



COMPETITION APPEAL TRIBUNAL

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

CASE NO 1133/1/1/09

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372 of 2003) (“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 Sicon Limited (“Sicon”) and John Sisk & Son Limited (“John Sisk”) (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”).

The Appellants are a UK construction company and its Irish ultimate parent company. The OFT concluded that the Appellants constituted a single economic entity and that this undertaking had been involved in a single instance of cover pricing in relation to a single tender (“the Infringement”). John Sisk accepted the OFT’s “Fast Track Offer” (by admitting its participation in the Infringement) and received a discount of 25% in respect of the penalty imposed for the Infringement. The penalty imposed by the OFT for the Infringement was £6,191,627.

In summary, the principal grounds of appeal on which the Appellants rely are that:

- (a) The OFT’s general analysis of cover pricing and its resulting decision to apply a starting point percentage of 5% for the Infringement was flawed. The OFT has misunderstood the nature and impact of cover pricing and, therefore, exaggerated the seriousness of such conduct. The OFT also failed to take account of the different types of cover pricing/collusion and, therefore, used a starting point percentage for John Sisk which was inconsistent with the limited nature of John Sisk’s infringement. Consequently the OFT adopted an inflated starting point percentage, which in turn resulted in an excessive Minimum Deterrence Threshold (“MDT”) percentage (since the MDT percentage appears to have been calculated based on the 5% figure).
- (b) The Decision imposed a disproportionate and discriminatory penalty on John Sisk as compared to the other parties. In particular:
 - (i) The imposition of the same MDT on parties with just one infringement and on parties involved in multiple infringements is tantamount to treating different situations in the same way and thus discriminatory.
 - (ii) The OFT applied the MDT to Sicon’s worldwide turnover, thereby massively increasing John Sisk’s penalty, without providing any proper explanation of why a penalty based on UK turnover would be insufficient to deter anti-competitive behaviour in the UK.
- (c) The OFT’s procedure in offering leniency served directly or indirectly to favour those undertakings that had committed the largest number of infringements and/or which had been subject to a dawn raid. The OFT thereby adopted an unfair, discriminatory and perverse approach to leniency, with the result that the fewer infringements a party has committed the more likely it is to have received a disproportionately higher fine.

The Appellants seek the following relief from the Tribunal:

- (a) Quash the Decision insofar as it relates to the penalty imposed on the Appellants;
- (b) Vary the penalty imposed on the Appellants so that a proportionate and non-discriminatory penalty is imposed;
- (c) Alternatively, refer the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the Tribunal's ruling; and
- (d) Order the OFT to pay the Appellants' costs.

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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