



COMPETITION APPEAL TRIBUNAL

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

**CASE NO 1120/1/1/09**

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (SI 2003, No 1372) (“the Rules”), the Registrar gives notice of the receipt of an appeal dated 20 November 2009, under section 46 of the Competition Act 1998 (“the Act”), by Quarmby Construction Company Limited (“QCC”) and its parent company, St James Securities Holdings Limited (“SJS”) (together, “the Appellants”) in respect of a decision in Case CE/4327-04 dated 21 September 2009 (“the Decision”) taken by the Office of Fair Trading (“OFT”).

According to the Decision, the OFT concluded that QCC had breached the Chapter I prohibition by providing a cover price in response to requests by other parties on three occasions (“the Infringements”). The OFT held SJS liable for QCC’s conduct as, at all relevant times, SJS was the parent company of QCC. The total fine imposed on the Appellants in respect of the Infringements was £881,749.

The Appellants submit that the OFT erred in law and/or fact in finding that the appellants infringed the Act. In particular, the Appellants advance the following grounds of appeal:

- (a) The OFT breached the principle of equal treatment by including the Appellants in the Decision. The Appellants should have been excluded from the scope of the investigation, and should not have been addressees of the Decision for the same reasons that each other company which had less than five suspect tenders has been excluded from the investigation and was not an addressee of the Decision. The Appellants submit that, if successful on this ground, this issue would be determinative of the Appellants’ appeal and the fine would be quashed.
- (b) The OFT erred in law by fining the Appellants in respect of one instance of cover pricing, which took place more than seven years prior to the date when the Appellants were first notified they were under investigation, and is “statute barred” by operation of Article 25 of Regulation (EC) 1/2003 and section 60 of the Act and/or the Limitation Act 1980.
- (c) The OFT erred in law by imposing a fine on the Appellants in respect of a tender whose closing date was 2.5 days after the Act came into force and by concluding that a cover price which predated the Act was caught by it nonetheless by virtue of transitional provisions.
- (d) There was and is insufficient evidence for the OFT to conclude that the Appellants engaged in cover pricing as alleged in the Decision, or at all.
- (e) The OFT breached the principle of equal treatment by removing a particular alleged infringement from the investigation on the basis that the client had not been deceived into thinking that the cover bid was genuine, but not removing another alleged infringement in relation to which there was evidence that the client was not deceived.

Further, the Appellants submit that the penalty imposed by the OFT was excessive in breach of section 36 of the Act and the principle of proportionality, in that the OFT failed to properly exercise its discretion, misapplied its penalty guidance and erred in fact and/or law. In particular, the Appellants advance the following grounds of appeal in respect of the penalty imposed by the OFT:

- (a) The OFT failed to calculate properly the starting point for the penalty.

- (b) The OFT failed to properly apply its guidance at step 3 (adjustment for other factors) and step 4 (adjustment for aggravating and mitigating factors) in calculating the penalty.
- (c) The OFT failed to take into consideration the inability of QCC and SJS to accept a “fast track offer”, as they had no evidence of simple cover pricing.

The Appellants seek the following relief from the Tribunal:

- (a) an order setting aside the Decision on the ground that the Appellants should not have been included in the statement of objections and/or the Decision at all;
- (b) an order setting aside the Decision insofar as it decides that the Appellants have infringed the Chapter I prohibition;
- (c) an order revoking the penalty imposed upon the Appellants or reducing the amount of that penalty; and
- (d) an order for costs.

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

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

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

*Charles Dhanowa OBE*  
Registrar

Published 23 November 2009