Neutral citation [2011] CAT 9

IN THE COMPETITION APPEAL TRIBUNAL

Cases No: 1125/1/1/09
1128/1/1/09
1130/1/1/09
1131/1/1/09
1136/1/1/09
1137/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

15 April 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
RICHARD PROSSER OBE
PROFESSOR PETER GRINYER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BARRETT ESTATE SERVICES LIMITED
(2) FRANCIS CONSTRUCTION LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) GAJ CONSTRUCTION LIMITED
(2) GAJ (HOLDINGS) LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) RENEW HOLDINGS PLC
(2) ALLENBUILD LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) ROBERT WOODHEAD (HOLDINGS) LIMITED
(2) ROBERT WOODHEAD LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) JH HALLAM (R&J) LIMITED
(2) JH HALLAM (CONTRACTS) LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

HOBSON AND PORTER LIMITED

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Heard at Victoria House on 28 to 30 June 2010

JUDGMENT (Non-Confidential Version)

Note: Excisions in this judgment marked "[…][**C**]" relate to passages excluded having regard to Schedule 4, paragraph 1 to the Enterprise Act 2002

APPEARANCES

Mr. Aidan Robertson Q.C. (instructed by Boyes Turner) appeared for Barrett Estate Services Limited and Francis Construction Limited.

Mr. Aidan Robertson Q.C. (instructed by Watson Burton LLP) appeared for GAJ Construction Limited and GAJ (Holdings) Limited.

Mr. George Peretz (instructed by DLA Piper UK LLP) appeared for Renew Holdings plc and Allenbuild Limited.

Mr. George Peretz (instructed by DLA Piper UK LLP) appeared for Robert Woodhead (Holdings) Limited and Robert Woodhead Limited.

Mr. Aidan Robertson Q.C. (instructed by Watson Burton LLP) appeared for JH Hallam (R&J) Limited and JH Hallam (Contracts) Limited.

Mr. Aidan Robertson Q.C. (instructed by Watson Burton LLP) appeared for Hobson and Porter Limited.

Miss Kelyn Bacon and Miss Sarah Ford (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent in Case Nos 1125/1/1/09 and 1128/1/1/09.

Mr. Daniel Beard and Mr. Philip Woolfe (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent in Case Nos 1130/1/1/09, 1131/1/1/09, 1136/1/1/09 and 1137/1/1/09.

TABLE OF CONTENTS

I. INTRODUCTION

1. On 21 September 2009, the Office of Fair Trading ("OFT") published a decision under the Competition Act 1998 ("the 1998 Act") entitled "Bid rigging in the construction industry in England" ("the Decision").[1] The Decision found that, between 2000 and 2006, 103 undertakings had been involved in bid-rigging of construction contracts, infringing section 2(1) of the 1998 Act (the "Chapter I prohibition"). Penalties were imposed on those undertakings found to have infringed the Chapter I prohibition.[2]

2. This is the Tribunal's judgment in six appeals challenging the Decision. A description of each of the Appellants and the infringements that they were found to have committed is set out in Section VII of this Decision. The OFT imposed penalties on these Appellants in the Decision as follows:

   a) **Francis Construction Limited, together with its ultimate parent company Barrett Estate Services Limited ("Francis")**: total penalty £530,238 (three infringements: 2001, 2004 and 2005).

   b) **GAJ Construction Limited, together with its ultimate parent company GAJ (Holdings) Limited ("GAJ")**: total penalty £109,683 (one infringement: 2003).

   c) **Allenbuild Limited, together with its ultimate parent company Renew plc ("Renew")**[3]: total penalty £3,547,931 (three infringements: 2000, 2003 and 2004).

---

1 For the purposes of this Judgment, references to the Decision are in the following form: "Decision/II.10-16 (p. 36)", where the first reference (after "Decision/") is to the relevant paragraph numbers, and the bracketed reference to the equivalent page number(s). This example thus refers to paragraphs II.10 to 16 of the Decision, at page 36.

2 The manner in which the OFT calculated the penalties imposed on those undertakings is described at Decision/VI.4-VI.665 (p. 1628-1839) and is summarised in the Tribunal's judgment in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 at paragraphs 25 to 67.

3 Although not an appellant, the OFT also addressed the Decision to Bullock Construction Limited ("Bullock"), a former subsidiary of Renew plc found to have participated in an infringement.

d) **Robert Woodhead Limited, together with its ultimate parent company Robert Woodhead Holdings Limited ("Woodhead")**: total penalty £411,595 (three infringements: 2001, 2001 and 2004).

e) **J H Hallam (Contracts) Limited, together with its ultimate parent company J H Hallam (R & J) Limited ("JHH")**: total penalty £359,588 (three infringements: 2002, 2004 and 2004).

f) **Hobson and Porter Limited ("Hobson & Porter")**: total penalty £574,507 (three infringements: all in 2005).

3. In light of the current economic climate and its effect on the UK construction industry, the OFT offered the addressees of the Decision an extended period of three years in which to pay their penalty (subject to payment of interest on the outstanding balance) (Decision/VI.290 (p. 1694)).

4. The six appeals covered in this judgment were heard by the same panel over the course of three days (between 28 and 30 June 2010) and all of them relate solely to the penalties imposed in the Decision, seeking the annulment or reduction of these penalties. In view of the overlap between the grounds of appeal we have decided to determine these six appeals in a single composite judgment.

5. Many of the Appellants' grounds of appeal on penalty have already been considered by the Tribunal in its composite penalty judgments in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 ("the Kier Judgment") and *G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7 ("the Tomlinson Judgment"). Where this is the case and it is appropriate to do so, we have referred to the reasoning in those judgments in support of our conclusions in this case.

6. We also agree with and adopt the Tribunal's conclusions at paragraphs 74 to 77 of the Kier Judgment regarding the nature of the Tribunal's jurisdiction to determine appeals against the imposition of a penalty by the OFT.

7. This judgment is structured as follows:

a) Section II provides an overview of the grounds of appeal raised by the Appellants, grouped by broad categories.

b) Sections III to VI set out the parties' specific submissions in relation to each ground of appeal (within these broad categories), together with the Tribunal's analysis and conclusions in relation thereto.

c) Section VII sets out the Tribunal's conclusions regarding the appropriate level of penalty that should be imposed on each of the Appellants. It also briefly describes the Appellants and the infringements in respect of which they were found liable.

d) Section VIII summarises our overall conclusions.

II. OVERVIEW OF THE GROUNDS OF APPEAL

8. There is substantial overlap between the grounds of appeal in these six appeals. We were aided considerably by the steps taken to avoid duplication of oral submissions where the Appellants raised identical grounds of appeal, in particular given the common representation of the Appellants in cases 1125/1/1/09, 1128/1/1/09, 1136/1/1/09 and 1137/1/1/09 (Aidan Robertson Q.C.) and also in cases 1130/1/1/09 and 1131/1/1/09 (George Peretz). We are grateful to counsel generally for enabling these hearings to take place so efficiently within the tight timetable set.

9. The Appellants' grounds of appeal can broadly be grouped as follows:

a) Challenges to the methodology adopted by the OFT. Within this category we include:

1. The OFT's use of turnover in the business year preceding the date of the Decision.

2. The alleged arbitrary selection of infringements.

3. The imposition of a separate fine for each infringement, rather than treating the conduct as "infringing behaviour from time to time".

4. The application of the minimum deterrence threshold ("MDT").

b) Challenges based on characteristics of the construction industry which it is alleged the OFT failed to take into account adequately or at all. Within this category we include:

1. The inclusion of both tendered and non-tendered work in the relevant product market.

2. The fact that this is a high turnover but low margin industry.

3. The fact that cover pricing was 'endemic' in the industry, and the low level of awareness of the OFT's earlier activities directed specifically at the construction sector.

c) Challenges alleging that the fine imposed was excessive. Within this category we include:

1. The overall penalty is excessive in itself, by comparison to other undertakings, or is disproportionate.

2. Comparison with fines in health and safety or corporate manslaughter cases.

3. Alleged lack of effect on prices.

4. Alleged discrimination against small and medium sized enterprises, and discriminatory approach to calculating uplift for director involvement.

d) Other challenges, namely:

1. Alleged inconsistency / discrimination in addressing the Decision to Renew.

2. Alleged error in assessing claims of financial hardship.

3. Alleged failure to take into account the objectively different position of a party.

4. Alleged failure to take into account other factors, including cessation of infringing conduct after the commencement of the investigation, co-operation with the OFT and adoption of a compliance programme.

10. We have considered all of the arguments that have been raised by the Appellants in relation to each challenge, and have had regard to the written submissions filed in September 2010 by each of these Appellants pursuant to paragraph 3(f) of the Tribunal's Order of 25 January 2010.

11. The Appellants have approached some of these challenges in different ways, with certain Appellants advancing arguments omitted by others. As the Tribunal noted at paragraph 76 of the Tomlinson Judgment, this raises the question of whether an Appellant who has challenged a particular aspect of the fining methodology but relies on arguments which we do not accept (referred to as "Appellant A" in the Tomlinson Judgment) can benefit from another Appellant's ("Appellant B") successful challenge to the same aspect of the methodology on the basis of different arguments. We agree with the Tribunal's conclusion in the Tomlinson Judgment that Appellant A's appeal should be allowed to the same extent as Appellant B's appeal in these circumstances.

Impact of successful liability appeals by other appellants

12. In their Notices of Appeal, both Woodhead and Renew sought the benefit of any successful challenge by another appellant (in the separate appeals against the

Decision heard by other Tribunal panels) on liability, insofar as that challenge demonstrated that the OFT's legal analysis of the facts was incorrect or that Renew or Woodhead was not liable in relation to a particular infringement.

13. This submission is of no consequence to Renew, as none of the other appellants contested liability for the infringements to which Renew was a party. However, the issue does arise for consideration in relation to Woodhead, as another appellant, North Midland Construction PLC ("North Midland") contested its liability for Infringement 46, an infringement to which Woodhead was also a party.[4]

14. We are not persuaded, however, that any successful challenge by North Midland has the consequence of annulling Woodhead's liability for Infringement 46. The OFT found that separate agreements and/or concerted practices were in place between each of G F Tomlinson and Bodill, between North Midland and Bodill, and between Woodhead and Bodill (see Decision/IV.1524 (p. 685)), rather than a single overall agreement between these companies. The Decision records that both Bodill and Woodhead admitted liability in relation to the tender. The fact that North Midland has challenged liability by reference to the specific evidence adduced by the OFT in respect of the alleged agreement between North Midland and Bodill has no bearing on the separate agreement that has been found to exist between Woodhead and Bodill and which was admitted by each.

15. It cannot be assumed that a successful challenge to one of the OFT's substantive findings would automatically or necessarily have any knock-on effect on its other findings. It is axiomatic that the evidence in each case must be judged according to its own facts.

[4] Case No. 1124/1/109, *North Midland Construction PLC v Office of Fair Trading*.

III. CHALLENGES TO THE METHODOLOGY ADOPTED BY THE OFT FOR IMPOSING THE PENALTIES

(a) The OFT's use of turnover in the business year preceding the date of the Decision

16. All of the Appellants in these cases challenged the OFT's use of turnover from the business year preceding the date of the Decision ("Pre-Decision Turnover") for the purposes of the penalty calculation, arguing that the OFT should have used instead turnover from the business year preceding the date when the infringement ended ("Pre-Infringement Turnover"). This is of particular significance in the calculation of relevant turnover at Step 1 of the penalty calculation described at paragraph 2.7 of the OFT's guidance as to the appropriate amount of a penalty, the most recent version of which was published in December 2004 ("the 2004 Guidance").

17. The arguments put forward by the Appellants included the following:

a) The length of time taken by the OFT to adopt the Decision has led to a situation where the turnover taken into account for the purposes of the penalty bears no direct correlation to the infringements. The types of projects in which the Appellants are involved vary from year to year, and undertakings may be in a very different situation, both absolutely and relative to each other, than they were at the time of the infringement (particularly as 2008 was a boom year for the construction industry). Woodhead referred to the judgment of the General Court in Case T-142/89 *Boël v. Commission* [1995] ECR II-867 where the Court held that the choice of a year in which the applicant had particularly high turnover exacerbated the disproportionate nature of the fine.

b) Whilst the OFT made it clear, when publishing the 2004 Guidance, that the turnover used at Step 5 of the penalty calculation (the application of the statutory cap on penalties at 10% of worldwide group turnover) had changed to Pre-Decision Turnover, the OFT did nothing to signal a change of approach as regards Step 1. Renew and Woodhead argued that the OFT was wrong to

claim that its policy has always been to treat the "last financial year" / "last business year" under Step 1 consistently with the terms of the Competition Act (Determination of Turnover for Penalties) Order 2000 ("the Turnover Order"), which was amended in 2004. No objective reader of the 2004 Guidance would have had any reason to suppose that the consequence of the amendment to the Turnover Order would be to change the basis of the Step 1 calculation by reference to Pre-Decision Turnover. The 2004 Guidance makes no reference to the Turnover Order in the context of the Step 1 calculation, nor did the OFT highlight this issue in the consultation process leading up to the 2004 Guidance. Renew submitted further that it would have been odd, against the background of several legislative and regulatory changes designed to align the UK and EU enforcement regimes, for the OFT to change its guidelines in a away which would *add* an inconsistency with the approach at EU level, without doing so expressly.

c) Certain infringements, for example all three of the infringements for which JHH was responsible (Infringements 95, 96 and 183), took place before the OFT purportedly changed its guidance to substitute Pre-Decision Turnover for Pre-Infringement Turnover. JHH, GAJ and Francis submitted that they were entitled to receive a penalty calculated in accordance with the guidance then in force (i.e. calculated by reference to Pre-Infringement Turnover). They argued that this principle derives from Article 7(1) of the European Convention on Human Rights ("ECHR"), which provides:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

JHH, GAJ and Francis submitted that the judgment of the House of Lords in *R (Uttley) v. Home Secretary* [2004] UKHL 38, [2004] 1 WLR 2278 precludes the imposition of a maximum penalty which is higher than the maximum penalty that could have been imposed at the time the infringements were committed. At the time of the infringements, the maximum penalty that could

have been imposed was based on Pre-Infringement Turnover, and the OFT should therefore have used the relevant figures for those years.

d) Renew submitted further that there are good reasons why Pre-Infringement Turnover should be used at Step 1 of the penalty calculation. Using Pre-Decision Turnover at Step 5 when considering the statutory cap on penalty is appropriate, as this prevents an excessive penalty being imposed on an undertaking as it stands at the date the penalty is imposed. However, the purpose of considering turnover at Step 1 (according to paragraph 2.4 of the 2004 Guidance) is to obtain an indication of the seriousness (or "real impact") of the infringement concerned, which is better reflected by an undertaking's turnover at the time of the infringement. Further, there is no reason to expect that any putative benefits accrued from the infringing behaviour are reflected in or related to turnover obtained many years after the infringements in question (and the OFT has made no finding that there were any such benefits).

e) Renew and Woodhead noted too that the European Commission currently calculates the starting point of fines for infringement of Articles 101 and 102 TFEU by reference to Pre-Infringement Turnover. Although the European Commission adopted a different approach to fining between 1998 and 2006, it would still refer to Pre-Infringement Turnover in order to establish the economic capacity of an undertaking to cause significant harm to competition (these Appellants referred, by way of example, to the European Commission's decisions in *Organic Peroxides*[5] and *Industrial Tubes*[6]).

18. In summary, the OFT's main points in response to the Appellants' submissions were as follows:

a) The use of Pre-Decision Turnover is an entirely proper, rational and lawful approach, and has the benefit that the deterrent effect of the penalty is calibrated to recent rather than historic levels of turnover, overcoming any practical difficulties in obtaining historic turnover figures and encouraging

[5] Case COMP/E-2/37.857 – Organic Peroxides, Commission Decision of 10 December 2003.

[6] Case COMP/E-1/38.240 – Industrial Tubes, Commission Decision of 16 December 2003.

undertakings to be more conscious of continuing risks associated with infringing behaviour. Further, a common approach to the measure of turnover adopted for Step 1 and Step 5 has the advantage that the starting point adopted by the OFT necessarily falls within the allowable range under the Turnover Order. As regards those undertakings, such as Woodhead, which generated a very high turnover in 2008, the OFT noted that the use of Pre-Infringement Turnover would be equally capable of lighting upon an exceptional year, and the possibility of adjustments in the later steps in the penalty calculation are capable of taking account of differences where the circumstances genuinely merit making an exception (which was not the case in relation to Woodhead).

b) There was no change of position by the OFT. Rather, the OFT's policy has always been to treat the last financial year under Step 1 consistently with the corresponding definition used in Article 3 of the Turnover Order. The 2004 Guidance reflected the change in the statutory provisions and referred to the amended provisions. Further, in the other recent construction industry collusive tendering decisions, the OFT similarly used Pre-Decision Turnover and there was no challenge to that approach. Mr. Beard, in his submissions before us on behalf of the OFT, also pointed to the principle of statutory interpretation that, where the same term is used in statutory material on more than one occasion, it is not to be taken to have different meanings in different places, unless there are clear indications to the contrary.[7]

c) Article 7 ECHR precludes only the retrospective imposition of a *maximum* penalty higher than was applicable at the time of the offence.[8] Thus, any Article 7 assessment would apply not in relation to the Step 1 figures but to the penalty assessed after Step 5. This is consistent with the judgment of Lord Phillips in *Uttley*, cited above, at paragraph 21:

> "…It follows that article 7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that

---

7 Transcript of Renew hearing, page 23, lines 29-34.

8 For the avoidance of doubt, the OFT's response was made without prejudice to the question of whether the imposition of a penalty for collusive tendering is a criminal sanction / penalty for the purposes of Articles 6 and 7 ECHR (which the OFT did not concede).

> which *could* have been imposed on the defendant under the law in force at the time that his offence was committed."

None of the penalties imposed by the Decision exceeded the maximum that could have been imposed under the Turnover Order before it was amended and the OFT carried out a check (Decision/VI.370 (p. 1711)) to ensure that this was the case.

d) The purpose of using a turnover figure at Step 1 is not in these cases to reflect the effect of the infringement or the size of the market affected. These are infringements by object, and so the OFT is not required to identify their effect on the market. The Appellants ignore the role of selecting an appropriate starting point percentage at Step 1, which is applied to a sum of money in order to fit with the subsequent steps in the process, but it is not necessary for that sum itself to be linked to any measure of "harm" or "impact". Indeed, an approach based on Pre-Infringement Turnover would not do so in any event, as the impact of such an infringement could not possibly have been felt before the infringement occurred.

e) The OFT is not required by section 60 of the 1998 Act to calculate the penalties it imposes under the 1998 Act in the same manner as penalties imposed by the European Commission under Council Regulation (EC) No. 1/2003 for infringements of Articles 101 and 102 TFEU.

The Tribunal's analysis and conclusion: the OFT's use of turnover in the business year preceding the date of the Decision

19. In our judgment, the OFT was wrong to use Pre-Decision Turnover at Step 1 of the penalty calculation and should instead have used Pre-Infringement Turnover, as was its practice prior to May 2004. We agree with and adopt the Tribunal's conclusions at paragraphs 130 to 139 of the Kier Judgment in this regard, as well as the specific conclusions at paragraphs 106 to 110 of the Tomlinson Judgment in relation to the application of Article 7(1) ECHR. We have set out below our conclusions in relation to the specific arguments advanced by the parties in these appeals at paragraphs 16 to 18 above.

20. Step 1 of the penalty calculation is concerned with an assessment of the seriousness of the infringement which takes account of "the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties" (paragraph 2.5 of the 2004 Guidance). As the Tribunal noted at paragraph 132 of the Kier Judgment, there is a tension between the consideration of circumstances related closely in time to the infringement, and the use of turnover at the time of an infringement decision which could be wholly remote from those circumstances. Between the date of an infringement and the date of the decision, there could be many intervening and unconnected developments and changes in both the infringer's business and the market in question.

21. The 2004 Guidance did not make any material change to the OFT's approach to Step 1 and did not justify the use of Pre-Decision Turnover at that step of the penalty calculation. Whilst the 2004 Guidance makes clear that Pre-Decision Turnover is relevant at Step 5, we are satisfied (having considered the wording of the OFT's earlier guidance published in 2000, the 2004 Guidance and the consultation drafts of the 2004 Guidance[9]) that the 2004 Guidance did not introduce the use of Pre-Decision Year Turnover at Step 1. The OFT could not rely on the fact that the measure of turnover used at Steps 1 and 5 had previously been the same, nor was there any reason why the two measures of turnover needed to be the same, given that they perform different functions in the penalty calculation. We therefore agree with and adopt the conclusions of the Tribunal at paragraph 137 of the Kier Judgment.

22. We agree with and adopt the Tribunal's conclusion at paragraphs 109 to 110 of the Tomlinson Judgment that Article 7(1) ECHR does not preclude the imposition of a higher penalty by the OFT than could have been imposed at the time of the

[9] During the hearing of Renew's appeal, the Chairman requested from the OFT details of the responses received to the OFT's consultation on the revised guidance, which formed part of a broader consultation on the revision of the OFT's competition law guidelines in light of the entry into force of Council Regulation (EC) No. 1/2003. The OFT responded to that request on 9 September 2010, confirming that, of the nine responses it had been able to locate which referred specifically to the guidance, none of these "expressed any concern, raised any query or otherwise referred to the meaning of the term 'last business year'".

infringement, provided that the maximum penalty (the statutory cap imposed by the Turnover Order) that applied at the time of the infringement is not exceeded.

23. We agree with the Tribunal's conclusion at paragraph 133 of the Kier Judgment that, whilst the characterisation of an infringement as "by object" means that effects need not be proved, effects (actual or potential) are not irrelevant to the assessment of penalty. Paragraph 2.5 of the 2004 Guidance recognises that the effects of an infringement must be taken into account when considering its seriousness, which is a further reason to select a measure of turnover which bears a closer temporal connection to the infringement. Further, the 2004 Guidance makes no distinction between infringements "by object" and "by effect" as far as the selection of a particular year of turnover is concerned.

24. We note that the European Commission calculates the "basic amount" of the fine by reference to Pre-Infringement Turnover. However, we do not consider that the OFT is required (by virtue of section 60 of the 1998 Act or otherwise) to bring its fining policy in line with that of the European Commission. We agree with the Tribunal's conclusion at paragraph 102 of the Tomlinson Judgment that there is a "relevant difference" between the UK and EU provisions in this regard, and that the Commission's fining guidelines do not supplant the OFT's statutory duty under section 38(8) of the 1998 Act to have regard to its own published guidance.

25. Since all of the Appellants challenged the OFT's use of Pre-Decision Turnover, we allow all of their appeals to this extent. The Tribunal requested the OFT to provide the Pre-Infringement Turnover figures it had gathered from each party during the course of its investigation. These were provided by the OFT in January 2011 and have been taken into account in assessing the appropriate level of the penalty in these appeals in Section VII below.

(b) The alleged arbitrary selection of infringements

26. Three of the Appellants represented by Mr. Robertson (Hobson & Porter, JHH and Francis) submitted that the OFT's choice of infringements was arbitrary. They submitted that it appeared to be entirely a matter of chance which sectors and

regions were selected for the infringements, leading to a considerable disparity between the penalties imposed.

27. In the case of Hobson & Porter, the penalty imposed for each of Infringements 236 and 238 was over four times higher than the penalty imposed for Infringement 230. In the case of JHH, the penalty imposed for each of Infringements 96 and 183 (before reduction for leniency) was ten times higher than the penalty imposed for Infringement 95. These Appellants argued that these disparities demonstrate the arbitrariness of the penalty calculations, which may happen to select infringements that fall within the parties' largest business sectors.

28. In the case of Francis, the evidence shows that one party, Mansell, made five approaches in a six year period to take a cover price from Francis. Francis submitted that this was clearly at the very bottom end of the scale of infringing conduct, yet the choice of three infringements for the vast majority of parties, including Francis, completely ignores this relevant point of distinction.

29. The OFT rejected the submission that its choice of infringements was arbitrary. The Decision describes in detail the manner in which the investigation was carried out and the process by which the OFT narrowed down the number of infringements. The OFT's choice of infringements was made on the basis of objective criteria, set out at Decision/II.1496 (p. 264), the most important of which was the quality of the available evidence. That process was manifestly not arbitrary.

The Tribunal's analysis and conclusion: alleged arbitrary selection of infringements

30. We consider that the OFT's selection of infringements was not arbitrary. The OFT explained in the Decision both its reasons for selecting a maximum of three alleged infringements (Decision/II.1470-1478 (p. 256-258)) and the criteria by which it selected those alleged infringements (Decision/II.1496 (p. 264)). We consider that the OFT was within its broad margin of discretion in deciding to proceed as it did, and in so doing acted reasonably and proportionately. As the Tribunal concluded at paragraph 124 of the Tomlinson Judgment, the OFT was not under an obligation,

when deciding which infringements to pursue in the Decision, to try to foresee the level of penalty which would ultimately be imposed in respect of the infringements.

31. Although we reject this ground of appeal, we note that the huge scale of this investigation led the OFT to abandon any attempt to individualise penalties based on total culpability, and adopt instead a form of collective punishment or "representative justice" in which a maximum of three infringements received a financial penalty calculated by reference to the formula in the 2004 Guidance. As Miss Bacon noted in her submissions on behalf at the OFT during the hearing of Francis' appeal:

> "There is simply not enough evidence, and the OFT has not got the resources, to make a comprehensive finding as to which parties are more culpable than others in this investigation and in these infringements." (Transcript of Barrett hearing, page 14)

32. The inevitable result of this approach is that there will be a measure of "rough justice" with some inconsistency of outcome. It also makes it difficult for the Tribunal to ensure that any difference in the level of penalty as between infringers is objectively justified by relative levels of culpability. Accordingly, we have been all the more cautious in our assessment of overall proportionality, to ensure that we are satisfied that the level of fine imposed on each Appellant is proportionate, given the facts of each case.

(c) The imposition of a separate fine for each infringement

33. Three of the Appellants represented by Mr. Robertson (Hobson & Porter, JHH and Francis) submitted that the OFT had in this case imposed multiple penalties for separate infringements, in circumstances where it should have imposed a single penalty in respect of "infringing behaviour from time to time". They argued that the OFT's decision to effectively impose three penalties is not only arbitrary and unjustified but is also outside the statutory scheme, in so far as the statutory cap on penalties under section 36(8) of the 1998 Act (10% of total turnover) could be exceeded if, for example, three penalties are imposed, each of which accounts for 5% of the undertaking's total turnover.

34. The OFT responded that the evidence in this investigation was not such as to make out a single continuous infringement. It pointed for example to the fact that JHH's three infringements concerned separate agreements which took place in two separate product markets on three discrete dates spanning a period in excess of two years. Further, had the OFT made a finding of a single continuous infringement, it would rightly have been challenged by numerous addressees of the Decision. Where more than one infringement has occurred, more than one penalty is justifiable, reflecting the fact that the commission of multiple infringements is more serious than the commission of a single infringement.

35. The OFT submitted further that a finding of a single continuous infringement would not necessarily have led to a lower penalty overall. The OFT has not attempted to circumvent the statutory cap on penalty under the 1998 Act: the intention of the 1998 Act is plainly not that the OFT should be prevented from imposing separate penalties in respect of separate infringements.

The Tribunal's analysis and conclusion: imposition of a separate fine for each infringement

36. We agree with the OFT that the evidence in this case did not support a finding of a single continuous infringement, and accordingly that it was entitled to impose a separate penalty in respect of each individual infringement. It is clear from section 36 of the 1998 Act that the ceiling of 10% only applies to fines imposed for infringement of the Chapter I and II prohibitions (and, where applicable, Articles 101 and 102 TFEU) and that it applies to each separate infringement of those prohibitions. We do not consider therefore that there has been any "circumvention" of the statutory maximum by the OFT in the Decision.

37. We do note, however, that a consequence of the OFT's approach in the Decision is that there is considerable disparity between the fines imposed in respect of near-identical infringements committed by the same undertaking. An example is Woodhead, which received penalties at the end of Step 1 of £115,981, £185,922 and £265,988 in respect of Infringements 46, 78 and 178. In our own re-assessment of the penalties at Section VII below, we have arrived at an overall figure in respect of

each of the Appellants which we consider to be appropriate in all the circumstances, and have divided this total by the number of infringements in order to arrive at the final penalty in respect of each infringement. This avoids a disparity between the penalties imposed on the same undertaking for near-identical infringements.

(d) The application of the MDT

38. The application of the MDT by the OFT was considered in some detail by the Tribunal at paragraphs 140 to 186 of the Kier Judgment, as all of the appellants before that Tribunal panel challenged, in one form or another, the application of the MDT. In the present appeals, only two of the Appellants, GAJ and Renew, directly challenged the application of the MDT. Woodhead brought a broader challenge to the Step 3 methodology, arguing that the OFT had not explained why certain undertakings required a deterrent of *more* than the MDT of 0.75% of total turnover. We summarise briefly below the Appellants' key submissions.

a) *No uplift was necessary as the penalty before Step 3 was not "nominal".* Both GAJ and Renew submitted that the MDT uplift was unjustified, as the outturn of Steps 1 and 2 of the penalty calculation (£65,832 for GAJ and £1,582,950 for Renew) was already substantial, and capable of meeting the OFT's objectives of punishment (in GAJ's case, for a single infringement) and deterrence. Although these Appellants accepted that the OFT is entitled to uplift a penalty for deterrence, it is only reasonable to do so where, as in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 ("*Makers*"), the penalty without the uplift would have been nominal. Renew noted too that its post-MDT penalty represents around two thirds of its post-tax profits in each of 2007 and 2008 and between half and two thirds of its pre-tax profits, which is a much higher proportion than for other undertakings.

b) *The use of the MDT involved a substantial and unjustified departure from the 2004 Guidance.* Renew submitted that the 2004 Guidance refers to the possibility of an "adjustment" at Step 3 to the figure calculated at the outturn of Steps 1 and 2, on a case-by-case basis, to deter undertakings from engaging in anti-competitive practices. Here, by contrast, the OFT mechanistically

applied the MDT formula to any party where the penalty after Steps 1 and 2 was less than 0.75% of its worldwide Pre-Decision Turnover, without regard to individual circumstances, or to the prevailing circumstances in the industry. Renew submitted that the OFT is not, without giving adequate reasons, entitled to ignore the 2004 Guidance and disregard Steps 1 and 2 when considering the application of the MDT. If the OFT wished to adopt a general practice of this kind, it would need to vary its guidance, and seek the approval of the Secretary of State on the relevant changes.

c) *Penalties should not be based on a simple calculation based on total turnover.* Renew cited *SA Musique Diffusion Française & Ors v. Commission* (Joined Cases 100/80 etc. [1983] ECR 1825) ("*Musique Diffusion*") in support of the proposition that a penalty should not be based on a simple calculation based on total turnover. The MDT approach entirely divorces the penalty imposed from any consideration of the seriousness of the infringement (ignoring one of the twin objectives of the 2004 Guidance), and fails to reflect the nature, effect or duration of the infringement.

d) *MDT should not be calculated by reference to the turnover of companies that are no longer part of the same undertaking.* Renew submitted that the OFT erred in using the combined turnover of Renew and Bullock for the purpose of calculating an MDT uplift to a penalty for which they would each be severally liable, despite the fact that the two companies are no longer part of the same undertaking. Renew submitted that this approach fails to comply with the principles of equal treatment and proportionality and leads to excessive deterrence, whereas the OFT might have achieved sufficient deterrence simply by imposing a penalty on Bullock calculated by reference to Bullock's own turnover and making Renew jointly and severally liable for that penalty. The OFT's use of Pre-Decision Turnover exacerbated the problem, as the OFT included turnover derived from activities that formed no part of the Renew / Bullock undertaking's activities at the time of Infringement 39 in 2000. Renew referred to the OFT's approach to the penalty imposed on Randstad Holding NV ("Randstad") in the OFT's *Construction Recruitment Forum*

decision[10] where the OFT only calculated the MDT by reference to that part of Randstad's turnover which is attributable to the activities of the Vedior NV Group, and not in respect of "a part of its business which had no involvement in the infringement."

e) *OFT failed to explain why a fine greater than 0.75% of total turnover was necessary for other undertakings.* Woodhead, whose penalty was not subject to the MDT uplift as it already accounted for 2% of its total group turnover, submitted that the OFT had not explained why certain undertakings rather than others required a deterrent of more than the MDT of 0.75% of total turnover. Woodhead submitted that any amount imposed for deterrence which exceeds the "minimum" required is, by definition, disproportionate. Mr. Robertson made a similar point on behalf of Francis, pointing to the fact that at the end of Step 2, each of the three penalties imposed on it exceeded the level of the MDT.[11] Woodhead also argued against the possible application of an MDT adjustment in the event that it succeeds in having its penalty adjusted on the basis of Pre-Infringement Turnover. Renew submitted that the OFT's approach to deterrence should also take account of the fact that there was an insufficient time lag between the publication of the OFT's earlier decisions in the roofing sector and these infringements for the industry to absorb lessons from the earlier conduct.

39. The OFT's response to very similar submissions by other appellants is set out in detail at paragraphs 150 to 163 of the Kier Judgment. Accordingly, although we have had full regard to the OFT's detailed submissions in relation to the MDT in these appeals, we have not summarised those submissions below, save in respect of specific challenges by these Appellants which were not considered in the Kier Judgment:

a) *Calculation of MDT by reference to the turnover of companies that are no longer part of the same undertaking*. As regards the OFT's decision to

---

10 OFT Decision of 29 September 2009 in Case CE/7510-06, *Construction Recruitment Forum* at paragraph 5.250.

11 Transcript of Francis hearing, page 4, lines 18 to 20.

impose a fine on Renew which was based on a combination of the turnover of Renew and Bullock, the OFT submitted that Renew was involved in the infringement by its failure to prevent Bullock from engaging in the unlawful conduct, and was fined for that reason. Simply making Renew jointly and severally liable for the penalty imposed on Bullock would not sufficiently deter the parent, and would reduce the deterrent for the subsidiary which shares with the parent the penalty it would otherwise have had to bear on its own. Accordingly, in order to achieve sufficient deterrence for both parties, it was necessary to take account of the turnover of each.

b) *Failure to explain why a fine greater than 0.75% of total turnover was necessary for other undertakings.* The OFT submitted that Woodhead's argument overlooks the fact that the level of penalty is intended to reflect both seriousness and deterrence, and the fact that a penalty may exceed the *minimum* necessary for deterrence does not mean that the penalty is excessive. Indeed the OFT applied a cap of 4.5% of total turnover as part of an overall method which ensured that penalties were proportionate.

The Tribunal's analysis and conclusion: application of the MDT

40. We have had the benefit of reading the Tribunal's conclusions on the application of the MDT at paragraphs 164 to 186 of the Kier Judgment. We agree with and adopt those conclusions, and set out below the Tribunal's overall conclusion in relation to the MDT at paragraph 185 of the Kier Judgment:

> "For these reasons we have concluded that the MDT was applied in a manner which was wrong in principle and was inconsistent with the [2004 Guidance]. In particular the MDT was applied mechanistically and without giving proper consideration to the individual circumstances of each case. Being based exclusively on total worldwide turnover, the MDT automatically excluded any proper consideration of other measures of the size and financial position of the undertaking on which a penalty was being imposed. The assumption on which the MDT appears to have been based, namely that the minimum deterrent penalty was 0.75% (or 1.05% as the case may be) of the undertaking's total worldwide turnover, was liable to and did give rise to excessive and disproportionate penalties."

41. We have set out below our conclusions in relation to the parties' specific submissions in these appeals.

42. *No uplift was necessary as the penalty before Step 3 was not "nominal"*: We do not consider the Tribunal's judgment in *Makers* to be authority for the proposition that a penalty can only be uplifted at Step 3 to prevent the application of a nominal fine. Rather, as paragraph 2.11 of the 2004 Guidance states, the OFT is entitled to adjust a fine at Step 3 to achieve the policy objectives set out at paragraph 1.4 of the 2004 Guidance, namely to reflect the seriousness of the infringement and to deter undertakings from engaging in anti-competitive practices. This may properly result in a fine which is far from nominal. However, we equally do not consider that *Makers* is authority for the proposition that the application of an MDT based on a fixed percentage of total worldwide turnover is an appropriate means of adjusting penalties without regard to the individual circumstances of each case. We agree with and adopt the conclusions of the Tribunal at paragraph 178 of the Kier Judgment in this regard.

43. *The use of the MDT involved a substantial and unjustified departure from the 2004 Guidance:* We agree with the Tribunal's conclusion at paragraph 181 of the Kier Judgment that it is going too far to describe the application of the MDT as a departure from (in their words, "an alteration of") the 2004 Guidance. While the paragraphs of the 2004 Guidance dealing with Step 3 are understandably expressed in broad terms, this did not justify or warrant an approach seeking to determine the penalty on a fixed percentage of worldwide turnover, regardless of the scale or area of infringement, and without consideration of any other features of the undertaking subject to the penalty.

44. *Penalties should not be based on a simple calculation based on total turnover:* Whilst there is nothing objectionable to the use of a percentage of total turnover to provide a provisional benchmark when calculating the Step 3 adjustment, such a mechanism must not be used as a substitute for an individual assessment of the case, and provided always that it does not result in the imposition of a gross penalty which is excessive and disproportionate. Where the OFT considers that it is appropriate to make an adjustment at Step 3, it must ensure that it gives proper consideration to all relevant factors, including proportionality, seriousness and culpability, as well as deterrence. We do not consider that the OFT's application of the MDT in relation to GAJ and Renew satisfied these requirements, in particular

because the OFT appeared to apply the MDT without having given any proper consideration to whether the outturn of Steps 1 and 2 was inappropriate, and did not "stand back" after the application of the MDT to verify whether the resulting figure was proportionate in order both to punish the particular undertaking for the specific infringement and to deter it and other companies from further transgressions of that kind (see paragraph 166 of the Kier Judgment).

45. *MDT should not be calculated by reference to the turnover of companies that are no longer part of the same undertaking:* As regards Renew's specific complaint that the OFT was wrong to take account of the combined turnover of Renew and Bullock for the purposes of calculating the MDT, we would note firstly that we have concluded at paragraphs 102 to 104 below that the OFT was correct to address its Decision to both Renew and Bullock. This has a number of consequences, notably that the OFT was correct to seek to impose a penalty that would achieve sufficient deterrence for both parties (in addition to general deterrence). However, in our view, the application of the MDT by reference to the total worldwide turnover of both Bullock and Renew (taking the penalty for Infringement 39 from £1,582,950 to £4,284,473), with no later adjustment to tailor the penalty to the individual circumstances of the case, highlights the failure by the OFT both to conduct an individualised Step 3 adjustment, and to ensure that the result of the adjustment is not excessive or disproportionate. We are not persuaded that the OFT gave proper consideration to whether the outturn of Steps 1 and 2 of the penalty calculation, or indeed a lower figure, would have achieved its stated aim of achieving sufficient deterrence for both Renew and Bullock. In a situation like this, Step 3 becomes crucial in the calculation of penalty.

46. *OFT failed to explain why a fine greater than 0.75% of total turnover was necessary for other undertakings:* We reject Woodhead's submission that any penalty that exceeds the OFT's chosen benchmark for minimum deterrence (0.75% of total turnover) is disproportionate. As we have noted above, it was the OFT's failure to carry out an individualised assessment of penalty, and to ensure the overall proportionality of the penalty after the application of the MDT, rather than the use of the formula itself, which was objectionable. Provided the OFT is satisfied that it is appropriate and proportionate to do so, there is nothing to

preclude it from imposing a penalty that exceeds a provisional benchmark that it has selected to achieve a minimum level of deterrence. However, we are unconvinced in this case by the OFT's claim to have applied an "overall method" which ensured that penalties were proportionate. As Mr. Peretz correctly pointed out in his submissions on behalf of Renew, the later adjustments made by the OFT after the application of the MDT were limited in scope[12], and were not capable of addressing an overall lack of proportionality in these penalties.

47. In light of our conclusions above, we allow the appeals by GAJ and Renew to the application of the MDT, and have given consideration in Section VII below to the level of the adjustment that should be made at Step 3 to the penalties imposed on these companies in the absence of the MDT.

IV. CHALLENGES BASED ON THE CHARACTERISTICS OF THE CONSTRUCTION INDUSTRY

(a) The inclusion of both tendered and non-tendered work in the relevant product definition

48. The Appellants represented by Mr. Robertson (Hobson & Porter, JHH, GAJ and Francis) submitted that the OFT was wrong to use turnover at Step 1 of the penalty calculation which was derived from activities in relation to which there was no possibility of cover pricing. In particular, they submitted that cover pricing only applied in tendered work. In their submission, cover pricing did not take place in other types of construction procurement, and the OFT was therefore wrong to include turnover relating to non-tendered work (for example, turnover derived from framework agreements) in its penalty calculation.

49. These Appellants made the following specific submissions under this ground of challenge:

a) At Decision/II.1693 (p. 319) the OFT concluded that public private partnership ("PPP") and private finance initiative ("PFI") projects should be

[12] Transcript of Renew hearing, page 14, lines 8 to 20.

excluded from the relevant market definition, on the basis that supply-side substitution may be more limited in relation to such projects. These Appellants submitted that the same principle should apply to exclude all non-tendered construction turnover (as, for example, once a framework agreement has been established, there can be no supply-side substitution by non-framework contractors).

b) The OFT's conclusion at Decision/II.1689 (p. 317) that "traditional and non-traditional methods of procurement belong in the same market" misses the main point which is that cover pricing could only affect work put out to tender. Product market definition is not an end in itself, and the overall goal is to establish a penalty which is appropriate to the infringement.

c) The examples of tenders on which the OFT relies (at Decision II.1680 (p. 314)) as examples of cover pricing occurring in relation to "non-traditional tenders" were in fact single-stage tenders. Accordingly, the OFT did not find evidence of cover pricing taking place outside single stage tenders.

50. The OFT responded that these Appellants' submissions were misconceived. The OFT's approach was to set the starting point for a penalty by reference to the turnover of the undertaking in the relevant market. The OFT defined a range of markets, and determined that the market should not be defined on the basis of the method by which bids were sought or prices negotiated. Accordingly, both tendered and non-tendered work fell within the same product and geographic markets. In circumstances where there is no challenge to the relevant product market definitions, which specify the goods and services which in principle are capable of being directly or indirectly affected by the conduct in question, it would not be reasonable to seek to identify piecemeal components of the activity within those markets which should be excluded.

51. GAJ made a specific argument in relation to the use of non-construction turnover in the calculation of the MDT at Step 3, arguing that the OFT had wrongly brought into consideration non-construction turnover earned by another company trading in its corporate group, GAJ Planned and Reactive Maintenance Limited, thus greatly

increasing the penalty imposed on GAJ. The OFT referred to the same arguments made above concerning the inclusion of turnover relating to non-tendered projects and, specifically in relation to the MDT, the OFT submitted that the policy objectives of deterrence would be inadequately pursued were the OFT to look at only a subset of turnover.

The Tribunal's analysis and conclusion: inclusion of both tendered and non-tendered work in the relevant product definition

52. In our judgment, the OFT was entitled to conclude that tendered and non-tendered work should be included in the same relevant market. The OFT was not required, as the Appellants contended, to examine whether the possibility of cover pricing existed in the market, but rather to consider conventional market definition issues such as the existence and extent of demand and supply-side substitutability. These issues were material to defining the relevant product market affected by the infringement on a reasonable and properly reasoned basis.[13]

53. We agree with the Tribunal's conclusion at paragraph 128 of the Tomlinson Judgment that the OFT's decision to exclude turnover relating to PPP and PFI projects from its market definition followed the application of conventional economic analysis which indicated that a narrower range of construction companies were able to bid for such projects. This did not amount to a conclusion by the OFT that it should exclude turnover relating to activities where cover pricing was not possible.

54. We have not considered it necessary to consider GAJ's arguments relating to the use of non-construction turnover in the calculation of the MDT at Step 3, given our conclusions at paragraphs 40 to 46 above in relation to the application of the MDT in these appeals. However, we agree with the Tribunal's conclusion at paragraph 130 of the Tomlinson Judgment that, as a matter of principle, for those aspects of the calculation of penalty which use total turnover (a measure of size and economic

[13] *Argos Limited and Littlewoods Limited v. OFT* and *JJB Sports plc v. OFT* [2006] EWCA Civ 1318, at [170].

position), we can see no general justification for excluding parts of that turnover relating to activities other than construction.

(b) A high turnover but low margin industry

55. The Appellants represented by Mr. Robertson argued that the penalty was excessive because the OFT failed to take into account the low margins but relatively high turnover prevalent in the construction industry. In some instances profits were a minute proportion of turnover. These Appellants submitted that turnover is high and margins are low because, first, the industry is competitive, and, second, a very large part of turnover of many construction companies comprises work done by sub-contractors.

56. Payments by clients to contractors for work carried out by sub-contractors are passed to the latter but are included in the contractor's turnover. Contractors do not have any choice whether to include money due to sub-contractors in their turnover, by virtue of section 474 of the Companies Act 2006 and the applicable accounting rules. These Appellants argued that such turnover does not reflect the true financial strength of the contractor, which essentially acts as an intermediary and does not earn a profit margin on payments to sub-contractors. Mr. Robertson gave the example of a project undertaken by GAJ to build a hospital building that would house an MRI scanner, in relation to which the building work cost £600,000 and the scanner a further £300,000. GAJ was instructed to procure the scanner from Philips or Toshiba, the only two manufacturers of such scanners, and the indirect payment for that scanner by the client appeared as turnover in GAJ's accounts.

57. In these Appellants' submission, the OFT's failure to take this factor into account has led to a disproportionate and unjust penalty. They do not argue that the OFT was precluded from using turnover as the basis for penalty calculation, rather that the use of turnover without due allowance for the specific characteristics of the industry in question can lead to disproportionate and unjust penalties. In this regard, Mr. Robertson referred to advice given by the Sentencing Advisory Panel to the Sentencing Guidelines Council in connection with proposed guidance in relation to corporate manslaughter and health and safety offences involving death:

> "…although the Panel continues to take the view that annual turnover should be the primary measure of an organisation's ability to pay a fine, where the defence is able to demonstrate that the organisation operates in an industry with genuinely and endemically low profitability (rather than profits that fluctuate or that have fallen after the offence), this may be taken into account to avoid injustice."

58. These Appellants made comparisons with penalties imposed by the OFT in other cases, including *Dairy products*[14], where the penalty imposed on Sainsbury's (in an early resolution with the OFT) for a more serious infringement accounted for 5.5% of its pre-tax annual profits (in a year when Sainsbury's profits accounted for 2.7% of its turnover). This compares with the fine imposed on Hobson & Porter, which accounted for 83% of its pre-tax annual profit, and the fine imposed on JHH which accounted for four years of profits in round figures. Francis received a penalty which represented 3.9% of its total group turnover in 2009 (2.05% in 2008), one of the highest penalties relative to size imposed by the OFT in the Decision (the average penalty being around 1.14% of turnover). Woodhead received a penalty which represented about 2% of its total group turnover and 682% of its profit after tax in 2009.

59. Mr. Robertson referred to *Musique Diffusion* (cited above) at paragraphs 120-121 in support of the proposition that there are limitations to the use of turnover as a measure in calculating penalties:

> "In assessing the gravity of an infringement regard must be had to a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market.
>
> It follows that, on the one hand, it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement. On the other hand, it follows that it is important not to confer on one or the other of those figures an importance disproportionate in relation to the other factors and, consequently, that the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. **That is particularly the case where the goods concerned account for**

[14] OFT case CE/3094-03, Investigation into certain large supermarkets and dairy processors regarding retail pricing practices for certain dairy products.

> **only a small part of that figure.** It is appropriate for the court to bear in mind those considerations in its assessment, by virtue of its powers of unlimited jurisdiction, of the gravity of the infringements in question." (Emphasis added)

60. The OFT responded that these Appellants' submissions regarding the low margins earned in the industry were effectively a call for the OFT to base its penalties only on margins and profitability. However, in the OFT's view, there were good reasons for using turnover:

    a) The use of turnover as the relevant measure of financial significance of an undertaking is consistent with the basic approach adopted in the Turnover Order (which establishes the maximum penalty that the OFT may impose by reference to turnover), with the 2004 Guidance, and with the approach adopted by the European Commission.

    b) Turnover is the financial measure of an undertaking's participation in a given market. An indicator of participation in a market must be transactions-based (hence turnover) and not margin-based, which reflects other variables such as the cost structure of the undertaking. Turnover is also a simple measure that may be easily ascertained from company accounts, and is less subjective and susceptible to manipulation than other measures (a profits-based approach would generally favour less efficient undertakings).

61. In response to the specific argument that a large percentage of these Appellants' turnover consists of payments to sub-contractors, the OFT noted that this issue is not exclusive to the construction industry. Rather, the inclusion within an undertaking's turnover of the costs of inputs required to provide the goods or services it offers (such as the cost of purchasing stock or wage costs) is entirely normal, and there is no special reason why certain of those costs should be excluded here.

62. The OFT rejected, too, the possibility of making an adjustment to the penalties based on profitability. It submitted that there is no justification for departing from a turnover-based approach, whether in favour of a profit-based approach or by application of an adjustment. Nor can any support be drawn from the headline

figures imposed following other investigations, which relate to different facts in different industries. Further, making blanket adjustments for an industry with alleged low profitability is highly problematic – differences between the construction industry and other industries may be a result of structural differences, or the greater degree of risk assumed in other industries, and collecting data to carry out a proper analysis of profitability would be a very substantial exercise. Miss Bacon, for the OFT, submitted that the OFT considered that the best way of dealing with claims of low profitability was by an assessment on a case by case basis of financial hardship.[15]

The Tribunal's analysis and conclusion: high turnover but low margin industry

63. We agree with the OFT that, in general, there are good reasons for the use of turnover as the relevant measure of the financial significance of an undertaking, and that it would be inappropriate to move towards a wholly profits-based measure, not least because such a measure would risk inappropriately penalising more efficient firms. The 2004 Guidance clearly provides that turnover is the appropriate measure when calculating the basic amount of the penalty at Step 1 of the penalty calculation, and when considering the application of the statutory cap at Step 5. However, this is not to say that financial measures other than turnover become irrelevant to the penalty calculation. Indeed, when considering – on a case-by-case basis – the adjustment that should be made at Step 3, the 2004 Guidance provides, at paragraph 2.11 that:

> "Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement **and the special characteristics, including the size and financial position of the undertaking in question**." (Emphasis added)

64. In our judgment, the OFT was too quick to dismiss out of hand the arguments founded on low profitability and the connected issue of the prevalence of sub-contracting arrangements. We agree with the Tribunal's conclusion at paragraph 133 of the Tomlinson Judgment that the OFT was wrong to equate sub-contracting in the construction industry with a retailer accounting for stock in its turnover. The

[15] Transcript of GAJ hearing, page 19, lines 9 to 11.

fact that a significant proportion of a construction firm's turnover comprises monies paid over to sub-contractors is a factor which affects the extent to which turnover can be regarded as a useful indicator of economic power in this market.

65. The OFT was wrong to overlook this important factor in assessing the appropriate level of penalty to impose in this case. Although the OFT claims to have taken low profitability into account in its assessment of financial hardship, we have noted at paragraph 115 below that the indicative profitability threshold used by the OFT in its assessment of claims of financial hardship itself proceeds on an unrealistic assumption in the context of this market, which was not remedied by the OFT's subsequent individual assessment of such claims.

66. We have considered how the OFT should have reflected this factor in its penalty calculation. We agree with the Tribunal's conclusion at paragraph 134 of the Tomlinson Judgment that it is inappropriate simply to deduct payments to sub-contractors from the measure of turnover used in the penalty calculation, as this would have an uneven effect on undertakings, depending on how far they rely on sub-contractors. Rather, this is a factor to be weighed in the balance together with other factors as part of the case-by-case examination that the OFT is required to perform at Step 3 of the 2004 Guidance. In our own assessment of the appropriate penalty that should have been applied to these Appellants, therefore, this is a factor that we have taken into account.

(c) The endemic nature of cover pricing and low awareness of the OFT's activities directed specifically at the construction sector

67. The Appellants represented by Mr. Robertson submitted that the OFT had failed sufficiently to take into account the endemic and "standard" nature of cover pricing in the construction industry, and that the selection of the addressees of the Decision to "carry the can" for the behaviour of the industry was unfair.

68. These Appellants submitted, too, that there was a widespread belief that cover pricing did not infringe the 1998 Act and that it was not apparent from the OFT's previous enforcement action in this sector that the OFT had specifically sanctioned

cover pricing. They referred to the titles of the OFT's previous cover pricing investigations, which referred to "price-fixing" and "collusive tendering" but not to cover pricing, as a possible reason why the construction industry failed to spot the significance of those cases prior to the OFT opening this investigation.

69. The OFT responded that the fact that cover pricing was endemic in the construction industry would, if anything, underline the necessity for a robust approach to deterrence. The fact that an entire industry (or a large part of it) thought that such conduct was acceptable is no excuse for a breach of the law. Nor was there uncertainty as to whether the practice of cover pricing was unlawful. No properly advised undertaking could ever have reasonably thought that such conduct was lawful or arguably lawful under the 1998 Act. Each of the Appellants is the subject of a penalty because of its participation in unlawful and anti-competitive practices, and such penalties are not unjust merely because others have also participated in such unlawful and anti-competitive practices.

The Tribunal's analysis and conclusion: endemic nature of cover pricing and low awareness of the OFT's activities directed specifically at the construction sector

70. We have noted without criticism at paragraph 31 above that the scale of this investigation and volume of evidence led the OFT to adopt an approach based on a form of representative justice. We have considered, too, the manner in which the OFT narrowed the scope of its investigation, by reference to objective qualitative and quantitative criteria, and concluded (at paragraph 30 above) that the OFT's selection of particular infringements to pursue was properly undertaken in exercise of the OFT's broad margin of discretion. Accordingly, although it is highly likely that many companies involved in cover pricing have escaped fines, the OFT was entitled to proceed as it did in relation to a select group of companies in relation to which it considered it had the most compelling evidence.

71. However, we agree with the Tribunal's conclusion at paragraph 107 of the Kier Judgment that the industry's general perceptions and motivations do have some bearing on the seriousness of the infringements in question. They provide a degree of general mitigation, and in our judgment more than has been recognised by the

OFT in the Decision, particularly as regards those companies whose infringements were committed prior to the publication by the OFT of its earlier cover pricing decisions (which is true for a number of these Appellants). We have had regard to these perceptions and motivations in arriving at the appropriate level of the penalty that should apply in respect of these Appellants. We do, however, strongly agree with the Tribunal's conclusions at paragraphs 163 and 282 of the Tomlinson Judgment that any misapprehension that construction companies may have had about the legality of cover pricing must have been dispelled by this investigation and these appeals, and that undertakings must recognise that any future instances of this kind of infringement will be dealt with very firmly.

V. CHALLENGES ALLEGING THAT THE FINE WAS EXCESSIVE

(a) Overall penalty is excessive in itself, by comparison to other undertakings or is disproportionate

72. None of the Appellants in their Notices of Appeal challenged the starting point percentage (5%) chosen by the OFT at Step 1 of the penalty calculation.[16] Indeed, the Appellants represented by Mr. Robertson stated that the 5% starting point "reflects that the OFT has found that the nature of the infringement can be described as being of a medium degree of seriousness". We have not therefore come to any conclusion as to whether, if we had heard argument from these parties on the point, we would have concluded that 5% was too high in these cases.

73. However, all of the Appellants in these cases submitted that the overall level of penalty imposed on them does not properly reflect the seriousness of the infringements. As Mr. Robertson argued on behalf of the Appellants that he represented, the overall fine reflects an infringement of a high degree of seriousness, which runs counter to the conclusion on the Step 1 starting point percentage, and results from the "mechanistic" application of the 2004 Guidance. Mr. Peretz for Woodhead referred to the Court of Appeal's judgment in *Argos and Littlewoods* [2006] EWCA Civ 1318, [2006] UKCLR 1135 in support of the

[16] In its September 2010 written submissions, Woodhead referred to and adopted the submissions made in relation to the 5% starting point before the other Tribunal panels which heard appeals against the Decision. See further paragraph 80 of the judgment below.

proposition that, where the OFT's approach results in penalties "inadvertently…inflated above the level necessary for deterrence" and/or "too high" then it is right for the Tribunal to intervene.

74. Hobson & Porter, JHH, Francis and Woodhead argued that the penalties imposed on them are discriminatory by comparison with the penalties imposed on other parties who participated in cover pricing and who were involved in the more serious practice of making compensation payments. Hobson & Porter drew a particular comparison with the fine imposed on Herbert Baggaley ("HB"). Despite similar numbers of infringements, the same leniency discount of 45% and a higher total worldwide turnover for HB, HB's total penalty is only one third of Hobson & Porter's penalty. This, submitted Hobson & Porter, highlights the arbitrariness of the OFT's approach to penalty calculation, and the failure of the OFT's methodology to reflect the comparative seriousness of infringements, in breach of the principle of equal treatment.

75. The OFT submitted that comparisons by reference to the overall penalty imposed on other undertakings are neither helpful nor relevant, particularly where the circumstances of each company may be completely different. The OFT's financial hardship assessment was not intended to evaluate the relative impact of each firm's penalty on its profits and/or net assets. A penalty may have a considerably greater impact on one firm than another, but this does not mean that either firm faces hardship or that either penalty is inappropriate.

76. The OFT denied that it had applied a mechanistic approach to penalties. Rather, it adopted a common methodology which was consistent with the 2004 Guidance, and treated infringements of a similar type in a similar way unless there were good reasons not to. The OFT submitted that, given the nature of the infringement found, it would have been unjustifiable and unfair to approach the penalty assessment on an *ad hoc* basis, without regard to common principles to secure consistency of treatment across infringements. That did not, in the OFT's submission, mean that particular facts of the individual cases were ignored. Rather, the OFT considered the particular representations made in light of all the evidence and assessed whether

they were such as to materially alter the assessment of any step in the process and, if so, to what extent.

The Tribunal's analysis and conclusion: overall penalty is excessive in itself, by comparison to other undertakings or is disproportionate

77. As the Tribunal noted at paragraph 150 of the Tomlinson Judgment, the final fine imposed on each addressee of the Decision is the result of many different choices made by the OFT as to what factors should or should not be taken into account when setting the penalty in accordance with the framework of the 2004 Guidance. Unless the Appellants can point to a flaw in those specific choices, a comparison between the overall level of fine imposed on two different companies is unlikely to be helpful. This is particularly the case where, as here, the OFT has not attempted to impose a fine that reflects the total culpability of each undertaking, had each and every suspected infringement been pursued to a finding of infringement (see our observations at paragraph 31 above).

78. Much of the difference between the fines imposed on individual companies results from the percentage of turnover that a particular company earned in the relevant market, but none of the Appellants challenged the approach at Step 1 of the 2004 Guidance whereby a starting point percentage is applied to the appropriate measure of relevant turnover. As regards companies involved in compensation payments, we agree with the OFT (and with the Tribunal's conclusion at paragraph 158 of the Tomlinson Judgment) that the fact that compensation payments were regarded as more serious than cover pricing was properly reflected in the calculation by adopting a higher starting percentage and a higher MDT. The fact that this does not result in the overall fine being in all cases higher than for these Appellants is the result of other factors coming into play.

79. However, we have already highlighted (at paragraph 31 above) that the nature and scale of the investigation in this case made it impossible or at least very difficult for the OFT readily to assess the proportionality of fines as between addressees of the Decision, and that we have accordingly been all the more cautious in our assessment of overall proportionality. Despite the OFT's claim at paragraph 76

above to have taken into account the particular facts of the individual cases, we are not satisfied that the OFT sufficiently "stood back" from the application of the individual steps of the 2004 Guidance and considered whether the penalties ultimately imposed were proportionate in all the circumstances. The adjustment of penalty at Steps 3 and 4 is more than a simple mathematical formula, by which fixed percentage discounts or uplifts in penalty are applied once the OFT is satisfied that a particular factor is present or absent in a particular case (in this regard see also paragraph 184 of the Kier Judgment). Rather, it requires a case-by-case assessment of whether the twin objectives set out in paragraph 1.4 of the 2004 Guidance are met, and whether the overall penalty is appropriate and proportionate to the particular circumstances of the case. This does not prevent the OFT from imposing a severe penalty where appropriate, but it should reduce the incidence of disproportionate fines.

80. In its September 2010 submissions, Woodhead stated that it agreed with the submissions made by appellants in cases before other Tribunal panels which directly challenged the OFT's use of a 5% starting point percentage. It noted that, although it had not in terms challenged the 5% starting point percentage, the points made by those appellants supported Woodhead's attack on the disproportionate nature of the penalty imposed on it, and that a reduction in the starting point percentage would be one way of addressing this concern.

81. We have taken account of Woodhead's submissions in this regard and note that the Tribunal in the Kier Judgment came to the conclusion that it would be appropriate to apply a lower starting point percentage. As we did not hear submissions on this issue, and given that Woodhead's submissions were advanced in support of its challenge to the overall proportionality of the penalty imposed on it, we have concluded that it is more appropriate to take account of this issue as part of our overall reassessment of the penalty (rather than by recalibrating the upfront starting point percentage in Woodhead's case only). We are satisfied that the adjustment described at paragraph 181 below results in a proportionate overall penalty for Woodhead in all the circumstances.

(b) Comparison with fines in health and safety or corporate manslaughter cases

82. The Appellants represented by Mr. Robertson referred to the much lower fines imposed on companies for breach of health and safety laws, such as the £7.5 million fine imposed on Balfour Beatty in connection with the Hatfield rail disaster, in support of their proposition that the fines in this case are excessive. These Appellants accepted that the penalty was imposed under a different legislative regime, but argued that it remains an appropriate cross-check for the Tribunal in considering the justice of the penalties in this case. We were taken, too, to observations of the Court of Appeal on the appropriate approach to sentencing under the Health and Safety Act 1974 and to the guidelines issued by the Sentencing Guidelines Council in relation to corporate manslaughter and health and safety offences. These Appellants submitted that the fines imposed on them were akin to the fines that would be imposed for offences resulting in death, which comparison shows that the OFT's penalties fail to reflect the seriousness of the infringements in this case. Mr. Peretz on behalf of Woodhead made a similar comparison between the level of fine imposed on Woodhead and fines typically imposed in a criminal context for serious health and safety infringements.[17]

83. The OFT responded that these Appellants start from the erroneous premise that there is a single scale or spectrum of seriousness on which all offences resulting in financial penalties must be gauged. Cartel violations constitute forms of economic harm that are punished within a dedicated regime focussed on the incentives that are relevant for firms acting in particular markets. No sensible or relevant comparison can be drawn with separate and distinct regimes, such as corporate manslaughter, addressing very different types of behaviour. Competition law infringements are often more enduring than the lapses that give rise to fines in criminal courts, especially when they are endemic as in these cases. Moreover, they may have potentially significant economic consequences, affecting the economic life of the nation. Parliament has made arrangements for severe penalties to be available where appropriate in order to ensure effective sanction and deterrence.

[17] Transcript of Woodhead hearing, page 9, lines 4 to 7.

The Tribunal's analysis and conclusion: Comparison with fines in health and safety or corporate manslaughter cases

84. We agree with and adopt the Tribunal's conclusion at paragraphs 138 to 139 of the Tomlinson Judgment. The comparators of corporate manslaughter and other health and safety sanctions are too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of these fines. Nor is the OFT required (whether by the 1998 Act or the 2004 Guidance) to have regard to fines in other statutory contexts when deciding how to calculate a fine in this context.

(c) Alleged lack of effect on prices

85. The Appellants represented by Mr. Robertson submitted that there was no evidence in the Decision that their participation in cover pricing had an adverse impact on prices paid by ultimate customers (referring to the OFT's conclusion at Decision/IV.68 (p. 410)) and contrasted this with the situation in cases such as *Dairy products*[18] and *Tobacco*[19]. Further, they argued that the Decision does not show that the Appellants' cover pricing made any difference to the genuine bids submitted by other parties, or that the Appellants earned supra-competitive profits as a result of cover pricing. The reality, in their submission, was that they only engaged in cover pricing to avoid incurring wasted costs on tenders they did not want to secure.

86. These Appellants submitted that the OFT is required to assess the proportionality of a penalty by reference to the actual nature and impact of the infringements on the relevant market. Accordingly, a penalty should be lower where the actual impact on the market cannot be demonstrated.

87. The OFT responded that there is no dispute by these Appellants that cover pricing by its object restricts competition. Accordingly, it is not therefore necessary to examine the anti-competitive effects of such conduct, and the OFT did not attempt

[18] See footnote 14 above.

[19] OFT Decision of 15 April 2010, Case CE/2598-03 - *Tobacco*.

in the Decision to quantify the anti-competitive effects of the infringements. This was not because such effects could not be demonstrated, but because the nature of the conduct was such as to reveal a sufficient degree of harm to competition, without going on to examine the consequences of the conduct. The OFT was not therefore required to consider the impact of each individual infringement on the market. In response to submissions made by the Appellants in relation to the Court of Justice's judgment in Case C-8/08 *T-Mobile Netherlands BV & Ors v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529, Mr. Beard noted that the judgment stands only for the proposition that anti-competitive effects *can* be of relevance when determining the amount of any penalty, not that they *must* be taken into account.[20]

The Tribunal's analysis and conclusion: alleged lack of effect on prices

88. We have noted at paragraph 23 above that the OFT is required by the 2004 Guidance to take into account, inter alia, the effects of an infringement in its assessment of the seriousness of an infringement when it determines the starting point for the financial penalty (paragraph 2.5). However, in our view, this does not mean that the OFT is required to determine the actual effects of an infringement when assessing penalties. The Decision was based on an assessment that the cover pricing arrangements were infringements "by object" (Decision/V.8 (p. 1623)). It follows that, for the purposes of paragraph 2.5 of the Guidance, the OFT was entitled to come to a view of the seriousness of cover pricing based on its likely effects, as it clearly did at Decision/IV.68 (p. 410). Accordingly, the absence of evidence of actual effects in relation to a particular infringement is not, in our view, a mitigating factor.

(d) Alleged discrimination against small and medium-sized enterprises ("SMEs")

89. All of the Appellants except Renew challenged the OFT's approach to geographic market definition in so far as this leads to discrimination between SMEs and firms operating on a national basis. SMEs whose operations are limited to a single geographic area were excessively penalised, as the totality of their turnover was

[20] Transcript of JHH hearing, pages 13-14.

captured by the OFT's defined product markets, whereas only a small proportion of the equivalent product turnover of national construction firms was taken into account. Francis submitted that the OFT's attempt to redress this obvious and dramatic imbalance by use of the MDT was plainly inadequate.

90. Hobson & Porter and JHH raised a subsidiary argument that the OFT had discriminated against SMEs in its approach to calculating an uplift at Step 4 of the penalty calculation for the personal involvement of directors (which led to a 5% uplift to the penalties imposed on each company). They submitted that SME directors are much more likely to be involved directly in cover pricing, whereas larger companies will have board directors who are not involved in day-to-day tendering work, and the OFT was wrong to draw a distinction between different sizes of business. They argued, too, that the only companies to have received an uplift in penalty for the involvement of directors are leniency parties, and the OFT unfairly held their co-operation against them by relying on this factor as an aggravating factor.

91. The OFT responded that these Appellants' submissions ignored the purpose of the different parts of the OFT's methodology and the relationship between those parts. Applying an appropriate percentage to the undertaking's turnover in the relevant market produces a reasonable starting point which reflects the seriousness of the infringement of that undertaking in the relevant market. It is also a consistent measure of seriousness as between undertakings that engage in the same conduct on the same market. If an undertaking happens to derive its entire turnover from that market, that is no reason to take a different approach, and an uplift can be applied on firms which derive turnover from other markets to ensure an adequate deterrent effect.

92. The OFT rejected the submissions made by Hobson & Porter and JHH in connection with director involvement as plainly bad. The mere fact that a company is an SME is no reason for the OFT to disapply the 2004 Guidance, and company directors should be aware of their obligations to compete fairly. Whatever the size of the undertaking and however it may operate day to day, it is not inevitable that senior managers and directors should engage in anti-competitive practices.

The Tribunal's analysis and conclusion: alleged discrimination against SMEs

93. In our judgment, the OFT did not discriminate between undertakings in performing the Step 1 calculation, insofar as it followed the methodology prescribed by the 2004 Guidance by applying the starting point percentage to the undertaking's turnover in the relevant market. The OFT was also alive to the consequence of this methodology, namely that firms whose activities are confined to a single relevant geographic (and, in some cases, product) market defined by the OFT were likely to receive a fine (after Steps 1 and 2 of the fining methodology) which accounts for a higher percentage of their total turnover (as their "relevant turnover" for these purposes is the same as their total turnover). It applied an adjustment to the penalties imposed on certain firms, including Hobson & Porter, which had either two or three infringements in the same market, and which had (when the penalties for each infringement were added together after Steps 1 and 2) received a penalty which accounted for more than 4.5% of total turnover (see Decision/VI.273 (p. 1688)). The adjustment brought the overall penalty for the infringements down to a figure that accounted for less than 4% of total turnover. The OFT stated that applying such an adjustment allowed for "genuinely exceptional, outlying penalties" to be avoided.

94. However, although this mechanism went some way towards the identification of outliers when the fines imposed on parties were compared side-by-side, it was no substitute for an assessment of the individual circumstances of each party. It also failed to recognise the characteristics of this particular industry, and of these companies. As Mr. Robertson pointed out before us, a firm with profits to turnover of 4.5% in this industry would be considered as having an exceptional level of performance. The six appellants before us (several of which were SMEs operating in a single geographic area) had significantly lower profitability. This was a factor to which the OFT should have had regard when considering whether an adjustment at Step 3 of the penalty calculation was appropriate. It is a factor that we have taken into account in calculating revised penalties at Section VII below.

95. We reject the submissions made by Hobson & Porter and JHH regarding the uplift in penalty resulting from director involvement. The OFT was correct to uplift a fine

where it had evidence that a director was involved in an infringement. Paragraph 2.15 of the 2004 Guidance makes it plain that "involvement of directors or senior management" in an infringement is an aggravating factor justifying an increase in penalty. We agree with the OFT that directors of companies of any size must be aware of their obligations to compete lawfully. It would plainly be inappropriate for the OFT to hold directors of smaller companies to a lower standard of compliance.

VI. OTHER CHALLENGES

(a) Alleged inconsistency / discrimination in addressing the Decision to Renew

96. Renew submitted that the OFT's decision to address the Decision to, and to impose a penalty on, Renew was discriminatory and contravened the requirement of equal treatment. This was the case in particular because, without explanation, the OFT did not address the Decision, and impose a penalty on, Strata Homes Limited ("SHL"), despite the fact that this company was in an identical position to Renew. Both companies are parent companies of infringing subsidiaries. Further, although SHL disposed of its interest in Strata Construction Limited after the infringements, SHL states in its 2006 accounts that it retains "close links" to Strata Construction Limited, a factor which Renew argued was not true of its relationship with its former subsidiary Bullock. Renew noted too that the OFT's approach in this case was also inconsistent with the approach in *Makers* (Makers being the wholly owned subsidiary of Keller Group plc ("Keller")), where the OFT addressed its decision to, and imposed a penalty based solely on the turnover of the participant company, Makers.

97. Even if the OFT has a wide discretion as to when and whether to impose penalties on parent companies in relation to the activities of their subsidiaries, Renew submitted that this discretion must still be exercised in accordance with general principles of law with adequate explanation so that it can be shown that the discretion is not exercised in an arbitrary manner.

98. Renew submitted, in light of the OFT's admission that an oversight had occurred, that the appropriate outcome is for the Tribunal to apply the judgment of the minority of the Tribunal (Michael Blair Q.C.) in *Makers*, and to reduce the penalty imposed on Renew in relation to Bullock's infringement (Infringement 39) to zero.

99. The OFT responded that its approach (set out at Decision/VI.61 (p. 1641)) is in the interests of effective sanctioning. It ensures that the infringing company is properly sanctioned for its direct participation in the infringement and reflects the fact that the parent company was itself part of the undertaking responsible for the infringement. Further, it recognises the failure of the former parent to prevent the infringing company from acting unlawfully. It should not be open to a parent company to escape liability for acts committed by a subsidiary (forming part of the same undertaking) simply because the parent company has disposed of that subsidiary by the time the anti-competitive conduct is investigated or penalised.

100. As regards the failure to address a fine to SHL, the OFT accepted that this was due to an oversight on its part, as other parent companies were indeed fined in the decision. However, this does not found a claim of discrimination since SHL was not treated differently for any good reason. It was a simple oversight made in the context of a complex and long-running investigation. There was no unjustified different treatment by comparison with relevant comparators. Rather, SHL has been the fortuitous beneficiary of different treatment which should not have occurred.

101. As regards *Makers* and the position of Makers' ultimate holding company, Keller, the OFT noted that this company was not an addressee of the OFT's decision in that case, and no penalty was therefore imposed. The fact that a different approach was adopted in that case does not in any way impugn the manner in which the Decision has been taken or the imposition of liability on parent companies as well as subsidiaries.

The Tribunal's analysis and conclusion: alleged inconsistency / discrimination in addressing the Decision to Renew

102. In our judgment the OFT was plainly entitled to address the Decision to, and impose a penalty on, Renew in respect of its subsidiaries' conduct on the basis that Renew formed part of a single economic entity with each subsidiary (Bullock and Allenbuild) at the time of the relevant infringements. We do not consider that Renew has demonstrated that the OFT improperly exercised its discretion in this regard, or that it acted in a discriminatory fashion or in breach of the principle of equal treatment. We accept the OFT's explanation that the failure to address the Decision to SHL was a simple oversight in the context of a complex and long-running investigation, and that any difference in treatment was entirely unintentional.

103. We have, however, considered whether fairness requires an adjustment to be made to Renew's penalty as a result of the OFT's mistake. In one respect, the situation is analogous to *Makers*, where the Tribunal had to consider the appropriate consequences of the OFT having used an incorrect turnover figure in calculating the penalty on one of the addressees of the Decision. A consequence of excluding SHL from the Decision is that its turnover was not taken into account at the relevant steps of the penalty calculation, such that the figure that was used to calculate the penalty on Strata Construction Limited was incorrect, as in *Makers*.

104. We have concluded that it would not be appropriate to reduce the penalty imposed on Renew as a result of the OFT's oversight in failing to address the Decision to SHL. The majority in *Makers* concluded (at paragraph 166 of their judgment) that an adjustment should only be made to a penalty in such circumstances "where it is disproportionate to a penalty imposed on another party which had been calculated by the OFT having relied on an error of law". We have not identified any such error of law here. There was simply the oversight described above: otherwise the OFT would have addressed the Decision to SHL in a non-discriminatory way. We agree with the conclusion of the majority at paragraph 167 of *Makers* that fairness does not require the OFT's mistake to inure to the benefit of Renew.

(b) Alleged error in assessing claims of financial hardship and the impact of the penalty on the Appellants

105. The Appellants represented by Mr. Robertson (and, to an extent, Woodhead) submitted that the OFT had failed to properly assess their claims of financial hardship or the impact of the penalty on their ongoing operations. We set out below our conclusion on the parties' general submissions on the subject of financial hardship. Our conclusions on the specific submissions made by each of these four Appellants, and the OFT's response to those submissions, are set out in Section VII below in our assessment of the appropriate level of penalty that should apply to these Appellants.

106. Mr. Robertson referred us to the Tribunal's judgment in *Achilles Paper Group Ltd v. OFT* [2006] CAT 24 ("*Achilles*") at [42] in support of the proposition that, when considering the extent to which a party's poor financial position is relevant to the amount of the penalty imposed, the Tribunal should not, so far as is possible, act inconsistently with principles applicable to comparable situations under EU law. In this regard, the European Commission's 2006 fining guidelines recognise that a reduction in fine can be granted on the basis that the fine would irretrievably jeopardise the economic viability of the undertaking.

107. Mr. Robertson also referred to the General Court's judgment in Joined Cases T-236/01 etc. *Tokai Carbon Co. Ltd & Ors v. Commission* [2004] ECR II-1181, where the Court recognised that a party's "real ability to pay" must be taken into account in the "specific social context", which took account inter alia of the consequences which payment of the fine would have, such as an increase in unemployment. He noted, too, that the EU approach allows exceptional economic circumstances to be taken into account, pointing to recent decisions by the European Commission in which the penalty imposed on certain undertakings was reduced because of their likely inability to pay the penalty given their financial situation.[21] Mr. Robertson referred, too, to the OFT's 2003 decision in the Northern Ireland Livestock Auctioneers Association ("NILAA") case, where no penalty was imposed, in part

[21] See, for example, the Commission's press release dated 23 June 2010 in relation to fines imposed by the Commission on 17 bathroom equipment manufacturers for their participation in a price-fixing cartel.

because the industry was facing difficulties as a result of both the BSE and foot and mouth outbreaks.

108. Mr. Robertson criticised the specific methodology used by the OFT to assess financial hardship claims, which was not explained adequately in the Decision, and which is only now explained at paragraph 156 of the OFT's Defence:

> "The financial assessment conducted in this particular case applied two key indicators of financial hardship, looking at the amount of the penalty the OFT was considering imposing, first as a percentage of adjusted net assets (that is, adjusted to take into account dividend payments made in the last three years), and secondly as a percentage of profit after tax. These indicators reflected the fact that payment of a penalty might be financed either by a reduction in shareholder funds or from the future profits a firm might make during the period over which the penalty is payable. In this particular case the OFT adopted an initial threshold of 50% adjusted net assets at the last balance sheet date or 150% of profit after tax, either in the most recent financial year or as an average of the last three financial years in order to identify companies most likely to suffer financial hardship. If the amount of the penalty exceeded these threshold figures, the OFT proceeded to consider the party's circumstances in greater detail. If the amount of the penalty fell below these thresholds, the OFT considered that the party's financial viability was unlikely to be threatened by the penalty in the absence of compelling evidence to the contrary."

109. Specifically, Mr. Robertson argued that the thresholds were set too high and failed to reflect economic reality, for example by reference to the typical profit margins achieved by construction firms, and the nature of the net assets held by such firms (which in many cases will amount only to the company's book debt). Further, the net assets test is inappropriate because it fails to recognise the importance of maintaining a strong working capital position in order to be included on tender lists for substantial projects. For example, cash balances held at the bank are necessary in order to be able to offer performance bonds on larger projects.

110. The OFT responded that the guidance and jurisprudence quoted by these Appellants underlined the highly exceptional circumstances in which a reduction in fine on grounds of financial hardship might be appropriate. Although the OFT is required to have regard to its own 2004 Guidance, and not that of the European Commission, the latter's penalty guidance emphasises that a reduction in penalty will be granted only "in exceptional cases" and not on the "mere finding of an adverse or loss-making financial situation". Further, in the Tribunal's judgment in *Achilles*, the Tribunal upheld the OFT's decision not to reduce the fine, in circumstances where

the appellant company had argued that the fine eventually imposed might mean that the company would go out of business. The OFT submitted too that the General Court cases cited by these Appellants in relation to financial hardship make it clear that an undertaking's ability to pay must be taken into account only in a "specific social context", that is by reference to the consequences which payment of the fine would have. It is clear from these cases that the very exceptional circumstances leading to a reduction in fine by the European Commission, for example in Joined Cases T-217/03 and T-245/03 *FNCBV & Ors v. Commission* [2006] ECR II-4887, or by the OFT in the NILAA case, are of a fundamentally different order of magnitude from the factors advanced by these appellants.

111. As regards the thresholds adopted by the OFT to assess financial hardship, the OFT submitted that a threshold of 150% of three year average profit after tax assumes that the fine can be paid using 50% of the company's profits each year for the three year period over which the fine is payable, which is not unreasonable. Further, it is not unrealistic to expect a penalty to be met from up to half the company's existing net assets in circumstances where any profits made will contribute to payment of the penalty, and the impact will be spread across three years. These thresholds were not in themselves determinative – rather, a company's circumstances warranted further scrutiny if either of them were exceeded.

112. More generally, the OFT noted that a number of the Appellants had provided new information to support their claims of financial hardship which was not before the OFT at the time it adopted the Decision. The OFT submitted that the Tribunal should be slow to take into account, or permit any further hardship adjustment by reference to, material that was not provided to the OFT prior to the Decision.

The Tribunal's analysis and conclusion: financial hardship

113. We agree with the OFT that a reduction in penalty on account of financial hardship is only likely to be appropriate in exceptional circumstances. Further, these Appellants' claims of financial hardship have to be considered in light of our own conclusions at Section VII below on the appropriate penalty that should be imposed on the Appellants.

114. We agree that, in principle, the general approach by the OFT to the question of financial hardship is sensible. This involves the use of adjusted net assets and average profit thresholds to trigger case-by-case assessment of financial hardship. In determining whether a penalty should be reduced on grounds of financial hardship the OFT took into account its decision to allow all undertakings to pay the penalty by instalments over a three year period, subject to payment of interest and other conditions.

115. However, we are concerned that, in the particular circumstances of this case, the use by the OFT of 50% of adjusted net assets and 150% of annual profits for this purpose was not likely to identify all instances of financial hardship, and we have sympathy with the submissions made by Mr. Robertson which are summarised at paragraph 109 above. We believe that these figures are too high given the particular characteristics of the construction industry, the impact of the recession on this industry and on these Appellants, the very low profit margins achieved by the companies in this industry (including these Appellants), the difficulty of liquidating much of a company's net assets (e.g. book debt), and the importance of retaining sufficient net assets in order to secure future work. This is not to deny that the threshold figures used by the OFT may be appropriate in other cases where the particular circumstances are different. Yet these figures were in practice relied on heavily by the OFT when deciding whether or not to grant a reduction in penalty. This highlights the importance of the OFT cross-checking, so far as possible, the gross penalties it arrived at against the indicators of financial position available to it.

116. In our own assessment of the claims of financial hardship made by these Appellants, we have therefore had regard to all such financial data as was made available by the parties over the course of the hearings, although we have been mindful of the OFT's submissions in relation to the presentation of such data. In our consideration of these claims, we have taken account of the group as a whole rather than the specific companies involved in the infringing conduct. We have also taken into account the OFT's offer to all addressees of the Decision, allowing payment of the penalty in 36 monthly instalments (subject to payment of interest on the outstanding balance).

(c) Alleged failure to take into account the objectively different position of Francis

117. Francis submitted that the OFT failed to take into account the representations that Francis submitted in response to the OFT's letter of 27 July 2009, which was issued by the OFT in response to the judgment of Cranston J in *Crest Nicholson plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin) ("*Crest Nicholson*"). In its response dated 31 July 2009, Francis repeated its submissions made in response to the Statement of Objections that it was unable to accept the OFT's fast track offer ("FTO") because it did not have any of the relevant evidence. Francis submitted that the OFT deliberately withheld that evidence from Francis when making the FTO, requiring Francis to make a "stab in the dark". Francis submitted that there is no indication in the Decision that the OFT took any of the matters set out in Francis' response of 31 July 2009 into account. The OFT was wrong, too, to criticise Francis for failing to retain documentary records relating to the transactions in question, in circumstances where the OFT had evidence but failed to provide it to Francis. By contrast, there was no obligation on Francis to retain documentary records of the transactions in question.

118. The OFT made two key points in response. First, that the judgment of Cranston J in *Crest Nicholson* (at paragraphs 76 and 77) makes it clear that the OFT was under no obligation to provide recipients of the FTO with any of the material which it considered might give rise to a reasonable suspicion of infringement in relation to the tenders specified in the schedule to the FTO letter. Second, that it was open to Francis to accept the infringements in the absence of such evidence in order to take advantage of the FTO, and many other companies did so.

The Tribunal's analysis and conclusion: alleged failure to take into account the objectively different position of Francis

119. Here, the OFT was required to consider, in accordance with Cranston J's judgment in *Crest Nicholson* (and his later declaration of 29 July 2009), whether Francis was in an objectively different position from other recipients of the FTO in relation to its ability fairly to admit liability in response to the FTO.

120. We have reviewed Francis' response to the Statement of Objections and its further written submissions of 31 July 2009 in response to the *Crest Nicholson* judgment, together with the OFT's response to those submissions in the Decision. We are satisfied that the OFT did consider those submissions before concluding that Francis was not in an objectively different position from other recipients of the FTO. At Decision/VI.361 (p. 1708-9) the OFT stated:

> "…As stated in paragraphs II.1554 to II.1556 above, the OFT does not accept that a fast track offer can be made and fairly accepted only where a company is able to carry out its own internal investigations and determine for itself whether or not the OFT's suspicion of an infringement is well-founded. There was no compulsion on the Parties to accept the OFT's offer. The alternative was to go through the normal process of receiving and responding to the Statement. Some of the companies which accepted the OFT's Fast Track Offer may have done so simply because they regarded participation in bid rigging as very likely, or knew that it was widespread at the time; some may have been willing to accept liability on the basis of the description of specific tenders in the OFT's letter. Some companies informed the OFT that they were accepting the offer as a 'commercial' decision, having no evidence of illegal activity but wishing to benefit from the penalty reduction on offer. In the circumstances, the OFT considers that the Parties were not in a materially different position from other Fast Track Offer recipients, and, in any event, to the extent that their positions might be considered different, the differences are not sufficient to justify any materially increased discount in penalty… ."

121. We agree with this conclusion, and cannot see how Francis' position differed materially from that of other FTO recipients, many of whom were similarly unable to inspect documentary records or interview employees in relation to the suspect tenders listed in the FTO. Crest Nicholson plc, by contrast, was found by the OFT to be in an objectively different position from other FTO recipients, given both its position as an historic indirect parent of the relevant infringing subsidiary and that, at the time that Crest received the FTO, its former subsidiary had not responded to the OFT's original FTO.

122. Francis claimed that it was incumbent on the OFT to provide the evidence in its possession in relation to Francis' infringements at the time of the FTO. However, as Cranston J noted at paragraph 77 of *Crest Nicholson*, it was not for the OFT (at the investigative phase) to provide each of the parties with full details of the case against them:

> "In my view the reason there was no need for the OFT to provide details of the 18 allegations in the Annex was because the law recognises that enforcement bodies

> such as the OFT have a considerable discretion in their conduct of investigations. The Fast Track Offer was simply not intended to afford recipients any sort of detailed account about the case against them. If the OFT had been required to provide all the evidence, even the gist of the evidence against any non-leniency applicant who was a suspected participant in cover pricing, there would have been no Fast Track Offer. I accept the reasons referred to above, that there would have been significant preparation work and it would have been wasted or would have distracted the OFT if evidence about the suspect tenders had to be conveyed to recipients of the offer. It is not to the point for the claimant to say that the argument falls to be tested not by reference to 112 companies but by sole reference to the claimant, and that it is not at all easy to see why in relation to it such information could not have been provided and, if necessary, to similarly affected companies. As emphasised above the Fast Track Offer was predicated on reducing the burden on the OFT from the investigation, not increasing it. There was no taint of unfairness in not providing recipients with evidential details."

123. We agree with Cranston J's analysis and conclusion. Accordingly, we reject this ground of Francis' appeal.

(d) Alleged failure to take into account other factors, including cessation of infringing conduct after the commencement of the investigation, co-operation with the OFT and adoption of a compliance programme

124. The Appellants represented by Mr. Robertson raised a number of additional points that they submitted should be borne in mind by the Tribunal in its assessment of the penalties, including that these Appellants each immediately ceased the practice of cover pricing upon learning of the OFT's investigation, co-operated fully with the investigation and put in place an appropriate competition law compliance regime. The OFT responded that, although the termination of illegal conduct upon its discovery was a proper response, it does not diminish blameworthiness. As regards co-operation, the OFT stated that co-operation had already been taken into account. Hobson & Porter and JHH received leniency reductions of 45%, GAJ received a reduction of 25% for accepting the FTO, and Francis received a reduction of 15% for its admission of liability in response to the Statement of Objections. As regards compliance, each of these Appellants received a 5% reduction in penalty in recognition of the fact that they had put in place compliance programmes (although in some cases this was effectively cancelled out by other factors).

The Tribunal's analysis and conclusion: alleged failure to take into account other factors

125. We are satisfied that the OFT adequately took these factors into account when calculating the penalties to be imposed on these Appellants, and do not consider that any further adjustment of the penalty is required on the basis of these Appellants' submissions under this heading.

VII. THE TRIBUNAL'S ASSESSMENT OF THE APPROPRIATE LEVEL OF THE PENALTY

126. It follows from our findings in the sections above that the penalties imposed on the Appellants cannot stand and should be reassessed by the Tribunal pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act. Each of the Appellants had sought the reduction of (and, in some cases, the annulment of) the penalties imposed on them by the Decision.

127. We have considered the impact of our conclusions above in connection with the application of the five step methodology set out in the 2004 Guidance, and have re-assessed the penalty for each of the Appellants to a level that we consider to be just and proportionate having had regard to all relevant circumstances put before us in the course of these appeals.

128. By way of general observation on our assessment of these penalties, we caution against any attempt to embark on a side-by-side comparison of the overall penalties imposed on the Appellants, whether by reference to each other, or the penalties reassessed by the other Tribunal panels that have heard appeals against the Decision. As we have noted at paragraphs 31 and 32 above, the particular approach adopted by the OFT in the Decision did not permit any assessment of the respective overall culpability of undertakings. Further, the overall level of penalty imposed on an undertaking is a result of the application of a number of different factors, which may be present in one case, but not another. The penalties that we have assessed

below are those which we consider proportionate and fair, taking account of all relevant factors specific to each Appellant.

Francis Construction Limited and Barrett Estate Services Limited

Description of the Appellants and the infringements identified in the Decision

129. At the time of issue of the Statement of Objections, Francis Construction Limited ("Francis Construction") undertook general building contracting work, both new build and refurbishment, in sectors such as housing, commercial, health and education. Barrett Estate Services Limited ("Barrett") is Francis Construction's ultimate holding company.

130. Francis Construction was found to have colluded with other contractors in relation to three bids, relating respectively to the alteration and new build works to form a combined school in Stoke Poges ("Infringement 69"), the refurbishment of 10/12 Bowden Road in Sunninghill ("Infringement 208") and a classroom extension at Hillside Primary School ("Infringement 234"). A penalty of £530,238 was imposed on Francis Construction, together with its ultimate parent company Barrett, in respect of these infringements.

The Tribunal's assessment of the appropriate level of penalty

131. In view of our conclusions on Francis' grounds of appeal, we propose to reassess the penalties for Infringements 69, 208 and 234.

132. For the purpose of Step 1 we have used relevant turnover figures provided by Francis in February 2011, as the original breakdown provided to the OFT did not clearly identify the relevant turnover of the corporate group, nor the relevant turnover in the markets identified by the OFT in the Decision. For Infringement 69, which was committed in August 2001, the relevant financial year for the assessment of turnover was the financial year ending 31 December 2000 when the relevant market turnover was £1,809,998. For Infringement 208, which was committed in November 2004, the relevant financial year for the assessment of turnover was the

financial year ending 31 December 2003 when the relevant market turnover was £4,249,981. For Infringement 234, which was committed in August 2005, the relevant financial year for the assessment of turnover was the financial year ending 31 December 2004 when the relevant market turnover was £1,809,962.

133. We apply the starting point percentage of 5% to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

Infringement 69	**Infringement 208**	**Infringement 234**	**Total**
£90,500	£212,499	£90,498	£393,497

134. The next step is for us to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence.

135. Although Francis did not make a specific claim to financial hardship, we were taken to the evidence of Mr. Mark Barrett, Managing Director of both Francis Construction and Barrett, regarding the impact of the OFT's penalty on these companies. He made the following key points:

a) The penalty imposed by the OFT represents 247% of group net profit after tax generated in the three years leading up to and including 2008, and 3.86% of total estimated group turnover for 2009.

b) The acquisition of GH Marshall Limited (a now insolvent mechanical services contractor) in December 2007 had serious financial consequences for the group, leading to an exceptional write-off item of £1,049,711 in the relevant group company's accounts.

c) The OFT took account of all of the financial assets of the parent group without regard to the extent to which those assets were derived from profits from construction turnover. Of the £6.9m net assets figure reflected in the group accounts for 2008, £4.3m is reflected in investment properties owned by

Barrett for a long time and were not acquired as a result of any construction activities undertaken by the group. The group's dividend payments depend heavily on historical profits generated by income from these investment properties.

d) Cash reserves have had to be earmarked to pay the OFT's penalty, as a result of which a number of cuts have had to be made, including director pay cuts, redundancies and a move to four day weeks for certain staff. Although dividends were paid in 2008, these were made before the OFT's penalty decision was made and before Francis knew the size of the penalty that would be imposed. The directors would not have approved dividends at this level if they had foreseen the size of the penalty that would be imposed.

136. The OFT made a number of submissions in relation to Francis' specific submissions regarding the impact of the penalty:

a) That the profitability figures quoted by Francis were stated as having taken account of the entirety of the fine. Group average profits after tax for the three year period ended 31 December 2008, excluding provision for the fine, were £391,044 and the fine accounted for 136% of this figure.

b) The group has high total net assets of around £7 million, and only £3 million of these are accounted for by debtors. Overall, the group has a healthy balance sheet, and is not going to be put in serious difficulties as a result of the fine.

c) Large amounts of money have been taken out of the company in the form of dividend payments in 2006, 2007 and 2008.

137. In light of our conclusion at paragraph 79 above that it is necessary to conduct a case-by-case assessment for each infringing undertaking of the need to adjust the penalty, we have considered the individual circumstances of Francis (including such information as was made available in relation to its size and financial position) in our assessment of whether any adjustment to the provisional penalty is necessary at

Step 3. We have had regard to the factors identified above by Francis, and the OFT's submissions in response.

138. The provisional penalty of £393,497 resulting from the application of Steps 1 and 2 of the penalty calculation accounts for approximately 101% of group average profits after tax (for the three year period ended 31 December 2008) before provision is made for payment of the penalty (allowing for such provision, the fine accounts for 184% of group average profits after tax). It accounts for 1.5% of group total worldwide turnover in the financial year ended 31 December 2008, and approximately 5.7% of net assets in that year.

139. In considering whether to make any adjustment at Step 3 of the penalty calculation, we have also had regard to our conclusions at paragraphs 63 to 66 above concerning the prevalence of low margins on turnover in this industry, at paragraphs 70 and 71 above in relation to the industry's general perceptions and motivations, and at paragraph 94 above in relation to the characteristics of this industry. Further, we have had regard to our general conclusions in relation to overall proportionality at paragraphs 32 and 79 above. In light of all of these factors, we have concluded that it would be appropriate to adjust the penalty at Step 3 to £210,000.

140. In light of our conclusion at paragraph 125 above that the OFT correctly applied the relevant Step 4 discounts to Francis, we apply the same 5% reduction granted by the OFT in respect of each of the three infringements to reflect efforts to ensure future compliance, and the same 15% reduction in respect of each of the three infringements as a result of Francis' admission of liability following the issue of the Statement of Objections. This leads to a revised global penalty of £169,575, which we have divided by three in order to calculate a final penalty for each infringement of £56,525.

141. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover.

GAJ Construction Limited and GAJ (Holdings) Limited

Description of the Appellants and the infringements identified in the Decision

142. At the time of issue of the Statement of Objections, GAJ Construction Limited ("GAJ Construction") was a general building contractor active in the West Midlands, undertaking works within sectors such as healthcare, education, commercial, leisure and sport, housing and industrial. GAJ Construction did not have an ultimate parent company between 2000 and 4 June 2002. GAJ (Holdings) Limited ("GAJ Holdings") was incorporated on 5 June 2002, on which date it became GAJ Construction's ultimate parent company.

143. GAJ Construction was found to have colluded with another contractor in relation to the refurbishment and modification of an industrial unit at the Alderman's Green Industrial Estate in Coventry ("Infringement 174"). A penalty of £146,244 was imposed on GAJ Construction, together with its ultimate parent company GAJ Holdings, in respect of the infringement, which was reduced to £109,683 after the companies accepted the FTO.

The Tribunal's assessment of the appropriate level of penalty

144. In view of our conclusions on GAJ's grounds of appeal, we propose to reassess the penalty for Infringement 174.

145. For the purpose of Step 1 we have used relevant turnover figures provided by the OFT in January 2011. For Infringement 174, which was committed in December 2003, the relevant financial year for the assessment of turnover was the financial year ending 30 June 2003 when the relevant market turnover was £2,058,098. We apply the starting point percentage of 5% to this figure. There being no adjustment at Step 2 for duration, this results in a provisional fine of £102,905. We note the consequence for GAJ that its successful submissions in relation to the use of Pre-Infringement Turnover results in the substitution of a higher figure after the application of Steps 1 and 2 of the penalty calculation. However, we consider that

the impact of this increase is mitigated by our later adjustments to the penalty considered below, in particular by disapplying the MDT originally applied by the OFT.

146. For the reasons set out in paragraphs 40 to 47 above, we have concluded that it would be inappropriate to apply the MDT as formulated and applied to GAJ by the OFT in the Decision. Accordingly, we have gone on to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence.

147. GAJ submitted that it was not in a position to pay the penalty imposed by the OFT. It relied on the witness evidence of the Joint Managing Director of GAJ Construction, Mr. Gordon Harker, to demonstrate the impact of the penalty on the company:

a) The penalty imposed by the OFT represents over three times GAJ Holdings' net profit for the year ending June 2009, and average net profit over the last eight years was 0.62%. As at the date of the oral hearing, GAJ Construction was loss-making and operating with very tight cash flow limits (the OFT's assessment was based on the consolidated accounts of GAJ Holdings, which is profitable). GAJ Construction made 20% of its workforce redundant over the previous year, and the remaining 42 employees work a four day week.

b) GAJ's finances were described as precarious. In the period July 2009 to February 2010 it made a loss of £322,100 and profitability had been affected by bad debts totalling £331,800 which were (as at the date of the oral hearing) anticipated to increase. Annual turnover was expected to reduce from around £20m per annum to £12m. It was expected that GAJ's bank would reduce its overdraft facility, and its credit rating had dropped to a level described as "Caution – credit at your discretion".

c) GAJ was said to be regularly tendering at negative margins, and winning fewer tenders, due to an increase in competition and projects being

abandoned. Other evidence showed a bleak picture, with the company becoming increasingly uncompetitive in a shrinking market.

148. GAJ argued that its situation was similar to that of the appellant before the Court of Appeal in *R v. Patchett Engineering* [2001] 1 CR App R (S) 40, where the Court of Appeal reduced a fine on the ground that "the fine and costs totalling £80,000 impose a financial burden on the company which would be likely to mean it could not keep its head above water".

149. The OFT made a number of submissions in relation to GAJ's specific submissions regarding the impact of the penalty:

a) That the profitability figures, properly understood, show a gradual increase (over the period from 2007 to 2009) in profitability. The profitability figures quoted by GAJ were stated as having taken account of the entirety of the fine. GAJ's average profits after tax for the three year period ended 30 June 2009, excluding provision for the fine, were £79,244 and the fine accounted for 138% of this figure.

b) The fact that GAJ paid a dividend of £30,000 in 2009 suggests that it does not consider itself to be in a precarious position, given that this could have been used to pay the majority of the penalty that is due from GAJ in the first year (as GAJ has three years over which to pay the penalty).

c) The evidence of staff redundancies and a shortened working week does not alter the OFT's view that GAJ is unlikely to face severe financial hardship as a result of paying the penalty. Reductions on this ground should only be taken into account in exceptional circumstances, since there is a risk that it would provide an incentive to firms to downsize in order to minimise the amount of their penalty.

150. On 23 February 2011, GAJ's legal representatives wrote to the Tribunal to inform it that GAJ Construction and GAJ Holdings went into administration on 27 January

2011. We did not receive any further submissions from GAJ or the OFT in this regard.

151. In light of our conclusion at paragraph 79 above that it is necessary to conduct a case-by-case assessment for each infringing undertaking of the need to adjust the penalty, we have considered the individual circumstances of GAJ (including such information as was made available in relation to its size and financial position) in our assessment of whether any adjustment to the provisional penalty is necessary at Step 3. We have had regard to the factors identified above by GAJ, and the OFT's submissions in response.

152. The provisional penalty of £102,905 resulting from the application of Steps 1 and 2 of the penalty calculation accounts for approximately 130% of group average profits after tax (for the three year period ended 30 June 2009) before provision is made for payment of the penalty (allowing for such provision, the fine accounts for 241% of group average profits after tax). It accounts for 0.6% of group total worldwide turnover in the financial year ended 30 June 2009, and approximately 12% of net assets in that year.

153. In considering whether to make any adjustment at Step 3 of the penalty calculation, we have also had regard to our conclusions at paragraphs 63 to 66 above concerning the prevalence of low margins on turnover in this industry, at paragraphs 70 and 71 above in relation to the industry's general perceptions and motivations, and at paragraph 94 above in relation to the characteristics of this industry. Further, we have had regard to our general conclusions in relation to overall proportionality at paragraphs 32 and 79 above. In light of all of these factors, we have concluded that it would be appropriate to adjust the penalty at Step 3 to £60,000.

154. In light of our conclusion at paragraph 125 above that the OFT correctly applied the relevant Step 4 discounts to GAJ, we apply the same 5% reduction granted by the OFT in respect of its infringement to reflect efforts to ensure future compliance. We reduce the penalty by a further 25% because GAJ accepted the FTO in respect of its infringement. This leads to a revised penalty of £42,750.

155. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover.

Allenbuild Limited and Renew Holdings plc

Description of the Appellants and the infringements identified in the Decision

156. At the time of issue of the Statement of Objections, Allenbuild Limited ("Allenbuild") operated in the healthcare, education, commercial, residential, leisure and retail sectors for both private and public clients. On 8 June 2001, Allenbuild was acquired by Montpellier Group plc ("Montpellier"). Montpellier transferred the beneficial ownership, and subsequently the legal ownership, of Allenbuild to YJL plc ("YJL"), a wholly-owned subsidiary of Montpellier. Montpellier subsequently changed its name to Renew plc on 12 January 2006.

157. Although not an appellant, the OFT also addressed its decision to Bullock Construction Limited ("Bullock"), another company active in construction, predominantly within the social housing sector. In 2000, Bullock was a wholly owned subsidiary of YJL Construction (UK) Limited, and its ultimate parent company was YJL.[22]

158. Allenbuild was found to have colluded with other contractors in relation to two bids, relating to the refurbishment of 60 flats at blocks 110 and 124 Sycamore Road in Stapenhill, Burton-on-Trent ("Infringement 137") and to the new build of four office units at The Glade Business Centre in Bestwood, Nottingham ("Infringement 204"). Bullock was found to have colluded with other contractors in relation to a bid relating to refurbishment works to 112 flats at Saxton Gardens in Leeds ("Infringement 39"). A penalty of £4,730,575 was imposed on Allenbuild and Bullock, together with Renew plc (as the current ultimate parent company of Allenbuild and the former ultimate parent company of Bullock), in respect of these

[22] Between the date of the infringement and the date of the Decision, Bullock was the subject of a change in ownership. As Bullock's new parent company did not form part of the same economic entity as Bullock at the relevant time, it was not found jointly and severally liable with Bullock, Allenbuild and Renew for payment of the penalty imposed on them.

infringements. This was reduced to £3,547,931 as a result of these companies' acceptance of the FTO.

The Tribunal's assessment of the appropriate level of penalty

159. In view of our conclusions on Renew's grounds of appeal, we propose to reassess the penalties for Infringements 39, 137 and 204.

160. For the purpose of Step 1 we have used relevant turnover figures provided by the OFT in January 2011, as supplemented by certain information provided by Renew in its Notice of Appeal.

161. For Infringement 39, which was committed in December 2000, the relevant financial year for the assessment of turnover was the financial year ending 30 September 2000. The turnover figures provided by the OFT in January 2011 did not include data for this financial year, nor did Renew provide such data together with its Notice of Appeal. Rather, at Annex 15 of its Notice of Appeal, Renew provided relevant turnover data for the financial year ended 30 September 1999, in the sum of £25,409,238, which relates entirely to turnover generated by Renew's former subsidiary, Bullock. Renew subsequently informed the Tribunal that it was not in a position to gather data in respect of Bullock for the financial year ended 30 September 2000. In these circumstances, we consider that it is appropriate to take account of such data as was made available by Renew, and propose to use the turnover figure that Renew provided for the financial year ended 30 September 1999 as the relevant turnover figure for Infringement 39. However, we would note that we have adjusted the penalty at Step 3 in any event (in light of the factors described at paragraphs 164 to 167 below), to a level that we consider to be fair and appropriate in all the circumstances, such that the specific figure used in respect of Infringement 39 is unlikely to be of any consequence.

162. For Infringement 137, which was committed in February 2003, the relevant financial year for the assessment of turnover was the financial year ending 30 September 2002 when the relevant market turnover was (according to the turnover

figures provided by the OFT in January 2011) £1,674,000.[23] For Infringement 204, which was committed in October 2004, the relevant financial year for the assessment of turnover was the financial year ending 30 September 2004 when the relevant market turnover was (according to the turnover figures provided by the OFT in January 2011) £427,000.[24]

163. We apply the starting point percentage of 5% to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

Infringement 39	**Infringement 137**	**Infringement 204**	**Total**
£1,270,462	£83,700	£21,350	£1,375,512

164. For the reasons set out in paragraphs 40 to 47 above, we have concluded that it would be inappropriate to apply the MDT as formulated and applied to Renew by the OFT in the Decision. Accordingly, we have gone on to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence.

165. In light of our conclusion at paragraph 79 above that it is necessary to conduct a case-by-case assessment for each infringing undertaking of the need to adjust the penalty, we have considered the individual circumstances of Renew (including such information as was made available in relation to its size and financial position) in our assessment of whether any adjustment to the provisional penalty is necessary at Step 3.

---

[23] In the table provided at Annex 15 to the Notice of Appeal, Renew states that its group achieved nil turnover in the relevant market in the year ended 30 September 2002. However, the figures originally provided by Renew to the OFT (as revised on 20 October 2008), which were provided to us in January 2011, state that the group achieved £1,674,000 in the year ended 30 September 2002, and we have used this figure in our calculation above.

[24] There was a further error in the table provided at Annex 15 to the Notice of Appeal as regards the stated relevant turnover figure for Infringement 204. The figures presented by Renew suggested that the relevant year for the purposes of Pre-Infringement Turnover was 30 September 2003 and provided a relevant turnover figure for that year. As noted here, we consider that the relevant year for the purposes of Pre-Infringement Turnover was 30 September 2004, and we have accordingly used the data provided by the OFT in January 2011.

166. The provisional penalty of £1,375,512 resulting from the application of Steps 1 and 2 of the penalty calculation accounts for approximately 18.8% of group profits after tax in the financial year ended 30 September 2008 (the same figure applies in respect of the financial year ended 30 September 2007). It accounts for 0.35% of group total worldwide turnover in the financial year ended 30 September 2008, and approximately 9.6% of net assets in that year.

167. In considering whether to make any adjustment at Step 3 of the penalty calculation, we have had regard to our general conclusions in relation to overall proportionality at paragraphs 32 and 79 above, and our specific conclusion at paragraph 45 above that the penalty should seek to achieve sufficient deterrence for both Renew and Bullock. In light of all of these factors, we have concluded that it would be appropriate to adjust the penalty at Step 3 to £1,300,000.

168. In light of our conclusion at paragraph 125 above that the OFT correctly applied the relevant Step 4 discounts to Renew, we apply the same 5% reduction granted by the OFT in respect of each of the three infringements to reflect efforts to ensure future compliance. We reduce the penalty by a further 25% because Renew accepted the FTO in respect of each of its infringements. This leads to a revised global penalty of £926,250.

169. We have considered whether, as in the case of the other Appellants, it would be appropriate to divide the global penalty by the number of infringements in order to calculate a final penalty for each infringement, or whether some other allocation might be appropriate to reflect the fact that the infringement committed by Renew's former subsidiary Bullock (Infringement 39) accounted for the greatest proportion of the penalty at Step 1. However, as we have already noted at paragraph 37 above, we do not consider that it is appropriate to impose disparate penalties for near-identical infringements by the same undertaking (even if part of that undertaking is now under different ownership), and we have therefore divided the global penalty by three in order to calculate a final penalty for each infringement of £308,750.

170. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover for these Appellants.

Robert Woodhead Limited and Robert Woodhead Holdings Limited

Description of the Appellants and the infringements identified in the Decision

171. At the time of issue of the Statement of Objections, Robert Woodhead Limited ("Robert Woodhead") specialised in design, construction, refurbishment and restoration of buildings. It undertook construction projects throughout the East Midlands and South Yorkshire in sectors such as education, leisure, heritage, churches, housing, private residential, commercial and industrial, defence, community and health. Robert Woodhead Holdings Limited ("Woodhead Holdings") is the ultimate parent company of Robert Woodhead.

172. Robert Woodhead was found to have colluded with other contractors in relation to three bids, relating to the construction of a new house at Western Terrace in Nottingham ("Infringement 46"), the construction of 15 dwellings at Station Road, Kimberley Phase 2 ("Infringement 78") and the new build of classrooms, toilets and a staff room at William Sharp Comprehensive School in Nottingham ("Infringement 178"). A penalty of £548,793 was imposed on Robert Woodhead, together with its ultimate parent company Woodhead Holdings, in respect of these infringements, which was reduced to £411,595 after Robert Woodhead accepted the FTO.

The Tribunal's assessment of the appropriate level of penalty

173. In view of our conclusions on Woodhead's grounds of appeal, we propose to reassess the penalties for Infringements 46, 78 and 178.

174. For the purpose of Step 1 we have used relevant turnover figures provided by the OFT in January 2011, as supplemented by the data provided by Woodhead at Annexes 20 and 22 to its Notice of Appeal. For Infringement 46, which was committed in January 2001, the relevant financial year for the assessment of turnover was the financial year ending 31 October 2000 when the relevant market turnover was £46,283. For Infringement 78, which was committed in October 2001, the relevant financial year for the assessment of turnover was the financial

year ending 31 October 2000. As Woodhead achieved nil turnover in the relevant market in that year, we have concluded that it would be appropriate to use relevant market turnover from the following financial year (i.e. the year ending 31 October 2001), when the relevant market turnover was £264,005. For Infringement 178, which was committed in January 2004, the relevant financial year for the assessment of turnover was the financial year ending 31 October 2003 when the relevant market turnover was £1,289,273.

175. We apply the starting point percentage of 5% to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

Infringement 46	**Infringement 78**	**Infringement 178**	**Total**
£2,314	£13,200	£64,464	£79,978

176. The next step is for us to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence.

177. Woodhead noted that the OFT had rejected its claim to financial hardship, despite the OFT stating at Decision/VI.609 (p. 1810) that a comparison of the penalty against Woodhead's net assets "demonstrated that there might be initial concerns about its financial position". However, the OFT simply concluded that Woodhead had not shown that the penalty would "threaten its viability" and did not go on to consider whether there was injustice or a lack of proportionality in Woodhead's penalty. Woodhead pointed to the disproportionate level of its penalty compared with other undertakings, and the fact that the penalty imposed by the OFT accounted for 682% of its post-tax profits and 57% of its net assets in the 2008 financial year.

178. The OFT dismissed the comparisons drawn by Woodhead to the penalties imposed on other undertakings as "self-serving and selective". It pointed to the fact that the penalty constituted 273% of Robert Woodhead's three year average profit after tax,

and to the fact that Woodhead Holdings paid significant dividends to shareholders in recent years.

179. In light of our conclusion at paragraph 79 above that it is necessary to conduct a case-by-case assessment for each infringing undertaking of the need to adjust the penalty, we have considered the individual circumstances of Woodhead (including such information as was made available in relation to its size and financial position) in our assessment of whether any adjustment to the provisional penalty is necessary at Step 3. We have had regard to the factors identified above by Woodhead, and the OFT's submissions in response.

180. The provisional penalty of £79,978 resulting from the application of Steps 1 and 2 of the penalty calculation accounts for approximately 99% of group profits after tax in the financial year ended 31 October 2008, and 53% of group average profits after tax for the three year period ended 31 October 2008. It accounts for 0.29% of group total worldwide turnover in the financial year ended 31 October 2008, and approximately 8.3% of net assets in that year.

181. In considering whether to make any adjustment at Step 3 of the penalty calculation, we have had regard to our general conclusions in relation to overall proportionality at paragraphs 32 and 79 above, and our specific conclusion at paragraph 81 above in relation to Woodhead's challenge (in its September 2010 submissions) to the starting point percentage adopted by the OFT in the Decision. We are not satisfied, however, that a penalty of £79,978 is adequate to punish and deter Woodhead, and to deter others from further infringements of this kind, and propose to adjust Woodhead's penalty at Step 3 to £210,000.

182. In light of our conclusion at paragraph 125 above that the OFT correctly applied the relevant Step 4 discounts to Woodhead, we apply the same 5% reduction granted by the OFT in respect of each of the three infringements to reflect efforts to ensure future compliance, and the same uplift of 5% in respect of Infringement 78 as a

result of the involvement of Woodhead's management in the infringement.[25] We reduce the penalty by a further 25% because Woodhead accepted the FTO in respect of each of its infringements. This leads to a revised global penalty of £151,725 which we have divided by three in order to calculate a final penalty for each infringement of £50,575.

183. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover.

J H Hallam (Contracts) Limited and J H Hallam (R & J) Limited

Description of the Appellants and the infringements identified in the Decision

184. At the time of issue of the Statement of Objections, J H Hallam (Contracts) Limited ("JH Hallam") undertook the construction of private housing, student accommodation, schools, other educational establishments and places of worship. It also carried out new build and refurbishment in the healthcare, industrial and commercial sectors. J H Hallam (R & J) Limited ("Hallam") is the ultimate parent company of JH Hallam.

185. JH Hallam was the subject of a "dawn raid" on 6 July 2005, carried out by the OFT pursuant to its powers under section 28 of the 1998 Act. Following the dawn raid, JH Hallam applied for leniency on 21 April 2006 in accordance with the OFT's leniency programme.

186. JH Hallam was found to have colluded with other contractors in relation to three bids, relating to the refurbishment of various health centres within the City East Primary Care Trust in the East Midlands ("Infringement 95"), to the refurbishment, adaptation and repair of certain buildings at the Sir John Moore Primary School in Derbyshire ("Infringement 96") and to a conversion for audio visual services at 12 Chiswick Road for the University of Leicester ("Infringement 183"). A penalty of £653,796 was imposed on JH Hallam, together with its ultimate parent company

[25] We have done so in this case by applying an aggregate discount of 3⅔% at Step 4 of the penalty calculation, generating a figure (prior to application of the 25% FTO discount) of £202,300.

Hallam, in respect of these infringements, which was reduced to £359,588 as a result of JH Hallam's successful application for leniency.

The Tribunal's assessment of the appropriate level of penalty

187. In view of our conclusions on JHH's grounds of appeal, we propose to reassess the penalties for Infringements 95, 96 and 183.

188. For the purpose of Step 1 we have used relevant turnover figures provided by the OFT in January 2011. For Infringement 95, which was committed in February 2002, the relevant financial year for the assessment of turnover was the financial year ending 31 March 2001 when the relevant market turnover was £1,602,767. For Infringement 96, which was also committed in February 2002, the relevant financial year for the assessment of turnover was the financial year ending 31 March 2001 when the relevant market turnover was £7,113,011. For Infringement 183, which was committed in March 2004, the relevant financial year for the assessment of turnover was the financial year ending 31 March 2003 when the relevant market turnover was £5,423,606.

189. We apply the starting point percentage of 5% to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

Infringement 95	**Infringement 96**	**Infringement 183**	**Total**
£80,138	£355,651	£271,180	£706,969

190. The next step is for us to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence.

191. The OFT in the Decision reduced the penalty for each infringement by 50% as a result of JHH's claim to financial hardship. JHH submitted that the reduction was inadequate and that the OFT's penalty still had a severe impact on JHH, such that […][**C**] if the penalty is not reduced. It relied on the witness evidence of Mr. Rob

Hefford, Finance Director of JH Hallam, to demonstrate the impact of the penalty on the company:

a) The penalty imposed by the OFT represents over four years' average annual pre-tax profit (by reference to pre-tax profit in the year ended 31 March 2009). […][**C**].

b) […][**C**].

c) […][**C**].

d) […][**C**].

e) JHH does not readily have the ability to liquidate net assets, which in JHH's case amounts to tangible assets (such as computers and cards), a minimum amount of assets, stocks, debtors and cash. […][**C**].

192. The OFT made a number of submissions in relation to JHH's specific submissions regarding the impact of the penalty:

a) The OFT gave careful consideration to the individual circumstances of each of the financial hardship applicants, and to its selection of the appropriate percentage reduction to award to JHH.

b) JHH's submissions in relation to the penalty as a proportion of profitability are misplaced. The point of reducing penalties to take account of financial hardship is not to carry out some fresh process of comparing the penalty to certain financial metrics in order to achieve the right level of penalty: that would replace the OFT's general methodology for setting the penalty. Rather, the OFT considered the more specific question of whether the proposed level of penalty would threaten the viability of the undertaking. Although JHH's average profit after tax has fallen on the basis of the latest figures, the OFT does not consider these changes are such as to threaten JHH's viability.

c) The fact that the revised penalty was a high proportion of profits does not necessarily mean the penalty would threaten a company's viability, if it was not a large proportion of the adjusted net assets of the company, and given that three years were allowed for payment of the penalty.

193. In light of our conclusion at paragraph 79 above that it is necessary to conduct a case-by-case assessment for each infringing undertaking of the need to adjust the penalty, we have considered the individual circumstances of JHH (including such information as was made available in relation to its size and financial position) in our assessment of whether any adjustment to the provisional penalty is necessary at Step 3. We have had regard to the factors identified above by JHH, and the OFT's response to those submissions. […][**C**].

194. The provisional penalty of £706,969 resulting from the application of Steps 1 and 2 (before any adjustment is made for financial hardship) of the penalty calculation accounts for approximately 890% of group average profits after tax (for the three year period ended 31 March 2008) and 1361% of profit after tax in the financial year ended 31 March 2009. It accounts for 1.6% of group total worldwide turnover in the financial year ended 31 March 2009 (and the same percentage in the previous year), and approximately 65.6% of net assets in that year (70.6% in the previous year). Given our conclusions at paragraphs 63 to 66 above concerning the prevalence of low margins on turnover in this industry (which is certainly true of JHH), at paragraph 115 above in relation to the inability for certain construction companies readily to liquidate net assets, and having regard to the particular circumstances of JHH, we are concerned that a penalty at this level would seriously threaten the viability of JHH.

195. In considering whether to make any adjustment at Step 3 of the penalty calculation, we have also had regard to our conclusions at paragraphs 70 and 71 above in relation to the industry's general perceptions and motivations, and at paragraph 94 above in relation to the characteristics of this industry. Further, we have had regard to our general conclusions in relation to overall proportionality at paragraphs 32 and 79 above. In light of all of these factors, we have concluded that it would be appropriate to adjust the penalty at Step 3 to £180,000.

196. In light of our conclusion at paragraph 125 above that the OFT correctly applied the relevant Step 4 discounts to JHH, we apply the same 5% reduction granted by the OFT in respect of each of the three infringements to reflect efforts to ensure future compliance, which is itself cancelled out by the 5% uplift in penalty for each infringement made by the OFT as a result of the participation of JHH's management in the infringements. We apply a further 45% reduction because leniency was granted in respect of all three infringements. This leads to a revised global penalty of £99,000, which we have divided by three in order to calculate a final penalty for each infringement of £33,000.

197. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover.

Hobson and Porter Limited

Description of the Appellant and the infringements identified in the Decision

198. At the time of issue of the Statement of Objections, Hobson and Porter was a major regional building contractor based in Hull and operated within the Yorkshire and North Lincolnshire area for clients such as local authorities, housing associations, education providers and leading companies involved in the commercial and industrial sectors. Hobson & Porter is a private limited company registered in England and Wales, and has no holding company and no subsidiaries.

199. Hobson & Porter was the subject of a "dawn raid" on 28 March 2006, carried out by the OFT pursuant to its powers under section 28 of the 1998 Act. Following the dawn raid, Hobson & Porter applied for leniency on 4 May 2006 in accordance with the OFT's leniency programme.

200. Hobson & Porter was found to have colluded with other contractors in relation to three bids, relating to the construction of 34 residential apartments at 71-74 Wright Street in Hull ("Infringement 230"), to the construction of a new build nursery in Bridlington ("Infringement 236") and to works at the Calder Link Building at the University of Hull ("Infringement 238"). A penalty of £1,044,558 was imposed on

Hobson & Porter in respect of these infringements, which was reduced to £574,507 as a result of Hobson & Porter's successful application for leniency.

The Tribunal's assessment of the appropriate level of penalty

201. In view of our conclusions on Hobson & Porter's grounds of appeal, we propose to reassess the penalties for Infringements 230, 236 and 238.

202. For the purpose of Step 1 we have used relevant turnover figures provided by the OFT in January 2011. For Infringement 230, which was committed in July 2005, the relevant financial year for the assessment of turnover was the financial year ending 30 September 2004 when the relevant market turnover was £327,844. For Infringements 236 and 238, which were committed in November 2005, the relevant financial year for the assessment of turnover was the financial year ending September 2005 when the relevant market turnover was £5,085,835.

203. We apply the starting point percentage of 5% to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

Infringement 230	**Infringement 236**	**Infringement 238**	**Total**
£16,392	£254,292	£254,292	£524,976

204. The next step is for us to consider whether any adjustment is needed at Step 3 to achieve the twin objectives of the 2004 Guidance, namely to impose penalties which reflect the seriousness of the infringement, and to achieve both specific and general deterrence.

205. The OFT in the Decision reduced the penalty for Infringements 236 and 238 by 45% at Step 3 of the penalty calculation for the reasons set out at Decision/VI.273 (p. 1688) and described at paragraph 93 above.

206. Notwithstanding this reduction, Hobson & Porter renewed its claim to financial hardship. Hobson & Porter submitted that the size of the penalty imposed by the OFT would have severe adverse consequences out of all proportion to the

seriousness of the infringements. It relied on the witness evidence of its Managing Director, Mr. David Watson, to demonstrate the impact of the penalty on the company:

a) The penalty imposed by the OFT represents over a year's average annual profit and, […][**C**]. Further, there is a need to keep cash balances as high as possible, as Hobson & Porter needs to retain a high net worth in order to be maintained on tender lists for substantial projects. […][**C**].

b) […][**C**].

c) The impact of the penalty spreads beyond financial matters, and has a very significant impact on Hobson & Porter's corporate reputation, existing commercial relationships and clients' procurement decisions. The imposition of the penalty together with the current depressed state of the construction industry […][**C**].

207. The OFT made a number of submissions in relation to Hobson & Porter's specific submissions regarding the impact of the penalty:

a) Although the penalty may represent over a year of Hobson & Porter's average annual profit, it was nevertheless only 13% of net current assets at the end of 2008. Since the fine could be paid over three years, only a third of its impact was felt in any one year. Further, despite its profit margins, Hobson & Porter felt able to pay a substantial dividend in 2008. Hobson & Porter's financial position is not such as to warrant a reduction in the amount of its penalty.

b) Hobson & Porter's submissions go no further than saying that, on the one hand, the penalty will reduce its ability to bid for certain contracts in the future and, on the other hand, that the company is experiencing the effect of adverse trading conditions. These submissions do not come close to meeting the standard that the OFT considered to be appropriate, namely whether the application of the penalty itself would threaten the viability of the undertaking.

208. In light of our conclusion at paragraph 79 above that it is necessary to conduct a case-by-case assessment for each infringing undertaking of the need to adjust the penalty, we have considered the individual circumstances of Hobson & Porter (including such information as was made available in relation to its size and financial position) in our assessment of whether any adjustment to the provisional penalty is necessary at Step 3. We have had regard to the factors identified above by Hobson & Porter, and the OFT's response to those submissions.

209. The provisional penalty of £524,976 resulting from the application of Steps 1 and 2 (before any adjustment is made, whether for financial hardship or by the application of a "cap" based on percentage of total turnover, as originally applied by the OFT) of the penalty calculation accounts for approximately 76% of pre-tax annual profit for the year ended 30 September 2008. It accounts for approximately 1.9% of group total worldwide turnover in the financial year ended 30 September 2008, and approximately 11.9% of net assets in that year.

210. In considering whether to make any adjustment at Step 3 of the penalty calculation, we have also had regard to our conclusions at paragraphs 63 to 66 above concerning the prevalence of low margins on turnover in this industry, at paragraphs 70 and 71 above in relation to the industry's general perceptions and motivations, and at paragraph 94 above in relation to the characteristics of this industry. Further, we have had regard to our general conclusions in relation to overall proportionality at paragraphs 32 and 79 above. In light of all of these factors, we have concluded that it would be appropriate to adjust the penalty at Step 3 to £225,000.

211. In light of our conclusion at paragraph 125 above that the OFT correctly applied the relevant Step 4 discounts to Hobson & Porter, we apply the same 5% reduction granted by the OFT in respect of each of the three infringements to reflect efforts to ensure future compliance, which is itself cancelled out by the 5% uplift in penalty for each infringement made by the OFT as a result of the participation of Hobson & Porter's management in the infringements. We apply a further 45% reduction because leniency was granted in respect of all three infringements. This leads to a revised global penalty of £123,750, which we have divided by three in order to calculate a final penalty for each infringement of £41,250.