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## **RPI OXFORD COMPETITION CONFERENCE 2003**

### **MOCK TRIAL TESTING THE CARTEL OFFENCE UNDER THE ENTERPRISE ACT (JULY 2003)**

**RPI CONFERENCE – 15/16 JULY 2003**

**SESSION 3: MOCK TRIAL**

**R -v- ALBERT HERRING AND OTHERS**

**IN THE CROWN COURT AT KEBLE**

**TRANSCRIPT OF TRIAL: VERBATIM VERSION**

**The players:**

|                          |                                   |
|--------------------------|-----------------------------------|
| Trial Judge:             | Mr Justice Swift                  |
| Defence counsel:         | Thomas Sharpe QC and Matthew Cook |
| Prosecution counsel:     | Peter Roth QC and Clair Dobbin    |
| Clerk:                   | Annelie Howard                    |
| Zoltan Biro:             | Himself                           |
| Mark Williams:           | Himself                           |
| Introduction and review: | Peter Freeman and Irwin Stelzer   |

**[CD 1]**

**Introductory remarks**

**Peter Freeman**

[For the purpose of this session, I would ask you to imagine that it is 2004] and the Section 188 offence has begun to bed down. You have a pack of materials and you, ladies and gentlemen, are the jury. In that pack you will see various helpful pieces of paper, one actually is the Section 188 offence; dishonestly agreeing to fix prices, share markets and so on. Now we have created a little case study which relates to external cladding materials and we have an unfortunate executive, one Albert Herring who is on trial this afternoon. And we are indebted to Grey Denham, Company Secretary of GKN for putting himself in this [laughter] invidious but honourable position. And he plays the commercial manager of Slabco and of course any resemblance in this case study to any living person, company or building material [laughter] is

entirely coincidental and we have sought an indemnity for a defamation and haven't obtained it. [laughter] Would you, however, please bear with us a little because we only have two hours and insofar as one can predict how these cases would go, there would be numerous procedural and, sort of, process points which would prevail and which would take up an awful lot of the time. Now we are cutting right through that, so in a sense this is an entirely artificial criminal trial.

We have invited the teams, the prosecution team and the defence team, to focus on the concepts of agreement and dishonesty, which we think are at least worth exploring at this early stage. Now it is my pleasure to hand over to Mr Justice Swift who presides over Keble Crown Court.

## **The trial**

### **Mr Justice Swift**

Welcome to Keble Crown Court, members of the jury. We've got very good acoustics. This is the first trial to take place in the United Kingdom of this offence of the cartel, criminalised cartel activity. So you are privileged beyond all other jurors to cast your decision, your vote at the end of this session. Counsel for the prosecution and counsel for the defence, I can tell you, have got some tricks up their sleeves because we know you've been through the really heavy stuff over the past day-and-a-half and they intend to be as instructive, informative and also amusing as possible. So to an extent we depart from reality to a degree this afternoon.

We are working to an extremely tight deadline and I am going to ask counsel for the prosecution and counsel for the defence really to stick to the agreed timetable, so that we do come to the end of the evidence by 3.30 this afternoon. I am not going to swear you all in, it's going to take too long, so assume you are duly sworn in. No objections are going to be allowed by any jurors to escape service this afternoon. [laughter] But I can give you, so far as I can, some degree of hope that after you have done service this afternoon you won't be asked to attend the Keble Crown Court ever again [laughter].

## **Pre-trial application**

### **Counsel for the prosecution**

My Lord, I'm sorry to interject. Before the jury is formally in court there are two matters the Crown would like to raise with your Lordship.

**Mr Justice Swift**

[Addressing the jury] For this purpose, you are not in court .

**Counsel for the prosecution**

The first matter is an application of which we gave notice to the court and indeed to my friends for the defence concerning the indictment, if your Lordship has the indictment, that on two counts the Crown is applying to make one insertion and one deletion from each count. For the particulars of the offence in count one to insert on the second line, “with John Monkfish of Cladders plc”, ... and then my Lord to delete the words, “and/or with Scotslab PLC”, and the same amendment identically to the particulars of offence under count two. And Mr Sharpe for the defence has been good enough to inform me that he has no objections to those amendments.

**Mr Justice Swift**

Since this is, as I said to the jury who have not yet been empanelled, that this is the first trial of this kind, why do you need the amendments to introduce an individual rather than the corporation?

**Counsel for the prosecution**

Because, my Lord, as you know, an agreement for these purposes has to be with individuals. That is our understanding of the position, that it is an agreement between individuals.

**Mr Justice Swift**

No, it says with one or more other persons, it doesn't say with another individual.

**Counsel for the prosecution**

But an agreement, not in the wording of the offence but as a matter of criminal law, an agreement can only be made with a human person, maybe on behalf of the company but the actual person giving consent has to be an individual person. And I think that is... it does reflect the facts of the case.

**Defence counsel**

My Lord, I have put up with all this, I'm quite happy to my friend's amendment, but he's quite wrong when he says “persons” is confined to human beings, it is quite clearly means companies as well. [laughter]

**Mr Justice Swift**

Well, I have to say that was my view Mr Sharpe [laughter]. Yes, thank you Mr Roth, that was your first point...

**Counsel for the prosecution**

Yes the second point my Lord is a matter of some delicacy which I raised before the jury comes into court. But I was concerned and I have to say, very surprised, great as is my respect of course for my good and learned friend Mr Sharpe, to see him at lunch, having lunch with his client [laughter] and with papers open before them. And as your Lordship knows well, and indeed my friend knows well, that is wholly contrary to the practice of the Criminal Bar [laughter] and we would appreciate his assurance that he was not in any way seeking to coach his client with regard to cross-examination.

**Counsel for the defence**

My good friend, we were simply talking about football. [Laughter]

**Mr Justice Swift**

Do you have another a good point Mr Roth? [laughter]

**Counsel for the prosecution**

No, I had only two.

**Mr Justice Swift**

The Jury is now empanelled.

**Counsel for the defence**

I will now call the, I think we now ask the defendant to..... but he can stay there. Sorry we're just,

**Mr Justice Swift**

... technical points?

**Counsel for the defence**

Grey can stay there ..... Do we have any, no. I don't think we have any technical points my Lord.

**Mr Justice Swift**

No, right. Mr Roth

**Counsel for the defence**

I mean, do you want me to? [Laughter]

**Mr Justice Swift**

Yes, I think Annelie, for this purpose you're the clerk of the Court. So would you put the charge as amended to the defendant?

The charges and pleadings

**Clerk**

Mr Albert Herring you are charged with dishonestly agreeing to make or implement arrangements which directly or indirectly fix a price for the supply in the United Kingdom of cladding materials contrary to Section 188 of the Enterprise Act 2002. This is count one of the indictment and the particulars of the offence are that you, Albert Herring, between 01 March and 30 April 2004 dishonestly agreed on behalf of Slabco PLC with John Monkfish of Cladders PLC to make or implement arrangements which directly or indirectly fix a price for the supply in the United Kingdom of cladding materials. Do you plead guilty or not guilty to that count?

**Defendant**

Not guilty.

**Clerk**

Not guilty, My Lord.

The second count is that you are charged, Albert Herring, with dishonestly agreeing to make or implement arrangements which divide customers for the supply in the United Kingdom of cladding materials contrary to Section 188 of the Enterprise Act 2002 and the particulars of the offence are that you, Albert Herring, between 01 March and the 30 April 2004 dishonestly agreed on behalf of Slabco PLC with John Monkfish of Cladders PLC to make or implement arrangements which divide between Slabco PLC and Cladders PLC customers for the supply in the United Kingdom of cladding materials. Do you plead guilty or not guilty to that count?

**Defendant**

Not guilty.

**Clerk**

Not guilty, my Lord.

**Mr Justice Swift**

Mr Roth.

Prosecution's opening speech**Counsel for the prosecution**

Members of the jury, I am here to prosecute in this matter with Miss Clair Dobbin sitting on my right. The defendant Mr Herring is represented by my learned friends, Mr Thomas Sharpe and Mr Matthew Cook, sitting over there to your right, left as I look at the room. The defendant, Mr Herring, is, and was at the time that we are concerned with, the commercial manager of a company called Slabco who are manufacturers of external cladding materials used on buildings. So they sell to building contractors in the building and construction industry. This case concerns events in March to April of this year 2004. The Crown contends that Mr Herring committed offences under an Act of Parliament that came into force over a year ago, on the 20<sup>th</sup> of June 2003, that is called the Enterprise Act. Normally, members of the jury, as you know, two competitors in an industry compete against each other trying to attract customers on the basis of price, the quality of their goods, service and so on. In the cladding market such competition is mostly on price. If in fact two competitors don't compete with each other on price but they agree with each other not to compete but, for example, to fix prices or to share customers between them, allocate customers, that is a criminal offence if there is such a dishonest agreement. It's an offence committed by the individuals who make the agreement, not by the company that employs them.

Now, very shortly, what happened here was this. Sales of cladding materials are of course very dependent on activity in the building and construction industry. The 1990s were a very good time with a lot of building work going on and so a high level of orders for cladding. But in November 2003 two of the largest British construction companies were subject to criminal investigation and were ordered to suspend trading. Their projects were frozen and other projects were cancelled

and the result was a loss of confidence throughout the construction industry which affected building contractors generally. So demand for cladding materials in Britain in the third quarter- of 200... the first 3 months, sorry the first quarter, the first 3 months, of 2004 declined and they were down almost 18% on the same period the previous year. The sharp decline in building activity of course hit the building contractors very badly, though still trading. They demanded significant discounts on price for cladding materials from their suppliers including Slabco. Since November of 2003 prices have fallen for cladding materials by some 15%.

Members of the jury, I hope you have with your papers an opening note that has been prepared by the Crown and perhaps I might ask you kindly to look at that as that will enable me to take things much more quickly. It is a 3 page note and if you could turn to page 2 of the note, at paragraph 5, where there is a quick summary of the facts as alleged by the Crown or indeed some of them common ground. I have told you that the defendant's the commercial manager of Slabco. There are in fact three companies, and only three UK companies, in the manufacture and supply of external cladding. The two others are called Scotslab and Cladders, and between them these three companies supply 90% of the UK market, the rest is made up by exports, and they supply building contractors throughout the UK. All of them are national suppliers. Conversations between the defendant and his opposite number, as it were, a Mr Monkfish of Cladders, were recorded by way of covert surveillance, that is to say secret tape recording which is a power given to the authorities under this Act of Parliament that I mention. They show that they were in contact with each other.

They met, Mr Monkfish and the defendant, Mr Herring, at the pub on the 1<sup>st</sup> of March and discussed the difficulties in the cladding supply market. And Mr Herring, as you will see from the tape recording of that conversation, showed that he knew that any arrangement to agree on prices may be anti-competitive and potentially against the law. But he still followed up the idea of making some arrangement by asking the Group Legal Adviser of Slabco, a Mr Fixit, for his opinion on it, and was told that such action may be criminal and could only be lawful if it got an exemption from the competition authorities, and that's a reference to the Office of Fair Trading in this country and the EC Commission, the European Commission in Brussels.

On the 21<sup>st</sup> of April Slabco held an extraordinary meeting of its Executive Committee, and Mr Herring was present, and it was convened to consider a proposed floor price, that's to say no prices to be reduced below a certain amount, for cladding and an allocation arrangement between Cladders and Scotslab and Slabco. And at the meeting, the Finance Director of Slabco said the

company would have to exit from production if its operations continued to be unprofitable beyond September of 2004. And it was agreed at that meeting that a positive indication should be made to the two other suppliers, Scotslab and Cladders, in respect of proposed arrangements. Mr Herring's superior, Mr Peter Trout, was authorised to conclude any appropriate arrangements on Slabco's behalf. But also at that meeting there was recorded advice from the outside solicitors to Slabco that for such an arrangement to be lawful it would have to be notified to these competition authorities.

Now there were two further meetings, again in the public house, the Dolphin public house, between Mr Monkfish and Mr Herring that were both recorded. The first on the 25<sup>th</sup> April and during that meeting Mr Herring specifically said to John Monkfish that his company might be interested but they wanted to do things legally. And Mr Monkfish, as you will see, was dismissive of that and said, "that will take far too long". And then five days later they met again, at the end of the same week on the 30<sup>th</sup> of April, and Albert Herring said he'd talked it over with Peter Trout and Slabco were ready to go ahead. Well, unfortunately the recording device recording that second meeting malfunctioned at that point and so the rest of the conversation is not decipherable. But there is an e-mail that was seized in a search that was made, under statutory powers, of the premises of Slabco – an e-mail from the defendant, Mr Herring, to his superior, Mr Trout, which contains explicit references to arrangements between a JM, and we say that's John Monkfish, and Mr Herring, and that the arrangements relate to the division of customers and the fixing of prices.

Members of the jury, there is one additional matter that is important to mention at this outset and that is this. I told you that the solicitors advised Slabco that for agreements to be lawful they'd have to apply for an exemption to the Competition Authorities and that advice was correct on the date it was given. And the condition under which those authorities can give exemption are very restricted, as you might expect, and they are set out in the law. They are set out in fact in another Act of Parliament called the Competition Act. But on the 1<sup>st</sup> of May of this year, 2004, the law was changed, and since that date the competition authorities, both the British ones and the ones in Brussels, no longer give exemptions. So an anti-competitive agreement will be contrary to the Competition Act, unless it fulfils specified conditions. So the conditions that the agreement has to fulfil to be lawful have not changed. What's changed is just that the authorities don't give exemption decisions any more and those conditions, you will see, are set out in page 3, the next page of the opening note. And you will see, I won't read them out to save time, if you cast your eye over it you will see that they are very narrowly drawn; a strict test, as one would expect.

Members of the jury can I ask you to turn in your papers to the indictment. That is the, what lawyers call the charge sheet, as it were.

**Mr Justice Swift**

Mr Roth, sorry to interrupt. What is the relevance of the change in the law on the 1<sup>st</sup> of May? Because your indictment refers to an agreement made between the 1<sup>st</sup> of March and the 30<sup>th</sup> of April, so presumably if your case is that an agreement had been made or was considered then they could have notified it during that period between 1<sup>st</sup> of March and 30<sup>th</sup> April. Is that right?

**Counsel for the prosecution**

They could. The agreement, as you will see on the documents, was actually made on the last date of that period, on 30 April. And the relevance is to make clear, so that we put the case fairly, that after that date it was no longer possible to apply for exemption. So they could have applied immediately on the 30<sup>th</sup> but after the 1<sup>st</sup>; and I haven't brought the amending legislation to court, exemptions are no longer granted.

**Mr Justice Swift**

Does that mean you want to amend the indictment again?

**Counsel for the prosecution**

No absolutely not. The agreement was made at that time and was a dishonest agreement. I am simply explaining...

**Mr Justice Swift**

No, no, sorry to press you on this. The particulars of the offence are that the agreement was made between the 1<sup>st</sup> of March and the 30<sup>th</sup> of April. Are you now telling me the agreement was only made on the 1<sup>st</sup> of May?

**Counsel for the prosecution**

No, it was made as a result of a series of discussions, but the final conclusion of it was on the 30<sup>th</sup> of April. But you have to look at those discussions together. It's just between the 1<sup>st</sup> of March and 30<sup>th</sup> April. We're not saying it was thereafter and so we're not within the new regime.

**Mr Justice Swift**

OK. Thank you very much.

### **Counsel for the prosecution**

Members of the jury, on the indictment you see that there are two counts charged under Section 188 of the statute I mentioned, the Enterprise Act of 2002. And the first count, and I think you will have heard that it has been amended, if you mark those amendments. It has three elements, first there is an agreement to carry out certain arrangements. Secondly the question of what those arrangements are, and what's charged is arrangements to make or which directly or indirectly fix a price for the supply in the United Kingdom of cladding materials, so that's subject of the agreement. And thirdly that the agreement has to be made dishonestly. Those are the three elements of the charge. And similarly, on the second count, again there are three elements. And the difference here is the substance of the agreement that's charged is in this case to divide between the customers for the supply in the United Kingdom of cladding materials. The Crown's case is that both these aspects, the elements that constitute count 1 and count 2, arise from the same series of discussions that, as I've just said in answer to His Lordship, reached their conclusion on the 30<sup>th</sup> of April.

The requirement of dishonesty has two elements to it. We have set them out in paragraph 4 of the opening note on page 1. The test for dishonesty involves a two-stage analysis. The first issue to be resolved is whether, according to the standards of reasonable honest people, what was done was dishonest. Reasonable and honest people for these purposes of course are people assumed to have knowledge of the law as it is, and the, so therefore from that perspective you may think that an agreement to fix prices between competitors, "conduct of that kind is disgraceful, shocking, disgusting, repulsive, yeugh," or you may think that "Parliament got it wrong and that really this should not be a criminal offence", but members of the jury, like income tax, although many people may disagree with it or the rate of tax, one still has to pay it. And it's a criminal offence if someone tries to avoid paying it even though they may think, perfectly genuinely, that the public would be better off if tax rates were lower. And if someone deliberately understates his earnings and makes a false tax return to avoid paying tax we say, "well that that is clearly dishonest according to the standards of reasonable honest people", whatever people may think generally about the rates of income tax at the time. You have to apply the law of the land, and you have to decide whether what happened here, members of the jury, was dishonest on the basis of the law as it is.

So that's the first element. The second element is; if it was dishonest by those standards whether the defendant, Mr Herring, himself must have realised that what he was doing was by those standards dishonest. Members of the jury there is no requirement that the agreement had to be implemented. In fact this agreement was not implemented. It may be because the companies concerned were raided by the authorities very soon after these matters occurred. They were raided on 26 May, when these documents were seized.

Finally, members of the jury, the task of the Crown is to prove that Mr Herring is guilty. Mr Herring does not have to prove his innocence. And how do we seek to prove that he is guilty? By making you sure that he committed the offences as charged. Members of the jury, his Lordship will remind you of that I'm sure at the end of the trial in directing you. And indeed insofar as there are any matters of law in this case, you must of course take your guidance from his Lordship. But what I have said is really by way of introduction to guide you through the case as it develops but the final directions you must take on matters of law are from the Judge.

#### The case for the prosecution

And so members of the jury, with that opening I turn to the case for the prosecution and in this case members of the jury, it depends on, heavily on, documents seized and the recordings which have helpfully been transcribed for the Court. You have I think a bundle of those documents which I'd ask you to open. The first one, labelled document 7A, it is the first of these recordings. A conversation at the Dolphin public house on the 1<sup>st</sup> of March recorded by Mr Bigears between Albert Herring and John Monkfish. It is accepted that it was indeed them.

#### **Mr Justice Swift**

Mr Roth, I'm not sure whether the jury has got the documents that you are about to refer to.

[laughter]

The judge is entitled to go off the record for a second...

[general discussion]

#### **Counsel for the defence**

As we wouldn't in a criminal case;

**Counsel for the prosecution**

Well we would if this were agreed.

**Counsel for the defence**

But it was not agreed.

**Counsel for the prosecution**

What I'll do, in the light of that, I shall read out the most important parts, I think that's the way to deal with it. The conversation started with social pleasantries and then with the two men talking about how times are very hard in the industry, customers pressing for discounts, price reductions, delaying payment and so on. And how tough it seems that all the odds are on the side of the customers. And Mr Monkfish says one of them told him that the buyer was king. And in the present market just had to cut or be cut off – "cut" obviously a reference to prices. And then Mr Monkfish says,

"Do we have to take it, suppose we agree not to go along with it, hold the line against ruinous price cutting. Not overcharging or anything but just keeping enough margin to keep going until the market picks up. Surely that's not unreasonable?"

And Mr Herring replies,

"I don't know, it sounds anti-competitive to me and I'm sure our lawyers wouldn't like it. I remember reading something very like that in the dos and don'ts at the back of our compliance manual." As a don't by the way.

And John Monkfish responds,

"yes but that's to stop us ripping the customer off. We wouldn't be doing that, just trying to survive in business until there's more demand, next year say. Anyway, think about it and maybe we could have another word. Thanks for the drink".

And the next document that the Crown relies on, [which] was seized at the premises, is an e-mail from Albert Herring to the Group Legal Adviser, Jim Fixit on the 1<sup>st</sup> of April. He says:

“Confidential – Jim I need to talk to you about an idea put to me by a contact at Cladders. Cladders are our main competitor, there’s one other small UK supplier,” that would be Scotslab, “and they are suffering as we are from the current downturn. He is suggesting an understanding on floor prices to keep us in the business until the market picks up – is that legal? I’m sure you will say ‘but he is not proposing price increases just smaller falls’. Give me a bell.”

And Jim Fixit replies the same day, the same morning indeed, and he says,

“Albert you need to be careful. What your contact is suggesting could land you both, and possibly all of us, in jail. Don’t say a word about this to anyone else including senior management until I have had a chance to think about it. I am not ruling out some sort of structural arrangement, but it would have to be public and we would have to get it exempted by the competition authorities. I will get back to you”.

A couple of weeks later, on the 21<sup>st</sup> of April, is the meeting with the Executive Committee of Slabco. The CEO says the meeting is called to consider a proposed floor price and allocation arrangement with Cladders and Scotslab with a view to earlier implementation. Mr Trout, the Commercial Director I referred to, reported demand for cladding materials was almost 18 per cent down on the same period in 2003. Current operations in this sector were not profitable. It was not thought that this could be in the long-term interests of customers who might have to switch to more expensive non-UK supply. Mr Whaley, and he is the finance director, confirmed that the company would have to exit this sector if negative margins continue after September of 2004.

Legal advice: Mr Fixit, remember the legal officer, reported preliminary advice from the company’s external legal advisers Hook & Line. This was framed in cautious terms but the bottom line was the company could only enter into this arrangement if it was notified to the OFT and the EC Commission for exemption and this was noted. It was agreed that the serious adverse market considerations required early action and the positive indication should be made to the other two UK suppliers. Mr Fixit was authorised to protect the company’s legal position to the maximum extent possible. Mr Trout was authorised to conclude any appropriate arrangements on the company’s behalf.

Just a few days after that, 25<sup>th</sup> of April, Monday, meeting in the pub between John Monkfish and Albert Herring the defendant. Albert Herring says,

“I have thought a bit more of what you said I talked it over with my chief we could be interested; we prefer to do it legally though”.

John Monkfish responds,

“never trust a lawyer. As soon as you put anything to them they say first you can't do it and then they write you incomprehensible opinions costing thousands. By the time that this is done legally it would be too late.”

The defendant replies,

“Sorry Jim I don't agree. My chief has agreed to contact yours and Scotslab's to agree a standard and publicly disclosed floor price and allocation agreement and to notify the authorities. That way we would stay on the right side of the law.”

John Monkfish answers,

“In your dreams friend. I guarantee you that by the time you have got all that set up we would both be out of business”.

That is on the 25th of April. 30<sup>th</sup> of April they meet again at the Dolphin pub and Albert Herring starts the conversation saying,

“I talked again to my chief following what you said. I can go ahead”.

And John Monkfish replies,

“Good news. Have you heard that Buildco”, that's a building company, “have laid off a hundred brickies because there is so little work? The way things are going I will be redundant. Let's see how we get on today”.

And at that point, as I said in opening, the recording device failed. But at the beginning of the following week there was an e-mail from Albert Herring to Peter Trout which says, “saw JM on Friday”, and we say ‘JM’ is clearly a reference to John Monkfish, “settled on the following. S&T

no further reductions in prices for skin L”, and skin cladding is a form of cladding, “and PC”, which we say is a reference to pre-cast, “until at least December 2004 when the position will be reviewed”. And then there are two columns, one headed ‘S’ and one headed ‘C’. We say that ‘S’ stands for Slabco and ‘C’ stands for Cladders, and beneath each column are the names of various construction companies, none appearing in both columns – one allocated to Slabco and one to Cladders.

And that, settled on the following report is the word is the report, say the Crown, from Mr Herring to Peter Trout of the concluded agreement the climax of these discussions made the previous Friday with John Monkfish on the 30<sup>th</sup> of April.

And, members of the jury, that is the case for the prosecution.

### **Mr Justice Swift**

Thank you very much Mr Roth. Mr Sharpe.

### The defence’s opening speech

#### **Counsel for the defence**

My Lord, I shall be brief in introducing the defence arguments. It is my intention to call Mr Herring and our expert economist.

Ladies and gentlemen of the jury, there are really three questions and three simple questions for you. First is, was there a price fixing agreement? First question. Second then, was there a market sharing agreement? Second question. And third question, were they entered into dishonestly? Now, you will hear evidence very soon from Mr Herring that no agreement was ever made. There were discussions, yes. There were aspirations expressed on both sides. But was there any form of agreement worthy of the name between them, did they strike a bargain? Was Mr Herring authorised to strike a bargain? On this, all that the prosecution can rely on are just a few words in a tape recording which failed. “I can go ahead,” and then three dots supplied. Meaning “I can go ahead and we can make an agreement today on price fixing”, that is what the Crown are reading into those words. Now you don’t have to listen to my learned friend on that. You are going to hear Mr Herring give his version of the events in just a moment.

Was there a market sharing agreement? There is no evidence whatsoever that market shares were ever discussed in the tape-recorded meetings you have heard extracts from, none whatsoever. To the extent there is any evidence about market sharing, it derives from an internal memorandum dated the 3<sup>rd</sup> of May. And you all heard his Lordship point out that the agreement alleged here took place on or before the 30<sup>th</sup> of April. No agreement, and my friend said this in terms, was made after the 30<sup>th</sup> of April. There is no evidence at all of any agreement in relation to market shares made before the 30<sup>th</sup> of April. As you will see when you hear the evidence, bear in mind; were market shares discussed at all? Were customer allocations discussed? The answer is no. So that is a charge that comes out of thin air. You will hear evidence.

**Counsel for the prosecution**

My Lord, forgive me, but my friend is going to call evidence, he is not making a submission of no case, this is not his closing speech. He is making comments to the jury before the evidence is heard and that is wholly inappropriate as he knows fully well!

**Counsel for the defence**

Lord, I have had the benefit of 30 minutes of listening to my friend. I think that I can set the scene in under 2 or 3 minutes to the jury and then I will call Mr Herring.

**Mr Justice Swift**

Please continue Mr Sharpe.

**Counsel for the defence**

Thank you so much [laughter]. And you will also hear evidence, you've heard it, that Slabco was in deep trouble. It faced a tough choice: it should withdraw from the market by September 2004, unless some other temporary, and as you will hear, lawful arrangements could be put together. Now, as you have already heard, the documentation points all the time to Mr Herring saying, "Yes we will do this but it must be lawful". "We want it to be lawful". "We want it to be above board and we want it to be public and comply with the law". We've heard that and we are going to hear Mr Herring say it as well. And of course of the last piece of evidence, [laughter] the last piece of the jigsaw lies in our expert evidence. What we are dealing with here...

**Counsel for the prosecution**

Well, I'd ask my friend not to tell the jury about it, because we will be making an application in that regard in due course. It would be quite wrong of him to start summarising evidence for which your Lordship was not .....

**Mr Justice Swift**

I understand, Mr Sharpe, that an application is going to be made in the event that you call Mr Biro and therefore it is appropriate that we don't get into that at this stage.

**Counsel for the defence**

Well I shall be calling him and we'll deal with it in due course.

**Mr Justice Swift**

You will call him if I approve. [laughter]

The case for the defence

**Counsel for the defence**

Indeed, yes. I think then it falls to me to call Mr Herring, Albert Herring. If we could have him sworn please.

**Mr Justice Swift**

The clerk again please.

**Clerk**

Albert Herring do you swear to tell the truth, the whole truth, and nothing but the truth?

**Albert Herring**

I do.

**Counsel for the defence**

Mr Herring you are the commercial manager of Slabco is that correct?

**Albert Herring**

Yes.

**Counsel for the defence**

And I am going to take you to the Executive Committee meeting that took place on the 21<sup>st</sup> of April and there are minutes of that. That you will find at 7D in your papers. Have you got it?

**Albert Herring**

Yes I have.

**Counsel for the defence**

Now you have already heard my friend introducing this evidence. But I want to take you back to that meeting. We see from the minutes that the trading was discussed, tell us about the state of Cladders and the company's trading.

**Albert Herring**

Well it was horrible really [laughter]. You know, we had had some good years in the 1990's but then everything had gone flat and then the market kind of drove off a cliff really [laughter]. And then the old bill closed down two of the biggest customers we .....

**Counsel for the defence**

I beg your pardon Mr Herring

**Albert Herring**

Sorry, the police closed down two of our biggest customers. And then the what was left they started asking for discounts, I mean it was ridiculous really.

**Counsel for the defence**

And, what was the reason for the collapse? I mean, perhaps you could develop your basis for the sudden collapse in the market?

**Albert Herring**

Well, well, you know, the building boom had come to an end and the, sort of, high growth had disappeared and it was really pretty flat and there was definitely pressure on prices. And then two of the biggest players got, well there were allegations that they were linked to organised crime. They got closed down and everybody lost confidence and nobody wanted to build any more because they thought the Mafia would turn up. You know, it was just hopeless. Nobody

was buying anything and, you know, we were just sort of having to try and cut prices dramatically to make sales.

**Counsel for the defence**

Did you see it as a permanent or a temporary situation?

**Albert Herring**

Well it was an absolute ruddy emergency really. I mean it was a crisis. You didn't know what to do. Probably you know once the police thing got sorted out it would probably come back but, you know, it could have been 3 or 4 months, who knows?

**Counsel for the defence**

Now, Mr Whaley, the finance director, attended the meeting didn't he?

**Albert Herring**

Yes.

**Counsel for the defence**

Now, just tell us what he had to say.

**Mr Justice Swift**

Just, can I make a note of this, do you say, Mr Herring, that the market would come back in 3 to 4 months?

**Albert Herring**

Yes, that is what we thought your Honour, yes.

**Mr Justice Swift**

But very temporary?

**Albert Herring**

Well, temporary, yeah, but enough time to go out of business if you are in a bad state.

**Counsel for the defence**

And you were in a bad state weren't you?

**Albert Herring**

We were, yes. [laughter]

**Counsel for the defence**

I will rephrase that. Mr Whaley is the finance director isn't he?

**Albert Herring**

Yes, sir, he is.

**Counsel for the defence**

And did he offer any comments on the financial position?

**Albert Herring**

Well yeah, he said we were stuffed really because, you know, we had had all this expansion in the 90's and we had to borrow to, sort of, build plant and we were up to our armpits in debt. And he said that, you know, our borrowing capacity was at its limit and it would get worse because, if anything, it dropped down, the credit rating would go and, you know, our banking covenants would trigger and we would have to pay everything back. It was diabolical, we would go up the wall.

**Counsel for the defence**

And so what was his solution?

**Albert Herring**

Well, you know, there had been a suggestion that we could, sort of, at least stabilise the market by not accepting any further price cuts.

**Counsel for the defence**

But, before that, did he comment on how quickly a solution had to be found?

**Albert Herring**

Oh yes, I mean he was convinced that 10, 12 weeks and that was it. The next time our borrowing had to come up for repayment we were gone.

**Counsel for the defence**

And had you exhausted all your borrowing opportunities.

**Albert Herring**

Absolutely, and if the credit rating went down, no bank would touch us.

**Counsel for the defence**

But your a good proposition aren't you?

**Albert Herring**

Well not in the state of that market no. We are just a little, sort of, building supplier from Smethwick really.

**Counsel for the defence**

So Mr Whaley said that the company would withdraw, is that the point?

**Albert Herring**

He said that we had to get out, that or, "liquidation" I think he called it.

**Counsel for the defence**

What did the Executive Committee resolve to do?

**Albert Herring**

Well basically they authorised my boss, that's Trout, to try and do a deal. But they were quite clear that, there was a lot of talk about legal stuff that I didn't really understand, but we had to do it legally.

**Counsel for the defence**

And Mr Trout is your boss and he, in the highest traditions, delegated to you the task.

**Albert Herring**

Yes, he always does.

**Counsel for the defence**

Yes. Alright, now lets turn to the next document. This is your conversation with Mr Monkfish in the pub on the 25<sup>th</sup> of April.

**Mr Justice Swift**

Mr Sharpe can you remind us which document.

**Counsel for the defence**

Certainly, 7E. What did Mr Monkfish want you to do there?

**Albert Herring**

Well he really wanted me to find out what was possible with Cladders, the company which Monkfish worked for. But, you know, I had to sort of make sure it was legal, like.

**Counsel for the defence**

Are you saying that he wanted you to do something that wasn't legal?

**Albert Herring**

No, we only wanted to do it legally but we needed to do something.

**Counsel for the defence**

And, I'm going to quote your words for the benefit of the jury, "Sorry Jim I don't agree. My chief has agreed to contact yours and Scotslab to agree a standard and publicly disclosed floor price and allocation agreement and to notify the authorities. That way we will stay the right side of the law." Are those your words?

**Albert Herring**

Yes, that was because Monkfish reckoned we hadn't got time to go through all the, like, legal formalities with the authorities and things.

**Counsel for the defence**

Your next recorded conversation, or perhaps more accurately half-recorded, is found at 7F. Have you got it? 7F?

**Albert Herring**

Sorry, mine's in a different place. I am a bit awkward like that!

**Counsel for the defence**

Take your time Mr Herring. Here, you see, is a very short conversation that was recorded and then the machine goes bust. You weren't aware of any recording were you?

**Albert Herring**

No. Nobody would snoop like that, I think that is horrible. [laughter]

**Counsel for the defence**

I do so sympathise Mr Herring. Now, "I talked again to my chief...". Who is your chief?

**Albert Herring**

That's Trout.

**Counsel for the defence**

That's right. What you said, "I can go ahead," and then we have Mr Monkfish saying "good news" and then he rejoices in the problems of Buildco. And then the listening device failed. Take us through the rest of the conversation to the best of your recollection.

**Albert Herring**

Well, you see, Trout had said to me that we could go ahead because there was something about the law changing and we didn't have to go back to the authorities any more. He said that it was going to be much easier and we could probably do it in the time and, you know, it was like all we had to do was convince ourselves that we were in a crisis and, well, as far as me and Monkfish were concerned that was absolutely no-brainer. I mean we knew we were in a crisis. So we thought well that is alright.

So I had to go off and I had to talk to Monkfish. And basically I said to him that we could go ahead providing... we could go ahead provided we could agree the sort of floor details and the products, you know. But, you know, that would all be subject, obviously because my Executive Committee had said that it was Trout's responsibility, provided that I got something with Monkfish I can guess he'd got to take it back where he'd got to take it back to and I'd got to take it back to Trout.

**Counsel for the defence**

So two points there. One, that the law was changing the next day...

**Albert Herring**

..it was old...

**Counsel for the defence**

...and that would no longer require this lengthy process of notification.

**Albert Herring**

Yeah, which is what he, Monkfish, yeah.

**Counsel for the defence**

Yes, and secondly did you actually tell him in terms that you had to take it back? Just remember it very carefully.

**Albert Herring**

Yes. I mean he knew that I was going to take it back to Trout but I told him, you know, I would have to take it back to the boss. The whole object really was to, sort of, finalise what we took back to our bosses.

**Counsel for the defence**

Now Mr Herring you understand the gravity of the offence with which you are charged.

**Albert Herring**

Yes I do.

**Counsel for the defence**

And the possibility that you may go to jail.

**Albert Herring**

Yeah, I don't like it. [laughter]

**Counsel for the defence**

But you are also under oath, so you must tell the truth.

**Albert Herring**

Yeah, no I know that, yes.

**Counsel for the defence**

So I'm going to put this question to you: did you at this meeting on the 30<sup>th</sup> of April make an agreement with Mr Monkfish to fix prices or set market shares?

**Albert Herring**

No sir, I didn't.

**Counsel for the defence**

One final set of questions.

If we go over to 7G. Now this is a document my friend didn't take the jury to, for reasons I can't understand.

**Mr Justice Swift**

Yes he did. He did Mr Sharpe.

**Counsel for the defence**

Did you? I'm so sorry I missed it.

**Mr Justice Swift**

Yes, in considerable detail.

**Counsel for the defence**

No other explanation. I'm going to take you back to it then. 3<sup>rd</sup> of May, alright that is three days after the alleged agreement was made. First of all this is an e-mail from you to Mr Sharpe your boss, yes?

**Albert Herring**

Yes, Sir.

**Counsel for the defence**

Got it? Now what does it mean, "saw JM on Friday", who is JM?

**Albert Herring**

That is Monkfish.

**Counsel for the defence**

Right, “settled on the following: S&T...”.

**Albert Herring**

That would be single and twin skin cladding.

**Counsel for the defence**

That’s a type of cladding, we won’t bother with the details of cladding. Then, “no further reductions in prices for skin L and PC...” and I take it that they are types of cladding as well.

**Albert Herring**

Yes it’s a type of twin and pre-cladding.

**Counsel for the defence**

“...until at least December 2004 when the position will be reviewed...”. I am just pausing there for the moment. What was the purpose of this e-mail to your boss?

**Albert Herring**

Well it was to tell him what was possible agreement with Cladders really so that he could sign off on it.

**Counsel for the defence**

Mr Herring I am going to put this to you because I know that my learned friend will put it to you: there is nothing of the sort. This represents a record of the agreement that you had already made.

**Albert Herring**

I’m just a salesman I can’t agree things like this.

**Counsel for the defence**

Will you turn to the bottom of the page we have two columns ‘S’ and ‘C’. “S” is?

**Albert Herring**

Yes 'S' is Slabco.

**Counsel for the defence**

And 'C' is Cladders.

**Albert Herring**

Is Cladders, yeah.

**Counsel for the defence**

What do these mean? They look like customers.

**Albert Herring**

Yes those are our major customers for those products.

**Counsel for the defence**

Why were you putting your major customers in an internal memo to your boss?

**Albert Herring**

Well its because he is the commercial director and these are the blokes who would be likely to bitch because, you know, the prices weren't going down, the discount. So it is really for his information as to which would be the customers that would be affected really.

**Counsel for the defence**

Now I asked you a question whether an agreement had been made with Monkfish on the 30<sup>th</sup> of April. By the 3<sup>rd</sup> of May had any agreement been made between the two companies?

**Albert Herring**

No, it couldn't have done because that was the day I sent it off to Trout. No agreement was made that I knew about.

**Counsel for the defence**

And, just pause for a moment. Before moving on, there is no documentation regarding market share or market share arrangements. Had you ever discussed that with Mr Monkfish in any capacity?

**Albert Herring**

No, I never discussed market shares or, you know, sharing our customers. No I have never discussed that with him at all.

**Counsel for the defence**

And the arrangement that you were contemplating with Monkfish and Cladders, how long do you think that that arrangement was likely to last?

**Albert Herring**

Well, I mean, you know, this was an emergency, it was a crisis it was really. The London office was necessary to get it through. You know, I mean its...

**Counsel for the defence**

In the light of that crisis, do you believe that you were doing anything dishonest in going forward for your discussions with Mr Monkfish?

**Albert Herring**

No absolutely not, I wouldn't do anything dishonest.

**Counsel for the defence**

I am being prompted to ask, you "wouldn't do anything dishonest", why not?

**Albert Herring**

Well I was brought up not to break the law. [laughter]

**Counsel for the defence**

But, let me rephrase the question. I'm glad of that reply it is what I hoped. But the question I think is more finally tuned. In going ahead and trying to forge a crisis cartel why did you not believe that you were doing anything dishonest?

**Albert Herring**

We didn't think we were doing anything wrong, because, well, you know, the market would be completely screwed up. Unless we did something like this at least one of us would go to the wall. And that would just be complete chaos in the market place then because it would just be, when it came back there would be no capacity to meet the demand.

**Counsel for the defence**

But the markets exist to weed out the strong from the weaker companies. Wouldn't consumers be better off if the market had operated effectively here?

**Albert Herring**

No, not really. I mean that is basic, well I'm not an expert am I, but it's, to me, a simple salesman, its supply and demand isn't it? I mean if it comes back and you haven't got the capacity then it is a sellers market isn't it? Because the buyers are just scrabbling around trying to get it and they paying premium prices I mean that is no good for anybody is it?

**Counsel for the defence**

And who would fill the gap for this essential commodity?

**Albert Herring**

Well it's probably some foreigners who would come in, some frogs or something, you know.  
[laughter]

**Counsel for the defence**

Our European partners would have entered the market. [laughter]

**Albert Herring**

Yeah, sorry.

**Counsel for the defence**

And in your judgment would they have charged higher or lower prices?

**Albert Herring**

Yes, well it is transport costs, I mean, you know, this stuff, it's big. You know, you're not transporting fresh air, it'd go up.

**Counsel for the defence**

So, your temporary arrangement would have protected consumers. Is that what lay behind your thinking?

**Counsel for the prosecution**

Well, again, my friend really is just putting words into the defendant's mouth, it really is wholly inappropriate.

**Counsel for the defence**

I will revise the question.

**Mr Justice Swift**

Before you revise the question Mr Sharpe, and this really applies to both counsel, it is now five to three and you have been on your feet since half past two. You have until quarter past three which, and that includes cross examination by Mr Roth. I would like you to put your last questions to this witness.

**Counsel for the defence**

I think I have exhausted all the questions that I wish to put to Mr Herring and much obliged My Lord, thank you.

**Mr Justice Swift**

A timely intervention from Mr Roth.

Prosecution cross-examination

**Counsel for the prosecution**

Mr Herring, can I ask you please to look at document 7A. That was the, on the Crown's case, the first time this idea of some kind of arrangement between you and Cladders between your company was suggested by John Monkfish that is right isn't it?

**Albert Herring**

Yes, that is right sir.

**Counsel for the prosecution**

And he says, at the bottom of that page, he says, “do we have to take it? All this price cutting and demands by customers, suppose we agree not to go along with it, hold the line against price cutting? Not overcharging or anything just keeping enough margin to keep going until the market picks up. Surely that is not unreasonable?” And you said, “I don’t know it sounds anti-competitive to me”. “It sounds anti-competitive to me”. Why? What do you think is anti-competitive about it?

**Albert Herring**

Well, you know, I am not a lawyer, but it’s... it just didn’t...

**Counsel for the prosecution**

This is your immediate reaction isn’t it, “it sounds anti-competitive”.

**Albert Herring**

Yeah... well... you know... its... you’re agreeing prices aren’t you?

**Counsel for the prosecution**

And why is that anti-competitive?

**Albert Herring**

Well we’ve always been told it is. I haven’t really thought it much further than that. It’s the kind of thing you can’t *do* you know.

**Counsel for the prosecution**

And then you go on, saying, “I’m sure our lawyers wouldn’t like it”. I remember that...

**Albert Herring**

Well our lawyers don’t like anything in my experience. [laughter]

**Counsel for the prosecution**

Lawyers can indeed be rather difficult Mr Herring, and I’m not trying to be that. But you did go on to explain in this case, “I remember reading something very like that as a don’t in the compliance manual”. The compliance manual is to tell you what as a manager you can and can’t do legally. Is that right?

**Albert Herring**

Well, yes... it's more... I think... I know when we're given these things, if it falls in a don't you go and talk to the lawyer.

**Counsel for the prosecution**

Don't do it before you've checked with a lawyer.

**Albert Herring**

Yes, absolutely.

**Counsel for the prosecution**

And in fact you do. Immediately after that, or a few weeks later anyway, you go and do exactly that. Very sensibly you check with the lawyers, with your internal lawyer Jim Fixit, and that's 7B. And you say, you set out what John Monkfish is suggesting, "an understanding on floor prices to keep us in the business until the market picks up, is that legal? I'm sure you'll say it isn't." But you ask the question very sensibly to check and you get an answer, very promptly. Lawyers are not always so prompt but Mr Fixit is that morning, and he says, "be careful. What your contact is suggesting could land you both and possibly all of us in jail". In other words he is saying isn't he that sort of thing is not just not allowed, its criminal.

**Albert Herring**

I suppose he is, yeah.

**Counsel for the prosecution**

And you understood that?

**Albert Herring**

Oh yeah, absolutely yeah.

**Counsel for the prosecution**

And then he goes on to say, "I'm not ruling out some sort of structured arrangement but it would have to be public and we'd have to get it exempted by the competition authorities". So he is telling you two things, its got to be publicly announced and its got to be exempted isn't it?

**Albert Herring**

Yeah.

**Counsel for the prosecution**

And then there is that meeting that Mr Sharpe, your counsel, asked you about. The Executive Committee meeting which you attend. And you say there was this legal discussion there and you didn't understand all of that. But it was clear to you that what the Executive Committee was saying is that whatever is done has got to be done legally.

**Albert Herring**

Oh yeah, that was quite clear.

**Counsel for the prosecution**

So it was clear to you that there is a legal way of doing these things and there's a non-legal, an illegal way of doing these things. That's right isn't it?

**Albert Herring**

Well I suppose there's always an illegal way of doing something, yeah.

**Counsel for the prosecution**

And in this particular category...[laughter] Well, I wouldn't know about that Mr Herring, I'll take your word for it. [more laughter] But in this particular case there was a particular way that was said legal and there was therefore, by implication to you, it would be illegal if not done the correct way?

**Albert Herring**

Yeah, that's fair.

**Counsel for the prosecution**

And, moving on quickly to the next document, you go back to see and meet your friend John Monkfish. Back at the Dolphin pub.

**Albert Herring**

It's a nice pub that.

**Counsel for the prosecution**

Sorry?

**Albert Herring**

It's a nice pub that.

**Counsel for the prosecution**

I know it myself. The only problem is, people tend to listen to what you say there. [laughter] And you say to him, "I've talked it over with my chief", and you have explained that it's indeed Trout, "and we could be interested, we prefer to do it legally though". And that's reflecting what you've just told the jury, that "we want to do it the legal way".

**Albert Herring**

Absolutely sir, yes.

**Counsel for the prosecution**

And I think its fair to say John Monkfish was a bit dismissive about that. And he said that by the time it's done legally it'll be too late. But you go on to say, "sorry Jim I don't agree, my chief has agreed to contact yours and Scotslab's to agree a standard and publicly disclosed floor price and allocation arrangement and to notify the authorities. That way we'll stay the right side of the law." So this, I know you're not a lawyer, nobody is holding you to your legal opinions, but what you're explaining is your understanding of the law is; it's got to be a standard and publicly disclosed price and allocation agreement first of all and, secondly, its got to be notified.

**Albert Herring**

That is what I was told.

**Counsel for the prosecution**

Yes, so that's what you understood. And John Monkfish thought that would all take much too long didn't he?

**Albert Herring**

Well, yeah he did, he said, you know, "we're damned if we have to wait for all that".

**Counsel for the prosecution**

And you went back and talked to Peter Trout after that conversation. Then you came back and met John Monkfish again at your favourite pub, the Dolphin, on 30<sup>th</sup> April, document 7F, “I talked again to my chief, following what you said I could go ahead”. Right?

**Albert Herring**

Yes, sir, that’s right.

**Counsel for the prosecution**

“Good news,” says John Monkfish, “lets see how we get on today”. “I can go ahead”. What you were going to go ahead with is making an arrangement with John Monkfish wasn’t it.

**Albert Herring**

Well, not really sir. As I explained to my counsel, it was, my boss phones me up – I’d relayed to him all the problems I’d had with Monkfish, he said we haven’t got time to wait for all this business of taking authority and things and getting permission. And my boss then tells me the law’s changed and you don’t need that anymore. All you need is a crisis and the markets falling apart and as far as I was concerned that was, I think I said, it was a no-brainer, you know. And it was a no-brainer, we were going down the pan, so we didn’t need that anymore. That is what I was told so I was telling him that, you know, basically I have got the clearance to go ahead I can come to an arrangement with Monkfish which I didn’t take that .....

**Counsel for the prosecution**

All I am asking you is that you can come to an arrangement with Monkfish?

**Albert Herring**

Which I have to take back to my boss.

**Counsel for the prosecution**

We will come to that in a moment. But the, so what you were going ahead with is coming to an arrangement with Monkfish which you then would take back to Peter Trout.

**Albert Herring**

Yes, that’s right.

**Counsel for the prosecution**

And that, in fact, is what you did at that meeting. You came to such an arrangement with Monkfish which you then take back to your boss.

**Albert Herring**

Well, in relation to some of the products yes. In relation to the skin and the pre-cast, yes.

**Counsel for the prosecution**

Yes, well just to be clear, let's just be quite clear, so what the arrangement was that you came to with John Monkfish which you would take back to your boss. The arrangement you came to on that day, is it fairly set out because you can send an e-mail on the Monday to Peter Trout Document 7G?

**Albert Herring**

I wouldn't say it is fairly set out, I mean my typing is a bit crap really but you know.

**Counsel for the prosecution**

Well we won't worry about the typing.

**Albert Herring**

It is what I typed.

**Counsel for the prosecution**

Yes. And what you typed reflected what you had arranged that Friday.

**Albert Herring**

Well it was what I had discussed with Monkfish, yes.

**Counsel for the prosecution**

Well it is not just what you discussed. It is what you had arranged with him, subject to Peter Trout being happy.

**Albert Herring**

Yes, that's fair.

**Counsel for the prosecution**

And when you say, "settled on the following," that means that's what John Monkfish and you had agreed and you take back to Peter Trout.

**Albert Herring**

That's what was in the part of the possible, yes.

**Counsel for the prosecution**

Yes. And you thought, and this covers both prices, no further reduction in prices for two types of cladding. Is that right is it?

**Albert Herring**

Yes, skin and pre-cast yes.

**Counsel for the prosecution**

Second, it is those two columns. You are, between you, allocating the majors, as you explained. Those are the main customers: who is going to be served by Slabco; and who is going to be served by Cladders.

**Albert Herring**

No, that is not the purpose of that, sir, no.

**Counsel for the prosecution**

Well, what is... why do you put Waits under Slabco?

**Albert Herring**

Well because Waits are one of our biggest customers and so are W&W for skin and PC products. And Murphy and Buildco Maykir, and they are sort of the better customers of Cladders for the same two products. So what I am doing is I am just informing him, he is my commercial director, you know. He has to know what is going on in the marketplace. If we put a floor under these prices I am just basically warning him who is likely to bitch. I mean they are just the basic major customers. We are not sharing anything out between each other.

**Counsel for the prosecution**

So when you say settled on the following and then you put that table below, are you saying to the jury that is not part of what you had settled on?

**Albert Herring**

No I settled on the following just refers to the paragraph there, I mean, that is just some notes at the bottom.

**Counsel for the prosecution**

Can we go back to document 7E please?

**Albert Herring**

To the 25<sup>th</sup> of April?

**Counsel for the prosecution**

That's right.

That's where you told John Monkfish what Peter Trout was going to do. You say, "my chief has agreed to contact yours and Scotslab to agree a standard and publicly disclosed floor price and allocation agreement". Now these are your words, what do you mean by allocation agreement?

**Albert Herring**

Well, I guess, you know, that's what he told me, I mean that you could allocate it to people.

**Counsel for the prosecution**

Allocate what? Allocate orders or allocate suppliers?

**Albert Herring**

Sure, orders yeah.

**Counsel for the prosecution**

And the people will be the customers?

**Albert Herring**

Yeah.

**Counsel for the prosecution**

So what you understood he was going to do was to agree a publicly disclosed floor price and to agree on allocating customers?

**Albert Herring**

Yeah, I guess so, yeah I did.

**Counsel for the prosecution**

And that's, he was going to that and its going to be notified. And that way you'll stay the right side of the law and then you meet again on the 30<sup>th</sup> of April and you say, "I talked again to Peter Trout I can go ahead".

**Albert Herring**

Yeah but that just, that was to reflect the conversation... As I'd said before, I'd gone back to Trout after this meeting saying that Monkfish had gone a bit ape, got really arsey about the idea of waiting and we couldn't wait. And Trout, as far as I knew, had heard from the lawyers that this thing had changed and we didn't have to go back anymore. I mean I'm the kind of bloke, I'm a salesman, I can go out I can deal with prices you know. The kind of thing that you're talking about which is like deciding who which customers you go to. I mean, that's the thing made by the kind of people much higher than me. I can't do things like that.

**Counsel for the prosecution**

How high up are you?

**Albert Herring**

I'm just a salesman, well, I've got a posh title, "commercial manager" or something. But this is board stuff that is isn't it? And Trout's the commercial director. I can't do things like that.

**Counsel for the prosecution**

You can't do things like what?

**Albert Herring**

Like decide who we're going to sell to. It's my job to go out there and get the contracts. Not decide what contracts or not that I can get. I cannot do things like that.

**Counsel for the prosecution**

That can only be done by Mr Trout?

**Albert Herring**

Oh, aye absolutely. Well probably even Trouty himself, sorry Mr Trout would want to take it to the board.

**Counsel for the prosecution**

But, unlike other kinds of things which you can do yourself?

**Albert Herring**

Yeah I can set a price, yeah, you know. I get a right rollicking if I set the wrong one, but you know, I can set a price.

**Counsel for the prosecution**

And setting a price is actually what you did do on the 30th of April wasn't it? Because that's something you could do.

**Albert Herring**

No, I can set a price with a customer. I mean what I did on the 30<sup>th</sup> of April was basically to get Monkfish, on behalf of Cladders if you like, to indicate what they put a floor price on so I could take that back.

**Counsel for the prosecution**

No, you agreed on no further reductions in prices subject to approval by Peter Trout, that is what you've said.

**Albert Herring**

Well, yeah and whoever Trouty wanted to get it approved by.

**Counsel for the prosecution**

What were you going to do about the allocation agreement?

**Albert Herring**

I didn't have an allocation agreement. You know, that's way beyond me.

**Mr Justice Swift**

Sorry, may I ask a question here? Can we look at this document 7G? This e-mail from you to Mr Trout. Do I understand it that when you say, “settled on the following”, that it’s referring to, first of all, no further reductions in prices until at least December 2004. And then this rather intriguing list of customers, two under S and two under C – was it your understanding, following this meeting you’ve had at the Dolphin house, Dolphin pub, that Monkfish or Cladders would not seek to compete with you in selling to Waits or W & W and you would settle with them that you would not seek to compete with them for business from Murphy and Buildco Maykir.

**Albert Herring**

No sir, I don’t think that that was my understanding at all.

**Mr Justice Swift**

Otherwise, what else can it mean?

**Albert Herring**

Just as I’ve said, sir. With respect, all I said was that I’m informing my boss as to who are the major customers in the market who are going to be affected by this floor pricing because he’s going to get his ear bent on the phone as soon as they twig what’s going on.

**Counsel for the prosecution**

Now, may I just ask, following on that, your boss, Peter Trout, what’s his position?

**Albert Herring**

He’s the commercial director sir. He’s a member of the board.

**Counsel for the prosecution**

And what is his responsibility as commercial director?

**Albert Herring**

Well he’s responsible for all sales and marketing activity.

**Counsel for the prosecution**

Yes. And Cladding is an important part of the group’s...

**Albert Herring**

It's virtually all of it.

**Counsel for the prosecution**

So it's a major part of his responsibilities.

**Albert Herring**

What, sorry?

**Counsel for the prosecution**

The selling of cladding.

**Albert Herring**

Well, it's his job, yes, selling and marketing.

**Counsel for the prosecution**

Are you telling the jury, Mr Herring, that Peter Trout didn't know that Waits were the major customer of Slabco, you had to put it in an e-mail?

**Albert Herring**

Yeah, well, why not?

**Mr Justice Swift**

Mr Roth I've got to limit you to two more questions in cross-examination.

**Counsel for the prosecution**

May I have four more questions your Honour?

**Mr Justice Swift**

Short ones.

**Counsel for the prosecution**

On your case, this arrangement was never implemented was it?

**Albert Herring**

Oh no sir, none of this was implemented no, because, I mean, the old Bill turned up and nicked me [laughter]. I mean I hadn't even got chance to get an instruction.

**Counsel for the prosecution**

And if it had been implemented it would've stop prices falling even further wouldn't it.

**Albert Herring**

Oh absolutely, I'm not denying that at all – it would've put a floor under the prices.

**Counsel for the prosecution**

You've told your counsel you are still the commercial manager of Slabco.

**Albert Herring**

Until they fire me I am.

**Counsel for the prosecution**

And they've not fired you?

**Albert Herring**

Not yet, no.

**Counsel for the prosecution**

So you're still selling cladding materials.

**Albert Herring**

I'm trying my best, yes.

**Counsel for the prosecution**

And so Slabco has not withdrawn from the UK market.

**Albert Herring**

Not at the moment,

**Counsel for the prosecution**

Thank you very much.

**Mr Justice Swift**

Limit re-examination to one question Mr Sharpe.

Re-examination by the defence

**Counsel for the defence**

That is exactly what I was asking for. One question it is. Going back to that meeting with Mr Monkfish that my friend was questioning you about - did you make it clear to Mr Monkfish that you could make no agreement on Slabco's behalf unless and until you had had the approval of Mr Trout of the proposed arrangements.

**Albert Herring**

Oh yeah, and he knew, I told him that and he knew that.

**Counsel for the defence**

Thank you.

**Mr Justice Swift**

Right, thank you very much Mr Herring

**Albert Herring**

Thank you sir.

**Mr Justice Swift**

Mr Sharpe.

**Counsel for the defence**

I now call Sir Zoltan Biro. Please would you kindly...

**Mr Justice Swift**

No, no, no you've got to wait for Mr Roth to make an application.

Application by the prosecution to exclude expert evidence

### **Counsel for the prosecution**

As we have indicated before, we have seen, in the usual way, my Lord, and the jury has withdrawn, an expert report from Professor Biro. And it is quite clear from that summary of his evidence that he is wholly irrelevant to the matters before the court in this case and therefore inadmissible as a matter of law. The question addressed in Mr Biro's report is whether the agreement would bring economic benefit to the industry and purchasers and specifically whether Slabco are likely to have exited from cladding production.

That is of no relevance at all, my Lord, to the question of dishonesty. The only evidence that is admissible in a trial is that which is relevant to an issue in the case. And it must go, if produced by the defence, to meeting an element of the offence or provide a complete answer to the commission of a crime. And here, that this evidence ought to be adduced on economic benefit to the consumer is wholly irrelevant. It aligns two quite different concepts. One is that the motive of the agreement may have been consumer welfare. That is quite distinct from whether an agreement was entered into dishonestly in the first place. For example, my Lord, if A and B agree to divert funds from the bank account of C into an account that they have set up and they do so because C is an arms dealer who will use that money to procure illegal arms, one may say that their aim is a laudable one and this is no answer to the fact their agreement or the mechanism by which they divert funds was dishonest. And this demonstrates, my Lord, the issue that's raised by Mr Biro's report may be very relevant as matters of mitigation but it is not relevant to the issues in the trial of guilt of the offences charged.

### **Mr Justice Swift**

Your case is that they are running a kind of Robin Hood defence is it here? You know the Robin Hood defence that they are robbing the rich to pay the poor and though Robin Hood's motives may be very well, he is not entitled to act like the Chancellor of the Exchequer in the absence of a Finance Act. It's that kind of, that kind of...

### **Counsel for the prosecution**

Your Lordship always puts it so much better than I do. [laughter]

### **Mr Justice Swift**

Putting it more into legal language, you are saying is that, however good Sir Zoltan's evidence is here, it can't go to the issue which you put in paragraph 4 of your opening note as to whether the defendant must himself have realised that what he was doing was, by those standards, dishonest.

**Counsel for the prosecution**

It certainly can't go to the subjective element. I am not sure it's even sought to be adduced on the subjective element. But as I understand it is sought to be adduced, and Mr Sharpe will correct me if I'm wrong, to the objective element of dishonesty. But it can't go to that either. Just as with your Lordship's example, the Robin Hood defence, one might think that there is a good reason for robbing people but it's not, would not be left to the jury to consider whether that could not be dishonest.

**Mr Justice Swift**

Well, Mr Sharpe, what have you got to say to this?

**Counsel for the defence**

This is a last minute application, my Lord. I have a few questions to put to Sir Zoltan so I won't detain the court if that should concern you. His evidence goes manifestly to the reasonableness and credibility of the case being advanced by Mr Herring as to what may have moved his conduct. He believed he was not doing anything dishonest and to the extent that Sir Zoltan's evidence can add credibility to that belief by his examination of the costs and benefits of crisis cartels to consumers on a temporary basis. It is valuable evidence which should go to the jury. In addition to that objective element he goes to the subjective element. To the very credibility of Mr Herring. Is it conceivable that somebody could hold such a view, we say if a Nobel prize winner like Sir Zoltan [laughter] can come to this court and endorse such a view as reasonable and honest we read across to say that it is quite credible that such views are reasonable and honest. So it goes to both the subjective and the objective elements.

**Mr Justice Swift**

We saw what happened to the noble prize winner Sir James Mirrlees in the recent T-Mobile case.

**Counsel for the defence**

I wouldn't dream of mentioning it.

**Mr Justice Swift**

Well, since this...

**Counsel for the prosecution**

My Lord, first of all, calling evidence the natural evidence is to credit is wholly inadmissible that is well established. And secondly, we do not seek to challenge and I do not challenge that Mr Herring honestly believed that this was something to be done to deal with a crisis in the industry. He said that and I didn't cross examine him on that point or challenge it.

**Mr Justice Swift**

Mr Roth, I have got your point, I have got the points taken down. And as I said this is the first trial ever in the United Kingdom of this offence and I am going to give some latitude to the defence on this occasion to call Sir Zoltan. But only for very very limited questions. You will have no more than three minutes. [laughter]

The case for the defence [continued]

**Counsel for the defence**

Zoltan, run!

Sir Zoltan, in about 30 seconds, could you kindly summarise the contents of your report.

**Professor Sir Zoltan Biro (Nobel laureate)**

I shall. I looked at Slabco's trading position in 2004 and found it to be in miserable state. Basically they were losing money and haemorrhaging cash. What I have also found is that this is a result of temporary phenomenon an unforeseen collapse in demand and one that would rectify itself over time. As Mr Herring said, after about 3 or 4 months one might start beginning to see a bit of an upturn. But it would probably take about 3 years or so for the market to rectify itself really. I also think, thinking ahead, Slabco has a very viable business. But the problem is they would have had to exit the market. They would never have been able to reach that position had there not been some form of arrangement on prices. **[CD 2]** Had Slabco exited, customers would have been worse off. 40 per cent of the capacity in the market would have left. Only two suppliers would have been left and actually prices would have gone up. And finally, if somebody had come back into the market at some point later all that would have happened is that a lot of resources would have been wasted by companies coming out and then coming back again.

**Counsel for the defence**

Thank you. In your experience in dealing with cartel enquiries, are you familiar with the Commission's treatment of crisis cartels?

**Professor Sir Zoltan Biro**

I am indeed. I am aware in particular of one a few years back in the synthetic fibre area.

**Counsel for the defence**

And is it unusual for the Commission to sanction temporary conservatory measures in emergency situations such as the present?

**Professor Sir Zoltan Biro**

It is very much in situations like this. But yes that is exactly what has happened.

**Counsel for the defence**

Have you read Dr Williams' report?

**Professor Sir Zoltan Biro**

I have indeed.

**Counsel for the defence**

Do you agree with it?

**Professor Sir Zoltan Biro**

I agree with every point bar one.

**Counsel for the defence**

And which is that?

**Professor Sir Zoltan Biro**

Which is the challenge that Slabco would in fact have exited the market. On every other ground I am comfortable with Dr Williams ...

**Counsel for the defence**

Why do you disagree with it?

**Professor Sir Zoltan Biro**

Well, as far as I can tell, Dr Williams provides an economically theoretical argument as to why in fact somebody would have come and financed this business. But to me this is simply a matter of fact. It is quite clear from what Mr Whaley has told us that they would have left. He is the finance director of the company and he is quite explicit that they would leave, they'd have to go.

**Counsel for the defence**

And as an expert economist yourself, are you saying that you, as an expert, would have nothing useful to say to this Court on the factual premises underlying Mr Whaley's belief?

**Professor Sir Zoltan Biro**

On the factual premises, absolutely not. What I would say very briefly is; I think Dr Williams' review of the theory is somewhat partial and he has somewhat of a purist view, if you like, of the efficiency of capital markets.

**Counsel for the defence**

Well, indeed, I have no further questions. Thank you.

**Mr Justice Swift**

No, no, stay there. [laughter]

**Professor Sir Zoltan Biro**

I thought this was easy.

**Mr Justice Swift**

Despite Mr Roth saying that you shouldn't be there, you've now got to assume he now wants to question you now that you are there.

Cross-examination by the prosecution

**Counsel for the prosecution**

Just to be clear Mr Biro, in the long term you accept Slabco's business is viable?

**Professor Sir Zoltan Biro**

Yes I have every reason to believe, since they were viable throughout the 90s, that as and when the collapse rectifies itself in, say 3 or 4 years, they ought to have a healthy business again.

**Counsel for the prosecution**

And in fact, prior to November 2003, very recently, you say in your report they had a very strong trading history.

**Professor Sir Zoltan Biro**

Yes, I mean this isn't an industry where the people are making very large profits. But they had a stable, healthy business.

**Counsel for the prosecution**

In fact in the 1990s they were doing rather well weren't they?

**Professor Sir Zoltan Biro**

Well, as I say this isn't an industry where companies were making large profits. But they had a healthy trading record.

**Counsel for the prosecution**

And the downturn is temporary.

**Professor Sir Zoltan Biro**

Indeed.

**Counsel for the prosecution**

Three years to recover fully, that's to pre-downturn levels. But you looked at forecasts from various analysts and I think you conclude that the level of activity would recover towards the end of 2004.

**Professor Sir Zoltan Biro**

Ah no. What would happen is that at the end of that year you'd see the beginnings of things going back upwards again, if you like, and move towards where it was. As my report says, that would then take a further three or so years to fully get back to where we were.

**Counsel for the prosecution**

Yes, to fully get back to the position but to return to the ... have you got a copy of your report with you?

**Professor Sir Zoltan Biro**

I do.

**Counsel for the prosecution**

Could you turn, I am working off a page of extracts from the report. I don't know if you have that same copy...

**Professor Sir Zoltan Biro**

I do.

**Counsel for the prosecution**

And you say in paragraph 13, second sentence, "prior to the events of November 2003 Slabco had an extremely strong trading history". That's your evidence isn't it?

**Professor Sir Zoltan Biro**

Yes.

**Counsel for the prosecution**

Until November.

**Professor Sir Zoltan Biro**

Yes.

**Counsel for the prosecution**

And you would expect the strong position to resume.

**Professor Sir Zoltan Biro**

After 2007ish. One would expect that to happen yes, were they to be able to sustain the market until that point.

**Counsel for the prosecution**

And the position is that their sales are above their direct costs at the moment aren't they?

**Professor Sir Zoltan Biro**

Yes.

**Counsel for the prosecution**

You've heard about the sorry state of the cladding industry. That's a reflection of the construction industry isn't it? They are the ones who are suffering from the fact of reduced prices.

**Professor Sir Zoltan Biro**

Everybody is suffering. That's where the problem began; but its fed through across the whole industry and all suppliers.

**Counsel for the prosecution**

Yes, it's not just the cladding. It's fed through and it started with construction who are also in crisis aren't they?

**Professor Sir Zoltan Biro**

Indeed.

**Mr Justice Swift**

Mr Roth, I've got to ask you to observe the same discipline as your opponent at this moment. Limit yourself to one or two more questions.

**Counsel for the prosecution**

So that we can get very rapidly to the point Mr Ballpoint [loud laughter]. The direct and immediate effect of this agreement, if implemented, is that building companies could not get lower prices for cladding, that being the immediate result.

**Professor Sir Zoltan Biro**

What would have happened is, as far as I understand it, what would have happened is, there would have been a floor on further price reductions, exactly.

**Counsel for the prosecution**

Yes, and that would have affected a substantial part of the UK cladding market for Slabco and Cladders, the main players.

**Professor Sir Zoltan Biro**

Indeed.

**Counsel for the prosecution**

Thank you.

**Mr Justice Swift**

Thank you Sir Zoltan.

Now Mr Roth, do you wish to call Dr Williams, if that's still his name... [laughter] If you do, again could you be extremely brief. [laughter]

The case for the prosecution

**Counsel for the prosecution**

If I might call Lord Williams [laughter].

Lord Williams, you are the director of NERA's competition group and I think you looked at the market analysis of the accounts of Slabco ... not the accounts, but the market carried out by Sir Zoltan.

**Lord Williams**

I'm sorry I've not looked at their accounts, I wasn't given that information. I merely read Mr Biro's report and read what he said. But I have no reason to disagree with what he said.

**Counsel for the prosecution**

And on that basis, we have heard that the sales cover their direct costs but nonetheless they have negative cash flow, could you just explain in simple terms to the jury what that means.

**Lord Williams**

Absolutely. If you look at the cost function of the business you have overheads. You know, the factory rent, the wages etc and then you have, if you like, the materials costs that you have to incur for every widget or whatever that you produce. And they are, sort of, direct costs. It's a very quick simplification given the time constraints.

In the long run, if the firm does not cover all of its costs, its direct costs and its overheads, it's going to make accounting losses. But in the short run, provided the price that it charges is more

than the direct costs, it is better off selling units at that price than not selling them at all. So in a sense it's what businessmen would call making contribution to overheads.

**Counsel for the prosecution**

Could you just explain those circumstances? Does it makes sense to continue in business or to cease trading?

**Lord Williams**

Absolutely, provided the price...

**Counsel for the prosecution**

Sorry, which of the two?

**Lord Williams**

If price exceeds the direct costs it makes sense to continue production.

**Counsel for the prosecution**

If Slabco, a public company, if they needed extra finance, you have heard the evidence of ... Mr Herring's blatant hearsay evidence really, relating what the finance director had explained. Are there sources from which extra finance could be obtained?

**Lord Williams**

One has to be very careful here. I was accused of having presented an overly theoretical analysis, and there is some substance in that claim, which is that I have not been able to verify in the facts of this case whether or not Slabco did as a matter of fact seek alternative funds of capital. I should say that I have also not seen any evidence presented by Slabco or the defendant that they did seek to do that.

**Counsel for the prosecution**

Well they have not put any evidence ... there is no such evidence before the court.

**Lord Williams**

I have no evidence either way as to what they did or didn't seek. As such it was the absence of any information one way or another on that matter that forced me to consider this from what you might call a more theoretical perspective than one would normally do.

**Counsel for the prosecution**

And the final question, Lord Williams, would you have expected them to have made strenuous efforts to get finance.

**Lord Williams**

Not only would I have expected them to make such efforts but I believe that many sources of finance would exist for a company with that history of profitability and this is, I think, the essential point. Precisely in a market where it is accepted by everybody that the downturn was very short lived, and where everyone confidently expected there would be a return to profitability in the near future. If the firm were in long-run crisis one would accept it's a reasonable position that finance may not be forthcoming.

**Counsel for the prosecution**

I said that's the last question. But just for illustration, those sorts of efforts a firm would make for finance, do they generate documentation and papers or are they just done over the phone?

**Lord Williams**

Well they might start with a phone call. But I couldn't believe that if they were pursued seriously they will not be at least some documentary draft work.

**Counsel for the prosecution**

Thank you very much.

**Lord Justice Swift**

Thank you.

**Counsel for the prosecution**

Could you stay there please.

Cross examination by the defence

**Counsel for the defence**

My Lord. Yes, well...

**Lord Justice Swift**

Three minutes.

**Counsel for the defence**

I have to say, Lord Williams, that you have taken a good deal of the wind out of my sails with your commendable honesty. Because it is true isn't it that you produce, in your own words, a highly theoretical paper.

**Lord Williams**

I said those words and I think I also prefaced it by saying that there were particular circumstances for that, which was the fact that nobody in this case, including parties on your side of this case, had provided the sort of evidence that I would have expected to have seen concerning the seeking of finance.

**Counsel for the defence**

Perhaps, perhaps.

**Lord Williams**

So it was that which actually forced me to rely upon a theoretical approach.

**Counsel for the defence**

Good. It's still a theoretical paper and I take it that in your career you've, have you advised Slabco?

**Lord Williams**

No.

**Counsel for the defence**

Cladders?

**Lord Williams**

No.

**Counsel for the defence**

Scotslab?

**Lord Williams**

No.

**Counsel for the defence**

That's 90% of the British cladding industry. [laughter]

**Lord Williams**

I have advised parties very similar to them.

**Counsel for the defence**

May I... , well, I may take it then, if I put it charitably, that you have no direct knowledge of the British cladding industry.

**Lord Williams**

With respect, I would say that I do have knowledge of the British construction industry and that the circumstances facing the cladding element of the construction industry are very similar to most other people who provide the materials for the construction business.

**Counsel for the defence**

Well, if it looks like a building you are the man than? That's the reply is it?

**Lord Williams**

I know more about milk, but...

**Counsel for the defence**

I think you said again, with commendable honesty, that you actually hadn't studied the accounts of Slabco.

**Lord Williams**

No. They were not made available to me but I did see the testimony of Mr Biro and I have no reason to doubt him.

**Counsel for the defence**

No, no, no. Thank you Lord Williams I have heard that. The accounts of a public company, these accounts, are freely obtainable. I think you only have to ask and the limitless resources of the Serious Fraud Office would have been put at your disposal.

**Lord Williams**

I went to Companies House and there weren't listed apparently. [laughter]

**Counsel for the defence**

It's an awfully inefficient organisation. But anyway you haven't.. you didn't study the accounts.

**Lord Williams**

Well they weren't at, be clear, they weren't at Companies House. I challenge you to look and see if they are there yourself.

**Counsel for the defence**

So you have neither asked for, nor received, nor studied the accounts.

**Lord Williams**

I went on the web site of Companies House and they did not appear to be there.

**Counsel for the defence**

But you didn't look at the accounts!

**Mr Justice Swift**

Mr Sharpe I think that the jury is getting the point.

**Counsel for the defence**

Good, good.

**Mr Justice Swift**

Can we move on.

**Counsel for the defence**

I was worried for a moment, My Lord. And, did you talk to bankers?

**Lord Williams**

No, no but when I ...

**Mr Justice Swift**

Mr Sharpe, when I said the jury is getting the point, I mean, come on; we have had cross-examination as to credit. Can you put a final 2 questions on the substance?

**Counsel for the defence**

Yes, I will.

You heard the evidence as reported by Mr Herring of Mr Whaley's contribution to the Executive Committee of the Board. You recall that the company would have to withdraw from this by the third quarter of 2004.

**Lord Williams**

I heard that it was reported that he said that. I have to say that I attached some lack of credibility to that claim. I also note they are still in the market despite the fact that the cartel was not implemented.

**Counsel for the defence**

I don't know what's happened since then and neither do you.

**Lord Williams**

Well, they are in business.

**Counsel for the defence**

I'm just simply pointing to the fact that we have a board minute which says that and we have Mr Herring who confirms it. So may we take it that unless there is any evidence to the contrary that Mr Whaley is an honest man and what he said he believed?

**Lord Williams**

In terms of the evidence to the contrary what I would say to you is the company is still in business and a price fixing agreement was not implemented.

**Counsel for the defence**

Well, look...

**Lord Williams**

So there *is* evidence to the contrary.

**Counsel for the defence**

I'm going to put this to you and I then I'm going to finish with you, Lord Williams. You may have got the economic theory right, although Sir Zoltan disagrees, but that is a debate, if I may put it between you economists. But you know nothing about the cladding industry, you know nothing about Slabco's finances, you know nothing about its relationship with its bankers and you come to this court with a theory as long as direct costs are covered the creditors can go hang.

**Lord Williams**

I don't believe I said that.

**Counsel for the defence**

Well, I am..., it's perhaps a gloss. You're saying that as long as the direct costs are covered if regular debt interest payments have to be met, as Mr Herring described, it's scant comfort for them to say that, "actually we're doing OK and covering the direct costs and there isn't really very much for you to meet our covenants".

**Lord Williams**

No, I would say that one regularly observes, across a wide variety of markets, companies that make large investments which later they can't recoup. But they *can* cover the direct costs. A limited company may go into receivership or the debt may be refinanced or whatever. One sees this, for example, with cable companies, but the company continues to trade. The original shareholders and maybe bondholders lose money but the company continues to trade before they refinance it.

**Counsel for the defence**

If your solution then is receivership this would be a great comfort to Slabco.

**Mr Justice Swift**

No I think Dr Williams' point is that this agreement was not implemented and your client is still in business.

**Counsel for the defence**

From which he asks the court and the jury to draw an inference that the arrangement was not indispensable at that time. I don't actually need to prove its indispensable, was indispensable. I have to show, or perhaps more accurately the prosecution have to show that my client was moved by some dishonesty.

**Mr Justice Swift**

Mr Sharpe, I think we are moving into closing speeches. Which, I suggest are suitable...

**Counsel for the defence**

I want to thank you for your theoretical contribution and speaking as an expert...

**Mr Justice Swift**

Dr Williams, the court is very grateful for your evidence.

**Counsel for the defence**

...not to have advised Slabco not to have exited, not to exit. Thank you.

Closing speeches**Mr Justice Swift**

Members of the jury, I'm now going to ask Mr Roth to close for the prosecution. And Mr Roth has five minutes. Following that and a bell at least will go on my left. I will be timed by the watchers on my left but I would ask you to keep to five minutes and also ask Mr Sharpe also to keep to five minutes. I would ask you in particular to deal with, or among other things to deal with, the question of authority that Mr Herring was so keen to establish that it was all to do with Mr Trout's responsibility.

Prosecution closing speech**Counsel for the prosecution**

Ladies and gentlemen of the jury this is, at the end of the day, of the evidence that you listened to so patiently, a very simple case. Three questions for you. Was there an agreement made between these two gentlemen, Albert Herring the defendant and John Monkfish? We say "yes",

and Mr Herring himself said “yes, there was an agreement that couldn’t be taken further” he had to take it back to his boss for approval. But what he had done with John Monkfish was to agree that there’d be no further reduction in prices for two kinds of cladding. And when he was asked, as you may remember, at the end of my cross-examining “was it implemented?” he said, “no, well the old Bill came along and got the documents”. That’s why he explained, it wasn’t implemented.

There is no question, or room for any doubt, that what they had agreed, which John Monkfish you will remember had been pressing for, would have gone ahead. And he had been told by Peter Trout, that’s how he starts that guy, that “I’ve talked to my chief”, to Peter Trout, “I can go ahead”. “I’ve talked,” in other words “my chief has told me go ahead and do the deal”, and he did. That’s on the agreement, the substance of the first count. On the second count he was adamant that had not, he said, been agreed, and the evidence on that turns on two matters. One is that the previous conversation he’d said, “well my boss is going to make an allocation agreement,” and then the list of customers under Slabco and Cladders. And you remember his explanation, “well that’s just to tell Peter Trout who are the main customers”. Now, is that credible? Would he be sending an email which is about the conversation he had with John Monkfish and reminding Peter Trout of one of the things that, as the commercial director for the main product of that company, indeed he said it is pretty much the whole business, who are our two biggest national customers? Talk about teaching your grandmother to suck eggs or your fish to suck roe or whatever, its just totally incredible, members of the jury.

And it is therefore, we say, it’s not market sharing as Mr Sharpe referred to markets, there’s no suggestion of market sharing. It is an allocation of customers, that, you recall, is the second count before you.

Is it dishonest? Well you’ve heard his evidence about, “there’s a legal way of doing things and an illegal way of doing things”, and that he had been told. And it’s clear through his emails that it’s got to be publicly disclosed and there’s got to be notification for exemption. Then, he said, he was told the law changed. We accept he is giving honest evidence. The law changed so there was no longer a requirement for an exemption. But he wasn’t told anything about public disclosure and of course there was no public disclosure. And there was no discussion about public disclosure and there was no understanding about public disclosure. This was to be a secret agreement between them so they could combine in a way that he knew was anti-competitive. He didn’t understand the theoretically economics but he knew that this sort of thing, fixing prices, is anti-competitive.

And we say not only did he realise that himself but you, members of the jury, applying the standards of ordinary decent people, would also say that this is the sort of price fixing that is against the law. And the fact that there may be a good motive to save a company, if I may go back to the example, and here I shall end. The example that I gave you at the beginning, of the man who thinks tax rates are too high and so he under-declares his income. Well suppose he doesn't think tax rates are too high, he thinks tax rates are fair but his company, his business, is in terrible trouble. The market's taken a downturn, times are hard. If he gets this tax bill he'll have to close down the business, lay off all his employees, it'll be the end of it. And so to save his business he under-declares his tax and puts in a false declaration.

One might understand why he seeks to do that but that in law is no excuse and that is still, that under-declaration, dishonest conduct according to the standards of society. Those are the standards, members of the jury, according to the oath that you all took one by one when we started this trial as you all remember, the oath fresh in your mind, is the standard that you are charged to apply. We submit that there can be only one verdict that you can return on both of these counts and that is "guilty".

### **Mr Justice Swift**

Mr Sharpe?

### Defence closing speech

#### **Counsel for the defence**

Ladies and gentlemen of the jury, my friend has fairly stated the legal case and I am not going to repeat it. But I am reminded in cases such as this of my old friend, now departed, Mr Rumpole, who in this court room, and indeed before the learned Judge, would say that, "the golden thread that runs through English common law is the burden of proof". I have to prove nothing. Mr Herring has to prove nothing. The Crown have to prove everything. And not merely have to prove it but prove it to your satisfaction beyond all reasonable doubt. Now, his Lordship will deal with this at length I'm sure in his summing up. But I state it now at the outset because you must ask yourselves, in assessing the evidence of Mr Herring and of Sir Zoltan, its relevance. Is it inconceivable that what he did was honestly motivated given his legal knowledge and the facts of the matters at the time. It is conceivable and, if after hearing Sir Zoltan, it is credible, then that

spark of doubt which tips the balance between guilt and innocence is present. And you must necessarily find for Mr Herring and give a “not guilty” verdict.

Recall the case that we have presented in defence to the Crown. First of all there was no agreement. No agreement to fix prices, no agreement to allocate customers, though I have to say, I fail to see the distinction of allocating customers and sharing the market, but no doubt that’s very clear to my friend. But it is irrelevant for you in my respectful submission.

Our case on this is: yes, there were discussions. They were over a relatively short period. Lawyers were involved from Scotslab’s part at least, Slabco’s . We knew nothing about Cladders’ internal advice and we also know the easy path for Mr Herring to have adopted right from the beginning on 1<sup>st</sup> of April would have been to have fallen in with Mr Monkfish’s plans and entered into an illegal and secret cartel. He chose not to do that, he spoke to his superior, he spoke to the lawyers. They came to a view which you’ve seen in writing and had in the evidence that they would not enter into an illegal agreement.

As late as the 25<sup>th</sup> of April we have Mr Herring saying to Monkfish, “no, we’re not going to do it, we want to have a legal agreement”. A legal arrangement that will pass muster. And then what happens in the intervening period up to the 30<sup>th</sup> of April and that truncated telephone... truncated conversation which was so imperfectly recorded? Well, the law had changed and whereas before notification was required to the British and Commission Authorities with some formality as many of you may know, after that point parties can enter into whatever agreements they like but they take the risk of it being subsequently demonstrated to be illegal. They take the risk.

Now, Mr Herring discussed these arrangements and in reply to my question he stated in terms that he did not agree with Monkfish what the terms of the arrangement were going to be. He discussed the terms in outline but he made it clear, as said in terms to me, that he would have to go back to his boss before any arrangement could be put into place.

You also heard that he told Monkfish that. That’s the part of the conversation that was not recorded. There is no good reason to disbelieve him because today the parties could, after the 1<sup>st</sup> of May, enter into such an arrangement without fear of this type of transaction if they honestly believe that such an arrangement could... would be for the benefit of the public. Those matters under the exemption provisions, which we have not detailed to you in this court, really go to the consumers’ interest; would the consumer be worse off if one or possibly two components of the

British cladding industry disappeared? We have heard the uncontroverted evidence and we have seen it in the minutes that Mr Whaley said they would have to withdraw. That hasn't been contested. He believed at that time honestly that the company would have to withdraw. Mr Herring heard that and had no reason to believe that this finance director was telling him lies or was inadequate for the job and coming to the wrong conclusion. So his task was to put together an arrangement which would save the company for the benefit of the consumer for a short period in conformity, as Sir Zoltan said, with Commission practice that a crisis cartel would be exempted.

So, in conclusion, no agreement was forged at all. No agreement could be forged at this level, it was all, as it were, subject to contract, subject to higher authority. And he made that very clear. But if you find against that, that there was an agreement, you've got to say that Mr Herring acted dishonestly. How can that be said in view of the stakes that were... the height of the stakes, that is to say that of the saving of the company? To say it's like a tax fraud, as my friend did, is completely to misunderstand the situation. There is a mechanism to allow short term crisis cartels. It's well established, you've heard Sir Zoltan and he was adapting that learning in that legal gateway in anticipation that that would be not successfully challenged. That moved him and therefore he did not have in the back of his mind a dishonest intent, a dishonest motive. He was not moved by dishonesty.

So you can find there was no agreement but if you should find there was an agreement, it is open to you now, and I suggest that you should, to say that he did not act dishonestly in all the circumstances. Ladies and gentlemen, I have nothing further to say. ...My learned junior... I have to conclude. I simply invite you to do what is right. [laughter].

[talk about a break]

No, no, I think you should give your summing-up.

[CD 3]

Judge's directions to the jury

### **Mr Justice Swift**

The defendant, Mr Albert Herring, is charged under section 188 of the Enterprise Act 2002 with what is known as a cartel offence. That is of dishonestly agreeing with John Monkfish from

Cladders Plc to make arrangements which directly or indirectly fix a price for the supply by Slabco of cladding materials and divide between Slabco and Cladders customers for the supply of those materials in the UK.

You have heard the prosecution and the defence cases and I have also allowed expert economic evidence to be admitted. You are now being asked to give your verdict. Let me tell you first of all about the different functions of the judge and the jury. The law is my area of responsibility and I must now give you the directions as to the law which applies in this case. When I do so, you must accept those directions and follow them. It is your responsibility to judge the evidence and decide all the relevant facts of this case. You do not have to decide every point which has been raised, only such matters as will enable you to say whether the charges laid against the defendant have been proved, and you will do that by having regard to the whole of the evidence, but only that evidence placed before you.

Let me move now to the burden of proof and both counsel have referred you to this extremely important aspect of British justice. It is for the prosecution to prove that the defendant is guilty, the defendant does not have to prove his innocence. How does the prosecution succeed in proving the defendant's guilt? The answer is by making you, the jury, sure of it. Nothing less than that will do. If after considering all the evidence you are sure, that the defendant is guilty you must return a verdict of "guilty". If you are not sure your verdict must be "not guilty". So if the prosecution has not made you sure, that it is proven beyond reasonable doubt, that the defendant has, between March and 30<sup>th</sup> of April 2004, dishonestly agreed on behalf of Slabco with John Monkfish from Cladders to make or implement arrangements which directly or indirectly fix a price for those materials, that is an end of the matter you must find the defendant not guilty on count number 1.

Similarly, if the prosecution has not made you sure that it is proven beyond reasonable doubt that the defendant has, between those two dates, dishonestly agreed on behalf of Slabco with John Monkfish to make or implement arrangements which divide customers between them for the supply of cladding materials, that it is again the end of the matter; you must find the defendant not guilty on count number 2.

One further advice: you must consider the case against the defendant on each of the two counts separately. However this does not mean that you should ignore all the evidence and background circumstances. It could be that your decision on the facts of one count might well assist you in

coming to a conclusion on the other count. Nevertheless, remember that you must reach separate verdicts on each count having focused on each separately and having formed a separate decision about it.

As I have said at the outset of this trial this is the first one of its kind to come before a jury under the Enterprise Act 2002. Counsel for the prosecution took you through section 188 of the Enterprise Act 2002 and indicated the areas of activity which are now subject to the criminal sanction. But I have to tell you, as members of the jury are not used to matters of economics, that this criminal offence only applies in respect of what are called “hardcore activities”, namely: price fixing; limitation of production; market sharing; and bid rigging. They comprise the most serious forms of anti-competitive activity and that is why in 2002 Parliament decided that they should be subject to a criminal sanction and, as is admitted by both counsel, the sanction applies to an individual and not the corporation.

The prosecution and defence cases have been well put and clearly put to you by both counsel and most recently. And I don't propose to summarise them or indeed to summarise the evidence when this hearing has been so short and when the evidence is still fresh in your minds.

#### Arrangement

Therefore I want to come to the key issues which you have to decide. The first is that you have to decide whether the defendant has entered into the arrangements referred to in the indictment and then whether or not in doing so he has acted dishonestly. Now a reference has been made by my learned counsel to an “agreement”. What the Act prohibits are arrangements made between an individual and another person and you have to ask yourself the following questions having regard to the evidence before you: was there a meeting of minds - the useful way of thinking about it – was there a meeting of minds as between the defendant and Mr Monkfish regarding the prices they were going to charge in the supply of cladding materials, count one, or the allocation of customers between Slabco and Cladders, was there a meeting of minds?

If taking account of all of the evidence and you may, and you may of course disregard what I say, but you may be influenced by the last two documents that were put before you. If, taking into account all the evidence, you are sure that the answer to question 1, that is arrangements, is “yes” then the element of an arrangement is proven.

#### Dishonesty

We then move to dishonesty and you have been addressed on the issue of dishonesty by both counsel. What you must decide in respect of dishonesty is whether according to the ordinary standards of reasonable and honest people what was done was dishonest. And what was done here is the allegation there was an arrangement. Was that arrangement dishonest by the ordinary standards of reasonable and honest people? If it was not dishonest then that is the end of the matter and the prosecution fails. And this is a matter of fact for you. It is not for the judge to indicate to you the kinds of conduct which you may regard as dishonest. It is for you in the year 2004 to decide whether the making of an agreement, a hardcore agreement, in circumstances in which it was neither disclosed to the customers nor the public nor the authorities falls within that category of dishonesty.

If you decide, having regard to the burden of proof, that that is dishonest you must then ask yourself a second question. You must consider whether the defendant himself must have realised that what he is doing was by those standards dishonest. And I have to tell you that in most cases where the actions are obviously dishonest by ordinary standards there will be no doubt about it, it will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest even if he asserts or generally believes that he is morally justified in acting as he did. And I intervened and referred you to Robin Hood or, as a learned judge expressed the view in 1982, antivivisectionists who remove animals from vivisection laboratories are acting dishonestly even though they may consider themselves to be morally justified in doing what they do because they know that ordinary people will consider these actions to be dishonest. Now that is the legal framework within which you must come to consider whether on the facts the prosecution have proved their case.

Evidence and relevance of economic evidence

Finally, I want to direct you on the issue of the evidence and the relevance of the evidence given by the economists. I allowed Mr Sharpe to introduce economic evidence because as I said this is the first trial of its kind in the country and it is important that you, the jury, should have as much information from experts as possible about the background to the circumstances in which this alleged agreement was made; but I have to tell you that this evidence is not relevant to the question of the defendant's dishonesty. It is, in my direction, a variant of what I described as the Robin Hood defence and you can think through the implications of this. If, in every case in which there is deliberate concealment of a hardcore illegal agreement, it is open to the defendant to produce *ex post* the evidence of an economist that there might have been some justification for

putting together that concealed agreement and not simply in order to protect the commercial interests of the company but to promote some wider public interest than that would cease to be a proper matter for consideration by a jury in a case of this kind. You would then move from being finders of fact into people asked to deliberate on the relative merits of the arguments of the two economists whose evidence has been put for you today.

So I have to tell you it comes back to the double test of dishonesty: the objective test and the subjective test, and if you conclude that Albert Herring on the burden of proof acted dishonestly in the making of the agreement as alleged then it is your duty to convict. But those are facts which you and only you must determine.

I am not going to ask you to retire to consider your verdict because you may never come back [laughter]. Nor am I asking you to appoint a foreman and I am only giving you a minute's pause before Peter Freeman or Irwin Stelzer are going to say "vote please" and you will vote with a show of hands. I can accept a majority verdict and we are quite capable of counting here, we have two economists in the front row [laughter]. So in the interests of a swift justice which we have administered this afternoon I ask you now to reach a verdict on a show of hands – guilty or not guilty... The clerk will address you again, yes go ahead.

### The verdict

#### **Clerk**

Members of the jury, do you find the defendant, Albert Herring, guilty or not guilty on **count one** which was dishonestly agreeing to make or implement arrangements which directly or indirectly fix a price for the supply in the United Kingdom of cladding materials contrary to section 188 of the Enterprise Act. Do you find the defendant guilty or not guilty? If you find him guilty please raise your hand [counting]. Twelve I make it... thirteen. So **on count one the defendant is found not guilty.**

On **count two**, do you find the defendant guilty or not guilty of dishonestly agreeing to make or implement arrangements which divide customers for the supply in the United Kingdom of cladding materials contrary to section 188 of the Enterprise Act. Do you find the defendant guilty or not guilty? If it is guilty please raise your hand [counting and talking]. Eight, so **the defendant is found not guilty.** [applause]

**Mr Justice Swift**

Mr Herring, you are discharged [laughter] without a stain on your character [laughter and talking].

**Counsel for the defence**

Costs?

**Mr Justice Swift**

Mr Sharpe, in the circumstances of this case, surely you're not going to press on with that application.

**Counsel for the defence**

Another shambles from the Serious Fraud Office.

**Mr Justice Swift**

Mr Herring you also have the solace of knowing that you will be able to keep your shoes and socks and, more important shoelaces, on this evening [laughter].

**Concluding remarks**

**Peter Freeman**

Right, well, shall I just offer some very brief observations on that then I can hand over to Irwin to offer more serious observations. But first of all I think everybody will know why most defendants plead guilty rather than face Peter Roth's devastating cross examination and equally why there are so many defendants sunning themselves on the Costa Brava [laughter] having been represented by Mr Sharpe. And we are very grateful to both of them and to their juniors who actually did quite a lot of work although were not allowed to speak this afternoon because of the shortage of time. And thanks also to everybody who put the case together, to Eran and to Emily and to our judge for summing up without the fifteen minutes he was obviously anticipating to put his thoughts together. But passing swiftly on...

You may have noticed the dog that didn't bark in the night. Mr Monkfish wasn't here – he does seem to be the worst character in this. He was the chap who put our poor Herring up to it and he fled the country. There are various documents that you haven't seen in this paper, including a solicitor's letter which was of course privileged. But one of the questions that may arise out of this is: are these cases going to target the right person and I think we picked up two elements. One is

the other co-conspirator. He got away, the case would have been stronger if he had been here and it may be that his guilt might have tainted Mr Herring. So that's one thought I would leave with you.

The other I think is that of course the senior managers of the company, Mr Trout and Mr Cod who didn't even get a mention but he is the Chief Executive – they are the people who actually arguably ought to be responsible for the conduct from which they would have benefited and I think one of the tests of this new offence is how the authorities are going to get at those people when the investigator, who is also actually your Mr Bigears by the way, in the pub could only record a conversation at Mr Herring's level, so I think those are two serious issues.

The other major point I just want to bring out is of course it's carefully slanted, this case study, to take place over the 30<sup>th</sup> of April and 1<sup>st</sup> of May 2004. And I think the question we were trying to bring out was in the new modernisation era, the era of self-assessment, it will be easier for people to run the argument that they honestly believed that what they were doing would be exempted. And I think the point that will have to be looked at more closely is that, of course unlike tax fraud where everybody knows fixing a tax return is wrong, everybody doesn't know that price fixing is wrong yet. And there are these funny cases that say in some circumstances price fixing can be right. So I think that that is the issue that will have to be clarified before these cases are brought. So those are really my two comments apart from we have had one pun which is "swift justice" but I'll just draw your attention to the other one. "The cladding industry would go to the wall". I can't remember who said that – I think it was appalling [laughter]. Thank you very much anyway. And thanks to the jury for being so patient.

### **Mr Justice Swift**

Irwin

### **Irwin Stelzer**

I just .. take one minute. First of all, in the list of people to thank we have to thank Peter because he made a lot of resources available to us and this and to the people who put this thing together. Second I just have two comments on the economic testimony and one on whether you had the right guy in the dock. In America we know how to do that, we would have said to Mr Herring, "we are not interested in you we are interested in the other guy, now we know you talked to your wife and daughter about this so the question was do we indict the three of you or would you like to tell us something about your CEO". In fact, that's what happened to Mike Milken when they said, "we

will indict your father if you don't talk". And that's what they are doing now to Jeff Skilling about indicting his wife if he doesn't give them Ken Ley. So you wouldn't have even been here,. you would've cut a deal and your boss would have been here or you and your wife and the kids and the grandchildren would all be in jail. Second, as to the economic evidence which strikes me as largely, ... not largely, completely irrelevant in a price fixing case. Two things, Mark's mistake was to accept an assignment which allowed someone to say its theoretical. I was asked once in a price fixing case in the plumbing supply industry to testify to the very simple economic truism that both perfect competition and perfect conspiracy lead to identical prices. I didn't do it because there were documents about meetings and everything else so I think theoretical testimony is useless. If your client doesn't give you everything, everything, stay home. That's my advice. As to the other testimony the fact that this company will in the long run survive in a highly cyclical industry highly leveraged unable to do more than cover direct costs at this period doesn't strike me as a plausible argument. But we did not have time to do that. It's all irrelevant anyhow, either the guy fixed prices or he didn't fix prices. As an American, this "dishonesty" word that crept in to a statute I was working on and they didn't tell me, that strikes me as going to be an interesting series of arguments.

Again I would like to join Peter and thank you as a lot of work went into this – I hope everybody found it more useful than listening to two more speeches, which was your alternative this afternoon had you stayed. And we look forward to seeing you next year [applause].

**END**

**RPI MOCK TRIAL  
DRAMATIS PERSONAE**

**Defendant** Albert Herring, Commercial Manager of Slabco PLC

Represented by: Samuel D Clerk – Instructing Solicitors  
Thomas Sharpe QC  
Matthew Cook  
Zoltan Biro

**Prosecution**

Represented by: Peter Roth QC  
Clair Dobbin  
Mark Williams

**Slabco PLC**

| <i>Name</i>    | <i>Position</i>     |
|----------------|---------------------|
| Albert Herring | Commercial Manager  |
| Jim Fixit      | Group Legal Adviser |
| Peter Trout    | Commercial Director |
| Tom Cod        | CEO                 |
| A Whaley       | Finance Director    |

**Cladders PLC**

| <i>Name</i>   | <i>Position</i> |
|---------------|-----------------|
| John Monkfish |                 |

**Hook & Line** (Slabco PLC's external legal advisors)

| <i>Name</i>   | <i>Position</i> |
|---------------|-----------------|
| Adam Gardener | Partner         |
| Eve Paradise  | Associate       |

**Investigators**

| <i>Name</i>  |              |     |
|--------------|--------------|-----|
| David Fisher |              | SFO |
| Fred Bigears | Intelligence | OFT |

## CHRONOLOGY

|               |  |
|---------------|--|
| 1 March 2004  | Conversation between A Herring (Slabco) and J Monkfish (Cladders)                |
| 1 April 2004  | Internal legal advice from J Fixit   |
| 15 April 2004 | J Fixit asks external advisors Hook & Line for legal advice                      |
| 21 April 2004 | Slabco's Executive Committee meeting give authority to act                       |
| 25 April 2004 | Hook & Line provide their advice   |
| 25 April 2004 | A Herring holding talks with J Monkfish  |
| 30 April 2004 | Attendance note of legal advice given at meeting between J Fixit and Hook & Line |
| 30 April 2004 | A Herring and J Monkfish discuss going ahead                                     |
| 3 May 2004    | Email from A Herring to P Trout re settled terms                                 |
| 26 May 2004   | SFO/OFT dawn raid  |
| 28 May 2004   | A Herring appearance before Mags Ct – not guilty plea                            |
| 2 June 2004   | Preliminary disclosure under CPI Act 1996  |

**IN KEBLE CROWN COURT  
INDICTMENT No. 0001584  
REGINA V ALBERT HERRING**

**Count 1**

**STATEMENT OF OFFENCE**

Dishonestly agreeing to make or implement arrangements which directly or indirectly fix a price for the supply in the United Kingdom of cladding materials, contrary to S 188 of the Enterprise Act 2002.

**PARTICULAR OF THE OFFENCE**

ALBERT HERRING between 1 March and 30 April 2004 dishonestly agreed on behalf of Slabco PLC with Cladders PLC and / or with Scotslab PLC to make or implement arrangements which directly or indirectly fix a price for the supply in the United Kingdom of cladding materials.

**Count 2**

**STATEMENT OF OFFENCE**

Dishonestly agreeing to make or implement arrangements which divide customers for the supply in the United Kingdom of cladding materials, contrary to S 188 of the Enterprise Act 2002.

**PARTICULAR OF THE OFFENCE**

ALBERT HERRING between 1 March and 30 April 2004 dishonestly agreed on behalf of Slabco PLC with Cladders PLC and / or with Scotslab PLC to make or implement arrangements which divide between Slabco PLC, Cladders PLC and Scotslab PLC customers for the supply in the United Kingdom of cladding materials.

IN THE CROWN COURT AT KEBLE.

R

-v-

ALBERT HERRING.

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NOTICE OF APPLICATION.

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1. The Crown will apply, under section 5 of the Indictments Act 1915, at trial to amend the indictment. These amendments will not affect the basis of the Crown's case and will not give rise to any additional issues.
2. The amendments will not cause any injustice or prejudice to the defendant as the amendments do not go to any substantive matters. The application is made to ensure the technical correctness of the indictment.
3. Guidance on the amendment of the indictment is set out in *Archbold* at 1-147, page 66.

Clair Dobbin.

**IN KEBLE CROWN COURT  
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**Enterprise Act 2002**  
**Section 188 Cartel offence**

- (1) 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 of the following kind relating to at least two undertakings (A and B).
- (2) The arrangements must be ones which, if operating as the parties to the agreement intend, would-
  - (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,
  - (b) limit or prevent supply by A in the United Kingdom of a product or service,
  - (c) limit or prevent production by A in the United Kingdom of a product,
  - (d) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,
  - (e) divide between A and B customers for the supply in the United Kingdom of a product or service, or
  - (f) be bid-rigging arrangements.
- (3) Unless subsection (2)(d), (e) or (f) applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would-
  - (a) directly or indirectly fix a price for the supply by B in the United Kingdom (otherwise than to A) of a product or service,
  - (b) limit or prevent supply by B in the United Kingdom of a product or service, or
  - (c) limit or prevent production by B in the United Kingdom of a product.
- (4) In subsections (2)(a) to (d) and (3), references to supply or production are to supply or production in the appropriate circumstances (for which see section 189).
- (5) "Bid-rigging arrangements" are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom-
  - (a) A but not B may make a bid, or
  - (b) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.
- (6) But arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made.
- (7) "Undertaking" has the same meaning as in Part 1 of the 1998 Act.

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**In the Royal Courts of Justice  
Search Warrant – Enterprise Act 2002 s.194**

To: David Fisher and each of the named officers identified in schedule 1 hereto.

An application having been made on this day in pursuance of Section 194 of the Enterprise Act 2002 (“the Act”) by David Fisher of the Serious Fraud Office, Elm Street London, I am satisfied that there are reasonable grounds for believing:

1. That there are documents including but not limited to, meeting notes, emails, letters, correspondence and other materials relevant to an investigation being conducted into an offence pursuant to Section 188 of the Act, namely a dishonest agreement with one or more other persons to make or implement arrangements which directly or indirectly fix a price for the supply by Slabco PLC in the United Kingdom of cladding materials, and divide between Slabco PLC, Cladders PLC and Scotslab PLC customers for the supply in the United Kingdom of cladding materials at the premises of Slabco PLC at Cemetery Road Smethwick, BNXXXX; and
2. That the service of a notice pursuant to Section 193 of the Act requesting the production of the said materials may prejudice the investigation.

You (and any officer named in Schedule 1 hereto) are hereby authorised to enter the premises, using such reasonable force as is necessary, to search the premises and take possession of any documents appearing to be of a relevant kind or take such steps as appear to be necessary for preserving them or preventing interference with them. You (and any officer named in Schedule 1 hereto) are entitled to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge information and belief, where it may be found. You may require any information which is stored in any electronic form and is accessible from the premises and which you consider relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away.

Signature of High Court Judge .....

Dated .....25 May 2004.....

**Schedule 1**

1. David Fisher
2. Matthew Eel
3. Donald Shrimp
4. Natasha Jellyfish
5. Marge Crayfish
6. Bartie Cuttlefish
7. Maggie Poorfish
8. Lisa Hermitcrab
9. Selma Prawn

- 10. Betty Fin
- 11. Petty Nofin
- 12. Nathan Lampreys

[OFFICE OF FAIR TRADING LETTERHEAD]

Dated 12 May 2004

To Whom it May Concern:

Pursuant to Section 195 of the Enterprise Act 2002 I, xxxxxx, Chairman of the Office of Fair Trading, hereby authorise David Fisher of the Serious Fraud Office, Elm Street, London, to exercise on behalf of the Office of Fair Trading (as a “competent person”) the powers conferred by Section 194 of the same Act in relation to this Office’s investigation into the conduct of Slabco PLC’s role and the suspicion that an offence pursuant to Section 188 of the Enterprise Act may have been committed.

Signed

.....

xxxxxxxxxxx

**Document 7(A)**

**Record of conversation between Albert Herring (AH) and John Monkfish (JM); Dolphin public house; 01 March 2004, 18:43 – 19:04.**

Recorded by Fred Bigears.

AH "What is your poison, John?"

JM "Bloody customers – oh, a pint of Fishhead's; please"

AH (after returning from the bar with drinks) "What's the matter with your customers, John? Are they getting you down?"

JM (after draining his glass) "They're so difficult; they ask for discounts, price reductions, free gifts; they delay payment and they threaten to stop buying. It's all I can do to keep sales to last year's level and even that's a reduction in real terms. I won't get a bonus this year and I'm a worried man. There's the alimony, the mortgage on the villa in Spain and the payments on my new glass fibre fishing rods – I mean what's a man to do?"

AH "Times are hard indeed. We're not doing so wonderfully ourselves. I'm doing my best but I get the feeling the customers are having it all their own way. If they're not careful, there will be no British suppliers left and the French will have the market to themselves. My chief is very concerned about it I know but he says I must just hang in there. Still, I don't expect much of a bonus this year either".

JM "It does seem a bit rum that the odds are all on the side of the customers. After all, take Pam Alligator, the purchasing manager of Snakepitts - she must have switched most of her business to you; she certainly told me she would if I wouldn't reduce our prices. Did she do that?"

AH "Would you like another Fishhead's?"

JM "My turn" (returns with two foaming beakers). "No, Pam told me the buyer was king in the present market and we just had to cut or be cut off. What did she say to you?"

AH "Actually much the same".

JM “But do we have to take it? Supposing we agreed not to go along with it – hold the line against ruinous price cutting; not overcharging or anything, but just keeping enough margin to keep going until the market picks up. Surely that’s not unreasonable?”

AH “I don’t know, it sounds anti-competitive to me and I’m sure our lawyers wouldn’t like it. I remember reading something very like that in the “Dos and Don’ts” at the back of our compliance manual – as a Don’t by the way”.

JM “Yes but that’s to stop us ripping the customer off. We wouldn’t be doing that – just trying to survive in business until there’s more demand – next year say. Anyway, think about it, and maybe we could have another word. Thanks for the drink, I’m off to the Angler’s Rest to meet Fred Cuttlebone...”.

**Document 7(B)**

**An email dated 1 April 2004 from AH to Group Legal Officer at Slabco, Jim Fixit (“Fixit”)**

“To : Fixit, Jim

Copy to : Records, Central

From : Herring, Albert

Sent : 01.04.03 @ 08.32am

Confidential

Jim, I need to talk to you about an idea put to me by a contact at Cladders. Cladders are our main competitor (there is one other small UK supplier) and are suffering, as are we, from the current downturn. He is suggesting an understanding on floor prices, to keep us in the business until the market picks up. Is that legal? I am sure you’ll say it isn’t but he’s not proposing price increases – just smaller falls. Give me a bell.”

**Document 7(C)**

**A reply email from Fixit to AH dated 1 April 2004**

“To : Herring, Albert

Copy to : Records, Central

From : Fixit, Jim

Sent : 01.04.03 @ 10.05am

Confidential

Albert, you need to be careful. What your contact is suggesting could land you both and possibly all of us in jail. Do not say a word about this to anyone else including senior management until I have had a chance to think about it. I am not ruling out some sort of structured arrangement but it would have to be public and we would have to get it exempted by the competition authorities. I'll get back to you.”

**Document 7(D)**

**Slabco PLC**

**Minutes of Extraordinary Meeting of Executive Committee**

**Thursday, 21<sup>st</sup> April 2004**

**11 o'clock**

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**STRICTLY CONFIDENTIAL**

|                      |             |                       |
|----------------------|-------------|-----------------------|
| <b>Present</b>       | Tom Cod     | (CEO)                 |
|                      | A. Whaley   | (Finance Director)    |
|                      | Peter Trout | (Commercial Director) |
| <b>In Attendance</b> | J. Fixit    | (Group Legal Officer) |
|                      | A. Herring  | (Commercial Manager)  |

**Purpose of Meeting**

1. Mr. Cod stated that the meeting had been called to consider a proposed floor price and allocation arrangement with Cladders PLC and Scotslab PLC with a view to early implementation.

**Market situation**

2. Mr. Trout reported that demand for cladding materials was 17.9% down on the same period (Q1) in 2003. Current operations in this sector were not profitable. It was not thought this could be in the long term interests of customers, who might have to switch to more expensive non-UK supply. Mr. Whaley confirmed that the company would have to exit this sector if negative margins continued after Q3/04. This was NOTED.

### **Legal advice**

3. Mr. Fixit reported preliminary advice received from the Company's external legal advisers Hook & Line. This was framed in cautious terms but the bottom line was that the company could only enter into this arrangement if it was notified to the OFT and EC Commission for exemption. This was NOTED.

### **Action**

4. It was AGREED that the serious adverse market considerations required early action and a positive indication should be made to the other two UK suppliers. Mr. Fixit was authorized to protect the Company's legal position to the maximum extent possible. Mr. Trout was authorized to conclude any appropriate arrangements on the Company's behalf.

**Document 7(E)**

**Extract of record of conversation between Albert Herring (AH) and John Monkfish (JM);  
Dolphin public house; 25 April 2004, 17:22 – 17:34.**

Recorded by an Fred Bigears.

AH “I’ve thought a bit more about what you said. I talked it over with my chief and we could be interested. We would prefer to do it legally though”.

JM “Never trust a lawyer! As soon as you put anything to them they say first you can’t do it and then they write you incomprehensible opinions costing thousands. By the time this is done legally it will be too late”.

AH “Sorry Jim, I don’t agree. My chief has agreed to contact yours – and Scotslab, to agree a standard and publicly disclosed floor price and allocation agreement and to notify the authorities. That way we will stay the right side of the law”.

JM “In your dreams, friend. I guarantee that by the time you’ve got all that set up, we’ll both be out of business. Cheers!”.

**Document 7(F)**

**Record of conversation between Albert Herring (AH) and John Monkfish (JM); Dolphin public house; 30 April 2004; 18:23 – 18: 57.**

AH I talked again to my chief following what you said. I can go ahead.....

JM Good news. Have you heard that Buildco have laid off 100 brickies because there's so little work. The way things are going I'll be redundant. Lets see how we get on today. ....

(The listening device failed and the rest of the conversation is indecipherable).

**Document 7(G)**

**An e-mail dated 3 May 2004 from Albert Herring to Peter Trout, Slabco's Commercial Director.**

(Seized following the search conducted at Slabco).

From: Albert Herring

To: Peter Trout

Sent: 03.05.04 @ 09:43am

Saw JM on Friday

Settled on the following:

(S & T)

No further reductions in prices for Skin L and P.C. until at least December 2004, when the position will be reviewed.

S

C

Waites

Murphy

W & W

Buildco  
Napier

**Document 8(A)**

**SLABCO PLC**

From : James L. Fixit  
Chief Legal Officer

15<sup>th</sup> April 2004

Adam Gardener  
Hook & Line  
14 Splitcane Street  
London EC

Commercial in Confidence

Dear Adam

Cladding Agreement – Competition Law

This is to seek your advice on the compatibility with competition law of a possible arrangement with two other UK companies as to a minimum price and allocation of orders. From what I know of competition law, such things are not encouraged and we need to know what can be done within the law.

Essentially, business is bad; demand is down (17.9% over the past year); we can't hold our prices and are losing sales as customers shop around. The building industry doesn't understand how important we are to them and seem happy for us to go to the wall, even though business is bound to pick up in a year or two and they will then have no British cladding suppliers.

We need action, urgently. Can you advise please? Ring for any further details. It would be good to see you again, and that nice young assistant of yours too.

Yours etc.

Jim

J. L. Fixit

## Document 8(B)

HOOK & LINE  
14 Splitcane Street  
London ECXXX

and in Brussels, Paris, Frankfurt  
Madrid, Rome, Lisbon, Copenhagen,  
Athens, Warsaw, Budapest, Dublin  
Stockholm, Helsinki, Luxemburg,  
Amsterdam and Smethwick

Draft [25<sup>th</sup> April 2004]  
Our Ref : 4/ZX104/EP  
Your Ref:

Strictly Private & Confidential  
Privileged Legal Advice

James L. Fixit Esq  
Chief Legal Officer  
Slabco PLC  
Cemetery Road  
SMETHWICK  
BNXXXX

Dear Jim

Proposed price and allocation arrangement : Competition Law

This is in reply to your letter of 15<sup>th</sup> April 2004 which we discussed at our recent meeting.

### Advice

Essentially this arrangement infringes EC and UK competition law and requires exemption from the prohibition under both systems to be valid and enforceable. Failure to establish this involves a serious risk of substantial fines and imprisonment or fines for the individuals concerned, as well as their disqualification as directors. A detailed economic argument to show why this arrangement is necessary and exemptable needs to be prepared without delay and no implementation of the proposed arrangement should occur in the meantime. We recommend that you instruct economic consultants to prepare this material.

### Reasons

Our reasons for this advice are as follows:-

Price fixing and market sharing agreements are particularly serious infringements of

(page 2 and subsequent pages missing from Hook & Line's files).

**Document 8(C)**

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|                 |                             |                      |
|-----------------|-----------------------------|----------------------|
| Attendance Note | 30 <sup>th</sup> April 2004 | 4/ZX104/EP           |
| Client : Slabco | Matter :                    | Possible arrangement |

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Adam Gardener (AG) and Eve Paradise (EP) attending James Fixit (JF) at the firm's Smethwick office to discuss JF's letter of 15<sup>th</sup> April.

It was explained that not only did the proposed arrangement raise serious issues under UK and EC competition law, but the new criminal offence under the Enterprise Act 2002 could also apply. The plan to notify the arrangement for exemption was unworkable as notifications were to be abolished in the UK and EC from 1<sup>st</sup> May 2004. In view of the exceptional economic circumstances, however, an argument for justification could be advanced but this would require detailed economic explanation. AG & EP could recommend economic consultants to assist on this but the main thing was to clarify the proposed terms and to make sure nothing was implemented until the justification was established.

AG & EP would set this out in writing.

Eve Paradise

(EP Ext 4077 Comp Dept)

IN THE CROWN COURT  
AT KEBH.

R

-v-

**ALBERT HERRING.**

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**OPENING NOTE.**

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**Introduction.**

1. This prosecution concerns the activities of Albert Herring acting in his capacity as the Commercial Manager of Slabco PLC. Slabco are a manufacturer of external cladding material and compete in a market with two other principal competitors. Those competitors are Cladders PLC and Scotslab PLC.
2. In essence the Crown contend that the defendant engaged in a dishonest course of conduct with a representative of Cladders for a dual purpose. The first was the agreement between them that the two companies would not reduce their prices for the supply of cladding materials within the United Kingdom and the second was the division of customers between them for the supply of cladding materials within the United Kingdom. This conduct is reflected in counts one and two on the indictment.

**Elements of the Offence.**

3. The Crown must demonstrate to the criminal standard (i) that there was an agreement between the defendant and one or more other persons (ii) that the agreement was made dishonestly and (iii) that it would if implemented as intended fix prices for supply and divide customers for the supply in the UK of cladding materials.
4. The test for dishonesty involves a two stage analysis. The first issue to be resolved is whether according to the standards of reasonable and honest people what was done was dishonest. If it was dishonest by those standards the further issue to be resolved is whether the defendant must himself have realised that what he was doing was, by those standards, dishonest.

**The Facts of the Offence.**

5. The defendant is the Commercial Manager of Slabco, one of the three principal companies concerned in the manufacture and supply of external cladding materials in the

UK. Between them, Slabco and its main competitors, Scotslab and Cladders, supplied 90% of the United Kingdom cladding market in 2003.

6. Conversations between the defendant and John Monkfish of Cladders were recorded by way of covert surveillance and demonstrate that they were in contact with each other. They met on the 1<sup>st</sup> March 2004 and discussed the difficulties in the cladding supply market.
7. The defendant, during that conversation, demonstrated awareness that such action may be anti-competitive and potentially against the law.
8. The defendant was later expressly warned by Slabco's Group legal advisor that such action may be criminal and that such an arrangement would require an exemption by the competition authorities.
9. On the 21<sup>st</sup> April 2004 Slabco held an extraordinary meeting of its Executive Committee. The defendant was present at that meeting. This meeting was convened in order to consider a proposed floor price and allocation arrangement with Cladders and Scotslab. At that meeting, Slabco's finance director said that the company would have to exit from cladding production if its operations continued to be unprofitable after the 3<sup>rd</sup> quarter of 2004. It was agreed at that meeting that a positive indication should be made to the two other UK suppliers in respect of the proposed arrangements.
10. The defendant's superior was duly authorized to conclude "any appropriate arrangements" on Slabco's behalf.
11. At that meeting there was specific discussion as regards the independent legal advice received by Slabco that for such an arrangement to be lawful it had to be notified to the OFT and the EC Commission for exemption.
12. There was a further meeting between Albert Herring and John Monkfish on the 25<sup>th</sup> April 2004 and again their conversation was intercepted. During that meeting the defendant specifically mentioned that Slabco would prefer to do things legally. However at another meeting on the 30<sup>th</sup> April 2004 Albert Herring signaled that Slabco were ready to go ahead.
13. Contained in an e mail of the 3<sup>rd</sup> May 2004, from the defendant to his superior (Peter Trout), were explicit references to arrangements made between 'JM' and Mr Herring. The Crown say that JM is John Monkfish and that the arrangements related to the division of customers and to the fixing of prices.
14. No application for an exemption was made to the OFT or the EC Commission. The grounds for such an exemption are set out in the competition legislation and they involve a complex assessment of all the prevailing factors to determine if an agreement meets specified economic conditions. In fact, on 1 May 2004 the law changed and the competition authorities no longer make exemption decisions. From that date onwards, anti-competitive agreements of this kind are unlawful unless they fulfil those same conditions. Those conditions are that the agreement or arrangement::

(a) *contributes to-*

*i. improving production or distribution, or*

*ii. promoting technical or economic progress,  
while allowing consumers a fair share of the resulting benefit; but*

(b) *does not-*

- i. impose on the companies concerned restrictions which are not indispensable to the attainment of those objectives; or*
- ii. afford the companies concerned the possibility of eliminating competition in respect of a substantial part of the products in question.*

**Conclusion.**

15. The Crown say that in all these circumstances what the defendant did was obviously dishonest and that as such it would have been apparent to him that it was dishonest. It is apparent that he believed such an arrangement was anti- competitive and criminal unless the subject of an exemption. Nonetheless he pursued the making of arrangements with Herring in order that they could fix prices between them and divide their customer base.

16. It may be suggested in the course of the trial that the arrangements here were not dishonest because they would have been of economic benefit. However, the requirements of the legislation are more specific as set out above. Slabco never carried out an assessment of whether those requirements were satisfied nor did the defendant believe that such an assessment was carried out. Furthermore, the requirements were clearly not satisfied on the facts of this case.

Peter Roth QC

Clair Dobbin

Counsel for the Prosecution.

## DEFENCE STATEMENT

1. Section 188 of the Enterprise Act 2002 materially provides that:
  - (1) *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 of the following kind relating to at least two undertakings (A and B).*
  - (2) *The arrangements must be ones which, if operating as the parties to the agreement intend, would -*
    - (a) *directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B of a product or service).*
    - ...
    - (d) *divide between A and B customers for a supply in the United Kingdom of a product or service.*
  - (3) *Unless section 2(d) ...applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would -*
    - (a) *directly or indirectly fix a price for supply by B in the United Kingdom (otherwise than to A of a product or service).*
2. The Prosecution contends that the Defendant dishonestly agreed on behalf of SlabCo with Cladders Plc and Scotslab Plc to make or implement agreements which:
  - 2.1. directly or indirectly fix a price for the supply in the UK of cladding materials.
  - 2.2. divide between SlabCo, Cladders Plc and Scotslab Plc customers for the supply in the UK of cladding materials.
3. The Defence admits that discussions took place between the Defendant on behalf of SlabCo and Mr Monkfish on behalf of Cladders about the possibility of a price control arrangement being entered into between SlabCo and Cladders.
4. However, the Defence:
  - 4.1. Denies that any finalized agreement or arrangement was entered into between the Defendant acting on behalf of SlabCo and any representative of Cladders about price fixing.
  - 4.2. Denies that the Defendant was party to any discussions relating to the division of customers and therefore denies that any arrangement relating to the division of customers was entered into whether with Cladders or with Scotslab.
  - 4.3. Denies that the Defendant was party to any discussions at all with any representative of Scotslab Plc and therefore denies that any arrangement was entered into between SlabCo and Scotslab.
  - 4.4. Denies that the Defendant would in any event have been acting dishonestly, given the benefits that would arise to consumers from such a price control arrangement being put into place. In this regard, the Defence will rely upon the Expert evidence of Mr Z. Biro.
5. The Defence will, therefore, contend that no offence has been committed by the Defendant.

Thomas Sharpe Q.C.  
Matthew Cook  
Counsel for the Defence

# Expert report of Zoltan Biro (Extracts)

## Introduction and main findings

1. I have been asked by Hook & Line, solicitors acting on behalf of Mr Albert Herring of Slabco Plc, to prepare a report on the economic state of the UK cladding industry in 2004. In particular, I have been asked to consider whether, in the light of recent economic events, it would have been reasonable to expect a temporary price fixing and/or market sharing arrangement between the leading suppliers of cladding materials to have provided economic benefits to the industry and the purchasers of these products.
2. The appendix to this report contains a set of background facts, which have been agreed with the prosecution. It is clear that the UK cladding industry has been suffering from a significant downturn during 2004 caused by unforeseen, exceptional events that have befallen the building and construction sector.
3. My main findings are as follows:
  - Slabco's prices during 2004 were at economically unsustainable levels;
  - the recent demand downturn is temporary;
  - Slabco's business is viable in the longer-term;
  - despite Slabco's long-term viability, the exit of Slabco was likely in the absence of a temporary arrangement on prices;
  - the exit of Slabco would arrest the recent fall in prices, cause prices to rise and be detrimental to customers; and
  - the exit of Slabco would lead to wasteful exit and re-entry costs.
4. On the basis of these findings, I conclude that it would reasonable to expect a temporary price fixing and/or market sharing arrangement between the leading suppliers of cladding materials to have provided economic benefits to the industry and the purchasers of the cladding products. My reasoning is explained below.

## **Slabco's prices during 2004 were at economically unsustainable levels**

5. I have examined monthly management accounting information for Slabco Plc over the period January 2002 to September 2004. This information shows that the profits and revenues of Slabco derived from the sale of cladding materials in the UK fell dramatically after November 2003. The reduction in sales profitability was attributable to a decline in sales volumes and a reduction in the prices achieved by Slabco.
6. My analysis of these data has revealed that, for each month from December 2003 to September 2004, the sales revenues of Slabco were sufficient to cover the direct costs of supply. However, these sales revenues were insufficient to cover Slabco's fixed costs – its fixed production and distribution costs, overheads and capital costs. At prevailing prices and volumes, the revenues generated by Slabco were insufficient to cover fully the costs of manufacturing and distributing cladding products.

7. The operating cashflows generated by Slabco's UK cladding business were negative throughout this period and Slabco found it necessary to draw on its overdraft facility in order to continue its operations.
8. Although I have not had access to comparable accounting information for the other UK suppliers, I have no reason to believe that the economic position of these companies was materially different to that of Slabco.
9. I therefore conclude that the prices of cladding products were at unsustainably low levels - the prices were insufficient to cover the on-going costs of operation and far below the levels required to remunerate appropriately future investments in cladding manufacture and distribution. I furthermore conclude that, if this situation had been expected to be permanent, then it would have been economically rational for Slabco to exit the cladding sector in order to avoid a situation of otherwise unavoidable on-going economic losses.

### **The recent demand downturn is temporary**

10. The recent fall in construction activity in the UK, and the consequent reduction in the demand for cladding materials, was caused by exceptional events. Whilst the suspension of trading of the UK's largest two construction companies had a significant impact on the level of construction and building activity, these effects cannot be expected to be permanent.
11. I have examined a range of forecasts by industry analysts. Although there is no overall consensus, these forecasts suggest that levels of activity would begin to recover towards the end of 2004. However, progress back to historic levels of demand may be slow. A number of analysts have indicated that a full recovery may not take place until 2007/08.

### **Slabco's business is viable in the longer-term**

12. It is expected that, at some point in the future, the UK construction industry will recover. At that point in time, I have every reason to believe that Slabco's activities in the UK cladding market would constitute a viable on-going concern.
13. I have examined the economic performance of the cladding market, and the performance of Slabco in particular, since the beginning of the 1990s. Prior to the events of November 2003, Slabco had an extremely strong trading history. If Slabco were able to weather the current economic storm, I can only conclude that this strong trading position would resume when the economic environment improves.

### **Despite Slabco's long-term viability, the exit of Slabco was likely in the absence of a temporary arrangement on prices**

14. Despite my views concerning the long-term viability of Slabco, I consider that, in the absence of a temporary arrangement on prices, the most likely outcome is that Slabco would exit the industry. In particular, I am of the view that:

- Slabco's cashflow position was such that additional finance was required for it continue to operate beyond 2004;
- such finance was unlikely to be forthcoming; and
- Slabco's exit from the cladding market would follow as a result.

15. [...]

**The exit of Slabco would arrest the recent fall in prices, cause prices to rise and be detrimental to customers**

18. On the basis of my analysis of the market evidence, I have concluded that, in the absence of a temporary arrangement to limit further price reductions in the UK market for cladding materials, the exit of Slabco from the market would be expected. In assessing the economic benefits arising from such an arrangement, it is therefore necessary to compare the likely outcome for purchasers of cladding materials in two alternative situations:
- an arrangement is reached between UK suppliers that limits further price falls and, as a result, Slabco continues to operate in the market; or
  - such an arrangement is not reached and, as a result, Slabco exits from the market, potentially re-entering the market only when demand and prices have recovered to appropriate levels.
19. I consider that it is reasonable to believe that purchasers may be better off in the first situation than the second situation - that purchasers would benefit directly from a temporary arrangement between UK suppliers that limits further price falls in the market.
20. The exit of Slabco from the UK cladding market can be expected to create upward pressure on the prices of cladding products as industry capacity would be substantially reduced and the number of competing domestic suppliers would fall from three to two. The impact of Slabco's exit on customer prices would therefore be similar to the effect of an agreement between suppliers to limit price falls within the market.
21. The exact level of prices that would prevail following the exit of Slabco is clearly unknown. However, it is certainly possible that such prices would be no lower - and could even be higher - than those that would prevail in the presence of an arrangement between UK suppliers to limit price falls. Indeed, I consider that there are good reasons to believe that this would be the case.
22. [...] It is therefore difficult to believe that [...] market forces would not serve to restore prices to more economic levels following the exit of Slabco.
23. Over the longer-term, as demand picks up, I would expect a prolonged period of increasing prices whilst the market tightens with only two domestic suppliers remaining. Considerable time would be needed for a new third supplier to re-establish itself in the market and provide the injection of additional capacity and competition necessary to limit this increase in prices. In contrast, in the presence of a temporary arrangement on prices that enabled Slabco to continue its operations, the capacity and competition provided by a third supplier would already be present in market, providing an immediate source of downward pressure on prices.

## **The exit of Slabco would lead to wasteful exit and re-entry costs**

24. My analysis indicates that, in the absence of a temporary arrangement on prices, it is likely that Slabco would be forced to cease operations and exit the UK cladding market. Slabco's exit would occur despite the long-term commercial viability of its business - this exit being forced by capital market failures and an inability to secure the necessary finance to weather the current economic storm in the sector.
25. [...]
27. My analysis strongly suggests that the economic costs entailed by the financing of Slabco's business during the current market crisis are considerably lower than the resource costs associated with closing Slabco's existing operations and re-establishing a new third supplier in the future. In other words, it would be economically efficient to ensure that Slabco continues to operate within the UK cladding market and, as I have explained above, this seems an unlikely prospect in the absence of a temporary arrangement on prices.

## Appendix: Agreed background facts

1. The following background facts have been agreed with the prosecution.

### The products and the suppliers

2. Slabco Plc is the largest supplier in the UK of external cladding materials for industrial and commercial buildings. Its principal competitors in the UK are Cladders Plc and Scotslab Plc. In 2003, the combined turnover of these three companies was £300 million. Of this, 95% was generated by sales of cladding materials in the UK. The remaining 5% of turnover relates to sales of cladding materials in other EEA countries.
3. Cladding is a part of the building construction process whereby walls and roofs are covered with an outer layer of material such as timber and stone. Cladding is employed for cosmetic reasons and as a means of insulation. The industry typically distinguishes between four groups of cladding materials: single and twin skin, pre-cast concrete and facing materials. A distinction is also typically drawn between the domestic and the industrial/commercial sectors.
4. Slabco and its competitors manufacture and distribute a range of external cladding materials. Their customers are primarily contractors in the UK building and construction industry.
5. The UK market for industrial and commercial cladding materials is highly concentrated. In 2003, approximately 90% of supply by volume was accounted for by the three domestic suppliers: Slabco (37%), Cladders (33%) and Scotslab (20%). The remaining 10% relates to overseas producers supplying mainly into the South-East of England. There are only minor variations in the regional market shares of the three domestic suppliers.
6. Although each of the three domestic suppliers provides a range of cladding products, quality differences between the offerings of the different suppliers are small. As a result, competition between the firms is largely focused on price. Prices are subject to individual negotiation with the customer and often agreed on a case-by-case basis to reflect the requirements and the volumes associated with particular construction projects. Typically, all three domestic suppliers will be invited to provide a quote for any sizeable project.

### The production process

16. There is considerable variation in the specifics of the production process depending on the type of material employed and the final use. However, in general terms, the manufacture of cladding materials consists of four stages:
  - Design development. Certain standard cladding products are bought off-the-shelf. However, cladding is sometimes designed on a case-by-case basis.
  - Preparation of raw materials. Typically this includes careful quality control of materials bought.
  - Shaping of units. This consists of cutting and firing as necessary and requires workers with a high degree of skill.

- Final treatment. This may be cosmetic or for functionality, e.g. chemical treatments are used for weather protection.
17. Design development requires expensive computer equipment, software licensing for modelling and at least one experienced engineer. The preparation stage requires manual labourers who are able to identify damaged materials. The shaping stage requires cutting machinery, a firing furnace (which must remain active for sustained periods of time, and cannot be de- and re-activated intermittently) and a smaller number of highly skilled workers. Finally, the treatment stage requires chemical spraying equipment and low skill workers.
  18. Although individual clients' needs are often manufactured on a made-to-order basis, a firm will need to maintain a given level of stocks of raw materials, semi-processed products and standard cladding products in order to secure sales. Finally, a firm will require a means of distributing their finished products.

### The demand for cladding materials

19. The key driver of the demand for cladding materials is the level of activity in the building and construction industry - which itself tends to follow trends in the UK macro-economy. Historically, the demand for cladding materials has been cyclical, with demand falling and rising with the general economic cycle. During the 1990s, however, the market exhibited strong year-on-year growth due to sustained high levels of building and construction activity.
20. By the end of the 1990s, this growth began to decline. Between 2000 and 2003, demand grew at approximately 1-2% per annum.

**Table 1: UK Cladding material volumes  
(Orders pa '000 tonnes)**

| Year               | Single skin | Twin skin | Pre-cast | Facing | Total |
|--------------------|-------------|-----------|----------|--------|-------|
| 2000               | 90          | 75        | 95       | 28     | 288   |
| 2001               | 92          | 75        | 96       | 29     | 292   |
| 2002               | 92          | 77        | 97       | 31     | 297   |
| 2003               | 94          | 80        | 98       | 32     | 304   |
| 2004<br>(estimate) | 77          | 66        | 80       | 26     | 250   |

Source: ABCMM

### The recent collapse of demand

21. In November 2003, the UK's two largest construction companies were ordered to suspend trading whilst criminal investigations were conducted concerning links to organised crime. A large number of partially completed construction projects were frozen and a number of other projects were cancelled. As a result, the demand for cladding materials in the UK in the first quarter of 2004 was down 17.9% on the same period in 2003.

22. This incident led to a significant loss of confidence in the UK building and construction sector that has depressed activity. Throughout 2004, the market failed to recover and the overall demand for cladding materials in 2004 is estimated to be substantially below 2003 levels.
23. The sharp decline in construction activity resulted in building contractors demanding significant discounts on cladding materials. Since November 2003, prices fell by approximately 15% across the industry.

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# Expert Report of Mark Williams in the matter of R. v Herring.

## 1. INTRODUCTION AND MAIN FINDINGS

My name is Dr Mark Edward Williams and I am a professional economist, specialising in antitrust/competition economics. My current position, which I have held since August 2002, is as a Director of National Economic Research Associates (NERA) in London and Brussels, head of NERA's London competition group, and co-chair (with Dr Jorge Padilla) of NERA's European Competition Policy Practice. I have over eight years experience advising on matters concerning the economics of competition policy and merger control. I have been asked by the Serious Fraud Office to prepare an expert report in connection with the proceedings of *R v Herring*. My instructions were to perform an analysis of the cladding materials market and its workings during the period in question.

I have considered and reviewed the background facts on which I agree with the defence. I have taken particular note of the demand downturn in 2004, which forms an integral element in the case presented by the defence.

I have had the benefit of being able to review extracts from the expert report of Mr Zoltan Biro. I was asked to consider whether a temporary arrangement to fix prices and/or share markets during the downturn of the industry would have led to detriments in consumer welfare.

My conclusions are:

- The prices for cladding have not at any time fallen below the direct costs of supply (which correspond closely to the economic concept of marginal cost) and accordingly, in terms of economic theory, it remained profitable for the firms to continue to supply product, rather than to cease production, given that the fixed costs were not avoidable over the relevant period. This is also what happened as a matter of fact.
- There exist multiple potential sources of capital to a viable business.
- Slabco's valuation is almost certainly positive, since current prices exceed short run marginal cost, and there are option values to remaining in the market.
- There is no reason to suppose that capital markets are inefficient in this case.
- The impact of Slabco's exit on market prices is irrelevant given the likelihood that exit would not occur.
- The very factors alluded to by the defence - high exit and entry costs in the context of a high probability of market demand bouncing back - increase the option value of remaining in the market, and increase further the probability of obtaining finance.
- Even if exit and re-entry were to occur, this may carry positive consumer benefits ignored by the defence's expert.

My conclusion is that the price fixing and/or market sharing arrangements would have been detrimental to the interests of consumers.

## 2. PRICES DURING 2004 WERE ABOVE DIRECT COSTS AND IN TERMS OF ECONOMIC THEORY, SLABCO COULD BE EXPECTED TO CONTINUE PRODUCTION.

I have not had the opportunity to study the accounts of the three market participants. However, in this regard, I note that Mr Biro, in paragraphs 5 and 6 writes:

"I have examined monthly management accounting information for Slabco Plc over the period January 2002 to September 2004. [...] My analysis of these data has revealed that, for each month from December 2003 to September 2004, **the sales revenues of Slabco were sufficient to cover the direct costs of supply.**" [emphasis added]

I have seen no evidence to suggest that Mr Biro's analysis on this matter is incorrect. Accordingly, throughout the months of December 2003 through September 2004, the sales revenues can be assumed to exceed the direct costs of supply.

It is well-understood as a *matter of economic theory* that as long as a firm is able to achieve a price per unit of production that covers the marginal cost of producing that unit, the firm is better off (in the sense of maximising profits or minimising losses) by remaining in the market than by ceasing to produce. Specifically each sale at least covers its marginal cost and is therefore making a contribution towards covering its fixed costs (which the firm would have to incur in any case). This incentive to produce exists even if the firm is making accounting losses by selling at this price. Accordingly, *in terms of economic theory*, I would expect Slabco to continue production, even at the depressed prices.

At paragraph 7 of his testimony, Mr Biro notes:

"The operating cashflows generated by Slabco's UK cladding business were negative throughout this period, and Slabco found it necessary to draw on its overdraft facility in order to continue its operations."

However, at paragraph 14 he adds:

"Despite my views concerning the long-term viability of Slabco, I consider that, in the absence of a temporary arrangement on prices, the most likely outcome is that Slabco would exit the industry. In particular, I am of the view that:

- Slabco's cashflow position was such that additional finance was required for it [to] continue to operate beyond 2004;
- such finance was unlikely to be forthcoming; and
- Slabco's exit from the cladding market would follow as a result."

By contrast, I consider that the conclusion that Slabco would have exited in the absence of the arrangements is flawed, for reasons set out below.

## 3. THERE EXISTS A WIDE ARRAY OF PROVIDERS OF CAPITAL TO BUSINESSES THAT HAVE A POSITIVE VALUATION

There are a wide range of providers of finance to companies whose valuation is positive, including companies currently in distress. These source of finance include:

- bank overdraft;
- a shareholder rights issue;
- private equity firms/venture capitalists (especially their so-called "vulture" funds); and
- larger corporations, both within the construction industry and outside of it.

In particular, it is recognised that at the present time, private equity firms have an abundance of capital awaiting suitable investment opportunities.

Accordingly, on the basis that, as Mr Biro claims before paragraph 12 "Slabco's business is viable in the longer-term", the claim that no party would, in any circumstances, provide finance such that Slabco could continue to supply the market is one that I find to be highly implausible.

#### **4. THE VALUATION OF SLABCO'S UNDERLYING BUSINESS IS HIGHLY LIKELY TO BE POSITIVE, BOTH IN TERMS OF NET PRESENT VALUE AND IN TERMS OF "OPTION VALUES"**

Although a wide variety of sources of capital exist, capital will only be provided to projects with a positive valuation. However, I consider that, on the basis of the record, it is almost certain that the value of Slabco's underlying business is positive.

#### **If price exceeds marginal cost, continuing to produce is profitable, and funding is likely to be available**

It is accepted that the market price, even when depressed, lies above direct costs of production. Accordingly, the operation is profitable on a marginal basis. I would expect Slabco and the other firms in the market to continue production in the short term, as it has done.

Whether it will remain in the market in the medium and long term will depend on whether the medium and long term prices exceed the medium and long term marginal costs. While prices in the future are necessarily uncertain, it is accepted that the downturn in prices is a temporary phenomenon, and that Slabco was historically a profitable business and is viable in the longer term.

On that basis I consider that prices are currently above the relevant short run marginal cost, and that they are likely to exceed the relevant marginal cost on a forward-looking basis. Due to the temporary nature of the demand downturn, prices are likely eventually to climb to a level at or above average cost as they have done in the past.

#### **Even if the price at any moment were below the relevant marginal cost, the Option Value of remaining in the market would likely be positive given that the demand collapse is strongly believed to be temporary**

Even if (which is denied) price were at some point to fall below direct (or marginal) cost, this does not imply that immediate exit would occur, or that the value of Slabco is non-positive. Specifically, there may exist an "option value" of remaining in the market even if price is below direct cost.

In markets (such as this) where there are sunk costs of entry and exit, it is well recognised that:

- firms do not enter the moment prices rise above the average cost of production and
- firms do not exit the moment prices fall below the marginal cost of production.

Instead, there is an "entry trigger " that lies above the standard so-called Marshallian trigger of  $p=ATC$ , and an "exit trigger" that lies below the Marshallian trigger of  $p=MC$ . The valuation of these "options" of exit and entry is technically complex. However, for present purposes it is instructive to note the comparative static effect on the option valuation of certain market features.

First, if the market price is highly volatile, option values are higher than if the market price is less volatile. Entry at a price above AC is less profitable because the option value of delaying to see whether the price remains high will rise. Equally, exit (possibly involving sunk costs, such as redundancy) will be less profitable because of the greater possibility that the market price will rise back up again, and that the firm, by remaining in the market could avoid incurring the re-entry costs (as well as any initial exit costs). The re-entry costs in this case are also high, not only in terms of the production process which requires *inter alia* state-of-the-art and cutting-edge design, the use of expensive computer equipment, software licensing, cutting machinery, a firing furnace, and a distribution network, but also in terms of acquiring experienced staff, and established client contacts.

In the presence of entry costs, which are a characteristic of the cladding market, there is an "option value "to remaining in the market. This option value derives from the fact that if and when demand picks up, the entry costs need not be (re) incurred. As long as the short term loss is smaller than the option value of delaying exit, a firm will stay in the market. Indeed the short run losses (compared to marginal cost) can be seen as the price of purchasing the option to remain in the market.

Second, option values are affected by whether the market price follows a pure random walk - in which subsequent price movements are uncorrelated with each other - or whether by contrast the market price follows a random walk but where the process is "mean-reverting", by which is meant the fact that at some point in time the price is below its long run value indicates that the next movement in price is more likely to be up than down. If the market price is mean reverting then, for given underlying volatility of the market price, the option value of not exiting will rise.

In the facts of this case, it is accepted by all parties that recovery in the market is highly likely. That is, the market price is highly likely to be mean reverting. Accordingly, the option value of remaining in the market will be higher than were the price not mean-reverting. Indeed, given the likelihood that construction that did not happen during the shutdown may simply be delayed not eliminated, it is possible that the "bounce-back" in demand and price will, in the short run, be to above the long run mean level.

As a matter of fact, the probability of demand picking up in the near future is very high. The downturn in 2004 would appear to be due – as the defending parties have, I understand, themselves argued - to temporary developments. Accordingly, the situations in which a positive option value arises would appear to be satisfied in this market.

I further consider that the economic analysis of the option value of remaining in the market is borne out by observation of actual real world markets, where it is frequently the case that firms remain for quite some period in loss making markets, exiting only when "all hope is lost".

**The valuation of Slabco's business is highly likely to be positive**

To summarise my conclusions on the valuation of Slabco, because price currently exceeds short run marginal cost and because medium and long term prices are expected to exceed medium and long term marginal costs, and even if price were below marginal cost, because the market circumstances create option values of remaining in the market, I consider that the valuation of Slabco is extremely likely to be positive.

## **5. CAPITAL MARKETS WOULD MOST LIKELY PROVIDE FINANCE TO SLABCO TO CONTINUE ITS OPERATIONS, GIVEN THAT THERE IS NO REASON TO SUPPOSE THAT CAPITAL MARKETS ARE IMPERFECT IN THIS CONTEXT**

Under previous headings I have argued that a wide range of providers of capital to businesses with positive value exist, and that Slabco as a business has positive value. I therefore conclude that capital would most likely have been provided to Slabco, contrary to the claim of Mr Biro. Specifically, Mr Biro has accepted that Slabco is fundamentally a long term profitable business, yet his argument implicitly assumes that capital markets are imperfect, and will not provide funds to a profitable business. I consider such an assumption unjustified, certainly in the absence of any explicit rationale for why capital markets should be imperfect in this line of business. It should be noted in this regard that it is only necessary that one provider of capital appreciate the value of Slabco for it to be rescued, even if 99% of potential providers of capital fail to recognise its value. Accordingly I consider it highly unlikely that finance will not be made available given the highly public, and eminently reversible, cause for the difficulties in the construction industry.

## **6. THE IMPACT OF THE EXIT OF SLABCO IS IRRELEVANT GIVEN THAT EXIT IS UNLIKELY**

I have reviewed the testimony of Mr Biro on the question of whether the exit of Slabco would cause consumer prices to rise. I see no reason to doubt the conclusion he has reached, that exit would cause prices to rise relative to a situation with no exit. Whether prices following exit would be below, at or above the level that the pricing and/or market sharing arrangements would bring about, is, in terms of economic theory, unclear. In any case, on the basis of my previous analysis, I doubt that exit would have occurred. I further consider that even if Slabco were to go into receivership, it would be most likely sold as a going concern, given that prices currently exceed short run marginal cost, and are expected to increase so that in the medium and long term prices are likely to exceed medium and long term marginal costs.

## **7. THE PRESENCE OF WASTEFUL EXIT AND RE-ENTRY COSTS CREATES OPTION VALUES OF REMAINING IN THE MARKET THAT UNDERMINE THE CLAIM THAT EXIT WILL OCCUR**

Mr Biro concludes his testimony with the claim that, absent the cartel, wasteful exit and re-entry costs would be incurred. I agree with Mr Biro that, *were* exit and re-entry to occur, this might potentially be wasteful. However, for the reasons expounded earlier, I consider that exit is unlikely. In particular, not only does price currently exceed marginal cost, but the very facts that Mr Biro relies on will strengthen the option value of remaining in the market, and increase the likelihood that capital market funding will be provided.

## **8. EVEN IF EXIT AND RE-ENTRY OCCURS, THE "SORTING" ROLE OF COMPETITION MAY BE BENEFICIAL**

Furthermore, even if - contrary to my argument - exit and re-entry does occur, there will likely be benefits arising from exit and entry in the facts of this market. In a market where technology is static, the technology employed on re-entry will presumably replicate the technology lost on exit. However, in the context of a market where the product requires "expensive computer equipment and software licensing for modelling", it is likely that the new entry may embody some technological improvement on the older generation capital equipment. As such, the exit and re-entry would fulfil the so-called "sorting" role of competition.