



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

Case No: 1337/1/12/17

Pursuant to rule 14 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) (the “Rules”) the Registrar gives notice of the receipt of an appeal on 20 December 2019 under section 46 of the Competition Act 1998 (the “Act”), by FP McCann Limited (“FP McCann”) against a decision of the Competition and Markets Authority (the “CMA”) dated 23 October 2019 in Case 50299: *Supply of products to the construction industry (pre-cast concrete drainage products)* (the “Decision”).¹ FP McCann is represented by Pinsent Masons LLP, 30 Crown Place, London EC2A 4ES (reference: Alan Davis and Paul Williams).

In the Decision, the CMA found that FP McCann had committed a single and continuous infringement of the Chapter I prohibition contained in section 2 of the Act and Article 101 of the Treaty on the Functioning of the European Union between 6 July 2006 and 13 March 2013 by participating in an agreement or a concerted practice which had as its object the prevention, restriction or distortion of competition in relation to the supply in Great Britain of certain pre-cast concrete drainage products. The CMA imposed a penalty of £25,449,676 on FP McCann.

In summary, FP McCann’s principal grounds of appeal are as follows:

1. As concerns the CMA’s findings on the implementation of the alleged infringement:
 - (a) The CMA erred in law in failing to give adequate reasons.
 - (b) To the extent that the CMA found FP McCann implemented the alleged infringement, it erred in fact.
2. The decision to impose the maximum penalty in this case was an unlawful breach of the CMA’s statutory duty to properly assess the penalty against the statutory maximum in each case. The CMA erred in law:
 - (a) by applying its purported statutory guidance as to the appropriate amount of a penalty dated 18 April 2018 (“the Guidance”). The Guidance is *ultra vires* s.38 of the Act, void and of no effect in that it abrogates the CMA’s statutory duty properly to consider the level of a penalty against the statutory maximum in each case; and/or
 - (b) because the Decision was inconsistent with the aforesaid statutory duty in this case.
3. As concerns the implementation and/or market effects of the alleged infringement:
 - (a) The CMA erred in law in treating a lack of implementation and/or market effects as irrelevant to penalty. These were substantial factors that justified a lower fine, since an infringement which is in fact implemented is necessarily more serious than one which is not (or is to a lesser extent).
 - (b) The CMA erred in fact:
 - (i) to the extent that it found that the alleged infringement was implemented by FP McCann and/or

¹ A non-confidential version of the Decision is available on the CMA’s website: <https://www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-civil-investigation>

- (ii) in failing to accept FP McCann's representations that the alleged infringement did not have an effect on the market for the products.
 - (c) In the premises, the CMA erred in law and/or in the exercise of its discretion in selecting the maximum starting point of 30% of FP McCann's relevant turnover at step 1 of the Guidance.
4. The CMA erred in law and/or in the exercise of its discretion in the application of steps 1 and 2 of the Guidance by failing to give adequate weight to FP McCann's real commercial situation during the Relevant Period.
 5. The CMA failed to make adequate allowance for factors mitigating the penalty:
 - (a) As concerns the length of the CMA's investigations, the CMA
 - (i) erred in law in deciding that its own unreasonable delay during an investigation was incapable of constituting a mitigating factor; and
 - (ii) erred in fact in deciding the length of its investigations was reasonable.
 - (b) The CMA erred in fact and/or in law and/or in the exercise of its discretion in making an allowance of only 5% for FP McCann's cooperation during its investigations.
 - (c) The CMA erred in fact and/or in the exercise of its discretion in making no allowance for FP McCann's competition law compliance programme.
 6. The CMA erred in law in assessing the proportionality of the penalty:
 - (a) In providing inadequate reasons; and/or
 - (b) By failing to take into account the fact that a large part of FP McCann's turnover in the business year preceding the Decision was the result of acquisitions after the end of the Relevant Period. Further and/or alternatively, the CMA contravened the principle of equal treatment.
 7. The CMA erred in law in failing to reduce the amount of the penalty it had proposed despite withdrawing aspects of its provisional case.

As regards the relief sought, FP McCann invites the Tribunal:

1. To set aside the Decision insofar as it contains a finding that FP McCann implemented the alleged infringement.
2. To remit the question of penalty to the CMA to consider following the adoption by the CMA and approval by the Secretary of State of lawful Guidance under s.38 of the Act.
3. Further and/or alternatively, to retake the Decision on the amount of the penalty imposed on FP McCann.
4. Further and/or alternatively, to vary the Decision on the amount of penalty imposed on FP McCann.
5. To grant such further or other relief as the Tribunal thinks fit.

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, Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP, so that it is received within **three weeks** of the publication of this notice.

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

Charles Dhanowa OBE, QC (Hon)

Registrar

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