

Deconstructing Construction: Lessons from the CAT's Judgments

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Overview of the *Construction* Judgments

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Headline points



- 25 appeals in *Construction bid rigging*
- 9 judgments
- 4 liability appeals succeeded in whole or in part
- Aggregate fines under appeal: ~ £80m
- Aggregate fines as varied: ~ £13.5m

Headline points (2)



- 3 appeals in *CRF* (penalty only)
- 1 judgment
- Aggregate fines under appeal: ~ £39m
- Aggregate fines as varied: ~ £8m

- Were the infringements made out?
- Appreciability under the 1998 Act
- Concept of an “undertaking”
 - Role of an independent contractor
 - Whether parent company exercised “decisive influence” such as to be liable for the infringement of a subsidiary

Were the infringements made out?



- Documentary evidence ambiguous
- Account given by leniency applicant employees inconsistent with appellant witnesses
- OFT's reliance on transcripts of interviews it had conducted heavily criticised

“The OFT’s decision not to lodge witness statements in support of its case caused us some concern, as we made clear at the outset of the hearing in this appeal. The OFT was asking us to uphold a finding of infringement – for which it had imposed a fine of over £3 million – on the basis of a transcript of an interview with a person who was apparently not the person who had written the notes on the key contemporaneous document. ...

The significance of the failure to produce a witness statement is two-fold. First, Mr Goodbun [of Mansell] has not been pressed about any of his answers – his comments in the interview in 2007 appear to have been simply taken at face value throughout the investigation and this appeal. If, once the appeal had been lodged, the OFT had gone back to Mr Goodbun to take a witness statement they may well have filled in many of the gaps that currently exist in the account of what happened....

The second disadvantage of relying on an interview transcript is that Mr Goodbun’s evidence has not been tested by cross-examination, a process which might also have generated a better understanding of the strength of the case against Durkan...”

Other liability issues



- Appreciability – *North Midland*
- The concept of an undertaking:
 - Freelance contractors – *Willis*
 - “decisive influence” – *Durkan*

Penalty issues – background



- (“simple”) cover pricing: context
- OFT’s penalty guidance and the CAT’s role

Penalty issues (2)



- Step 1 – starting point of 5%
- Step 1 – appropriate year of “relevant turnover”
- Step 1 – “relevant turnover” itself

- Step 3 – deterrence uplift: the MDT
- Guidance, para 2.11:
 - “adjustment” to the figure reached after steps 1 and 2
 - Specific and general deterrence
 - “Case by case” approach to each infringing undertaking

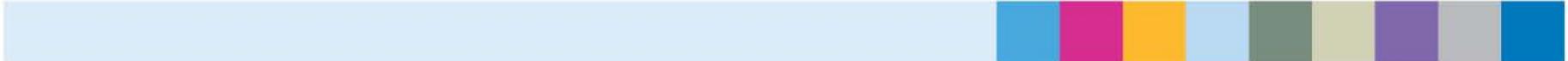
- OFT's application of MDT criticised:
 - Why would 0.75% of worldwide turnover produce a minimum deterrent?
 - “Far too blunt an instrument” to achieve deterrence in individual cases
 - Inappropriate focus exclusively on turnover
 - Resulted in disproportionate penalties – need to strike a “fair balance” between seriousness/culpability and deterrence

- But
 - use of MDT not an alteration of guidance
 - nothing to stop OFT using a mechanism to assist it in making an adjustment, so long as resulting figures are subject to individual appraisal
- NB CAT's re-calculations do not throw much light on how they were arrived at

Miscellaneous issues



- Comparison with penalties in other contexts
- Limitation
- Discrimination arguments
- Financial hardship



- Case selection and resource allocation
- Evidence and procedure
- Fining policy - the Holy Grail of non-discrimination and proportionality

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