



## COMPETITION APPEAL TRIBUNAL

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

#### CASE NO 1121/1/1/09

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 Durkan Holdings Limited, Durkan Limited and Concentra Limited (formerly known as Durkan Pudelek Limited) (together, “Durkan”) in respect of a decision in Case CE/4327-04 dated 21 September 2009 (“the Decision”) taken by the Office of Fair Trading (“OFT”).

The OFT made the following findings of infringement in the Decision: Infringement 135, a compensation payment agreement between Durkan Pudelek Limited (“DP”) and Mansell (without any giving or taking of cover prices); Infringement 220, an alleged giving of a cover price by Durkan Limited (“DL”) to Mansell; and Infringement 240, an alleged giving of a cover price by DP to Balfour Beatty Refurbishment Limited.

In respect of Infringements 135 and 240, the Decision finds that Durkan Holdings Limited (“DH”) is jointly and severally liable with DP for payment of the penalties. This is because the Decision finds that DH can be presumed to have exercised decisive influence over DP’s commercial policy during the relevant periods and therefore formed part of the same economic entity. The Decision also finds that DH did in fact exercise decisive influence over DP. DH appeals against these findings (“the Control Issue”). The Decision bases its penalty calculation for Infringements 135 and 240 on the consolidated turnover of both DP and DH. If DH’s appeal on the Control Issue is successful, DH will not be liable for either infringement 135 and 240 and DP’s penalty calculation would have to be reduced accordingly. This is the sole basis of DP’s appeal.

In respect of Infringement 220, DL denies that it gave a cover price to Mansell as found in the Decision or at all. It appeals against this finding of infringement. The Decision finds that DH is jointly and severally liable for payment of the penalties imposed in respect of Infringement 220. DH does not contest the finding that it exercised decisive influence over DL. However, if DL’s appeal against the finding of infringement is successful, the imposition of a financial penalty on both it and DH will have to be quashed. This is the sole basis of DH’s appeal on this infringement.

Durkan challenges three aspects of the penalty calculations set out in the Decision:

- (a) First, in calculating the “relevant turnover” figure at Step 1, the OFT based itself on the business year preceding the date of the OFT’s final decision. Durkan submits that this arbitrary approach fails to ensure that the overall penalty resulting from the totality of the calculation is appropriate to the infringement in question and is therefore unlawful.
- (b) Second, even if the OFT was entitled to base its Step 1 calculation on the business year preceding the date of the OFT’s final decision, the figures supplied to the OFT by DH and DL contained errors. Durkan asks the Tribunal to vary the amount of the penalty to rectify these errors pursuant to its powers under paragraph 3(2)(b) of Schedule 8 to the Competition Act 1998.
- (c) Third, in any event, the OFT was not entitled to apply a higher Step 1 starting point percentage and a higher Step 3 Minimum Deterrence Threshold (“MDT”) percentage to infringements involving compensation payments. This was contrary to the principles of equal treatment and/or proportionality.

Durkan seeks the following relief from the Tribunal:

- (a) the finding that DH is liable for Infringements 135 and 240 and the financial penalties imposed on it in relation to those infringements should be quashed;
- (b) the level of fine imposed on DP for Infringements 135 and 240 should be reduced insofar as it takes account of the turnover of DH in its calculation;
- (c) the findings in the Decision in relation to Infringement 220 and the financial penalty imposed on DL and DH in respect of that infringement should be quashed;
- (d) in respect of the penalty calculation, the Tribunal should quash and/or vary the amount of the penalty and the MDT percentage applied to Durkan should be reduced.
- (e) if successful in whole or in part, Durkan will seek an order that the OFT pay their costs of this appeal.

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