

## Appeals Result in OFT Fine Reductions for Construction Companies

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Following the first batch of appeals against the Office of Fair Trading's (OFT) decisions in the construction cover pricing case, the Competition Appeal Tribunal (CAT) has reduced the fines for all 13 companies.

On 11 March 2011, the CAT handed down a judgment covering the appeals by Kier, Ballast Nedam, Bowmer and Kirkland, Corringway, Thomas Vale, and Sicon. The CAT found that the total fines imposed by the OFT were excessive given the nature of the infringement. The CAT substantially reduced the total fines imposed on each of the appellants from a combined total of around £42 million to £4.4 million.

Subsequently, on 22 March, the CAT handed down a judgment on an appeal by Durkan on both liability and penalty. The CAT concluded that the OFT had been correct to attribute liability for two infringements, although the OFT had not established to the requisite standard for one infringement. The total fine imposed on Durkan was therefore reduced from £6,720,551 to £2,436,000.

On 24 March, the CAT reduced the fines imposed against a further six undertakings (Tomlinson, Sol, Seddon, Interclass, Apollo and Galliford Try) from around £15.5 million to £4.2 million.

The OFT previously concluded that between 2000 and 2006, construction companies had breached the Chapter I prohibition of the Competition Act 1998 by "cover pricing". This is the process of companies submitting bids for construction contracts that they did not intend to win in order to create a misleading impression of a competitive bidding process. This was referred to as "simple cover pricing". Some companies also created agreements to pay compensation to

competing bidders in addition to the cover pricing. The OFT fines totalled £129.2 million for 103 construction companies as a result of the OFT's largest-ever investigation.

Overall, 25 appeals have been lodged to the CAT, most of which only challenge the level of the penalty imposed by the OFT; however, Durkan and five others additionally challenge the OFT's findings of infringement.

The main grounds of appeal raised in these cases included:

## — **Starting Point of the Fine**

The OFT had applied a starting point of the fines at 5% of relevant turnover in the relevant market for simple covering pricing and 7% for those infringements involving compensation payments. The maximum that the OFT can impose for the most serious of infringements is 10%. On reflection, in the Kier joint judgment, the CAT stated that the starting point percentage must better reflect the seriousness of the breach. The CAT considered that it was therefore appropriate to apply a lower starting point of 3.5% for simple cover pricing as it was less serious than bid rigging, which results in customers paying inflated prices.

It is notable, however, that in the Tomlinson joint judgment, the CAT did not apply the reduced 3.5% starting point adjustment because none of the appellants challenged the 5% starting point.

## — **Wrong Turnover**

In all the construction appeals to date, the CAT has overruled the OFT in applying its own fining guidance. The CAT found that the OFT had erred in interpreting the "relevant turnover" as being the turnover in the undertaking's last business year prior to the decision. The OFT's guidance on the appropriate level of fines should have been interpreted as referring to the year preceding the date when the infringement came to an end, which mirrors the European Commission's approach.

## — Minimum Deterrence Threshold (MDT)

In the Kier and Tomlinson joint appeals, the CAT concluded that the MDT was applied mechanistically and as a substitute for individual assessments. The MDT is utilised when the relevant turnover for calculating the fine represents a relatively low proportion of the undertaking's total worldwide turnover. The OFT imposed the MDT for simple cover pricing at 0.75% of the companies' total turnover in the last business year prior to the decision. This percentage was derived by assuming that the undertaking's relevant turnover in the relevant market represented at least 15% of its worldwide turnover, and the starting point of 5% was therefore applied to that figure (*i.e.*, 5% of 15% = 0.75%). Basing the MDT on total worldwide turnover is authorised in the OFT guidelines; however, the CAT considered that the OFT's approach excluded any consideration of the size and financial position of the undertakings.

The CAT in the Kier joint judgment stated that it had been inclined to rule that the MDT was such a radical departure from a permitted "adjustment" that it required formal consultation and ministerial approval. However, the CAT resisted and instead stated that the formula's application was flawed and the guidance should be amended to include the threshold.

The CAT's judgments act as an embarrassment to the OFT, with the largest fine reduction reaching 90% for the Kier Group. This is significant considering that the OFT highlighted the construction case in the government's recent proposal for competition reform as one of the success stories of the UK competition law system. The OFT may appeal the fine reductions, and the CAT has extended the deadline for the OFT to do so in respect of the Kier and Tomlinson joint judgments until one month from the notification of the final CAT judgment on the matter.

The construction appeals also raise an interesting issue of the OFT decisions that have not been appealed, as only approximately a quarter of the firms did so. Whilst the pending appellants may receive a reduction in their fines following the CAT's interpretations, the companies that did not appeal are now unable to do so under the current legal framework, which imposes a two-month deadline from when the appellant was notified of the decision.

In the wider context aside from the construction case, the CAT has so far ordered OFT penalties to be reduced in eight cases, increased in one case, and has refused to make changes in three

cases. The statistics therefore suggest a degree of optimism in the outcome of appealing OFT decisions to the CAT.

These appeals highlight the importance of evaluating possible grounds of appeal at an early stage; for example, the OFT applying the wrong turnover calculations has a potentially wide-ranging impact. Many companies may have already paid OFT fines and potentially overpaid.

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