Neutral citation [2024] CAT 79

Case No: 1588/1/12/23

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

20 December 2024

Before:

BRIDGET LUCAS KC
(Chair)
EYAD MAHER DABBAH
DEREK RIDYARD

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) KELTBRAY LIMITED
(2) KELTBRAY HOLDINGS LIMITED

Appellants

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 29 April 2024 – 3 May 2024

JUDGMENT

APPEARANCES

Alison Pople KC and David Gregory (instructed by BCL Solicitors LLP) appeared on behalf of the Appellants.

Rob Williams KC, Professor David Bailey, and Will Perry (instructed by the Competition and Markets Authority) appeared on behalf of the Respondents.

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A. INTRODUCTION

1. This is an appeal to the Tribunal under section 46 of the Competition Act 1998 ("CA 1998") brought by Keltbray Limited and Keltbray Holdings Limited (together, "Keltbray") against a decision of the Competition and Markets Authority ("CMA") in Case 50697 *Supply of demolition and related services* dated 23 March 2023 ("the Decision").

2. In the Decision, the CMA found that ten undertakings had between them breached section 2(1) CA 1998 ("the Chapter I prohibition") and committed a total of 19 infringements ("the Infringements") by entering into agreements which may affect trade within the United Kingdom, and which have as their object or effect the prevention, restriction or distortion of competition. The Infringements took the form of "cover bidding", which involves a company submitting a price in a tender process not designed to win the contract, but which has been decided upon in conjunction with a competitor in the process, in order to give the appearance of competition.

3. Keltbray entered into a settlement agreement with the CMA on 25 February 2022 ("Settlement Agreement"), in which it admitted liability for eight infringements concerning cover bidding: five between April and November 2014; and three in November and December 2016. By the Settlement Agreement, Keltbray accepted that the CMA would impose a maximum total penalty of £20 million in respect of those infringements, to which a reduction of 20% would be applied in recognition of the procedural efficiencies achieved through settlement. Taking into account the settlement discount, the amount payable by Keltbray to the CMA pursuant to the Decision was £16 million.

4. Keltbray's appeal is summarised in paragraph 2 of its Notice of Appeal dated 23 May 2023 ("NoA") as follows:

> "Keltbray accepts that it engaged in the infringements but submits that the penalty imposed upon it (a) has been assessed on a flawed basis, as the CMA adopted an incorrect and overly broad product market definition of Demolition Services assessed to have been affected by the eight infringements in which

Keltbray engaged; and (b) is in any event disproportionate to the seriousness and impact of Keltbray's involvement in those infringements."

5. The appeal is brought on three grounds:

(1) Ground 1 concerns the approach applied by the CMA to the identification of the "relevant turnover" for the purposes of the CMA Guidance as to the Appropriate Amount of a Penalty dated 18 April 2018 ("the Penalty Guidance"). Keltbray submits that the CMA erred at "Step 1" when applying the Penalty Guidance by calculating a penalty on the basis of entire market revenue over a broadly defined market. Keltbray maintains that the circumstances of the case required that turnover be calculated by reference to the value of the individual contracts associated with the eight admitted Infringements. The CMA's approach was to take Keltbray's market wide revenue as the relevant turnover for "Step 1", and to apply it to each Infringement. This, Keltbray says, meant that its entire market revenue was used multiple times and resulted in a manifestly disproportionate "Step 1" figure. This led to a finding that the "relevant" turnover was in excess of £820 million across Keltbray's eight Infringements when the value of the eight tenders was in total less than £58m. Keltbray submits that this was not a proper application of the Penalty Guidance, or alternatively that the CMA should have adapted or departed from it in the particular circumstances of this case. Had the CMA used the tender value as the measure of relevant turnover, and applied the same principles it had applied at each subsequent "step" in its penalty calculation, the ultimate penalty would have been £12,562,167, considerably less than the actual penalty imposed of £20m.

(2) Ground 2 also concerns market definition. Keltbray submits (in the alternative to Ground 1) that the CMA erred by including revenues from what Keltbray refers to as "Highly Complex Demolition Services" ("HCDS"). Keltbray maintains that HCDS fall within a separate economic market to the provision of general demolition services

("GDS"), and that none of Keltbray's Infringements concerned the HCDS market. Keltbray suggests that this led the CMA to more than double the relevant turnover in its penalty calculation. Keltbray alleges that – had the CMA excluded HCDS and applied the same principles it had applied at each subsequent "step" in its penalty calculation – the ultimate penalty would have been £77,873,040.

(3) Ground 3 concerns proportionality. Keltbray maintains that the £20 million penalty is excessive in all the circumstances. Keltbray submits that the CMA has applied its Penalty Guidance mechanistically and without proper regard to the real seriousness and impact of the conduct at issue. Keltbray alleges that the CMA erred at Steps One, Two, Three and Four of the Penalty Guidance. The CMA took into account full year, market-wide, turnover for infringements which were, Keltbray claims, limited in their duration and scope to individual projects, and applied an excessive seriousness percentage. Keltbray also argues that the CMA paid insufficient regard to the "very small" profit margins in the industry (which it suggests were on average 0.75%).

6. The CMA accepts that, by virtue of Keltbray having participated in 8 individual Infringements, its market wide turnover has been taken into account multiple times. However, the CMA's position is that this has been addressed at "Step 4" of the Penalty Guidance. Step 4 requires the CMA to consider whether an adjustment to the figure produced at Step 3 of the calculation is necessary for specific deterrence and proportionality. The Step 3 figure in the CMA's calculation was £178,688,256, but this was adjusted significantly at Step 4, and reduced to £20m. The CMA submits that it has not erred in its application of the Penalty Guidance, and that there is no basis for calculating the relevant turnover by reference to the individual tenders. The CMA also disputes that there is any division between HCDS and GDS. Even if Keltbray is right on Ground 2, the turnover figure for what Keltbray terms GDS is significantly above the £20m penalty that the CMA considered to be appropriate at Step 4, and so the point

goes nowhere. The CMA maintains that it has correctly applied the Penalty Guidance, and the penalty of £20m is not disproportionate.

7. In addition, the CMA seeks an order pursuant to paragraph 3(2)(b) of Schedule 8 CA 1998 for the revocation of the 20% settlement discount given to Keltbray, as explained in paragraph 3 above. The CMA submits that the consequence of this appeal is that the Terms of Settlement no longer apply and that the procedural efficiencies – which are otherwise achieved by a settlement and which justify a discount being given – have been lost.

B. LEGAL FRAMEWORK

(1) Statutory provisions

8. The CMA's power to impose penalties on undertakings which have infringed the Chapter I prohibition comes from s. 36 CA 1998. Section 36(1) provides:

> "On making a decision that an agreement has infringed the Chapter I prohibition ... the CMA may require an undertaking which is a party to the agreement to pay the CMA a penalty in respect of the infringement."

9. The CMA therefore has a broad discretion in relation to the imposition of penalties, which is subject to the following qualifications:

(1) A penalty may only be imposed if the infringement has been committed intentionally or negligently: s. 36(3) CA 1998.

(2) In fixing a penalty, the CMA must have regard to the seriousness of the infringement and the desirability of deterring both the undertaking on whom the penalty is imposed and others from infringing the Chapter I prohibition: s. 36(7A) CA 1998.

(3) No penalty may exceed 10% of the turnover of the undertaking: s. 36(8) CA 1998.

10. The CMA is required under s. 38 CA 1998 to prepare and publish guidance as to the appropriate amount of any penalty, and must have regard to this guidance when setting the amount of a penalty. In this case the applicable guidance is the 2018 version.

(2) Penalty Guidance

11. The Penalty Guidance states that the twin objectives of the CMA's policy on penalties are:

    (1) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and

    (2) to ensure that the threat of penalties will deter both the infringing undertakings (specific deterrence) and other undertakings at large (general deterrence) from engaging in future anticompetitive activities.[1]

12. The Penalty Guidance refers to the CMA's discretion to impose penalties and records the CMA's intention "where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets, other cartel activities and serious abuses of a dominant position". The CMA considers these agreements to be "among the most serious infringements of competition law".[2]

13. The Penalty Guidance sets out, in paragraph 2.1, a six-step approach to the calculation of penalties:

    (1) Step 1 addresses the calculation of the starting point having regard to the seriousness of the infringement and the need for general deterrence, and the relevant turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking's

[1] Penalty Guidance, paragraph 1.2.
[2] Penalty Guidance, paragraph 1.3.

last business year: Penalty Guidance, paragraph 2.11. The CMA will apply a starting point of up to 30% of an undertaking's relevant turnover in order to reflect the seriousness of the particular infringement, and the need for specific and general deterrence. Step One involves a three-stage process:

(i) At the first stage, the CMA will consider the likelihood that the type of infringement at issue will, by its nature, cause harm to competition. The CMA will generally use a starting point between 21-30% of relevant turnover for infringements which it considers are "most likely by their very nature to harm competition". This includes cartel activities and non-cartel "object" infringements.[3]

(ii) At the second stage, the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately to consumers. When making its case-specific assessment, the CMA will consider the factors such as the market coverage of the infringement, the actual or potential effect of the infringement on competitors and third parties, and the actual or potential harm caused to consumers whether directly or indirectly.[4]

(iii) Finally, the CMA will consider whether the starting point for a particular infringement is sufficient for the purpose of general deterrence: in particular, the need to deter other undertakings, whether in the same market or more broadly, from engaging in the same or similar conduct.[5]

[3] Penalty Guidance, paragraphs 2.4 and 2.6.
[4] Penalty Guidance, paragraph 2.8.
[5] Penalty Guidance, paragraph 2.9.

(2) Step 2 - adjustment for duration. The starting point produced by Step 1 may be increased or decreased at Step Two to reflect the duration of the infringement. Penalties for infringements lasting more than one year may be multiplied by the number of years of the infringement. Generally, infringements lasting for less than one year will be treated as a full year by the CMA when calculating the duration of the infringement. In exceptional cases, the CMA may decrease the starting point where the duration of the infringement is less than one year.[6]

(3) Step 3 - adjustment for aggravating or mitigating factors. The amount of the financial penalty calculated at Step 2 may be increased or decreased for aggravating or mitigating factors:

(i) Aggravating factors include: the role of the undertaking as a leader in, or instigator of, the infringement; involvement of directors or senior management; continuing the infringement after the start of the investigation; repeated infringements by the same undertaking; infringements which are committed intentionally rather than negligently; and failure to comply with competition law following receipt of a warning or advisory letter in respect of the relevant conduct.[7]

(ii) Mitigating factors include termination of the infringement as soon as the CMA intervenes, and cooperation which enables the enforcement process to be concluded more effectively and/or speedily.[8]

(4) Step 4 - adjustment for specific deterrence and proportionality. At Step 4, the CMA will assess whether the overall penalty proposed is "appropriate in the round" and consider whether adjustments should be

[6] Penalty Guidance, paragraph 2.16
[7] Penalty Guidance, paragraph 2.18.
[8] Penalty Guidance, paragraph 2.19.

made for specific deterrence or proportionality.[9] Assessing whether a penalty is proportionate may involve consideration of the undertaking's size and financial position. The Penalty Guidance notes that the CMA may have regard to indicators including, where they are available, total turnover, profitability, including profits after tax, net assets and dividends, liquidity and industry margins as well as any other relevant circumstances of the case.[10]

(5) Step 5 - adjustment if the maximum penalty of 10% of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy. At Step 5 an adjustment may be required to ensure that the maximum penalty of 10% of worldwide turnover is not exceeded.

(6) Step 6 - adjustment for leniency, settlement discounts and/or approval of a voluntary redress scheme. This final step enables the CMA to reduce an undertaking's penalty where the CMA's leniency programme applies, and in order to reflect any discount on settlement.

(a) Relevant Turnover

14. For the purposes of Step 1, the relevant turnover is the turnover of the undertaking in the relevant product and geographic markets affected by the infringement in the undertaking's last business year.[11]

15. There was a degree of common ground between the parties relating to the role of market definition when determining the relevant turnover. Market definition is a tool rather than an end in itself: See *Meta Platforms Inc v Competition and Markets Authority* [2022] Bus LR 1162 at [41]. Regard must be had to the purpose for which a market is being defined. In this case, the market definition

[9] Penalty Guidance, paragraph 2.24.
[10] Penalty Guidance, paragraph 2.20.
[11] Penalty Guidance, paragraph 2.11.

is concerned with identifying the relevant turnover for the purposes of the penalty calculation.

16. In a Chapter I case, the CMA is not required to undertake a formal market definition analysis when considering the product market for the purpose of Step 1 of the Penalty Guidance, whether at the investigation stage or on appeal: *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2006] EWCA Civ 1318 at [169]-[173] ("*Argos CoA*"). As the Court of Appeal explained:

> "173. There is inevitably an arbitrary element in the calculation…. Inevitably also, in the absence of a formal market analysis, the market as ascertained may be other than that which would be established in a Chapter II case, by the formal analysis which would have been carried out in such a case. The purpose of the identification of the relevant product market in relation to penalty is quite different, and it is not necessary or appropriate to be so exact as when ascertaining a market for the purpose of seeing whether an undertaking has a dominant position in a relevant market, before deciding whether that position, if it exists has been abused. Thus, as it seems to us, the reason why it is not necessary, at any rate in a Chapter I case involving price-fixing, to conduct a formal market analysis is the same as the reason why the market which is taken for calculation of the turnover relevant for Step 1 on a penalty assessment may properly be assessed on a broad view of the particular trade which has been affected by the proved infringement, rather than by a relatively exact application of principles that would be relevant for a formal such as substitutability or, on the other hand, by limiting the turnover in question to sales of the very products or service which were the direct subject of the price-fixing arrangement or other anti-competitive practice."

17. The CMA (and the Tribunal) does, however, "have to be satisfied, on a reasonable and properly reasoned basis that it can identify the relevant product market affected by the infringement" (see *Argos CoA* at [226]).

18. We also note that market definition involves an "significant degree of judgement", in relation to which the CMA is afforded an "ample margin of appreciation": see *BGL (Holdings) Ltd v CMA* [2022] CAT 36 at [105].

(3) The seriousness percentage

19. While the CMA is expected to take a broadly consistent approach, the Tribunal has recognised that each case is dependent on its facts: see *Eden Brown v OFT* [2011] CAT 8 (*"Eden Brown"*) at [78], confirmed by *Roland (U.K.) Limited v CMA* [2021] CAT 8; [2021] 5 CMLR 11 (*"Roland"*) at [87].

20. However, in selecting the appropriate starting point for a penalty at Step 1, the CMA must have regard to the range of possible competition infringements and their relative seriousness and ensure that there is sufficient "headroom" left to reflect the distinction in culpability between, for example, "simple" cover pricing and bid rigging: see *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 (*"Kier"*), at [93]-[94] and [114].

21. The Tribunal in *Kier* at [88] confirmed that while there is no requirement to investigate the effects of an infringement in an "object" case, a finding as to the actual effects may justify a higher starting point being set for the penalty:

> "…The infringements in question are by object, and as such the OFT is not required to identify their effects on the market. The nature of the conduct was such as to reveal a sufficient degree of harm to competition without examining its consequences. Had the OFT reached conclusions as to the actual effects of the infringements, it might have been justified in setting higher starting points."

22. Nonetheless, the Tribunal confirmed at [133] that the actual or potential effects of an infringement were relevant to considering "seriousness" for the purpose of applying Penalty Guidance:

> "The OFT's response is that, as the present infringements are 'by object', it is not required to identify their effects on the market. This does not meet the point. Whilst the characterisation of the infringement as 'by object' means that effects need not be proved in order to establish the breach, this does not render irrelevant the likely effects to penalty. It is clearly necessary to take into account the effects (actual or potential) of an infringement when considering its seriousness, as the Guidance states in unequivocal terms. There is nothing in the Guidance which suggests that a different approach should be taken for infringements by object. Moreover, the Decision itself emphasises the importance of 'ensuring that there is a correlation between the penalty and the harm.'"

23. In *FP McCann Limited v Competition and Markets Authority* [2020] CAT 28 ("*FP McCann*") (a case relating to the same version of the Penalty Guidance as is relevant to this appeal), the Tribunal considered further the approach to be taken when fixing penalties in cases involving restriction of competition by object. At [114] the Tribunal held that when fixing a penalty in an object case, the CMA is entitled to have regard to the likelihood of harm resulting from the infringement. The Tribunal stated:

> "115. The CMA is entitled to fix a penalty for such an infringement without knowing whether the restriction did or did not have an adverse effect on competition. In particular, if the CMA does not know this, it is not under an obligation in a restriction by object case to investigate whether there was also a restriction by effects. … There is good reason for this being the position. A restriction by object is an infringement irrespective of the effects of the infringement. An inquiry into the effects of a restriction by object may involve very considerable investigation and evidence gathering and be very time consuming. Such an inquiry may be considered to be unnecessary where there is an infringement by object. At the stage of fixing the penalty, the CMA is entitled to take the view in an appropriate case that the infringement by means of a restriction by object is a very serious infringement and fix the penalty accordingly. It can choose not to investigate whether the effects of the infringement were such that it can regard the infringement as even more serious than it already considers the infringement to be.
>
> 116. If the CMA makes a specific finding that the infringement did have an adverse effect on competition, then the CMA must have evidence on which it can make that finding. If the CMA does make such a finding, supported by evidence, then it can take that finding into account when fixing the penalty. The existence of an adverse effect on competition might persuade the CMA to fix a penalty which is higher than the penalty it would have fixed, absent that finding. But such a finding will not inevitably result in a higher penalty as compared with a serious case of a restriction by object where the CMA has not made any finding, one way or the other, as to the effects of the cartel. That may be because the CMA might form the view that a case of a restriction by object is one of the most serious cases, which deserves a penalty at the top of the range, even where it does not know whether the restriction by object had an adverse effect on competition.
>
> 117. If the CMA is proposing to fix a penalty without knowing whether the restriction by object had an adverse effect on competition and one or more of the cartelists gives the CMA evidence that the cartel did not have an adverse effect on competition, the CMA ought to consider the appropriate response to that evidence. If the evidence is clear, then the CMA ought to make a finding in accordance with that evidence. If the evidence is not clear and, in particular, would require considerable investigation, then the CMA may take the view that it can fix a penalty

> on the basis that it does not know whether the cartel did or did not have an adverse effect on competition. The CMA can take the view that in a case of an infringement by means of a restriction by object it does not need to investigate whether there was also an infringement by reason of a restriction by effects."

(4) The overall and cumulative level of penalty

24. Where (as on this appeal) multiple infringements are in issue, the overall and cumulative level of the penalty must be considered. *Interclass Holdings Limited v Office of Fair Trading* [2012] EWCA Civ 1056 ("*Interclass CoA*") was an appeal relating to the imposition of penalties by the OFT (under the then relevant penalty guidance, published in 2004) following its investigation into collusive tendering practices in the construction industry, and in particular, cover pricing. In that case the OFT considered it appropriate to treat each infringement separately and to impose a separate financial penalty for each infringement. Because of the scale of the inquiry and the number of individual infringements, the OFT selected a maximum of three infringements in relation to each undertaking. Patten LJ stated the following:

> "64. It seems to me that the correct approach to the assessment of penalty must be to proceed in stages beginning with an initial assessment for each infringement having regard to its seriousness. This is what both the CAT and the OFT did in this case and no criticism is made of the starting figure. But when considering whether that figure should be increased in order to give effect to the policy objective of deterrence two factors come into play. The first is whether the amount of the Step 1 penalty will act as a sufficient deterrent for the particular undertaking on which it is imposed. The second is whether it will be sufficient to deter others operating in the same field by bringing home to them that such conduct is illegal and will be effectively punished.
>
> 65. Although at Step 1 the CAT is calculating the penalty for each infringement, it seems to me impossible at Step 3 not to have some regard to the overall and cumulative level of penalty imposed on the undertaking when considering whether the Step 1 figures should be increased. This is a conventional approach to sentencing and is obviously relevant to a consideration of the impact which financial penalties will have on the particular undertaking. Similarly in relation to other would-be offenders it is the headline figure which matters."

25. The present appeal involves a number of infringements and it is it necessary to consider the overall cumulative level of the penalty imposed by the CMA. That

consideration is now undertaken at Step 4 of the Penalty Guidance applicable in this case (a step formally introduced following the decision in *Interclass CoA*). A downward adjustment of the Step 3 figure may be required where an undertaking has committed multiple infringements for which the turnover in the relevant product and geographic markets and time periods overlap. This is to ensure that the penalty is not disproportionate or excessive: *Generics UK Limited* [2021] CAT 9 ("*Generics*").

(5) The Level of Penalties

26. In *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 (*"Napp Pharmaceutical"*) the Tribunal made the following observation about the level of penalties and the need for effective deterrence at [502]:

> "the sum imposed must be such as to constitute a serious and effective deterrent, both to the undertaking concerned and to other undertakings tempted to engage in similar conduct. The policy objectives of the Act will not be achieved unless this Tribunal is prepared to uphold severe penalties for serious infringements".

27. The Tribunal addressed the relationship between deterrence and culpability in *Eden Brown* at [99], saying:

> "Furthermore, in having regard to the need for deterrence, it is important not to lose sight of the need for the penalty properly also to reflect the culpability of the undertaking in terms of the seriousness and hence the scale and effect of the infringement. In short, determination of the penalty requires a refined consideration and an assessment of all the relevant circumstances, and the element of deterrence, whilst undoubtedly one of those circumstances, should not lead to the level of penalty being calculated according to a mathematical formula."

28. The Court of Appeal confirmed in *Interclass CoA* at [70] that the calculation of a penalty "is not a question of applying a rigid mathematical formula", and that "[a]n element of discretion is essential". This discretion is to be exercised on a proper and consistent basis, although the Tribunal has noted that comparisons between undertakings fined in respect of the same decision must be approached

with caution. In *GF Tomlinson v OFT* [2011] CAT 7 (*"GF Tomlinson"*) the Tribunal stated at [150]:

> "The final figure for the fine imposed on each addressee is the result of many different choices made by the OFT as to what factors should or should not be taken into account when setting the penalty in accordance with the framework set out in the Guidelines. The fact that the application of these choices results in two different companies being subject to widely varying fines is not a matter for complaint or criticism by itself."

29. We were also referred to the judgment in *Generics* at [153] where the Tribunal expressed the view that the seriousness percentage of 21% used at Step 1 in that case was "on the high side", but did not fall outside the CMA's margin of appreciation. Whether a lack of understanding on the part of the infringer as to the seriousness of the conduct amounted to a mitigating factor was something that could be taken into account at different steps of the applicable penalty guidance. The Tribunal stated at [176]:

> "… there is a degree of overlap between the various considerations that can be taken into account under the individual steps of the Penalty Guidance. We consider that the novelty of the infringement was a factor that should be reflected in calculation of the penalty but the CMA addressed this aspect under Step 4. In our view, that was not in itself an error: the important point is that it should be addressed and what matters is the overall calculation which results."

(6) Duty to give reasons

30. In *FP McCann* at [309] the Tribunal considered the need to give reasons for any decision made:

> "There is clear guidance in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, [2004] 1 WLR 1953 (*"Porter (No 2*)") as to what is required in this respect. At [35]-[36], Lord Brown summarised the law as follows (we omit specific points which related to the planning context of that case):
>
> > "35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. … Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. …"

31. At [312] the Tribunal stated:

> "When considering FPM's contention that the reasons given by the CMA were not clear, adequate and intelligible, it is important to remember that Step 4 is dealing with the question whether the penalty figure arrived at pursuant to Steps 1 to 3 ought to be adjusted on the grounds of deterrence or proportionality. The Penalty Guidance refers to various matters which will be considered but ultimately the assessment of the figure at Step 4 is an assessment "in the round": see paragraph 2.24 of the Penalty Guidance. As to the question of proportionality, paragraph 2.24 states that the issue is whether the penalty is "disproportionate or excessive". The questions arising at Step 4 involve matters of evaluation or judgment. By their very nature, they do not lend themselves to elaborate explanations."

32. The Tribunal held at [313] that no more was required of the CMA by way of explanation than "clear, adequate and intelligible reasons as to why it arrived at [its Step 4 figure]".

33. Noting that the Penalty Guidance states that the Step 4 figure is to be arrived at "in the round", the Tribunal also stated at [314] that:

> "At Step 4, there is no single right figure in a case like the present. What is involved is evaluation and judgement on the question of proportionality. What matters is what figure feels appropriate taking account of all relevant considerations."

34. The Tribunal in *Napp Pharmaceutical* stated at [508] that fixing of a penalty should be "done by methods which are as simple as possible, and easily verifiable by the Tribunal."

(7) Requirement to have regard to Penalty Guidance

35. Relevant bodies should follow guidance which has, through consultation and Parliamentary sanction, the force of statutory guidance (such as the Penalty Guidance in this case) unless they have cogent, special or powerful reasons not to: see *R (London Oratory School) v The Schools Adjudicator* [2015] ELR 335 per Cobb J at [57]-[58].

36. In the context of penalties under competition law, although the CMA is required to "have regard to" its guidance when setting a penalty under s. 38 CA 1998, the general language in which the section is expressed does not bind the CMA to follow its guidance in all respects in every case. However, the CMA should give reasons for any significant departure from it: See *Argos CoA* at [161].

37. The Tribunal noted in *Kier* at [76] that:

> "The Guidance reflects the [CMA's] chosen methodology for exercising its power to penalise infringements. It is expressed in relatively wide and non-specific language, which is open to interpretation, and which is clearly designed to leave the OFT sufficient flexibility to apply its provisions in many different situations."

38. The Tribunal in *Kier* went on to state that the relevant penalty guidance under consideration in that case (which did not include the equivalent of what is now Step 4) was not to be applied mechanistically without giving proper consideration to the individual circumstances of the case: see *Kier* at [184] and [185]. To do so would be wrong in principle, and inconsistent with the guidance itself which requires a case-by-case analysis and assessment of the appropriate penalty.

(8) The Tribunal's role in penalty appeals

39. A party whose conduct is the subject of a CMA decision may appeal to the Tribunal under s. 46 CA 1998. The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the Notice of Appeal (paragraph 3(1) of Schedule 8 CA 1998), and may impose, revoke, or vary the

amount of a penalty imposed by the CMA (paragraph 3(2) of Schedule 8 CA 1998).

40. The approach which the Tribunal should take in relation to an appeal against penalty has been considered in a number of decisions of the Tribunal and the Court of Appeal. These decisions have established the guiding principles which we should apply to this appeal.

41. In *Argos Ltd v OFT* [2005] CAT 13 (*"Argos CAT"*), the Tribunal stated at [172] that, provided that the CMA remained within its margin of appreciation in applying the relevant guidance, "the Tribunal's primary task is to assess the justice of the overall penalty rather than to consider in minute detail the individual Steps applied by the OFT".

42. In *Kier*, the Tribunal considered the meaning of the CMA's "margin of appreciation":

> "76. The 'margin of appreciation' … does not in any way impede or diminish the Tribunal's undoubted jurisdiction to reach its own independent view as to what is a just penalty in the light of all the relevant factors. In these circumstances any debate about the scope of any margin of appreciation becomes somewhat sterile … Provided the penalty ultimately arrived at is, in the Tribunal's view appropriate it will rarely serve much purpose to examine minutely the way in which the OFT interpreted and applied the Guidance at each specific step. As the Tribunal said in Argos …, the Guidance allows scope for adjusting at later stages a penalty which viewed in isolation at an earlier, provisional, stage might appear too high or too low.
>
> 77. On the other hand if, … the ultimate penalty appears to be excessive it will be important for the Tribunal to investigate and identify at which stage of the OFT's process error has crept in. … the imposition of an excessive or unjust penalty is likely to reflect some misapplication or misinterpretation of the Guidance. …"

43. In *GF Tomlinson*, the Tribunal agreed with the Tribunal's decision in *Kier*, and stated at [72] that its role is *"two-fold"*. First, the Tribunal is required to adjudicate on the specific complaints raised since it is important that the OFT (and now the CMA) and the parties know where the Tribunal considers that it has gone wrong in applying the relevant penalty guidance. Second, the Tribunal

is required to look at the matter in the round and form its own view about the appropriateness of the penalty imposed.

44. In *FP McCann*, the earlier decisions were summarised in the following terms:

> "72. … It is relevant to refer in this regard *to Kier Group plc and Others v Office of Fair Trading* [2011] CAT 3 ("*Kier*") at [76]-[77], *G F Tomlinson Group Limited and Others v Office of Fair Trading* [2011] CAT 7 at [72] and *Balmoral Tanks Limited and Another v Competition and Markets Authority* [2017] CAT 23 ("*Balmoral Tanks*") at [134]-[135].
>
> 73. The above authorities establish that:
>
> (1) an appellant is entitled to an appeal on the merits, which has been described as a full appeal; the jurisdiction of the Tribunal is not restricted to the jurisdiction which would be appropriate if this process were by way of judicial review;
>
> (2) it has been said that if the overall penalty is considered by the Tribunal to be appropriate, it will usually not be necessary to examine minutely the way in which the CMA interpreted and applied the Penalty Guidance at each specific step;
>
> (3) however, where an appellant makes specific complaints about particular steps taken by the CMA it will be necessary for the Tribunal to address the specific complaints which have been made;
>
> (4) it would not be right to ignore the conclusions and evaluations of the CMA but ultimately the Tribunal must make its own assessment as to the penalty which is appropriate in all the circumstances, having regard to the Penalty Guidance."

45. The distinction between the CMA's margin of appreciation and the supervisory jurisdiction of the Tribunal, and the limits of an appellate jurisdiction were considered by the Vice Chancellor in *CMA v Flynn Pharma* [2020] EWCA Civ 339 ("*Flynn Pharma*") at [135] to [147]. In particular:

> "140. From case law it is possible to draw various conclusions about the role of judicial bodies in relation to the margin of appreciation of a competition authority: (i) for a (non-judicial) administrative body lawfully to be able to impose quasi-criminal sanctions there must be a right of challenge; (ii) that right must offer guarantees of a type required by Article 6; (iii) the subsequent review must be by a judicial body with "full jurisdiction"; (iv) the judicial body must have the power to quash the decision "in all respects on questions of fact and law"; (v) the judicial body must have the power to substitute its own

> appraisal for that of the decision maker; (vi) the judicial body must conduct its evaluation of the legality of the decision "on the basis of the evidence adduced" by the appellant; and (vii), the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an "in depth review of the law and of the facts" by the supervising judicial body.
>
> …
>
> 141. Notwithstanding the above the jurisdiction of the Tribunal is not unfettered. This flows primarily from the fact that the appeal is not a de novo hearing but takes the decision as its starting, middle and end point."

46. The effect of this was then set out at [142] to [147]. The Tribunal can hear evidence, including new evidence in support of allegations of errors in the decision, and make findings of both fact and law. However, the Tribunal should only interfere if it concludes that the decision is wrong in a material respect. The reference to materiality is important. It is not an exact science and there is no fixed list of errors that the Tribunal might consider material. But it is consistent with a merits appeal for the Tribunal to conclude that the approach taken by the CMA and its resultant findings are reasonable in all the circumstances and to refrain from interfering on that basis. The Tribunal can be expected to set out its reasoning on the materiality of errors found.

47. In summary, there is "a certain tension" between "margin of appreciation" and the Tribunal's "supervisory jurisdiction", but the outcome is that the Tribunal should only interfere if it concludes that the decision is wrong in a material respect. The reference to "materiality" is important, and whether an error is material (or not) is a matter of judgment for the Tribunal": see *Allergan v CMA* [2023] CAT 56 ("*Allergan*") at [34].

(9) Guidance on the CMA's investigation procedures in Competition Act 1998 cases, 2019 ("CMA8 Guidance")

48. The CMA8 Guidance is relevant to the CMA's application to revoke Keltbray's settlement discount. It sets out the CMA's procedures and explains how the CMA generally conducts investigations. It addresses matters such as the provision of a draft Statement of Objections and draft Penalty Statement, the

right of an addressee to respond, the issue of an infringement decision and imposition of financial penalties.

49. We were specifically referred to Chapter 14 of the CMA8 Guidance which deals with settlement. In particular:

(1) Paragraph 14.2 explains that settlement allows the CMA to achieve efficiencies through a streamlined administrative procedure, leading to an earlier adoption of an infringement decision, and/or resource savings.

(2) Paragraph 14.7 addresses the requirements for settlement and sets out what the CMA will require "[a]t a minimum". The CMA will require three things: (1) a clear and unequivocal admission of liability; (2) the immediate cessation of the infringing behaviour, and (3) confirmation that the addressee "will pay a penalty set at a maximum amount". Paragraph 14.7 states that "this maximum penalty – which will apply provided the business continues to follow the requirements of settlement – will reflect the application of the settlement discount to the penalty that would otherwise have been imposed."

(3) Paragraph 14.8 provides that the settling party must confirm that it accepts that "if the settling business appeals the decision, it will no longer benefit from the settlement discount".

(4) Paragraph 14.9 states, in effect, that the decision of a business to settle is voluntary and that it should satisfy itself, and will be taken to have satisfied itself, that it is prepared to admit the infringement, accept "the maximum level of penalty to be imposed", and understand the implications of settling.

(5) Paragraph 14.15 deals with the draft penalty calculation and makes clear that there will be an opportunity to make limited representations on the draft penalty calculation as part of the settlement discussions.

(6) Paragraph 14.28 reiterates that "[a]s part of the minimum requirements for settlement, a business must accept that it will pay a maximum penalty. This is the maximum amount of penalty that the settling business will pay if the CMA issues an infringement decision."

(7) Paragraph 14.30 states: "The settlement discount set out in the infringement decision will no longer apply if a settling business appeals the infringement decision to the Competition Appeal Tribunal. The Competition Appeal Tribunal has full jurisdiction to review the appropriate level of penalty".

C. THE DECISION

50. Chapter 1 of the Decision sets out, in very brief summary, its relevant addressees, the finding that there had been 19 Infringements, and the procedural history of the investigation. Paragraph 1.5 of the Decision records that Keltbray was a settling party, and had agreed to accept a maximum financial penalty.

51. Chapter 2 of the Decision is titled "The Relevant Market". It provides an industry overview, and records the CMA's conclusion as to the "relevant market" for the purposes of calculating the financial penalties in this case. The Infringements considered in the Decision relate to the supply of Demolition Services and Asbestos Removal Services. These were defined in the following terms:

> "(a) 'Demolition Services' are services provided for the deconstruction, break down or removal of the whole or part of a building, including: levelling an entire structure or building (total demolition); demolishing the interior of a building while preserving the exterior (selective demolition); soft strip; cut and carve; facade retention; structural alterations; top-down demolition; floor-by-floor demolition; high reach demolition; dismantling; and any services necessary to support demolition work.

(b) 'Asbestos Removal Services' are services provided for the safe removal of asbestos during demolition work."[12]

52. Chapter 2 refers to the fact that typically only a small number of suppliers are invited to tender for a project;[13] that a pre-qualification process is often used to create a shortlist of potential suppliers likely to be the most appropriate for the project;[14] and that the CMA had been told that it is in a supplier's interest to tender for projects which are high value or prestigious, or which involve clients that they may wish to work for in the future, as this maintains their reputation and prospects of securing future work.

53. The CMA's approach to defining "the relevant market", for the purposes of calculating "the relevant turnover" for penalty purposes, is set out at paragraphs 2.7 to 2.19. The CMA identified Demolition Services and Asbestos Removal Services as being the focal products. The CMA concluded that Demolition Services and Asbestos Removal Services were not in the same market as each other, or part of a wider market. In reaching that conclusion, the CMA considered that in order to supply Asbestos Removal Services, specific plant, expertise and a qualified labour force were required. From a supply side perspective, it is not easy for providers of Demolition Services to switch to the supply of Asbestos Removal Services. Similar considerations apply to "Explosive Demolition Services", and Decommissioning Services (such as the decommissioning of power stations) both of which are highly regulated. The CMA also concluded that the relevant geographic market is not split on regional or national lines, and is no wider than the UK. The CMA therefore concluded that the relevant markets are: (1) the supply of Demolition Services in the UK; and (2) the supply of Asbestos Removal Services in the UK.

54. Whilst some of the infringements found in the Decision include compensation arrangements between bidders, Keltbray was not found to be party to such

[12] Paragraph 2.2 of the Decision. Footnotes omitted.
[13] Paragraph 2.4 of the Decision.
[14] Paragraph 2.4, of the Decision.

conduct and was found only to have participated in cover bidding. As to that, the Decision explained cover bidding in the following terms:

> "3.4 Tendering procedures are designed to provide structured competition, including in areas where it might otherwise be absent. An essential feature of this system is that prospective suppliers prepare and submit tenders independently of each other.
>
> 3.5 Cover bidding occurs when a company submits a price in a tender process which is not designed to win the contract, and which has been decided upon in conjunction with a competitor in the process, in order to give the appearance of competition.
>
> ...
>
> 3.7 In both cover pricing and compensation payment arrangements, tenders are not prepared and submitted independently of each other and, as a result the tendering process is distorted. As the CAT has recognised, this is even more so where the tendering process is selective:
>
> *'When the tendering process is selective rather than open to all potential bidders, the loss of independence through knowledge of the intentions of other selected bidders can have an even greater distorting effect on the tendering process. In a selective tendering process the contractors invited to tender will in general be those considered most likely to have the required specialist skills . . . since the selective tendering process by its nature has a restricted number of bidders, any interference with the selected bidders' independence can result in significant distortions of competition'."*

55. Chapter 3 sets out the legal principles that apply when seeking to establish whether or not the Chapter I prohibition has been infringed, and in particular:

> "3.15 As regards cover bidding, the CAT has stated that:
>
> *'The tendering process is designed to identify the most cost-effective bid. The competitive tendering process may be interfered with if the tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants. Such behaviour by undertakings leads to conditions of competition which do not correspond to the normal conditions of the market'.*'
>
> 3.16 Where an undertaking participating in a concerted practice remains active on the market, there is a presumption that it will take account of

information exchanged with its competitors when determining its own conduct on the market."[15]

56. As regards whether or not cover bidding may amount to a "by object" infringement, Chapter 3 states (including by reference to relevant case law cited in footnotes which are not included here):

> "3.17 Agreements and concerted practices that have the object of preventing, restricting or distorting competition are those forms of coordination between undertakings that can be regarded, by their very nature, as being harmful to the proper functioning of competition.
>
> 3.18 It is settled law that cover bidding and compensation payment arrangements, may amount to an agreement or concerted practice that infringes the Chapter I prohibition by object. As set out further below, this is not affected by the parties' subjective intentions, or whether or not the arrangement was implemented.
>
> *Cover bidding*
>
> 3.19 Cover bidding arrangements manipulate the tendering procedure and restrict price competition in a number of ways: first, the party receiving a cover price submits a price to the customer that has been determined or influenced directly or indirectly by the party that gave it a cover price; second, the party giving a cover price determines its own price in the knowledge that the party to whom it provided a cover price will be submitting a high bid not intended to win the tender.
>
> 3.20 As observed by the European Commission:
>
> > 'the submission of cover quotes to customers is a manipulation of the tendering procedure. The manipulation consists in the fact that the companies involved, except the one which is the lowest bidder, have no intention of winning the contract [...]. This means that the customer is confronted with a false choice and that the prices quoted in all the bids which he receives are deliberately higher than the price of the company which is "the lowest bidder", and at all events higher than they would be in a competitive environment'.
>
> 3.21 Cover bidding is a serious restriction of competition and has been found to be a form of price fixing and market sharing.
>
> 3.22 The CMA considers cover bidding to be a serious infringement of competition law, by object, even if not all of the parties in the tender process are party to the cover bidding arrangement. At least one of the objects of any cover bidding arrangement is to distort competition by deceiving the customer as to the level of competition: the submission of even one cover bid reduces uncertainty and deprives the customer of an opportunity to make an informed decision as to whether to obtain

[15] Footnotes omitted.

a competitive bid elsewhere; and the potential effects of cover pricing may extend beyond the confines of the specific contract being tendered and create an atmosphere of collusion. As stated by the CAT, cover bidding arrangements:

(a) reduce the number of competitive bids submitted in respect of a particular tender;

(b) deprive the tenderee of the opportunity of seeking a replacement (competitive) bid;

(c) prevent other contractors wishing to place competitive bids in respect of that particular tender from doing so; and

(d) give the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired.

...

Subjective intentions

3.26 The object of an agreement or concerted practice is to be identified primarily from an examination of objective factors, such as the content of its provisions, its objectives, and the legal and economic context of which it forms part.

3.27 The object of an agreement or concerted practice is not assessed by reference to the parties' subjective intentions when they enter into it. Anti competitive subjective intentions on the part of the parties can be taken into account in the assessment, but they are not a necessary factor for a finding that the object of the conduct was anti-competitive.

3.28 As regards cover bidding, the CAT has found that it is irrelevant that a party may have submitted a cover bid so as not to risk being excluded from future tender lists; this is because:

> *'Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the [Competition] Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition'.*

3.29 Moreover, even if a company does not wish to win a particular contract, it does not need to collude with its competitors in order to put in a high quotation. As the OFT stated:

> *'A competitive bid is one which reflects the bidder's own perception of the potential risks and rewards involved in the project and the wider marketplace. Whilst a bidder might unilaterally submit a high bid in the hope of not winning a tender, in doing so it will take into account the risk that the bid could be so low as to win the job, or so high as to damage its credibility. Where a bidder submits a cover*

price, however, this risk is curtailed as the price has simply been obtained from a competitor. In this way, a bidder submitting a cover price deliberately substitutes practical cooperation for the risks of the competitive process [...] and the bid cannot, therefore be regarded as "genuine" or "competitive'".

3.30 An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim.

3.31 The fact that the parties may not have considered the anti-competitive nature of their conduct, and therefore may not have appreciated that the object or effect of that conduct was anti-competitive, is not a relevant consideration when considering the existence of an infringement.

3.32 There is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.

…

Appreciable restriction of competition

3.34 An agreement or concerted practice will not infringe the Chapter I prohibition if its impact on competition is not appreciable. An agreement that has an anticompetitive object constitutes an appreciable restriction on competition by its nature and independently of any concrete effect that it may have."[16]

57. The CMA sets out the evidence in relation to each Infringement, and the CMA's legal assessment of that conduct, in Chapter 4. The CMA then finds in Chapter 5 that Keltbray was directly involved in, and liable for, eight of the Infringements: Infringements 4, 5, 7, 8, 10, 12, 13 and 14.

58. Chapter 6 addresses the action that the CMA considered to be appropriate. The CMA found that each of the Infringements had been committed intentionally or recklessly, and had as their object the restriction of competition. The CMA considered it appropriate to impose a penalty for each of the Infringements in which the parties were involved: "given the seriousness of the conduct and in order to deter similar conduct in the future".[17] The CMA's conclusion was that "the Infringements had as their object the restriction of competition, and that the conduct of the parties was deliberate and obviously anti-competitive, such that

[16] Footnotes omitted.
[17] Paragraph 6.5 of the Decision.

they must have been aware, could not have been unaware, or at the least ought to have known that it would result in a restriction or distortion of competition".[18]

59. Chapter 6 then details the approach that the CMA took to calculating the penalty for each of the infringing parties.

(1) Step 1

60. Step 1 is dealt with at paragraphs 6.18 to 6.37 of the Decision. In relation to the determination of the relevant turnover, the CMA identified that pursuant to the Penalty Guidance, it is "the turnover of the undertaking in the relevant market affected by the infringement in the undertaking's *'last business year'* that is the financial year preceding the date when the infringement ended".[19] The CMA acknowledged that:

> "there is a degree of double counting that arises by calculating multiple fines using the same relevant turnover in the same financial year, resulting in an inflated relevant turnover figure. By contrast, in relation to a year-long single continuous infringement, relevant turnover would be factored into the penalty calculation only once. The CMA has taken this into account in the making its assessment (sic) for proportionality, at step 4 …"[20]

61. The double-counting in relation to Keltbray can be seen from the following table:[21]

Infringement	**Relevant Market**	**Date on which infringement ended**	**Last business year**	**Relevant Turnover**
Bow Street (1)	Demolition Services and Asbestos Removal Services in the UK	17 April 2014	Financial year ending 31 October 2013	£64,725,000

[18] Paragraph 6.12 of the Decision.
[19] Paragraph 6.19 of the Decision.
[20] Paragraph 6.21 of the Decision.
[21] See the table on pp 120–125 of the Decision; Keltbray's details and figures appear on pp 122–123.

Station Hill, Reading	Demolition Services in the UK	9 June 2014	Financial year ending 31 October 2013	£58,783,000
Duke Street, London	Demolition Services in the UK	9 July 2014	Financial year ending 31 October 2013	£58,783,000
Lombard House, Redhill	Demolition Services in the UK	22 August 2014	Financial year ending 31 October 2013	£58,783,000
Bow Street (2)	Demolition Services in the UK	28 November 2014	Financial year ending 31 October 2014	£72,745,000
33 Grosvenor Place	Demolition Services and Asbestos Removal Services in the UK	16 November 2016	Financial year ending 31 October 2016	£175,607,000
Wellington House	Demolition Services and Asbestos Removal Services in the UK	8 December 2016	Financial year ending 31 October 2016	£175,607,00
Ilona Rose House	Demolition Services in the UK	18 November 2016	Financial year ending 31 October 2016	£155,510,000

62. The CMA addressed its assessment of seriousness by reference to the three stages set out in the Penalty Guidance. *First*, as regards the likelihood that the type of infringement at issue will, by its nature, cause harm to competition:

(1) the CMA concluded that:

"6.25 In this case, the Infringements concern cover bidding and/or compensation payment arrangements, within a selective tendering process. For the reasons set out below, the CMA considers that cover bidding is a serious restriction and distortion of competition, which is very likely, by its nature, to cause harm to competition.

6.26 Cover bidding is an object infringement (see chapter 3).

6.27 The content and primary objective of a cover bidding arrangement is to frustrate the tendering process chosen by the customer .. It is from the perspective of the customer that cover bidding should be assessed. The mutual trust and understanding between the provider of the cover bid and the recipient is the antithesis of a competitive relationship between undertakings participating in a closed bidding process, in which each undertaking is subject to the risks associated with not being able accurately to anticipate competitors' behaviour and is expected to adapt its own conduct accordingly. Cover bidding thus, by its nature, restricts and distorts competition.

6.28 Moreover, cover bidding has numerous potential harmful effects. For example:

(a) cover bidding compromises the tendering exercise by misleading the tenderee as to the number of competitive bids that it has received, thereby depriving it of the opportunity to make an informed decision as to whether to seek a replacement (competitive) bid. This is the case irrespective of whether the party submitting the cover bid may have unilaterally decided not to compete, or submitted a cover bid so as not to risk being excluded from future tender lists. Cover bidding is thus inherently harmful to competition because it distorts the tender process irrespective of the subjective intentions of those committing the infringement.

(b) to the extent that the bidder making a cover bid, rather than simply declining to bid, is motivated by a desire to protect its bidding credibility with a customer, the other bidders have no legitimate interest in protecting a rival's bidding credibility. Indeed, maintaining and protecting credibility may be regarded as a factor that influences a bidder's competitive behaviour, including decisions as to whether to bid, and what prices to bid;

(c) future tendering process are liable to be more susceptible to cover bidding where competitors are aware of each other's willingness to engage in that conduct;

(d) tenderees' perceptions as regards a competitive price may be distorted by having seen inflated cover bids, which may affect

> Their assessment of both the bids in the instant case and future bids."[22]

(2) Paragraph 6.25 contains footnote 578 which addressed submissions made by two other addressees of the Decision to the effect that "simple cover bidding" should be viewed as less serious than other forms of price fixing (a reference to *Kier* at [93] to [102]). In footnote 578, the CMA:

> "recognises and has had regard to the fact that, depending on the circumstances, other object infringements may be more serious, but it does not follow from this that cover bidding is not a serious infringement. Moreover, in light of the CMA's experience subsequent to [the Kier Group case] the CMA considers that some of the statements in that judgment are no longer applicable, in particular the dicta at paragraphs 101 to 102 of the judgment concerning the likely effects of cover pricing and the foreseeability of its effect on competition".

We will return to this point further in paragraph 305 below.

(3) The Decision referred to the CMA's (and its predecessor, the OFT's) experience that cover bidding continues to occur despite numerous infringement decisions (and penalties levied) relating to it, or other cartel behaviour within the construction industry, and to the CMA's conclusion that parties must benefit from such conduct.[23]

(4) The CMA recognised (and took into account) that "single instances of cover bidding between two or more parties may be viewed as less serious than a long running, multipartite, market wide cartel; and that the provision of a cover bid may not always have affected the outcome of the tender, or the final price paid",[24] but considered that it is a serious restriction of the competition rules.[25] The Decision cited *GF Tomlinson* at [282] in which the Tribunal warned undertakings that they "must recognise that any future instances of this kind of infringement will be dealt with very firmly by the Tribunal".

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[22] Footnotes omitted.
[23] Paragraph 6.29 of the Decision.
[24] Paragraph 6.30 of the Decision.
[25] Paragraph 6.31 of the Decision.

(5) The CMA concluded that the starting point on seriousness was within the 21-30% range in order to reflect the serious nature of the Infringements, but for Infringements involving compensation payments it would be higher than those involving cover bidding alone.

63. As regards the *second stage* - the likelihood and extent of harm to competition in the specific relevant circumstances of the case - the Decision states as follows:

> "6.34 … In particular, the CMA considers that the following factors point to a high likelihood and extent of harm:
>
> (a) the Infringements concerned 19 tender processes, and included conduct by some of the leading demolition companies in the UK;
>
> (b) the number of companies that submitted bids for the affected contracts was small, given the specialist nature of the work and the cost involved in preparing tender documents. The CMA therefore considers it reasonable to conclude that at least some of the Parties involved in the Infringements are likely to have been aware, or could guess, that they faced only limited competition. A number of Parties in this case were involved in more than one Infringement with the same counterparty;
>
> (c) in 16 out of the 19 Infringements in issue, the contract was awarded to one of the Parties involved in the relevant cover bidding arrangement;
>
> (d) the Infringements concerned tender processes which were carried out on behalf of range of end-customer, including public sector bodies, and involved significant contracts ranging in value from approximately £800,000 to £50.2m. …
>
> 6.35 Against this, the CMA has also taken into account that the following factors would tend to temper the likelihood and extent of harm to competition:
>
> *(a)* not all of the parties involved with the relevant tender processes were party to the anti-competitive arrangements; and

(b) the structure of the relevant market in this case is relatively fragmented, with smaller demolition companies competing on a regional basis."[26]

64. In relation to the *third stage* – general deterrence – the CMA considered that this was a particularly important consideration in this case, and a clear message needed to be sent to other businesses that they should not engage in such conduct. The CMA referred to the fact that there had already been a number of investigations and infringements found in the construction and related sectors, including specifically cover pricing. The unlawful nature of the parties conduct in this case has been established for a number of years and ought to have been well known to them.[27]

65. The CMA therefore concluded that in order to reflect the seriousness of the Infringements, and need for general deterrence, the appropriate starting percentage for cover bidding alone (being the conduct in which Keltbray participated) was 24%: the percentage for conduct involving compensation payments (with or without cover bidding) was 26%.[28]

(2) Step 2

66. The CMA recorded that the duration of each of the Infringements was less than one year, and concluded that there are no exceptional circumstances which would make it appropriate to decrease the starting point in this case. The multiple to be applied to the Step 1 figure was therefore "x1" for each Infringement.[29]

(3) Step 3

67. The CMA considered that the involvement of directors or senior management in relation to each of the Infringements was an aggravating factor. This

[26] Footnotes omitted.
[27] Paragraph 6.36 of the Decision.
[28] Paragraph 6.37 of the Decision.
[29] Paragraph 6.39–6.40 of the Decision.

ultimately affected five of Keltbray's Infringements. Cooperation was a mitigating factor, in relation to which Keltbray received a 5% reduction.[30] Keltbray also received a 10% reduction for adequately demonstrating that it had taken steps to ensure compliance with competition law.[31]

68. The figure produced for Keltbray at the end of Step 3 was £178,688,256.

(4) Step 4

69. The Decision deals with adjustments made for specific deterrence and proportionality in general terms at paragraphs 6.60 to 6.63 and specifically as regards Keltbray at paragraphs 6.89 to 6.93. The CMA, having regard to all the relevant circumstances, considered the figure referred to in the previous paragraph to be "disproportionately large", warranting a reduction at Step 4.[32] The CMA considered that a penalty of £20 million was appropriate to reflect the serious nature of the Infringements in which Keltbray was involved, its role, its size and financial position, and the need for specific and general deterrence.[33]

70. In reaching that conclusion the CMA had regard to the following factors:

> "6.91 …
>
> *(a)* the fact that [Keltbray's] relevant turnover has been factored into the penalty calculation more than once for those financial years in which there was more than one infringement,[637] resulting in a disproportionately large penalty figure after step 3. By contrast, in the case of a year-long single continuous infringement, relevant turnover would be factored into the penalty calculation only once. Without a reduction at this step, the total penalty for multiple infringements within the same financial year, which together lasted for substantially less than one year, could be significantly higher than the penalty for a year-long single continuous infringement;

[30] Paragraph 6.51–6.52 of the Decision.
[31] Paragraph 6.54–6.55 of the Decision.
[32] Paragraph 6.89 of the Decision.
[33] Paragraph 6.90 of the Decision.

(b) the fact that each of [Keltbray's] Infringements was of a short duration and concerned a single contract, rather than the entirety of its business in the relevant markets; and

(c) [Keltbray] was neither a leader nor an instigator of the conduct.

6.92 Balanced against this are the following factors which are also relevant to the CMA's assessment of proportionality and, in particular to what extent it is appropriate to reduce the penalty:

(a) **the nature of the Infringements**: cover bidding arrangements are, by their nature, serious restrictions of competition;

(b) **the role of the undertaking**: [Keltbray] was involved in eight Infringements over the course of three years concerning cover bidding;

(c) **The impact of the undertaking's infringing activity**: any impact of the conduct will have lasted at least for the whole duration of the affected contracts as well having the potential for continuing impacts".

6.93 In conjunction with all of these factors, the CMA has also taken into account [Kelbray's] size and financial position, [Keltbray] has:

(i) worldwide turnover of £389.5 million in 2021 and average worldwide turnover for 2019 to 2021 of around £460.5 million. A penalty of £20 million represents around 4% of its average worldwide turnover and around 0.5% of such turnover when considered on a per infringement basis;

(ii) profit after tax of £6.8 million in 2019 and losses after tax of £9.3 million in 2020 and £4.3 million in 2021;

(iii) net assets that have reduced from £41.8 million to £27.7 million over the period 2019 to 2021. A penalty of £20 million represents 72% of [Keltbray's] net assets in 2021, and 9% of such assets when considered on a per infringement basis; and

(iv) made dividend payments in 2019 and 2020 totalling £6.5 million, but no dividend payment in 2021."

(5) Step 5

71. No further adjustment was required at Step 5 as the proposed penalty was less than 10% of Keltbray's worldwide turnover.

(6) Step 6

72. At Step 6, the CMA allowed a 20% discount for Keltbray having agreed to settle. That reduced the penalty payable from £20 million to £16 million.

D. THE SETTLEMENT AGREEMENT

73. Keltbray was one of eight addressees of the Decision to enter into a settlement agreement with the CMA.

74. On 19 July 2021, Keltbray's solicitors confirmed that it wished to enter into settlement discussions. On 27 September 2021, the CMA confirmed that it would enter into settlement discussions, and set out key elements of the settlement procedure. The CMA's letter referred to the CMA8 Guidance and set out the minimum requirements for settlement listed in paragraph 14.7 of the Guidance and stated that Keltbray must confirm that it accepted that a streamlined administrative process would apply for the remainder of the investigation. The letter enclosed a draft timetable for settlement (Annex A) and Terms of Settlement (Annex B).

75. On 8 October 2021, Keltbray's solicitors wrote to confirm its agreement in principle to the Terms of Settlement as set out in Annex B.

76. A draft version of the Statement of Objections ("SO") along with a draft penalty calculation were sent to Keltbray on 8 November 2021. The draft penalty was in the following form:

STEPS	CONTRACTS							
	Bow Street Hotel (1)	Station Hill	Selfridges	Lombard House	Bow Street Hotel (2)	33 Grosvenor Place	Wellington House	Ilona Rose House
Relevant turnover	£64,725,000	£58,783,000	£58,783,000	£58,783,000	£72,745,000	£175,607,000	£175,607,000	£155,510,000
Step 1	26%	26%	26%	26%	26%	26%	26%	26%
Step 2	1	1	1	1	1	1	1	1
Step 3								
Ag: DI	~	~	~	~	~	~	~	~
Ag: L/I	~	~	~	~	~	~	~	~
Mit: Coop	-5%	-5%	-5%	-5%	-5%	-5%	-5%	-5%
Penalty	£15,987,075	£14,519,401	£14,519,401	£14,519,401	£17,968,015	£43,374,929	£43,374,929	£38,410,970
Combined	**£202,674,121**							
Step 4	*Adjustment for specific deterrence or proportionality* **£65,000,000**							
Step 5	*Adjustment to take account of the statutory maximum penalty* **£42,863,934**							
Step 6	Settlement discount = 20%							
Proposed penalty payable	**£34,291,147**							

77. The CMA met with Keltbray on 16 December 2021 to discuss the potential settlement of the investigation. That meeting was attended by, amongst others, Mr Burnside and Mr Corrigan, being the key decision makers for the purposes of settlement, and authorised to conclude any settlement on Keltbray's behalf. Keltbray provided the CMA with information both before and after that meeting.

78. On 11 February 2022, the CMA sent to Keltbray the final penalty calculation; the penalty calculations for the other settling parties; a draft final settlement letter (the "Settlement Letter") annexing the CMA's final Terms of Settlement; an amended version of the draft SO; and a document setting out the adjustments that had been made to the previous draft penalty calculation. The CMA's letter recorded that:

> "Should [Keltbray] … decide to settle the investigation with the CMA on the basis of the final penalty calculation, this will represent the maximum penalty that would be imposed on your client by the CMA following the issue of any infringement decision.
>
> The CMA does not propose to enter into further discussions on the contents of the Draft [SO] dated 11 February 2022, the final penalty calculation, the settlement letter and Terms of Settlement, save in circumstances that the CMA considers exceptional."

79. The final penalty calculation provided to Keltbray took into account some of the points made in the course of the settlement meeting and the additional information provided. It was in the following form, and is reflected in the Decision:

STEPS	CONTRACTS							
	Bow Street (1)	Station Hill	Duke Street, London	Lombard House	Bow Street (2)	33 Grosvenor Place	Wellington House	Ilona Rose House
Relevant turnover	£64,725,000	£58,783,000	£58,783,000	£58,783,000	£72,745,000	£175,607,000	£175,607,000	£155,510,000
Step 1	24%	24%	24%	24%	24%	24%	24%	24%
Step 2	1	1	1	1	1	1	1	1
Step 3								
Ag: DI	+15%	+15%	+15%	+15%	+15%	-	-	-
Ag: LI	-	-	-	-	-	-	-	-
Mit: Coop	-5%	-5%	-5%	-5%	-5%	-5%	-5%	-5%
Mit: Compl'	-10%	-10%	-10%	-10%	-10%	-10%	-10%	-10%
Penalty	£15,534,000	£14,107,920	£14,107,920	£14,107,920	£17,458,800	£35,823,828	£35,823,828	£31,724,040
Combined	**£178,688,256**							
Step 4	*Adjustment for specific deterrence or proportionality* **£20,000,000**							
Step 5	*No adjustment required to take account of the statutory maximum penalty* **£20,000,000**							
Step 6	Settlement discount = 20%							
Penalty payable	**£16,000,000**							

80. The Settlement Letter required Keltbray to confirm that it "voluntarily, clearly and unequivocally" admitted that it had participated in agreements or concerted practices which had as their object the prevention, restriction or distortion of competition, in the form of cover bidding arrangements, specifically the Infringements; accepted liability for them; admitted the accuracy of the facts giving rise to the Infringements as set out in the Draft Statement of Objections; accepted the CMA's Terms of Settlement, and offered to settle on those terms; and confirmed that the infringing behaviour had ceased. The letter further required Keltbray to accept that "consequent to their admission of liability, the CMA will impose a maximum total penalty of £20,000,000 on them in respect of the infringements … to which, pursuant to and dependent on compliance with the Terms of Settlement, a reduction of 20% will be applied on account of the

procedural efficiencies achieved through settlement, giving a maximum penalty payable of £16,000,000".

81. The CMA's Terms of Settlement (which reflected those sent under cover of the CMA's letter of 19 July 2021) included the following:

> "**Admission of facts and liability**
>
> 4. The Settling Party is prepared to provide an admission of its participation in, and liability for, the entire infringements as applicable to it as set out in the Draft Statement of Objections (the Settlement Infringements), including the facts as set out in the Draft Statement of Objections insofar as they are relevant to the Settling Party's involvement in the Settlement Infringements, subject to any limited representations (including on manifest factual inaccuracies) that are indicated in a memorandum that may be provided pursuant to paragraph 6."
>
> …
>
> **Streamlined procedure**
>
> 6. The Settling Party will limit any written representations on the Draft Statement of Objections to a concise memorandum (indicating only any manifest factual inaccuracies contained within the Draft Statement of Objections, which will be provided to the CMA as part of the settlement discussions). The Settling Party will also limit its written representations on any Statement of Objections and supplementary Statement of Objections that the CMA may issue in respect of the Settlement Infringement(s) to a concise memorandum indicating only any manifest factual inaccuracies.
>
> 7. The Settling Party will not request an oral hearing.
>
> …
>
> 10. In advance of the settlement discussions, the Settling Party will be provided with a draft calculation of the maximum total penalty to be imposed by the CMA in respect of the Settlement Infringements. The Settling Party will be given an opportunity to make limited representations on the draft penalty calculation as part of the settlement discussions, provided that in the CMA's view, these are not inconsistent with the Settling Party's admission of liability to be made in respect of the Settlement Infringements. Any such representations will be taken into account in calculating the final maximum total penalty…
>
> …
>
> **CMA infringement decision and reduction in penalty**

16. In recognition of the Settling Party's admission in accordance with paragraph 4 above and agreement to a streamlined administrative procedure for the remainder of the investigation in accordance with paragraphs 6 to 12 above, any infringement decision that may be adopted by the CMA in respect of the Settling Party in the above investigation will, subject to paragraph 17 below:

    a. set out the CMA's findings in substantially the same terms as the Draft Statement of Objections and subsequent Statement of Objections, subject to any amendments deemed necessary and appropriate by the CMA including as a result of (i) any representations on manifest factual inaccuracies in the Draft Statement of Objections, and/or (ii) any other information, as reflected in any supplementary Statement of Objections that the CMA may issue in respect of any of the Settlement Infringements,

    b. note the Settling Party's clear and unequivocal admission of the Settlement Infringements,

    c. conclude as to whether the Settling Party has committed the Settlement Infringements and,

    d. if the CMA concludes that the Settling Party has committed the Settlement Infringements, impose a maximum total penalty of £20,000,000 on the Settling Party (the Total Penalty), to which a reduction of 20% (the Settlement Discount) will be applied on account of the procedural efficiencies achieved through settlement, giving a maximum penalty payable of £16,000,000 (the Settlement Penalty). The CMA may, without notice, make adjustments that have the effect of reducing the Settling Party's Total Penalty indicated above and (through the Settlement Discount) the Settlement Penalty."

…

Termination post-infringement decision

20. The Settling Party accepts that the Terms of Settlement will no longer apply if following the adoption of any infringement decision, the Settling Party appeals or brings any legal challenge in relation to any infringement decision arising from the investigation to any court, including but not limited to the CAT.

…

Termination post-infringement decision

23. If, following the adoption of any infringement decision, the CMA determines that the Terms of Settlement no longer apply because the Settling Party has not complied with one or more of the requirements of the Terms of Settlement, the CMA may take action to recover whichever of the Total Penalty, and/or the Settlement Discount (as applicable) remains outstanding.

24. If the Settling Party brings appeal proceedings before the CAT (including as to penalty) against any infringement decision arising from the investigation, the CMA reserves the right to make an application to the CAT:

- to increase the penalty imposed on the Settling Party (the Settlement Penalty), such that there is no Settlement Discount, and
- to require the Settling Party to pay the CMA's full costs of the appeal regardless of the outcome of that appeal."

82. On 25 February 2022, Keltbray provided a signed copy of the CMA's draft Settlement Letter transposed onto its own letterhead, which also annexed the CMA's Terms of Settlement. The Settlement Letter was signed by Mr Peter Burnside, and Mr Vincent Corrigan (two of Keltbray's witnesses in the case), who confirmed that Keltbray had read the draft SO, had been provided with the opportunity to review the supporting evidence and fully understood the contents of the draft SO.

83. By letter dated 17 March 2022, the CMA confirmed that its Case and Policy Committee had authorised settlement on the terms of the Settlement Letter and Terms of Settlement. This was roughly a year prior to the adoption of the Decision on 23 March 2023.

84. In the course of this appeal, Keltbray has sought to make various, relatively minor, corrections to Keltbray's "relevant turnover" figure for the purposes of Step 1 to exclude certain revenues relating to asbestos removal, which was not undertaken during the course of demolition work, and decommissioning work (which is not covered by the Decision).[34] The CMA has accepted that the "relevant turnover" at Step 1 should be adjusted, although it maintains that this makes no difference to the assessment it made at Step 4.

[34] The recalculated figures were supported by a witness statement of Shula Diane de Jersey, a solicitor from BCL Solicitors LLP, the firm representing Keltbray dated 1 December 2023.

85. The result is that the figures in the Penalty Calculation up to Step 3 should be revised as follows:

	Bow St (1)	Station Hill	Duke St	Lombard House	Bow St (2)	33 Grosvenor Place	Wellington House	Ilona Rose
Relevant Turnover	58,161,000	55,408,000	55,408,000	55,408,000	63,476,000	146,527,000	146,527,000	144,202,000
Step 1	24%	24%	24%	24%	24%	24%	24%	24%
Step 2	1	1	1	1	1	1	1	1
Sub total	13,958,640	13,297,920	13,297,920	13,297,920	15,234,240	35,166,480	35,166,480	34,608,480
Step 3: Aggravating (Director Involvement)	15%+	15%+	15%+	15%+	15%+	-	-	-
Step 3: Mitigating (cooperation)	-5%	-5%	-5%	-5%	-5%	-5%	-5%	-5%
Step 3: Mitigating (compliance)	-10%	-10%	-10%	-10%	-10%	-10%	-10%	-10%
Penalty	13,958,640	13,297,920	13,297,920	13,297,920	15,234,240	29,891,508	29,891,508	29,417,208
Combined				158,286,864				

86. It is on the basis of this penalty calculation that the appeal proceeded.

E. THE EVIDENCE

(1) The Witnesses

87. In support of its appeal, Keltbray relied upon witness statements from four witnesses: Mr Peter Burnside; Mr Vincent Corrigan; Mr Tim Lohmann; and Ms Shula Diane de Jersey (a partner at Keltbray's solicitors, BCL Solicitors LLP).

(a) Keltbray's evidence

88. Peter Burnside is a fellow of the Institute of Chartered Accountants in Ireland. He joined Keltbray in February 2018 as its Chief Financial Officer.

(1) Mr Burnside's first and second statements dated 23 May 2023 and 7 September 2023 addressed three issues: (1) Corrections to Keltbray's turnover figures; (2) tender submission data; and (3) Keltbray's financial position (by reference to a time to pay application, and Keltbray's audited accounts for the year ending 31 October 2022). The correction to Keltbray's turnover is dealt with in paragraph 84 above. The tender submission data is to the effect that Keltbray submitted a total of 729 tender bids in the period covered by the Decision (January 2013 to June 2018). In the two years in which Keltbray's 8 Infringements occurred (2014 and 2016), Keltbray submitted 251 tender bids.

(2) Mr Burnside's third statement dated 29 November 2023 provided evidence in support of Keltbray's argument that the markets for HCDS and GDS are distinct, and therefore goes to Ground 2 of the Appeal; the proposition that these are two separate and distinct markets appears in Mr Robin Noble's expert report (discussed below). Mr Noble considered the question of supply-side substitution and concluded that there was insufficient supply-side substitution from HCDS to GDS for there to be a single market, because the gross profit margins on HCDS were significantly higher than on GDS. Mr Burnside presented the results of a sampling exercise undertaken in relation to Keltbray's demolition projects. Mr Burnside's sample project schedule contained information about a total of 34 demolition projects. Of these 9 are said to be HCDS, and the remaining 25 are GDS projects (applying criteria identified in Mr Noble's report). Mr Burnside stated that "to achieve a representative sample, Keltbray randomly selected a cross-section of what it would describe as simple, 'cut and carve', and more complex projects from a pool of those for which it had access to reliable information". We will refer to this schedule ("PB3") further below.

(3) Mr Burnside produced a fourth witness statement dated 27 April 2024. This followed the Tribunal's pre-hearing letter to the parties dated 24 April 2024 which listed a number of issues we anticipated would need to be covered by the experts in the course of their concurrent "hot tub" evidence. One of those issues related to the selection exercise carried out in the preparation of PB3, and another related to the reasons why the tender margins (that is to say, the margins provided for when the tenders were initially submitted) were on average higher than the outturn margins on the same projects in GDS projects, and in relation to HCDS projects the reverse was the case. We will refer to the substance of this fourth witness statement in paragraph 239(1) below. The CMA initially objected to this statement, on the basis that it was very late, and addressed issues that ought to have been recognised as being relevant at a much earlier stage. Ultimately, at the hearing however, the CMA

raised no objection to the Tribunal admitting the evidence on the basis that it would be addressed in cross-examination, and submissions made as to the weight to be attached to it in particular given the lack of opportunity to seek relevant disclosure.

89. Vincent Corrigan has been the Chief Operating Officer of Keltbray since November 2019. He is a quantity surveyor by training with almost 40 years' experience in the construction industry. He originally joined Keltbray in 2015 as a Group Board Director. He has been involved in various large projects, including: Excel Docklands; the Arsenal Emirates Stadium; the London O2 Arena; and the London 2012 Olympic (currently West Ham) Stadium. Mr Corrigan provided one witness statement dated 23 May 2023 that gave a description of the nature of the HCDS projects undertaken by Keltbray and highlighted distinctions between GDS projects and [HCDS] projects, and addressed the CMA's approach to the relevant geographic market, and the "highly distinct nature of the services supplied in Central London". Mr Corrigan's evidence is relevant to Ground 2 of the NoA. Mr Corrigan's statement provided a "description of the demolition services offered by Keltbray; identification of the various project contract procurement routes; an explanation of the distinction between GDS and HCDS; an explanation of how the infringing projects fit in with that categorization; and an explanation of the materiality of this to Keltbray's turnover figures for the purpose of the penalty calculation". We will return to the substance of that evidence in paragraph 205 below. The latter issue – the CMA's approach to the relevant geographic market – was not pressed before us.

90. Tim Lohmann is the Director of Strategic Engineering at the Keltbray Group. He is a Chartered Structural Engineer with over 30 years' construction industry experience. He joined Keltbray's in-house engineering team, Wentworth House Partnership ("WHP") in 2015, and was appointed to his current role in 2021. He has a broad range of responsibilities including providing engineering oversight to all of the Group's work.

(1) Mr Lohmann provided one witness statement dated 23 May 2023 which was relevant to Ground 2 of the NoA, and was submitted to provide an example of each of a simple; "cut and carve"; complex; and HCDS project from an engineering perspective. His statement also provided evidence as to the transferability of skills between demolition project types. His evidence is referred to in more detail in paragraph 219 below.

(2) Mr Lohmann was not cross-examined, but his evidence is relevant to our understanding of the expert evidence of Mr Noble.

91. Shula Diane de Jersey is a solicitor at BCL Solicitors, which is the firm acting for Keltbray. Her statement set out the process she undertook to calculate Keltbray's corrected turnover figures in light of the change of market definition to asbestos removal and related services, and to produce turnover figures excluding projects identified as HCDS. Ms de Jersey was not cross-examined and, being purely a mathematical exercise, her calculations are accepted as being correct, albeit that – in relation to HCDS and Ground 2 of the NoA – the premise on which the recalculation is made is plainly contested.

(b) The CMA's evidence

92. The CMA adduced evidence from three witnesses, two of which, for reasons we briefly explain in section E(2) below, can be regarded as providing expert evidence. The factual witness evidence for the CMA was provided by Ms Juliette Enser, previously a Senior Director for Cartels but since March 2024 an Interim Executive Director for Competition Enforcement at the CMA. Ms Enser has occupied other senior roles at the CMA and prior to that at the OFT. For our purposes, her role as Senior Director for Cartels is most relevant. In that role, given her responsibility for the CMA's portfolio of cartel investigations, she served as the Senior Responsible Officer (SRO) for the CMA's investigation in this case, which resulted in the Decision.

(1) Ms Enser's witness statement dealt with the decisions taken relating to the decision to issue the SO and draft Penalty Statement, the settlement process and the decision to issue the Decision and determination of the level of appropriate penalty. She also addressed the settlement discount in circumstances where Keltbray has issued the Notice of Appeal. She explained that the Decision is expressed in concise terms, and that this is part of a deliberate effort on the part of the CMA to streamline the drafting of decisions generally for the benefit of all concerned, including the parties, the Tribunal and the public. The Decision sought to concentrate on the key aspects of the case citing only the most probative evidence, and sought to avoid duplication as far as possible, and did not "[set] out in the same level of detail our reasoning for the penalties for the settling parties".

(2) In her evidence, Ms Enser sought to explain "(i) why the CMA regards cover bidding as a serious infringement and why significant financial penalties are needed to deter it, particularly in the construction industry; (ii) how the CMA approached the exercise of market definition in this case, and why [she] believed that approach to be reasonable; (iii) why … the proportionality adjustments at Step 4 …were applied such that is likely that in many scenarios changes to the mode of calculation of 'relevant turnover' at Step 1 would still have resulted in financial penalties of a broadly similar magnitude being imposed on Keltbray … (iv) the background to settlement, the settlement process with Keltbray, and the basis on which Keltbray settled; and why, having brought the present appeal notwithstanding the Settlement Agreement, Keltbray's penalty should be revised up to £20 million, to reflect the forfeiture of the Settlement Discount".

93. Subject only to the selection exercise in relation to PB3 (which we return to in paragraph 99 below), we consider the evidence to have been given by all the witnesses in a straightforward and candid manner. In their oral evidence, each

of the witnesses did their best to assist us in understanding their respective positions.

(2) The Experts

94. We also heard expert evidence provided on behalf of both Keltbray and the CMA as follows:

(1) Keltbray relied on expert evidence from Mr Robin Noble, a partner at Oxera Consulting LLP specialising in, among other things, competition economics. He is experienced in giving evidence on matters such as market definition in competition cases, including in this Tribunal.

(2) The CMA relied on a statement of Dr Mike Walker. Dr Walker is the Chief Economic Advisor at the CMA, and was responsible for ensuring that there was a thorough review of the robustness of the economic analysis set out in the SO and Decision, and the evidence used to support that analysis. This means that he does not, strictly speaking, satisfy the requirements for an independent expert. However, there was no objection to his evidence being treated as expert evidence in these proceedings, and we agree that it is plainly appropriate that we treat it as such.

(3) The CMA also relied on a statement of Dr Jenny Haydock, Deputy Chief Economic Adviser at the CMA. Dr Haydock was not involved during the administrative proceedings and had no involvement in the issuing of the CMA's Decision. This appeal was originally listed to be heard together with an appeal brought in relation to the Decision by Squibb Group Limited challenging the finding in the Decision that the conduct gave rise to an object infringement ("the Squibb Appeal"). Dr Haydock's evidence was provided primarily in response to the expert report filed in the Squibb Appeal. The Squibb Appeal was withdrawn by order dated 15 March 2023, but Keltbray sought to cross-examine Dr

Haydock in relation to two sections of her statement covering the likely effects and significance of cover bidding. Given her role at the CMA, the same issues arise as regards her status as an expert as arise in relation to Dr Walker. For the same reasons as apply in relation to Dr Walker we treat her evidence as expert evidence in this case.

95. Mr Noble was instructed by Keltbray to provide his expert opinion on whether the CMA's defined relevant product and geographic markets were too broad and, if so, to provide his opinion on the appropriate market definitions in this case. His first report dated 23 May 2023 ("Noble 1"), sets out his analysis and conclusions on both issues, although, as mentioned in paragraph 89 above, the issue of relevant geographic market was not pressed before us. Mr Noble's evidence is referred to in further detail below in relation to Ground 2 of the NoA. In summary, he identified two distinct groups of projects: those that can be termed as being within a GDS product market and those within a HCDS product market. He distinguished HCDS projects based on two key factors: demolition involving an infrastructure site (such as a railway station or London underground line) and/or their size in financial terms (Mr Noble used a threshold of £36.8m). Mr Noble concluded that demand-side substitution between different demolition work packages is limited; that the degree to which the market is likely to be wider than each individual project will be driven primarily by supply-side substitution; and that there are a variety of barriers which are likely to limit supply-side substitution between GDS and HCDS.

96. Dr Walker's statement dated 14 September 2023 addressed the evidence filed both in this appeal, and in the Squibb Appeal in relation to market definition. His evidence addressed the framework for defining the relevant market (both product and geographic): whether the relevant market is properly confined to the individual tender; whether the CMA conducted a reasonable and proportionate market definition exercise for the purpose of the Decision; whether the product market definition could have excluded from its scope HCDS; and whether the geographic market definition could have been drawn more narrowly to include a Central London geographic market. In brief

summary, Dr Walker concluded that: the relevant market was not the individual tender; the CMA's market definition was reasonable; there was no reasonable basis on which to separate HCDS and GDS; and there was no reasonable basis on which to confine the geographic market to central London.

97. Mr Noble then prepared a second report dated 1 December 2023 ("Noble 2") which addressed the matters raised by Dr Walker. This also addressed the further data provided by Mr Burnside in his third witness statement (referred to in paragraph 88(2) above) which Mr Noble considered supported his initial conclusions regarding the division between GDS and HCDS. The "extreme-scale" threshold figure for HCDS was revised to £36.5m.

98. Mr Noble and Dr Walker agreed the terms of a joint expert statement dated 8 March 2024. This recorded a substantial degree of consensus on a number of the issues in this case. Mr Noble and Dr Walker agreed on: the appropriate approach to market definition; the relevance of supply side substitution from HCDS to GDS to market definition (but not the relevance of supply side substitution the other way around); some of the issues relating to the ability and incentive to substitute from HCDS to GDS (but not, for example, whether or not it is better to look at outturn gross margins or expected margins when considering these incentives); the relevance of scale in product market definition (but not the estimated size of the respective HCDS and GDS segments or the proposition that the HCDS segment is too small to a competitive effect on prices of GDS); and most issues relating to geographic market definition (but not, for example, the proposition that Central London is likely to be a separate market to other areas of the UK). We refer to the relevant points of difference in section F(5) below.

99. We heard the expert evidence of Mr Noble and Dr Walker concurrently, with the questioning led by Mr Derek Ridyard by reference to a list of issues we provided to the parties in advance. We are satisfied that, in giving their evidence, both Mr Noble and Dr Walker sought to assist the Tribunal. They engaged in a helpful and constructive way in the production of the joint expert report and in

the concurrent evidence session. This enabled us to understand the scope and extent of the areas of agreement and difference between them. They gave clear answers fairly, acknowledging what could be agreed between them (and to what extent) and identifying and explaining points of difference. We were concerned, however, that Mr Noble's conclusions were drawn from a small sample of information generally relating solely to Keltbray and, as matters transpired, that the process for the selection of projects for inclusion in PB3 was unsatisfactory. Mr Noble acknowledged that it would have been better had he been aware of these issues sooner. We accept that explanation; however, we consider that Mr Noble could and should have raised and addressed at an earlier stage with Keltbray the issues that the Tribunal identified relating to the sampling exercise that had been undertaken. These issues should not have come to light only, in effect, immediately before the hearing.

100. Dr Haydock's statement dated 14 September 2023 dealt with the likely effects of cover bidding. So far as is relevant to this appeal, this was done by considering the incentives to participate in cover bidding from the perspective of the firm submitting a genuine bid, and of the firm submitting a cover bid. She concluded: (1) that cover bidding is likely to have both direct effects on the tender in question, and wider effects; and (2) that there is no pro-competitive justification for cover bidding and that the sole purpose and effect of cover bidding is to distort competition. Dr Haydock also addressed the significance of the effects of cover bidding, and expressed her scepticism of any claims that cover bidding in general is likely to have very small or insignificant effects. Dr Haydock was cross-examined by Keltbray on the sections of her statement relevant to this appeal. Her evidence was clear and consistent. She fairly acknowledged, where appropriate, the limits of her analysis, but provided clear explanations of the basis upon which her conclusions were reached. We refer to the substance of Dr Haydock's evidence, which is relevant principally to Ground 1 of the NoA below.

101. Subject to the selection of projects for inclusion in PB3 which was not, in our view, explored as it should have been by Mr Noble, we consider the experts' evidence to be of great assistance to us.

F. THE GROUNDS OF APPEAL

(1) General

102. Before turning to the specific grounds of appeal, both Keltbray and the CMA made various submissions by way of an overview of the principles underpinning the penalty setting process, and Keltbray's complaints in this case in particular.

(a) Keltbray's submissions

103. Keltbray submitted that the penalty setting process usually requires an assessment of three factors:

(1) an assessment of the conduct to be penalised;

(2) an assessment of the party to be penalised; and

(3) any necessary permissible wider considerations, such as the need for general deterrence.

104. An assessment of the conduct to be penalised, will entail a consideration of the following four matters:

(1) The nature of the anti-competitive conduct. Keltbray submits that in each of the eight Infringements the conduct in issue was cover bidding in individual selective tender processes, themselves each representing a "very small fraction of the overall market, however broadly or narrowly defined". In seven of the Infringements, Keltbray provided cover prices in response to a request from another undertaking in circumstances where Keltbray was known not to be the preferred bidder, or did not

want the job. In the remaining Infringement, Keltbray requested a cover price from two other undertakings, but did not win the tender. In three of the eight Infringements, the client did not ultimately proceed with the demolition, and in another, the project was cancelled. Keltbray submits that such considerations can properly affect an assessment of the seriousness of the conduct. Keltbray submits that the nature of the anti-competitive conduct is relevant to Steps 1 and 4 of the penalty calculation, and is relevant to Grounds 1 and 3 of its appeal.

(2) The number and duration of the Infringements. Keltbray submits that five of the tenders were submitted in 2014, three in 2016, and that the duration of each was "very short". This is relevant to Step 2 of the penalty calculation, which requires an assessment of the duration of "an infringement" (singular). The Penalty Guidance does not address the issue of how multiple infringements are to be dealt with. Even when considering Step 4 (proportionality), it refers to "infringement" (singular). This is relevant to Ground 3 of the Appeal.

(3) The culpability of Keltbray in the conduct. This is considered at Steps 3 (mitigating and aggravating factors) and Step 4 (proportionality) of the penalty calculation. Keltbray refers, in particular, to paragraph 6.92(b) of the Decision (set out at paragraph 70 above) which Keltbray submits refers to the number of Infringements and period over which they took place, but not Keltbray's role in them. Keltbray also submits that it does not reflect the fact that: the Infringements represented a "very small fraction" of its demolition services bids (approximately 3% of its tenders during 2014 and 2016); or that Keltbray submitted non-infringing bids in tenders for which other addressees of the Decision (not Keltbray) had been found to be culpable. The Decision expressly found Keltbray was neither a leader nor instigator of the conduct. Keltbray also points to the fact that the infringing conduct had ceased three years before the commencement of the CMA's investigation which can be a mitigating factor at Step 3. Keltbray suggests that this was not taken into account

at Step 3 or Step 4. The thrust of Keltbray's submission is that there has been no case specific assessment of Keltbray's role in the Infringements. This is relevant principally to Ground 3 of the Appeal.

(4) The seriousness of the conduct. When it comes to seriousness, Keltbray submits that there are two key features. The first is the inherent seriousness of the conduct, and the second relates to the role of the undertaking in the conduct. There is a degree of overlap between culpability and seriousness. It is possible, for example, to have "a walk-on part" in serious anti-competitive conduct, and a more active role in less serious anti-competitive conduct.

(5) Seriousness is primarily considered at Step 1 of the penalty calculation when the CMA is required to categorise the conduct by reference to a scale from 1 to 30%. Keltbray submits that it is necessary to assess where the conduct in this case sits on the scale of Chapter I infringements. This case did not involve bid-rigging, and was not a market-wide price fixing cartel. If the penalty setting process indicates that the conduct in this case is being treated the same as either of those activities then, Keltbray submits, it is a "clear warning sign that something has gone wrong". The CMA's assessment of seriousness is relevant to Grounds 1 and 3 of the Appeal.

105. An assessment of the party to be penalised entails consideration of the financial metrics of the undertaking that is to be penalised. That may require the CMA to take into account factors that affect the industry generally, or the undertaking specifically. This is primarily a factor taken into account at Step 4 (proportionality) of the penalty calculation, but is also taken into account at Step 1 because the use of "relevant turnover" may distinguish between large and small industry players engaged in similar infringing activities. Keltbray submits that there is a danger at Step 1 that the undertaking's industry activity is dissociated from its role in the infringing activity. This is where Keltbray

suggests the proper identification of the "relevant turnover" is important: a matter considered in Grounds 1 and 2 of the Appeal.

(1) The primary focus on the specific undertaking is at Step 4 where specific deterrence is taken into account and that, Keltbray says, must entail an overview of the undertaking's conduct together with an assessment of its ability to pay. Keltbray relies on paragraph 99 of *Eden Brown* (which we have referred to in paragraph 27 above) in this regard, and the importance of a refined consideration and assessment of all the relevant circumstances, which Keltbray says has been demonstrably lacking in this case. This is relevant to Ground 3 of the Appeal.

(2) Keltbray's principal complaint in relation to Step 4 is that the figure of £158m reached at Step 3 is put into a "black box" from which emerges at Step 4 a penalty of £20m. That, Keltbray says, is a figure reached without any refined consideration or assessment, and without any reasoning or methodology provided. The CMA's position in this case is, in effect, to say that it does not matter what changes you make to Steps 1 to 3, because they do not affect the fact that a proportionality assessment still leads to a penalty of £20m at Step 4. In other words, it does not matter how we get there, because it is (in the CMA's view) a £20 million case. This, Keltbray says, is wholly inadequate, and inconsistent with the refined consideration and assessment of all the relevant circumstances that is required. Keltbray complains that the fixing of the penalty has been done by methods which are not easily verifiable by the Tribunal. These arguments are relevant to Ground 3 of the Appeal.

106. As regards the third factor, namely whether there are any other relevant considerations, Keltbray submits that there is only one in this case: general deterrence. This is relevant to Step 1 and to the seriousness percentage that is applied. This is relevant to Ground 3 of the Appeal.

107. In breaking down the Steps of the penalty calculation by reference to the Grounds of Appeal in the way Keltbray has done, it is clear that they are interrelated. There is, for example, a significant overlap between Grounds 1 and 2, both of which concern the CMA's approach to "relevant turnover" and product market definition at Step 1. There is also a significant overlap between Grounds 1, 2 and 3 in so far as it is alleged that the penalty was disproportionate because of the CMA's approach to relevant turnover. Grounds 1 and 3 overlap in so far as Ground 1 requires an assessment of the harmful effects of the infringing conduct, and Ground 3 requires an assessment of its seriousness.

108. We will deal with the arguments in the order in which they were made, but it will be apparent that what is said in relation to Grounds 1 and 2, also applies in relation to Ground 3. Inevitably this leads to a degree of repetition when dealing with each Ground in context, although we have sought where possible to minimise this.

(b) CMA's submissions

109. The CMA made three general points:

(1) First, each element of the penalty methodology has a job to do, and the CMA's choice of method at each step must be assessed on its merits. The CMA should not be attempting to skew its approach (at Steps 1 to 3) to produce a figure which conforms with its ultimate view of where the appropriate level of penalty should be. Step 4 is there to rebalance the penalty produced by Steps 1 to 3, if and as necessary.

(2) Second, there is an important point that risks being overlooked in this appeal, and this is that the Decision and the method adopted by the CMA in relation to penalty apply to ten parties involved in nineteen Infringements; not just Keltbray. As Mr Williams KC, for the CMA put it, some parties had committed eight, nine or even twelve infringements. Some had high turnover and some had low turnover, and the proportion

of that turnover that related to demolition services differed. Some parties committed multiple infringements over a short period, and for some the period was longer. Some involved compensation payments and some did not. The CMA's method had to capture information across a number of parameters and variables, and had to generate consistent and comparable numbers for each party.

(3) There are particular reasons why the figure for Keltbray at Steps 1 to 3 was high, related to the number of its infringements, and the larger relevant turnover in the provision of demolition services in certain years. The CMA was aware of this issue and addressed it at Step 4. If the CMA had taken an approach that had focused on producing a lower figure at Step 1 for Keltbray that might well have had adverse effects on other parties. The fact that the methodology resulted in higher figures for Keltbray does not mean that it was flawed. It means that Keltbray was in a particular position, which was identified at Step 4.

110. The CMA also submitted that if the Tribunal concludes that the figures calculated at Steps 1 to 3 should be lower, it does not necessarily follow that the figure at Step 4 should also be reduced. Step 4 is where substantial adjustments may be made to address specific deterrence, and proportionality. If the Tribunal were to conclude that the Step 3 figure in this case was *lower* than £20 million (as would be the result if Keltbray succeeded on Ground 1), then the Tribunal would have to consider whether or not it would then need to be increased at Step 4 so as to address specific deterrence or proportionality. The CMA relied on *FP McCann* as an example of a case in which challenges to individual aspects of the penalty calculation ultimately came to nothing, because the appeal yielded a figure higher than the Step 4 figure reached by the CMA, and the CMA's approach at Step 4 which had resulted in a significant reduction in the penalty was ultimately upheld.

(c) Analysis

111. We have no issue with the key factors relevant to penalty as identified by Keltbray and summarised in paragraphs 103 to 105(1) above. Breaking down the process in this way, underlines the fact that there are various points in the penalty setting process at which the issues raised by Keltbray can be (and the CMA submits have been) taken into account. The Penalty Guidance plainly provides scope for the CMA (or this Tribunal) to take into account certain factors at more than one stage.

112. As the Tribunal said in *Kier* at [76], it is the ultimate penalty that matters. If that is appropriate, then a detailed analysis of the figures produced at each specific step is unlikely to serve any real purpose. The suitable approach may be different depending on the circumstances. In some cases, a factor may reasonably be taken into account early in the penalty-setting process. In others, it may be appropriate to factor it in at a later stage. In other cases, it may be equally acceptable to take either approach. As long as reasons are given for the approach being adopted in the particular circumstances of the case, the process is verifiable by the Tribunal, and all relevant circumstances have been taken into account and the ultimate penalty is considered to be appropriate, then that is sufficient.

113. There is no getting away from the fact that, in this case, the approach of the CMA to the fact there were multiple infringements gives rise to a disproportionate figure at Step 1. There is some force in the submission that, as a result, if the penalty was looked at only at Steps 1, 2 and 3, it would appear as though Keltbray was being treated on a par with, and worse than, a participant in a market-wide cartel. The latter would be treated as participating in one infringement, and its relevant turnover would be taken into account only once for the purposes of the penalty calculation. It is also the case that, in order to reach the ultimate penalty figure, a hefty reduction is required at Step 4: from £158m to £20m. We raised this point in the course of the hearing, and invited submissions as to possible alternative approaches, and a better understanding of

the reasons why the CMA's approach was a reasonable one to adopt in this case. We address this further in relation to Ground 3 below.

114. However, for present purposes, and as a general principle, we are satisfied that it is a *non sequitur* to suggest that the production of a figure that is plainly disproportionate at Step 1 means that something has necessarily gone wrong with the penalty-setting process. There may be a number of factors that have contributed to that result at Step 1. The key issue is whether or not those factors have been sufficiently recognised, adequately explained and properly addressed at a later stage such that the ultimate penalty is appropriate.

115. It follows that we agree with the first general point made by the CMA. We also accept the CMA's second and third points. In a multi-party, multi-infringement case such as the one at hand, the CMA must do the best it can to achieve consistency in its approach, bearing in mind that Step 4 is there as a sense check on the results of that exercise and expressly requires the CMA to take account of matters specific to each party involved. The fact that the CMA's approach might lead to a higher, even disproportionate, figure at Step 3 for Keltbray does not mean that the CMA's approach is flawed if proportionality is adequately addressed at Step 4. It must also be borne in mind that there may be a number of ways of approaching the penalty calculation, more than one of which may be a perfectly reasonable way of going about the task. If another approach were to be adopted, it might well generate different figures at different stages, requiring a different adjustment at Step 4. It does not follow, therefore, from the fact that there might have been another way of carrying out the penalty calculation, such that the starting point at Step 1 may be lower, that the ultimate figure produced by the CMA's approach is wrong.

116. We now turn to consider the three Grounds of Appeal.

(2) Ground 1

117. Ground 1 of the Appeal, as set out in the NoA, is as follows:

> "the CMA erred by calculating a penalty on the basis of relevant turnover comprised by all of Keltbray's turnover for Demolition and/ or Asbestos Removal Services. The circumstances of the case required the turnover to be restricted to the value of the very small number of contracts associated with the Infringements."

Ground 1 therefore relates to the identification of the "relevant turnover" for the purposes of Step 1.

118. As paragraph 2.11 of the Penalty Guidance provides:

> "The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the date when the infringement ended."

119. The CMA used Keltbray's turnover in what it defined as the relevant product market, namely the markets for the supply of: (a) demolition services in the UK (for Infringements 5, 7, 8 and 10 and 14); and (b) demolition services and asbestos removal services in the UK (for Infringements 4, 12 and 13).

(a) Keltbray's submissions

120. In its skeleton argument, Keltbray put its argument as follows:

> "In summary: the CMA's inclusion of market-wide revenues (on its definition) in respect of the Step One penalty calculation identifies 'relevant turnover' on a scale which is entirely divorced from the economic reality of Keltbray's infringements. The CMA's attempt to justify this on the basis that effects were not limited to individual projects does not bear scrutiny. A proportionate approach on the facts of this particular case would have been to take the project value of each infringement as the measure of relevant turnover. There is Dutch precedent for a similar approach."

121. In its NoA at paragraph 22, Keltbray submitted that the CMA's approach leads to an absurd and grossly disproportionate figure because:

(1) It takes the entirety of Keltbray's revenues for the relevant year into account, even though each individual Infringement concerned cover bidding with respect to a single contract. Citing Infringement 4 as an example, the contract value was £653,165 (being the winning tender bid)

whereas the annual turnover of Keltbray was £67,725,103 in the year in question: over 100 times larger. The CMA adopted a seriousness percentage of 24%. Keltbray's turnover, multiplied by 24% gives a starting point of £16,254,000 at Step 1: 25 times larger than the contract value.

(2) That is then compounded because there was more than one individual Infringement in each of the years in issue: 2014 and 2016. The result is that the annual turnover relevant to certain Infringements is then used multiple times. Because there were four Infringements in 2014, for which the financial year 2013 was relevant, in effect 96% (4 x 24%) of Keltbray's annual turnover for that year is taken into account at Step 1, and for three Infringements in 2016, 72% (3 x 24%) of Keltbray's demolition services revenue, and 48% of its asbestos removal services turnover in that year is included.

(3) Whilst the CMA purported to address this at Step 4, by reducing the fine by 89% to £20 million, the rationale for this was "impenetrable". The CMA erred in incorrectly or inappropriately identifying the relevant turnover for each Infringement at Step 1 which led to a grossly disproportionate figure in Steps 1 to 3. Specifically, the CMA erred because it should have treated each project as being in its own distinct market.

122. Keltbray submits that:

(1) Properly construed, the Penalty Guidance does not require market-wide revenues to be taken into account as relevant turnover in every case, where to do so would result in a Step 1 figure that failed to reflect the extent and likelihood of actual or potential harm to competition and consumers. That is particularly the case where the relevant infringement related to individual contracts which, from a demand-side perspective, can properly considered as individual markets.

(2) Alternatively, if the Penalty Guidance does require market-wide revenues to be taken into account as relevant turnover, the CMA should not have applied it. The Penalty Guidance can be departed from when a good reason exists to do so.

123. In either case, Keltbray argues that the CMA's application of the Penalty Guidance amounted to an error of law. Either the approach applied was not permitted or, if it was permitted, the CMA ought to have exercised its discretion not to apply it, and instead limited relevant turnover to the revenues actually earned on the affected projects. In either case, it is submitted that the CMA erred in fact by failing to appreciate that the individual projects constituted separate markets, and in law, and in the exercise of its discretion, by not then reflecting that fact in its approach to relevant turnover at Step 1.

124. Keltbray relied on *Argos CoA* at [171] to [173] in support of the proposition that the concept of relevant turnover is not necessarily co-extensive with turnover in an economic market. In that case, the Court held that although the infringement related to the sale of football shirts, turnover in separate but related markets (for example, shirts and socks) "may reasonably be considered to have been affected by the infringement".[35] Keltbray suggests that, by parity of reasoning, the reverse must be true: "where large swathes of a market cannot reasonably be considered to have been affected by the infringement, that turnover should be excluded". Keltbray argues that if the CMA includes turnover generated in a market that is wider than the market that is actually affected by the Infringements, then the starting point for the entire exercise will have "got off on the wrong foot", and the penalty be "on its way" to being unfair and disproportionate.

125. Keltbray also referred us to: (1) analogous provisions in the EU Commission's fining guidelines[36] to the effect that it is the value of the undertaking's sales of

[35] Paragraph 171 of the judgment.
[36] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006).

goods or services to which the infringement "directly or indirectly relates", that should be taken as the starting point;[37] (2) the EU General Court's decision in Case T-604/18 *Google v Commission* [2023] 4 CMLR 5 at [1063] which states that this is required "if the economic reality and scale of that infringement are not to be distorted when determining penalty"; and (3) the EU Court of Justice's decision in Case C-444/11 P *Team Relocations and Others v Commission* [2013] 5 CMLR 38 at [76] which stated that "the concept of the value of sales … cannot extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel".

126. This latter statement by the Court of Justice must be seen in its proper context. The case concerned a market wide cartel, and the calculation of the fine. Having identified "the objective of adopting as the starting point for the calculation of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it", the Court continued in the same paragraph (i.e. paragraph 76) that, as a consequence, "while the concept of the value of sales referred to [in the fining guidelines] admittedly cannot, extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel, it would however be contrary to the goal pursued by that provision if that concept were understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel". In other words, in many cases, it would be wrong to limit relevant turnover only to the sales actually affected by that cartel. We do not, therefore see this passage as supportive of the proposition for which it was cited.

127. Keltbray also relies upon the Penalty Guidance itself, which recognises that, in exceptional circumstances, the relevant turnover will not be the total turnover in the relevant market, such as where the undertaking operates on the basis of commission fees (although it is not suggested that that is the case here). Plainly, the market under consideration is not one based on "commission" or anything

[37] Paragraph 13 of the guidelines.

akin to that. Rather, it appears to be relied upon in support of the general proposition that the CMA ought to have recognised that the present situation was "exceptional" and therefore limited relevant turnover to that generated in relation to the relevant tenders.

128. Keltbray's argument is essentially that the CMA's approach: (i) encompasses revenue from supplies that are not on any reasonable view affected by the infringement; (ii) creates a starting point that does not reflect the economic reality and scale of the infringement; and (iii) goes beyond the scope of the infringement found in the Decision. The CMA's penalty calculation does not, therefore, comply with the statutory requirement (s. 36(7A) CA 1998), that the penalty should reflect the seriousness of the conduct and the desirability of deterrence, and the CMA ought to have adopted an approach that properly reflected the twin objectives. Alternatively, the CMA ought to have exercised its discretion and adopted a different approach.

129. Had the CMA applied what Keltbray maintained is the correct approach, and treated the relevant turnover as being the revenue arising from each individual project in relation to which Keltbray committed an Infringement, the figure at the end of Step 3 (assuming that the CMA maintained its approach to the seriousness percentage and mitigation) would have been around £12 million.

CMA's approach not permitted under CA 1998

130. Keltbray submits that in taking the candidate market of all demolition services and/or asbestos removal services, the CMA adopted the wrong starting point. The correct approach would have been to begin with the possibility that the individual demolition projects subject to the infringement may be markets in themselves.

(1) Keltbray referred to the OFT's Market Definition guidance (OFT403), which is referred to in the Penalty Guidance. Keltbray submitted that most competitive constraints arise from demand-side substitution (i.e.

the customer's ability to switch to alternative products or services within a relatively short period of time). Supply-side substitution (i.e. the prospect of market entry by others) plays a secondary role in market definition, and should not be used to expand it unless it is reasonably likely to take place and is constraining the behaviour of suppliers of the focal products. This, Keltbray says, underlines the importance of adopting a narrow focal market to begin with. An overly broad market definition will mean that the revenue base for calculating the penalty will be overstated.

(2) Keltbray submitted that the market as defined by the CMA in terms of all demolition services and/or asbestos removal services is too broad. The correct approach would be for the CMA to start with the possibility that each individual project is its own economic market, given that demand-side substitution is limited. Supply-side substitution serves only to identify the potential suppliers to the narrow candidate market of each individual project. It does not justify including other projects supplied by those potential suppliers (and hence, for example, to define the market in terms of all demolition services).

CMA erred in the exercise of its discretion

131. The second way in which Keltbray puts its case on Ground 1 is that even if the relevant product market encompasses all demolition and/or asbestos removal service *and* the Penalty Guidance requires all revenues in that market to be considered, the result is so absurd and disproportionate at Step 1 that the CMA should not have adopted that approach. Instead, the CMA should have limited relevant revenues to the revenues earned (or to be earned) on the relevant projects.

132. The argument is as follows:

(1) Whilst cover bidding might comprise a market-wide single and continuous infringement, and part of an overall plan with a common objective, in this case the CMA's findings were far more limited. The CMA found only eight individual Infringements, and made no finding that the infringements collectively or individually had actual or potential market-wide effects. Keltbray submitted that paragraph 6.28 of the Decision refers only to tender specific,[38] customer specific,[39] or speculative theories of harm.[40] In particular, Keltbray pointed to the fact that the CMA found just eight infringements across 729 tenders during the relevant period. Keltbray suggested it follows that it must be wrong to be penalised on the basis that its whole market revenues are potentially affected by the Infringements. That would not reflect the CMA's findings. Keltbray also suggests that there is no evidence to support a wider, customer specific theory of ham because there is no evidence that they take prices from previous tenders into account in assessing future tenders.

(2) Keltbray submits that the CMA's analysis as to effects is cursory, not backed by evidence, and does not even purport to demonstrate market-wide effects (whether actual or potential).

(3) Keltbray's case is summarised in its NoA at paragraph 39 as follows:

> "… an alternative approach is required. To take all revenues into account for each infringement results in there being no difference at Step One between treating each infringement as if it related to one contract and as if it related to every single contract Keltbray entered into in that year. In the absence of a market-wide theory of harm, that is patently absurd and a tantamount distortion of the economic reality and scale of the infringements in question. `If, properly construed, the Penalty Guidance does mandate such an approach, then this was a case where the CMA was permitted and obliged not to apply the guidance."

[38] Paragraph 6.28(a) and (b).
[39] Paragraph 6.28(d).
[40] Paragraph 6.28(c).

133. Where, as here, Keltbray did not win any of the infringing bids, it submitted that although its own revenues are zero, it is appropriate to take into account the winning bid figure. This, Keltbray suggested, is a "far better measure of the scope of the economic impact of the conduct than taking the undertaking's revenues from all the infringing party's other unrelated projects".

134. Keltbray relied upon a decision of the Netherlands Trade and Industry Appeals Tribunal of 12 October 2017 in Case No. 16/3-5 *Sloopbedrijven (Demolition companies), Van Eijk Sloopwerken BV and ors v The Netherlands Authority for Consumers and Markets*, ECLI:NL:CBB:2017:325, OCL 320 (NL 2017). The case concerned cover-pricing in the demolition sector, and the imposition of a fine by the Netherlands Authority for Consumers and Markets ("ACM"). The appeal was against both the finding of infringement by object under Article 6 and the imposition of a fine under Articles 56 and 57 of the Dutch Competition Act 1997. Article 7 of the Act provided that Article 6 does not apply where the relevant anti-competitive agreement fell within certain parameters based on combined turnover, combined market share and number of undertakings involved in the agreement. It was therefore in the interests of the undertakings involved to argue for a *broader* market definition. The ACM adopted the position that individual tenders formed separate markets, and limited its consideration of supply side substitution to the undertakings that had submitted bids on the tenders concerned. On this basis, the Article 7 exclusion did not apply. The conduct of the undertakings was found to have an appreciable effect on competition. The appellant undertakings, on the other hand, argued that the ACM ought to have considered the relevant market to be the "countrywide demolition market". If the appellants were correct, taking their market-wide revenue, their combined market share would be less than the relevant threshold figure of 10%.

135. In that context, the Netherlands Trade and Industry Appeals Tribunal found that the ACM's position was correct, and that the individual tenders were the relevant markets. In order to determine the combined market share for the purposes of Article 7, the ACM had divided the number of companies involved

in cover pricing by the number of bidders in the tender concerned. The Tribunal specifically noted that the approach adopted by the ACM was suitable for determining the total market share of the companies concerned for the purposes of Article 7 (see paragraph 6.3.2 of the judgment).

136. Keltbray submits that – to the extent that its appeal invites the Tribunal to take an approach to relevant turnover that has not been taken before – there is nothing wrong in doing so. A new approach may be required where the normal penalty setting process is "not fit for purpose". Moreover, the fact that relevant CMA guidance has evolved, and itself cites previous decisions, shows that it is appropriate to draw on or rely on points of principle, or comparable approaches in other cases, including those decided in other jurisdictions. In particular, in so far as the approach advanced by Keltbray would entail the use of the turnover of third parties in relation to the relevant tenders, it is sometimes appropriate to do so. For example, this occurs in pay for delay cases where there is no relevant turnover of such party to consider.

(b) The CMA's submissions

137. The CMA's position on Ground 1 is as follows:

(1) As a preliminary point, given that the Infringements resulted in contracts being undertaken by third parties other than Keltbray, the result of Keltbray's approach would be that the Step 1 figure would not be based on Keltbray's turnover at all, but on that earned by third parties (leaving aside the difficulties in knowing what that figure actually is in relation to any particular project given the potential for changes and increases in the scope of works), and the use of revenues earned in the year of the relevant Infringement, rather than (as per the Penalty Guidance) the prior financial year. Whilst this is done in cases such as pay for delay cases, where the fact that the infringing undertaking is not present on the relevant market is the essence of the infringement, Keltbray is present on the market here and such a departure is not required. Further, the

purpose of establishing relevant turnover is also to reflect the scale of the undertaking's activities in the affected market (see Penalty Guidance, at paragraph 2.12). That is not achieved if only the individual tenders are taken into account.

(2) The logic of Keltbray's position is that any product or service for which there is no demand-side substitution will sit within its own product market. This would mean, for example, every domestic building project is its own market.

(3) On the basis of economic principles, the market is not confined to the individual tender. Mr Noble and Dr Walker agree that there is limited demand side substitution, but also that there is supply-side substitution between projects. Whilst they disagree as to the extent and effect of supply-side substitution (and this is the subject of Ground 2), they agree that the market is wider than the individual tender.

(4) It is reasonable and rational to define the relevant product markets based on both demand-side and supply-side substitution. This is because the Penalty Guidance requires the CMA to consider the relevant turnover in the market affected by the infringement, and that will include both demand-side and supply-side considerations. Whilst potential market entrants are not participating in the specific tenders in issue, they may potentially be able to supply the market.

(5) The CMA relied on *Argos CoA* at [173] (we refer to this further in paragraph 252 below): the CMA may proceed on a broad view of the trade affected by the infringement, rather than limit the turnover in question to the products and services which were the subject of the particular transaction to which the (admitted) infringement (in this case) relates.

(6) The CMA's findings at paragraphs 3.22 and 6.28(c) and (d) of the Decision (set out at paragraphs 56 and 62 above) address the wider effects of the Infringements, and were accepted by Keltbray when it settled.

(7) Keltbray's argument is not really based on an economic argument, but on the contention that: (1) the turnover actually affected by the infringing conduct is confined to the individual tenders in question; and (2) any product market defined on the basis of supply-side substitution will include unaffected turnover. Keltbray's argument is, in reality, a challenge to the existence of potential wider effects. This is an impermissible attack on the Decision's finding that there has been an object infringement: a finding, in terms of liability, that Keltbray has accepted. That finding is based on the existence of potential effects that go beyond the confines of the specific contract being tendered, and that has not been appealed.

(8) Keltbray has not adduced any factual or economic evidence in support of its position that the likely effects do not apply, or are limited in this case. The CMA relies on the Tribunal's decision in *Royal Mail Group Ltd v DAF Trucks Ltd & Ors* [2023] CAT 6 ("*Trucks*") at [282] and [306], upheld on appeal [2024] EWCA Civ 181 at [138] to [144], where the Tribunal held that profit maximising firms which engage in anticompetitive activity can be assumed to have concluded that the risk of fines and actions for damages are counterbalanced by the prospect of commercial gain, and that there was a lack of evidence of any other explanation.

(9) Keltbray is, in any event, wrong, and Dr Haydock's evidence supports the existence of likely or potential effects of cover bidding. Keltbray's approach conflates the question of whether there were in fact actual anti-competitive effects on the wider market beyond the individual tenders *with* the relevant question of whether there are likely or potential effects

on the wider market of the kind identified in the Decision and by Dr Haydock in her evidence. It is the latter question to which the CMA had regard to in reaching its Decision, and in calculating the penalty.

(10) The CMA's approach of including Keltbray's relevant turnover in the product market defined by the CMA at Step 1, and adjusting for the scope and reach of the conduct elsewhere in the penalty calculation was a reasonable and rational one, and well within the CMA's margin of appreciation.

(11) The CMA's approach is consistent with the policy objectives of the Penalty Guidance. The Step 1 assessment involves a consideration of both the seriousness of the infringement and general deterrence. That involves an assessment of both actual and potential effects. It is, therefore, permissible to take into account – for the purposes of relevant turnover – Keltbray's turnover in the market potentially affected: not just the turnover actually affected by the Infringements. That may include unaffected turnover. There is no requirement on the CMA to identify or prove what turnover was *actually* affected.

138. Further, and as regards the alternative way Keltbray put it case, on the assumption that its approach did comply with the Penalty Guidance, the CMA did not err in the exercise of its discretion in not then excluding turnover other than that generated by the individual tenders related to the eight Infringements. Keltbray misunderstands the penalty setting process:

(1) The CMA does not suggest that it could not depart from the Penalty Guidance, but it does stress that it is required to have regard to it (s. 38(8) CA 1998). Contrary to what Keltbray suggests, it is not irrational or unreasonable to have applied it in order to determine the starting point.

(2) Keltbray focuses on the relevant turnover figure generated at Step 1 and then fails to see the penalty setting process in the round because it

ignores the adjustment at Step 4. It can only be suggested that Keltbray is treated worse than a cartelist if the adjustment at Step 4 is ignored.

139. In the Dutch Case, the Dutch ACM adopted the approach that it did to market definition, on the facts of that case and the available evidence, and within the legal framework that applies in the Netherlands. The relevant undertakings lost in their challenge to market definition, and the appreciability threshold under Dutch law was met. However, the undertakings then benefitted from the narrowly framed market when it came to penalty because the relevant turnover in the narrower market was lower. That does not mean that is the approach that must be taken here. In this case, the Tribunal has the benefit of the expert evidence of Mr Noble and Dr Walker, neither of whom consider that the relevant market is confined to the individual tenders. The Tribunal is concerned with the application of the Penalty Guidance, and the relevant applicable case law of the United Kingdom. The fact that the authorities in the Dutch case adopted the approach they did, does not mean the CMA's approach here was unreasonable or irrational, or that the approach taken in the Dutch case is the only reasonable one.

The potential effects of cover bidding

140. We have referred to the findings in the Decision relating to the effects of cover bidding in paragraphs 56 and 62 above. Ms Pople KC for Keltbray sought to argue that the focus is on the effects of cover bidding in relation to the specific tenders in issue: and predominantly on the tenderee, rather than market-wide effects. She points to a lack of evidence relating to the existence of wider-potential effects. The thrust of her argument was that a theory of market-wide harm was speculative.

141. However, the potential for wider effects has been the subject of previous decisions of the Tribunal, which were specifically referred to in the Decision at Chapters 3 and 6.

142. At the hearing of this appeal, both Keltbray and the CMA referred us to the decision in *North Midland Construction plc v OFT* [2011] CAT 14 ("*North Midland*"). Given the importance of Keltbray's arguments relating to the effects of cover bidding and their relevance to "relevant turnover", it is appropriate for us to set out the Tribunal's conclusions as to the effects of cover bidding in full:

> "55. In its recent judgment in *Kier* …, which dealt with six appeals against penalties imposed by the OFT in the Decision, the Tribunal referred to the above passages from [*Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 at [208] to [211] and [251]] and commented further on the potential effects on competition of cover pricing. In particular, the practice was capable of providing an illicit advantage in relation to future tendering exercises by protecting a tenderer, who did not wish to win the work, from the risk of losing credibility by putting in an unrealistically inflated bid. As well as distorting that element of competition, cover pricing enabled the tenderer to avoid the need to make a timely decision not to bid, thereby depriving a substitute bidder of the opportunity of making a genuine tender. There was also the risk that the number of requests for cover prices was such that the provider became aware that he faced little or no real competition, possibly giving rise to a temptation to inflate his own bid. Nor could the risk be discounted that a culture of collusion between competitors as regards cover pricing might facilitate anti-competitive cooperation in other respects. Given that the markets in question had admittedly been extremely narrowly framed in the Decision, both in product and geographical terms, any indirect harm of the kind referred to would be likely to be felt more broadly across all activities affected by the practice. (See paragraphs 96 to 110 of the judgment in *Kier*.)
>
> 56. Thus the potential effects of cover pricing extend beyond the confines of the specific contract being tendered, and into similar tendering exercises to be conducted in the future. They may also contribute to the creation of a climate of anti-competitive co-operation between contractors. We do not therefore agree with North Midland's submission that in relation to the appreciability of effects on competition an individual cover pricing arrangement should be viewed as amounting to no more than a single telephone call, with one party doing the other a favour by providing price information in respect of an isolated tender. The potential effects inherent in the conduct in question are wider and more significant than that characterisation would imply. In that regard the OFT was entitled to and did in the Decision expressly rely upon those effects …."

143. Keltbray submitted that the discussion of the likelihood of effect was linked to the narrow market definition adopted in that case. Where the market has been defined broadly and where the findings relate only to individual acts of collusion, Keltbray submits that there can be no assumption that there are

market wide effects, and there is a lack of any convincing rationale for those wider effects.

144. The CMA referred us to the discussion relating to the effects of cover bidding at paragraphs 96 to 110 in *Kier* (referred to in the last sentence of paragraph 55 of *North Midland*). At [96], the Tribunal said:

> "Some of the effects there mentioned may also occur where an unwilling bidder, rather than requesting a cover price, simply decides to have a stab at formulating a bid which is sufficiently high to ensure that he does not win. Such a bid would hardly be regarded as truly "competitive", and the anticipated number of competitive bids may therefore still not necessarily be received by the client even though no cover price has been provided. On the other hand, as the OFT points out, the bidder may risk losing credibility if his inflated bid is very out of line with other bids. Cover pricing therefore provides protection from that particular element of competition and is thereby capable of providing an illicit advantage in relation to future tendering exercises. In the absence of cover pricing, companies who were invited to bid but did not want the work would either have to take the credibility risk associated with an artificially inflated bid, or decline the invitation to tender at the appropriate time. In the latter case the client would normally be in a position to invite a substitute tenderer who might well be interested in obtaining the work, and would therefore submit a competitive bid."

145. At [98], the Tribunal described possible spill-over effects in the following terms:

> "As to a possible spill-over effect into more serious cartel activities, we accept Ms Adkins' argument that extensive involvement in cover pricing does not necessarily have such result; this is evidenced by the fact that out of approximately 4,000 suspect tenders examined in the course of a broad and intensive inquiry, only 6 apparently involved collusion in the form of compensation payments. Nevertheless, there is force in the OFT submission that a culture of collusion between competitors as regards cover pricing may facilitate anti-competitive cooperation in other respects."

146. Although *Kier* itself was a case in which the markets were narrowly defined, the CMA relies upon the latter paragraph in support of the proposition that wider effects do not only arise where the markets are narrowly defined.

147. The OFT in *Kier* had accepted that cover pricing was at that time a long standing, widespread and endemic practice throughout the industry, motivated by a genuine and widespread perception within that if a company did not

participate in a tender process when invited to do so, it ran the risk of being excluded from tender lists. Nevertheless, the Tribunal in that case stated at [99] that it was "certainly not an innocuous activity". In *GF Tomlinson v OFT* [2011] CAT 7, the Tribunal stated at [81] that:

> "In future, no undertaking can claim before this Tribunal to have thought that cover pricing was an innocuous practice and we hope that the practice has now died out."

148. We also heard evidence from Dr Haydock in relation to the potential wider effects of cover bidding. As explained in paragraph 90 above, Dr Haydock's witness statement was originally filed in relation to the Squibb Appeal. Dr Haydock covered in section A and B of her statement the likely effects of cover bidding, and the significance of the effects of cover bidding. Once the Squibb Appeal was no longer pursued, Dr Haydock's evidence might no longer have been relevant, save for the fact that the CMA referred to it in its Consolidated Defence. That led Keltbray to seek to cross-examine Dr Haydock on Sections A and B of her statement, as being relevant to Ground 1 of this appeal.

149. Dr Haydock considered the likely effects of cover bidding from the perspective of the incentive of the firm submitting a genuine bid *and* the incentive of the firm submitting a cover bid, and considered the likely magnitude of that effect. Her evidence to us was to the following effect:

(1) The incentive of the firm submitting a genuine bid. The firm submitting the genuine bid may wish to decrease competition within the tender in question so that it has an increased likelihood of winning the tender and can offer a higher price. That is, of course, a tender specific theory of harm. Dr Haydock went on to explain two wider effects. First, a reduction in the pool of genuine competitors may not only increase the price paid by the tenderee in that specific tender, but may also act as a barrier to entry/expansion by reducing the possibilities for a wider range of firms to compete for the contract ("the barrier to expansion point"). Consequently, a narrower range of competitors may be considered in future tenders, leading to higher prices in those tenders. Second, the

firm submitting the cover bid may facilitate the cover bid because it hopes that the favour will be reciprocated in due course ("the reciprocity point"). The reciprocity point implies a pattern of behaviour whereby firms effectively trade cover bids across tenders and, therefore, cover bidding would be expected to have a distortionary effect on competition beyond the tender in question.

(2) The incentive of the firm submitting a cover bid. Dr Haydock identified three reasons why a firm might submit a cover bid. First, it may wish to benefit from a cover bid in a future tender in which it is the genuine bidder: i.e. the reciprocity point. Second, the firm may believe that there is a perceived benefit in participating in the tender and appearing to be credible in doing so ("the credibility point"). If the firm is able to maintain its reputation it may be more likely to be included in future tenders, and might win tenders in doing so. A further consequence is that this may also reduce the likelihood of a tenderee seeking additional bids from other firms, and therefore act as a barrier to entry/expansion by reducing the possibilities for a wider range of firms to compete for contracts. Third, the firm may be motivated by the receipt of a compensation payment (a factor not relevant to Keltbray in relation to the Infringements).

(3) In summary, therefore, in addition to the direct effects on the tender in question, there are wider effects beyond the tender in question which include a barrier to entry/expansion for firms which might otherwise be invited to participate and/or because it implies the existence of a reciprocal arrangement whereby firms exchange cover bids across tenders.

(4) As regards the significance of cover bidding, it is not possible to be precise about the magnitude of its effects. This is particularly because some of the effects extend beyond the specific tenders (for example in relation to a firm's reputation and/or as barriers to entry/expansion) and

likely be diffuse. However, firms have chosen to engage in an illegal practice notwithstanding the risk and costs involved. This implies that the perceived benefits must be material, and therefore the distortion of competition is also likely to be material. Dr Haydock was unaware of any pro-competitive reason for cover bidding, and concluded that there are unlikely to be any pro-competitive effects.

150. On the reciprocity, credibility and barrier to entry points, Keltbray's submissions were as follows:

(1) Reciprocity: Keltbray submitted that the CMA conducted a thorough investigation and in the end charged it with only eight Infringements which represented a "tiny fragment of the market in a period when it entered 729 bids". It is not credible that these Infringements could cause a market-wide risk of collusion, and it is unjust to penalise Keltbray on the basis that it did, in the absence of any evidence of wrongdoing going beyond those specific Infringements.

(2) Credibility/Reputational gain: Keltbray submitted that this case is distinguishable from *Trucks* because there is an explanation as to why Keltbray acted as it did. A concern about not being invited to bid in future tenders formed part of the underlying rationale for the conduct. Keltbay contends that this not a theory of anti-competitive harm sufficient to justify taking into account market wide revenues. First, because there is no evidence to suggest that the customer would act irrationally and not invite a quality operator to bid in future tenders. In other words, there would be no difference in how future tenders would be run, and therefore the perceived rationale on the part of Keltbray is itself irrational, and the infringing conduct would have no effect. Second, it affects only those who are aware of the undertaking's bid having been submitted. The rest of the market will simply not know that a bid has been submitted, and thus there is no reputational gain to be had. Third, there are better ways of enhancing reputation and credibility:

for example, by providing high quality services. It is difficult, Keltbray said, to view an enhancement of reputation as a parameter of competition having any real impact. In other words, the effect of this argument is that Keltbray contended that its own concern as to loss of credibility and reputation were irrational.

(3) Barrier to entry/expansion: Keltbray submitted that this point was not really articulated in the decision at all. It is not a point made in paragraphs 3.22 or 6.28 of the Decision which are the paragraphs relied on by the CMA. There must be conduct capable of excluding rivals or hindering their expansion. Whether or not that occurred depends on the scope of the infringement in issue. The barrier to entry does not work in relation to an infringement relating to single tenders in a broadly expressed market. As Ms Pople put it: "There is an entire universe of transactions in the market for a would be competitor to compete in". The occurrence of cover bidding in around 1% of Keltbray's tenders does not establish a barrier to entry at all, let alone a market wide one.

151. Keltbray argued that, where it cannot be shown that the effects of the conduct are literally confined to the individual infringement, the answer is not to include market wide turnover, but to consider what measure best reflects the economic reach of the conduct. Given that there is no tenable theory of market wide harm in this case, the appropriate measure for the economic reach of the conduct is the tenders themselves. The way in which the "unproven and diffuse" spillover effects can be taken into account is when setting the seriousness percentage.

(c) Analysis

152. In so far as Keltbray argues that the potential, wider effects of cover bidding were insufficiently articulated in Chapter 6 of the Decision, we disagree. We consider that the potential for such effects is explained in Chapter 3 of the Decision, and in the case law which is expressly referred to. There would be no reason to include this explanation if, as Keltbray suggests, those effects are not

relevant to the Decision and the CMA's findings. We also bear in mind the statement made by Lord Brown of Eaton-Under-Heywood in See *South Bucks District Council v Porter (No. 2)* [2004] UKHL 33, [2004] 1WLR at [36] that:

> "Decision letters are to be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced."

153. In *Tesco plc v Competition Commission* [2009] CAT 6 (in the context of judicial review of a decision of the former Competition Commission included in its Report on the Supply of Groceries in the UK), the Tribunal stated at [79] that: the Report "should be read as a whole and should not be analysed as if it were a statute".

154. We accept the submissions made by the CMA to the effect that it needs to be remembered that this Decision was prepared, at least as regards Keltbray specifically, on a stream-lined basis. Reading Chapter 3 and Chapter 6 together, it is clear that the CMA was relying on the existence of the wider potential effects of cover bidding as articulated in the case law, and regarded them as applicable on the facts of this case, and for the purposes of the findings it made in the Decision.

155. For the purposes of paragraph 2.11 of the Penalty Guidance, the Court of Appeal in *Argos CoA* makes clear that it is not necessary for the CMA to undertake a formal market definition analysis. What is required is a "broad view of the particular trade which has been affected by the proved infringement, rather than … by limiting the turnover in question to sales of the very products or service which were the direct subject of the price-fixing arrangement or other anti-competitive practice".[41]

156. The Court of Appeal had to consider appeals arising out of two distinct investigations concerning: (1) Toys and Games and relating to agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd; and (2) Football

[41] Paragraph 173 of the judgment.

Shirts, relating to sales of replica football kit. The appeals related to both liability and penalty.

157. Regarding the findings on Toys and Games, the Tribunal had stated (*Argos CAT*) that it "was reasonable for the OFT to bring in as a starting point in the calculation of penalty the total turnover of each party in boys' toys" at [199] and, similarly, also it was "reasonable for the OFT to include the whole turnover of each party in games and puzzles in the calculation" at [200]; and the same analysis, according to the Tribunal, applied to plush products at [201]. In this regard, the Tribunal found that the appellants in the case did not produce any evidence as to why some of the products at hand (i.e. boys' toys) should not be taken into account as part of the calculation of relevant turnover.

158. In relation to girls' toys, creative and infant and pre-school however, the Tribunal considered "the OFT's approach is insufficiently supported by evidence or analysis, insofar as the OFT has brought into account the whole of the turnover for the sectors girls' toys, infant and pre-school, creative and hand-held electronic games" [206]. This, according to the Tribunal, was because "in product categories where Hasbro has only a small market share and there are only one or two infringing products, any suggested link between the infringement and the total turnover in the product category concerned may, economically speaking, be tenuous" at [205]. It stated at [242]:

> "All that said, we remain conscious of the argument advanced by Argos that, by bringing into the penalty calculation the whole of Argos and Littlewoods turnover in girls' toys, creative, infant and pre-school and hand-held electronics, the OFT did include as "relevant turnover" some turnover which may have been affected only peripherally by the infringements."

159. Notwithstanding that, the Tribunal recognised the legitimate justification behind the approach followed by the OFT to the calculation of the turnover regarding these products. The Tribunal stated at [204] that:

> "The OFT's approach represents a simple and understandable starting point, and is not devoid of any rational basis. It avoids detailed economic analysis, which in our view is desirable when it comes to the calculation of the penalty.

> If the overall penalty produced by the OFT's approach is appropriate, we should in our view be slow to interfere with the detailed calculations."

160. It is important, therefore, not to lose sight that Step 1 is only one part of the process, and regard must be had to the appropriateness of the overall penalty.

161. The Court of Appeal declined to overturn the Tribunal's decision on penalty in relation to either of the two infringement findings. The Court of Appeal at [231], among other things, emphasised the importance of respecting the Tribunal's expertise and the hesitation it must show before interfering with its assessment of penalties.

162. As we have said, when considering what view it should take of the particular trade or product market that has been affected by the infringement, the CMA is entitled to have regard to both the actual and wider potential effects of the infringing conduct, which go beyond the products or service which were the direct subject of the finding of infringement. The Tribunal in *Kier* at [88], quoted in paragraph 21 above, (see also *FP McCann*) makes clear that the CMA is not required to investigate or prove those effects (actual or potential) in a by object case. But when it comes to penalty, the CMA *is required* to have regard to the harmful effects of the infringing conduct, both actual and potential. In an object case, in relation to both liability and penalty, the focus is on the potential harm inherent in the conduct (see *North Midland* at [56]). If the CMA wishes to go further and seeks to establish the actual harm that the infringing conduct caused, then it is open to it to do so. If it proves that actual harm is caused, that may justify a higher seriousness percentage. But the CMA is not required to go that far.

163. In *Kier* at [132], the Tribunal stated that "the aim of the [Penalty] Guidance is to assess the Step 1 penalty by reference to *inter alia* the seriousness of the infringement which, in turn, is very closely related to its harmful effects (actual or potential) on the specific market and on competitors and consumers in that market". Pursuant to paragraph 2.3 of the Penalty Guidance, the CMA is required to have regard to the likely effects, including potential effects, when

assessing the seriousness percentage to be applied to the relevant turnover. It follows, therefore, that the underlying relevant turnover to which that percentage is applied must also reflect the potential effects. Those potential effects may extend wider than the specific products and contracts which are the subject of the findings of infringement. In our view, that, in turn, means that the product market by reference to which the relevant turnover is derived may be ascertained by reference to the wider, potential harm inherent in the infringing conduct. If, therefore, the potential effects extend beyond the specific contract in issue, then the CMA is entitled to consider the product market by reference to those wider effects.

164. Accepting, as Ms Pople must, that the Penalty Guidance makes clear that relevant turnover is to be determined by reference not only to actual effects of the infringing conduct, but also the potential effects, Keltbray's submissions in closing were initially to the effect that the CMA – and this Tribunal – is required to consider whether there have been actual or potential effects and, if the latter, to ask whether the potential effects were likely to occur, or merely theoretically possible. Ms Pople urged us to be "very sceptical about [the] indirect theories [of harm] being advanced to justify market wide revenues". This was particularly so in this case where Keltbray contends that the revenues generated in the tenders relevant to the Infringements were small relative to the entire market for demolition services.

165. Keltbray suggested that the focus should be on the revenues "more or less co-extensive with the wrongdoing", which Keltbray submits are those (of third parties) that relate to the individual tenders themselves. The effect of Ms Pople's submissions was that the existence of potential wider effects is sufficient for a finding of object infringement, but the "potential wider effects issue comes into play for a different purpose in the penalty setting process". At that stage, the CMA had to consider whether or not, and the extent to which, those potential effects in reality affect the undertaking's turnover. In the absence of evidence as to the reality of the theories of wider potential effects operating in relation to

these specific Infringements, there would be no basis to draw in market wide turnover. The basis for doing so would be unreasonable and unreasoned.

166. The problem with this submission is the fact that the wider, potential effects of cover bidding are established in the case law. We also accept the evidence of Dr Haydock in this regard. Keltbray, on the other hand, did not adduce any evidence in support of the proposition that there were no wider effects. As regards the specific points raised in relation to that evidence on behalf of Keltbray, in our view:

(1) Reciprocity: the fact that the CMA only made findings in relation to 8 Infringements does not mean that the remaining 729 infringements received a clean bill of health. The CMA is not required to investigate or prove further harmful conduct to justify its conclusions in relation to the potential for harm extending beyond the tenders in issue.

(2) Credibility/reputational gain: The reasons why firms may engage in cover bidding have been considered by the Tribunal in previous case law: See paragraphs 140 to 149 above. As those cases make clear, the subjective reason why Keltbray acted as it did, and even the fact that its belief may be misplaced, does not displace the potential for harm extending beyond the contracts in issue, or the fact that cover bidding is a serious infringement.

(3) Barrier to entry/expansion: As we have said in paragraph 152 above, we consider this point was addressed in the Decision and formed part of the CMA's findings. We do not accept Keltbray's argument that Keltbray's 8 Infringements were incapable of having wider, potential effects in the market beyond each individual tender. Keltbray adduced no evidence to this effect, and its case was based on mere assertion.

167. Underpinning Keltbray's submissions is the proposition that the use of the words "affected by the infringement" in relation to the definition of "relevant

turnover" in paragraph 2.11 means that the CMA is required to investigate further, and prove that each of the individual Infringements either did have, or was capable of having the alleged effect. That is to overstate what it is that the CMA is required to do. The CMA does not have to investigate at the penalty stage whether the restriction did or did not have an adverse effect (*FP McCann* at [31]). It is entitled to impose a penalty without knowing, based on the potential for an adverse effect.

168. That proposition also takes Keltbray's own conduct out of context. Keltbray's infringing conduct did not relate to an isolated occurrence, but extended to a number of tender processes. Further, the Decision concerned a number of other participants in each of the relevant tender processes who engaged in similar conduct. This does not mean that Keltbray can be penalised for the conduct of others. It does, however, give force to the argument that there were wider potential effects on competition beyond the individual contracts concerned, and that a broader product market definition is warranted. As was made clear in *North Midland* and *Kier*, and as stated in the Decision itself the potential effects of the practice "may extend beyond the confines of the specific contract being tendered and create an atmosphere of collusion".

169. In her closing submissions, Ms Pople ultimately accepted that she was not contending that there were no potential wider, spillover effects. Instead, she argued that the way in which these effects ought to be reflected at Step 1 was by making an adjustment to the seriousness percentage. However, she did not really explain how that would work. As we see it, on Keltbray's case, such an exercise would require: (1) the relevant turnover to be calculated by reference to a product market that reflects only actual effects, and possibly some of the potential harmful effects arising from the infringing conduct (being those realistically likely to occur and connected with the specific contracts the subject of the infringing conduct); and (2) a subsequent increase in the seriousness percentage to reflect any remaining wider, potential harmful effects.

170. That sort of approach introduces such a level of complexity and subjective judgment as to be unworkable. It is also inconsistent with the case law to which we have referred, and with the need for simplicity and transparency in the penalty setting process. It is not an approach contemplated by the Penalty Guidance, which does not draw any distinction along these lines, either in paragraph 2.3 or 2.11.

171. Keltbray's approach raises the issue of how far the CMA – and this Tribunal – must, at the penalty stage, get into an assessment of the likely effects and the estimation of the scale of effects in what is an object infringement case. Keltbray's approach suggests that for the purposes of penalty, the CMA is required to embark on the very exercise it is not required to undertake when finding that there is an object infringement, and must positively prove the actual effects of the infringement, or at least carry out an assessment of the likelihood of effects and the estimation or measurement of the scale of effects arising from the infringing conduct. We disagree. This is to misinterpret the Penalty Guidance.

172. It follows, therefore, that we consider the approach of the CMA to be permitted by the Penalty Guidance. The first way in which Ground 1 is put fails.

173. The question then arises as to whether or not, in the circumstances of this case, the CMA ought to have exercised its discretion and not applied the Penalty Guidance in relation to "relevant turnover". Whilst the Penalty Guidance may be disapplied where there is a good reason to do so, we see no good reason to do that here.

174. Nor do we consider that the Dutch case leads us to any different conclusion. In that case, and for a different purpose, and within the legal framework applicable in the Netherlands, the ACM focused on the individual tenders themselves. The result was that there was a narrow market definition, and lower fine (from which the infringing entities benefitted). That does not mean that it is the approach that the CMA must, or ought to have adopted, in this case.

175. Moreover, we consider that there are strong reasons why it would be inappropriate to adopt Keltbray's approach. It would entail a significant departure from the Penalty Guidance. It would involve taking the turnover of others, earned in relation to individual tenders, into account, rather than Keltbray's own turnover. We agree with the CMA that the situation here is very different from pay to delay cases, where the infringing party does not participate in the market to which the infringement relates. Further, such an approach would cut across the need for consistency as between the various addressees of the Decision if it were applied to all undertakings. So, for example, a small undertaking would be less enthusiastic about adopting that approach. The turnover relating to the infringement itself earned by a third party could, hypothetically, be greater than the undertaking's turnover generated by the provision of demolition services.

176. We note that Keltbray's approach is unsupported by the factual or expert evidence before us. Neither Mr Noble, nor Dr Walker in their evidence relating to Ground 2 of the Appeal, which focuses on market definition, suggested that supply-side substitution is irrelevant, or that the product market should be drawn as narrowly as Keltbray suggests. Keltbray's approach is, in our view, not supported in law or economic theory.

177. For the reasons we have explained, we accept that there are potential wider effects, beyond the individual tenders, and as such, it was rational and reasonable for the CMA to define the product market in a way that reflected those wider effects, and to calculate relevant turnover accordingly. That was permitted by the Penalty Guidance, and the CMA did not err in failing to exercise its discretion to adopt a different approach.

178. Finally, we note Keltbray's submission that, had the CMA considered only the individual Infringements, the figure at the end of Step 3 would have been £12m. We do not accept that. Keltbray ultimately accepted on this appeal that there were wider effects beyond the individual tenders that would need to be taken into account at some point in the process. The suggestion was that this could be

done at the point of fixing the seriousness percentage. There are a number of difficulties with such an approach, not least of which is Keltbray's suggestion that the seriousness percentage is already too high. However, for present purposes, it suffices to say that it is not correct to assume, even on Keltbray's case, that the figure of £12m is the highpoint and that the only direction of travel is down from there. That would be to ignore the wider effects that Keltbray acknowledges exist.

179. We are sympathetic to the CMA's submission that Keltbray's argument on Ground 1 of the Appeal amounts to a collateral attack on the object infringement finding. In particular, as we have said in paragraph 163 above, we consider that the Decision was sufficiently clear that it is inherent in the nature of cover bidding that the potential effects (whether or not they actually occurred) are wider than the specific tenders in issue, and that this is the basis upon which its infringement findings proceeded. Keltbray accepted those findings for the purposes of settlement. In submissions, Keltbray insisted that it accepts that finding on liability. However in our view, the distinction Keltbray seeks to draw between what was accepted in relation to wider effects for the purposes of liability and what is now disputed for the purposes of penalty is artificial. In reality, on the hearing of this appeal we have been drawn into a re-examination of at least some of the findings in the Decision relating to the potential effects.

180. For the reasons we have given, we are satisfied that the CMA have correctly considered and applied paragraphs 2.3 and 2.11 of the Penalty Guidance when identifying relevant turnover. The CMA has an obligation, per s. 38(8) CA 1998, to have regard to the Penalty Guidance. The CMA cannot therefore be criticised for the close adherence to its Penalty Guidance that Keltbray now portrays as a rigid following of it. Such close adherence enhances the prospect of legal certainty and predictability, and promotes consistency as between the multiple addressees in this case

181. We dismiss Ground 1 of the Appeal.

(3) Ground 2 of the Appeal

182. Ground 2 of the Appeal, as set out in the Notice of Appeal, is as follows:

> "in the alternative, the CMA erred by including in relevant turnover for the purposes of calculating the fine revenues from Highly Complex Demolition Services notwithstanding that these sit in a separate economic market."

Ground 2, therefore, also relates to the identification of "relevant turnover" for the purposes of Step 1. It is however focused on the definition of the relevant market and specifically whether there is a division between highly complex demolition services (HCDS) and general demolition services (GDS).

(a) Keltbray's submissions

183. Ground 2 is summarised in Keltbray's skeleton argument in the following terms:

> "In summary: the CMA failed to investigate for a relevant product market distinction along the dimensions of scale and complexity. There is ample evidence indicating that [HCDS] fall within a separate product market from [GDS]. The impact of this error would be to reduce the Step Two calculation by 56% (i.e. more than half). Such an adjustment would inevitably require a significant consequential adjustment to Keltbray's eventual penalty."

184. Relying on the evidence of Mr Corrigan and Mr Lohmann, Keltbray submitted that within Demolition Services there is a range of scale and complexity. This is summarised in Keltbray's skeleton argument in the following terms:

> "21. …
>
> a. **Simple project**s involve project values of £1-5m, and are usually carried out under a main contractor. They are quick to complete (16-24 weeks) and are covered by a firm's normal public liability insurance. There are a large number of competitors carrying out this work and a high volume of firms entering and exiting the market. Tender processes are simple, unlikely to involve extensive civil engineering input and cheap to prepare (£15,000)/ Customers are focused on price. The workforce and safety and environmental resources are likely interchangeable with other sites.
>
> b. **Cut-and-carve projects** involve retaining (and reinforcing) part of the existing building whilst demolishing the rest. This involves greater engineering complexity. Values range from £1m to c.

£17m. Again, a large number of competitors can carry out this work (including construction firms). The requisite insurance premiums are likely to be higher. There is a greater need for civil engineering input. Customers are still focused on price (especially at the lower end) but, as project values increase, more emphasis is placed on the skill and experience of the contractor and a more skilled workforce is required.

c. **More complex demolition projects** involve greater engineering complexity and range in value £10-20m. Keltbray is more likely to contract with the developer directly. Works take longer to complete. Preparation of tender sis longer and more expensive (e.g. £100,000). Prior experience is an essential pre-requisite. There is greater use of pre-qualification questionnaires to screen bidders and post-tender queries Tender scoring is more weighted to technical approach than price. The work demands more operatives and managers and a wider skill set.

22. As to **Highly Complex Demolition Services**:

a. These include projects exceptional in their scale, value, engineering complexity and associated regulation. They often have significant neighbouring infrastructure and adjacent critical assets. They require bespoke engineering solutions. The pool for customers for such projects is very small.

b. They exceed less complex projects in their scale and value with values ranging up to £97m (Earl's Court) and delivered over 30 months.

c. Only three or four suppliers are capable of delivering such tenders.

d. The projects involving onerous financial provisions and risks (in terms of performance bonds, guarantees, collateral warranties, the risk of damages, insurance requirements) and place significant demands on working capital.

e. There is a greater use of direct award as opposed to competitive tender. Where used, tender processes are longer and more detailed. Third party stakeholders (e.g. Network Rail, TfL) may have a right to comment on or approve the demolition firm.

f. A far greater workforce and management time is required both at the pre-commencement stage and during delivery. Few companies have resource for such a commitment. Staff are highly skilled and command pay at the upper levels of the available range."

185. Keltbray's argument is as follows:

(1) The CMA's market definition analysed the relevant market by type of service. Demolition Services and Asbestos Removal Services were defined as relevant markets within the scope of the infringements found in the Decision. Explosive Demolition Services, and Decommissioning were defined as separate markets outside the scope of the infringements, given the requirement for specific expertise, experience and accreditation: their significant complexity and high value amounted to barriers to entry. The CMA failed to follow the same logic when asking whether, within Demolition Services, there was a subset of services which could be similarly differentiated and could be identified as a separate market.

(2) That there is a subset of HCDS is supported by the expert evidence; we will return to the expert evidence in paragraph 187*ff* below.

(3) In a market where the value of products differs by multiple orders of magnitude, it cannot safely be assumed that all products fall in the same market. The Decision concerns projects varying in value from £0.5m to over £50m. Whilst Keltbray (and others) bid at both ends of the spectrum, that does not mean that these projects are not separate markets, or that there are no barriers to switching between them.

(4) The CMA's section 26 (of the CA 1998) Notices to the parties referred to certain categories of service, and simply asked in general terms for comments. It did not ask questions related to potential market delineation based on the scale or complexity of the project, and did not make clear that the questions related to market definition.

(5) There was evidence available to the CMA which raised the issue of scale and complexity posing barriers to switching, including the section 26 Notices and interviews, and the 2020 IBIS Report (the "IBIS Report").

186. Mr Noble considered the evidence and proposed a market definition between GDS and HCDS. HCDS is defined by reference to two criteria: (1) demolition at a major infrastructure site; and/or (2) a project value in excess of £36.5m.

187. Mr Noble considered that there are significant barriers to switching up or down between these two segments. Only 3 or 4 firms operate in the HCDS field, compared to approximately 800 firms in total who are active in the GDS sector. Suppliers of GDS lack the relevant in-house civil engineering expertise to undertake HCDS. Smaller firms also face insuperable financial barriers to competition in the HCDS sector. HCDS are often focussed in Central London where there are enhanced logistical difficulties facing new entrants.

188. If HCDS cannot be constrained by GDS, then that is informative, not least because the CMA excluded Explosion Demolition Services and Decommissioning because of barriers to entry to these markets. HCDS ought also to be excluded, the relevant question being: "if [GDS] do not competitively constrain [HCDS], then on what basis might infringements on small value projects affect the provision of services on major infrastructure projects? The CMA has no theory of harm as regards the bearing of Keltbray's infringements (which all related to [GDS]) on [HCDS], the turnover of which the CMA repeatedly included in its penalty calculations." On this basis, revenues from HCDS ought to be excluded from relevant turnover.

189. As regards switching the other way, from HCDS to GDS, Keltbray relies on Mr Noble's evidence to say that there is a lack of economic incentive to switch (due to higher margins on HCDS), and even if there was an incentive to switch, given the relatively smaller scale of HCDS, it would be insufficient to exert a competitive constraint on GDS.

190. The removal of HCDS would reduce the Step 3 figure to **£77,873,040**.

(b) The CMA's Submissions

191. The CMA submitted that Keltbray again focuses on only one step in the penalty setting process. The CMA also submitted that the point is academic. The Step 3 figure that Keltbray suggests would be £78m is still almost four times the penalty of £20m that the CMA ultimately considered to be appropriate at Step 4. There is therefore no reason to think that the outcome would have been any different at Step 4. The CMA's reason for a reduction was to avoid a disproportionate penalty given that income had been taken into account multiple times and the infringements related only to specific contracts and not to a cartel, and that applies equally whether the starting point is £78m or £178m.

192. There is no evidential basis for drawing a line between GDS and HCDS. The evidence gathered by the CMA suggested that the addressees of the Decision competed for projects across a range of complexity and values.

193. Keltbray's argument is, in effect, a rerun of the argument on Ground 1 of the Appeal. Keltbray suggested that the CMA has no theory of harm as to how cover pricing in the provision of GDS can impact competition between the parties in the provision of HCDS. However, the CMA's answer was the same: cover pricing has the potential to impair competition going beyond the individual tenders. The CMA submitted that some of the Infringements (which Keltbray suggests are GDS) involved suppliers whom Keltbray identified as also being suppliers of HCDS, and who were therefore aware that Keltbray was willing to participate in cover pricing. The CMA also submitted that there is a consistency between the clients and contractors, across what Keltbray maintains are GDS and HCDS projects, and the credibility point (paragraph 149(2) above) applies across the range of projects.

194. The submission that the CMA erred in failing to investigate whether there are two separate markets, is unmeritorious given that it was not a point raised by Keltbray, or by other addressees of the Decision. In any event, it takes matters

no further forward because the Tribunal now has the evidence and can decide it.

195. The key issue relevant to Keltbray's claim that there is a separate and distinct GDS market is supply side substitutability, and the willingness of suppliers of HCDS to switch to GDS. As to that, Dr Walker disagrees that the existence of barriers to switching up is informative of this question. The barriers raised by Mr Noble only reflect the fact that not all suppliers can supply the most complex jobs.

196. The two reasons for separating the market between HCDS and GDS identified by Mr Noble are: (1) outturn gross margins; and (2) the small scale of the HCDS market. As to margin, the CMA is not obliged to conduct a detailed evaluation of margin at Step 1. In any event, Mr Noble's analysis is based solely on Keltbray's own data, and not market wide data; the sample of Keltbray's data carries a number of uncertainties; and Mr Noble puts undue weight on the difference between outturn margin for GDS and HCDS. Dr Walker considered expected margins better inform the incentives to switch resources between projects.

197. The CMA considered that the information from the parties to the investigation was adequate and proportionate to the task of market definition. That evidence does not suggest a clean distinction, but a sliding scale of complexity and value in relation to which not every supplier can provide HCDS, but suppliers of HCDS may divert resources to GDS. In any event, the investigation of market definition was adequate bearing in mind Keltbray settled, and did not dispute the market definition or suggest the division between GDS and HCDS that it now relies upon.

Section 26 Notices

198. A Section 26 notice was served on Keltbray by letter dated 24 March 2021. Annex 1 to that letter listed information that was required to be provided. The CMA set out its understanding of the demolition sector as follows:

> "Based on information available to the CMA at this stage, the demolition sector can be split into the following six main categories of service:
>
> a) **demolition** - including levelling an entire structure or building (total demolition); demolishing the interior of a building while preserving the exterior (selective demolition); soft strip; cut and carve; façade retention; structural alterations, top-down demolition, explosive demolition, high reach demolition;
>
> b) **dismantling** - including breaking down a structure through the removal of its components;
>
> c) **decommissioning** - including the deconstruction of power plants, nuclear power plant stations and associated nuclear facilities;
>
> d) **remediation** - including clean-up services, ground remediation/stabilisation, waste, scrap, recycling, disposal of reclaimed material, ground water remediation, decontamination;
>
> e) **asbestos services** - including consultancy, removal, surveying, assessment; and
>
> f) **related services** - including enabling works, temporary works, specialised concrete works (e.g. cutting/drilling), lifting services, logistics, groundworks, piling, excavation, basement works, underpinning, foundations, slab work, crushing, infilling, steelwork, protection works, specialist engineering, consultancy, survey works, transportation of waste products, provision of hoardings."

199. Keltbray and other addressees of the Section 26 Notice were asked to:

> "Please confirm whether you agree with the distinctions set out above and, if not, please explain how you consider the various services to be categorised.
>
> 1(i) In the remainder of this notice, questions are asked about the main categories of service listed from (a-f) above. **If you have indicated in response to question 1 that you do not agree with the distinctions**, and wish to modify the above list of main categories and sub-categories in order to respond accurately to the notice, please:
>
> a) produce an updated list in accordance with how you consider demolition services are categorised, and
>
> b) respond to the remaining questions 2-5 in accordance with your modified list. Please ensure in that event, that each sub-category

> (that is, each specific service named above) is included in your modified list." (Emphasis in original)

200. In questions 1 to 3, Keltbray was then required to provide information in relation to the services provided in each of the broad categories identified by the CMA (or the categories as amended by Keltbray parties). Questions 4 and 5 related to whether there were any geographic limits to the services provided by Keltbray.

201. Keltbray provided its comments on the categories (a) to (f) and, for example, indicated that it did not regard "Remediation" as a category of "demolition". Keltbray did not, in its answers, suggest that GDS and HCDS were separate categories. In its answer to question 4, which sought information relating to whether there were any characteristics of the services provided (the need for specialist equipment, for example) that restricted where the service could be supplied, Keltbray responded: "Keltbray's demolition business model focuses on the specialist demolition of complex jobs in highly regulated environments such as the City of London or the City of Westminster. The barriers to entry into demolition for smaller, simpler regional jobs are low in terms of the manpower and machinery and this drives down the opportunity to make a suitable margin. This is particularly the case outside the M25." The answer went on to refer to Keltbray's target market being complex environments with high levels of engineering specialism, which attracted a level of margin that could not be obtained from an industrial demolition outside London, and to the degree that management had the bandwidth to consider jobs outside London.

202. On 9 June 2021, Keltbray was served with a further Section 26 Notice which sought further information relating to turnover. The definitions in the Section 26 Notice included: "Demolition and Related Services"; "Explosive Demolition and Related Services"; "Decommissioning and Related Services"; and "Asbestos Removal and Related Services". Keltbray was asked to provide annual turnover information relating to the Demolition and Related Services, and Asbestos Removal and Related Services categories.

203. The draft and final form of the SO set out the CMA's approach to the Relevant Market in the same terms as appear in the Decision.

(4) Error of Process

(a) Keltbray's submissions

204. Keltbray argued that the CMA had committed an error of process during the investigation in its failure to consider a narrower affected market, and in failing to seek evidence from the infringing parties that would have enabled them to identify a relevant GDS market which would have led to a smaller Affected Revenue base. Specifically, Keltbray accused the CMA of pre-framing its product market definition in the Section 26 Notices, and failing to explain sufficiently clearly that questions 1 to 3 were concerned with economic market definition.

205. This concern was addressed further in the evidence of Mr Corrigan, who explained that whilst the CMA's Section 26 questions on geographic market definition were clearly signposted to provide an opportunity for respondents to make arguments on possible geographic markets that were narrower than the UK as a whole, the corresponding questions on demolition services simply asked for information on the services that Keltbray had provided. They did not permit an exploration of narrower product markets. Mr Corrigan's evidence was that Keltbray simply took the CMA's questions at face value without making any representations on the existence of a narrower relevant product market.

206. At the Hearing, Ms Pople argued that it was unreasonable to assume that a business person responding to a Section 26 Notice should have had regard to specialist competition law considerations of relevant market definition, and that there was therefore no reason why Mr Corrigan should have seen the Section 26 Notice as an opportunity to make an argument for a narrower product market and an associated smaller Affected Revenue base for Step 1 of the CMA's fine calculations.

207. Ms Pople also pointed to various responses from other addressees of Section 26 Notices in the investigation (Careys/Scudder; Cantillon; Clifford Devlin; Erith; McGee and Squibb) which it was submitted highlighted issues of project complexity and value, and were said to support a split into separate markets of GDS and HCDS. Keltbray argues that it was an error of process to start from market definitions based on broad category of service, but not scale and complexity.

(b) CMA's submissions

208. In response, the CMA argued that Keltbray and Mr Corrigan had understood that the Section 26 questions on geographic market definition provided an opportunity to put forward a narrower geographic market, and it was implausible that the same thought process could not be applied when responding to questions that asked about the relevant product dimension of market definition: i.e. the different demolition services provided by Keltbray. Even if it was unreasonable to expect business personnel to have a clear view on the technicalities behind product market definition questions, Keltbray had been advised by a competent law firm during the investigation who could and should have been well placed to identify the Section 26 questions on demolition services as an opportunity to engage the CMA with any representations about the relevant product market.

The evidence

209. The CMA adduced evidence from Ms Enser. She was cross-examined by Ms Pople in relation to the Section 26 Notice, and the alleged error of process.

210. Ms Enser accepted that the Section 26 Notice was served for three purposes: informing market definition; providing background to the industry; and gaining an understanding of the wider context given the CMA's view that cover bidding was an object infringement. She also accepted that the questions as framed did not specifically ask about scale, complexity or value of projects, although some

addressed dimensions of complexity (such as whether special equipment was required). Her evidence was to the effect that consideration had been given to whether the market should be narrowed by reference to the specialised nature of services, and that resulted in the separation of asbestos removal, and explosive demolition. In relation to other work, the relevant undertakings supplied almost all of the services that otherwise comprise demolition, and could sub-contract where special skills were required. Ms Enser made the point that none of the projects the subject of the Decision were as simple as "knocking down a garage". If they had been, that might have warranted a separate market, but that was not the sort of work involved in the relevant projects.

211. Ms Pople submitted that it was clear that, despite Ms Enser indicating that the sector described in the section 26 Notice was not treated as a preconceived candidate market, it was used in that way. There was no incremental expansion of the smallest candidate market from an individual infringement. Ms Pople submitted that there was a real and substantive difference between HCDS and GDS, and that it was not possible to bridge that gap using subcontractors. The highly specialised nature of HCDS, and the staff and equipment needed to do it, led to the conclusion that it should in fact have been treated the same as explosive demolition and decommissioning.

212. Mr Corrigan also gave evidence as to the basis upon which questions 1 to 3 in the section 26 Notice were answered by Keltbray. His evidence was that he did not understand the purpose of questions 1 to 3: "Were we to be aware that they were to be used for the purposes of defining … the product market – geography is laid out clearly – then we would have responded to that question as well". He acknowledged that he had appreciated that questions 4 and 5 were related to the geographic dimension of market definition.

(c) Analysis

213. We do not think it matters much whether or not Keltbray's business leadership expressly understood that questions 1 to 3 in the Section 26 Notice went to

market definition, although we note that Mr Corrigan understood that questions 4 and 5 were dealing with the geographic part of that exercise. In any event, Keltbray was aware of the approach that the CMA was taking to market definition prior to the adoption of the Decision. It was not suggested at any point during that time or prior to this appeal that there were separate markets for GDS and HCDS. Keltbray's submission on error of process is to suggest that the CMA failed to test for and discover a delineation between GDS and HCDS: a specifically separate market that Keltbray itself failed to draw to the CMA's attention.

214. We do not accept that, even if there is a separation between those markets, the failure to identify it can be described as an error of process on the CMA's part. It was evidently open to Keltbray to have made representations about a narrower affected product market. The key question to address is therefore one of substance (and outcome), not process. It is to that issue that we now turn.

(5) Error of outcome

215. Kelbray framed its Ground 2 argument as one that concerned market definition, and specifically whether the CMA should have adopted a narrower GDS product market when calculating the relevant turnover for Step 1 of the penalty calculation. The CMA cautioned against adopting an overly formalistic approach to market definition, and there was a degree of common ground between the parties relating to the role of market definition when determining the relevant turnover.

216. To recap, market definition is a tool rather than an end in itself. In a Chapter I prohibition case, the CMA is not required to undertake a formal market definition analysis when considering the product market for the purpose of Step 1 of the Penalty Guidance, whether at the investigation stage or on appeal: *Argos CoA* at [173].

217. The process of defining the relevant market should be context-specific and not an abstract or academic exercise. The description of the task in hand was in our view summarised by the following two comments from Ms Pople during the Hearing:

> "The clear purpose of the guidance is to identify revenues more or less coextensive with the ambit of the wrongdoing" (Day 4, Transcript, page 11)
>
> "We submit it is important to remain grounded in the real question here, which is: what is the reasonable measure of the relevant economic activity affected by the infringement?" (Day 4, Transcript page 35])

218. As indicated in paragraph 184 above, based on Mr Corrigan's evidence, Keltbray submitted that GDS is broken down into three sub-categories: "simple"; "cut and carve"; and "more complex". HCDS is said to sit in a category of its own. Mr Corrigan provided examples of each sub-category of GDS, and of projects which he maintained fell within the category of HCDS. In order to assist in the analysis of the demolition sector, Mr Noble devised a series of questions ("the allocation questions") which were then answered by Keltbray in relation to each of the Infringement projects, and each of the other projects contributing to Keltbray's turnover figure for the purposes of the CMA's penalty calculation. The questions concerned matters such as: whether or not the demolition involved a major infrastructure site; whether the project duration exceeded 12 months; whether it required additional insurance cover; how many engineers and managers were engaged; what tender process was adopted, the tender value, and eventual contract value. The results were included in two spreadsheets. On the basis of the responses received from Keltbray, Mr Noble ascribed the projects to either GDS or HCDS.

(a) The factual evidence

219. Mr Lohmann's evidence provided more detail in relation to specific examples of each category of demolition projects, and addressed the transferability of skills between demolition project types. In particular, as regards the latter, his evidence referred to the need for operatives to have certain levels of skill and qualifications to undertake certain types of work. He confirmed that some skills,

such as simple manual skills, are common to all types of demolition projects. Those operatives are readily transferable between projects of all types. The more complex the project, the more skilled and experienced the management needs to be. Mr Lohmann's evidence was that it would not be economical for those qualified to work on the more complex projects to be deployed on simple demolition projects all the time. He also made the point that if Keltbray wishes to retain its best, highly skilled personnel, it is necessary to ensure that they have exposure to the more complex projects, and they would not want to work on simple projects all the time. However, he acknowledged that "the reality is, there are a limited number of highly complex projects and therefore Keltbray's higher skilled operatives undertake work on all types of General Demolition projects".

220. Mr Corrigan was cross-examined by reference to various sample projects. In relation to the Old War Office project – a project worth over £50m – Mr Corrigan said there would be a degree of complexity beyond simple, but accepted that it was difficult to tell whether it would be HCDS based only on value, and what he knew about the project. He accepted that Keltbray did a significant amount of work (over 50% of its turnover) in relation to projects in the £1-5m bracket; that there could be complex low value projects, and less complex high value projects, and that value alone does not dictate whether a project is complex or not. Mr Corrigan was questioned in relation to the allocation schedule relating to projects which contributed to the relevant turnover. He was unable to provide much detail as to the projects concerned, but accepted that it demonstrated that Keltbray competed for projects with a value below £1m. Some relatively low value projects nevertheless had an infrastructure connection.

221. At the other end of the spectrum, Mr Corrigan was asked about a project called 150 Leadenhall, which had an outturn revenue value of £34.7m, but was categorised as GDS because it is just below the HCDS threshold value adopted by Mr Noble. Mr Corrigan accepted that any line drawn based on value to try and identify complexity was bound to be arbitrary to some extent. Another

example (referred to as The Broadway) had an outturn revenue of £44.5m, but its initial tender value was £11m. Mr Corrigan's evidence was that this did not start out as HCDS but became such. In relation to that project, Mr Corrigan accepted that the concept was "a bit fluid". The position was similar in relation to the Battersea Power Station project. In relation to the Elephant & Castle project, whilst it involved a major infrastructure site, Mr Corrigan did not categorise it as HCDS. He suggested that whether it was called HCDS or a more complex GDS was "a marginal call".

222. Mr Corrigan accepted that there is a sliding scale of complexity not just within and between the sub-categories of GDS but that also extends from the simple GDS projects to the top end of HCDS. As regards highly qualified staff, Mr Corrigan accepted that they can be used on all types of demolition projects, but said that would not be sustainable in the long term. Again, there is a sliding scale. It would be better to deploy those staff in the cut and carve projects or "more complex" projects if they were not being utilised in HCDS.

223. In answer to a question from the Tribunal, Mr Corrigan accepted that Keltbray does not distinguish between GDS and HCDS internally. There is no department that deals particularly with one category or the other. He stated that there was:

> "a wide pool of people and a wide pool of kit, and we have management that deploys where that should go. Where that should go is determined by the sort of work that we win. The sort of work that we win is on the basis of a targeted strategy as opposed to we want volume. On that basis we do internally do market analysis of where those higher more complex projects may exist relative to general volume, and we have a sieving process as part of our management process of determining where we allocate bid resource, therefore, for the purposes of trying to win. But do we have separate divisions which deal with highly complex or simple demolition? No."

224. Mr Corrigan also accepted that GDS forms an important part of Keltbray's business, even though Keltbray's preference is to do HCDS work. His evidence was to the effect that, as far as commercial terms are concerned (performance bonds and the like), they would be different as between projects at the simpler end of GDS and HCDS, but the middle would be more blurred.

225. Mr Burnside was also cross-examined. He was surprised that 50% of Keltbray's turnover was generated in contracts of under £5m in value, but commented that there are always a lot of small contracts, and that the highly qualified staff have to train somewhere. Mr Burnside accepted that the tender margin was a "pretty good guide" to the margin Keltbray expected to make on a tender. He also accepted that the tender margins were not so different as between HCDS and GDS, and whilst he suggested they would be higher in the former, that was more a question of impression.

(b) The expert evidence

226. Mr Noble and Dr Walker met to discuss their respective reports. Following this, they prepared a joint statement as to the extent of the areas of (dis)agreement between them. We are grateful to them for their constructive and helpful approach in identifying these areas. The joint statement recorded the following position:

(1) Market Definition: The correct approach to market definition is to apply the Hypothetical Monopolist Test (HMT), although it is important to remember that this provides a conceptual framework to guide qualitative assessments, rather than requiring to be applied in detail empirically. Market definition requires an element of judgment as to how the available evidence is interpreted. The most appropriate starting point in this case is to take individual tenders for specific demolition work as the focal products. There is likely to be very limited demand side substitutability in this case. Whether the market is wider than the individual tenders will depend on the extent of supply-side substitutability. Within the HMT, the hypothetical price increase is typically 5-10%.

(2) Direction of supply-side substitutability: Supply-side substitution from HCDS to GDS was relevant for market definition in this case. On the issue of the extent to which supply-side substitution from GDS to HCDS

was relevant, Mr Noble considered that it was relevant, and Dr Walker said that it was not.

(3) Ability and incentive to substitute from HCDS to GDS: Mr Noble and Dr Walker agreed that an assessment of the effectiveness of supply-side substitution should consider all resources that could reasonably be used to provide the focal product. They also agreed that "ability matters": the ability of HCDS suppliers to switch to GDS in response to a price increase in the GDS segment was relevant. HCDS suppliers are generally capable of providing GDS, given the lower level of complexity involved. They agreed that incentives to switch from HCDS to GDS were also relevant.

(4) Outturn gross margin: For Keltbray, HCDS projects have significantly higher *average* outturn gross margins than GDS projects, based on the sample of projects taken by Mr Noble. However, Dr Walker took issue with the sample taken by Mr Noble, and we will return to this below. Dr Walker considered that there was a substantial overlap between the outturn gross margin distributions of HCDS and GDS projects in the sample taken by Mr Noble. Mr Noble disagreed. We refer to this further below. Mr Noble and Dr Walker agreed that, in the sample, the weighted average outturn gross margin for Keltbray's GDS projects was 8.9%, and for HCDS, 18%. If GDS prices increased by 5-10%, this would increase Keltbray's weighted average GDS outturn gross margin to a level between 13.2% to 17.2%.

(5) Profit margin: Mr Noble and Dr Walker agreed that Keltbray's profit margins on GDS projects are likely to be higher than the average margin across the GDS segment as a whole, because Keltbray was predominantly active in providing more complex, higher-priced projects within the GDS segment.

(6) Tender gross margin: There was minimal difference between the tender gross margins of Keltbray's HCDS and GDS projects identified in the sample. The weighted averages were 14.4% for HCDS and 15.5% for GDS, and the simple averages were 14.9% for HCDS and 14% for GDS.

(7) Dr Walker was of the view that expected margins at the point of tender were likely to be a better indicator of Keltbray's incentive to shift resources between projects than outturn margins. Mr Noble disagreed. We return to this issue below.

(8) The experts disagreed as to whether or not HCDS suppliers were likely to have an incentive to switch from HCDS to GDS projects in response to a Small but Significant Non-Transitory Increase in Price (SSNIP) in the GDS segment. Dr Walker was of the view that there was such an incentive, and Mr Noble thought there was not.

(9) Relevance of scale in product market definition: Both Mr Noble and Dr Walker agreed that the scale of the relevant market segments is relevant when considering the effectiveness of supply-side substitution as a competitive constraint. A market segment must have sufficient capacity to be able to constrain a hypothetical monopolist in the focal segment. They also agreed that it would not be possible for the entire HCDS segment to switch supply to the GDS segment within a reasonable timeframe in response to a price increase in GDS. Mr Noble considered that the relative size of the HCDS market was £150-200m, and GDS was £800-850m. Dr Walker disagreed since Mr Noble's GDS segment appeared to include: decommissioning; asbestos services; and explosive demolition. None of these services were likely to be in the same market as the projects in this case. The GDS figure was, in Dr Walker's view, likely to have been overstated. Mr Noble thought that the amount of capacity that could be switched, or that suppliers would have an incentive to switch, from HCDS to GDS was unlikely to be sufficient to have a competitive effect on prices in GDS. Dr Walker disagreed. In his

view, the fact that HCDS providers already provided GDS projects indicated that they had an incentive to bid for GDS tenders and so would affect competitive conditions and hence prices in the GDS sector. The similarity of expected margins was consistent with this.

227. We note that both Dr Walker and Mr Noble agreed that, for the purposes of exploring this issue, it was necessary to take a view on the wider adverse consequences of the Infringements beyond the individual projects on which cover bids occurred. We have already referred to their agreed view on this point at paragraph 98 above as it is relevant to Ground 1 of the Appeal.

228. They also agreed that the SSNIP test framework provided the appropriate approach to addressing the issues and organising the evidence. Since there was limited if any demand-side substitution between individual projects, the focus in applying the SSNIP framework should lie with supply-side substitution – i.e. whether demolition firms have the ability and incentive to redeploy their resources between demolition projects of different characteristics in the face of a small (5-10%) unilateral increase in the price for any candidate product market.

229. We have referred, at paragraph 155 above, to the fact that, in the context of penalty it is not necessary for the CMA to engage in formal market definition exercise (and this includes not needing to conduct a SSNIP analysis). We address it in this judgment because we must decide whether there is any merit in Keltbray's division between HCDS and GDS. However, the fact that we do so should not be taken as imposing a requirement on the CMA to undertake a formal market definition for the purposes of assessing the relevant product market in Step 1 of the Penalty Guidance.

230. Mr Noble argued that it was unusual for a market definition exercise to rely on supply-side substitution, and that competition authorities' guidance on market definition generally focuses more on demand-side substitution as the most likely source of competitive constraints when conducting the SSNIP test. We do not

disagree with either observation, but do not consider this particularly relevant in the current case where demand-side substitution had been agreed not to be operative. There is no reason why, if it meets the tests of ability and incentives, supply-side substitution should be discounted as a factor that could defeat a SSNIP analysis of demand-side substitution and justify the adoption of a wider relevant product market.

231. We turn then to consider the key disputes between Mr Noble and Dr Walker.

232. As regards the direction of substitutability, the position is as follows:

(1) Since all of Keltbray's Infringements took place on projects that fall within Mr Noble's GDS candidate market, the relevant SSNIP test hypothesis in this case (or the "focal product") concerns GDS and whether a hypothetical monopolist supplier of GDS would have the power to sustain a SSNIP above the competitive level. For this reason, Dr Walker argued that the analysis of supply-side switching should focus on one direction only: the ability and incentive for suppliers of HCDS to redeploy resources from HCDS to GDS project opportunities in the event of a unilateral increase in price of the latter.

(2) Mr Noble agreed that switching from HCDS to GDS should be the primary focus of the assessment, but considered that supply-side switching in the opposite direction from GDS to HCDS might also have some relevance for two reasons: first, at least one of the infringements investigated by the CMA concerned an HCDS project; and second, because it might help to identify relevant distinctions between the resources required in the two types of project.

(3) We do not find either of Mr Noble's arguments convincing. Given that we are concerned with Keltbray's current appeal against the Decision, we do not consider that the factors that might have been relevant to another appeal, had it been brought, are informative. Further, we do not

consider that the possible existence of obstacles that might prevent GDS suppliers from gaining access to HCDS project opportunities has relevance for the supply-side switching that would need to take place from HCDS to GDS in order to test the existence of Mr Noble's GDS candidate market. There is no compelling reason why barriers that might exist in one direction would be informative on barriers that might exist in the opposite direction, and so the most productive approach in our view is to assess supply-side substitution from HCDS to GDS.

233. We note that in reaching his proposed HCDS/GDS distinction, Mr Noble appeared to have been influenced by what he saw as a barrier to switching that would face a GDS contractor who had no HCDS track record. As the experts acknowledged, the information on which to base a conclusion on this issue was imperfect. However, a number of evidential factors are unpromising for Mr Noble's narrow GDS market hypothesis:

(1) The demolition contractors who carry out HCDS projects do also conduct GDS projects. In Keltbray's case almost exactly half of its demolition services revenues come from GDS projects (and significantly more than half of all its projects). Mr Noble's evidence indicated that the same held true for other contractors involved in HCDS.

(2) As we have said, Keltbray does not itself adopt any internal division between HCDS and GDS projects. Nor does it operate separate physical depots for HCDS and GDS projects or otherwise organise itself in different operating divisions for the two types of contract. Keltbray's factual witnesses confirmed that its skilled workers and sophisticated machinery would be deployed across HCDS and GDS projects, even if there was, on average, a greater likelihood that more skilled workers would be deployed towards more technically demanding work.

(3) The HCDS/GDS distinction is not one that is known or acknowledged in the demolition industry, but rather appears to have been identified by Mr Noble in the context of defining a narrow market for the purposes of this case. That fact is not in itself fatal, but it does place particular onus on Mr Noble to make good the argument by reference to cogent evidence of barriers to supply-side switching.

234. As regards margin, it is evident that demolition contractors who engage in HCDS projects have the ability to undertake GDS projects, and indeed that they do so to a considerable degree. In light of this, significant weight must be placed on the available margin data to test whether it revealed a substantial difference in the financial rewards available as between HCDS and GDS projects, such as to indicate a likely absence of incentive to switch resources from HCDS to GDS.

235. In Noble 1, Mr Noble cited evidence from three Keltbray projects described in Mr Corrigan's evidence, which showed gross margins on GDS projects of 7%, 8% and 12%, compared to a single HCDS project that yielded a gross margin of 24%. He took this as indicative of much higher returns in HCDS projects. That would imply that there was no incentive to shift resources from HCDS to GDS opportunities even in the event of a 5-10% increase in price of the latter. This conclusion was supported by evidence from both Mr Corrigan and Mr Lohmann to suggest that the higher paid and higher skilled staff who might expect to work on HCDS projects would not be a competitive option, if deployed on smaller and lower margin GDS projects. There are, however, severe limitations to a conclusion on market definition based on a solitary margin observation for HCDS projects.

236. In Noble 2, and in response to some criticisms contained in Dr Walker's Statement, Mr Noble sought to address this problem by presenting a more comprehensive analysis of Keltbray's margin data across 34 projects, 25 of which were categorised as GDS and 9 as HCDS. The weighted average outturn gross margin for the two groups were 18% and 9.8% respectively. (We comment

below on the existence of other data on Keltbray's tender margins and the rather different picture that they convey).

237. Mr Noble also presented a bar chart showing the overlap between the individual project gross margins, indicating that the margins on even the two HCDS projects that fell in the lowest margin band of that category (10-15%) were above the weighted average for all GDS projects. However, Dr Walker, in his comments in the joint statement and his oral evidence, noted that there was nevertheless a substantial overlap between the margins achieved by Keltbray on GDS and HCDS projects, with 9 of the 25 GDS projects having a higher margin than the lowest HCDS project margin of 11.9%.

238. In the concurrent evidence session with Mr Noble and Dr Walker, a number of further issues arose with respect to the collection and interpretation of the margin data.

239. First, as regards sample selection, in the joint statement, Mr Noble stated that "it is not possible to obtain any more data points", that the data represented "a randomly selected sample of projects" and that the results "should provide a good guide to the overall position of GDS projects undertaken by Keltbray". In response to questions raised by the Tribunal prior to the hearing, however, some doubt was cast on all of these claims.

    (1) Mr Noble was unable to explain the basis of the "random" sample selection in PB3 had been carried out by Keltbray. This led to the submission of a further factual witness statement, filed shortly before the hearing, from Mr Burnside in which it was clarified that:

        (i) Keltbray's data had been subject to a cyber-attack in 2021 and this had reduced the easy accessibility of historic project margin data.

(ii) The 9 HCDS projects selected were the full set of such projects available to Keltbray.

(iii) The 25 GDS projects comprised those that were readily available to Keltbray, augmented by a further 3 projects that had been selected with assistance from Mr Deacy, former Managing Director of Keltbray, in an attempt to increase the number of simple GDS projects within the GDS sample (which would in Keltbray's view have been under-represented in the original sample).

(2) We have no specific reason to question the criteria used by Keltbray in selecting the GDS projects in PB3. We also accept that experts often have to work within the bounds of the imperfect data that it is possible to collect when undertaking empirical analysis of this kind. However, Mr Noble's reports did not properly reflect the limitations of the margin data available in the way that we would expect him to have done. It is plainly not the case that the data came from what could properly be referred to as a "random" sample, contrary to what was claimed.

(3) The Tribunal had particular concerns with the possible exercise of discretion in adding the 3 "simple" GDS projects selected by Mr Deacy. We requested Mr Noble to re-calculate his results excluding these observations. Since one of the projects in question had a very large negative margin outcome, this recalculation led to a small increase in the average margin for GDS projects, though this did not fundamentally change the pattern that emerged from the margin data.

240. Second, both the joint statement and the concurrent session identified the distinction between Keltbray's tender and outturn margins as an issue to be addressed. For GDS projects, Mr Noble found that the weighted average of the margins contained in the tender documents was 6.6 percentage points higher than that for the outturn margins, whereas for the HCDS projects the position

was reversed, with the weighted average of the tender margins being 3.6 percentage points lower than for the outturn margins.

(1) Mr Noble argued that it was more appropriate to focus on outturn margins than tender margins, since his preferred measure represented the actual market prices. In contrast, Dr Walker considered that tender margins were more likely to reflect the expected returns, and that decisions as to whether to allocate responses to one project or another would be more likely to be determined by such expectations.

(2) The two different margin measures had a significant impact on the comparison between GDS and HCDS project rewards. On Mr Noble's preferred outturn margin approach, it showed weighted average margins at 18% for HCDS and 8.9% for GFDS projects, a gap of 9.1 percentage points. But under the tender margin comparison favoured by Dr Walker, the rankings flipped around, yielding a weighted average of 14.4% for HCDS and 15.5% for GDS projects – a gap in favour of GDS projects of 1.1 percentage points.

(3) Neither approach was determinative of the issue of product market definition, though clearly reliance on tender margins would suggest a much closer call between the financial attractions of the two categories. That would make it more difficult for Mr Noble to sustain his conclusion that there was ineffective supply-side substitution between the categories.

(4) We found some difficulty in assessing this issue absent a cogent explanation for the reasons behind the observed margin patterns, and whilst the results themselves were clearly reported we were surprised that this was not addressed more fully in Mr Noble's two reports. This was therefore another issue the Tribunal noted in advance of the hearing. Since Mr Noble was not able to explain the reasons behind this

discrepancy, it was a further issue covered by Mr Burnside's third witness statement immediately prior to the Hearing.

(5) However, Mr Burnside's evidence on this point did not fully resolve it. His best explanation for the gap between tender and outturn margins in GDS projects was that, due to the importance of price in such work, there was a tendency for the client to haggle with the shortlisted bidders prior to a final decision, and that the tender bids contained some room for this haggling process to take place. This was less true for HCDS projects which were less likely to involve formal tenders in the first place, and for which any discussions between the client and contractor were likely to involve discussions about extra work that might be required alongside the original specification. However, Mr Burnside accepted that it would be odd for bidders in a GDS contract to run the risk of losing a project by deliberately submitting a tender bid that was not competitive, and he agreed that in a well-run demolition business there should not be a large and systematic gap between expected and outturn margins. This to some extent cut across the "haggling" explanation for the observed gap.

(6) Some further uncertainty on this issue was added by a reference made by Mr Burnside to "contract margins", a possible third category that would reflect the margins defined in the final deal agreed between Keltbray and the client on successful bids. Such contract margin data might be a more useful guide to market prices than the outturn margins. The latter can be affected by a variety of factors and unforeseen events that might occur during the execution of the work itself. However, since no contract margin analysis was presented to the Tribunal, we were unable to take this further.

241. Third, the experts disagreed as to whether the margin analysis should focus on the "central tendency" of the margin for any project category, or look more broadly at the distribution of margins and the areas of individual overlap.

(1) In the concurrent session, Mr Noble expressed his preference for comparing the central tendency (as captured by the weighted average margin for each category) whilst Dr Walker argued that comparing the actual distribution of margins, including the fact that the distributions of the two sub-samples overlapped to a considerable extent, provides a more reliable impression

(2) Both experts' positions on this issue were favourable to their respective client's positions. The case for Mr Noble's approach would have been stronger had it been evident that a clear conceptual distinction existed between the two project types, and that the observed variation in outturn margins represented statistical noise that could usefully be eliminated or reduced by the averaging process. However, we did not find convincing evidence to support either of these positions. Given the diversity of the projects themselves, and the absence of any discrete dividing line between one project category and another, it seems more likely that the range of observed margin outcomes reflects genuine variety in the different demolition projects and that the wide distribution of project margin outturns should be taken at face value. This interpretation is consistent with the conclusion that there is, as Dr Walker observed, a significant overlap in the margin outcomes across GDS and HCDS projects.

(c) The relevance of the cost base

242. A further complication in comparing margins across project types is that this makes no allowance for the potential for different costs between the projects. If it were the case, for example, that HCDS projects always employed higher cost resources than those employed in GDS projects, then a finding that the margins in the two areas were similar would not necessarily indicate that it would be financially neutral for a supplier to shift focus from HCDS to GDS, since the use of higher cost resources to undertake GDS work might squeeze the available margin.

243. Mr Noble mentioned this possibility in his evidence, and cited Keltbray's factual evidence to the effect that Keltbray employed a range of higher and lower cost resources depending on the complexity of the work. For example, wage ranges from £18 to £25 per hour applied to different operatives depending on their skills and experience. However, there was no evidence of a clear split between the cost of the resources applied to the two project categories, and as such it is not possible to assess what, if any, importance should be attributed to this. It is at best one factor, amongst several others, that suggests a cautious approach to the margin evidence is required.

244. A potential countervailing factor in margin comparisons between project categories is the possibility that HCDS projects might require a higher gross margin to compensate for higher overhead costs associated with larger, more complex and riskier projects. If that were the case, the point of financial indifference between allocating resources between HCDS and GDS opportunities might not arise where gross margins are identical. Neither Mr Noble nor Dr Walker raised this point explicitly, and Keltbray did not produce net margin results for a project on project basis. In his evidence however, Mr Burnside did indicate that more complex projects could demand higher overhead costs.

245. Relevance of Scale: Mr Noble argued that, even if it were established that contractors would switch resources from HCDS to GDS projects, the relatively small size of the HCDS sector would preclude supply-side switching from HCDS to GDS from exerting an effective competitive constraint. Hence, on the usual application of the SSNIP test framework one would accept that GDS is a relevant product market.

246. In the absence of any reliable data on total HCDS revenues, Mr Noble made a number of assumptions to reach his conclusion. He relied on the IBIS Report for the estimate that the total UK demolition sector had a value of around £1bn, and that Keltbray and Erith combined accounted for around one third of this total. He then (for reasons not explained in his two reports) extrapolated this to

an estimate of £300-400m for the four operators who operated in this segment (Keltbray, Erith, McGee and John F Hunt). Since around half of Keltbray's revenues arose from HCDS projects, Mr Noble assumed the same might be true of the other HCDS players and thus derived a total HCDS estimate of £150-200m. He argued that supply-side switching from an HCDS base of this modest size could not constrain a GDS market that was worth £800-850m.

247. Dr Walker objected to this on both factual and conceptual grounds. As regards the facts, he did not accept the basis for Mr Noble's estimate of the relative sizes of the GDS and HCDS sectors, which were based on a very simple (and unsubstantiated) extrapolation from Keltbray's own GDS/HCDS mix to the other HCDS suppliers. As regards the conceptual framework, Dr Walker criticised Mr Noble for his failure to assess how much capacity would need to relocate from HCDS to GDS projects in order to defeat the GDS SSNIP. He also argued that the appropriate response to a finding that there was insufficient HCDS capacity to constrain GDS supply prices would be to explore still wider market options rather than to conclude that GDS was a relevant market, though he did not suggest where one might look for any such wider market constraints.

248. The discussion of this topic in the concurrent session provided an opportunity to explore these factors further.

(1) First, it became evident that there was very little information available to assess the relative scale of the HCDS and GDS segments; hence, little reliance can be placed on the factual position that is derived from Mr Noble's assumptions as described above.

(2) Second, Mr Noble accepted that he had not made any assessment of how much capacity would, in principle, need to switch from HCDS to GDS to defeat a SSNIP in GDS. At the Hearing, Mr Noble sought to develop an argument (based on an analogy with the critical loss analysis that is often used to assess demand-side switching) that it could require a large amount of capacity to switch towards GDS projects, to bring about the

necessary price effect given the low margins in GDS. However, it was unreasonable to expect Dr Walker to provide a considered response to this point, or for the Tribunal to accord it any weight, given that it had formed no part of either of Mr Noble's reports.

(3) Third, the discussions between the experts and the Tribunal revealed a concern that this entire argument could be criticised for failing to consider the appropriate context for this part of the discussion on the relevant market. Had the scenario been a concern about the exercise of market power within the GDS segment, and the question was therefore whether constraints from the switching of HCDS capacity could be sufficient to neutralise such concerns, Mr Noble's line of analysis (if not his conclusions) might be considered apposite for the task. However, given that the context here is set by Keltbray's own clarification of "what is the reasonable measure of the relevant economic activity affected by the infringement", the key issue in this specific context is not whether substitution from HCDS would constrain GDS, but whether an effect of the infringement within the GDS segment would or would not impact prices for HCDS contracts.

249. Mr Noble answered this question in his oral evidence, noting that the act of switching capacity from HCDS to GDS in response to a GDS SSNIP would have the effect of making HCDS resources more scarce and hence increasing HCDS prices and margins. As Dr Walker then commented, this confirms that a SSNIP in GDS would affect the turnover in both segments.

250. In short, since Mr Noble and Dr Walker agreed that price increases in the GDS segment would likely spill over to the HCDS segment, it seems clear that infringement effects in GDS would also affect competitive conditions in the HCDS segment. We consider that this should be decisive in rejecting this part of Mr Noble's argument on a narrow GDS market in the current context.

(d) The application of the SSNIP test to GDS margin data

251. The discussion above primarily concerns a comparison of evidence on the current margins and competitive conditions within the GDS and HCDS segments of the UK demolition services market. To relate this to the scenario posited in the SSNIP test framework, it is necessary to assess how a SSNIP (i.e. a 5-10% unilateral increase in price) of GDS would change the incentives facing a supplier of HCDS. In an activity in which gross margins lie in the range of 5-15%, a price change of this magnitude would be expected significantly to increase the commercial attractiveness of diverting resources and effort towards GDS.

252. Due to the areas of uncertainty surrounding the margin evidence (as discussed above), it is not possible to reach a definitive view on the impact that a hypothesised SSNIP would have on the incentives facing an HCDS operator in switching resources towards GDS. However, even taking the position most favourable to Keltbray and Mr Noble's arguments, and focusing on average *outturn* margins, a 10% SSNIP would be sufficient to eliminate the gap between the GDS and HCDS segments. Focusing instead on *tender* margins, and/or looking at the overall distribution of observed margins across the range of projects analysed, even a 5% SSNIP would be more than suffice to create a significant change in the rankings of the margins available on projects assigned to the different categories.

253. The balance of the evidence points towards rejecting the notion that the commercial rewards available in the GDS and HCDS segments are so significantly distinct from one another that they would be substantially immune from a GDS SSNIP. To the extent that one can rely on margin data alone to make the assessment – and leaving aside the problems presented by the fact that this is a limited sample derived entirely from Keltbray's own data rather than industry-wide data – on most if not all of the plausible scenarios, the margin evidence indicates that such a SSNIP would induce a considerable supply side shift in the direction of resources towards GDS projects.

(e) Conclusion on Ground 2

254. We are unpersuaded either by Keltbray's arguments on Ground 2, or by the supporting analysis provided by Mr Noble. Whilst Mr Noble's analysis might answer the question of whether there are criteria by reference to which one could separate the most complex demolition projects from the rest, that is not the issue that the CMA was answering or required to consider for the purposes of Step 1 of the Penalty Guidance.

255. The CMA was attempting to define the market by taking a broad view of the particular trade affected by the conduct. The question for us is whether or not the CMA had a reasonable basis for defining the market as it did. We are of the view that it did. In particular:

(1) The evidence disclosed no clear distinction between HCDS and GDS projects. The division was derived from limited, Keltbray data, and by Keltbray's economic expert, Mr Noble. It is not a division that was applied by Keltbray itself, and it is not corroborated by any industry or factual documents. Ms Pople submitted that this simply means that Keltbray takes a joined-up approach to the allocation of resources - and does not mean that there are no economic constraints as to where resources are allocated. Mr Noble made the same point in his evidence. We accept that Keltbray's failure to apply the division is not in itself fatal, but it provides an unpromising and challenging start for the assessment of Keltbray's claim.

(2) We accept that where the line is drawn when defining the product market for the purposes of ascertaining relevant turnover *may* include an element of arbitrariness (and Mr Noble made the same point by reference to drawing a line on a map for the purposes of geographic markets). However, on the facts of this case, in our view the evidence reveals a clear picture that the small number of demolition contractors who are involved in HCDS projects also engage in a large number of

less sophisticated demolition projects, many of which may still require considerable engineering skills and highly technical equipment. Moreover, there is every indication that a common set of resources is employed by Keltbray across the different project types.

(3) We have noted that considerable uncertainty exists over the available margin evidence. Some such uncertainty is inherent in an analysis of this kind, though we have made some criticisms to the effect that certain aspects might have been improved and better communicated in Mr Noble's evidence.

(4) Ms Pople argued that outturn margins reflected the actual costs and revenues involved in delivering a project and were preferable to tender margins which she suggested contained an element of "sell" on the tenderer's part which would not be achieved once the price had been negotiated. She suggested that outturn margins were preferable as reflecting actual outcomes, rather than Keltbray's over-optimistic estimates of what they hoped to achieve. We do not accept this. The cross-examination of Mr Corrigan demonstrated that outturn margins can be affected by many factors, which would not be known at the time that the tenders were submitted and the allocation of resources considered. Further, Mr Burnside accepted that tender margin was a pretty good guide to Keltbray's expected margin.

(5) In any event, even taking Mr Noble's preferred view on the margin evidence at face value, it does not show a clear gap between rewards from GDS and HCDS projects of a kind that would indicate an absence of supply-side interaction between the two. Nor does it suggest that Keltbray and other similarly placed contractors would choose not to switch resources to GDS in the event of a significant unilateral shift in prices and hence available margins between the two types of work. On interpretations that are less favourable to Mr Noble's claims, the margin

evidence is positively supportive of close supply side substitution between the project categories.

(6) We find no reason to consider that an adverse effect on prices in the GDS segment of the market would not, through the process of supply-side substitution, lead to a shifting of resources between the two project types as the mix was re-optimised.

(7) We consider that Mr Noble's market definition test asked the wrong question and/or did not properly frame the analysis to the specific context in hand – whether effects arising from infringements that took place on GDS projects would spill over to HCDS projects (not the other way around). The fact that a different answer *might* arise had the market definition issue arisen in another context (which itself is highly uncertain given the gaps in the information available), is simply not relevant to the case in hand.

(8) Keltbray suggested that the CMA had no credible theory of harm in relation to HCDS, because there is no evidence that suppliers of HCDS would find themselves excluded from a GDS opportunity affected by cover bidding. Keltbray suggests that the way to exclude suppliers of HCDS is to cover bid on HCDS projects, not GDS projects. There is no evidence of that occurring given the Infringements related only to GDS. However, that submission does not answer the perception of collusion point. Nor does it explain why cover bidding was done by Keltbray at all if, as it suggested, its primary focus was not to win GDS projects but to succeed in HCDS. On that analysis, cover bidding on GDS projects would have minimal impact on its HCDS bids. So, why do it? We heard little evidence on that beyond the "credibility" argument. In light of the decisions in *Kier* and *GF Tomlinson* that is no longer an adequate answer.

256. There is considerable force in the submission of the CMA that the case advanced by Keltbray on Ground 2 of the Appeal is not based on a broad view of the affected trade, but on Keltbray's own classification of demolition services which has been crafted for this appeal in circumstances where there is no evidence that the classification was applied by any industry participant in practice, or that Keltbray itself acknowledged the stark division it now relies upon in the way it ran its own business. If Keltbray's Ground 2 case is right, on Keltbray's own evidence, and in particular that of Mr Burnside and Mr Corrigan, it would require the CMA to make a number of subjective and nuanced judgments which, in our view go significantly further than the level of arbitrariness contemplated in *Argos CoA* at [173].

257. We accept the CMA's point that the proposed market definition focuses on Keltbray specific data (being data which, for the reasons we have explained, is in any event incomplete and unsatisfactory) and Keltbray's own subjective perception of its business, which we also note was provided after-the-fact. From that evidence, we were then invited to extrapolate conclusions about the product market on an industry-wide basis, for the purposes of a Decision that was not concerned only with Keltbray, but instead applied to multiple parties, each of which, no doubt, would have its own data and subjective views. The evidence is simply insufficient and inadequate to warrant us taking such a step. It must, therefore, follow, that it is an insufficient basis on which to find that the CMA ought to have adopted the approach advocated by Keltbray.

258. In view of our conclusion, we leave to one side whether, had Keltbray established that a separate market exists for GDS, this would fatally damage the CMA's penalty calculation, or simply change the starting point for Step 4 in a way that would make no difference to the ultimate penalty imposed. We will consider the proportionality of the ultimate penalty when assessing Ground 3 of the Appeal. However, we agree with the CMA that even if the Step 1 figure was reduced, it does not necessarily follow that the final penalty at Step 4 would have been any different.

259. We dismiss Ground 2 of the Appeal.

(6) Ground 3

260. Ground 3 of the NoA is expressed in the following terms:

> "The CMA has applied its penalty guidance mechanistically and without proper regard to the real seriousness and impact of the conduct at issue. At each stage of the penalty calculation, the CMA made a series of decisions which wrongly tended to inflate the penalty applicable to Keltbray. Although the CMA purported to make a proportionality 'reduction' at Step Four, it was applying a reduction from a level that was so obviously grossly disproportionate that it could not be taken as any sensible starting point. Taken in the round, the CMA's reasoning failed properly to reflect the actual circumstances of the infringements. The CMA thus erred in law by failing to achieve the statutory objectives in s. 36(7A) [of the CA 1998] and/or erroneously exercised its discretion by imposing a penalty that was in all the circumstances disproportionate."

(a) Keltbray's submissions

261. In its skeleton argument, and in its submissions Keltbray put its argument under three headings:

Double-counting

262. Step 1 calculations are required to respect the principle of proportionality, with the more severe penalties being reserved for the worst "more impactful" infringements. Keltbray submitted that the Step 1 figure produced by the CMA is grossly disproportionate and entirely divorced from the real seriousness and impact of the infringements. In particular, a market-wide price fixing cartel is far worse than four separate cover bidding infringements relating to four individual projects in one year. The four projects in 2014 had a total value of £7.72m in a market worth £1bn annually. Keltbray's own turnover in the demolition market in the year preceding 2014 was £55.4m.

263. The Step 1 calculation for a market-wide cartel would yield a starting point for a maximum penalty of 30% x market-wide turnover. Here, the CMA has, for 2014, taken 4x annual turnover x 24%, giving rise to a starting point of 96%.

The CMA's approach gives a figure more than three times higher than that which would apply to the most egregious market-wide cartel.

264. Step 1, functioning properly, is designed to yield a penalty broadly proportionate to the infringement: "i.e. a measure of the economic reach multiplied by a seriousness factor". Step 4 recognises that there are circumstances which might then need to be adjusted up or down in light of specific proportionality concerns. There is something wrong when Step 1 gives rise to an obviously disproportionate figure which is then not just adjusted but abandoned at Step 4 and replaced with a figure with no clear articulation as to how it has been reached. As Keltbray put it: "the penalty emerges out of a black box: either it is the product of some calculation the CMA has not disclosed or it is arbitrary".

Three "superior" approaches

265. Keltbray submits that there were three approaches to calculating Keltbray's penalty that were superior to that adopted by the CMA.

266. First, the CMA ought to have taken relevant project specific revenues into account. This was Keltbray's Ground 1 argument. We have dismissed Ground 1 and so do not refer to it further.

267. Second, if market-wide revenues were to be taken into account (whether as calculated on the basis set out in Ground 2 of the Appeal, or on the CMA's approach in the case), the CMA ought to have selected a seriousness percentage that more accurately reflected the fact that these were isolated infringements on a far larger market.

(1) Keltbray submits that it is obviously wrong to adopt 24% as the appropriate percentage, given that is 80% of the 30% seriousness percentage applicable to a market-wide cartel. Keltbray relied upon the observations made by the Tribunal when imposing a 30% seriousness

percentage in *Allergan* at [375] where the conduct in that case was: "(i) extremely serious, (ii) protracted, (iii) resulting in significant economic harm to the wider community and (iv) resulting in significant economic benefit to the Appellants".

(2) The CMA ought to have adopted a more flexible approach, and recognised that some cases will only affect a small part of the market over a short period of time, where the theory of harm is focussed on a particular customer and any wider effects are unproven, speculative and, as Dr Haydock suggested in her evidence, "diffuse".

(3) In *Kier*, the Tribunal adopted a seriousness percentage of 3.5% of a possible 10% where the infringing conduct was cover bidding: being conduct regarded as less serious than bid rigging. Whilst the Tribunal recognised that this might rise over time as the market could be expected to understand the unlawfulness of cover bidding, there is no justification to increasing it to 80% of the available scale; in particular given that headroom needs to be preserved for the more serious infringements.

(4) Keltbray referred to the following specific points:

(i) The CMA justified the selection of 24% by reference to the fact that there were 19 Infringements (see paragraph 6.34(a)). However, the seriousness percentage was applied not to those 19 Infringements collectively but to each individually. That approach was flawed: Keltbray was not involved in all 19 of those Infringements, and entered non-infringing bids in 3 of them.

(ii) Keltbray emphasised the fact that it was only found to have infringed in 8 out of 729 bids submitted in the relevant period.

(iii) The CMA suggested that all of the bidders in 6 out of Keltbray's Infringements were party to cover bidding. Keltbray said that was the case in only 4 of the Infringements.

(iv) Keltbray maintained that that there was no evidence of significant economic harm to the wider community. Price is not necessarily the determining factor. So, for example, some customers will have a preference for an individual supplier in any event. The role of non-price factors (such as specialist experience, safety record) mitigated the seriousness of the Infringements in this case.

(5) Keltbray submitted that the CMA should have deployed a far lower seriousness percentage to reflect its decision to calculate a penalty for each infringement individually; the fact that a small portion of the market was affected by each Infringement; and the need to leave sufficient headroom for worse infringements and the circumstances of the case.

268. Third, the CMA should have adjusted the duration multiplier to less than 1 to reflect the fact that each Infringement only lasted a short period of time. That is permitted at Step 2.

Low Margin

269. Keltbray argued that the demolition sector is one of very low margins. The Decision led to penalties which were many multiples of profitability.

270. The figures can be seen from the following table:

	Average Wordwide turnover	Average Profit after tax	Net profit margin	Step Four penalty	Penalty as % of net profit	Penalty as % of turnover
BMG	£46,300,000	£1,500,000	3.24%	£3,000,000	200%	6.48%
CCH	£28,500,000	*£1,700,000*	5.96%	£10,000,000	590%	35.09%

Clifford Devlin	£10,800,000	£895,000	8.29%	£1,500,000	168%	13.89%
DSM Nobel	£54,500,000	-£11,700,000	-21.47%	£1,750,000	-15%	3.21%
JFHG	£77,400,000	£1,933,333	2.50%	£7,000,000	362%	9.04%
Keltbray	£460,500,000	-£2,266,667	-0.49%	£20,000,000	-882%	4.34%
McGee/MFCOIL	£95,700,000	£3,866,667	4.04%	£20,000,000	517%	20.90%
SPC	£472,900,000	£6,233,333	1.32%	£40,000,000	642%	8.46%
EEH	£184,600,000	£7,500,000	4.06%	£30,000,000	400%	16.25%
Squibb	£32,200,000	£1,300,000	4.04%	£2,000,000	154%	6.21%
Average	**£146,340,000**	**£1,096,167**	**0.75%**	**£13,525,000**	**1234%**	**9.24%**

271. On the basis of these figures, the penalty proposed by the CMA is 12 times the infringing parties' average profit, and Keltbray says that it is profit, rather than turnover, which will be the source from which a penalty is met. The CMA's approach ignores the fact that profitability varies as between different business sectors. Keltbray claimed that "to deprive a high cost, low margin business of many years of potential profitability is starkly unfair". Keltbray pointed to the Court of Appeal decision in *Interclass CoA,* which concerned cover bidding in the construction industry. In that case, a penalty of 1.3% of turnover imposed on Interclass was found to be excessive when compared to the penalties of 0.08% to 0.8% applied to others. On appeal, the penalty was reduced to 0.82% of the group's turnover. In that light, Keltbray claims that its penalty of 4.34% is manifestly excessive.

CMA's submissions

272. The CMA submitted that a penalty of £20m is not arbitrary or disproportionate. Keltbray committed eight object Infringements. Keltbray is a large construction company with an average worldwide turnover of over £460m between 2019 and 2021. Its size is relevant, because a higher penalty is required for specific deterrence. The penalty for each Infringement amounts to around 0.5% of that worldwide turnover.

273. The CMA recognised that the relevant turnover for each of 2014 and 2016 was taken into account multiple times and that this was disproportionate, and needed

to be addressed at Step 4. Each of Keltbray's Infringements concerned a single contract, and not the entirety of its business. However, the Infringements were, by their very nature, capable of having a wider effect beyond the individual tenders in issue.

274. The CMA considered the financial impact on Keltbray specifically at Step 4. When viewed as a percentage of its profit, the fine does appear to be more burdensome for Keltbray but it is less so when viewed as a percentage of turnover and by reference to net assets in 2021 (72% of total net assets, and 9% per Infringement). The penalty equates to a penalty of £2.5m per Infringement. That is not out of kilter with the other large infringers, such as: Scudder; Erith; McGee; John F Hunt; and Brown & Mason. In a given case, penalties will not necessarily be equal as between infringers, given their specific circumstances; though in the present case there is in fact a broad parity as between Keltbray and McGee. We refer to this in paragraph 324 below.

Double-counting

275. The CMA's short answer to double-counting is that this was recognised by the CMA and informed the CMA's approach to proportionality at Step 4: "[t]he critical question is not whether the Step 1 figures contravened the principle of proportionality, but that proportionality is respected in the final analysis, as it was." Paragraph 6.30 of the Decision makes clear that the CMA took into account the fact that single instances of cover bidding between two or more parties may be viewed as less serious than a multipartite market-wide cartel. It was neither necessary nor appropriate to benchmark the Step 1 figure by reference to a market-wide cartel. Step 4 is the point at which adjustments are made to reflect proportionality: not Step 1. Step 1 is not to be viewed in isolation.

276. The CMA maintained that its proportionality assessment was transparent and structured, as set out at paragraphs 6.90-6.93 of the Decision. To the extent that the decision relating to the appropriate adjustment was "taken in the round", this

is in accordance with *FP McCann* which acknowledges that the questions arising at Step 4 "do not lend themselves to elaborate explanations" and what is involved is "evaluation or judgement".[42]

Three "superior" approaches

277. The CMA argued that Keltbray's suggested approaches to addressing the proportionality issue are not superior. Keltbray's first proposal, we have already rejected.

278. The CMA submitted that Keltbray's second suggestion that the seriousness percentage should be reduced is also inappropriate and will not work. The penalty is not required to be benchmarked against the most serious infringement imaginable. In any event, at 24% there is sufficient headroom for more serious infringements. It would be wrong to benchmark the penalty in this case against that imposed in *Kier*, not least given that the fact that cover bidding is a serious infringement ought, by now, to be well known.

279. As regards the specific points raised by Keltbray:

(1) Keltbray's criticism of the application of a seriousness percentage reflecting the fact that there were 19 infringements is misconceived. In assessing the extent and likelihood of harm "in the specific circumstances of the individual case", it is relevant to take into account the fact that the infringing conduct affected 19 tender processes, and that the 4 largest contractors (which include Keltbray), with a combined market share of 43.6%, were involved in a number of the Infringements.

(2) It is inaccurate to suggest that the CMA only found infringing conduct in relation to 8 out of 729 bids. The CMA found that Keltbray had committed 8 out of the 19 Infringements. The CMA did not investigate whether all of Keltbray's other bids involved cover bidding., An

[42] Paragraph 312 of the judgment.

important part of the Penalty Guidance is the need for general deterrence, which is significant given that the CMA is only able to detect a small portion of infringing conduct.

(3) The CMA maintains that all of the bidders in 6 out of Keltbray's 8 Infringements were party to cover bidding.

(4) The CMA disagreed with the proposition that there is no evidence of significant economic harm to the wider community. Cover bidding is the antithesis of the competitive process and generally has an inflationary impact on price to the detriment of the tenderee. The fact that a customer might have a preference for a supplier or took into account non-price factors does not affect the inherent seriousness of cover bidding as an anti-competitive practice.

280. The third alternative of adjusting the duration multiplier relates to Step 2, against which there is no appeal. The Penalty Guidance does not require an adjustment to the duration multiplier where the period of the infringement is less than 1 year. The short duration is, in any event, addressed at Step 4.

Low margin

281. The CMA argued that Keltbray's net profit margin of -0.49% during the Infringements, and its losses incurred during the pandemic are not good reasons to reduce the penalty. Profits vary widely from year to year, and a snapshot of profits is not a reliable reflection of Keltbray's financial position and ability to pay a fine. Keltbray's reliance on *average* net profit across all of the addressees of the Decision is uninformative, given that it includes, and is skewed by, one operator having incurred a -21.47% net loss. Several operators in fact earned 4% net profit or more.

282. The CMA, in the exercise of its regulatory judgment, considered whether, looked at in the round, and by reference to all of the circumstances, a penalty of

£20m is proportionate, and concluded that it was. It is not required to attach particular weight to the industry margin, or Keltbray's own margins, or to make comparisons with other cases.

283. As a general point, the CMA submitted that it is important to recall that the CMA, at Step 4, took a step back, and took stock making such adjustment as it considered necessary. It was the OFT's failure to do this in *Kier* and *Eden Brown* that led to criticism from the Tribunal, and ultimately to the introduction of Step 4 in the Penalty Guidance. At Step 4, the CMA is required to make a multi-factorial assessment in the round, which is what the CMA maintains it has done.

(b) Analysis

284. During the course of the hearing, we raised our concern regarding the reduction from the Step 3 figure of £158m to £20m at Step 4. That is, on any analysis, a significant drop. Keltbray suggested that £158m goes into a "black box" and £20m comes out at Step 4. That submission is not without merit. The reasons why the figure of £20m was ultimately considered by the CMA to be appropriate were not immediately apparent to us from the Decision.

285. We accept that the Decision must be read in a straightforward manner from the perspective of a party well aware of the issues involved and arguments advanced; that the Penalty Guidance specifically states that at Step 4 the CMA will assess whether the overall penalty is appropriate "in the round", and that the questions arising at Step 4 involve matters of evaluation or judgment, and by their very nature, do not lend themselves to elaborate explanations. However, the scale of the reduction at Step 4, without a clear explanation of the reasoning for it, became something of an elephant in the courtroom. We were not satisfied that the reasoning in the Decision at Step 4 was sufficiently intelligible or adequate for us to be able to verify the CMA's approach. We were concerned to establish whether the need for a reduction on that scale arose from any error in the methodology applied.

286. The CMA submitted that the perceived elephant was not in fact present. The CMA's position is that the reduction is attributable to the fact that Keltbray was involved in eight Infringements, and the fact that it has a significant presence in the market, which is reflected in its relevant turnover. The CMA stressed the fact that this is a multi-party case, involving ten different parties. The methodology adopted by the CMA was to apply the Penalty Guidance so as to ensure consistency in approach to all parties. The Penalty Guidance provides a principled framework which enables figures to be calculated at Step 3 that can be compared across all parties. At Step 4, therefore, when the CMA takes a step back, there is a comparable baseline for all parties before the CMA considers their specific circumstances. The fact that the Step 4 adjustment in Keltbray's case led to a significant reduction does not mean that the methodology itself is flawed.

287. In light of the concerns that we had raised, the CMA produced various alternative penalty calculations prepared on the basis of different assumptions and hypothetical scenarios reflecting the CMA's approach, and the consequences of the grounds of appeal put forward by Keltbray. We found these calculations to be of great assistance in providing clarity and in illustrating the issues arising in a multi-party, multi-infringement case, like the present.

288. What follows is our assessment of the appropriate penalty to impose on Keltbray in this case. We address the various grounds of appeal under Ground 3 at the point at which they arise at the relevant Steps of the Penalty Guidance.

Step 1

289. To recap, at Step 1, it is necessary to calculate the starting point having regard to: (i) the seriousness of the infringement and need for general deterrence; and (ii) the relevant turnover of the undertaking. Having dismissed Ground 1, two of Keltbray's remaining arguments under Ground 3 relate to Step 1: Double-counting, and the seriousness percentage.

Double-counting

290. As regards double-counting, had the CMA not recognised this as an issue, and not taken steps to address it at Step 4, there would obviously have been force in Keltbray's point. However, Keltbray's argument only holds good if Step 1 is viewed in complete isolation from Step 4. We do not accept that it should be. As the Tribunal said in *Kier* at [76], "the Guidance allows scope for adjusting at later stages a penalty which viewed in isolation at an earlier stage might appear too high or too low".

291. The short answer, therefore, is that the CMA at paragraph 6.21 of the Decision expressly recognised the issue, and that as a result the relevant turnover figure would be inflated. The CMA also specifically contrasted the case of a year-long single continuous infringement, where relevant turnover would be factored into the penalty calculation only once. The CMA also signposted that it had addressed the issue of double-counting at Step 4.

292. We do not see any basis for criticising the CMA's approach. We will consider whether the double-counting issue was adequately addressed at Step 4 in paragraphs 325 to 327 below. It also follows that it is incorrect to suggest that Keltbray was treated worse than a cartelist. That ignores the fact that the inflated figure at Step 1 was not, ultimately, the penalty charged.

293. We note that the comparison with a market wide cartel is, in any event, likely to be more complicated than Keltbray suggested. The CMA produced a calculation, by way of example, that reflected a hypothetical cartel which continued for the period from April 2014 to November 2016. If the last year of the infringement was taken to be the relevant turnover, the figure would be £144,202,000. Applying the same seriousness percentage of 24%, but multiplying for a duration of 2.5 years, and then applying the same 15% deduction for mitigation for cooperation and compliance, would give a total of £81m at Step 3. That is four times greater than the penalty ultimately imposed in this case for the eight individual Infringements, though still amounts to 50%

of the figure generated at Step 1 by the CMA in this case. However, if the cartel was continuous, then obviously there would be less scope for reduction at Step 4. Further, if the seriousness starting point was increased to 30%, the Step 3 figure would rise to around £101m.

The seriousness percentage

294. We turn then to consider Keltbray's submission that at Step 1 the CMA ought to have adopted a lower seriousness percentage to reflect the fact that the Infringements were isolated incidents on a far larger market.

295. As regards the first stage – how likely it is for the infringement at issue to, by its nature, harm competition – we have already addressed this in paragraphs 166 to 177 above, in relation to Ground 1. We see no reason to disagree with the CMA's approach. That cover bidding is a serious object infringement is incontrovertible. That said: (a) cover bidding is not as serious as bid-rigging; (b) isolated instances are not as serious as a market-wide cartel; and (c) for all the reasons explained in the case law and in the Decision, cover bidding with compensation payments is generally regarded as more serious than cover bidding where no inducement is offered.

296. The CMA expressly addressed these factors when adopting a starting point of between 21-30%. In relation to its Stage 1 analysis, the Decision also referred to the CMA's experience as a regulator:

> "6.29 Over the past decade the experience of the CMA, and its predecessor the OFT, has been that cover bidding continues to occur despite numerous infringement decisions relating to cover bidding or other cartel behaviour within the construction industry, and the imposition of penalties. The frequent recurrence of cover bidding within the construction industry makes it reasonable to conclude that parties benefit from distorting the competitive process and depriving tenderees of the opportunity to make informed decisions about whether to seek replacement (competitive bids)…"

297. As regards the second stage, we agree with Keltbray that there is an element of tension between, on the one hand, treating each Infringement as an individual infringement for the purposes of the seriousness percentage but then on the

other, taking into account the fact that each was part of a wider course of conduct which took place on other occasions and involved other undertakings (and in some instances, not Keltbray at all). The Penalty Guidance at paragraph 2.4 refers to the need to reflect the seriousness of the particular infringement (singular). Paragraph 2.5 refers to the need for a case specific assessment of the relevant circumstances of the individual case. Paragraph 2.8 refers to the second stage, and refers to the fact that the CMA will consider whether it is appropriate to adjust the starting point upwards or downwards to take account of specific circumstances of the case that might be relevant to the extent and likelihood of harm to competition and ultimately consumers. The reference to the circumstances of the case, may be broad enough to extend beyond the individual infringement, but otherwise paragraph 2.8 is focused on "the infringement" (again, singular). Paragraph 2.9 refers to the need to consider whether the starting point for a particular infringement (again, singular) is sufficient for the purpose of general deterrence. Paragraph 2.10 considers the position where there is more than one undertaking involved in an infringement (again, singular), but does not address the position where there is more than one infringement. Paragraph 2.10 states that "The starting point is intended to reflect the seriousness of the infringement at issue, rather than the particular circumstances of each undertaking's unlawful conduct (which are taken into account at other steps)". It goes on to explain that "for infringements involving more than one undertaking, the CMA expects to adopt the same percentage starting point for each undertaking to the infringement".

298. In our view, in a multi-party, multi-infringement case where the CMA considers it appropriate to treat each infringement separately, when assessing the seriousness percentage at Step 1, generally the focus should be on each individual infringement (including, for the avoidance of doubt, its actual and potential effects of the infringement in terms of competition and consumers). The fact that other infringements may have been committed by some - but not all - addressees can be factored in at a later stage. If, for example, there were twenty infringements, and one entity was involved with all twenty, and another was involved in only one, it would be unduly harsh on the latter to fix the

seriousness percentage on the basis that each infringement was part of a wider course of anti-competitive conduct by another. On the other hand, if all of the bidders were party to cover bidding in a particular infringement, that may well justify a higher seriousness percentage being applied at Step 1 to reflect the extent and likelihood of harm.

299. By analogy with paragraph 2.10, it seems to us that if the aim is to establish a consistent seriousness percentage applicable to all, then each infringement should be considered separately. We note that this is consistent with the focus on each individual infringement in *Interclass CoA* at [64] and [65]. The particular circumstances of each undertaking's unlawful conduct (including whether it was involved in other infringements with other participants) could be taken into account either at Step 3 (aggravating factors) or at Step 4.

300. In other words, the fact that there were 19 Infringements is a relevant factor, and the CMA is entitled to have regard to the wider context in which those Infringements were found, and to the fact that in a number of instances the same parties were involved (whether that be six in relation to Keltbray as the CMA contends, or four as Keltbray suggests). Whilst Keltbray was not involved in all of the infringements which were the subject of the Decision, it was still involved in almost half of them, and that is plainly a relevant consideration that must be factored in at some stage in the process, but we consider it more appropriate to do so at Step 4.

301. We do not accept that the Infringements ought to be viewed as less serious because they related to only 8 of 729 tender bids provided by Keltbray over the period covered by the Decision. The CMA did not investigate every bid, let alone suggest that they were lawful. Nor do we accept that the fact that some bidders may consider factors other than price when deciding to award contracts means that the Infringements are somehow less serious. If that is what happens, it raises the question as to why it is that, despite the decisions of this Tribunal regarding the anti-competitive nature and seriousness of cover bidding, Keltbray (and others) nevertheless felt the need to participate in it at all.

302. As regards stage 3 – general deterrence – we agree with the CMA that this is an important consideration in this case. There is a need to send a clear message to other businesses that they should not engage in similar conduct: a message that, in light of previous investigations and findings of infringements, including in the construction industry, is not getting through.

The appropriate seriousness percentage

303. As regards Keltbray's comparison of this case with *Kier*, a percentage of around 35% of the available scale would put the conduct in this case within the second bracket (10-20%) of the Penalty Guidance, and at the lower end of that bracket. Keltbray accepted that would be too low but contended that the fact that there now ought to be more appreciation of the seriousness of cover bidding cannot justify an increase to 80% of the available scale.

304. The Penalty Guidance makes clear that a starting point of between 21 and 30% of relevant turnover will generally be used for cartel activities but is not restricted to such cases. It will also apply to non-cartel object infringements inherently likely to cause significant harm to competition.

305. Comparison to the approach taken on the seriousness percentage in earlier cases only takes matters so far. It is common ground that the world has moved on since *Kier*. The relevant penalty guidance has also changed since *Kier*. Step 1 now takes into account the need for general deterrence, whereas Step 1 of the (old) penalty guidance that applied in *Kier* did not. One of the reasons why a 35% maximum was adopted in *Kier* was that there was a degree of uncertainty relating to the seriousness and anti-competitive effect of cover bidding at the time. That is not the position now. The GF *Tomlinson* decision at [282] lays down a marker for this:

> "For the reasons set out in this judgment, these appeals have resulted in substantial reductions in the level of fines imposed. That should certainly not be interpreted by these or other undertakings as indicating that the Tribunal considers cover pricing to be anything less than a serious infringement of the competition rules. Undertakings must recognise that any future instances of this kind of infringement will be dealt with very firmly by the Tribunal."

306. Both *Kier* and *GF Tomlinson* were cases decided 13 years ago, and the decisions in both made clear that infringements involving cover bidding would be viewed more seriously in future. *Interclass CoA*, which applied a starting point of 5% out of a possible 10%, was decided in 2012.

307. We were also referred by the CMA to the EU Court of Justice's decision in Case C-440/11P *European Commission v Stichting Administratiekantoor Portielje* EU:C:2013:514, an appeal arising from the cartel relating to the removal industry. At [110] to [111], the Court considered the relative seriousness of providing "cover quotes", as opposed to agreements on "prices", and concluded at [111] that "the Commission was fully entitled to classify the agreements on commissions and cover quotes as agreements on prices and customer-sharing and such agreements, like agreements on prices, clearly form part of the category of the most serious restrictions of competition." The seriousness percentage was set at 17% out of a possible range up to 30%.

308. We consider the top bracket to be the appropriate starting point in this case, for all of the reasons explained by the CMA. We also agree with the CMA's assessment that there is nothing in the second and third stage of Step 1 that would warrant the percentage being dropped to the middle bracket (and the lower bracket would plainly be inappropriate).

309. We have, however, found it difficult to determine where in the top bracket the seriousness percentage should sit, in particular in light of the need for sufficient headroom for more serious cases. We accept the CMA's submission that it (and we) are not required to imagine the worst possible scenario and benchmark the assessment against that.

310. On balance, however, we consider the seriousness percentage is on the high side, and materially so. We consider a seriousness percentage of around 21% would be appropriate. This represents an uplift to approximately 70% of the available scale. We consider that this is warranted given the time that has passed since *Kier*, the fact that cover bidding is capable of having adverse effects that

flow beyond the specific projects and customers involved in the specific tenders in issue, and the need to underline the seriousness of this conduct in unequivocal terms, given what we are told by the CMA about the persistence of such conduct. We will consider at paragraph 331 below the particular circumstances of Keltbray's unlawful conduct (including its involvement in other infringements with other participants). Our approach will, however, lead to a different figure at Step 3.

311. We accept Professor Bailey's submissions that a lower figure at Step 3 does not necessarily mean that there will be a lower figure at Step 4. Whether or not it should in this case is an issue we refer to when we consider Step 4 below.

Step 2

312. At Step 2, the CMA adopted a multiplier of 1. The practice of rounding up has a policy justification of ensuring specific deterrence because, whilst the infringement might only last a short period, the effects may last significantly longer (see, for example, *Balmoral Tanks Limited v Competition and Markets Authority* [2017] CAT 23 at [147]).

313. We consider the CMA's approach to be appropriate, and consistent with the Penalty Guidance. Further, it is important to note: (1) that more than one Infringement took place in each of 2014 and 2016; and (2) that, in any event, the fact that a multiplier of 1 led to the relevant turnover being taken into account multiple times, is addressed at Step 4. We therefore do not accept that Keltbray's third proposed approach was "superior" to that adopted by the CMA.

Step 3

314. Step 3 is uncontroversial, and we see no reason to depart from the approach adopted by the CMA to aggravating and mitigating factors.

Step 4

315. Step 4 provides the opportunity to look at the overall and cumulative level of the penalty to be imposed on the specific undertaking. When looking at Step 4, the issue is one of evaluation and judgment. There is no single correct figure. An elaborate explanation is not required. As regards the exercise to be undertaken, we were referred by Professor Bailey to *The Commissioners for HM Revenue and Customs v Procter & Gamble UK* [2009] EWCA Civ 407. This case related to the correct VAT treatment for the savoury snack, Pringles. HM Revenue and Customs took the view that they were similar to potato crisps and subject to VAT at the standard rate. The Value Added Tax and Duties Tribunal agreed. The High Court held that the product was zero-rated.

316. On appeal to the Court of Appeal, Lord Justice Jacob considered at [19] the approach that the Tribunal had to take when making its assessment in the following terms:

> "It was not incumbent on the tribunal in making its multi-factorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that the judgment must enable the appellate court to understand why the Judge reached his decision … and that the decision 'must contain … a summary of the Tribunal's basic factual conclusion and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts' (per Thomas Bingham MR in *Meek v City of Birmingham District Council* [1987] IRLR 250). It is quite clear how this Tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told 'why they have won or lost.'"

317. That passage throws into sharp focus a difficulty that we had when considering the CMA's assessment at paragraph 6.93 of the Decision of Keltbray's own financial position. Whilst the CMA sets out the figures that apply for Keltbray in relation to the list of financial indicators set out in paragraph 2.20 of the Penalty Guidance, what we do not have is any explanation of how those factors have contributed to the conclusion the CMA ultimately reached on penalty.

318. In particular, in relation to net profits, the approach of the CMA is entirely opaque: the Decision is silent. Professor Bailey fairly accepted this. Whilst the CMA did explain what a penalty of £20m represents – in terms of average worldwide turnover, and net assets, and on a per infringement basis – the Decision simply recorded what the profit and loss figures for the financial years 2019 to 2021 were. Professor Bailey submitted that this demonstrated that the CMA clearly took net profits into account, even if it is unclear as to how it influenced the penalty calculation. Professor Bailey argued that it was not necessary for the CMA to descend to any further level of granularity, or to explain further how each of the financial factors was weighed in the balance.

319. We disagree. We do not accept that a recitation of the relevant figures is sufficient to enable the reader to understand how the financial indicators have informed the CMA's assessment of the penalty to be charged. It is not unreasonable to expect a short explanation from the CMA of its overall assessment of the financial indicators, and their relevance to its decision on penalty. That does not mean that a detailed, or elaborate, explanation is required from the CMA of the weight attached to each individual financial indicator. Nonetheless, a proper explanation of the conclusions that the CMA has drawn from the undertaking's size and financial position, and the relevance of those conclusions to the penalty calculation at Step 4, is, in our view, required.

320. The CMA pointed to the fact that, by the time that the Decision was drafted Keltbray had already agreed to pay the £20m penalty and so the need to elaborate to a greater extent had not been foreseen. We note that in relation to Erith and Squibb, who did not settle, a slightly more detailed analysis is provided in the Decision. We accept that the CMA had reasons for <u>why</u> the explanation was lacking. However, the fact is that it <u>is</u> lacking, such that in relation to the matters in paragraph 6.93 of the Decision, in particular, we were unable to follow the CMA's reasoning. We are not unsympathetic to the aim of the CMA to streamline its decisions, and we also accept that, in light of the settlement in the case, an appeal against penalty was unexpected. However, in relation to this issue, the information was pared back a little too much.

321. Professor Bailey took us through the financial indicators dealt with at paragraph 6.93, and explained the CMA's position in the following terms:

(1) Worldwide Turnover. This provides an insight into the scale of the business, and a basis for consistency checks across the parties. Paragraph 6.93(i) makes clear that, in relation to Keltbray, a penalty of £20m represents around 4% of its average worldwide turnover and around 0.5% of such turnover when considered on a per infringement basis.

(2) Profitability and margin. The CMA accepted that the industry is relatively low margin, but the average of 0.75% adopted by Keltbray was an unreliable figure. First, it was skewed by the negative margins, one of which was an outlier. Most companies achieved around 4%. The IBIS Report suggested the figure was around 5%, and Mr Burnside, in his cross-examination, confirmed that this was the sort of profit margin he would expect. As regards Keltbray's own profit margins, paragraph 6.93(ii) discloses profit after tax of £6.8m in 2019, and losses after tax of £9.3m in 2020 and £4.3m in 2021, although the latter makes provision for a regulatory penalty of £6m. The latter two years were also impacted by the pandemic. Whereas Keltbray suggested that it will take around 5.8 years to pay the penalty, in reality: (a) penalties do not necessarily have to be paid from profits; and (b) in any event, profits vary year on year. Profit after tax in 2022 was £3.1m, so still less than half of that in 2019. However, it is important to bear in mind that profitability is not the only metric.

(3) Net assets. Paragraph 6.93(iii) of the Decision states that Keltbray's net assets reduced from £41.8m to £27.7m over the period 2019 to 2021. A penalty of £20m represents 72% of Keltbray's net assets in 2021, and 9% on a per Infringement basis.

(4) If too much focus is placed on short-term profitability, there would be a real risk that the penalty will not provide adequate deterrence. That is why the CMA triangulates between net assets, turnover and profits after tax. If the penalty were to be reduced to reflect the difficulties presented in years affected by the pandemic (which affected two of the three relevant financial years), the penalty would be insufficient to reflect the need for specific deterrence.

(5) Keltbray's annual report for the subsequent year ending 31 October 2022 shows key performance indicators. One of those figures is operating profit. Having been loss making in 2020 and 2021, operating profit had recovered to £5.2m. In the previous year ending 31 October 2021, which showed a loss of £1.78m, Keltbray had made a provision for penalty of £6m. Keltbray's profit after interest and tax was £3.1m. Further, Keltbray had group cash headroom of £38.1m.

(6) Keltbray did not suggest that this is a case of financial hardship and that it could not pay. As part of the settlement process, Keltbray confirmed that they acknowledged the penalty might be a maximum of £20m and did not suggest that they could not pay. In any event, the procedure that undertakings can follow in the event of financial hardship is separate and arises after the penalty setting process.

322. An important factor in the application of the Penalty Guidance is the ability to check for consistency in approach and effect as regards the individual undertakings involved in the infringements, bearing in mind their respective financial positions and specific circumstances. The CMA produced a table (set out below) which showed that a penalty of £2.5m per infringement for Keltbray was similar to that imposed on other large infringers, in absolute terms, and relative to worldwide turnover.

Demolition Company	**Per-infringement penalty**	**Per-infringement penalty as a % of**

		worldwide turnover in 2021
Keltbray	£2.5 m	0.6%
Scudder	£3.3 m	1%
Erith	£3.3 m	1.9%
McGee	£2.5 m	2.5%
John F Hunt	£2.3 m	2.9%
Brown & Mason	£1.5 m	3.6%

323. The CMA submitted that, whilst the penalty may impact Keltbray more acutely in terms of profitability, it is less burdensome when compared to other infringing parties when viewed as a percentage of worldwide turnover and assets per Infringements. By way of comparison, the CMA referred us to the calculation of McGee's penalty at paragraph 6.98 of the Decision. McGee was also involved in 8 infringements and received a penalty of £20m. The circumstances were different in that two of the eight Infringements involved compensation arrangements, and McGee was the lead instigator in relation to one. The relevant financial indicators were as follows:

(1) Average worldwide turnover was around £95m, with the result that a fine of £20m represented 21% of its average worldwide turnover, and 3% on a per Infringement basis.

(2) McGee made profits after tax of £7.1m in 2019 and £7.2m in 2021, and a loss of £2.7m in the intervening year. The penalty represented 515% of McGee's average profit and 64% of its profit per Infringement.

(3) Net assets reduced from £14.9m to £12.5m over the period 2019 to 2021. The penalty represented 160% of McGee's net assets in 2021, and 20% of such assets per Infringement.

324. This example demonstrates the various factors that have to be taken into account when considering the individual circumstances of an undertaking, whilst seeking to maintain consistency. The more serious nature of McGee's conduct is reflected in the Decision. Although the penalty imposed is the same as that imposed on Keltbray (£20m), it represented a significantly higher proportion of its turnover, and net assets. It also represented a significant multiple of its profits and, were the penalty to be paid out of profits, like Keltbray, it would take many years to do so.

325. Returning then to our assessment at Step 4, whilst it is right to say that the drop between Step 3 and Step 4, in purely financial terms for Keltbray, is significantly greater than for any other undertaking under the Decision we are satisfied that the CMA's methodology is, broadly speaking and subject to what we say in paragraphs 331 and 332 below, sound. On closer analysis, the elephant is illusory. We accept that the significant reduction is the result of Keltbray's particular circumstances, primarily its presence in the relevant market, which meant its turnover was significantly higher; and its involvement in eight Infringements which meant that its relevant turnover was factored in multiple times at Step 1 (an approach that was also used in, for example, *Interclass CoA*).

326. Although the methodology adopted by the CMA resulted in a significant reduction at Step 4 so far as Keltbray was concerned, the same methodology did not produce the same effect in relation to the other undertakings in the case. The methodology is not therefore, we accept, at fault. If it was, the same problem would arise for others. The methodology in fact highlighted the issue that has arisen for Keltbray at Step 3, and enabled the CMA to address it appropriately at Step 4.

327. We agree with the CMA's identification of the relevant considerations to penalty at Step 4 set out at paragraphs 6.91 to 6.93, and note that, consistent with what we say in paragraph 300 above, the CMA has had regard to Keltbray's involvement in multiple Infringements at Step 4 (see paragraph 6.92).

328. As regards the financial indicators, Keltbray failed to adduce any reliable evidence as to what it claimed was the industry margin. To attempt to derive an average only by reference to the ten addressees of the Decision is plainly unsatisfactory, not least because it is skewed by the significant losses incurred by one industry participant, and by Keltbray itself. That the industry margin may be nearer to 4-5% is supported by Mr Burnside's oral evidence, and we note that a number of other companies achieve margins of that level or higher. We do not, therefore, accept that the industry margin is as low as Keltbray suggests.

329. We do, however, note that the CMA accepts that the construction industry is one of low margins. Given that is the case, it is necessary to bear in mind that turnover is not necessarily a reliable indicator of ability to pay, and (importantly in this context) that low profit margins may impact and enhance the specific deterrent effect.

330. Whilst it is plainly right to triangulate all of the financial indicators, in our view the CMA paid insufficient regard to Keltbray's low profit margins, and losses in 2020 and 2021 (even bearing in mind that the 2021 accounts included provision for a £6m *"regulatory penalty"*). This is particularly so when seen in the context of an industry that the CMA acknowledges is low margin. We do not consider that it is an answer to point to the 2022 accounts. That is not the relevant year for the purposes of the Penalty Guidance, and these were not the accounts used for the purposes of the Decision. Even if they were, they disclose profits of only £3.1m.

Conclusion

331. We have reached the conclusion that the appropriate penalty in this case at Step 4 is **£18 million**. In reaching this decision we have applied the approach of the CMA which we consider to have been broadly correct, subject to the following factors:

(1) We note that the corrections to the Step 1 figures originally adopted by the CMA for the purposes of its Penalty Calculation and which were agreed at the commencement of this appeal result in a reduction of approximately £20m in the combined Step 3 penalty figure to around £158m.

(2) Applying a seriousness percentage of 21% in accordance with paragraph 310 above, produces a combined Step 3 figure of around £139m. That is almost £40m less than the figure that the CMA originally considered was the figure produced at Step 3.

(3) Whilst we accept that it does not necessarily follow that a reduction in the Step 3 figure will result in a reduction at Step 4, in this case we consider that, all else being equal, logically it should. In particular, if the significant double-counting of relevant turnover is properly to be taken into account, the fact that relevant turnover is now lower can reasonably be expected to impact directly the ultimate bottom line. By way of example, if the combined total of £158m is divided by 8 (a rough and ready indicator, we freely acknowledge) all else being equal, the penalty would be nearly £20m, but if the combined Step 3 figure is £139m, it is £17.5m.

(4) All else is not necessarily equal. As we indicated at 300 above, we consider that the impact of Keltbray's involvement in more than one infringement (and the wider consequences of this) needs to be reflected at Step 4: a factor likely to militate against reductions in penalty. On the other hand, as we have indicated above, we do not consider sufficient weight was given to the low margin nature of the industry, and Keltbray's lack of profitability in the relevant years: a factor likely to enhance the impact of the penalty from a specific deterrence perspective.

(5) In the course of submissions, Professor Bailey posited a sense check of the £20m penalty in the context of a Step 3 figure of £158m along the

following lines. The Step 3 penalty for the individual Infringements ranged from £13.2m to £29m. The penalty of £20m levied by the CMA for eight Infringements lies roughly in the middle of the range of penalties (£13.2m to £29m), calculated for each individual infringement. The assumption underpinning this exercise is that it would be wrong for Keltbray to receive a penalty based on the highest relevant turnover for an individual Infringement, but equally the penalty would be too low if based only on the lowest relevant turnover figure. Applying that approach here, bearing in mind the recalculated Step 3 figures range between £12.2m and £26.2m, a penalty of around £18m sits roughly in the middle (and £20m at the higher end).

(6) As a further cross check, the CMA presented a calculation that reflected the approach advocated by Keltbray for the purposes of Ground 1 of the Appeal – using only the specific tender values of £12.5m for the Step 1 figure. We have already determined that this approach is an inappropriate starting point, but we nevertheless found the exercise useful in the context of proportionality. The calculation reflected the concession made by Keltbray that, were its approach to be adopted, the potential wider effects would need to be reflected somewhere, and that could be done via the seriousness percentage (again, an approach that we have rejected). If the relevant Step 1 figure was £12.5m, and the seriousness percentage was increased to 30%, the Step 3 figure would have been £15.7m. The CMA submitted that this is too low to reflect the wider effects of cover bidding, and would also not reflect the need for specific deterrence regarding a company with Keltbray's financial indicators. We agree. We also note in passing that this exercise underlines the artificiality of seeking to tweak the seriousness percentage to its maximum, in order to avoid the greater Step 1 figure that a calculation based on multiple individual infringements produced for Keltbray: thus leaving no headroom for more serious cases.

332. At Step 4, on the facts of the present case, the critical issue appears to us to be whether, bearing in mind that the Step 1 figures have reduced, the penalty of £20m remains proportionate by reference to Keltbray's participation in multiple infringements, and the need for specific deterrence. In our view, a penalty of £18m appropriately reflects the fact that Keltbray was involved in 8 Infringements. We also consider a penalty at this level is no less likely to act as a specific deterrent to Keltbray than a penalty of £20m, taking into account all of the financial indicators, and bearing in mind the CMA's acknowledgement of the low margin nature of the industry. We therefore see no reason why, on the facts of this case, the figure at Step 4 should not reduce to reflect the reduction in the Step 1 figure. That reflects a proportionate approach, and penalty, in all the circumstances.

G. SETTLEMENT DISCOUNT AND ITS REVOCATION

333. It is common ground between the parties that, as a result of this appeal being brought, the Terms of Settlement no longer apply. The CMA formally applied to the Tribunal under paragraph 3(2)(b) of Schedule 8 to the CA1998 to revoke the discount.

(1) The Law and relevant CMA guidance

334. Rule (paragraph) 9 of *The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014* allows the CMA to use a settlement mechanism in certain situations. Specifically, under 9(1):

> "The CMA may decide to follow a settlement procedure in respect of an investigation under the Act where a party to that investigation—
>
> a. admits that it has been a party to an agreement or has been engaged in conduct which infringes the Chapter I prohibition or the Chapter II prohibition in relation to that investigation, and
>
> b. agrees to an expedited administrative procedure for the remainder of the investigation."

335. We referred to the CMA8 Guidance relating to settlement and in particular the circumstances in which the settlement discount can be revoked at paragraphs 48 and 49 above.

336. The Tribunal considered the revocation of a settlement discount in *Roland U.K. Limited v Competition and Markets Authority* [2021] CAT 8. The Tribunal's decision was as follows:

> "136. The essence of the settlement discount procedure under the Investigation Guidance, as reflected in the Terms of Settlement, is a bargain between the CMA and the settling party: the CMA agrees to accept a lower penalty than would otherwise be payable by the settling party in return for the settling party agreeing not to appeal the CMA's decision.
>
> 137. Although, as submitted by Roland, a settlement of a CMA investigation is different from a settlement concluding a commercial dispute, in that the former contemplates the possibility of an appeal, there is, in our view, no valid reason for the Tribunal to ignore that essential bargain and permit a settling party which brings an appeal against the infringement decision to retain the benefit of the discount and thereby receive a lower penalty than it otherwise would have received.
>
> 138. There is no unfairness in holding Roland to its bargain in this case. Roland had ample opportunity to consider the penalty proposed by the CMA, which was reduced to take account of some of Roland's submissions. In signing the Terms of Settlement, Roland agreed to the imposition of a maximum penalty of £4,003,321 in full knowledge of the calculation used by the CMA and with the benefit of legal advice. Roland confirmed that it was aware that the 20% discount was being given on the basis that Roland did not appeal.
>
> 139. We accept the CMA's submission that if a settling party could retain the benefit of a settlement discount despite appealing the infringement decision, the settlement process would be undermined. Businesses would enter settlement agreements not with a view to bringing finality to an investigation but as a means of achieving an undeserved reduction in their penalty prior to an appeal aimed at achieving an even greater reduction. CMA staff who had worked on the case in question and assigned to other cases on settlement being reached would need to be taken off the other cases and redeployed to the case on appeal."
>
> 140. Roland's argument that the Tribunal should attempt to quantify the savings made by the CMA as a result of the settlement (comparing the position of the CMA after the appeal with the position it would have been in if there had not been a settlement) and allow Roland to have the benefit, if not of the whole discount, of the amount of the discount less any extra costs incurred by the CMA as a result of the appeal,

> gives rise to the same objections. Moreover, quantifying the savings would in itself be a potentially complex and time-consuming exercise."

(2) CMA's submissions

337. The CMA submitted that *Roland* is determinative of the issue. The CMA stressed the important policy considerations that underpin the settlement procedure, which is intended to incentivise undertakings who have engaged in anti-competitive conduct to settle with the CMA which will mean that the CMA can streamline proceedings and free up resources to work on other matters. That, the CMA says, is only the case if the settlement is full and final. If there is any appeal, the case must be reopened, and significant resources would need to be committed to dealing with that appeal. As in this case, that is no small endeavour. This appeal has involved three very senior members of staff – Ms Enser, Dr Walker and Dr Haydock – and has resulted in a hearing lasting a week.

338. As regards Keltbray's submissions that seek to draw parallels with other legal regimes where a discount for acceptance of liability only applies, the CMA relies on *GF Tomlinson* at [138] to [139]. There, the Appellants sought to draw comparison with fines set for other kinds of statutory infringements. The Tribunal noted that the CA 1998 did not require the (old) OFT to consider fines in other statutory contexts when deciding how to exercise its discretion on penalty. The CMA also submitted that the CMA's settlement regime is different to other regimes because the settling party must not only accept the facts and liability, but also agree to pay a penalty up to an agreed maximum figure.

339. The CMA emphasised the voluntary nature of the settlement it had reached with Keltbray, and the fact that Keltbray was aware that the grant of the discount was conditional upon it satisfying all of the settlement conditions. We have referred to the process by which the settlement was reached in paragraphs 46 to 48 above.

(3) Keltbray's submissions

340. Keltbray submitted that, although it appealed against penalty, its admission of liability still stands, and that will have resulted in procedural efficiencies for the CMA. Keltbray should be given credit for its admission of liabiliity, even if it now disputes the appropriate penalty. That credit should take the form of a "significant reduction" in penalty, which, Keltbray says, is consistent with other sentencing regimes in criminal cases and FCA enforcement cases.

341. Keltbray sought to distinguish *Roland* on the basis that the Tribunal did not in that case consider the parallels with criminal law and FCA regulation, and erred in its analysis by suggesting that the removal of the settlement discount in full was holding *Roland* to its bargain. Keltbray submitted that by settling, all that it (and *Roland*) agreed is that the Terms of Settlement would cease to apply if it appealed: it was not thereby foregoing its entitlement to a reduction in penalty which should follow its admission of liability. Keltbray argues that a significant discount is still warranted in light of Keltbray's admission of liability, which is unaffected by this penalty appeal.

342. We were also referred by Keltbray to *Interclass* as a case where the OFT proposed that a 25% discount would apply if liability was accepted, but did not tie that discount to acceptance of the level of penalty. On the appeals against penalty, therefore, the 25% discount continued to apply.

343. As regards *GF Tomlinson*, Keltbray submitted that we should have regard to the context, which was that the appellants in that case sought to draw comparisons with the level of fines charged for breaches under other statutes. The Tribunal was referring to that when it said that the CA 1998 did not require the OFT to consider fines in other statutory contexts.

344. In this case, Keltbray said it had admitted liability as soon as it could. Had it not done so, there would have been significantly more work to do, with the possibility of an appeal against the infringement decision. Significant

efficiencies have, therefore, been achieved. A penalty appeal is less onerous than an appeal against a finding of infringement. Keltbray submitted that the purpose of the settlement discount was to save the CMA the need to spend further time on an intensive investigation not, in effect, to prevent an appeal against penalty which Keltbray is entitled to make. Even if its appeal is dismissed, the settlement discount (or more accurately, an equivalent reduction) should nevertheless be applied in recognition of its admission of liability.

(4) Analysis

345. We were referred, in the course of submissions, to *R (Gallaher Group Limited) v The Competition and Markets Authority* [2018] UKSC 25. The case concerned two manufacturers and a number of retailers that had been accused of an infringement in relation to tobacco pricing. Some of the parties entered into Early Resolution Agreements ("ERAs") with the OFT and received a settlement discount. Martin McColl Retail Group Ltd and TM Retail Group Ltd (together TMR) sought and obtained an assurance that, even though it was settling, it would get the benefit of a successful appeal brought by any other party. The others had not sought such assurance. Various parties appealed, and the CMA's infringement finding was set aside. TMR was reimbursed the penalty it had paid, and received a contribution towards its costs. The other settling parties argued that they should receive the same treatment. The CMA refused, and so the settling parties applied for judicial review based on public law requirements of fairness and equal treatment: an application which was granted by the Court of Appeal. The Supreme Court allowed the OFT's appeal, concluding that TMR was in a different position to the other settling parties, having been given the assurance by the OFT. The other settling parties remained bound by the terms of their ERAs.

346. Lord Sumption, in his judgment, stated:

> "47. The terms of the Early Resolution Agreements made with TMR, Gallaher, Somerfield and Asda in this case followed the internal procedures laid down within the OFT. They sought to balance these considerations by providing (i) that the party under investigation

> would be entitled to terminate the agreement at any time before receipt of the final decision, in which case it would forgo the discount; and (ii) that notwithstanding its admission it would be entitled to exercise its statutory right of appeal against the decision to the Competition Appeal Tribunal, in which case the OFT would be at liberty to apply to the Tribunal to increase the penalty and order the party under investigation to pay the costs of the appeal in any event. It is fundamental to the efficacy of such an agreement that subject to its terms it cuts short the investigation of the counterparty by finally resolving the issues as between it and the OFT. Where an Early Resolution Agreement is made with one party but the investigation proceeds against others, the former is entitled to the benefit of the discount or to the benefit of the continuing investigation and/or an appeal. He is not entitled to both.
>
> 48. This carefully drawn balance was disturbed by the oral assurance unwisely given by the responsible OFT officer Ms Branch to TMR, but not Gallaher or Somerfield." (emphasis added)

347. The CMA relied upon the underlined section in the statement as being supportive of its case. Keltbray argued that the decision in *Gallaher* has to be seen in context: in that case, the infringement finding had been overturned, and penalty was therefore moot. Lord Sumption was not suggesting that where a settling party appeals on penalty, there is no scope for a reduction in the penalty determined on appeal to reflect an admission of liability. Keltbray submits that the Tribunal is not therefore precluded by the decision in *Gallagher* from making a reduction if it considers it appropriate to do so. Keltbray also submitted that it may be that the policy of the CMA is that it will only provide a discount for admitting liability if the undertaking also accepts that the CMA has correctly calculated the penalty, but that is an internal policy issue, and the Tribunal should decline to follow it.

348. In our view, the decision in *Gallagher* was directed at a different issue: whether or not a settling party could take the benefit of an appeal brought by other non-settling parties. The answer to that is usually no, save that in *Gallagher*, TMR had received an assurance that should not, in hindsight, have been provided at all but which the Supreme Court considered the OFT was right to honour. The question of whether or not, on a penalty appeal, the appellant is entitled to receive credit (in the form of a reduction in penalty) for admitting liability,

notwithstanding the fact that the settlement discount no longer applies, did not arise.

349. We also agree with Keltbray that the passage in *GF Tomlinson* is addressed to a different issue. It simply makes the uncontroversial point that it is inapposite to seek to draw comparisons between the level of fines or penalties levied under other statutory regimes and those levied by the CMA in competition cases. Conversely, we do not consider that Keltbray's submissions are supported by the process adopted in *Interclass*. The "Fast Track Offer" in *Interclass* was a one-off offer used by the OFT in the particular circumstances of that case.

350. We see no reason to depart from the approach taken by the Tribunal in *Roland*. In particular:

(1) There is no unfairness in holding Keltbray to its bargain in this case. As set out in paragraphs 74 to 83 above, Keltbray had ample time to consider the penalty proposed by the CMA. Keltbray made submissions on the draft penalty calculation, which resulted in a lower penalty being proposed by the CMA. Keltbray agreed to pay a maximum penalty of £20m and was aware of how the CMA had calculated it, and with the benefit of legal advice. Keltbray was also aware that the 20% discount was being applied on the basis that there would be no appeal, including as regards penalty.

(2) For the same reasons as the Tribunal articulated in *Roland* at [139] and [140], there are important policy considerations that underpin the settlement process which would be undermined were we to make a reduction in penalty. As in *Roland*, Keltbray's approach is to invite us to attempt to quantify the savings made by the CMA as a result of its acceptance of liability at the settlement stage. That is a complex and time-consuming exercise: an exercise, we might add, that Keltbray has not attempted to undertake itself. Keltbray's suggestion that we leave the discount untouched and address the CMA's diversion of resources

by way of an order for costs is inappropriate for similar reasons. Again, Keltbray failed to articulate how this should be done. In our view, any attempt to divide between credit for admission, and credit for accepting a level of penalty amounts to a dicing and slicing of the settlement mechanism whereas the settlement process is, as the CMA08 Guidance makes clear, intended to operate as a whole.

351. The CMA settlement mechanism is specific to competition cases and, as we have said, there are fundamental policy principles at play which underpin the process. We do not accept Keltbray's claim that the administration of justice would be damaged if a reduction is not applied in this case. In our view, it is more likely that it would be damaged if we did permit Keltbray to in effect retain the benefit of the discount it had received by applying a reduction of a similar amount to the penalty we have determined is appropriate on this appeal. That would be to allow Keltbray to have its cake and eat it.

352. That is not to say that Keltbray cannot appeal: of course it is entitled to do so. However, if it considered the draft penalty calculation to be too high, it was open to Keltbray not to settle, to indicate that it accepted liability and to appeal the penalty imposed. Had it done so, and had it been successful, it would not have been entitled to any discount. We cannot see how Keltbray can be in a better position having accepted liability (and the penalty calculation) and agreed not to appeal, and then having done the opposite.

353. We are not persuaded by the argument that the CMA was saved significant costs by Keltbray's acceptance of liability. As the CMA pointed out, significant costs had already been incurred in producing the Decision by which time the CMA was satisfied that liability was established (a view shared by Keltbray given it does not dispute liability). Nor do we accept Keltbray's submission that its acceptance of liability meant that this appeal was shorter than had it appealed against liability as well. This appeal lasted a week, during which we heard both factual and expert evidence, including in relation to the wider effects of cover bidding as part of a collateral attack on the object finding in the Decision. It is

worth noting that the time estimate for this appeal only reduced by two days when Squibb, which did dispute liability, withdrew its appeal.

354. Generalised comparison to the position in criminal law and FCA enforcement where parties might be permitted to accept liability and challenge penalty do not take the matter further. It would take properly reasoned and detailed submissions by reference to the detail of those regimes, and relevant case law for Keltbray to persuade us otherwise: an approach that Keltbray has not adopted in this case.

355. The CMA's application to revoke the 20% discount is successful. We are not minded to apply a reduction equivalent to that amount, or indeed any reduction to the penalty of £18m that we have decided is appropriate.

356. This judgment is unanimous.

Bridget Lucas KC Chair	Professor Eyad Maher Dabbah	Derek Ridyard

Charles Dhanowa O.B.E., K.C. (*Hon*)
Registrar

Date: 20 December 2024