

Apex Case Note ~ CAT on a Hot Tin Roof

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1. On 25 February 2005 the Competition Appeal Tribunal (“CAT”) dismissed an appeal by Apex Asphalt and Paving Co. Limited (“Apex”) against the OFT’s decision on anti-competitive practices in the roofing industry.¹ Apex was one of nine roofing contractors found to have infringed the Chapter I prohibition² by colluding over the making of tender bids for roofing contracts in the West Midlands. The findings concerned a form of collusive tendering known as “cover bidding”, in which supplier A submits a bid that is not intended to win the contract, but has been decided on in collusion with supplier B in order to ensure that supplier B wins the contract.
2. The findings against Apex related to the bidding for two separate contracts: the FHH Contracts and the Dudley Contracts. Interesting points of procedure and substance emerge from the CAT’s judgment.
3. **Procedure – Deficient Rule 14 Notice:** Before making a decision that the Chapter I or Chapter II prohibition has been infringed, the OFT must give persons likely to be affected by the decision the opportunity to make representations. At the time this was done by service of a “Rule 14 Notice”.³ In this case, the OFT had, in error, failed to state expressly in the Notice that it was intending to take action against Apex in respect of the Dudley Contracts. By the time it realised its mistake, Apex had already submitted its written response. There followed a telephone call and email exchange, as a result of which Apex submitted a supplemental response addressing the Dudley contracts. However, Apex maintained that, as a result of its initial error, the OFT was not entitled to take an adverse decision or impose a penalty against Apex in respect of the Dudley Contracts.
4. The CAT rejected Apex’s submissions on this point. It recognised that, where the OFT decided to impose a penalty that had not been mentioned in the original Notice, it must normally serve a Supplementary Notice complying with all the relevant procedural rules.⁴ However, the rationale for this requirement was that the Notice must make it possible for the undertaking to defend itself. Here, it was clear from Apex’s supplemental response that, following the exchange of emails, it fully understood the facts relied upon by the OFT, and the OFT’s intention to impose a penalty in respect of the Dudley Contracts. Since Apex had not shown what difference it would have made to its responses had it been fully aware of the case

¹ *Apex v OFT* [2005] CAT 4.

² CA 1998, s.2.

³ CA 1998, s.31. The Notice is now called a “Statement of Objections”

⁴ Case T-25/95 *Cimenteries v Commission* [2000] ECR II-491.

against it from the start, it had not in fact been caused any prejudice by the OFT's omission.

5. Focussing on substance over form, the CAT adopted what would seem to be a sensible approach on the facts of this case. However, it remains critical at the administrative stage that an undertaking is provided with written notice of all the facts and circumstances alleged against it, including the imposition of a penalty, so that it can comment accordingly. Had Apex's rights of defence actually been prejudiced by the OFT's omission, it is unlikely that the CAT would have waived the requirement to issue a Supplementary Rule 14 Notice.
6. **Substance – Concerted Practices:** In support of its finding that Apex had engaged in a concerted practice in relation to the FHH Contracts, the OFT relied on a fax dated 30 August 2001 from Apex to one of its competitors, Briggs. Before the CAT, it was agreed that (i) Apex had wanted to win the FHH Contracts; (ii) the fax had contained figures which were intended to form the basis of an unsuccessful bid by Briggs; and (iii) Briggs did not in fact submit any bid. However, whereas the OFT contended that Apex sent the fax at its own instigation, Apex said it was sent in response to a request from Briggs. Based on this, it argued that merely acceding to a unilateral request for figures could not give rise to a concerted practice, as it did not evidence a common intention between the parties. Moreover, since Briggs had not submitted a bid, the OFT had failed to show that the parties' conduct had been altered as a result of the supposed cooperation.
7. The CAT rejected these arguments and found that a concerted practice was established. Irrespective of who had instigated the 30 August fax, there had been direct or indirect contact between Apex and Briggs, the object or effect of which had been to influence a competitor's conduct on the market, or disclose to a competitor one's own future conduct on the market. Such contact was strictly precluded.⁵ The CAT found that, even if Apex had instigated the fax, this was not unilateral conduct as the fax itself was evidence of a prior conversation in which Briggs had agreed to receive a cover figure from Apex. The CAT was able to infer this on the face of the fax, notwithstanding that it had expressly disregarded the only direct evidence of such a conversation – extracts of an interview with a Briggs employee – on the basis that it had been omitted from the Decision.
8. The fact that Briggs had not in fact submitted a bid for the FHH Contracts was found to be immaterial. Although a concerted practice implied consequential conduct on the market, the placing of a bid by Briggs was not a necessary ingredient. First, in line with EC case law, the CAT recognised a presumption that the exchange of information between the parties had an impact of their conduct on the market: each party was presumed to have taken account of the information it received from the other when determining its own conduct in the tendering process.⁶ Critically, no evidence had been adduced by Apex to rebut this presumption. Secondly, since the *object* of the cooperation between Apex and Briggs was anti-competitive, it was unnecessary to consider the effect: a concerted practice arose *before* considering whether the person receiving the price actually submitted a bid.
9. In line with EC case law, the CAT's judgment confirms that the concept of a concerted practice is flexible. Undertakings need to treat carefully in relation to contact with their competitors and might be advised to distance themselves expressly from requests for, or attempts to provide, information. As far as tendering is concerned, it is difficult to see how cover bidding can ever be lawful.

Apex was represented by Daniel Beard and the OFT was represented by Tim Ward, both of Monckton Chambers

For more information on Ben Lask, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on www.monckton.com.

⁵ Cases 40/73 etc. *Suiker Unie* [1975] ECR 1663.

⁶ Case C-42/92P *Anic* [1999] ECR I-4125.