



Neutral citation [2010] CAT 2

IN THE COMPETITION
APPEAL TRIBUNAL

Cases: 1114-1115/1/1/09
1117-1139/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

25 January 2010

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
VIVIEN ROSE
LORD CARLILE OF BERRIEW Q.C.

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) KIER GROUP PLC
(2) KIER REGIONAL LIMITED

-v-

OFFICE OF FAIR TRADING

CREST NICHOLSON PLC

-v-

OFFICE OF FAIR TRADING

(1) GF TOMLINSON GROUP LIMITED
(2) GF TOMLINSON BUILDING LIMITED

-v-

OFFICE OF FAIR TRADING

(1) GMI CONSTRUCTION HOLDINGS PLC
(2) GMI CONSTRUCTION GROUP PLC

-v-

OFFICE OF FAIR TRADING

BALLAST NEDAM NV

-v-

OFFICE OF FAIR TRADING

(1) QUARMBY CONSTRUCTION COMPANY LIMITED
(2) ST JAMES SECURITIES HOLDINGS LIMITED

-v-

OFFICE OF FAIR TRADING

(1) DURKAN HOLDINGS LIMITED

(2) DURKAN LIMITED

(3) CONCENTRA LIMITED

-v-

OFFICE OF FAIR TRADING

AH WILLIS AND SONS LIMITED

-v-

OFFICE OF FAIR TRADING

(1) SOL CONSTRUCTION LIMITED

(2) BARKBURY CONSTRUCTION LIMITED

-v-

OFFICE OF FAIR TRADING

NORTH MIDLAND CONSTRUCTION PLC

-v-

OFFICE OF FAIR TRADING

(1) BARRETT ESTATE SERVICES LIMITED

(2) FRANCIS CONSTRUCTION LIMITED

-v-

OFFICE OF FAIR TRADING

ISG PEARCE LIMITED

-v-

OFFICE OF FAIR TRADING

(1) BOWMER AND KIRKLAND LIMITED

(2) B&K PROPERTY SERVICES LIMITED

-v-

OFFICE OF FAIR TRADING

(1) GAJ CONSTRUCTION LIMITED

(2) GAJ (HOLDINGS) LIMITED

-v-

OFFICE OF FAIR TRADING

CORRINGWAY CONCLUSIONS PLC

-v-

OFFICE OF FAIR TRADING

(1) RENEW HOLDINGS PLC

(2) ALLENBUILD LIMITED

-v-

OFFICE OF FAIR TRADING

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

-v-

OFFICE OF FAIR TRADING

- (1) THOMAS VALE HOLDINGS LIMITED**
(2) THOMAS VALE CONSTRUCTION PLC

-v-

OFFICE OF FAIR TRADING

- (1) SICON LIMITED**
(2) JOHN SISK & SON LIMITED

-v-

OFFICE OF FAIR TRADING

- (1) G&J SEDDON LIMITED**
(2) SEDDON GROUP LIMITED

-v-

OFFICE OF FAIR TRADING

- (1) INTERCLASS HOLDINGS LIMITED**
(2) INTERCLASS PLC

-v-

OFFICE OF FAIR TRADING

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

-v-

OFFICE OF FAIR TRADING

HOBSON AND PORTER LIMITED

-v-

OFFICE OF FAIR TRADING

APOLLO PROPERTY GROUP SERVICES LIMITED

-v-

OFFICE OF FAIR TRADING

GALLIFORD TRY PLC

-v-

OFFICE OF FAIR TRADING

RULING ON THE FUTURE COURSE OF THE PROCEEDINGS

APPEARANCES

Mr. Aidan Robertson Q.C. (instructed by McCormicks) appeared on behalf of GMI and Construction Holdings plc and GMI Construction Group plc.

(instructed by Boyes Turner) appeared on behalf of Barrett Estate Services Limited and Francis Construction Limited.

(instructed by Watson Burton) appeared on behalf of GAJ Construction Limited, GAJ (Holdings) Limited, G&J Seddon Limited, Seddon Group Limited, Interclass Holdings Limited, Interclass plc, JH Hallam (R&J) Limited, JH Hallam (Contracts) Limited and Hobson and Porter Limited.

Mr. Aidan Robertson Q.C. (instructed by JH Powell & Co) appeared on behalf of GF Tomlinson Group Ltd and GF Tomlinson Building Limited.
and Ms Sarah Abram

Ms Bernadine Adkins (instructed by Wragge & Co) appeared on behalf of Thomas Vale Holdings Limited and Thomas Vale Construction Plc.

Mr. Christopher Vajda Q.C. (instructed by CMS Cameron Mckenna) appeared on behalf of Ballast Nedam NV.

Mr. George Peretz (instructed by DLA Piper UK) appeared on behalf of Renew Holdings Plc, Allenbuild Limited, Robert Woodhead (Holdings) Limited and Robert Woodhead Limited.

Ms Kassie Smith (instructed by Pinsent Masons) appeared on behalf of Galliford Try Plc.

Ms Marie Demetriou (instructed by Ashurst) appeared on behalf of Crest Nicholson Plc.

Mr. Mark Brealey Q.C. (instructed by Simmons & Simmons) appeared on behalf of Kier Group plc and Kier Regional Limited.

Mr. Mark Clough Q.C. (instructed by Addleshaw Goddard LLP) appeared on behalf of Quarmby Construction Company Limited and St. James Securities Holdings Limited.

Mr. Mark Hoskins Q.C. (instructed by Jones Day) appeared on behalf of Durkan Holdings Limited, Durkan Limited and Concentra Limited.

Mr. Paul Harris (instructed by Nabarro) appeared on behalf of Corringway Conclusions plc.

Mr. Josh Holmes (instructed by DLA Piper UK) appeared on behalf of ISG Pearce Limited.

Mr. Rhodri Thompson Q.C. (instructed by Browne Jacobsen LLP) appeared on behalf of Sol Construction Limited, Barkbury Construction Limited and North Midland Construction Plc.

Mr. Thomas de la Mare (instructed by Pinsent Masons LLP) appeared on behalf of Apollo Property Group Services Limited.

Mr. Thomas Sharpe Q.C. (instructed by Shepherd and Wedderburn) appeared on behalf of Bowmer and Kirkland Limited and B&K Property Services Limited.

(instructed by Mayer Brown International) appeared on behalf of Sicon Limited and John Sisk and Son Limited.

Mr. Matthew Cook (instructed by Field Seymour Parkes) appeared on behalf of AH Willis.

Mr. David Unterhalter, S.C. and Mr. Daniel Beard and Ms. Kelyn Bacon (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

THE PRESIDENT:

1. There are one hundred and three addressees of an infringement decision by the Office of Fair Trading taken on 21 September 2009. This decision, which runs to nearly two thousand pages, results in fines being imposed on those addressees totalling £129.2 million (after making allowance for reductions for leniency and other matters). Twenty five of the addressees have appealed; six of them have appealed both liability and penalty; the remainder have appealed in relation to penalty only.
2. So far as the case management of these appeals is concerned, we have had the benefit of extremely helpful written and oral submissions from the OFT and also from the appellants. The issues today are: how to manage the appeals effectively, and by reference to what timetable. One specific issue emerged between the appellants (or the vast majority of them) and the OFT. The OFT felt that so far as the penalty appeals are concerned, certain points of legal principle of general application could usefully be identified and disposed of by the Tribunal as preliminary issues, with a view to shortening and simplifying the disposal of those appeals. The majority of the appellants considered that few, if any, points of general principle actually arise which are not dependent on the individual facts of the specific cases.
3. The Tribunal, although originally attracted by the prospect of simplification in that way, has come to the conclusion that the appellants (or the vast majority of them) are right in saying that increased costs and delay are likely to be the result of trying to identify and decide individual points of principle for a number of cases. Therefore in our view each case will need to be separately heard and resolved in its entirety. Logistically it will also be necessary for the Tribunal to split the cases between three panels. This is necessary in order to ensure that the appeals can be disposed of fairly and within a reasonable time, ensuring that proper attention is paid to each of the cases.
4. A further difference has emerged between the OFT and the appellants. Mr. Unterhalter SC, who appeared on behalf of the OFT, has stated that there is only a small case team available at the OFT to process these appeals. In particular, he states that there is only one key person who has been responsible for the work on each of the penalty appeals i.e. one person for all the penalty appeals. This, Mr. Unterhalter said, means that the

Tribunal should not (as it has expressed a wish to do) list two penalty-only appeals in different courtrooms at the same time for an oral hearing. Mr. Unterhalter also submits that for much the same reasons the Tribunal should not hear a penalty-only appeal at the same time that a liability appeal is running in one of the other courts: in particular because there is not a sufficiently large team at the OFT to enable the key people to be available in court in each case.

5. The Tribunal in no way underestimates the logistical task which the OFT must undertake in defending these appeals, both in relation to the defences which must be filed and the skeleton arguments which must be prepared and also, of course, in relation to the preparation for the hearings. However, this is simply a factor of there being, in effect, one hundred or so different decisions taken at the same time in relation to different addressees. One must say that in view of the size of the task one can only be grateful that there are merely twenty five appellants.
6. However, the Tribunal has to ensure, so far as it can, that all the cases are heard fairly and expeditiously and we consider that the OFT's suggestion that the hearings be conducted in a linear fashion thereby extending those hearings into the autumn of this year is not appropriate in this context. Nor is it appropriate, in our view, to have one Tribunal panel constituted to hear all twenty five penalty appeals as was also suggested.
7. As for the issue of different appeals being heard in the Tribunal's two courtrooms at the same time, this is necessary in order to ensure that the hearings are completed within what we consider to be a reasonable time to enable the appeals themselves to be resolved with reasonable expedition. We consider that in the time between now and the proposed dates for the hearings, which we have set out in a chart for the benefit of the parties, there will be adequate opportunity for the two key people in the OFT case team referred to by Mr. Unterhalter, to share some of their key knowledge with other OFT personnel, as well as outside counsel. We note that there are several highly competent and able outside counsel already instructed. The time available between now and then should ensure that persons of an appropriate level of responsibility and knowledge will be able to be present in court on behalf of the OFT so as to ensure that proper instructions and clarifications can be given to counsel as and when necessary.

8. Further, given that the penalty-only oral hearings are going to be very short in any event, (we envisage a time limit in those appeals in the order of thirty minutes for each of the parties) we cannot suppose that there will in practice be the difficulties which Mr. Unterhalter now apprehends; the vast majority of submissions will have been already put in writing by the parties. In addition there will be an opportunity for each party to see the transcript of all the hearings at an early stage and thereafter to make any further brief written submissions which are regarded as essential.

9. In those circumstances we have decided to adhere to the plan for the oral hearings which is set out in the document which was handed down at the beginning of today's hearing. Of course, there will be some movement in that because, as I have already indicated, there is just a notional time of two days indicated there for each of the appeals on liability. Those periods are likely to change as matters develop and the precise hearing times allowed for the liability cases will have to be determined by the Tribunal panel constituted to hear those cases as a matter of their own individual case management, although we do envisage if at all possible completing the hearings within the three week window that is indicated in the chart to which I have referred.