks if Balmoral Tanks has sold any CGSTs to Compco, getting an indication of the level of sales in the market from its competitor. Mr Snee later tells the others that Franklin Hodge intends to bid to win future Compco contracts, telling Mr Joyce that Franklin Hodge will 'bid close to but under' what Balmoral Tanks has offered. Mr Snee also gives a price range that Franklin Hodge will quote for school tanks on the future Compco contracts: 'I'm going to have to go closer to the £9,500 than £10,500, on schools that's not because I'm trying to drag the price down, it's because I've got to try to open the door.'

3.53 Mr Snee also discusses a recent pre-qualification bid Franklin Hodge has won for Hall & Kay and its intention not to reduce the price agreed with Hall & Kay " ... come hell or high water. If someone rings up and says well they're a bit cheaper cos even Hall and Kay have gone through the process of trying to reduce, duck, instead of constantly going to Franklin Hodge. You must now get 3 prices but we have rigidly stuck to the price we agreed and we won't move off that, mainly for credibility reason, that kind of supports the point, I'm not going to move from that."

3.54 All attendees take an active role in discussing what should be the target price bands for future bids for schools and 135m<sup>3</sup> tanks. Mr Snee summarises the position, once it is clear that Balmoral Tanks are not prepared to take part in customer allocation: '... Good. So coming back to where we were then, it's going to be a complicated picture isn't it, on the pricing front, this is like market sharing we going to have to manage it as best we can I suppose, is the conclusion we're coming to.'

3.55 Mr Joyce responds: 'We can always pick the phone up and have chat about it see where we are, make it quite clear where the bands are, if you go outside that band, on the low side then I'd like to think it won't be driven by us.'"

65. On price bands, the CMA concludes from the Transcript that:

“3.57 Mr Joyce explains in this exchange what would be ‘a target’ price for school tanks and later in the meeting states ‘that’s why I think you’ve got to have the bands to work with, to keep as the market price there is a market price for everything give or take. [?] if you’re feeling a bit hungry you’ll go here and if you’re feeling a bit flush and you’re not under pressure then you might squeeze it up, but if you take everyone low it’s a disaster, you’ve got to have a mixture of jobs [?].’ He notes with regard to a price that Mr Snee is proposing to bid for a future contract: ‘If it’s falling out of the bands, that’s the concern’. Mr Joyce goes on to state that the parties to the information exchange should be aiming for prices at the higher end: ‘Better near the top of the band than the bottom of the band for sure. [inaudible]. Somehow that’s the area the target price.’

3.58 Mr Snee notes towards the end of the discussion: ‘So in summary then we’ve got some agreement on bands...’ None of the attendees register any dissent to this assertion.”

66. The CMA then describes the three phone calls that Mr Snee had after he had been left alone in the room and the revised bid Franklin Hodge submitted to Compco later that day. The CMA notes that the price at which Balmoral ultimately won the contract was £100 below the lower end of the band discussed for 135m<sup>3</sup> tanks. The CMA states that there is also contemporaneous email evidence that Franklin Hodge revised its prices for 135m<sup>3</sup> and school tanks after the Meeting: paragraph 3.67.
67. The CMA then turns in the Information Exchange Decision to the legal assessment of what happened. It refers to the case law on the nature of a concerted practice and to cases of infringements involving the exchange of price information. The CMA refers in particular to the judgment in *T-Mobile* where the Court of Justice confirmed that a meeting on a single occasion between competitors may, in principle, constitute a sufficient basis to find a concerted practice.
68. The CMA found that as a result of the exchange of information about their current prices and future pricing intentions at the Meeting, the parties reduced uncertainty as to their intended conduct on the market and substituted practical cooperation between them for the risks of competition. As regards Balmoral, the CMA stated:

“4.15 On the part of Balmoral Tanks, the evidence, at paragraphs 3.3 to 3.30 shows that by July 2012 it must have been aware of its competitors’ objectives, even if not the detail of the cartel arrangements. However, even if it had not been aware prior to the meeting on 11 July 2012, as alleged by



Balmoral, Balmoral Tanks was made aware early on during the meeting that its competitors were involved in customer allocation. Despite this and its intention to end the contact, Balmoral Tanks remained at the meeting and continued to exchange information on recent past bids, current pricing and future pricing intentions.

4.16 The information shared at the meeting on 11 July 2012 was sufficient to reduce uncertainties as to the participants' pricing intentions in respect of CGSTs for schools and 135m<sup>3</sup> CGSTs generally and in respect of dealings with Comco, Tyco and Hall & Kay specifically."

69. The CMA went on to conclude that the exchange of commercially sensitive information between the parties about their current pricing and future pricing intentions had an anti-competitive object:

"4.46 The information comprised both generic and contract-specific information in the form of price bands and prices quoted for specific contracts. This information was useful and of practical value, as demonstrated by the fact that it was disseminated internally at Franklin Hodge immediately after the meeting and was used by Franklin Hodge to put in a revised bid for a specific contract just below the middle of the price band for 135m<sup>3</sup> tanks where it thought Balmoral would bid, but 'not crazily below'. It reduced uncertainty as to the Parties' future conduct on the market and highlighted to Franklin Hodge, Kondea and Galglass that there would be less downward pressure on their prices than they might otherwise have expected. As such, the exchange of this information can be regarded, by its very nature, as injurious to the proper functioning of normal competition."

70. The CMA went on to make findings regarding the other elements of Article 101 and the Chapter 1 prohibition such as effect on trade and the application of exclusions or exemptions. None of those raises an issue in this appeal. Section 5 of the Information Exchange Decision dealt with the calculation of the penalty. We discuss that in more detail below in relation to Balmoral's appeal against the fine imposed on it.
71. The Main Cartel Decision found that between 29 April 2005 and 27 November 2012, Franklin Hodge, Galglass and Kondea were parties to an agreement and/or concerted practice took the form of price-fixing, bid-rigging and market sharing by way of customer allocation. CST was party to that agreement from 29 April 2005 until 2 May 2012, the date on which CST approached the CMA with an application for leniency. The parties to the Main Cartel agreed which customers 'belonged' to which party and agreed benchmark prices for a range of tanks which were used to calculate the maximum discount on price which would be offered to customers 'belonging' to another party to the

arrangement. These arrangements were agreed and reinforced in regular meetings attended by the representatives of the parties involved, as well as in bilateral exchanges concerning particular bids.

72. Both Mr Snee and Mr Joyce gave evidence before us. We are sure that both of them were honest witnesses and were doing their best to assist the court. Mr Snee was more measured in his evidence than Mr Joyce and he clearly has less personal investment in the proceedings than Mr Joyce. It appeared to us that Mr Snee had ‘moved on’, both in the sense that in recent years he has moved out of a direct, sales role and into a role as a business development manager for Franklin Hodge and also in the sense that he regards the events of 2012 as a closed chapter, firmly in the past. Mr Joyce by contrast still feels a keen sense of grievance about the outcome of the CMA’s investigation. This is clear from the passages of his written evidence we quote below and from his occasionally combative response to Mr Williams’ questions on behalf of the CMA. We formed the impression that Mr Joyce’s sense of unfairness in relation to the CMA’s findings was unresolved. Mr Joyce clearly felt that those findings indicate that he, personally, and Balmoral as a company, behaved dishonourably. This has caused him to remember the tenor of the Meeting as well as what was actually said in a way which is inconsistent with the objective evidence of the recording, perhaps mixing up his subjective thoughts and motivations at the time with what he actually said and the impression his conduct makes on the attendees at the Meeting and on the viewer of the recording. This is not surprising given Mr Joyce’s evidence that he had never watched the recording of the Meeting, although he had, of course, read the transcript. We accept Mr Williams’ submission that the Tribunal should rely on the objective evidence of the audio-visual recording rather than on Mr Snee’s or Mr Joyce’s recollection or interpretation of the Meeting since their recollection may be unwittingly coloured by their subsequent experiences. Where their recollection of what happened at the Meeting differs from what we saw ourselves on the recording, we clearly have the advantage of being able to rely on the recording and the impression that it makes upon us.

## **F. BALMORAL'S CHALLENGE TO THE FINDING OF LIABILITY**

### **(1) General unfairness and inconsistency**

73. In its Notice of Appeal, Balmoral states that it is extraordinary that the CMA saw fit to render the Information Exchange Decision. A point that was raised in the Notice of Appeal but not argued so forcefully at the hearing was an allegation that the CMA was motivated to take the Decision because the criminal trial had gone “spectacularly badly for the CMA”. The picture that the CMA presented to the Crown Court was one in which Balmoral destroyed or smashed the cartel, rejecting outright its anti-competitive arrangements and winning the day with honest competition. As Judge Goymer said in summing up to the jury at Southwark Crown Court, Mr Joyce was not interested in getting involved in customer sharing and price fixing: “He regarded it as unethical and immoral, and that what one should do is go out there into the marketplace and win work”. That is a very different picture, Balmoral say, from the picture which the CMA tries to paint in the Information Exchange Decision.
74. In the Notice of Appeal, Balmoral contends that the stance taken by the CMA in the criminal prosecution and in the Information Exchange Decision cannot stand side by side; either the CMA got the Information Exchange Decision wrong or it misrepresented the true position in the criminal proceedings. Mr Joyce in his written evidence stresses that that he is particularly aggrieved by the inconsistent way that the CMA has approached the issue of his credibility as a witness. His evidence was relied on by the CMA in building its case in both the criminal prosecution and the civil investigation of the Main Cartel. However in reaching the Information Exchange Decision the CMA has disbelieved his account of his motives in attending the meeting and the nature of the comments he made during it.
75. We should make clear from the outset that the task of the Tribunal in this appeal is not to decide whether this is a case that should or should not have been pursued by the CMA. There are occasions on which the Tribunal is called upon to review the reasonableness of the decisions that the CMA makes

when deciding whether or not to pursue a particular allegation of infringement. But this appeal is not such an occasion. Our task is only to consider whether the evidence on which the CMA relied and which is before us supports a finding of infringement and whether the fine imposed was appropriate.

76. We do not see any inconsistency in the stance taken by the CMA in this case. The authority pursued the criminal and civil proceedings in parallel. In August 2013 the CMA wrote to Balmoral's legal representatives stating that the decision not to prosecute Mr Joyce was separate from and unconnected with the investigation under the Competition Act. The CMA has never contended that Balmoral was a party to the Main Cartel which was the subject of the criminal proceedings. The CMA's case in respect of the Information Exchange does not depend on them concluding that Mr Joyce went to the Meeting with the intention of exchanging confidential pricing information; it depends only on the contention that at the Meeting in fact such information was exchanged.

**(2) The CMA misunderstood the purpose or object of the meeting**

77. Balmoral contends that the object of the Meeting and of the disclosure of information was not to restrict competition so far as Mr Snee and Mr Dean were concerned, but to persuade Mr Joyce to bring Balmoral into the Main Cartel. When Mr Snee was asked in interview why he and Mr Dean had shared pricing information with Mr Joyce, he explained:

‘...to come to a better arrangement on price so it was to sort of get a bit more of a better understanding of where prices were and I was trying to explore with Allan, you know, sort of I was trying to get out of Allan exactly where he was going with some of his, some of his pricing policy’. (see paragraph 4.49 of the Information Exchange Decision).

78. Balmoral's purpose was to put an end to unwanted contact. Mr Joyce's evidence is that following an uncomfortable meeting in March 2012 at which the others had complained about Balmoral's competitive pricing, he had discussed with Jim Milne, the Chairman of Balmoral Group and their financial director how and when they could cease contacts with their competitors. It was agreed that he could do so once Balmoral had secured its vortex inhibitor

certification but not before. He expressed the point in trenchant terms in his second witness statement:

“15. ... As noted, I had been very open within Balmoral about the Competitors’ contacts and that Balmoral would never compromise the way it competes. To suggest that in attending the Meeting I or Balmoral sought to restrict competition not only defies common sense but would also mean that, having actively raised this issue with my Chairman and colleagues within Balmoral, I then did an about turn before or during the Meeting. Again, I can’t think of any common sense reason why I would have done this in the circumstances and context I have outlined. It is also personally offensive to me. It suggests that I would say one thing to my Chairman and colleagues but then effectively lie and do the opposite and not tell anyone and hope that, somehow, they would not find out. Further, to implement any of what the CMA is alleging would require me to issue a direct instruction to our sales director, which he quite rightly would have questioned why.”

79. Mr O’Donoghue particularly criticised the CMA for artificially dividing the Meeting into the period before the existence of the Main Cartel was revealed to Mr Joyce and he refused to join the customer allocation arrangements and the remainder of the Meeting. Mr O’Donoghue sought to characterise the remainder of the Meeting as a continuing attempt by Mr Snee and Mr Dean to persuade Mr Joyce to bring Balmoral into the Main Cartel, offering the titbits of pricing information as an inducement. Mr Joyce continued to rebuff these attempts. It cannot be right, he submitted, that an undertaking commits an infringement simply by being in a room when information is provided by competitors in order to induce it to join an infringement, otherwise it would be impossible for that undertaking to refuse to take part in an infringement.
80. In making this submission, Mr O’Donoghue relies on European authorities where the Court focused on analysing the purpose for which an agreement or arrangement is entered into by the parties. Cases 96/82 etc *IAZ v Commission* EU:C:1983:310 concerned an agreement between Belgian water companies and suppliers of washing machines and dishwashers stipulating that all machines connected to the water supply had to have a certificate of conformity with standards imposed to protect the quality of drinking water. The Commission found the agreement infringed what is now Article 101 because the certificates were only given to official importers and not to parallel importers. The European Court referred to the need to have regard to the content and origin of the agreement and the circumstances in which it was

implemented in finding that the clearly expressed intention of treating parallel importers less favourably than official imports with a view to hindering parallel imports:

“25. Therefore, the purpose of the Agreement, regard being had to its terms, the legal and economic context in which it was concluded and the conduct of the parties, is appreciably to restrict competition within the common market, notwithstanding the fact that it also pursues the objective of protecting public health and reducing the cost of conformity checks. That finding is not invalidated by the fact that it has not been established that it was the intention of all the parties to the Agreement to restrict competition”

81. More recently in Cases C-501/06P etc *GlaxoSmithKline v Commission* EU:C:2009:610 the Commission had condemned GlaxoSmithKline's ('GSK') distribution agreement with wholesalers in Spain under which medicines described by GSK as being prime candidates for parallel trade principally between Spain and the United Kingdom were sold. The distribution agreement contained clauses which the wholesalers complained restricted parallel imports by introducing a differentiated pricing system. The Commission had found that the restriction on parallel imports was a restriction of competition by object. The General Court had annulled that part of the decision but upheld the decision insofar as it found that the agreement had an anti-competitive effect. On appeal, when assessing the anti-competitive object of the agreement, the Court of Justice reiterated that regard must be had to the content of the agreement's provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (paragraph 58). The Court of Justice also stated that although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the EU judicature from taking that aspect into account. Mr O'Donoghue also referred to Case 246/86 *Belasco* EU:C:1989:301, paras 12 and 15 where the Court of Justice rejected arguments from a cooperative of Belgian roofing felt manufacturers that the purpose of a price-fixing and market sharing agreement was to enable the members to make a collective application to the Belgian Ministry for price increases. The Court of Justice upheld the finding of infringement even though the prices fixed for new products may not have been observed in practice because the decisions of Belasco's general meeting fixing prices were intended to restrict competition.

82. We do not consider that these cases support Balmoral's contention that the correct focus for the CMA or the Tribunal is the intentions or purpose of the participants in the Meeting at the point when they first enter the room. The relevant purpose is not the purpose which those attending the Meeting hoped to achieve when they started their discussion but the purpose of the arrangement that had been arrived at by the end of the Meeting. We accept that the purpose of Mr Snee and Mr Dean going into the Meeting was to persuade Balmoral to join the Main Cartel. But once it became clear that that was not going to happen, they were keen to see if anything could be salvaged from the Meeting which would reduce the competitive pressure from Balmoral and make it possible for the customer allocation agreement between the remaining suppliers to continue in some modified form. To restate that in terms familiar from the case law, their intention and purpose was to reduce the uncertainty that prevailed in the market because of Balmoral's conduct and replace it with some greater ability to predict what prices Balmoral would quote to customers in the future. The CMA found that that purpose was achieved and that the information exchanged did reduce uncertainty - Mr Snee and Mr Dean thought that they did have a better idea of the prices Balmoral would quote.
83. So far as Mr Joyce's purpose is concerned, again we accept that he went to the Meeting intending to put a stop to illegitimate contact from the others, as agreed with his senior colleagues in Balmoral. But that was not the end of the matter. He stayed on after he had told them Balmoral was not interested in joining the Main Cartel. Mr Joyce complains that it is artificial for the CMA to expect him just to get up and leave the meeting abruptly or to inform the CMA about the existence of the Main Cartel. Although he maintained his refusal to join in customer allocation throughout the Meeting, he wanted to remain on cordial terms with Mr Snee and Mr Dean, given that he would have to meet them in the future at legitimate industry events. Towards the end of his cross-examination when it was put to him that he could have left the Meeting much sooner than he did, Mr Joyce said:

"No, I do not. As I said yesterday, I had had numbers of meetings with these guys, I have said this already. Yes? I tried to recruit Clive Dean. I am actually quite a professional guy, I do have some manners. If I turn up to

that, having been chased for 8 months and having been to a number of meetings, I cannot just walk in there and almost put up my finger and walk out the door, because I am going to meet these guys in the market place, at trade association meetings or exhibitions. I am quite a confident person but I am not an arrogant person, and there is quite a big difference, so that is why I did not walk out.”

84. It is because executives meeting together for a legitimate industry purpose must be firmly discouraged from giving into any temptation they may face to slip into illegitimate discussion of prices that the case law defines the concept of concerted practice in price exchanges so broadly. It is also why Governments consider it necessary to confer on competition authorities extensive investigatory powers and the ability to impose substantial fines for infringements. We consider the evidence as to Mr Joyce’s behaviour further below. But we reject the submission that the CMA failed to take into account the purpose of the Meeting or the economic and legal context of which the discussions at the Meeting formed a part.
85. We agree with the CMA that an important part of the context of the Meeting is the success of the Main Cartel in putting a stop to previous price competition and in raising prices in the market. The context of the Meeting was, as Mr Joyce knew even before he was told about the formal customer allocation arrangement, that relations among the suppliers were cosy, they met regularly to discuss things to an extent that Mr Joyce was well aware was inappropriate. These were suppliers who were accustomed to knowing each other’s plans and prices and to acting on that information for their mutual benefit. In our judgment, the economic context of the Meeting makes it more rather than less likely that truthful information would be exchanged and that people would immediately act on that information. These companies were accustomed to deliberately foregoing contracts in order to maintain a steady market share at a higher profit margin than they would earn if they competed vigorously for every contract. Mr Joyce must have realised, at least he should have realised, that any information he provided about future pricing would be snapped up by Mr Dean and Mr Snee who were very eager to prevent the collapse of the Main Cartel.



86. Whatever had been the intentions of the parties before they went into the Meeting, we agree with the assessment of the CMA that the evidence shows that none of the parties present at the Meeting expressed any reservations or objections to each other in relation to the provision or receipt of the information provided. On the contrary, the transcript of the Meeting shows all attendees taking an active role in sharing and soliciting information. We agree that there is no clear dividing point in the Meeting between the early attempts to persuade Balmoral to join the Main Cartel and the later information exchange; Mr Snee and Mr Dean may well have hoped that by demonstrating the usefulness of such meetings to Mr Joyce, they would change his mind. They may have been encouraged in that hope by the fact that Mr Joyce wrote down the information they were providing. But in our judgment there were two strands to the Meeting – the continuing attempts to recruit Balmoral to the Main Cartel and the discussion of prices. This was not a situation where Mr Joyce was the passive recipient of information as part of Mr Snee’s and Mr Dean’s attempts to recruit Balmoral. Mr Joyce provided information himself about Balmoral’s prices and at one point in the meeting directly asked Mr Dean to tell him the price that Kondea had quoted for a particular contract.
87. The CMA concluded:
- “Although Mr Joyce made it clear during the meeting that he did not want to participate in the customer allocation arrangements between the parties, other comments made by Mr Joyce during the meeting show that his objective when discussing prices was for prices to stabilise towards the higher end of the bands being discussed at the meeting. Mr Joyce noted during the meeting that: ‘the thing for me is to get it stabilised because if we keep going even lower from my point of view as well, we’re hitting rock bottom rather quickly’. He then later notes: ‘Better near the top of the band than the bottom of the band for sure.’ In addition, when asked by Mr Snee if Balmoral Tanks ‘want to try to squeeze the price and get up as quickly as you can?’, Mr Joyce answered, ‘Yes... Pushing that band up, the top end rather than the bottom’. Mr Joyce also said in interview that Balmoral Tanks was trying to avoid a ‘price war’.”
88. We agree that that is an accurate and fair conclusion to draw from the recording of the Meeting.

**(3) Mr Joyce's lack of involvement in Balmoral pricing decisions**

89. In support of the contention that Mr Joyce's object in attending the meeting could not be to restrict competition by disclosing the company's pricing intentions, Balmoral say that Mr Joyce was not meaningfully involved in the pricing of CGSTs. It was Balmoral's sales director Norman Ross and his sales team who were responsible for setting prices and for all negotiations with customers. Balmoral assert that the CMA failed to take Balmoral's internal structures and restraints that they placed on Mr Joyce into account when reaching the Decision.

90. Further, Balmoral point to the fact that Mr Joyce made it clear to Mr Snee and Mr Dean at the Meeting that he was not involved in pricing decisions within Balmoral. Mr Joyce said (Transcript page 16):

“...Everybody's got to make some money. I think what you might, find, seriously that you'll see your prices creeping up, but I don't talk to the sales guys either, they're got guidelines and I'm saying [inaudible] they push on and they've got the tanks they go for, there's a lot of pressure internally now from Balmoral now and it consists of what's going on at Tyco now...”

91. In his written evidence, Mr Joyce said that Balmoral operates a 'cost plus' system for pricing tank bids. This requires sales staff to use an estimating system to base the prices they offer for any product on the estimated cost of manufacturing, transporting and installing the tank, plus a margin for Balmoral. During 2012, the sales team had a target margin to achieve with CGSTs set annually as part of the budget process. His evidence was that all quotations sent to customers and negotiations on price were undertaken by Mr Ross and his team. At this time there was a team of six internal sales people and six regional sales people based in Croydon rather than in Aberdeen where he was based. His practical scope for influencing them was reduced. The mark up that the sales staff include in the price quoted depends on what they believe will be the best price they can obtain and still win the contract. Mr Joyce said his role was to approve any bid if it fell below a 10 per cent margin but that beyond that he did not interfere with the prices offered by the sales staff. He said:

“Even if the some bizarre reason I had wanted to undermine Balmoral’s strategy and help our Competitors, I would have struggled to do so. This is because, as I explain above, I did not have day to day involvement in our pricing of CGSTs. That task was left to Norman Ross. Had I wanted to share Balmoral’s pricing strategy with the Competitors, I would have first needed to convince Norman why, all of a sudden, I wanted more involvement with the pricing of one particular product group. I did not do so. Had I done so, it would almost certainly have set alarm bells ringing for Norman and his Sales Team. They would have questioned why I needed that specific information, and I would have had no good answer to give them.”

92. Further, he says that his market knowledge of average prices for tanks was based on historic information provided by Mr Ross after the quotes had been submitted to customers.
93. However, this submission is not, in our judgment, supported by the evidence. First, it is clear from the transcript of the Meeting that, after telling Mr Snee and Mr Dean at the start of the Meeting that he did not have any contact with the sales team, he readily answered their later questions about what Balmoral intended to quote on actual, prospective bids or what it would quote if asked, hypothetically, to bid. For example, at page 49 of the transcript when Mr Dean asked Mr Joyce directly what Balmoral would quote if a bid was sought for a 135m<sup>3</sup> tank, Mr Joyce did not respond that he could not answer because Mr Ross and his team were responsible for setting prices and he had no influence over this. On the contrary, he responded that it would be “somewhere between £15,000 and £17,000” and when pressed he said “I would be surprised if it is less than £16,000”. Similarly Mr Joyce openly wrote down the pricing information that Mr Snee and Mr Dean provided: he did not say that there was no point them telling him their prices because he could not make use of the information within Balmoral.
94. Whatever was the real position within Balmoral, Mr Joyce certainly said nothing to disabuse Mr Dean and Mr Snee of their assumption that Mr Joyce was able to give accurate information about how the prices Balmoral would quote in future bids. Even if this was not true because he could not influence Balmoral’s pricing or because he knew Balmoral would not stick to any prices that he provided to his competitors, that does not absolve Balmoral of liability for an infringement. Mr Joyce gave them that information knowing that they

were likely to use it in their future pricing decisions, as in fact Mr Snee did in his phone calls after the others had left. In *Dole* the General Court held:

“484 Moreover, even if a participant in collusive conduct may seek to exploit it for its own ends, or even cheat, that does not however diminish its liability in respect of its participation in that conduct. According to settled case law, an undertaking which, despite a cartel with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.”

95. Similarly in *Smart Chips* the General Court rejected an argument from the applicants that the information they disclosed was inaccurate saying:

“91. ... the fact remains that the very disclosure of that type of information on future prices, whether correct or inaccurate, is capable of influencing the conduct of undertakings on the market. In that regard, it has been held that, even on the assumption that it is proved that certain participants in the cartel succeeded in misleading other participants by sending incorrect information and in using the cartel to their advantage, by not complying with it, the infringement committed is not eliminated by that simple fact”.

96. Secondly, although Mr Joyce may not have set prices or been involved directly in negotiations with customers, he clearly did have an influence on prices quoted because the ‘cost plus’ price that Mr Ross’ team could quote was based on cost estimates over which Mr Joyce did exercise influence.

97. This was demonstrated at the hearing by an email exchange from May 2012. Mr Beaumont from the customer Tyco emailed one of the sales team at Balmoral Tanks asking Balmoral to agree a total order price of £47,000. This created a problem because that price would not provide the minimum margin on the deal, given the costs estimates provided to the sales team. The sales team therefore needed to seek authorisation to quote the reduced price. Mr Ross and Mr Joyce then exchanged emails about what to do. They recognised that the problem arose because of the inclusion of an element in the cost stack that Mr Ross referred to as ‘stealth’. Mr Joyce explained in the witness box that this cost represented a margin for error that was included because the costs were being estimated from the operation of a new factory starting with production from scratch. He had therefore included an investment charge in the cost stack as a precaution against accidentally quoting prices which, it might turn out, did not actually cover the real costs. Mr Ross wanted to

‘remove the stealth altogether’ but Mr Joyce demurred saying that that would be a big step and should be discussed further.

98. What we gather from Mr Joyce’s evidence is that although he may not have been directly involved with negotiations with the customer over price, he did in effect influence the prices offered because he decided the amounts to be included in the cost stack, by reference to which the margin was calculated by the sales team when deciding whether or not to approve a quote which appeared, given the cost stack provided to the sales team, to make an inadequate margin. Given the way that Balmoral dealt with pricing, the sharp distinction that Mr Joyce and Balmoral sought to draw between influencing costs and influencing price is in fact a semantic difference. If Mr Joyce had wanted to push Balmoral’s prices up (and we are not suggesting that he did) he could easily have done so by simply adding something into the cost stack so that Mr Ross and the sales team would have to price at a margin above that higher cost. Similarly, if Mr Joyce wanted to enable the sales team to quote a lower price, he could do so by removing or reducing an item in the cost stack so that the price they wanted to quote would appear to generate the required profit margin.
99. We reject the argument that the CMA should not have found that Mr Joyce disclosed useful pricing because he had no influence over Balmoral’s pricing.

**(4) The one-off Meeting and the nature of the information exchanged**

100. The Notice of Appeal contends that the CMA erroneously concluded that the comments exchanged at the meeting were capable of reducing uncertainty within the CGST market and thereby producing a sufficient degree of harm to competition for the purposes of an object infringement.

*(a) Is this a market in which a one-off exchange of information can amount to an infringement?*

101. Mr O’Donoghue points out that most cases where information exchange has been condemned concern either information exchange as an instrument

intended to enforce or monitor an underlying price fixing cartel or where there have been systematic exchanges of information over time. Balmoral must accept that it is possible that a disclosure of pricing on a single occasion can be condemned, since that was what the Court of Justice held in *T-Mobile*. But whether that is possible depends on the nature of the market and the subject matter of the concertation: see paragraph 59 of the judgment in *T-Mobile*. In that case, the objective of the concerted action related to a one-off alteration in market conduct with reference simply to one parameter of competition, namely the level of standard dealer remuneration for post-paying mobile phone customers. That was why only a single meeting was necessary.

102. The CMA dealt with this point at paragraph 4.17 of the Information Exchange Decision. The CMA recognised that one meeting may have been insufficient had the parties wanted to fix the prices for specific bids on an ongoing basis. However, the CMA had not alleged that the parties entered into a price-fixing agreement at the 11 July Meeting. In a market where there were pre-existing cartel arrangements between all but one of the market participants, the extent of competition on the market was already limited. In these circumstances, the exchange of information about the prices that the parties were charging their customers and the price bands within which the parties would seek to charge going forward, was clearly capable of reducing uncertainty about their future pricing.
  
103. We accept that the position here is somewhere between the situation in *T-Mobile* where the confidential information disclosed related to a single, major long-term decision by the Dutch mobile network operators and the position in *Dole* where prices for bananas fluctuated from week to week in response to many factors beyond the suppliers' control so regular discussions were necessary. The market for CGSTs is characterised by bids for substantial contracts many of which have a value of between £20,000 and £40,000 and a few for substantially more than that. The market in the present case shares with *T-Mobile* the characteristic that there are only a few suppliers. In the CGST market there are very few customers as well so that pricing signals can have an amplified effect in reducing the uncertainty generated by a competitive dynamic. The spreadsheet provided by Balmoral shows that the

companies are invited to bid very regularly, several times each month, although the number of bids that ultimately lead to a sale is much smaller either because Balmoral's bid is not accepted or because the fire suppression system contractors' bid is not accepted by the overall building project contractor. A single indication as to future pricing may therefore affect a material number of bids and a material value of potential work.

104. Moreover, the significance of the price exchange information here was not simply in the numbers themselves but as an indication to Mr Snee and Mr Dean (whether or not it was true) that Balmoral was not intending to push prices down. This was the concern of Mr Snee and Mr Dean particularly given the recent instance of an aggressively priced bid of £14,600 for a 135m<sup>3</sup> tank submitted by Galglass to Tyco for a supermarkets project. What Mr Snee took away from the Meeting was explained in one of his phone calls after the Meeting. He told his colleague that Tyco's Swansea office had told Galglass of a low quote from Balmoral, prompting Mr Stringer to reduce Galglass's quote to £14,500. Mr Snee felt able to reassure his colleague, after the Meeting, that that Balmoral did not intend to keep pushing the price down to below £15,000 for a supermarket tank but would price within the band discussed:

“according to Balmoral, they don't want to be down around £15,000 but its £15,000 to £17,000, but probably closer to the £16,000 on the 135s I would guess. I don't really know where we are at Compco, but I guess around that sort of figure. But I'm just trying to give you a better picture of where Balmoral might be on price.”

105. This was also, in our judgment, the significance of Mr Joyce telling Mr Snee and Mr Dean that he recognised that Balmoral would never succeed in shaking all the other suppliers out of the market and the references to sustainable prices and the danger of prices spinning out of control. In a context where all the suppliers other than Balmoral are accustomed to fixing prices and swapping pricing information regularly and where all suppliers expressed their concern at the possibility of prices sinking to rock bottom, we find that an exchange of pricing intentions at a single meeting has the potential to affect the prices bid over a significant period into the future.

106. We therefore agree with the CMA that this is a market in which a one-off exchange of pricing information is an object infringement of the competition rules.

**(b) *Was the information exchanged too generic to be useful?***

107. Balmoral argue that the pricing information was ‘generic’ and of limited used because no two CGSTs are sold for the same price because it depends on a variety of factors. In his written evidence, Mr Joyce says that his only forward-looking comments as to prices were expressed as his wishes or hopes for the way the market would develop. He describes this as “the sort of chitchat that happens all the time, broad and aspirational comments-in many cases wishful thinking.”

108. Mr Joyce also states in his written evidence that the prices quoted for a tank size can vary significantly depending on the cost of the ancillaries, installation, dimensions of tank and whether they are sold as a package or on a stand-alone basis. Tanks can have different galvanised thickness, different liner materials and different test standards. The products were not commoditised.

109. In our judgment it is clear from the transcript of the Meeting that the prices discussed went well beyond generic pricing. Particular prices were put forward, both in relation to past bids and as to future pricing intentions. We consider that Mr Joyce’s evidence about the bespoke nature of the products is exaggerated. There are differences between tanks but if those differences had been so great as to render any price exchange devoid of purpose, it is difficult to understand why the discussion about prices at the Meeting lasted for as long as it did. If Mr Joyce is right in his witness evidence that transporting the tank components is a significant element in the price, it is surprising that there was no mention of transport costs at the Meeting. In the Main Cartel, the CMA describes the evolution of the price-fixing aspect of the agreement. An initial agreement on permitted discounts did not work and was replaced by an agreement on price lists. This enabled the parties to ensure that discounts given on quotes for CGSTs were from a known and agreed price, irrespective of the individual manufacturing costs of each undertaking: see paragraphs



3.338 onwards of the Main Cartel Decision. The price list system enabled the parties to the Main Cartel to increase prices over time. That would not be possible in a market where pricing decisions had to be made on a contract by contract basis because the products were so different each time. We find that the weight of the evidence strongly supports the CMA's conclusion that CGSTs are a sufficiently commoditised product for price information to be valuable among competitors.

(c) *Were the price bands too wide and just reflective of market state?*

110. As we have described, the Information Exchange Decision focuses particularly on the price bands discussed at the 11 July Meeting — £9,500 to £10,500 for tanks for schools and between £15,000 and £17,000 for 135m<sup>3</sup> tanks for supermarkets. In his written evidence Mr Joyce says:

“48. I did not divulge any information that would have indicated Balmoral's future pricing. I did, however, mention my views on the average price bands on two tank sizes. The content and context of the two tank sizes and price bands were nothing more than generic comments based on information that was readily available in the market place. Those bands were very wide and from what I had seen from quotes we received from customers, I believed simply reflected the average range of prices in the market for these tanks.”

111. Mr Joyce goes on to say that the only reason he mentioned the price bands was to try and cut the conversation off. He says “I thought if I made some noncommittal and vague noises about pricing for two tank sizes they might stop pushing me on the price issue”. But he insists that the information was not sensitive or commercially useful in the real world markets they faced. The price bands were not intended to be, and were not understood by anyone at the meeting as target prices. He reiterated this evidence in his second witness statement where he comments that the price bands were very wide and nothing more than generic comments that he believed reflected the average range of certain prices in the market for these tanks.

112. The CMA rejected this point when it was put to it by Balmoral. The CMA did not accept that the price bands were aggregated data i.e. averaged prices across the industry. It found that they were effectively target price ranges. The CMA went on to hold that even if the price bands referred to average market pricing,

in a market which was already cartelised average prices providing meaningful indication of competitors' pricing: see paragraph 4.54 of the Information Exchange Decision.

113. There is plenty of material in the transcript to support the CMA's rejection of this submission. We agree with the CMA's finding that Mr Joyce was describing the bands as being targets during the meeting:

“Better near the top of the band than the bottom of the band for sure. [inaudible]. Somehow that's the area the target price.”

Mr Joyce also stated during the meeting:

“...that's why I think you've got to have the bands to work with, to keep as the market price there is a market price for everything give or take. [?] if you're feeling a bit hungry you'll go here and if you're feeling a bit flush and you're not under pressure then you might squeeze it up, but if you take everyone low it's a disaster, you've got to have a mixture of jobs [?].”

Mr Joyce also noted with regard to a price that Mr Snee was proposing to bid for a future contract: ‘if it's falling out the bands, that's the concern’.

114. The transcript establishes that the bands were being put forward by Mr Joyce, particularly in light of the concern expressed by everyone attending at the Galglass bid for £14,600 to Tyco before the Meeting.

***(d) Was the information historic only?***

115. Balmoral argue that the CMA erred in its factual assessment because the information was historic, relating to prices charged for tenders already awarded. This lacked value especially since Mr Joyce explained to Mr Snee and Mr Dean that Balmoral's pricing was haphazard because they had not worked out their cost structure properly yet. Mr Joyce explained at the hearing that Balmoral relocated its hot press steel manufacturing plant from one facility to another in South Wales and recruited a large number of additional people to enable them to launch themselves into the CGST market. This indicated that Balmoral's past pricing was not an indication of where their prices would be set going forward. Conversely, Mr Joyce says that Balmoral could not rely on what others had previously charged because those

prices had been set in the context of the cartel and could no longer be maintained.

116. The CMA accepted that some of the prices discussed at the meeting related to past bids but found that there was also a discussion of current prices: para 4.58

“Some of the prices discussed during the meeting, although relating to past bids, were clearly current prices. For example, Mr Joyce clarified that the prices he quoted for school tanks and 135m<sup>3</sup> tanks, were current prices: ‘we’re selling at that price, we are now below it’. This is corroborated by Mr Joyce’s interview transcript in which he confirmed that these prices were current prices: ‘Well, I think, with those tanks, you could... £15,000 to £17,000 would be probably roughly where we would be as a price for that size of product.’”

117. We agree with the CMA’s conclusion that some of the information exchanged related to future pricing intentions and that when the historic pricing was discussed it was referred to on the basis that the prices quoted were too low and should not be repeated in the future. The CMA records that Mr Joyce acknowledged the sensitivity of historic pricing information in his interview: ‘I would not supply a competitor with Balmoral historical product pricing information, as this may be used by them to form their own pricing strategy’. In his witness statement, Mr Snee described the information provided to Balmoral Tanks as commercially sensitive:

“Clive and I gave Allan detailed information on our pricing policies for the various types of tanks, and discussed with him typical pricing. Ordinarily, such information might be commercially sensitive, but was part of the arrangement and we shared the information with Allan.”

Mr Snee also confirmed when interviewed that he would consider the figures provided by him and Mr Dean at the meeting to be commercially sensitive and to reflect current pricing intentions, and that he was trying in the meeting to obtain information from Mr Joyce regarding Balmoral’s pricing policy.

118. We are therefore fully satisfied that the nature of pricing information exchanged at the Meeting was such that it was useful to the participants and it was exchanged in circumstances that made it clear that the parties intended the others to rely on it in their pricing decisions and expected to use the information themselves in their future pricing decisions. Mr Joyce’s conduct

at the Meeting did not show that he was giving or receiving the information in any different spirit than the others.

**(5) The absence of any actual or potential effect on the conduct of the parties**

119. We have referred earlier to the case law of the European Courts establishing it is inherent in the concept of a concerted practice that the information exchanged has some effect on the subsequent conduct of the parties, even where the concerted practice is an object infringement so that there is no need to show any actual effect on competition. We also referred to the legal presumption that the information exchanged will affect the conduct on the market of the parties where they remain active suppliers following the exchange: see paragraph 40, above. On the question of whether the information exchange affected the parties' conduct after the Meeting, the CMA does not rely only on that presumption. The CMA notes that there is evidence that the information provided by Balmoral Tanks to the other parties was disseminated within at least Franklin Hodge. Further, both general and contract specific information was taken into account by Franklin Hodge as part of the process for establishing prices to be quoted when bidding for contracts to supply CGSTs to Compco: see paragraph 4.30 of the Information Exchange Decision. The CMA found "This shows that the information provided by Balmoral Tanks was regarded by at least Franklin Hodge as of interest and immediate value and reduced uncertainty as to Balmoral's intended conduct on the market".

120. We are satisfied both that the presumption applies in this case and also that there is actual evidence, in Mr Snee's phone calls, of the pricing bands discussed at the Meeting affecting the bid put in by Franklin Hodge to Compco. The fact that Balmoral bid below the lower end of the band and won the contract with a bid of £14,900 does not establish that Balmoral did not take the discussions into account. Even if we accept Mr Joyce's evidence that the pricing information at the meeting was not passed on to Mr Ross's team, that does not prevent an infringement from occurring, as the CMA found in paragraph 4.33 of the Information Exchange Decision.

(a) *Was there price transparency in the market anyway?*

121. Balmoral argue that the pricing information exchanged was not capable of influencing the parties' conduct because there was already price transparency at the behest of the customers. The evidence was that in the CGST market, the customers commonly told a supplier the quotes provided by competing supplies so as to try to elicit a better price. Mr Snee said in statements prepared in 2013 that it was commonplace for customers to use estimates from Franklin Hodges' competitors to try to reduce prices and on one occasion he had been sent a spreadsheet by the customers showing the prices quoted by Galglass, Kondea and Balmoral. This practice was referred to at the Meeting where Mr Joyce (as reported by Mr Snee in a phone call) said that he was very surprised that customers show quotes from one competitor to another. Mr Joyce said in his written evidence:

“It was clear to me that both Clive and Nigel were aware of Balmoral's quotes in detail and that they regularly obtained that information from customers. Clive said as much during the Meeting, telling me that customers would always go back to him after our bids to give his company the ‘last bite of the cherry’. Therefore I did not think I was revealing anything new or sensitive, otherwise I would not have done it. There is a market price for every product and it is a company's duty to know the value of its product offering.”

122. We bear in mind that in *Tate & Lyle*, the General Court rejected an argument from the appellant that the information exchanged was released to the market shortly after and so was readily accessible market data. The General Court held that the infringement had been committed because the meetings between competitors “allowed the participants to become aware of that information more simply, rapidly and directly than they would from the market”. In the present case, we consider that if there are times when a customer considers it is in its commercial interest to disclose information about quotations received from other bidders, then they are of course entitled to do so. But we agree with the CMA's assessment that the Meeting provided an opportunity for the parties to confirm their understanding of what prices were being charged for particular tanks directly from their competitors and, moreover, to gain a better understanding of what prices their competitors might charge in the future.

That information would not be readily available in other ways: see paragraph 4.68 of the Information Exchange Decision.

**(b) Evidence that Balmoral competed vigorously after the Meeting**

123. Mr Joyce states in his evidence that he did not pass on any information he received to Mr Ross and the sales team, although he is recorded as having told the CMA in interview that he did generally pass this kind of information on within Balmoral Tanks as market intelligence: see paragraph 4.34 of the Information Exchange Decision. We have explained above that we regard Mr Joyce as being in a position to influence the prices quoted by the sales team more subtly than simply instructing them what to do or telling them the bands of prices within which they must quote thereafter. Mr Joyce's evidence at the hearing before us was that he and other managers at Balmoral Tanks were still in the process of working out the true cost of producing the tanks from the new facility opened to expand Balmoral's product range into this sector. That is the excuse he gave to Mr Snee and Mr Dean for the apparently haphazard nature of Balmoral's pricing. It would certainly be surprising if, as he claimed, he had no influence on the prices that the company was charging so soon after the Balmoral Group's decision to enter this new market.
124. Mr Joyce also states in his second witness statement that in rejecting the pressure from the others to join the Main Cartel, he specifically made clear that Balmoral would continue to compete aggressively, and that they did immediately after the Meeting. We do not read the transcript as conveying any such clear message. It is true that Mr Joyce explained to Mr Snee and Mr Dean that Balmoral had a substantial sales team and needed to generate enough business to cover the cost of employing them. He stressed that Balmoral wanted to maintain a reputation with its customers as being competitive and keen for work. But he also joined with them in expressing concern that prices should not drop too low and recognising that, given the flat state of the market, none of them had anything to gain by charging the kinds of very low prices that had occasionally been seen in the market. The men all seemed to recognise that the overall volume of the market was inelastic so that reducing prices would not generate new business. Cutting prices would simply

lead to existing market volumes generating less money for everyone. Mr Joyce also explained to Mr Snee and Mr Dean that Balmoral recognised that customers' desire to see a number of healthy players in the market. This sent a signal that Balmoral's ambitions were limited.

125. In addition to those general indications of what was influencing Balmoral's pricing decisions, Mr Joyce engaged in detailed discussions about pricing intentions and price bands. We consider that the exchange of pricing information gave Balmoral the choice of sticking within the bands discussed and foregoing market share in return for higher profit margins or undercutting the bands by a small amount, confident that a price below the band was likely to be a lower price than the others would quote. We cannot, of course, know what prices Balmoral would have quoted customers in the months following the Meeting if the Meeting had not taken place. We note that the CMA recorded in paragraph 4.34 of the Information Exchange Decision, and footnote 341 that some of the prices quoted by Balmoral Tanks after the Meeting were within the bands discussed. Even if Balmoral did in fact continue to compete aggressively for business after the Meeting, this does not, in our judgment, negate Balmoral's liability for the infringement. We have already quoted the passage from the General Court's judgment in *Dole* that a cartel member who disregards what is agreed for its own ends is still liable for the infringement.

**(6) Conclusion on liability**

126. Having ourselves assessed the evidence relied on by the CMA we are entirely satisfied that Balmoral was party to the infringement identified in the Information Exchange Decision. Mr Joyce went to the Meeting knowing or suspecting that the discussion was very likely to trespass into problematic areas and that was confirmed soon after the discussion started when he was told that the others were party to a customer sharing arrangement. However reluctantly, Mr Joyce was then drawn into a conversation about pricing with Balmoral's competitors which went well beyond a discussion of general market conditions or historic prices. He must have realised why Mr Snee and Mr Dean were pressing him for Balmoral pricing information and why they

were disclosing to him their pricing information. He must have realised when he told them at the start that he trusted them and that they could be frank with each other; when he started noting down the prices for different tanks that they were discussing and when he answered direct questions about how Balmoral would respond to future requests for quotes that the others would rely on this information and that they would hope that he would abide by that information so that prices could stabilise and perhaps increase.

127. What appears to us from the recording of the Meeting was that Mr Joyce was seeking to reassure Mr Snee and Mr Dean that although Balmoral would not join the Main Cartel, it would charge prices that would not render the continuation by the others of the Cartel entirely impossible. Those hopes that he engendered were not fulfilled and we accept that Franklin Hodge and Kondea realised soon after that the game was up and there was no point, after the Meeting, complaining further to Balmoral about its pricing. Applying the case law which establishes where the line is to be drawn between innocuous discussion and infringement, we are in no doubt that the conduct here was an infringement. We therefore dismiss Balmoral's appeal on liability.

## **G. BALMORAL'S CHALLENGE TO THE PENALTY**

### **(1) The relevant legislation and Guidance**

128. Section 36 of the Competition Act, as amended, provides:

“(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 101(1), the CMA may require an undertaking which is a party to the agreement to pay the CMA a penalty in respect of the infringement.

...

(3) The CMA may impose a penalty on an undertaking under subsection (2) ... Only if the CMA is satisfied that the infringement has been committed intentionally or negligently by the undertaking.

...

(7A) in fixing a penalty under this section the CMA must have regard to –

(a) the seriousness of the infringement concerned, and



(b) the desirability of deterring both the undertaking on whom the penalty is imposed and others from-

(i) entering into agreements which infringe the Chapter I prohibition or the prohibition in Article 101(1) or

(ii) engaging in conduct which infringes the Chapter 2 prohibition or the prohibition in Article 102.

(8) No penalty fixed by the CMA under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).”

129. The relevant order referred to in section 36(8) is the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259). That provides that the turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the CMA is taken or, if figures are not available for that business year, the one immediately preceding it.
130. Section 38 of the Competition Act requires the CMA to prepare and publish guidance as to the appropriate amount of any penalty in respect of an infringement of the Chapter 1 prohibition or the prohibition in Article 101(1). That guidance must be approved by the Secretary of State and according to section 38(8) when setting the amount of a penalty, the CMA and the Tribunal must have regard to the guidance for the time being in force under this section. The obligation on the part of the Tribunal to have regard to guidance was inserted into section 38 by the Enterprise and Regulatory Reform Act 2013.
131. The current Guidance issued by the CMA is *Guidance as to the appropriate amount of a penalty* (OFT423, September 2012), adopted by the CMA Board (‘the Guidance’). That Guidance states that the twin objectives of the CMA’s policy on financial penalties are to impose penalties which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.

132. The CMA found that the Information Exchange Infringement had been committed intentionally or at least negligently for the purposes of section 36(3) and stated in paragraph 5.6 of the Information Exchange Decision that it was appropriate in the circumstances of this case to exercise its discretion to impose a penalty on Balmoral given the seriousness of the infringement and in order to deter similar conduct in the future. Balmoral contends in Ground 3 of its appeal that the CMA should not have exercised its discretion to impose a penalty on Balmoral at all or alternative, in Ground 4, that the penalty should be reduced to a nominal level. As to the first point it says that it is perverse and unfair to impose a fine on Balmoral. It is also discriminatory given that the CMA did not penalise the members of the Main Cartel for their participation in the Information Exchange Infringement. Balmoral contends that this is a breach of the principle of equal treatment.

**(2) The Tribunal's task in assessing the penalty**

133. Paragraph 3(2) of Schedule 8 to the Competition Act, as amended, provides that on an appeal against penalty the Tribunal may confirm or set aside the decision which is the subject of the appeal and may impose or revoke, or vary the amount of, a penalty.

134. The role of the Tribunal in relation to penalty appeals was considered by the Tribunal in *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 which cited passages from earlier judgments of the Tribunal and the Court of Appeal. Those judgments were given before the 2013 amendment to section 38 which imposes on the Tribunal an obligation to have regard to the CMA's penalty guidance. Nonetheless we consider the general description of the Tribunal's role there still to be relevant insofar as it stresses that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, particularly in view of the undertaking's right under Article 6(1) of the European Convention on Human Rights to have the penalty reviewed afresh by an impartial and independent tribunal. The Tribunal's comments in *Kier* that it would not be right for the Tribunal to ignore the CMA's own approach and reasoning in the decision under challenge and that it should recognise a margin of appreciation afforded to the CMA in the application of its guidance are still relevant. The

Tribunal in *Kier* clarified that the reference there to the CMA's margin of appreciation is not intended to restrict the intensity of the Tribunal's review of the penalty decision. Rather it indicates that "the Tribunal's role is not minutely to analyse each step of the Guidance but rather to consider the matter in the round, and on that basis, assess whether the final penalty is appropriate.": see paragraph 75 of *Kier*. The Tribunal went on:

"76. The "margin of appreciation" to which the Tribunal there refers does not in any way impede or diminish the Tribunal's undoubted jurisdiction to reach its own independent view as to what is a just penalty in the light of all the relevant factors. In these circumstances any debate about the scope of any margin of appreciation becomes somewhat sterile. The Guidance reflects the OFT's chosen methodology for exercising its power to penalise infringements. It is expressed in relatively wide and non-specific language, which is open to interpretation, and which is clearly designed to leave the OFT sufficient flexibility to apply its provisions in many different situations. Provided the penalty ultimately arrived at is, in the Tribunal's view, appropriate it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the Guidance at each specific step. As the Tribunal said in *Argos* (above), the Guidance allows scope for adjusting at later stages a penalty which viewed in isolation at an earlier, provisional, stage might appear too high or too low.

77. On the other hand if, as in all the Present Appeals, the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in. Assuming the Guidance itself is unimpugned (and in the Present Appeals there has been no attack on it), the imposition of an excessive or unjust penalty is likely to reflect some misapplication or misinterpretation of the Guidance."

135. In *G F Tomlinson Group Ltd and others v Office of Fair Trading* [2011] CAT 7, the Tribunal described the role of the Tribunal in an appeal against penalty in the following terms:

"72 ... In our judgment, the Tribunal's task is two-fold. The grounds of appeal pleaded by the Present Appellants raise a number of specific complaints about particular steps taken by the OFT in computing the fines imposed in the Decision. Part of our task is therefore to adjudicate on those specific complaints since it is important for the OFT and the parties to know where, if anywhere, we judge that the OFT has gone wrong in applying the Guidance in this case. But the other part of our task is, as the OFT accepts, to look at the matter in the round and form our own view about the appropriateness of the penalties imposed."

136. We will first describe how the penalty of £130,000 was calculated and in the course of that description consider Balmoral's challenges to some of the

specific steps taken by the CMA in arriving at that amount. We will then consider the broader challenges to the overall fine.

**(3) Balmoral’s challenges to particular steps in the calculation of the penalty**

*(a) Step 1: calculation of the starting point*

137. The first step in determining the level of financial penalty is to calculate the starting point, having regard to the relevant turnover of the undertaking and the seriousness of the infringement. The ‘turnover’ for this calculation is relevant the turnover of the undertaking in the relevant market affected by the infringement in the undertaking’s last business year. The relevant market for these purposes is the supply of CGSTs for water storage used in sprinkler systems in the UK. The ‘last business year’ is the undertaking’s financial year *preceding* the date when the infringement ended, which in Balmoral’s case is the financial year running from 1 April 2011 to 31 March 2012: see the statutory instruments referred to earlier.

138. The CMA recorded that Balmoral was a new entrant with limited business in the CGST market in the financial year prior to the alleged infringement. It entered the CGST market in late 2011, delivering its first certified CGST in February 2012. Relevant turnover during the two month period from February to 31 March 2012 (the end of Balmoral’s financial year preceding the date of the infringement) was only £19,200. Turnover for the next full financial year (1 April 2012 to 31 March 2013), which included the date of the Meeting, had risen significantly to £1,932,355. This suggested, the CMA said, that applying the relevant turnover from the period indicated by the Guidance would not be an accurate reflection of Balmoral’s real economic situation at the time of the infringement. In this regard, the CMA referred to the CAT’s judgment in *Kier* paragraphs 126, 132 and 138, where the Tribunal said that the level of penalty should reflect the undertaking’s real economic situation at the time the infringement was committed. The CMA concluded:

“5.19 Having had regard to the Penalties Guidance, the CMA considers that a more appropriate approach in the particular circumstances of this case is to use the 12-month period immediately preceding the infringement as a basis

for determining relevant turnover. Balmoral Tanks' relevant turnover in this period was £802,588.

5.20 This gives a more accurate reflection of Balmoral Tanks' economic situation at the time of the infringement, as a new entrant to the CGST market with increasing turnover, as compared to alternative approaches, such as using the previous financial year ending 31 March 2012 (which includes only two months of relevant turnover) or the five month period of turnover up to July 2012 grossed up to a full 12 month period, or using Balmoral's turnover from a later period (such as at the end of the financial year during which the infringement took place)."

139. The CMA referred to Balmoral's representations that the CMA was not permitted to depart from the Guidance purely to enable it to arrive at a significantly higher penalty than that envisaged by the Guidance. The CMA rejected this, stating that the Guidance is not legally binding and it was appropriate to depart from it in this case. In any event, the CMA indicated, if they had used the much lower figure of £19,200 as the starting point they would have had to apply an uplift elsewhere in the calculation in order to arrive at an appropriate sum. The CMA therefore used the figure of £802,588 as the relevant turnover.
140. Balmoral contends that there was no lawful or justified basis for the CMA ignoring its own Guidance on the relevant turnover. It objects that the increase in turnover in 2012 was the direct result of Balmoral competing with the other suppliers rather than colluding with them and so was wholly unconnected with the alleged infringement. The use of this turnover therefore effectively amounts to penalising Balmoral for competing in the market when the rest of the suppliers were party to the cartel.
141. In our judgment, the CMA was right and fair to identify the 12 month period ending with the date of the Meeting rather than the financial year ending on 31 March 2012 as a more representative period of Balmoral's business for this purpose. A situation where the value of the infringer's business is rising rapidly is precisely the kind of situation where the Guidance may need to be modified to arrive at a more accurate reflection of the infringer's position on the market. This does not amount to penalising Balmoral for its success. The starting point is aimed simply at identifying what turnover the infringer has earned on the relevant market, however it has earned it. We note that if the

CMA had chosen either of the other two turnover levels, it would have arrived at a very much higher figure. Between 1 April 2012 and 11 July 2012 Balmoral earned £395,371.28 so the grossed up annual figure would be £948,891. The turnover for the financial year 1 April 2012 – 31 March 2013 was very considerably more since Balmoral made a large number of sales in the second half of 2012. It is not true to say, therefore, that the CMA chose a parameter which allowed it to increase the level of the fine.

142. We note Balmoral's submission that the CMA failed to take into account the fact that the alleged information exchange only involved two out of numerous sizes of tanks. The two sizes only made up around 6 – 7% of all the CGST quotes. However, the Guidance is clear that the turnover to be used is that earned in the relevant market and there is no challenge by Balmoral to the CMA's finding that the relevant market is the market for CGSTs in the United Kingdom.
143. As regards the seriousness of the infringement (the second stage in finding the starting point for Step 1), the CMA noted that the maximum multiplier to apply to the relevant turnover is 30 per cent. In the Main Cartel Decision, the CMA applied the maximum 30 per cent figure. In this case the CMA applied a multiplier of 18 per cent. It arrived at that figure taking into account a number of factors. This was an infringement by 'object' and of its nature inherently risked creating significant anti-competitive harm. Although it is not suggested that any agreement to fix prices involving Balmoral was reached at the Meeting, the information exchanged was capable of reducing uncertainty regarding competitors' prices in the market. Moreover, the information exchange took place between all CGST suppliers on the market at that time (except CST which had by then made a leniency application to the OFT). It also took place in the context of a market which was already subject to a long-running cartel involving price-fixing, market sharing and bid-rigging. Balmoral continued to participate in the meeting, providing and receiving information about current pricing and future pricing intentions after Mr Joyce had been told about the Main Cartel.

144. On the other hand, the CMA recognised that the infringement took place at a single meeting and whilst the exchange of information reduced uncertainty in the market, it did not remove it completely. Evidence of specific harm to consumers resulting from the exchange of information was limited. It was clear that Balmoral continued to compete, including on some occasions pricing below the bands discussed at the meeting. Applying the 18 per cent to the relevant turnover resulted in a starting penalty of £144,466.
145. Balmoral contends that the CMA should have applied a percentage of appreciably less than 10 per cent. It argues that the CMA did not take into account the fact that Balmoral was the only pro-competitive force in the market and that there was no evidence of specific harm to customers by virtue of the information exchange. On this point Balmoral relies on the aggressive bid put in by Balmoral shortly after the Meeting which won it the contract from Compcoco and on Mr Joyce's evidence that he did not pass on the information discussed at the Meeting to Mr Ross nor did he instruct him or any other member of the sales team to keep within any particular price bands for the two tank sizes.
146. In our judgment, the reasoning of the CMA in arriving at the seriousness percentage of 18 per cent is unimpeachable. Any horizontal arrangement involving all the suppliers in the market and relating to price is likely to attract a seriousness multiplier in the upper end of the range of 0 to 30 per cent. The CMA did specifically take into account the lack of evidence of specific harm and it dealt with the other points made by Balmoral elsewhere. We consider that the CMA was justified in using 18 per cent as the multiplier here.

***(b) Step 2: adjustment for duration***

147. The second step in arriving at the penalty is to adjust the starting point for duration. The CMA applied a multiplier of 1 to the starting penalty. The CMA noted that the practice of rounding up for infringements lasting less than a year aims at ensuring sufficient deterrence for shorter infringements, recognising that even infringements of a very short duration (including those which may take place at a single meeting) may have longer lasting effects. The CMA

quoted from the judgment of the CAT in *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4, paragraph 278 recognising that the effect of an infringement has a potential continuing impact on future tendering processes by the same tenderers. Moreover, once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified. The fact that the infringement is based on an exchange of information which took place at a single meeting is, however, taken into account at Steps 1 and 4.

148. Balmoral accepts that the Guidance states that where the total duration of the infringement is less than one year, the CMA will treat the duration as a full year unless there are exceptional circumstances. Balmoral contends however that the circumstances here are exceptional because the infringement took place at a single meeting.
149. We cannot see any basis for interfering with the CMA's decision here and we agree with their reasoning. The same arguments apply here as we considered in relation to the issue whether an exchange of information at a single meeting could, in this market, amount to an infringement. There was no basis for departing from the Guidance in this regard.

*(c) Step 3: adjustment for aggravating and mitigating factors*

150. At step 3, the CMA then applied an uplift of 5% to reflect the involvement of Mr Joyce as a senior executive officer of Balmoral in the infringement but also to reflect the fact that he did not instigate the Meeting and attended with the intention of making it clear that Balmoral was not willing to take part in customer allocation or market sharing arrangements.
151. As regards mitigating factors, the CMA applied a discount of 15 per cent which it explained in the following terms: (footnotes omitted)

“5.39 The CMA considers that it is appropriate to decrease the penalty for Balmoral at step 3 by 15% to reflect its significant cooperation in both the



civil and parallel criminal investigations, which involved: (i) agreeing to a streamlined access to file process, which led to savings of time and resource; (ii) making witnesses available for interview who provided witness statements, including Mr Joyce who also gave evidence at the criminal trial; and (iii) allowing the CMA access to electronic material and archive material for the purposes of the criminal investigation.

5.40 The CMA would not normally apply such a significant discount for cooperation, but has done so exceptionally in this case to take account of the significant cooperation provided by Balmoral in the context of both the criminal and civil investigations.

5.41 Balmoral has suggested in its representations to the CMA that its cooperation discount should be much higher and akin to a leniency discount. The CMA has a specific leniency policy (the ‘Leniency Guidance’). In order to benefit from leniency, an undertaking must fulfil certain conditions, including accepting that it has infringed competition law. Balmoral did not apply for leniency in accordance with the Leniency Guidance.”

152. The figure arrived at by the end of Step 3 was £130,019.
153. Balmoral argue that the reduction of 15% was not genuinely reflective of Balmoral’s full cooperation in both the criminal and civil investigations. They suggest that a reduction of 50 per cent was appropriate.
154. We recognise that maintaining the integrity and attractiveness of the leniency regime is an important aim for the enforcement of the competition rules. The key feature of the leniency programme is not that undertakings cooperate with the CMA by helping with an investigation after the CMA has discovered the existence of an anti-competitive practice. Rather it is to encourage undertakings to come forward with information which either discloses the existence of the infringement to the CMA for the first time or adds significant value to the investigations (Type A leniency of the kind granted to CST or Type B leniency) or which encourages a second or later applicants to add significant value to the investigation (Type C leniency of the kind granted to Franklin Hodge). Direct and indirect communication of prices is one of the kinds of infringement that can engage the leniency regime. The conditions of benefiting from leniency include admission of liability as well as cooperation with the investigation. As paragraph 5.9 of the Leniency Guidance states:

“Leniency is given in exchange for admissions of participation in cartel conduct ... the conditions of leniency necessitate that there should be continuing acceptance of having engaged in cartel activity, including an

acceptance that such activity infringed the Chapter I prohibition or Article 101 of the TFEU ...”

155. We also note that the reduction of 15% given to Balmoral was higher than the reduction of 10% given to Galglass which also cooperated by, amongst other things, making witnesses available at the criminal trial and to Kondea which was granted a discount of 5% to reflect its cooperation in both the civil and the criminal proceedings.
156. We consider that where the leniency regime is available but not used by an infringing undertaking, it would be very rare for any reduction in penalty for cooperation to be as high as 50 per cent, that being the maximum reduction contemplated for Type C leniency. We consider that 15 per cent was a fair reduction to make and we see no basis for interfering with it.

*(d) Step 4: deterrence uplift*

157. The CMA then went on to consider whether a further uplift was needed at Step 4 to achieve the objective of deterring Balmoral from future anti-competitive conduct or to ensure that a penalty is proportionate, having regard to appropriate indicators of the size and financial position of the undertaking as well as any other relevant circumstances of the case. The CMA noted that about 85% of the Balmoral group’s turnover in the financial year ending 31 March 2015 was generated outside the Balmoral Tanks business. Given the size and financial position of Balmoral, the CMA would normally consider a significant uplift to ensure that the penalty was sufficient to deter the undertaking and others from breaching competition law in the future. The CMA went on:

“5.48 However, in light of the particular circumstances of this case, the CMA does not propose to apply an uplift to the penalty at the end of step 3, having regard to:

- Balmoral’s refusal to join the main cartel despite facing significant pressure from other parties to do so; and more generally the overall pro-competitive effect of Balmoral’s entry on the market (which prior to Balmoral’s entry had been subject to a long-running cartel arrangement between all the UK suppliers of CGSTs) which is bound to have played at least some part in the collapse of the main cartel,

- the fact that Balmoral did not instigate the meeting at which the information exchange took place, and attended with the intention of making it clear that it was not interested in allocating customers or market sharing,
- the fact that the information exchange infringement was confined to a single meeting,
- the time and resources incurred by Balmoral in relation to both the criminal and civil investigations into the main cartel, as well as the deterrent effect on Balmoral of its Managing Director having been arrested (although ultimately not charged) in connection with the criminal investigation”.

158. Assessing the penalty in the round, the CMA concluded that a penalty of £130,019 was appropriate for deterrence purposes without being disproportionate or excessive. The final penalty was therefore rounded down from £130,019 to £130,000.
159. As we have explained above, we reject the specific criticisms made by Balmoral of the way in which the CMA calculated the fine.

**(4) Balmoral’s submissions that the fine is unfair and discriminatory**

160. Balmoral is aggrieved that a penalty was imposed on it for this infringement and that no penalty was imposed on the other parties to the information exchange infringement. In the Information Exchange Decision, the CMA noted that Balmoral argued that it would infringe the principle of equal treatment for the CMA to impose a penalty on Balmoral in respect of the information exchange infringement, but not also on the other parties. The CMA said that the decision to fine only Balmoral reflects the particular circumstances, including the closeness of the link between the other parties’ involvement in the facts underlying the Information Exchange Infringement and the Main Cartel Infringement, and the level of the penalties imposed on them in the Main Cartel Decision: see paragraph 5.51 of the Information Exchange Decision. The CMA said that the other companies had been fined for conduct which took place between 29 April 2005 and 27 November 2012, including the 11 July Meeting at which the Information Exchange Infringement took place.

161. Balmoral also complained that the fine imposed on it was much higher than the fine imposed on one of the parties to the much more serious Main Cartel. The CMA said in the Information Exchange Decision that this was in part because the fines for the others had been reduced significantly in some instances to ensure that they were not disproportionate given the size and financial position of those undertakings and to prevent the maximum penalty being exceeded. A direct comparison between the penalties proposed for the parties to the Main Cartel, and the penalty proposed for Balmoral in respect of the information exchange would not, the CMA said, be appropriate due to the very different infringements in question. However, the CMA had had regard, in assessing the appropriateness and proportionality of the proposed penalty for Balmoral in the round, to the penalties imposed on the others and had concluded that Balmoral's penalty "is appropriate and proportionate in the round, taking into account the varying sizes and financial position of the Parties".
162. In the Main Cartel Decision, the CMA did not calculate a financial penalty for CST which had been granted full immunity under the leniency policy. For the other three parties the CMA followed the Guidance as to the 'last business year' meaning the undertaking's financial year preceding the date when the infringement ended for Franklin Hodge and Kondea. By this time Galglass and its parent companies were in liquidation and unable to provide the CMA with relevant turnover figures. The CMA therefore used Galglass' 2011 sales of GSTs to its top 20 customers. The CMA used the highest possible percentage for seriousness, 30%, and applied a multiplier of 7.75 to reflect the duration of the main cartel. It increased the penalty by 15% to reflect the aggravating factor of the involvement of directors in the infringement.
163. In considering mitigating factors, the CMA decreased the penalty for Galglass by 10% to reflect its cooperation in both the civil and criminal investigations and reduced the penalty for Kondea by 5% similarly. Franklin Hodge had been granted Type C leniency which was dealt with at a different stage of the calculation. Each of the infringers was also granted a reduction of 10% (at the end of step 6) to reflect compliance activities demonstrating "a clear and unambiguous commitment to competition law compliance throughout the

organisation from the top down”: see paragraph 5.38 of the Main Cartel Decision.

164. At step four, the CMA considered whether the penalty should be increased for specific deterrence or conversely whether it should be decreased to ensure that it was not disproportionate or excessive:
- (1) For Franklin Hodge, the penalty was decreased by 65% to £3,598,455 to ensure that it was not disproportionate or excessive. The CMA noted that this represented 3% of Franklin Hodge’s average annual worldwide turnover, 13% of its adjusted net assets and 217% of its average annual profit after tax.
  - (2) For Galglass the penalty was decreased by 75% to £1,212,389 to ensure that it was not disproportionate or excessive. The CMA noted that this figure represented about 7% of the undertaking’s average annual worldwide turnover, 29% of adjusted net assets and 239% of average annual profit after tax.
  - (3) For Kondea the penalty was decreased by 95% to £127,342 to ensure that it was not disproportionate or excessive. The CMA noted that this represented 43% of the undertaking’s average annual worldwide turnover, 1703% of its net assets and 213% of its profit after tax for the financial year ending 2014.
165. The CMA then applied the statutory cap which provides that a penalty for an infringement must not exceed 10% of the undertaking’s ‘applicable turnover’, that is the worldwide turnover of the undertaking in the business year preceding the date of the CMA’s decision: see section 36(8) of the Competition Act. This did not affect Franklin Hodge’s penalty but it reduced Galglass’ penalty to £859,541 and Kondea’s penalty to £30,900.
166. Finally, the CMA reduced Franklin Hodge’s penalty by 30% pursuant to the Type C leniency that had been granted and all the parties got a settlement discount because they had admitted the facts and allegations of the Main

Cartel infringement as set out in the Statement of Objections. The final penalties payable were therefore £2,015,135 for Franklin Hodge, £22,248 for Kondea and £587,926 for Galglass.

167. In the *G F Tomlinson* judgment referred to earlier, the Tribunal considered a submission by some of the appellants that other addressees of the infringement decision in that case had been subject to fines which were lower than theirs, inviting the Tribunal to draw the conclusion that the fines imposed were arbitrary or discriminatory or that they offended against the principle of equal treatment. The Tribunal said:

“150. Such comparisons must be approached with caution. The final figure for the fine imposed on each addressee is the result of many different choices made by the OFT as to what factors should or should not be taken into account when setting the penalty in accordance with the framework set out in the Guidelines. The fact that the application of these choices results in two different companies being subject to widely varying fines is not a matter for complaint or criticism by itself.

[...]

152. We do not accept the premise underlying Galliford Try’s submissions that it is possible simply to compare its fine with that of the two undertakings it has picked for the purposes of the appeal and conclude that its fine was perverse, arbitrary, unfair or discriminatory. Rather we must look at all the factors that fed into the final amount and determine whether there was a particular flaw in the choice of that factor or the way it was dealt with. The Tribunal must then go on to consider in the round whether the penalty is too high of itself (rather than in relation to other fines), having regard to the nature of the infringement and other factors. Our assessment of the overall proportionality of the fine imposed on a particular undertaking is not an attempt to even up the fines as between the undertakings with which the Appellant has compared itself.

[...]

157 The question whether the OFT has acted in a discriminatory manner cannot be addressed simply by looking at the outcome of the fining process. It can only be addressed by looking at the parameters the OFT chose to include in its computation.”

168. Further, in the *G F Tomlinson* appeal, a number of appellants complained that although the OFT had accepted that their infringement was less serious than some of the other infringements committed by other addressees of the decision, their fine was higher than those imposed on the more serious infringers, whether expressed in absolute terms or as a percentage of total

turnover. The Tribunal rejected the suggestion that there was a breach of the principle of equal treatment for that reason. The relative seriousness of the infringement was properly reflected by adopting a higher starting percentage in calculating the fine. The fact that this did not result in the overall fine being in all cases higher for the more serious infringers was the result of other factors coming into play and did not evidence discrimination.

169. In our judgment, the same reasoning applies in the present case. The Main Cartel was treated as much more serious than the Information Exchange because the multiplier at Step 1 was 30% rather than 18%. That did not ultimately result in higher fines for all the Main Cartel members because of other factors coming into play. The fine imposed on Balmoral was a very much smaller percentage of its worldwide turnover, net assets and profit after tax than the fines imposed on the others, comparing the figures in paragraph 164 above with those in paragraph 5.50 of the Information Exchange Decision. We can see nothing in the way that the CMA approached the calculation of the Main Cartel fines on the one hand and the fine on Balmoral on the other which indicates any unequal treatment or discrimination.
170. We were initially concerned by the fact that the other participants in the Information Exchange Infringement had not been subject to any fine at all even though the CMA treated that infringement as separate from the Main Cartel. However Mr Williams reminded us that section 36(7A) of the Competition Act provides that in fixing a penalty the CMA must have regard to the need for deterrence on the undertaking concerned and on others. The question for the CMA when considering whether to impose a penalty on Franklin Hodge, Galglass and Kondea for the Information Exchange Infringement was whether it was necessary to impose a fine in addition to the fine imposed by the Main Cartel Decision for the statutory purposes, including deterrence. The CMA was, we accept, entitled to conclude that it could not justify imposing an additional fine on the Main Cartel members for their participation in the Information Exchange infringement, applying the statutory test.

171. Finally we have taken a step back to consider the fairness and proportionality of the fine imposed on Balmoral for this infringement. We have concluded that there is no basis for criticising it. It is an appropriate amount given the nature of the infringement, the need to send a clear signal to other undertakings of the dangers of casual discussions about price but also given the very positive effect Balmoral had on this market by its decision to compete vigorously on price and to cooperate with the CMA in its investigation of the Main Cartel.

172. We therefore unanimously dismiss the appeal.

The Hon. Mrs Justice Rose  
Chairman

Dr Catherine Bell CB

Margot Daly

Charles Dhanowa O.B.E., Q.C. (*Hon*)  
Registrar

Date: 6 October 2017