



COMPETITION APPEAL TRIBUNAL

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

CASE NO 1115/1/1/09

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 18 November 2009, under section 46 of the Competition Act 1998 (“the Act”), by Crest Nicholson Plc (“Crest”) 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 found that Pearce Construction (Midlands) Limited (“Pearce Midlands”), a former indirect subsidiary company of Crest, committed a single infringement of cover pricing in relation to the refurbishment of a school in Handsworth in September 2001 (“the Infringement”). The OFT did not find that any payment had been made in relation to the Infringement. The OFT imposed a total penalty in relation to the Infringement of £5,188,846 and found Crest to be jointly and severally liable, together with Pearce Midlands and Pearce Midlands’ holding company, ISG Pearce Group Limited (formerly Pearce Group Limited, formerly Pearce Group plc) (“Pearce Group”), to pay £4,369,555 of this penalty. Crest was granted a 15% reduction for making an admission of liability in respect of the Infringement on 10 August 2009. Pearce Group was a wholly owned subsidiary of Crest from 1985 until it was sold to its management, by way of a management buy-out, in January 2003. Following the sale of the Pearce Group, Crest retained no activities in construction.

Crest advances four grounds of appeal against the penalty imposed on it by the OFT:

- (a) In failing to reduce the penalty imposed on Crest as a consequence of the fact that Crest was in an objectively different position from other recipients of a “fast track offer” made by the OFT (which offered a reduction in penalty in return for, *inter alia*, an admission of infringement), the OFT has acted in breach of the principles of fairness and equal treatment. Crest submits that, in this regard, the OFT has failed to take proper account of the judgment and order of Cranston J in *R (Crest Nicholson Plc) v. OFT* [2009] EWHC 1875 (Admin).
- (b) The application by the OFT of a minimum deterrence threshold (“MDT”) in calculating the penalty is unlawful because it breaches the principle of equal treatment and/or is disproportionate and/or fails to have proper regard to the OFT’s penalty guidance.
- (c) The OFT has erred in law and/or acted unreasonably in its selection of the year preceding the date of the Decision as the relevant year of turnover for the purposes of the first stage of calculating the penalty.
- (d) The penalty imposed on Crest is in breach of the principles of equality and proportionality and is excessive, in particular because:
 - (i) the use of the MDT resulted in an uplift to Crest’s penalty that was higher than the average uplift of seven times;
 - (ii) the size of Crest’s penalty (and the uplift to that penalty) exceeds that imposed on parties who also made payments in exchange for cover pricing, and many of those who engaged in more than one infringement;

- (iii) the OFT's selection of the year preceding the Decision as the relevant year of turnover means that the MDT was applied to a turnover that was higher than it would have been had the OFT used the year preceding the Infringement;
- (iv) the level of the penalty far exceeds the value of the contract which was the subject of the Infringement;
- (v) the penalty imposed on Crest is more than five times larger than the penalty imposed on other parties engaged in the same infringement in respect of the same tender.

Crest seeks the following relief from the Tribunal:

- (a) an order revoking the decision to impose a penalty on Crest or alternatively an order that the penalty on Crest be reduced;
- (b) an order that costs be awarded to Crest; and
- (c) such other order or relief as the Tribunal considers 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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