



COMPETITION APPEAL TRIBUNAL

**NOTICE OF APPEAL UNDER SECTION 46 OF
THE COMPETITION ACT 1998**

CASE NO 1124/1/1/09

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (SI 2003, No 1372) (“the Rules”), the Registrar gives notice of the receipt of an appeal dated 23 November 2009, under section 46 of the Competition Act 1998 (“the Act”), by North Midland Construction plc (“North Midland”) in respect of a decision in Case CE/4327-04 dated 21 September 2009 (“the Decision”) taken by the Office of Fair Trading (“OFT”).

North Midland appeals against four decisions of the OFT contained in the Decision: a finding that North Midland was party to an infringement comprising a supply of information between Bodill and Sons (Contractors) Limited and North Midland on or about 22 January 2001 in relation to a new house to be built in Nottingham (“the Nottingham house decision”); a decision to impose a fine of £27,200 in relation to the Nottingham house decision; a finding that North Midland was party to a further infringement comprising the supply of information from North Midland to Admiral Construction Limited on or about 4 May 2004 in respect of the price at which North Midland would respond to an invitation to tender from Corus Engineering Steels in relation to civil works for Aldwarke Primary Mill, Rotherham (“the Rotherham mill decision”); and a decision to impose a fine of £1,516,613 in relation to the Rotherham mill decision.

North Midland submits that the four decisions should be set aside pursuant to paragraph 3(2) of Schedule 8 of the Competition Act 1998 and/or that the penalties imposed on North Midland should be revoked or varied on the following grounds:

- (a) The Nottingham house decision does not provide sufficient evidence of the facts alleged by the OFT to satisfy the burden of proof for such an allegation;
- (b) On the facts as alleged, neither infringement decision satisfies the requirement of appreciability for the application of section 2 of the Competition Act 1998, either in respect of potential effect on competition or in respect of the trade with the United Kingdom;
- (c) The penalty of £1,516,613 imposed under the Rotherham mill fining decision is unlawful, in that it is excessive, disproportionate and unfair both in itself; and when compared to other penalties imposed by the OFT in the Decision; and when the very short duration of the infringement as alleged is taken into account.

In respect of its second ground of appeal, North Midland further submits that the Tribunal may wish to consider the possibility of a reference to the European Court of Justice pursuant to Article 234 of the EC Treaty, given that the point in respect of appreciability is no less relevant to the application of Article 81(1) of the EC Treaty than of the Chapter I prohibition under UK domestic competition law.

North Midland submits that the Tribunal should:

- (a) set aside the Nottingham house decision and the Rotherham mill decision pursuant to paragraph 3(2) of Schedule 8 to the Competition Act 1998; or alternatively
- (b) set aside the Rotherham mill fining decision and vary the amount of the penalty imposed on North Midland pursuant to paragraph 3(2)(b) of Schedule 8 to the Competition Act 1998 to a level that is proportionate and non-discriminatory as against the other addressees of the Decision; and in any event

(c) order the OFT to pay the costs of this appeal pursuant to rule 55 of the Rules.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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