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Case No: C3/2011/1965

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
[2011] CAT 7
(Vivien Rose (Chairman), Sheila Hewitt, Graham Mather)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31st July 2012

Before :

THE CHANCELLOR OF THE HIGH COURT
LADY JUSTICE HALLETT
and
LORD JUSTICE PATTEN

- -

Between :

(1) INTERCLASS HOLDINGS LIMITED **(2) INTERCLASS PLC**	**Appellants**
- and -	
OFFICE OF FAIR TRADING	**Respondent**

- -
- -

Aidan Robertson QC (instructed by **Watson Burton LLP**) for the **Appellants**
Kelyn Bacon and Philip Woolfe (instructed by **The Office of Fair Trading**) for the **Respondent**

Hearing date : 26th June 2012

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Approved Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by Interclass PLC and its holding company, Interclass Holdings Limited (together "Interclass"), against a decision of the Competition Appeal Tribunal dated 24th March 2011 about the level of penalties imposed by the Office of Fair Trading following its investigation into collusive tendering practices in the construction industry.

2. The OFT investigation began in April 2004 and was its largest ever investigation under the Competition Act 1998 ("the 1998 Act"). It involved an examination of over 4,000 tenders and over 1,000 companies. The statement of objections was issued in April 2008 in relation to 112 companies. In its Decision of 21st September 2009 the OFT imposed fines totalling some £129.2m in respect of 103 of those undertakings.

3. Chief amongst the practices which the OFT investigation revealed was what is described as cover pricing. This occurs when a bidder in a competitive tender submits a price for the contract which is not intended to secure the contract but yet is designed to give the appearance of a credible bid. These objectives are achieved by a process of collaboration between tenderers under which the companies who do not wish to win the contract fix the amount of their tenders by reference to the amount bid by the undertaking which does wish to secure the contract. It therefore involves the disclosure as between the tenderers of what should be commercially sensitive and confidential price information and the practice of a deception on the party awarding the contract who is given the impression that a competitive tendering process has taken place.

4. In some cases payments were made by one bidder to another to compensate the latter for the costs involved in submitting what was certain to be a losing bid. The OFT regarded these cases as more serious than what they described as simple cover pricing and this was reflected in the level of penalty imposed.

5. The origin of cover pricing lay in the desire of many companies to remain on the relevant tender list and was born out of a concern that their failure to bid for a contract which they did not want might lead to their exclusion from the lists. The OFT's investigation found only a limited number of cases in which exclusion had occurred but accepted that there was a genuine and widespread concern that this might be the consequence of declining to bid.

6. But whatever justifications may have been offered for the practice, it was clearly anti-competitive and constituted an infringement of s.2(1) of the 1998 Act. It was common ground before the CAT that it had as its object the prevention, restriction or distortion of competition within the UK. The OFT has power under s.36 of the 1998 Act to impose fines for a Chapter I infringement which these were. So far as relevant, s.36 provides that:

> "(1) On making a decision that an agreement has infringed the Chapter I prohibition or that it has infringed the prohibition in Article 81(1), the OFT may require an undertaking which is a

> party to the agreement to pay the OFT a penalty in respect of the infringement.
>
> …
>
> (3) The OFT may impose a penalty on an undertaking under subsection (1) or (2) only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking.
>
> …
>
> (8) No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)."

7. The turnover provisions referred to in s.36(8) are contained in the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 309/2000) which was amended by the Competition Act 1998 (Determination of Turnover for Penalties) Order 2004 (SI 1259/2004) with effect from 1st May 2004. Under the original Order the turnover referred to in s.36(8) to which the 10% limit applied was the applicable turnover for the business year preceding the date when the infringement ended. "Applicable turnover" was defined in the Schedule to the Order in these terms:

> "3. The applicable turnover of an undertaking ... shall be limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities to undertakings or consumers in the United Kingdom after deduction of sales rebates, value added tax and other taxes directly related to turnover.
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> 4. Where an undertaking consists of two or more undertakings that each prepare accounts then the applicable turnover shall be calculated by adding together the respective applicable turnover of each, save that no account shall be taken of any turnover resulting from the sale of products or the provision of services between them."

8. The 2004 Order substitutes a new Article 3 which provides that:

> "The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it."

9. Paragraph 3 of the Schedule was also amended by deleting the words "to undertakings or consumers in the United Kingdom".

10. The combined effect of these changes is that applicable turnover for the purposes of s.36(8) now includes the worldwide turnover of the undertaking and the 10% cap is

applied to that turnover not in the business year preceding the end of the infringement but in the year preceding the date on which the OFT decision is taken. Like the CAT in its own judgment, I will refer to these two years as the Infringement Year and the Decision Year respectively.

11. The OFT publishes guidance about penalties as it is required to do under s.38(1) of the 1998 Act. Section 38(8) requires it to have regard to that guidance when deciding on the amount of a penalty. This court considered the status of this guidance in *Argos Ltd and Littlewoods Ltd v JJB Sports plc v OFT* [2006] EWCA Civ 1318 at [161]-[165]:

> "[161] The language of s 38(8) is general in nature. It does not bind the OFT to follow the Guidance in all respects in every case. However, in accordance with general principle, the OFT must give reasons for any significant departure from the Guidance: compare the judgment of the CFI in *Tokai Carbon v Commission*, Case T-236/01, decided on 29 April 2004, at para 231:
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> > "As the Commission decided to apply in this particular case the differentiation method laid down in the Guidelines, it was required to adhere to them, and where it departs from them it must set out expressly the reasons for justifying such a departure."
>
> [162] The tribunal had to consider the relevance of the Guidance to its own decisions for the first time in an earlier appeal, *Napp Pharmaceutical Holdings* [2002] CAT 1. After observing that the tribunal is not bound by the Guidance, and is not even expressly required by the Act to have regard to it, and having quoted from Sch 8 para 3(2) of the Act as to its powers on an appeal as regards penalty, the tribunal said this:
>
> > "499 It follows, in our judgment, that the tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed ab initio by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the tribunal at the stage of its judgment.
>
> > 500 That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's

> own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this tribunal in appeals against penalties.
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> 501 We emphasise, however, that the only constraint on the amount of the penalty binding on this tribunal is that which flows from the Maximum Penalties Order . . . It is clear from that Order that Parliament intended that it is the overall turnover of the undertaking concerned, rather than its turnover in the products affected by the infringement, which is the final determinant for the amount of the penalty . . . .
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> 502 We agree with the thrust of the Director's Guidance that while the turnover in the products affected by the infringement may be an indicative starting point for the assessment of the penalty, the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this tribunal is prepared to uphold severe penalties for serious infringements. As the Guidance makes clear, the achievement of the necessary deterrent may well involve penalties above, often well above, 10% of turnover in the products directly concerned by the infringement, subject only to the overall 'cap' imposed by the Maximum Penalties Order. The position in this respect is no different in principle under Article 15(2) of Council Regulation no 17, albeit that the applicable maximum penalty under that provision is differently calculated."

[163] In *Napp*, and in turn in the two judgments under appeal, the tribunal commented on the application of the Guidance by the Director (in *Napp*) and by the OFT (in the present cases), then went on to set out its own views on the seriousness of the infringement, and to make its own assessment of the penalty, on the basis of a "broad brush" approach, taking the case as a whole. The tribunal carried out a "cross check" to see whether the amount so arrived at would be within the parameters set out in the Guidance, and concluded that it would be. It seems to us that this is an appropriate approach for the tribunal.

[164] In any given case the tribunal may have to review the penalty in any event because, following a hearing, the facts

> may have been found differently from those on which the OFT proceeded. Correspondingly, on an appeal to the Court of Appeal the same may apply if an appeal on liability has (unlike in the present cases) been successful in showing that, though there was some infringement, it was not the same as that which the tribunal found.
>
> [165] We agree in particular with what the tribunal said at para 499 of its judgment in *Napp*, quoted above. In the case of the Court of Appeal, it seems to us that it is right for the court to recognise that the tribunal is an expert and specialised body, and that, subject to any difference in the basis on which the infringements are to be considered as a result of any appeal on liability, the court should hesitate before interfering with the tribunal's assessment of the appropriate penalty."

12. In summary the OFT Guidance, the most recent version of which was published in December 2004, prescribes a five-step process leading to the determination of the penalty. This is designed to enable the OFT to give effect to the twin objectives of its policy on financial penalties which are stated in the Guidance to be to impose penalties which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

13. The five-step approach consists of:

    (1) a calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking;

    (2) adjustment for duration;

    (3) adjustment for other factors

    (4) adjustment for further aggravating or mitigating factors, and

    (5) adjustment if the maximum penalty of 10% of worldwide turnover is exceeded and to avoid double jeopardy.

14. For the purpose of Step 1, the relevant turnover is taken to be the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year (paragraph 2.7). The starting point may not exceed 10% of the relevant turnover: see paragraph 2.8. It must also be based upon the OFT's assessment of the seriousness of the infringement. Paragraph 2.5 states that:

> "When making its assessment, the OFT will consider a number of factors, including 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. The damage caused to consumers whether directly or indirectly will also be an important

> consideration. The assessment will be made on a case by case basis for all types of infringement, taking account of all the circumstances of the case."

15. In the present case the OFT decided that the starting point for infringements involving simple cover pricing should be 5% of relevant turnover and 7% where compensation payments were involved. It also applied these figures to relevant turnover in the Decision Year rather than in the Infringement Year.

16. No adjustment was made for duration at Step 2 so that the starting point figures (representing as they did the OFT's assessment of the seriousness of the infringements) then fell to be adjusted (if necessary) to take account of other factors, in particular, the objective of deterrence. The Guidance on this states:

> "2.11 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anticompetitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article [101], Article [102], the Chapter I and/or Chapter II prohibition. 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. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.
>
> 2.12 The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step.
>
> 2.13 In exceptional circumstances, where the relevant turnover of an undertaking is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step."

17. The most significant adjustment made by the OFT was the adoption of a minimum deterrent threshold ("MDT"). This was designed to deal with those cases where the Step 1 figure represented only a very small proportion of turnover in the Decision Year due to the level of the undertaking's business in other markets. In order to make the penalty a sufficient deterrent for that undertaking, the OFT raised the level of penalty to a minimum of 0.75% of total turnover in the Decision Year where the infringements did not involve compensation payments (as described in paragraph 4)

and to a minimum of 1.05% of total turnover where they did. These figures were derived from earlier OFT decisions.

18. It is necessary at this stage to say a little more about the composition of the starting figures. The OFT considered that it was appropriate to treat each infringement separately and to impose a separate financial penalty for each infringement. Because of the scale of the inquiry and the number of individual infringements, the OFT selected a maximum of three infringements in relation to each undertaking. This was criticised by a number of undertakings in their responses to the statement of objections as arbitrary and unfair because it could lead to penalties of three times the amount for which they would have been liable had their infringements been treated as a single offence. Some undertakings said that this was contrary to the methodology adopted in earlier inquiries. Others said that the potential for unfairness should be recognised when setting the starting point figure.

19. The OFT in paragraphs VI.13 – VI.22 of its Decision rejected these criticisms and declined to adopt a lower starting point to take account of them. There was, it said, no evidence of an overall bid rigging scheme which would justify treating a multiplicity of infringements as one and where a party had been shown to have committed more than one infringement it should face more than one penalty. It would also be difficult to factor into the setting of a single penalty cases where the infringing party had accepted the OFT's Fast Track Offer (see paragraph 25 below) and where the infringements had affected a number of different markets. But the OFT did recognise that it had a duty to ensure that the penalties imposed were fair and proportionate:

> "… taking into account all of the factors in this case, including the fact that penalties are being imposed for a maximum of three infringements per Party. For example:
>
> - this is one of the factors taken into account by the OFT when setting the level of the Minimum Deterrence Threshold at a level sufficient to achieve deterrence – see paragraph VI.223 below; and
>
> - where a Party has more than one infringement in this Decision that occurred in the same relevant market, the OFT has considered whether a reduction is required at step 3 to ensure that the cumulative impact of the aggregate penalty is not excessive by virtue of the Party conducting a large proportion of its business in that relevant market during the financial year prior to the OFT's decision – see paragraphs VI.271 to VI.273 below."

20. The MDT was therefore applied only once to each undertaking but was applied on an infringement by infringement basis rather than to the cumulative total of the Step 1 penalties. So where that undertaking had two or more infringements under consideration the MDT was only applied if none of the Step 1 penalty figures individually exceeded the MDT. In that case the highest of the penalties was increased to the MDT but the other penalty or penalties were left unchanged. The undertaking then paid the total sum involved. If, however, one of the individual

penalties (or where only one infringement was charged, the penalty for that infringement) already exceeded the MDT then no further adjustment was made.

21. One of the issues raised by Interclass in the CAT and again on this appeal was financial hardship. The OFT considered that this was something to be taken into account (if at all) at the end of Step 2 as part of its consideration of whether the starting figure was a sufficient deterrent. It made an offer to all the undertakings affected by its Decision enabling them to pay the penalties imposed by instalments over a three year period subject to payment of interest. Interclass did not take up this offer but raised the question of financial hardship as a separate ground of appeal.

22. The OFT does not accept that it has any obligation to reduce an otherwise justifiable penalty merely to ensure that a particular undertaking is not reduced to insolvency. But it has exercised what it describes in the Decision as a margin of appreciation in order to reduce penalties on account of financial hardship on a case by case basis. This involved cross-checking claims that the penalty would cause financial hardship against other publicly filed information such as the company accounts. Ultimately it was for the individual undertaking to make good its case for a reduction of penalty on those grounds. In the case of Interclass, the OFT said that although a comparison of the penalty against the company's adjusted net assets and liabilities indicated that there might be concerns about its financial position, an assessment made against net current assets did not indicate that the penalty would threaten its viability. Its claim for any further reduction of the penalties on those grounds was therefore rejected.

23. The calculation of penalty in the case of Interclass is described in the table below which is taken from paragraph VI.525 of the OFT Decision.

Penalty step		**Infringement 75**	**Infringement 150**
Infringement date		18/09/2001	25/06/2003
Product market		Education	Education
Geographic market		West Midlands	West Midlands
Total turnover yr end		31/10/2008	31/10/2008
Total worldwide turnover		£24,559,058	£24,559,058
Relevant turnover yr end		31/10/2008	31/10/2008
Relevant turnover		£6,517,972	£6,517,972
Step 1 starting point		5%	5%
Penalty after step 1		**£325,899**	**£325,899**
Duration multiplier		1	1
Penalty after step 2		**£325,899**	**£325,899**
Penalty as % of total t/o		1.33%	1.33%
MDT to apply		-	0.75%
Penalty after step 3		**£325,899**	**£325,899**
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-5%	-5%
	Cooperation	-	-
Total step 4 adjustment		-5%	-5%
Penalty after step 4		**£309,604**	**£309,604**
% of total turnover		1.26%	1.26%
% of pre 1/5/04 turnover		1.33%	2.07%
Penalty after step 5		**£309,604**	**£309,604**
Leniency/fast track		-25%	-25%
Final gross penalty			**£619,207**
Final penalty after leniency/fast track			**£464,406**

24. Penalties were imposed on the basis of two infringements at the starting rate of 5% of relevant turnover. MDT did not apply because the penalties exceeded 0.75% of total turnover and at Step 4 a 5% reduction was applied to take account of the company's introduction of a compliance programme. The resulting aggregate penalty of £619,207 was then further reduced by 25% because Interclass had participated in the OFT's Fast Track Offer.

25. The OFT operates a leniency programme which is described in Part 3 of the Guidance. It provides either a complete or partial immunity from penalty for undertakings which are willing to come forward and co-operate with the OFT in cartel activity cases. Its investigation into bid rigging in the construction industry began in 2004 and by the end of 2006 the OFT had received some thirty-seven applications for leniency. After concerns were expressed that any further applications might make the investigation unmanageable, the OFT wrote to eighty-five other companies in March 2007 with what it termed its Fast Track Offer. Each company was provided with a list of between five and twenty tenders where they were suspected of bid rigging and was told that it would receive a reduction of 25% in penalty if it admitted that it had taken part in a suspect tender. Forty-five companies (including Interclass) admitted being involved in bid rigging in response to this offer and received the 25% net reduction.

26. The letter containing the Fast Track Offer was sent to Interclass on 22nd March 2007. This was the first direct contact with the OFT in relation to the bid rigging inquiry. In its reply (dated 25th April 2007) Interclass made the point that it had already taken steps in January 2006 to put an end to cover pricing as soon as it appreciated that the practice was anti-competitive and had legal consequences under the Competition Act 1998. One of Interclass's complaints is that its earlier cesseation of cover pricing was not taken account of in the OFT Decision or by the CAT on the subsequent appeal.

27. The OFT Decision led to twenty-five admissible appeals which were heard over a four-week period. Eighteen of the appeals were heard in groups by three separate panels. The Interclass appeal was one of a group of six heard by a panel chaired by Vivien Rose. The other two panels were chaired by the President of the CAT (Barling J) and by Lord Carlile of Berriew QC. They produced four group judgments of which *Kier & Ors v OFT* [2011] CAT 3 ("Kier") was the first in time. Many of the issues raised by Interclass and the other appellants in their group of appeals had already been considered by the CAT in *Kier*. These included:

    (i) an allegation that the overall level of fines was disproportionate and excessive having regard to the nature of the infringements;

    (ii) challenges to the OFT's methodology; in particular -

        (a) the use of the Decision Year as relevant turnover at Step 1;

        (b) the application of the MDT; and

        (c) the imposition of a separate fine for each infringement; and

    (iii) a complaint that the OFT failed adequately to take into account the fact that the construction industry is a high turnover but low margin industry.

28. Interclass also had a separate and case specific complaint about the OFT's failure to grant a discount for financial hardship.

29. On the general points common both to the Kier and to the Interclass appeal, the CAT in this case largely accepted and followed the reasoning in *Kier*. The CAT also decided that it should give each appellant the benefit of arguments which had succeeded in a particular appeal and were relevant to other appeals even if those arguments had not been deployed in those other appeals.

30. There was no challenge by Interclass or the other appellants in the same group to the adoption of 5% of relevant turnover as the Step 1 figure. But submissions were made that cover pricing was endemic at the time and was widely regarded as legitimate even in some textbooks about tendering for construction projects. The tribunal in *Kier* had said that the OFT did not give sufficient credit for this point and that it was not catered for merely by a decision not to raise the Step 1 percentage above the 5% level applied in earlier OFT decisions. At paragraph 81 of its decision the CAT in this case said:

> "None of the Present Appellants has challenged the use by the OFT of the 5 per cent starting point and indeed, Tomlinson, Seddon and Interclass expressly state that they do not challenge that as being the correct percentage to be applied at Step 1. We have not therefore come to any conclusion as to whether, if we had heard argument from the parties on the point, we would have concluded that 5 per cent was too high in these cases. However, we consider that the point raised by the Present Appellants about the endemic nature of cover pricing can be taken into account adequately when we come to consider the question of deterrence. In future, no undertaking can claim before this Tribunal to have thought that cover pricing was an innocuous practice and we hope that the practice has now died out. Those factors are relevant to the question of whether an increase in the fine is still necessary to ensure that the Present Appellants and other undertakings are deterred from engaging in conduct which they now know to be a serious infringement of the competition rules. We will come back to this point in that context."

31. The first specific challenge to the OFT's methodology was in relation to the use of the Decision Year to establish relevant turnover. This substantially increased the level of penalties for all the appellants in the group. A number of arguments were deployed in favour of using an alternative year but the CAT's decision was based on the submissions of Galliford Try that the OFT had misconstrued its own Guidance as to the operation of Step 1 when it used relevant turnover in the Decision Year.

32. Step 1 turnover was defined in the original OFT Guidance published in March 2000 as:

> "the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last financial year."

33. This was amended in paragraph 2.7 of the 2004 revised Guidance to read:

> "The **relevant turnover** is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year." (emphasis in the original)"

34. Although, as mentioned earlier, the Amended Turnover Order had changed the applicable turnover from the Infringement Year to the Decision Year for the purpose of applying the s.36(8) cap, it was made clear in paragraph 2.18 of the 2004 Guidance that for infringements which ended before 1st May 2004 the penalty would (if necessary) be adjusted at Step 5 by reference to the cap which would have applied at the time when the infringement ended: i.e. 10% of applicable turnover in the Infringement Year. The OFT calculation of penalty contained in the earlier table shows that the OFT performed this check at Stage 5. But the CAT accepted the submission that consistently with this the phrase "last business year" in paragraph 2.7 of the 2004 Guidance should be interpreted as also preserving the Infringement Year turnover for the purposes of Step 1 in cases where the infringements had ceased before 1st May 2004. This would, they said, "produce a provisional penalty that reflects the harmful effects of the unlawful conduct on the product and geographic market affected by the infringement". At Step 1 they therefore substituted relevant turnover in the Infringement Year.

35. The next issue to be considered was the MDT. This had no application to Interclass but the appellants who were affected by it all argued that it was wrong to base its application on worldwide turnover across all of the company's activities and that any MDT should have been calculated by reference to the company's activities in areas where cover pricing was prevalent.

36. As in *Kier* the CAT concluded that the application of the MDT had led to disproportionate and excessive penalties. The automatic substitution of the MDT for the Step 2 figure was not a suitable mechanism for ensuring deterrence. Instead it was necessary to consider whether the uplift was suitable in the specific circumstances of each case taking into account other factors relevant to the individual undertaking and the industry more generally.

37. The third factor which the CAT considered was the imposition of a separate fine for each infringement. One particular complaint was that the addition of the MDT to the fines for the other infringements produced a total figure that exceeded what was required for deterrence. The CAT stated that the fines were intended to achieve more than deterrence and had also to reflect the seriousness of the infringement. For this reason, the OFT had been entitled to impose a separate fine for each infringement even if the total produced exceeded what was required for deterrence. The statutory maximum under s.36(8) applied to each infringement but was not exceeded in this case even by the aggregation of the penalties for each undertaking.

38. A more general question was whether some adjustment needed to be made to reflect the fact that the construction industry is one in which turnover may be high but the profit margins are very low as a percentage of turnover. This is partly the consequence of the turnover including payments which are destined for sub-

contractors. Turnover, it was said, was not therefore a reliable guide to profitability and this needed to be taken into account in fixing the level of penalties.

39. The OFT was not prepared to treat the construction industry as a special case in this respect. But the CAT disagreed. It says in its Decision that high turnover/low profit is a factor which is relevant "when considering the overall impact of the penalties on these undertakings": see Decision paragraph 133. But it raised the question of how this should be given effect to:

> "134. Although a number of the Present Appellants raised this same point, they were less clear about how the OFT could or should have taken this factor into account in its calculation of the penalties in these cases. Some of them eschewed any suggestion that profit should have been used as a measure instead of turnover. We agree that individual group profit is an unsatisfactory alternative, for the reasons set out by the OFT in paragraphs VI.72 to VI.74/1643 of the Decision. We also reject the suggestion made by Tomlinson, Interclass and Seddon that the OFT should simply have relied on turnover net of subcontractor fees in its calculations. This would have had a very uneven effect on the undertakings, depending on how far they rely on subcontractors. It would also mean that a company that chooses to employ its own workforce would be disadvantaged.
>
> 135. We do however consider that this aspect of the way the construction industry operates should have been reflected at some point in the OFT's calculation. It is an important factor when considering the likely impact of the fines on these undertakings and in particular whether the fines arrived at after applying Steps 1 and 2 of the Guidance are an adequate deterrent. We have therefore taken this factor into account in that context when we recalculate the fines."

40. The CAT then proceeded to re-calculate the penalties in the individual appeals. It used the same Step 1 and Step 2 figures and then came to consider whether any Step 3 adjustment was necessary for deterrence or punishment in the absence of the MDT. In this context account was to be taken of factors such as low profit margins as described in paragraph 135 of the Decision quoted above.

41. The CAT described its own methodology in these terms:

> "161. Having arrived at a provisional figure for each fine we have considered whether the aggregate figure for all infringements is sufficient to punish the undertaking and to deter that undertaking and other undertakings from committing infringements in the future. We mentioned earlier (at paragraph 74) that submissions raised by other appellants arguing for a lower Step 1 starting percentage were also raised by the Present Appellants in more general mitigation. We have therefore had regard to a number of factors in assessing the need for an adjustment at Step 3 for each of the Present Appellants.

162. First, the relevant turnover used at Step 1 above comes from several years ago. We have borne in mind, when considering the need for an adjustment at Step 3, the importance of ensuring that the fine we set acts as a deterrent in terms of today's money values.

163. Secondly, we note that many of the addressees of the Decision submitted to the OFT that one of the reasons why the practice was so endemic in the industry was a perception that if they did not respond to a prospective client's invitation to tender, this could lead to their removal from future invitations to tender for work for that client. The OFT has accepted that in certain cases such exclusion had taken place and has also accepted that the fear expressed was genuine. We hope that one result of this investigation is that clients recognise that it is in their interests to remove any such perception. Companies invited to bid should be confident that they will not be disadvantaged in future competitions if they decline the invitation on that one occasion. If this motive for unlawful conduct is removed, it is less likely that companies will be tempted to revert to this unlawful activity. Any misapprehension that construction companies may have had about the legality of cover pricing must have been dispelled by this investigation and these appeals. These factors are relevant to the question whether an increase in the penalty at Step 3 is nonetheless needed to ensure adequate deterrence.

164. We also take into account that this is a high turnover and low margin industry so that a penalty representing a particular percentage of turnover is likely to have a greater impact on the undertaking than it would have on an undertaking operating in an industry where margins were typically higher. In deciding in each case what adjustment to make at Step 3 we have had regard to the global turnover of the undertaking in the Decision Year as a broad indication of its financial position. We have not applied any particular percentage to that turnover in order to arrive at a minimum level. Instead, in those cases where we consider that an uplift at Step 3 is necessary for deterrence we have applied a multiplier to the provisional aggregate fine to arrive at a figure we consider appropriate.

165. We have then applied the Step 4 adjustments made by the OFT in the Decision since these were not challenged by the Present Appellants. Finally we have applied any reduction granted for leniency or as a result of accepting the Fast Track Offer. We have divided the resulting aggregate figure equally among the infringements for which a penalty is imposed. Finally, we have rounded down the figure for each infringement to the nearest £1000: this avoids the appearance of a degree of precision which is inconsistent with the way in which we have in fact approached this exercise."

42. The change from the Decision Year to the Infringement Year as the year of relevant turnover had a significant effect on the Step 1 figures. Relevant turnover for the financial year ending 31st October 2000 (which was the Infringement Year for Infringement 75) was £3,872,814. For the year ending 31st October 2002 (the Infringement Year for Infringement 150) it was £1,837,870. The Step 1 figures were therefore £193,640 and £91,893 respectively: a total of £285,533 compared with £651,798 under the OFT calculation after Step 2.

43. At Step 3 the OFT made no adjustment for the MDT because the level of penalty already exceeded 0.75% of total turnover in the Decision Year. The CAT had therefore to consider whether the change to the Infringement Year and the consequent diminution in the Step 1 figure necessitated an increase in penalty at Step 3 either to reflect the seriousness of the offence or for the purpose of deterrence. As part of this process it said that it was taking into account the fact that the construction business operated on low profit margins; that cover pricing was endemic in the industry at the time; and that the investigation had dispelled any misapprehension about the legality of cover pricing (see paragraph 30 above). Interclass says that it should also have taken into account its cessation of cover pricing from a date early in 2006.

44. The CAT decided to increase the total penalty at Step 3 by applying a multiplier of two thereby increasing it to £571,066. The 5% Step 4 adjustment was then applied together with the further 25% reduction to take account of Interclass having accepted the Fast Track Offer for both infringements. The result is a total penalty of £406,884.

45. The next issue for the CAT to consider was financial hardship. I shall return to this in more detail later in this judgment because it forms one of the grounds of appeal. But, in short, Interclass produced evidence from its managing director to say that the workforce had taken a 10% pay cut in 2009 and that there were redundancies and short-time working. The OFT penalty was described as the final nail in the coffin and threatened the credit rating of the company with its bank which was essential to the maintenance of its cash flow. The penalty was said to represent 47.9% of net current assets for the year ended 31st October 2008 and over 50% of the previous three years' audited profits.

46. The claim of financial hardship was disputed by the OFT largely by reference to the fact that directors' emoluments had increased from £186,049 in 2007 to £481,451 in the year ended 31st October 2008. The CAT said:

> "We agree with the OFT that when considering financial hardship it is appropriate to look at the group as a whole rather than at the companies within the group that are directly involved in the infringing conduct. The relevant question is whether the continued viability of the undertaking is threatened. We also agree that the substantial increase in directors' emoluments for the year ended 31 October 2008 casts doubt on Interclass's claim of hardship. The fact that pay and bonuses were contractually due under terms and conditions put in place in more prosperous times is not the end of the matter. If the directors are not prepared to forego or postpone substantial bonus or pension contribution entitlements even though this may jeopardise the existence of the company, they

> cannot at the same time argue that the Tribunal should substantially reduce the fine to enable the company to stay afloat."

47. It therefore rejected the claim to financial hardship based on the accounts for 2008. But it also took into account the draft accounts for the year ended 31st October 2009 which post-date the OFT Decision but record a loss for the year of £347,250. Shareholders' funds amounted to £883,936 and directors' remuneration was reduced to £183,384.

48. The CAT took the view that a further reduction of 20% was appropriate to take account of the poor trading figures for 2009. This reduced the overall penalty to £325,507 which was rounded down to £162,000 for each infringement.

The appeal

49. Interclass appeals against the decision of the CAT with the permission of Lloyd LJ. It says that even a fine of £324,000 for the two infringements is far too high and is disproportionate to the general level of fines imposed on other undertakings for similar infringements. It takes issue with the CAT's determination that a combined fine of £571,000 was required at Step 3 and says that this is inconsistent with the CAT's expressed intention to take into account the endemic nature of cover pricing at the time of the infringements; the low profit ratios involved; and the fact that the OFT investigation had already been effective to dispel any doubts about the legality of cover pricing. Despite the CAT's assertions that it proposed to take these matters into account at Step 3, the effect of doubling the penalty from £285,533 to £571,066 was that even after the Step 4 and 5 reductions of 30% and the further reduction for financial hardship, Interclass received a much smaller reduction in penalty than any of the other appellants to the CAT. Although in paragraph 221 of its Decision the CAT states that it has increased the penalty to £571,066 "in the light of all the relevant factors", Mr Robertson QC for Interclass submits that the discrepancy in penalties is inexplicable (and unexplained) if that exercise was in fact properly carried out.

50. Mr Robertson produced a comparative table which shows the penalties imposed by the CAT as a percentage of group turnover in 2010; the financial year prior to the CAT Decision. Interclass was fined a total of £324,000 which equates to 1.3% of total group turnover of £24.5m. The other appellants in the same group of appeals received fines amounting to between 0.1% and 0.8% of group turnover. For the other two groups of appeals heard by the CAT, the penalties ranged from 0.03% to 0.55%. Other discrepancies are also relied on. Kier (which received the largest percentage reduction in penalty (94%)) was fined £1.7m by the CAT for three infringements compared with an OFT penalty of £17.89m. The CAT penalty was 0.08% of group turnover in the Decision Year but also falls to be compared with Kier's pre-tax group profits of £58.4m in that year. Interclass was fined a total of £324,000 against a group loss of nearly £250,000.

51. Interclass's first ground of appeal is that the doubling of the penalty at Step 3 was unjustified by any of the factors which it was relevant for the CAT to have taken into account. Mr Robertson accepts, as he must, that a difference in the level of penalty imposed does not, as a general rule, provide grounds for an appeal unless it discloses a difference in treatment which cannot be justified by any factors relevant to the

particular infringement. Here, he says, the CAT treated all infringements in the form of simple cover pricing as comparable hence its general approach to the use of the Infringement Year rather than the Decision Year as the basis of the Step 1 calculation and its acceptance of the general relevance of factors such as low profit margins and the endemic nature of cover pricing to the penalties to be imposed on all of the infringing undertakings.

52. Interclass does not quarrel with the use of a multiplier as such but with the end result. The doubling of the Step 1 figures all but eliminated the reduction in penalty consequent on the change from the Decision Year to the Infringement Year as the determinant of relevant turnover. That change was effected in part because the use of the Infringement Year produced a provisional figure which more closely reflected the effect of cover pricing on the relevant product and geographic market at the time when the infringement occurred. This is directly related to the seriousness of the infringement which has to be reflected in the Step 1 figure: see paras 2.3 and 2.5 of the Guidance. The CAT did not consider that it was necessary to alter the starting point figure of 5% of relevant turnover even in relation to its own reduced Step 1 figure and must be taken to have been content that it was an appropriate starting figure to reflect the seriousness of the infringements. How then, it is said, can it be justifiable to double the Step 1 figure to make it an effective punishment and deterrence when most of the "relevant factors" referred to in paragraph 221 point away from the need to make any significant increase in the Step 1 figure on either count? The concern about the absence of any proven need to increase the penalty at Step 3 in order to provide an effective punishment is heightened by the fact that in paragraph 164 of the Decision (quoted in paragraph 4 above) the CAT describes the application of the multiplier solely in terms of deterrence.

53. Mr Robertson submitted that had the CAT not doubled the Step 1 figure then his clients would have been treated in a way that was broadly comparable to the other appellants. Its total penalty would have been reduced to £202,000 or 0.82% of group turnover for the year before the CAT judgment. There is no explanation given in paragraph 221 as to why a figure of £571,066 was thought appropriate or as to how it accommodates the relevant factors I have referred to. All that it says is that:

> "221. The next step is to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Interclass and others from further infringements of this kind. We have had regard to the fact that Interclass's worldwide group turnover was about £24.5 million in the year ending 31 October 2008. In the light of all the relevant factors we consider that a penalty in excess of £285,533 is needed. We consider that a multiplier of two is appropriate bringing Interclass's fine to £571,066. To this fine we apply a 5 per cent reduction at Step 4 and a further 25 per cent reduction because Interclass accepted the OFT's Fast Track Offer in respect of both the infringements. This results in an aggregate penalty for the two infringements of £406,884."

54. If deterrence was the significant reason for the uplift then the Decision should have explained why a penalty of 1.3% of 2010 group turnover was thought appropriate when the CAT had been told that cover pricing had been discontinued by Interclass

early in 2006; had accepted that this was a low profit margin industry which needed to be taken into account in assessing penalty; and, perhaps most importantly, had accepted in paras 81 and 163 of its Decision that the investigation itself had made it impossible for any undertaking to contend in the future that it believed that cover pricing was unobjectionable as an industry practice. In these circumstances how, it is said, can a doubling of the penalty be said to be necessary to deter either Interclass or other undertakings from engaging in the same practice in the future?

55. The CAT gives no clear answer to this question in its Decision. Mr Robertson referred to paragraph 162 of the CAT Decision (quoted in paragraph 41 above) which speaks of the importance of ensuring that the fine acts as a deterrent in terms of today's money values. But the group turnover of Interclass for the Infringement Years applicable to the two penalties was £23.3m (2000) and £15m (2002) and that for 2008 (which was used by the CAT for the Step 3 calculation) was only £24.3m. Interclass submits that this cannot justify a doubling of the Step 1 penalty. It also takes no account of the fact that in 2009 group turnover was only £14.5m; that it was £17.6m in 2010; and that in 2011 it was £19.1m.

56. In short, Mr Robertson submits that the CAT has identified nothing specific to Interclass which justifies a disproportionate increase in penalty on grounds of deterrence. All of the "relevant" factors identified in the Decision apply without modification to each of the appellants and none of them indicates a need for an uplift of the magnitude applied to Interclass. Interclass has, he says, received a much more severe penalty at Step 3 than any of the other appellants and no reasons have been given to justify the disparity in treatment.

57. Ms Bacon for the OFT reminded us that the CAT's assessment of penalty does not have to follow the OFT Guidance to the letter but must be based on its own assessment of the seriousness of the infringement taking the case as a whole. I accept that, but the Guidance remains important both because it explains the process of calculation and assessment undertaken by the OFT and incorporates the policy objectives which the sentencing exercise is designed to achieve. The Court in *Argos Ltd* affirms its utility as a cross-check against the CAT's own calculations of penalty.

58. In this case, however, the CAT is not criticised for departing from the Guidance or the method of calculation which it embodies. As explained earlier, the CAT followed the same step-by-step approach as the OFT but altered the relevant year of the turnover for the purpose of calculating the Step 1 figure. The critical stage was Step 3. But again there is no challenge to the CAT's entitlement to increase the Step 1 figure in order either to reflect the seriousness of the infringements or to make the penalties imposed an effective deterrent. The only real issue is whether the increase of 100% can be objectively justified having regard to the relevant factors in play.

59. This Court's jurisdiction is governed by s.49(1) of the 1998 Act and is not limited (in relation to penalty) to errors of law by the CAT. But in a case where there is no real challenge to the primary findings of fact this Court is limited to a review of the penalties based on the material before the CAT. Given the specialist nature of the tribunal and its obvious expertise in these matters, an appeal against penalty is unlikely to be successful unless it can be shown either that the CAT erred in principle (which can include a failure to take relevant matters into account) or that, looked at overall, the penalties imposed were clearly disproportionate or discriminatory so as to

be unjustifiable by any of the matters which the CAT either did or should have taken into account.

60. Ms Bacon makes the point that by concentrating on the overall level of penalties imposed Interclass is in effect arguing for the restoration of something equivalent to the MDT. The decision of the CAT that Step 3 should be based on the specific circumstances of each case rather than on the imposition of a formula severed the link, she says, with turnover as the sole arbiter of penalty and instead required the CAT to consider current turnover along with other relevant factors when considering the adequacy of the penalty and deterrence. This, she submitted, can produce widely differing results. Unless the Court can identify relevant factors which the CAT failed to take into account, it should not attempt to substitute its own views for those of the specialist tribunal.

61. The arguments based on the apparent lack of proportionality between penalties are also said to be misconceived insofar as they turn on a comparison of the percentage reductions in penalty which each of the appellants received. This fails to take into account that the switch to the Infringement Year for Step 1 purposes and the removal of the MDT impacted in very different ways on various appellants depending upon their turnover in the years relevant to the infringement and the Decision Year turnover. For some (such as Interclass) the removal of the MDT had no impact at all. In other cases it was very significant.

62. The correct methodology (which the CAT adopted) was to work upwards from the infringements rather than to try to assess some kind of absolute reduction in penalty. This required the CAT to calculate the Step 1 figure (which is not challenged) and then to consider whether an increase was necessary on a case specific basis. Inevitably this will produce disparities in treatment when the final figure is looked at simply as a percentage of current turnover but that does not mean that the decision is wrong. The process is not a comparative one.

63. Ms Bacon also says that the argument about the CAT's use of the multiplier is advanced in the grounds of appeal primarily as a reasons challenge and that there was no separate ground of appeal based on the alleged failure to consider the early cessation of cover pricing by Interclass. But the point was clearly taken at the permission hearing before Lloyd LJ and, if necessary, we would give Interclass permission to amend its notice of appeal. The point was obviously there and has been fully argued. Her main point is that early compliance was taken account of by the OFT in the 5% reduction at Step 4 and, although not stated in terms, it is clear that the CAT did not consider that it was necessary to make any additional reduction on account of this.

64. It seems to me that the correct approach to the assessment of penalty must be to proceed in stages beginning with an initial assessment for each infringement having regard to its seriousness. This is what both the CAT and the OFT did in this case and no criticism is made of the starting figure. But when considering whether that figure should be increased in order to give effect to the policy objective of deterrence two factors come into play. The first is whether the amount of the Step 1 penalty will act as a sufficient deterrent for the particular undertaking on which it is imposed. The second is whether it will be sufficient to deter others operating in the same field by bringing home to them that such conduct is illegal and will be effectively punished.

65. Although at Step 1 the CAT is calculating the penalty for each infringement, it seems to me impossible at Step 3 not to have some regard to the overall and cumulative level of penalty imposed on the undertaking when considering whether the Step 1 figures should be increased. This is a conventional approach to sentencing and is obviously relevant to a consideration of the impact which financial penalties will have on the particular undertaking. Similarly in relation to other would-be offenders it is the headline figure which matters.

66. The CAT has given no reasons in paragraph 221 of its Decision for the doubling of the penalty to £571,066 beyond saying that an increase to that amount was appropriate in the light of all relevant factors. But some further help is available from paragraphs 163-4 (quoted at paragraph 41 above) which state in terms that they had taken into account low margins; the endemic nature of cover pricing in the period when it occurred; and the impact which the investigation had had on other undertakings in the industry and their ability to plead ignorance of the illegality involved. The CAT stated in paragraph 164 that they had not applied a fixed penalty to the group's global turnover in the Decision Year but rather had applied a suitable multiplier to the provisional fine to arrive at a figure which they considered necessary for deterrence in the circumstances of the case. But that (as one would expect) involves an acceptance by them that the overall level of fine imposed in each case should be proportionate to the current financial position of the undertaking involved when considering the effectiveness of the penalty as a deterrent and the CAT in every case looked at the penalties in cumulative terms.

67. What I think is troubling about the multiplier used for Interclass is that the figure it produces is so out of line with the level of fines which the CAT thought necessary to act as a deterrent in other similar cases. If one uses the methodology of the CAT by taking global group turnover in the Decision Year as an approximate indicator of financial strength (and ignores the actual profit figures for that year) one can see that Interclass was fined 1.3% of turnover whereas Tomlinson, Sol, Seddon and Galliford Try were fined 0.37%; 0.8%; 0.19% and 0.1% respectively.

68. I agree with Ms Bacon that one cannot judge the correctness of these outcomes simply by comparing the percentage rates of reduction in each appeal. One has to follow the CAT methodology beginning with Step 1. But if one does that it remains the fact that in each of the appeals in this group the infringements involved simple cover pricing with no obvious aggravating features. The Step 1 penalty was 5% of Infringement Year turnover in each case. If one puts aside the issue about Interclass's early cessation of cover pricing the other relevant factors seem to be common to all the cases and do not obviously call for any disparity of treatment on that account. The issue therefore for the CAT was whether (and, if so, by how much) the Step 1 penalties should be increased for purposes of deterrence.

69. In terms of providing an effective deterrent for others, again no differentiation between the various appellants was necessary. As I mentioned earlier, what was necessary was to set a general level of penalty which sent out the appropriate message. Case specific deterrence could be different. The CAT needed to consider what was necessary in each case to prevent further infringement by the undertaking in question. This could justify a disparity in treatment. But in this case there is nothing in the Decision to indicate that Interclass needed to be treated more harshly in this

respect than other appellants on account of any case specific factors which the CAT was entitled to take into account. The CAT has not identified anything of that kind.

70. In these circumstances, I have reached the conclusion that the overall level of penalty imposed by the CAT cannot be justified on the grounds stated in the Decision having regard to the material before the tribunal. I accept Ms Bacon's submission that some level of disparity between the fines is inevitable. This is not a question of applying a rigid mathematical formula. An element of discretion is essential. But discretion has to be exercised on a proper and consistent basis and I can see no justification for imposing a penalty equivalent to 1.3% of current group turnover on Interclass by reference to the same factors which in most cases led to penalties of between 0.1% and 0.37%. Sol is closer in amount but in that case the Step 1 figure (due to the size of the group's relevant turnover) was already 1.46% of Decision Year turnover. In the circumstances, no increase for deterrence was made at Step 3 and the penalties were reduced to 0.8% for leniency. If one takes the cases (such as Seddon and Tomlinson) where the Step 1 penalty produced a much lower figure proportionate to current turnover the increases have brought total penalty to a fraction of that imposed on Interclass.

71. It may be said that it is only by being able to compare the end result of the Step 3 assessment in Interclass with that in the other appeals that it becomes possible to say that there is something disproportionate about the level of sentence and that had it stood alone the level of penalty imposed on Interclass could not be said to be obviously wrong. But in a case where the tribunal has failed to give any real explanation of the uplift then it is, in my view, permissible to take the general level of fines imposed at Step 3 into account as a cross-check on whether something has in fact gone wrong with the process. The position is not dissimilar to the approach adopted by this Court when dealing with cases of disparity in criminal sentences. In *R v Coleman and Petch* [2007] EWCA Crim 2318 Moses LJ said that:

> "8. There is no absence of examples of cases where this court allows appeals on the basis of disparity of sentencing notwithstanding that the sentence at issue would not, absent disparity, be regarded as manifestly excessive or the sentence against which it is being compared too lenient. Attempts to identify some principle based upon this court's view of whether the sense of grievance is justified or whether "right-thinking" members of the public with full knowledge of the facts and circumstances would consider something had "gone wrong with the administration of justice" provide little guidance as to those cases in which this court's sense of justice and fairness is offended or where this court has declined to reduce one sentence so as to pass two wrong sentences (contrast the approach in *Fawcett* [1983] 5 Cr App R S 158 and *Stroud* [1977] 65 Cr App R 150). In *Franksen* [1996] 2 Cr App R S 366 the court reduced an appropriate sentence of 7 years' imprisonment for possessing crack cocaine with intent to supply solely on the basis that a co-defendant who received half of that sentence had been too successful in attracting unjustified mercy from the sentencing judge.

> 9. We do not think that this court should attempt to identify some principle according to which it will or will not interfere on the grounds of disparity. Justice in the sphere of criminal law requires a flexibility and sensitivity to the facts of particular cases which will be impeded by the identification of a principle which may be applied with too great a rigidity. We prefer to consider the circumstances of the instant appeal and whether we take the view that the consequences are unjust."

72. The consequences in the case of Interclass are both disproportionate and unjust. I would therefore set aside the tribunal's application of the multiplier as part of Step 3 and leave the Step 1 figure unchanged at £285,533 to which the Step 4 reduction of 5% and the 25% reduction for accepting the Fast Track Offer fall to be applied. This results in a total penalty of £202,000. I would not, however, make any further reduction specifically on account of the early cessation of cover pricing in 2006. This was, I think, adequately taken into account as part of the Step 4 reduction and is, in any event, catered for by the amendment of the Step 3 figure.

Financial hardship

73. The OFT gave Interclass three years to pay the fines but it did not take the offer up. Instead it has pursued its appeal right up to this court. The three year period has now expired and the OFT has declined to grant Interclass an extension. Mr Robertson submits that the penalty should be less than £100,000. The CAT (in paragraph 232 of its Decision) stated that the relevant test was whether the continued viability of the undertaking is threatened and it is, I think, common ground that in considering financial hardship one has to look at the group as a whole rather than simply consider the position of the company which has infringed. He submits that the CAT has not applied this test because the penalty imposed will deprive the group of the working capital which it needs in order to operate. It has an overdraft facility of £750,000 and the CAT penalty of £324,000 had the effect of reducing working capital to £426,000.

74. The CAT had evidence from Mr David Jones, the managing director of Interclass, that pointed out the cash flow problems involved and the reduction in operations that was likely to result from them. The bank was likely to demand a reduction in the group's borrowing levels which, in turn, would have an impact on the type of work for which they could compete. A reduction in turnover and the group's credit rating would result in Interclass being removed from the tender lists of many of their major public sector clients.

75. Mr Robertson submitted that even if the Step 3 penalty was reduced to the Step 1 figure these difficulties would remain and that there was a real risk of the group being forced into administration. But I think it is useful to review the CAT's decision on financial hardship by reference to the grounds on which it was made and then to consider whether the reduction in penalty to £202,000 calls for any modification in that position.

76. The evidence from Mr Jones concentrated on the group financial statements for the year ending 31st October 2008. In that year Interclass posted a net loss after tax of £72,893. Net current assets stood at £968,714 and shareholders' funds at £1.231m. But the OFT had also taken into account that directors' remuneration had risen to

£481,451 from £186,049 in 2007 in order to meet bonuses that were contractually due and to fund a significant pension contribution. For these reasons the CAT was not persuaded that a case of financial hardship had been made out on the basis of the 2008 financial statements.

77. But it also took into account the draft 2009 financial statements which show a net loss for the year of £347,250; net current assets of £626,262; and shareholders' funds of £883,936. In the same year directors' remuneration fell back to its pre-2008 level at £183,384. On the basis of its financial performance for 2009 which the CAT described as poor, a further 20% reduction in penalty was applied on grounds of financial hardship.

78. Mr Robertson made a number of points about the reasons for the increased payments to directors in 2008 but these seem to me to be largely irrelevant. The CAT was obliged to have regard to the group's financial position at the time when it calculated the penalty and to decide in the light of those figures whether a case of financial hardship had been made out. This is exactly what it did by reference to the 2009 financial statements. I can see no error of principle in that particularly when one takes into account the statement in the directors' report that the bank is currently satisfied with the company's financial performance and that the directors do not think there is any risk of the overdraft facilities being withdrawn.

79. Since we are being asked to review and re-exercise this discretion, it is also relevant to consider the group's up-to-date financial position. Provision was made for the entire fine of £324,000 in the group financial statement for the year ending 31st October 2010 in which there was a net loss of £244,599. Net current assets amounted to £562,879 and shareholders' funds to £639,337. Similar figures are recorded for 2011 but the group in that year made a net profit of £20,113.

80. There is nothing in these figures which should cause us to differ from the CAT's treatment of the issue of financial hardship in relation to the fines which it imposed. But the reduction of those fines to the Step 1 figure obviously requires us to re-consider whether there is any justification for applying even the 20% reduction to the £202,000 of penalty which remains after the reduction for compliance and the acceptance of the Fast Track Offer.

81. In my judgment there is not. If, as I consider, the appeal against the CAT's treatment of financial hardship must fail there can be no justification for reducing further the £202,000 figure. If £324,000 was an affordable penalty so is £202,000. The position might be different if there had been a significant downturn in the group's financial position since 2009 but the financial statements do not support that. The directors' report for 2011 continues to record that the bank is currently satisfied with group performance which has returned to profit despite having provided for the fine in the previous year.

82. I would therefore reject the appeal on the issue of financial hardship but allow it in relation to the multiplier. As a consequence, I would substitute for the figure of £324,000 a total fine of £202,000 or £101,000 for each infringement. In these circumstances, it is unnecessary to consider the other grounds of appeal which cannot produce a better outcome for the appellants.

Lady Justice Hallett :

83. I agree.

The Chancellor of the High Court :

84. I also agree.