Neutral citation [2011] CAT 10

**IN THE COMPETITION APPEAL TRIBUNAL**

Cases No: 1115/1/1/09
1126/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

15 April 2011

Before:

LORD CARLILE OF BERRIEW Q.C.
(Chairman)
ANN KELLY
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

**CREST NICHOLSON PLC**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

**ISG PEARCE LIMITED**

Appellant

- v -

**OFFICE OF FAIR TRADING**

Respondent

Heard at Victoria House on 2 and 5 July 2010

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**JUDGMENT**

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## APPEARANCES

Miss Marie Demetriou (instructed by Ashurst LLP) and Mr. Nigel Parr (of Ashurst LLP) appeared for the Appellant Crest Nicholson PLC.

Mr. Paul Lasok Q.C. and Mr. Josh Holmes (instructed by DLA Piper UK LLP) appeared for the Appellant ISG Pearce Limited.

Mr. Daniel Beard and Mr. Tony Singla (instructed by the General Counsel, Office of Fair Trading) appeared for the Respondent.

## TABLE OF CONTENTS

## I. INTRODUCTION

1. On 21 September 2009, the Office of Fair Trading ("OFT") published a decision under the Competition Act 1998 ("the 1998 Act") entitled "Bid rigging in the construction industry in England" ("the Decision").[1] The Decision found that, between 2000 and 2006, 103 undertakings had been involved in bid-rigging of construction contracts, infringing section 2(1) of the 1998 Act (the "Chapter I prohibition"). Penalties were imposed on those undertakings found to have infringed the Chapter I prohibition.[2]

2. Pearce Construction (Midlands) Limited ("Pearce") is a wholly owned subsidiary of ISG Pearce Limited ("ISG Pearce"). From 2000 until 31 January 2003, Pearce's and ISG Pearce's ultimate parent company was Crest Nicholson PLC ("Crest Nicholson"). On 31 January 2003, Pearce and ISG Pearce ceased to be subsidiaries of Crest Nicholson, following a management buy-out of ISG Pearce.[3]

3. According to the Decision, Pearce was found to have colluded with other contractors in relation to a bid relating to the refurbishment and extension to Wattville Thomas J&I School in Handsworth ("Infringement 75"). The return date for tenders in relation to this particular project was 18 September 2001.

4. The OFT's general approach in the Decision was to address the Decision to, and impose a penalty on, the "undertaking directly involved in the infringement", together with that undertaking's ultimate parent company at the time of the infringement. However, the OFT concluded in relation to Pearce that, at the time it was bidding for the tender that was the subject of Infringement 75, Pearce was

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1 For the purposes of this Judgment, references to the Decision are in the following form: "Decision/II.10-16 (p. 36)", where the first reference (after "Decision/") is to the relevant paragraph numbers, and the bracketed reference to the equivalent page number(s). This example thus refers to paragraphs II.10 to 16 of the Decision, at page 36.

2 The manner in which the OFT calculated the penalties imposed on those undertakings is described at Decision/VI.4-VI.665 (p. 1628-1839) and is summarised in the Tribunal's judgment in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 at paragraphs 25 to 67.

3 Pearce and ISG Pearce are now subsidiaries of ISG plc, although Pearce is now a dormant company. The Decision was not addressed to ISG plc, as it did not form part of the same economic entity as Pearce and ISG Pearce at the relevant time.

acting under the terms of an undisclosed agency agreement with ISG Pearce ("the Agency Agreement").[4] ISG Pearce was therefore the undisclosed principal involved in this tender process. Accordingly, the OFT concluded as follows at Decision/II.1022 (p184):

> "The OFT is holding [ISG Pearce] liable…as the undisclosed principal of Pearce and, therefore, because it was directly involved in the relevant Infringement."

5. The OFT further concluded that Pearce, ISG Pearce and Crest Nicholson formed part of the same undertaking at the time of the infringement, and that the OFT was entitled to hold them jointly and severally liable for Pearce and ISG Pearce's participation in the infringement (Decision/II.1019 (p. 183)). A penalty of £5,188,846 was imposed in respect of the infringement. Crest Nicholson's liability for the penalty was reduced by 15% following its admission of liability for the infringement, so that it remains liable for the amount of £4,369,555. Pearce and ISG Pearce remain liable for the entirety of the penalty of £5,188,846 since these companies made no admission of liability.

6. On 18 November 2009, Crest Nicholson appealed the Decision as regards the penalty imposed on it. On 23 November 2009, ISG Pearce appealed the Decision both as regards liability for Infringement 75 and the amount of the penalty imposed on it.

*Overview of the grounds of appeal*

7. ISG Pearce's liability appeal was limited to a single ground, namely that the OFT erred in concluding that Pearce was an agent for ISG Pearce, and breached the principle of equal treatment or otherwise erred by (i) including ISG Pearce in the undertaking responsible for the infringement; and (ii) failing to limit liability in accordance with the approach followed in Decision/VI.381 (p. 1714).[5]

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[4] The Agency Agreement was entered into between C. H. Pearce & Sons Plc (now ISG Pearce) and W. A. Cox (Evesham Ltd) (now Pearce) in October 1987.

[5] Decision/VI.381 (p. 1714) provided that, where a penalty had been imposed on a party which, at the time of the Decision, constituted two separate undertakings, the penalty imposed on each undertaking would be capped at 10% of that undertaking's total turnover in the most recent business year preceding the Decision.

8. ISG Pearce and Crest Nicholson (together, "the Appellants") raised the following main grounds of appeal as regards penalty:

(a) The OFT erred in law or acted unreasonably in its selection of the relevant year of turnover at Step 1 (and, in the case of Crest Nicholson, at Step 3) of the penalty calculation.

(b) The OFT's application of the minimum deterrence threshold ("MDT") at Step 3 of the penalty calculation was unlawful because it infringed the principle of equal treatment, was disproportionate, unfair and/or failed to have regard to the OFT's penalty guidance. ISG Pearce submitted in particular that the OFT erred in imposing a single penalty on ISG Pearce, Pearce and Crest Nicholson set by reference to their combined turnovers coupled with joint and several liability.

(c) As regards the 15% reduction in penalty granted to Crest Nicholson as a result of its admission of liability:

i. Crest Nicholson submitted that, by failing to grant it a greater reduction in penalty due to its objectively different position, the OFT acted in breach of the principle of equal treatment and failed to take proper account of the judgment and order of Cranston J in *Crest Nicholson plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin).

ii. ISG Pearce submitted that the OFT erred in adjusting the penalty applicable to ISG Pearce and Pearce by reason of Crest Nicholson's late admission.

(d) The penalty imposed by the OFT was in breach of the principles of equal treatment and proportionality and was excessive. As part of this ground of appeal, ISG Pearce submitted that the OFT had erred in its assessment of the seriousness of the infringement and was wrong to choose a starting point percentage of 5%.

9. On 23 April 2010 the Tribunal made an Order granting each Appellant permission to appear in the other's appeal. On 7 May 2010, ISG Pearce filed written observations on the penalty issues arising in Crest Nicholson's appeal, in support of the grant of relief sought by Crest Nicholson. On 14 May 2010, Crest Nicholson filed written observations on the liability issue arising in ISG Pearce's appeal, in support of the grant of relief sought by the OFT. ISG Pearce filed a reply to those observations on liability on 21 May 2010. The main hearing in these proceedings took place on 2 and 5 July 2010.

*Summary of the Tribunal's conclusions*

10. For the reasons set out in this judgment, we dismiss ISG Pearce's appeal on liability, but have upheld certain of the Appellants' grounds of appeal on penalty. We have imposed a revised penalty of £950,000, for which the Appellants are jointly and severally liable, save that Crest Nicholson's liability for the penalty is reduced by 20%.

## II. LIABILITY OF ISG PEARCE FOR INFRINGEMENT 75

*The parties' submissions*

11. ISG Pearce did not argue that the OFT *could not* have found it liable for Infringement 75 as the intermediate parent company of Pearce. Indeed, it accepted as much in its Notice of Appeal (para 2.26). Rather, ISG Pearce complained of discriminatory treatment. Whereas other intermediate parent companies were excluded from the scope of the investigation (the OFT pursuing instead only the infringing subsidiary and the ultimate parent company), ISG Pearce was included as an addressee of the Decision.

12. ISG Pearce submitted that the key issue between it and the OFT was whether or not the existence of the Agency Agreement between ISG Pearce and Pearce was sufficient to justify the differential treatment of ISG Pearce by comparison with other intermediate parent companies. ISG Pearce submitted that it was not, principally because the Agency Agreement existed for a technical purpose only

(i.e., in order to minimise auditing requirements and reduce auditing fees) and ISG Pearce was in no different a position – as a matter of substance – from any other intermediate parent company.

13. ISG Pearce submitted that the Agency Agreement did not in any way change the way in which Pearce continued to operate as an independent company, with its own separate board and management team, assuming the financial and commercial risk in relation to its business in the West Midlands. ISG Pearce relied on the witness evidence of its current and former finance directors, Mr. Timothy Leigh and Mr. Brian Herring, in this regard, in particular pointing to the board and management structure of Pearce, its budgetary responsibility, payroll and cash flow, and the fact that contracts (and arrangements with sub-contractors) were bid for, and entered into, in the name of Pearce only. ISG Pearce submitted that the evidence pointed to the existence of a parent / subsidiary relationship, and any control or influence exercised by ISG Pearce was in the context of such a relationship, and did not support a finding of an agency relationship.

14. ISG Pearce submitted that the OFT had adopted an overly formalistic approach to its analysis of the agency relationship between ISG Pearce and Pearce, and that the OFT was wrong to conclude that the existence of a formal written agency agreement means that the parties to that agreement form a single economic entity for the purposes of UK and EU competition law. Rather, this depends on the precise factual nature of the relationship; the existence of the Agency Agreement is no more than one element of the wider factual and economic context. ISG Pearce referred to the case law of the Court of Justice and, in particular, Case C-217/05, *Confederacion Espanola de Empresarios de Estaciones de Servicio v. Compania Espanola de Petroleos SA* [2006] ECR 1-11987 at paragraph 45:

> "…where the agreements concluded between a principal and its intermediaries confer on or allow them functions which, from an economic point of view, are approximately the same as those carried out by an independent economic operator, because they make provision for those intermediaries to assume the financial and commercial risks linked to sales or the performance of contracts entered into with third parties, such intermediaries cannot be regarded as auxiliary organs forming an integral part of the principal's undertaking, so that a clause restricting competition which they have entered into may be an agreement between undertakings for the purposes of [Article 101 TFEU] (see, to that effect, *Suiker Unie*, paragraphs 541 and 542)."

15. ISG Pearce also referred to the factors listed by the European Commission in its guidelines on vertical restraints ("the Vertical Guidelines")[6], and submitted that it is clear from these guidelines that the form of a written agreement between parties is not definitive. It argued that the evidence of Mr. Leigh and Mr. Herring demonstrates that the factors listed by the European Commission as determinative of an agency agreement (in particular at paragraph 16 of the Vertical Guidelines[7]) are not present in connection with the relationship between ISG Pearce and Pearce. In particular, ISG Pearce submitted:

(a) Pearce was genuinely providing the contract services itself and contracting, in its own name only, with all customers and suppliers;

(b) Pearce was responsible for the estimating, building, sub-contracting and financing of its business operations and was responsible on its own account for arranging and paying sub-contractors;

(c) Pearce owned and dealt with any land and/or assets in its own name;

(d) Pearce paid sub-contractors directly and customers paid Pearce directly and, as such, Pearce bore the risk of non-payment and for chasing customers for non-payment;

(e) Pearce was responsible to its customers for any liability or damage caused by its actions and any guarantee or indemnity from Pearce was provided as a parent company guarantee;

(f) Pearce was entirely responsible (financially and commercially) for its own marketing and customer relations and had its own dedicated marketing team;

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6 ISG Pearce referred both to the Vertical Guidelines published in 2000 (OJ C291, 13.10.2000, p.1) and to the revised version published in 2010 (OJ C130, 19.5.2010, p.1).

7 We were referred to this paragraph as it appears both in the 2000 and 2010 versions of the Vertical Guidelines.

(g) Pearce had a separate executive board, separate management and staff and made its own market-specific investment in the training of personnel and employment (or otherwise) of staff; and

(h) Pearce bore the commercial and economic risks of its business.

16. ISG Pearce submitted that the activities of Pearce were therefore entirely consistent with those of an autonomous entity. This, in ISG Pearce's submission, was supported by the fact that Companies House wrote to Pearce on 8 September 1997 (in a letter exhibited to Mr. Herring's first witness statement) requiring it to submit revised accounts on the basis that Pearce was "aquiring rights and occurring [sic] legal liability on its contracts". ISG Pearce contended that the true factual and economic nature of the Agency Agreement, properly understood, placed ISG Pearce in the same position as other intermediate parent companies in the Decision and, as such, ISG Pearce should not have been treated differently.

17. The OFT submitted (at para 7 of the Defence) that ISG Pearce's liability rests on two grounds: (i) ISG Pearce exercised decisive influence over Pearce; and (ii) ISG Pearce was the undisclosed principal of Pearce. Each of these constituted independent and self-standing bases for holding ISG Pearce liable. The existence of the agency relationship was not relevant to the finding of decisive influence, but was relevant to the question of whether ISG Pearce could be considered to have been directly involved in the infringement and thus treated as an addressee of the Decision.

18. The OFT submitted further that the effect of the agency relationship between ISG Pearce and Pearce was clear from the wording of the Agency Agreement. Although Pearce may have been ostensibly independent of ISG Pearce (in that it had its own board, management structure and bank account), this is irrelevant to the legal relationship between the parties established by clause 1 of the Agency Agreement:

> "The Company [here, ISG Pearce] hereby appoints the Agent [here, Pearce] and the Agent hereby accepts appointment as the agent of the Company for the sole purpose of carrying on on behalf of the Company in the name of the Agent the business of building contractors and property developers upon such terms and subject to such limitations as the parties may from time to time agree in writing."

19. The OFT submitted that it was entitled to conclude that ISG Pearce was in an objectively different position vis-à-vis its subsidiary from other indermediate parent companies. The Agency Agreement was of legal significance for holding ISG Pearce liable and an equivalent arrangement did not (as far as the OFT was aware) exist between any other parent and subsidiary addressees of the Decision. Further, failing to address the Decision to ISG Pearce would discriminate in favour of ISG Pearce and Pearce, as none of their turnover would have been taken into account for the purposes of the penalty calculation for Infringement 75. This was because the effect of the Agency Agreement was that turnover attributable to Pearce was held on behalf of ISG Pearce and reflected only in the statutory accounts of ISG Pearce.

20. Crest Nicholson, for its part, took issue with ISG Pearce's assertion – at paragraph 4 of its skeleton argument – that the Agency Agreement "had no factual, commercial or economic effect that was capable of differentiating the Appellant from other intermediate parents referred to in the Decision." Crest Nicholson submitted that this was inconsistent with the clear wording of the Agency Agreement, which provided in particular that:

(a) All business carried on by Pearce was carried on as agent for ISG Pearce;

(b) All assets owned or acquired by Pearce during the course of such business were held in trust for ISG Pearce;

(c) Pearce was precluded from carrying on business on its own account without ISG Pearce's consent;

(d) ISG Pearce indemnified Pearce in respect of all costs and liabilities incurred in the conduct of its business.

21. Crest Nicholson pointed to similar agreements within its corporate group that are now being unwound specifically because of their commercial and economic effects. The fact that Pearce carried on business transactions in its own name is not relevant; it is simply a feature of an undisclosed agency agreement, and the fact that the Agency Arrangement was undisclosed does not deprive it of its legal effect.

22. Both the OFT and Crest Nicholson submitted that ISG Pearce's reliance on the Vertical Guidelines and the case law of the Court of Justice was misplaced. The Vertical Guidelines delineate between those arrangements with intermediaries which might fall within Article 101 TFEU (because the intermediary is considered to be acting as an independent third party) and those which do not (because the principal and agent are found to be part of a single economic entity). Here, it was already clear that Pearce and ISG Pearce formed part of a single economic entity. Thus, the present case is not concerned with whether the criteria identified in the Vertical Guidelines are met, but rather whether the OFT was correct to treat ISG Pearce differently from other intermediate parent companies in the Decision.

23. ISG Pearce, in its reply to Crest Nicholson's observations in support of the OFT, submitted that those observations were too narrowly focused on the mere existence of the Agency Agreement, and ignored the reality of the relationship between ISG Pearce and Pearce. Of particular significance in this context was the fact that, at the time of entering into the Agency Agreement, ISG Pearce and Pearce were each carrying on a similar type of business, but in different regions (Pearce operated in the West Midlands, where ISG Pearce was not active). Accordingly, although the Agency Agreement made Pearce an agent for ISG Pearce, it did not prevent Pearce from continuing to carry on and develop its existing business in the West Midlands. Further, ISG Pearce submitted that the other contractual restrictions quoted by Crest Nicholson were purely formal in nature and lacking economic and commercial substance.

*The Tribunal's analysis and conclusion*

24. In our judgment, the OFT was entitled to find ISG Pearce liable for Infringement 75, given the undisputed conclusion that ISG Pearce had the ability to exercise decisive influence over Pearce at the relevant time (Decision/II.1017 (p. 183)). However, the gravamen of ISG Pearce's complaint is unequal treatment, as ISG Pearce claimed to have been treated differently from other intermediate parent companies in the Decision without objective justification.

25. It is common ground that the principle of equal treatment requires that those in a similar position be treated equally and those in a different position be treated differently (see *Crest Nicholson plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin) at paragraph 87).

26. It is also accepted that the OFT did treat ISG Pearce differently from other intermediate parent companies insofar as ISG Pearce was held liable for an infringement, whereas other intermediate parent companies were not (the OFT's general approach in the Decision was to pursue only the "undertaking directly involved in the infringement" together with that undertaking's ultimate parent company at the time of the infringement). The relevant question is whether there was a material objective difference between ISG Pearce and other intermediate parent companies such that the OFT was justified in addressing the Decision to ISG Pearce.

27. The objective difference identified by the OFT was the existence of an agency relationship between ISG Pearce and Pearce, which it considered was of legal significance and which did not exist (so far as the OFT was aware) as between any other parent and subsidiary found to have committed an infringement in the Decision.

28. We have considered the provisions of the Agency Agreement and the parties' suggested interpretations of that agreement. However, in so doing, we have not sought to compare the terms of the Agency Agreement with the illustrative criteria set out in the Vertical Guidelines. Those guidelines are aimed at the question of whether an agreement concluded between two companies can itself fall within the scope of the competition rules. It was unnecessary for the OFT to consider these criteria in this case, as it had already established that ISG Pearce was liable for the infringement as a result of its ability to exercise decisive influence over Pearce. Rather, we must consider whether any particular factor, or combination of factors, arising out of the Agency Agreement, establishes that ISG Pearce was in an objectively different position from other intermediate parent companies. We agree with Mr. Lasok Q.C., for ISG Pearce, that the differentiating factor must be something that is real and of substance.

29. We have considered carefully the evidence of Messrs Leigh and Herring (for ISG Pearce) and Mr. Kevin Maguire (Company Secretary of Crest Nicholson). We accept the explanation provided by ISG Pearce's witnesses as to the circumstances in which the Agency Agreement was put in place, namely to reduce the auditing requirements (and the accompanying expense) of the Crest companies. However, we are not satisfied that we should, as ISG Pearce's witnesses suggested we should, effectively ignore the existence of the Agency Agreement. Mr. Herring stated at paragraph 20 of his witness statement:

> "Any limits of authority imposed on [Pearce] by [ISG Pearce] did not arise as a result of the Agency Agreement, but existed in the context of the usual parent and subsidiary relationship. The Agency Agreement did not, in practice, affect the decision-making process of [Pearce]."

30. This is a view that cannot be sustained in light of the wording of the Agency Agreement, which appears to impose a clear limit on Pearce's authority. In particular, clause 3.6 of the Agency Agreement provides:

> "The Agent shall not save with the prior written consent of the Company which the Company may refuse in its absolute and unfettered discretion without assigning any reason therefor carry on any business of any description or incur any liability save as is necessary for or incidental to the responsible conduct of the Agency business."

31. We are satisfied from the evidence that the Agency Agreement had the effect of making Pearce the undisclosed agent of ISG Pearce. The factors listed by Crest Nicholson at paragraph 20 above support this finding, and we agree with the OFT's conclusion at Decision/II.1018 (p. 183):

> "…The OFT considers the fact that Pearce was able to bid on behalf of [ISG Pearce] for tenders for the provision of services, whilst having no turnover of its own, to be evidence of a principal and agent relationship whereby Pearce assumed no performance risk and received no financial reward for its agency activities."

32. The clearest evidence of the actual impact of the Agency Agreement can be found in the written representations submitted by Pearce on 14 July 2008 in response to the Statement of Objections. When the Statement of Objections was sent to Pearce on 16 April 2008, the OFT asked Pearce to provide it with updated turnover figures. The relevant part of Pearce's response stated as follows:

"**5 Turnover**

5.1 In its letter of 16 April 2000 to Andrij Jurkiw, the OFT has asked [Pearce] to provide it with updated details of its relevant turnover and total worldwide turnover between 1999 and 2006. The OFT already has copies of [Pearce] Directors' Reports and Accounts from 1 November 1999 to 30 April 2006 (see Documents 12313 to 12318). As set out in these reports, [Pearce] did not achieve any turnover during this period. Set out below, is the information requested by the OFT, including turnover for the year ending 1999 based on [Pearce] Directors' Reports and Accounts:

**Turnover Information for [Pearce]**

| Year Ending | Relevant Turnover | Total Turnover |
|---|---|---|
| 1999 | £0 | £0 |
| 2000 | £0 | £0 |
| 2001 | £0 | £0 |
| 2002 | £0 | £0 |
| 2003 | £0 | £0 |
| 2004 | £0 | £0 |
| 2005 | £0 | £0 |
| 2006 | £0 | £0 |

5.2 As set out in the SO, [Pearce] is a non-trading company. At the time of the alleged infringements, the ultimate parent company of [Pearce] was Crest Nicholson, to whom the SO has also been addressed. For relevant and total turnover information for Crest Nicholson, please refer to Crest Nicholson.

…

5.5 The OFT has also asked parties to confirm the total turnover information set out in the relevant company section of the SO. In the SO, the OFT quotes the total turnover information for Pearce Holdings Limited stating that the turnover for [Pearce] has, from 31 January 2003, been consolidated with Pearce Holdings Limited consolidated turnover. This is not correct. As set out above, [Pearce] had no turnover during this period. Consequently no [Pearce] turnover has been consolidated with the consolidated turnover of Pearce Holdings Limited."

33. It follows that the Agency Agreement had the immediate practical consequence that turnover attributable to Pearce was reflected only in the statutory accounts of ISG Pearce. We are satisfied from this, and the other provisions of the Agency Agreement (including those listed by Crest Nicholson at paragraph 20 above), that in both legal and economic terms Pearce acted on behalf of ISG Pearce. This clearly established an objective difference between ISG Pearce and other intermediate parent companies, such that the OFT was correct to address the Decision to ISG Pearce.

34. We were not assisted by Mr. Herring's reference to the letter received from Companies House, described at paragraph 16 above. The opinion of Leading Counsel referred to in that letter was directed at a different question, namely whether Pearce had infringed the status of a "dormant company" for the purpose of the Companies Act 1985. Further, the restatement of Pearce's accounts necessitated by the letter from Companies House in 1997, did not prevent Pearce from reporting zero turnover in its accounts in subsequent years (as can be seen from the information provided by Pearce to the OFT described at paragraph 32 above).

35. We agree with the OFT that there was a genuine avoidance issue here, as failure to address the Decision to ISG Pearce would have allowed ISG Pearce and Pearce to avoid having any of their turnover taken into account for the purpose of determining the penalty for Infringement 75, by virtue of the "accounting tool" of the Agency Agreement. Addressing the Decision to ISG Pearce prevented such avoidance and placed ISG Pearce and Pearce on the same footing as other companies directly involved in the infringement.

36. Accordingly, we conclude that it was appropriate for the OFT to take account of the consequences of the Agency Agreement when addressing the Decision to ISG Pearce as well as Pearce. For the OFT to have taken a different approach might itself have risked breaching the principle of equal treatment. An undertaking which receives the benefit of a particular corporate structure for one purpose (in the form of reduced auditing requirements) must accept the consequences of that structure for other purposes, including enforcement action by a competition authority.

## III. PENALTIES

37. We now turn to the Appellants' submissions in relation to the penalty imposed by the OFT in respect of Infringement 75 (summarised above at paragraph 8).

38. Certain of the Appellants' grounds of appeal on penalty have already been considered by the Tribunal in its composite penalty judgments in *Kier Group plc & Ors v. Office of Fair Trading* [2011] CAT 3 ("the Kier Judgment"), *G F Tomlinson Building Limited & Ors v. Office of Fair Trading* [2011] CAT 7 ("the Tomlinson

Judgment") and *Barrett Estate Services Limited & Ors v. Office of Fair Trading* [2011] CAT 9 ("the Barrett Judgment"). Where this is the case and where it is appropriate to do so, we have cited the reasoning in those judgments in support of our conclusions in this case.

39. We also agree with and adopt the Tribunal's conclusions at paragraphs 74 to 77 of the Kier Judgment regarding the nature of the Tribunal's jurisdiction to determine appeals against the imposition of a penalty by the OFT.

40. We agree too with the Tribunal's conclusion at paragraph 76 of the Tomlinson Judgment as regards the impact of a successful challenge by one Appellant to one aspect of the fining methodology on the other Appellant who has challenged the same aspect, but relies on arguments which we do not accept.

## (A) OFT'S SELECTION OF THE RELEVANT YEAR OF TURNOVER

*The Appellants' submissions*

41. The Appellants, in common with the majority of the companies who have appealed the Decision, challenged the OFT's use of turnover from the business year preceding the date of the Decision ("Pre-Decision Turnover") for the purposes of Step 1 of the penalty calculation, arguing that the OFT should have used instead turnover from the business year preceding the date when the infringement ended ("Pre-Infringement Turnover"). Crest Nicholson made very similar submissions in connection with the OFT's use of Pre-Decision Turnover at Step 3 of the penalty calculation, and we have considered these at paragraph 56 below.

42. The Appellants made the following specific submissions:

(a) The purpose of Step 1 of the penalty calculation is to determine the seriousness of the infringement, and the OFT is required by paragraph 2.9 of its guidance as to the appropriate amount of a penalty ("the 2004 Guidance") to take account of "…the real impact of the infringing activity of each undertaking on competition". The seriousness of the infringement is better

reflected by an undertaking's turnover at around the time the infringement occurred, rather than turnover at a future arbitrary point in time, at which stage the undertaking's size and position in the market is likely to have changed. Nor can the OFT assume that any benefit accrued to the undertaking as a result of the infringement is reflected in turnover derived many years after the infringement, nor has the OFT made any finding that such a benefit was accrued. The Appellants submitted, too, that the use of Pre-Infringement Turnover was consistent with the practice of the European Commission when calculating penalties for competition law infringements. Crest Nicholson submitted further that section 60 of the 1998 Act requires the OFT to follow the European Commission's approach in this regard.

(b) The OFT failed to have regard to its published guidance, which has always used Pre-Infringement Turnover at Step 1 of the penalty calculation. Whilst the guidance was amended to require the use of Pre-Decision Turnover at Step 5 of the penalty calculation, following the 2004 amendment of the Competition Act (Determination of Turnover for Penalties) Order 2000 ("the Turnover Order"), no such amendment was made to the methodology in Step 1. Had the OFT intended to change the turnover taken into account at Step 1 of the 2004 Guidance, it should have made that change explicit.

43. Crest Nicholson made three additional submissions in this regard:

(a) The OFT unlawfully changed its practice retrospectively. Infringement 75 took place in 2001, but the OFT imposed a penalty calculated in accordance with its practice from 2004 onwards. Crest Nicholson submitted that this was both in breach of Article 7 of the European Convention on Human Rights ("ECHR") and ran counter to the general presumption against retrospective rules.

(b) The OFT's approach was inconsistent with its approach to calculating penalties imposed on parties entering into early resolution agreements: in the

*Fuel Surcharges*[8], *Milk*[9] and *Tobacco*[10] cases, the penalties were based on Pre-Infringement Turnover.

(c) The OFT's approach forced it to make artificial assumptions of the parties' turnover, for example by recreating the structure of the group as it was at the time of the infringements in relation to companies now in separate ownership, which would not have been necessary it it had used Pre-Infringement Turnover. This was an interrelated point to ISG Pearce's submissions at paragraph 51(c) below.

*The OFT's submissions*

44. The OFT's submissions in relation to the relevant year of turnover have been set out in some detail by the Tribunal in the Kier Judgment, the Tomlinson Judgment and the Barrett Judgment, and we have taken these into account, together with the OFT's specific submissions in relation to these Appellants. The OFT's key submissions in response to the grounds put forward by these Appellants were that:

(a) The Appellants were wrong to suggest that the purpose of using a turnover figure at Step 1 is to reflect the effect of the infringement or the size of the market affected. Rather, because the infringements are by object, the OFT is not required to identify their effect on the market. The Appellants also ignored the role of selecting an appropriate percentage at Step 1, the application of the other steps in the 2004 Guidance and the OFT's overall exercise of its discretion in setting penalties. Further, the OFT is not required by section 60 of the 1998 Act to calculate penalties in the same manner as the European Commission. When issuing its penalty guidance, the OFT will have regard to the manner in which other competition authorities (including the European Commission) operate. Once this is

[8] OFT case CE/7691-06, Investigation into alleged price fixing of airline passenger fuel surcharges for long-haul passenger flights.

[9] OFT case CE/3094-03, Investigation into certain large supermarkets and dairy processors regarding retail pricing practices for certain dairy products.

[10] OFT Decision of 15 April 2010, Case CE/2598-03 - *Tobacco*.

established, the OFT's obligation is to act having regard to its own guidance, and it is not bound by the European Commission's approach.

(b) The Appellants were also wrong to suggest that the OFT had misdirected itself in its interpretation of the Turnover Order. The OFT did not contend that it was bound to set the Step 1 relevant turnover in line with the Turnover Order and/or by reference to Pre-Decision Turnover. Rather, it simply submitted that to do so is a plainly reasonable and rational approach, which also has the advantage of calibrating the deterrent effect of the penalty to recent levels of turnover.

(c) Contrary to Crest Nicholson's contention, Article 7 ECHR applies only to the maximum penalty that could have been imposed on the undertaking at the time of the infringement. The maximum penalty that could have been imposed on Crest Nicholson at the time of the infringement was 10% of its total turnover, and the penalty actually imposed does not exceed that cap by reference to Crest Nicholson's turnover at that time.

(d) The mere fact that the OFT was required to use proxy figures in relation to certain undertakings does not render its entire methodology unlawful. The use of proxy figures has been endorsed by the Court of Justice (Case C-76/06 P *Britannia Alloys & Chemicals Ltd v. Commission* [2007] ECR I-4405) and the proxies used in this case were appropriate.

*The Tribunal's analysis and conclusions*

45. In our judgment, the OFT was wrong to use Pre-Decision Turnover at Step 1 of the penalty calculation and should instead have used Pre-Infringement Turnover, as was its practice prior to May 2004. We agree with and adopt the Tribunal's conclusions at paragraphs 130 to 139 of the Kier Judgment in this regard, as well as the conclusions at paragraphs 106 to 110 of the Tomlinson Judgment in relation to the application of Article 7(1) ECHR. We have set out below our conclusions in relation to the specific arguments advanced by the parties in these appeals at paragraphs 41 to 44 above.

46. Step 1 of the penalty calculation is concerned with an assessment of the seriousness of the infringement which takes account of "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" (paragraph 2.5 of the 2004 Guidance). As the Tribunal noted at paragraph 132 of the Kier Judgment, there is a tension between the consideration of circumstances related closely in time to the infringement, and the use of turnover at the time of an infringement decision which could be wholly remote from those circumstances. Between the date of an infringement and the date of the decision, there could be many intervening and unconnected developments and changes in both the infringer's business and the market in question. Such tension is particularly acute in the circumstances of these Appellants, where the structure of the corporate group underwent substantial change after the infringement and before the Decision.

47. The 2004 Guidance did not make any material change to the OFT's approach to Step 1 and did not justify the use of Pre-Decision Turnover at that step of the penalty calculation. Whilst the 2004 Guidance makes clear that Pre-Decision Turnover is relevant at Step 5, we are satisfied that the 2004 Guidance did not introduce the use of Pre-Decision Turnover at Step 1. The OFT could not rely on the fact that the measure of turnover used at Steps 1 and 5 had previously been the same, nor was there any reason why the two measures of turnover needed to be the same, given that they perform different functions in the penalty calculation. We therefore agree with and adopt the conclusions of the Tribunal at paragraph 137 of the Kier Judgment.

48. We agree with and adopt the Tribunal's conclusion at paragraphs 109 to 110 of the Tomlinson Judgment that Article 7(1) ECHR does not preclude the imposition of a higher penalty by the OFT than could have been imposed at the time of the infringement, provided that the maximum penalty (the statutory cap imposed by the Turnover Order) that applied at the time of the infringement is not exceeded. As Mr. Beard correctly noted in his submissions for the OFT, "it makes no difference if

the process by which the penalty is ascertained has changed in the intervening period."[11]

49. We note that the European Commission calculates the "basic amount" of the fine by reference to Pre-Infringement Turnover. However, we do not consider that the OFT is required (by virtue of section 60 of the 1998 Act or otherwise) to bring its fining policy in line with that of the European Commission. We agree with the Tribunal's conclusion at paragraph 102 of the Tomlinson Judgment that there is a "relevant difference" between the UK and EU provisions in this regard, and that the Commission's fining guidelines do not supplant the OFT's statutory duty under section 38(8) of the 1998 Act to have regard to its own published guidance.

50. The Tribunal requested the OFT to provide the Pre-Infringement Turnover figures it had gathered from each party during the course of its investigation. These were provided by the OFT in January 2011. Both ISG Pearce and Crest Nicholson had provided Pre-Infringement Turnover figures to the OFT. However, the relevant Pre-Infringement Turnover figures provided by Crest Nicholson were stated only to be estimates (as it did not itself generate any turnover in the relevant market and it no longer had access to the relevant data for that year in respect of ISG Pearce and Pearce). We have therefore relied on the Pre-Infringement Turnover data provided by ISG Pearce, and will substitute this in our recalculation of the penalty. We note the oddity that this leads to the substitution of a higher figure than that originally applied by the OFT at Step 1, although in light of our conclusions at paragraphs 99 to 100 below, this is a matter of little consequence.

## (B) OFT'S APPLICATION OF THE MINIMUM DETERRENCE THRESHOLD AT STEP 3 OF THE PENALTY CALCULATION

*The Appellants' submissions*

51. The Appellants submitted that the OFT had erred in its application of the MDT at Step 3 of the penalty calculation, as follows:

[11] Transcript of Crest Nicholson hearing, page 37, lines 16-26.

(a) Paragraph 2.12 of the 2004 Guidance provides that the need to adjust the penalty at Step 3 "will be made on a case by case basis for each individual infringing undertaking". The Appellants submitted that the 2004 Guidance did not allow the OFT to apply a "blanket" adjustment across all addressees of the Decision. The MDT as applied by the OFT takes no account of the individual circumstances of each infringing undertaking.

(b) The application of an MDT set solely by reference to total turnover bears no relationship to its relevant turnover and renders otiose Steps 1 and 2 of the penalty calculation. The Appellants submitted that the OFT had ignored the wording of the 2004 Guidance, which refers to an "adjustment" to the penalty resulting from Steps 1 and 2, and had in fact "replaced" it with a new, entirely unrelated figure at Step 3. Crest Nicholson submitted that the OFT's approach disproportionately affects undertakings which happen to be part of a group with a large total turnover (even where that total turnover is entirely unrelated to the market in which the infringement took place) and is contrary to the case law of both the Tribunal in *Umbro & Ors v. OFT* [2005] CAT 22 (at paragraph 176) and the Court of Justice in Joined Cases 100 to 103/80, *SA Musique Diffusion Française and others v. Commission* [1983] ECR 1825. In the latter case, it was stated (at paragraph 121):

> "…the fixing of an appropriate fine cannot be the result of a simple calculation based on the total turnover. That is particularly the case where the goods concerned account for only a small part of that figure."

(c) ISG Pearce made a related submission, namely that the OFT erred in imposing a penalty on it based on the consolidated turnover of both ISG Pearce and Crest Nicholson, in circumstances where they are no longer in the same corporate group.[12] Where the relevant undertaking comprised several legal entities within the same corporate group, the OFT based its penalty calculations on the consolidated turnover of the ultimate parent company. It was submitted, however, that this approach was plainly

[12] ISG Pearce's submissions in this paragraph formed a separate ground of appeal in its Notice of Appeal. However, given that the use of the combined turnover of Crest Nicholson and ISG Pearce in the penalty calculation was primarily of relevance in connection with the application of the MDT, we have considered it under this head.

inappropriate where the separate legal entities are no longer in the same group, as ISG Pearce's penalty was based on turnover that is totally unrelated to its business or the size of its undertaking as it exists now. This produced a fine that was more than necessary for achieving deterrence and effective sanctioning. Crest Nicholson essentially repeated, in connection with Step 3, its submissions in connection with the use of Pre-Decision Turnover at Step 1.

(d) Both Appellants submitted that the OFT was wrong to draw support from the Tribunal's judgment in *Makers UK Limited v Office of Fair Trading* [2007] CAT 11 ("*Makers*"), as there are important differences between the circumstances of the two cases. Importantly, in *Makers*, the Tribunal approved the application of an MDT which was 0.75% of Makers' total turnover, and not, as was the case here, 0.75% of the total turnover of its ultimate holding company, Keller Group plc.

*The OFT's submissions*

52. The OFT rejected the Appellants' submissions in relation to the MDT, and maintained that its application of the MDT in the Decision was legitimate, proportionate and non-discriminatory. The OFT's response to very similar submissions by other appellants is set out in detail at paragraphs 150 to 163 of the Kier Judgment. Accordingly, although we have had full regard to the OFT's detailed submissions in relation to the MDT in these appeals, we have not summarised those submissions below, save in respect of specific challenges by these Appellants which were not considered in the Kier Judgment:

(a) The OFT rejected these Appellants' submission that it had adopted a "blanket" approach. The OFT did in fact consider the circumstances of individual parties, but identified no persuasive reasons for departing from a consistent application of its MDT methodology. None of the factors advanced by the Appellants (for example, the seriousness of the infringement, the lack of direct responsibility and lack of any need for deterrence) justify a lower MDT; instead they overlook the importance of

securing general (as well as specific) deterrence. For example, seriousness was taken into account as a factor at Step 1; the lack of direct involvement may be taken into account at Step 4. Nor should the Appellants benefit from a discount because the OFT only identified one infringement in the Decision. It would be unfair to differentiate at Step 3 on the basis of the number of infringements committed, in particular because of the consolidation and selection exercise which the OFT conducted during the administrative procedure.

(b) The OFT submitted that it had been correct to calculate the MDT by reference to the parties' combined group turnover. The point of the MDT is to ensure that the penalty imposed constitutes a sufficient deterrence, and it must therefore take into account the overall size of the undertaking concerned. Mr. Beard submitted that the Appellants' reference to *Musique Diffusion Française* was misplaced, as this was a case that was decided at a time before there was any meaningful guidance as to how the European Commission would apply penalties. The Court in that case identified other factors that the Commission should take into account, including relevant market turnover, but the Court explicitly stated that it was permissible, for the purpose of fixing the penalty, to have regard to the total turnover of the undertaking. As regards the parties' combined group turnover, the OFT pointed to the fact that ISG Pearce and Crest Nicholson were jointly and severally liable for the penalty imposed on them, and that penalty is proportionate to their combined group turnover.

*The Tribunal's analysis and conclusions*

53. We have had the benefit of reading the Tribunal's conclusions on the application of the MDT at paragraphs 164 to 186 of the Kier Judgment. We agree with and adopt those conclusions. The OFT's application of the MDT in the Decision had a particularly acute impact on the Appellants, inflating a fine of some £2,229 (after the application of Steps 1 and 2) to £5,461,944 (prior to the application of the Step 4 adjustments and the discount awarded to Crest Nicholson for its late admission of liability). In our view, in an attempt to achieve consistent treatment by applying

exactly the same Step 3 mechanism to all addressees of the Decision, the OFT failed properly to consider the individual circumstances of each addressee. Indeed, this case reveals the dramatic consequences of applying a formulaic and identical methodology. We consider this was an untenable approach given the very substantial penalties imposed. We have set out below our conclusions in relation to the parties' specific submissions in these appeals.

54. In our view, whilst there is nothing objectionable to the use of a percentage of total turnover to provide a provisional benchmark when calculating the Step 3 adjustment, such a mechanism must not be used as a substitute for an individual assessment of the case, and should not result in the imposition of a final penalty which is excessive and disproportionate. Where the OFT considers that it is appropriate to make an adjustment at Step 3, it must ensure that it gives proper consideration to all relevant factors, including proportionality, seriousness and culpability, as well as deterrence. We do not consider that the OFT's application of the MDT in relation to these Appellants satisfied these requirements, in particular because the OFT did not "stand back" after the application of the MDT to verify whether the resulting figure was proportionate in order both to punish the particular undertaking for the specific infringement and to deter it and other companies from further transgressions of that kind (see paragraph 166 of the Kier Judgment).

55. We agree with the Appellants that the OFT was wrong to determine the penalty on the basis of a fixed percentage of turnover, irrespective of the circumstances of the undertaking and the particular infringement. Notwithstanding Mr. Beard's submissions regarding the broader context of the Court of Justice's judgment in *Musique Diffusion Française*, we agree with the logic of the Court's conclusion in that case that an appropriate fine should not be exclusively determined by reference to total turnover. We also agree with the Tribunal's conclusion at paragraph 178 of the Kier Judgment that the Tribunal's decision in *Makers* was specific to its facts, and thus of limited precedent value.

56. Given our conclusion that it would not be appropriate to apply an uplift purely based on worldwide turnover, we do not need to consider the Appellants' submissions in relation to the artificiality of grouping together the Pre-Decision

Turnover of both ISG Pearce and Crest Nicholson, or Crest Nicholson's specific submission that the OFT should have used Pre-Infringement Turnover at Step 3. However, the particular circumstances of the Appellants – the separation of ISG Pearce and Pearce from Crest Nicholson's corporate group in 2003 – should have been taken into account by the OFT in considering whether an adjustment at Step 3 was appropriate and, if so, to what extent.

57. Given our conclusion that the OFT wrongly applied the MDT in the Decision, we have considered the appropriate Step 3 adjustment that should be made to the penalty imposed on the Appellants at Section IV below.

## (C) REDUCTION IN PENALTY FOR CREST NICHOLSON'S ADMISSION OF LIABILITY

58. Before turning to the parties' submissions in relation to this ground of appeal, it is appropriate to set out briefly some of the factual background to the OFT's treatment of Crest Nicholson during the course of its investigation.

*Factual background*

59. The factual background to this investigation, and to the OFT's treatment of Crest Nicholson in particular, is described in some detail in the judgment of Cranston J in *Crest Nicholson plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin) ("the Administrative Court Judgment"). That judgment describes how the OFT in this investigation employed a particular technique for the first time, known as the "fast track offer" ("FTO"), by which the OFT – having closed the leniency process – offered companies a reduction in penalty in exchange for an admission of liability in respect of certain specified "suspect tenders".

60. The FTO was sent to ISG Pearce (then known as Pearce Group) on 22 March 2007. In early May 2007, ISG Pearce wrote to the OFT, declining the opportunity to take up the FTO and stating that it did not consider that ISG Pearce was the correct addressee of the FTO. This was because the majority of the suspect tenders listed in the annex to the FTO were bid for by Pearce, whilst it was under the ownership

and ultimate control of Crest Nicholson. On 7 November 2007, the OFT sent the FTO to each of Pearce and Crest Nicholson. On 18 December 2007, Crest Nicholson wrote to the OFT, stating that, having made enquiries of directors and employees and searched for potentially relevant information, it had not been able to verify the allegations set out in the FTO and that it could not, therefore, acting in good faith, admit liability. The manner in which the OFT communicated the FTO to these companies, and the way in which each responded, is described in more detail at paragraphs 17 to 25 of the Administrative Court Judgment.

61. Crest Nicholson challenged, by way of judicial review, the administration of the FTO by the OFT. Although Cranston J confirmed the legality of the OFT's use of the FTO in the Administrative Court Judgment, he agreed with Crest Nicholson that the OFT had breached the principles of equal treatment and fairness. The OFT failed to recognise that Crest Nicholson was in an objectively different position from other recipients of the FTO, because it was not in a position – as an historic indirect parent company – to access information about the suspect tenders listed in the FTO, having sold the part of the business which had engaged directly in the infringements and having no personnel from that time remaining in the company. In light of his conclusions, Cranston J made an order on 29 July 2009, which contained the following declaration:

> "The OFT must consider whether the Claimant was in an objectively different position from other recipients of the Fast Track Offer in relation to its ability fairly to admit liability in response to the Fast Track Offer. If the OFT is satisfied that it was, it must take that into account when determining what penalty, if any, it imposes on the Claimant."

62. On 27 July 2009, the OFT wrote to Crest Nicholson, inviting it to make representations in light of the Administrative Court Judgment as to:

(a) Whether Crest Nicholson was in an objectively different position compared to other FTO recipients which put it in a position where it could not fairly admit the allegations and accept the FTO at the time it was made;

(b) If so, what effect that claimed different position should have on any penalty ultimately imposed by the OFT.

63. Although the deadline for representations in response to the SO had passed, the OFT stated in its letter that, in light of the "exceptional circumstances" arising from the litigation, Crest Nicholson would be given a further period in which to make an admission of liability. The OFT wrote at the same time to the other companies that had initially rejected the FTO in similar terms.

64. Crest Nicholson responded to that letter on 10 August 2009 and, in summary, made the following submissions:

(a) It was in an objectively different position from other recipients of the FTO.

(b) As a result of the OFT's refusal to take account of this objective difference, Crest Nicholson had been deprived of the opportunity to avail itself of the 25% reduction in penalty contained in the FTO.

(c) It would be unlawful for the OFT to penalise Crest Nicholson for refusing to make a "blind admission" in response to the FTO, and it should be treated equally with those parties that had made such blind admissions and had provided no other assistance to the OFT in the form of additional information or evidence.

(d) Accordingly, the principles of fairness and equal treatment required that the OFT reduce the aggregate level of any penalty imposed on Crest Nicholson by 25%.

65. Further, Crest Nicholson also stated in its response that it "is willing to admit that the evidence now provided by the OFT in relation to …[Infringement 75]… demonstrates that [Pearce] engaged in bid-rigging in relation to that contract by accepting a cover price from Balfour Beatty" and that Crest Nicholson "does not contest that it is jointly and severally liable, together with [ISG Pearce] and [Pearce] as their historic parent company, for the commission of [Infringement 75]."

66. In September 2009, the OFT published the Decision. At Decision/VI.343-353 (p.1704-1707), the OFT considered the appropriate level of reduction to award to

Crest Nicholson, in particular in light of the Administrative Court Judgment and the representations made by Crest Nicholson in relation thereto. The OFT concluded that it would not be appropriate to extend a 25% discount to Crest Nicholson for two main reasons. First, granting a 25% discount to Crest Nicholson would be tantamount to re-opening the FTO, something which Cranston J specifically said was not required (at paragraph 89 of the Administrative Court Judgment). Second, undertakings which had accepted the FTO prior to the issuing of the Statement of Objections (i) had assisted the OFT in selecting the contracts it wished to pursue and strengthening the OFT's case in relation to the infringement in question, and (ii) did so in circumstances where they had not seen the OFT's evidence and hence did not know the strength of the OFT's case against them or the likelihood of the OFT ultimately being able to proceed in response of a particular suspect tender.

67. Having concluded that it was not appropriate to award Crest Nicholson a 25% discount, the OFT then considered whether Crest Nicholson had demonstrated that it was in an objectively different position from other recipients of the FTO such that it should be treated materially differently from other parties which made admissions of liability following the issuing of the Statement of Objections. At Decision/VI.351-353 (p. 1706-1707), the OFT concluded as follows:

> "VI.351. Although the OFT does not accept that Crest Nicholson's post-Statement admission warrants a 25 per cent reduction in penalty, the OFT does accept that the admission warrants some reduction in its liability for the penalty imposed in respect of Infringement 75. The OFT has considered the particular matters raised by Crest Nicholson which it has been suggested mean that Crest Nicholson was in an objectively different position from other recipients of the OFT's Fast Track Offer such that it should be treated materially differently from other parties which made post-Statement admissions.
>
> VI.352. The OFT notes that many of the recipients of the OFT's Fast Track Offer, including those that accepted it, will have been able to access only limited information in relation to the Suspect Tenders. There might be a range of reasons why limited information was available to such Parties and the OFT does not consider that the reasons given by Crest Nicholson are such as to warrant a materially higher discount than 15 per cent (in the light of the nature and purpose of the OFT's Fast Track Offer). The OFT does not accept either that Crest Nicholson received no assistance from [ISG Pearce] or Pearce or that it was unable to be guided at all by its former subsidiaries' likely reply to the OFT's Fast Track Offer. Rather, the OFT notes that in its letter of 18 December 2007 responding to the OFT's Fast Track Offer, Crest Nicholson stated that Pearce's solicitors had 'informed us that they [had] not uncovered any evidence to support the OFT's allegations'. Moreover, to the extent that Crest Nicholson wished to be guided by its former subsidiary's response to the OFT's Fast Track Offer, this was a clear

> indication as to Pearce's likely position (and was accurate). In any event, the OFT does not consider that even if the assistance it received from [ISG Pearce] and/or Pearce was limited, that this is sufficient basis for a materially higher discount than 15 per cent.
>
> VI.353. In the light of the consideration of each of the matters raised by Crest Nicholson, taking into account the nature and purpose of the OFT's Fast Track Offer and bearing in mind the principles of fairness and effectiveness in the setting of financial penalties, the OFT does not consider that the matters raised by Crest Nicholson together justify any reduction in penalty higher than the 15 per cent discount awarded to other Parties who also made admissions following the issue of the Statement - see paragraphs VI.323 to VI.328 above. The OFT does not consider that the difference between Crest Nicholson's position and that of other Fast Track Offer recipients was so significant as to warrant any additional discount."

68. Consequently, at Decision/VI.585 (p. 1800), the OFT stated that it had reduced the penalty imposed on Crest Nicholson by 15% as a result of its admission of liability.

*Crest Nicholson's submissions*

69. Crest Nicholson submitted that, in failing to reduce the penalty imposed on it by 25% as a consequence of the fact that it was in an objectively different position from other recipients of the FTO, the OFT acted in breach of the principles of fairness and equal treatment, and failed to take proper account of the Administrative Court Judgment. In particular, Crest Nicholson submitted that the OFT's approach in this regard was wrong for the following reasons:

(a) Contrary to Cranston J's declaration and the principle of equal treatment, the OFT failed to determine, as a necessary first step, the extent to which Crest Nicholson was in an objectively different position from other recipients of the FTO in its ability fairly to admit liability in response to the FTO. The Decision contains no clear conclusion in this regard and, despite stating at Decision/VI.349 (p.1705) that it "accepts that prima facie Crest Nicholson could be seen as in an objectively different position from the other Fast Track Offer recipients", the OFT then withdraws from that position in Decision/VI.352 (p. 1706) (cited above).

(b) There was no proper basis for the OFT to conclude that Crest Nicholson was not in an objectively different position from other recipients of the FTO in its ability fairly to respond to the FTO, in particular because:

i. The OFT failed to take account of the conflict of interests, identified at paragraph 63 of the Administrative Court Judgment, between Crest Nicholson (on the one hand) and ISG Pearce and Pearce (on the other hand) in reaching its conclusion that Crest Nicholson was able to admit liability as a result of the "assistance" it received from ISG Pearce's solicitors. ISG Pearce, in its own submissions, denied that there was any conflict of interest, but agreed that there was no assistance that it could have given to Crest Nicholson.

ii. The OFT was wrong to conclude that Crest Nicholson could have been "guided by its former subsidiary's response to the OFT's Fast Track Offer". Rather, this provided no assistance at all, as ISG Pearce rejected the FTO, whereas Crest Nicholson – having seen the gist of the case relied on by the OFT in relation to the infringement – decided to admit liability.

iii. The OFT's finding that many recipients of the FTO only had access to limited information fails to acknowledge that Crest Nicholson, as an historic, indirect parent company of a company under investigation, was in a different position from companies which were themselves alleged to have committed an infringement. It was inherently less likely to have access to information enabling it fairly to admit liability in response to the FTO. Rather, it had no access to the relevant information. Further, even if other companies were in an equally disadvantaged position, Crest Nicholson does not need to establish that it was in a unique position in order to be in a relevantly different position requiring different treatment.

(c) The OFT failed to reflect the objectively different position of Crest Nicholson when setting the level of the penalty. The OFT's conclusion that

the difference between Crest Nicholson and other recipients of the FTO did not warrant a "materially higher discount than 15%" is inadequate, when the OFT should have gone on to consider whether any discount higher than 15% was required. In this regard:

i. The OFT was wrong to decide that offering a 25% discount would be tantamount to re-opening the FTO. There is a distinction between Cranston J requiring the OFT to re-take a procedural step, and requiring the OFT to take account of Crest Nicholson's different position in fixing any penalty.

ii. The principle of equal treatment required the OFT in this case to award Crest Nicholson a 25% discount. Cranston J held that Crest Nicholson was in a different position from most, if not all, other recipients of the FTO because it was unable fairly to admit liability in response to the FTO. By reason of the procedure adopted by the OFT, Crest Nicholson was deprived of the opportunity of availing itself of a 25% discount, and the only way to redress this unfairness was for the OFT to grant Crest Nicholson a 25% discount in the Decision. In failing to do so, the OFT has treated Crest Nicholson in exactly the same way as it has treated undertakings who did have the opportunity fairly to admit liability in response to the FTO.

iii. The only way of remedying the breach of the principles of fairness and equal treatment is to apply a reduction to Crest Nicholson's penalty to reflect its lost opportunity of receiving the 25% reduction accorded by the FTO.

*ISG Pearce's submissions*

70. In addition to supporting Crest Nicholson's submissions above, ISG Pearce submitted that it should receive the benefit of both (i) Crest Nicholson's admission of liability on 10 August 2009 and (ii) any further reduction in penalty awarded by the Tribunal, should Crest Nicholson be successful in its submission above that it

should have received a greater discount than 15%. ISG Pearce expressed a particular concern that the OFT's approach to Crest Nicholson's admission of liability resulted in a disproportionate and unfair outcome for ISG Pearce. Rather than reducing the overall penalty imposed on Crest Nicholson, ISG Pearce and Pearce as a result of Crest Nicholson's admission, the OFT re-apportioned the existing penalty, leaving ISG Pearce and Pearce solely liable for £819,291 of the total penalty.

71. ISG Pearce advanced a number of reasons why the OFT was wrong to proceed in this manner:

(a) ISG Pearce was not given any notice of Crest Nicholson's admission of liability, or any opportunity to comment on it or its implications for ISG Pearce or on the level of the applicable penalty. ISG Pearce submitted that this was a breach of the OFT's procedural requirements and that, had it known that Crest Nicholson (its parent company at the time of the infringement) had made an admission of liability, it would have made a similar admission, as it had no different or better information than Crest Nicholson. Knowledge of the position taken by Crest Nicholson would have had a material effect on ISG Pearce's decision as to how to respond to the OFT's allegations.

(b) The OFT's approach was inconsistent with the basis on which the OFT set about calculating penalties, which avoided any attempt to apportion liability between companies found to be part of a single economic undertaking. Here, the OFT determined that the companies were liable as a single economic unit, and calculated the overall level of the penalty by combining the turnover of Crest Nicholson, ISG Pearce and Pearce. However, the OFT then assigned 15% of that total turnover to ISG Pearce and Pearce, which runs counter to that premise, and to the principle stated by the OFT at Decision/VI.62 (p. 1641):

> "Where a Participant Company and its former parent are being held jointly and severally liable for a penalty, any attribution or division of the penalty is a matter between them and does not concern the OFT."

(c) The OFT's approach was inconsistent with the principle of equal treatment, in that the OFT awarded reductions for comparable admissions of liability to ten other parties in the Decision and, in every other case where an admission was made by one company within a single economic entity, the reduction was applied to the whole of the penalty. Mr. Lasok took us to the OFT's treatment of Francis Construction Limited ("Francis") and Barrett Estate Services Limited ("Barrett") in the Decision, where an admission by Francis following the Statement of Objections was attributed also to its parent company Barrett, such that the overall "party" identified by the OFT benefited from a reduced penalty. ISG Pearce referred, too, to the OFT's approach to parties who had accepted the FTO: even where a single economic entity had broken up between the time of the infringement and the time of the FTO, the acceptance of the FTO by one undertaking entitled all undertakings in the original economic entity to a reduction in penalty. As Mr. Lasok put it: "…it is a ludicrous situation to be in in which the effect on a fine of an admission as to the liability of an undertaking will shift radically depending upon the timing of a divestment."[13]

*The OFT's submissions*

72. The OFT maintained that it had properly taken account of the Administrative Court Judgment and was entitled to take the view, in the exercise of its discretion, that there was no basis for granting Crest Nicholson a discount higher than 15%. Cranston J recognised that the OFT's had a "very wide" discretion to decide what discount, "if any" should be granted. In particular, the OFT made the following submissions:

(a) The OFT referred to its reasoning at Decision/VI.352 (p. 1706) which explained why Crest Nicholson's particular status did not justify granting it a higher discount. Although the OFT accepted that Crest Nicholson could, *prima facie*, be seen as being in a different position from other parties, this difference could not justify granting a discount of 25%, which would amount to the re-opening of the FTO, an approach which Cranston J

[13] Transcript of ISG Pearce hearing, day 1, pages 32-33.

specifically indicated would be unfair to other FTO recipients. Cranston J went further, and stated that unfairness would result for the FTO recipients if Crest Nicholson were to "secure a similar level of discount" (para 81). Mr. Beard for the OFT argued that Cranston J had made it clear that there needed to be "clear blue water" between the position of a company that accepted the FTO and those companies making admissions following the Statement of Objections.[14]

(b) The late admission by Crest Nicholson warranted some discount for co-operation, which the OFT assessed at 15% (the top end of the discounts provided to those who made admissions following the Statement of Objections). By contrast, the FTO discount of 25% was afforded in circumstances where the respondents assisted the OFT at an early stage of its investigation. The benefits of admissions post-Statement of Objections were far smaller and thus justified only smaller discounts.

(c) The factors advanced by Crest Nicholson in support of its claim to a higher discount, namely its status as a historic parent and its claim that it was "inherently less likely" to have access to relevant information, were not as distinctive as contended, nor any good basis for materially different treatment in any event.[15] As regards the lack of assistance which Crest Nicholson claims to have received from ISG Pearce, the OFT submitted that, regardless of any conflict of interest (an issue which Mr. Beard suggested that Crest Nicholson had "grossly overplayed"), ISG Pearce's position was that it had found no evidence which supported the OFT's allegations. In such circumstances, it is speculative for Crest Nicholson to assert that, if it had still been the parent of the infringing subsidiary, it would have had access to more information before responding to the FTO.

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14 Transcript of Crest Nicholson hearing, page 28, lines 14-19.

15 See, in particular, Mr. Beard's submissions at the Crest Nicholson hearing (Transcript page 23, lines 15-27).

73. The OFT rejected ISG Pearce's submission that it should benefit from the same discount (or indeed a higher discount) granted to Crest Nicholson as a result of its admission of liability:

(a) ISG Pearce was wrong to suggest that the OFT effectively increased ISG Pearce's liability by the amount it reduced Crest Nicholson's penalty. Rather, the overall level of penalty imposed in relation to the undertaking (consisting of Crest Nicholson, ISG Pearce and Pearce) remained unchanged, but there is a part of that penalty for which Crest Nicholson is no longer liable.

(b) It was appropriate for the OFT to recognise that, at the time of the Decision, Crest Nicholson and ISG Pearce were separate undertakings, and to reflect that fact when considering the impact of Crest Nicholson's admission following the Statement of Objections. This situation can not be compared with the effect of an admission made by a legal entity which is part of a single undertaking at the time of the Decision. Mr. Beard highlighted two issues which, in his view, distinguished the position of Francis and Barrett from that of Crest Nicholson and ISG Pearce: first, at the time of the Decision, Francis and Barrett were part of the same undertaking; second, they made joint representations in relation to the Statement of Objections.[16] By contrast, each of Crest Nicholson and ISG Pearce has an independent decision making structure, and the OFT could not simply impute an admission to a separate legal entity.

(c) ISG Pearce's allegation of procedural unfairness is misplaced. ISG Pearce, presented with the same information as Crest Nicholson in the Statement of Objections, was afforded the same opportunity to admit liability and decided not to do so. It thus did not provide the OFT with the same benefit as Crest Nicholson's admission, and did not justify the same level of discount. Further, as ISG Pearce continued to contest liability even post-Decision, it is not credible for it to suggest that it might have admitted liability earlier. The

[16] Transcript of ISG Pearce hearing, day 1, page 19. This point was disputed by Mr. Lasok, who referred to Decision/IV.2147 (p. 792) in support of his submission that an admission was made by Francis only (Transcript, day 1, page 31).

OFT was not obliged to tell other parties whether proposed infringements in the Statement of Objections were being accepted.

*The Tribunal's analysis and conclusions*

74. The Administrative Court Judgment and the subsequent declaration by Cranston J (quoted at paragraph 61 above) made it clear that two tasks were required to be performed by the OFT when it came to assess the penalty to be imposed on Crest Nicholson in this case. First, the OFT was required to consider whether Crest Nicholson was in an objectively different position from other recipients of the FTO in relation to its ability fairly to admit liability in response to the FTO. Second, if the OFT was satisfied that Crest Nicholson was in such a position, it was required to take that fact into account when determining the penalty to be imposed on Crest Nicholson. These are not principles which are specific to the case of Crest Nicholson in light of the Administrative Court Judgment, but are principles which should have been applied by the OFT in any event (to ensure that the penalties imposed did not breach the principle of equal treatment).

75. As regards the first task, it is clear that the OFT acknowledged the objective difference between Crest Nicholson's position and that of other FTO recipients at Decision/VI.349 (p. 1705) and Decision/VI.353 (p. 1706-7). The nature of that objective difference was clear from the OFT's witness evidence cited at paragraph 64 of the Administrative Court Judgment:

> "…In a witness statement for the hearing the OFT has now recognised that the claimant was the only historic parent whose former subsidiary had not been sent the May Fast Track Offer with the disadvantage, as against those other historic parents, that their historic indirect subsidiary had not had time to make their own investigations."

76. When it came to the second task, however, the OFT concluded in light of Crest Nicholson's submissions that the extent of that difference was not "so significant as to warrant any additional discount" above the 15% awarded to other companies that made an admission of liability following the issue of the Statement of Objections ("a post-SO admission") (Decision/VI.353 (p. 1707), quoted in full at paragraph 67 above).

77. We have identified two key strands of reasoning in the OFT's analysis at Decision/VI.349 to VI.353 (p. 1705-1707). First, that the level of assistance provided by Crest Nicholson to the OFT during the investigation was more akin to that provided by companies which had made a post-SO admission than that provided by companies which had accepted the FTO (Decision/VI.350 (p. 1706) and Decision/VI.353 (p. 1707)). Second, that the "reasons given by Crest Nicholson" in its August 2009 submissions, such as its inability to access information and the lack of assistance from ISG Pearce, did not amount to "a sufficient basis for a materially higher discount than 15 per cent" (Decision/VI.352 (p. 1706)).

78. In our view, each strand of reasoning was flawed. As regards the first, the OFT conducted an inappropriately rigid analysis of Crest Nicholson's position by reference to two "bright line" discount thresholds of 25% and 15%, and failed properly to examine whether the particular circumstances of Crest Nicholson's position merited a different level of reduction. Neither the position of a company that accepted the FTO, nor that of a company that made a post-SO admission, provided an appropriate point of comparison as Crest Nicholson was in an objectively different position from each.

79. As regards the OFT's second strand of reasoning, the factors that the OFT discounted (at Decision/VI.352 (p. 1706)) as providing any basis for a discount higher than 15% were the very ones cited by Cranston J in establishing Crest Nicholson's *prima facie* objectively different position at paragraph 63 of the Administrative Court Judgment. These merited closer scrutiny than was afforded them in the Decision and justified a level of discount that was a measure higher than that afforded to companies that made a post-SO admission. In our view, the OFT failed to heed the warning at paragraph 83 of the Administrative Court Judgment:

> "…What [the OFT] must not do is to set its face, as it has until now, against acknowledging that if the claimant was in an objectively different position when it received the November Fast Track Offer, that was not a relevant consideration in the application of its penalty policy."

80. We are mindful of the unfairness that Cranston J was concerned might result if Crest Nicholson were to "secure a similar level of discount" to those companies

who received the FTO discount of 25% (paragraph 81 of the Administrative Court Judgment). However, there was no analysis in the Decision which considered why a mid-way point of 20%, for example, might not have properly reflected Crest Nicholson's objectively different position from other FTO recipients whilst securing the "clear blue water" that Mr. Beard suggested should exist between the discount secured by Crest Nicholson and that secured by companies that accepted the FTO and received the full 25% discount.

81. We recognise that the Administrative Court Judgment was not itself mandating a specific approach by the OFT, and Cranston J acknowledged (at paragraph 83) that it was "for the OFT to decide" on the appropriate level of penalty and whether to grant any reduction at all to Crest Nicholson. However, it would appear that in an effort to secure consistency of treatment as between the very large number of addressees of the Decision, the OFT failed properly to consider the individual circumstances of Crest Nicholson. We consider that the OFT should have granted Crest Nicholson a higher discount to reflect its objectively different position, and propose to substitute a discount of 20% in our recalculation of the appropriate penalty at Section IV below.

82. As regards the position of ISG Pearce, the OFT was correct not to impute Crest Nicholson's post-SO admission to ISG Pearce. Crest Nicholson and ISG Pearce were separate legal entities at the time of that admission and each company had its own independent decision-making structure. Accordingly, a discount awarded to Crest Nicholson could not automatically inure to the benefit of ISG Pearce. We agree with Mr. Beard that it cannot be lawful and fair to treat a separate legal person that has made no admission in the same way as a person that has.

83. Nor was there procedural unfairness in the OFT's decision not to inform ISG Pearce of Crest Nicholson's post-SO admission. ISG Pearce was afforded a substantial window of opportunity in which to admit liability and concluded, for its own reasons, that it would not be appropriate to do so. The fact that Crest Nicholson came to a different view, for its own reasons, does not mean that the OFT was then required to notify ISG Pearce. We agree with Mr. Beard that it would be inappropriate to require to OFT to undertake such a "put back" exercise in

connection with post-SO admissions. We therefore consider that ISG Pearce should not benefit from the same reduction in penalty as afforded to Crest Nicholson at paragraph 81 above.

## (D) PENALTY WAS IN BREACH OF THE PRINCIPLES OF EQUALITY AND PROPORTIONALITY AND WAS EXCESSIVE

*The Appellants' submissions*

84. The Appellants submitted that the penalty imposed on them was disproportionate and unfair when considered in the context of the infringement and when compared with the levels of penalty imposed on other undertakings in the Decision.

85. ISG Pearce submitted that the infringement was not of such seriousness as to merit either the starting point percentage chosen by the OFT for the purposes of Step 1 of the penalty calculation (5%), or the level of adjustment for deterrence made at Step 3 of the penalty calculation. As regards the starting point percentage chosen by the OFT at Step 1, ISG Pearce submitted both that the OFT was wrong to characterise Pearce's behaviour as bid-rigging, and had failed to demonstrate how Infringement 75, viewed by itself, merited a 5% starting point, or how Infringement 75 was equivalent to the circumstances of other infringements for which a starting point of 5% was applied.

86. ISG Pearce submitted that there were material differences between Infringement 75 and other infringements. For example, Infringement 75 was different from those cover pricing arrangements which materially restricted competition either by directly fixing the price of the contract (because only one genuine tender was submitted) or because they resulted in a much lower level of competition for the contract than was the case in relation to Infringement 75. Further, the OFT could not simply attribute to the infringement specific features and consequences that are said to identify its seriousness: rather the OFT assumes the burden of establishing the presence of them in the infringement (*Case T-450/05 Automobiles Peugeot SA and Peugeot Nederland NV v Commission* [2009] ECR II-02533). As Mr. Lasok submitted at the hearing:

> "What has happened in the present case is that we have a sort of Technicolor description of cover pricing in an early part of the decision which describes all of the horrible things that arise in cover pricing cases, such as for example the disclosure of commercially sensitive information, yet when we come to the description of infringement 75 we do not find any finding of fact that enables one to conclude that any of these horrible things actually arose in the case of infringement 75." (Transcript of ISG Pearce hearing, day 1, page 16, lines 24-29)

87. Crest Nicholson, whilst it did not challenge the starting point percentage chosen by the OFT, submitted that the overall penalty imposed on it failed to reflect the seriousness of the infringement. Crest Nicholson submitted that the OFT's use of Pre-Decision Turnover, coupled with the application of the MDT as a simple percentage of total turnover, has resulted in a particularly disproportionate fine, which is entirely disconnected from the market and effect of the infringement. In particular, the OFT's use of Pre-Decision Turnover means that the MDT was applied to turnover which was £184 million higher than it would have been if Pre-Infringement Turnover had been used, due in large part to Crest Nicholson's success in residential development.

88. Both ISG Pearce and Crest Nicholson submitted that the OFT was also wrong to state that it was not required, in relation to an object infringement, to identify the effect of the infringement on the market. Rather, the actual effect of the infringement can be relevant to the calculation of the penalty (Case C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-04529).

89. The Appellants submitted that both the overall level of fine imposed, and the level of the MDT adjustment at Step 3 of the penalty calculation, were significantly higher than those imposed on other undertakings in the Decision, including those involved in compensation payments. The fine imposed on the Appellants was the eleventh highest imposed under the Decision, accounting for a significant proportion of the Appellants' total worldwide turnover and the MDT adjustment led to an uplift of 2,450 times to the penalty between Steps 2 and 3. Further, the fine imposed on the Appellants was five times greater than that imposed on the other parties to Infringement 75, and the level of the fine exceeded the value of the contract subject to the infringement. This ran counter to the OFT's statement at

Decision/VI.273 (p. 1688) (in relation to a discount applied to certain addressees of the Decision) that:

> "An aggregate penalty may be considered excessive if it significantly exceeds the equivalent penalties for other parties in the same case that were involved in very similar infringements and is well above the level necessary to ensure deterrence."

*The OFT's submissions*

90. The OFT's submissions in relation to the Step 1 starting point percentage have been considered in some detail by the Tribunal at paragraphs 85 to 91 of the Kier Judgment and the OFT deployed very similar arguments in response to ISG Pearce's submissions. We do not find it necessary to repeat these here, in particular in light of our conclusion at paragraph 96 below, but have set out the OFT's response to the specific submissions made by these Appellants.

91. Mr. Beard submitted that the *Peugeot* case was not authority for the proposition that the OFT was required to consider the individual effects of individual infringements. He referred to the OFT's conclusion at Decision/VI.137 (p. 1659):

> "… whilst not all of the Infringements described in this Decision will necessarily have had the actual effect of preventing or restricting competition, as a minimum all of the Infringements had as their object the distortion of competition and, contrary to some Parties' suggestions, none of them can be expected to have had a benign or positive effect. The starting point at step 1 has been set to reflect this distortion."

92. As regards the overall level of the penalty imposed on them, the OFT submitted that the Appellants' circumstances were not exceptional, and many other appellants claimed that their penalty is excessive when compared with other undertakings. However, it is essential for the OFT to adopt a consistent methodology and the OFT cannot switch methods because it might suit some parties.

93. Further, the OFT submitted that the Appellants had ignored the importance of effective competition law enforcement by the OFT, and in particular the need for deterrence. The construction industry is an important part of the UK economy and these were serious infringements, which formed part of an endemic and widespread culture of bid-rigging. In the circumstances, the OFT submitted that the penalty imposed was fair and reasonable in light of the overall size of the undertaking.

*The Tribunal's analysis and conclusions*

94. The parties' submissions under this heading are intimately connected with the application of the MDT, given that it was the application of the MDT that led to the very substantial uplift to the overall level of the penalty imposed on the Appellants.

95. In our view, it should have been immediately apparent to the OFT that the ultimate penalty imposed on the Appellants in the Decision was disproportionate and excessive in all the circumstances of the infringement and in light of the Appellants' own circumstances. It was clear that the policy objectives set out at paragraph 1.4 of the 2004 Guidance meant that a substantial uplift to the penalty after Step 2 was required (given the Appellants' comparatively low relevant turnover). However, it was not appropriate for the OFT to deploy a "one size fits all" mechanism, which had no regard to individual circumstances, to achieve this goal.

96. Although we note ISG Pearce's challenge to the starting point percentage, and the Tribunal's conclusion in relation to similar submissions at paragraphs 92 to 116 of the Kier Judgment, in the particular circumstances of the Appellants we do not consider that this is a point of any real consequence. The relevant turnover figure which we intend to use at Step 1 is still relatively low, such that a substantial uplift at Step 3 is still necessary in order to achieve the objectives of the 2004 Guidance, and the particular choice of starting point percentage (whether 5% as deployed by the OFT in the Decision, or 3.5% as adopted by the Tribunal in the Kier Judgment) is immaterial to our determination of the appropriate penalty in this case.

## IV. THE TRIBUNAL'S ASSESSMENT OF THE APPROPRIATE LEVEL OF PENALTY

97. It follows from our findings in the sections above that the penalty imposed on the Appellants cannot stand and should be reassessed by the Tribunal pursuant to paragraph 3(2)(b) of Schedule 8 to the 1998 Act.

98. We have considered the impact of our conclusions above in connection with the application of the five step methodology set out in the 2004 Guidance, and have reassessed the penalty to a level that we consider to be just and proportionate having regard to all relevant circumstances put before us in the course of Crest Nicholson's and ISG Pearce's appeals. We agree with and adopt the conclusions of the Tribunal at paragraph 126 of the Barrett Judgment and caution against any attempt to embark on a side-by-side comparison of the overall penalties imposed on the Appellants and the penalties reassessed by the other Tribunal panels that have heard appeals against the Decision.

99. At Step 1 of the penalty calculation, we propose to substitute Pre-Infringement Turnover, as a result of the Appellants' successful ground of appeal considered at paragraphs 41 to 50 above. For Infringement 75, which was committed in September 2001, the relevant financial year for the assessment of turnover was the financial year ending 30 June 2001 when the relevant market turnover was £393,000. We have used the figures provided by ISG Pearce, for the reason stated at paragraph 50 above. The particular choice of starting point percentage is, as we have stated at paragraph 96 above, of little immediate consequence as, even assuming that the applicable starting point percentage here should be a maximum of 5%, this results in a relatively low Step 1 figure of £19,650. No adjustment is made to the penalty at Step 2 as the infringement did not exceed a year's duration.

100. At Step 3 of the penalty calculation, we are of the view that the MDT as originally formulated by the OFT should no longer be applied (as a result of the Appellants' successful ground of appeal considered at paragraphs 51 to 57 above). However, in all the circumstances, including the nature, scale and seriousness of the

infringement, the size and financial position of the Appellants[17], the value of the contract that formed the subject of the infringement, and the need to achieve specific and general deterrence, we consider that it is appropriate to apply a substantial uplift to the figure resulting from the application of Steps 1 and 2 of the penalty calculation. We have come to the view that the penalty should be adjusted at Step 3 to £1 million.

101. At Step 4 of the penalty calculation we apply the same discount of 5% that was originally awarded to the Appellants for their adoption of a competition compliance programme, resulting in a figure of £950,000. The Appellants are jointly and severally liable for the penalty save that, in light of Crest Nicholson's successful submissions at paragraphs 69 to 81 above in relation to the level of discount awarded as a result of its late admission of liability, Crest Nicholson's liability for the penalty is reduced by 20%.

102. At Step 5, we are satisfied that the revised penalty does not exceed the statutory cap of 10% of worldwide group turnover for either ISG Pearce or Crest Nicholson considered individually.

## V. CONCLUSION

103. In conclusion our findings are that:

(a) The appeal against ISG Pearce's liability for Infringement 75 is dismissed;

(b) The Appellants' challenge to the penalty succeeds to the extent described in this Judgment, such that the penalty for Infringement 75 is set at £950,000, for which the Appellants are jointly and severally liable, save that Crest Nicholson's liability for the penalty is reduced by 20%.

[17] We were not taken by the parties in detail to their financial statements. However, we consider in the particular circumstances of the Appellants that it is appropriate to have regard to the Appellants' financial statements both in the year preceding the infringement (as a single entity comprising both Appellants – Crest Nicholson achieved a total group turnover in 2001 of £597,900,000) and in the year preceding the publication of the Decision (as separate entities, ISG Pearce and Crest Nicholson achieved total group turnover in 2008 of £214,619,000 (for a 14 month year) and £544,300,000 respectively).

104. Subject to any representations by the parties the penalty will be subject to interest at 1% above Bank of England base rate from 24 November 2009 to the date of payment or the date of any relevant judgment obtained by the OFT under section 37(1) of the 1998 Act.

Lord Carlile Q.C. Ann Kelly Arthur Pryor

Charles Dhanowa
Registrar Date: 15 April 2011