



COMPETITION APPEAL TRIBUNAL

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

CASE NO 1125/1/1/09

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 Barrett Estate Services Limited (“Barrett”) and Francis Construction Limited (“Francis”) (together, “the Appellants”) in respect of a decision in Case CE/4327-04 dated 21 September 2009 (“the Decision”) taken by the Office of Fair Trading (“OFT”).

According to the Decision, the OFT concluded that the Appellants had been involved in three infringements of collusive tendering by cover pricing in breach of the Chapter I prohibition (“the Infringements”). The OFT imposed a penalty of £530,238 on the Appellants. The Appellants submit that the OFT’s penalty in respect of the Infringements has been calculated arbitrarily, is excessive, disproportionate and unjust and should be reduced. In particular, the Appellants submit that:

- (a) The turnover to be taken into account for penalty calculation purposes should only be that turnover derived from the market sectors and the types of work where cover pricing was carried out. The OFT incorrectly rejected the Appellants’ submission that cover pricing only affected tendered work and therefore turnover in non-tendered work should have been excluded.
- (b) The penalty is excessive because the OFT failed to take into account the low margins but relatively high turnover prevalent in the construction industry generally. As a result, turnover is not an indication of and is in fact unrelated to financial strength.
- (c) The OFT found that there is no evidence in relation to the Appellants that any of the infringements had any actual effect on prices. A penalty should be lower where there is no actual impact on the market, or where such an impact cannot be demonstrated.
- (d) The OFT has effectively trebled the penalty by imposing a penalty for three infringements which is unjust. In addition, the choice of three infringements by the OFT is arbitrary.
- (e) The Decision discriminates against small and medium sized firms in the approach to the geographic market definition and by comparison with undertakings involved in the more serious practice of making compensation payments.
- (f) The Appellants had a right to have received a penalty calculated in accordance with the guidance in force at the time, in particular in respect of one infringement that took place in 2001 before the OFT changed its guidance to the last business year approach. The right to receive a penalty on the basis of the law as it was at the time of the infringement derives from Article 7 of the European Convention on Human Rights, given effect by the Human Rights Act 1998.
- (g) The OFT failed to take account of representations made by the Appellants to the OFT following the judgment in *R (Crest Nicholson Plc) v. OFT* [2009] EWHC 1875 (Admin), in particular the fact that the Appellants were unable to respond to the OFT’s “fast track offer” because they did not have any of the relevant evidence.
- (h) The OFT has not given the Appellants any reduction on grounds of financial hardship, in breach of the principles of non-discrimination and equal treatment.

The Appellants seek the following relief from the Tribunal:

- (a) to set aside the Decision in part as it relates to the penalty imposed on the Appellants by the Decision;
- (b) to revoke, alternatively to reduce, the penalty imposed on the Appellants by the Decision;
- (c) an order that the OFT pays the Appellants' costs of and incidental to this appeal; and
- (d) such other relief as the Tribunal may consider appropriate.

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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