

COMPETITION LAW

EDEN BROWN LIMITED & OTHERS v OFFICE OF FAIR TRADING

(“THE CONSTRUCTION RECRUITMENT FORUM” CASE)
[2011] CAT 8

OWAIN DRAPER
JULY 2011

On 1 April 2011, the Competition Appeal Tribunal (“CAT”) allowed in part the appeals of 3 undertakings against the penalties imposed by the OFT in its decision on the “Construction Recruitment Forum” cartel. The CAT (Mr Justice Roth presiding) reduced the total amount of the fines imposed on the Appellants by over £30 million, and set out detailed reasoning as to the flaws in the OFT’s approach.

THE DECISION

By a decision dated 29 September 2009, the OFT found that 7 undertakings engaged in the supply of recruitment services to the construction industry in the UK had infringed the Chapter I prohibition in the Competition Act 1998 (“the Act”). The OFT imposed fines under section 36 of the Act as follows (after leniency reductions):

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Undertaking	Fine
A Warwick Associates Ltd	£3,303
CDI Anderselite Ltd & CDI Corp ("CDI")	£7,602,789 (30% leniency)
Eden Brown Ltd ("Eden Brown")	£1,072,069 (35% leniency)
Fusion People Ltd	£125,021 (20% leniency)
Hays plc, Hays Specialist Recruitment Ltd & Hays Specialist Recruitment (Holdings) Ltd ("Hays")	£30,359,129 (30% leniency)
Henry Recruitment Ltd	£108,043 (25% leniency)
Beresford Blake Thomas Ltd, Hill McGlynn Ltd, Randstad UK Holding Ltd & Randstad Holding NV ("Randstad")	£0 (100% leniency; otherwise £116,849,686)

Eden Brown, CDI and Hays ("the Appellants") appealed their fines to the CAT; their appeals were heard together in July 2010.

THE FACTS

The addressee's of the decision were, with the exception of their non-UK parent companies, engaged in the supply of recruitment services to the construction industry in the UK ("recruitment services"). The market for recruitment services had the following key features:

- (a) it was composed of different elements, namely (i) the supply of candidates to be engaged and paid directly by the client company ("employment agency") and (ii) the supply of workers who are engaged and paid by the recruitment undertaking

to work for; and under the control of, the client company ("employment business");

- (b) construction companies (and potential candidates) are free to contract with as many recruitment services providers as they wish;
- (c) construction companies may also appoint a "Managed Service Provider" ("MSP"), the role of which is to manage the company's relationships with recruitment agencies; an MSP is described as a "MasterVendor" where it supplies also its own candidates and as a "Neutral Vendor" where it does not.

In late 2003, Parc UK Ltd ("Parc") entered the market as a Neutral Vendor MSP and, in the eyes of the addressees of the OFT's decision, posed a threat to the margins available to recruitment agencies. These undertakings, the members of Construction Recruitment Forum ("CRF"), met 5 times between 2004 and 2006 and engaged in (i) a collective refusal to supply Parc, and (ii) the fixing of "target fee rates" for the supply of candidates to Neutral Vendors (such as Parc) and certain construction companies. The CRF initiative failed, and the cartel came to end prior to the OFT's investigation; the infringing conduct was, nonetheless, held by the CAT to amount to a "very serious violation of competition law" (see the Judgment at [79]).

JUDGMENT OF THE CAT

The grounds of appeal required the CAT to give detailed consideration to several aspects of the OFT's approach to calculating the fines, including as to whether it had failed to follow (or had misapplied) the relevant published guidance.

The Guidance

In accordance with section 38(8) of the Act, the OFT must have regard to the guidance prepared and published under that section when setting the amount of a penalty ("the Guidance"). It follows that the Guidance has an "enhanced status" as compared to general advice and guidelines prepared by the OFT, and that the OFT must provide reasons for any significant departure from the Guidance (see [26] to [28]).

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The Guidance sets out at paragraph 1.4 the twin policy objectives of the OFT's approach to financial penalties, which are:

- *to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and*
- *to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices."*

In pursuit of these objectives, the Guidance sets out a five-step process for determining the amount of the penalty, which the CAT summarised as follows:

"Step 1:

calculation of the starting point having regard to the seriousness of the infringement and the "relevant turnover" of the undertaking. The starting point may never exceed 10 per cent of that relevant turnover.

Step 2:

adjustment for duration: penalties for infringements that last for more than one year may be multiplied by not more than the number of years of infringement and part years may be treated as full years for this purpose.

Step 3:

adjustment for other factors: the penalty derived from Steps 1 and 2 may be adjusted "as appropriate" to achieve the policy objectives set out above.

Step 4:

adjustment for further aggravating and mitigating factors.

Step 5:

adjustment to prevent the statutory maximum penalty of 10 per cent of worldwide turnover being exceeded and to avoid double jeopardy where a penalty has been imposed by the European Commission or in another EU Member State in respect of the same agreement or conduct." (see [30])

Issue 1: Step 1- gross/net turnover

The Guidance defines “relevant turnover” for the purpose of Step 1 as:

“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” (para 2.7).

The Appellants challenged neither the definition of the relevant product market nor the decision that the relevant geographic market was no wider than the United Kingdom.

The Appellants did argue, however, that the OFT was wrong to have used as the relevant turnover for each undertaking the *gross* turnover which it achieved in respect of its “employment business”, the OFT having included in relevant turnover in respect of temporary workers the amounts that represented the wages costs of those workers that were paid by the agency and reimbursed to the agency by the client. The Appellants submitted that the relevant turnover for the purpose of Step 1 was their *net* turnover, i.e. the turnover representing the fees retained by them and *excluding* charges that were “passed through” to the client (wages costs).

The CAT found in favour of the Appellants on this issue, reasoning that the purpose of the use of relevant turnover in Step 1 was to “reflect the effective scale of each undertaking”, including relative to the other infringing undertakings. The CAT took into account in reaching this view, amongst other things:

- i. the evidence from a UBS analyst that all recruitment industry analysts use net fees (rather than gross turnover) “to assess the actual economic performance and activity” of the recruitment agencies (see [44]);
- ii. the joint statement from the expert accountants instructed in the case that, because the mix between temporary and permanent workers differed between undertakings, it was the net fees figure that was “used by...the industry to compare the value and performance of recruitment agencies” and which provided “a sensible basis for comparison between entities” (see [45]); and

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- iii. that passed-through wages costs were not, in its view, comparable to a fluctuating manufacturing input cost (the OFT having relied upon the reasoning in Case T-127/04 *KME Germany v Commission* [2009] ECR II-I 167, in which case the input was copper): see [46] to [47];
- iv. that there was force in CDI's argument that recruitment agencies ought, in this respect, to be treated as (or analogously to) "*intermediaries*" as described in the Commission's Consolidated Jurisdictional Notice and addressed in Case T-417/05 *Endesa SA v Commission* [2006] ECR II-2533, in respect of which turnover is taken to be the amount of commission only, rather than the total payment received by the intermediary (see [49] to [56]).

Accordingly, the CAT held that the OFT ought in this case to have used instead the turnover figure representing net fees: see [56].

Issue 2: The relevant year

The CAT also found against the OFT on its use in Step 1 of the turnover of the relevant undertaking in the year preceding the decision ("pre-decision turnover") in preference to the turnover of the undertaking in the year preceding the end of the infringement ("pre-infringement turnover").

The CAT agreed with Eden Brown that, in short, the change made in May 2004 to the year of turnover used to calculate the cap on penalties (under the Maximum Penalties Order) did not necessitate a corresponding change to be made by the OFT in applying Step 1 of the Guidance, as the purpose of the turnover figure used was different in each case; indeed, it was inappropriate to make use of pre-decision turnover in Step 1, because the purpose of "relevant turnover" was to determine "*the real impact of the infringing activity*": see [63] to [64].

The CAT refused CDI's request to have a corresponding change made in its case, as it had not included a challenge to the "relevant turnover" year in its Grounds of Appeal and would not have been allowed to amend those grounds, had it so applied (see [69] to [70]).

Issue 3: The “seriousness percentage”

The OFT had decided upon a “starting point” in Step 1 of 9% of relevant turnover to reflect that the infringement was at the upper end of the 1-10 scale of seriousness (i.e. it was “9 out of 10” for seriousness). The CAT agreed with the OFT that it was not bound by previous decisions but had to judge each case on its facts, and that the relevant passage in the Guidance did not list all of the relevant considerations in this regard and could not be subjected to a “box-ticking” approach: see [78]. It held that the decision that the infringement merited a seriousness score of 9 was not “so out of line or inappropriate” as to amount to a misapplication of the Guidance, noting that the infringement was “a very serious violation of competition law”.

Issue 4: The Minimum Deterrence Threshold (“MDT”)

In *Makers UK Ltd v OFT* [2007] CAT 11, the CAT had rejected a challenge to the imposition by the OFT an MDT calculation at Step 3 to increase for deterrence purposes the penalty to the level it would have been if the undertaking had made 15% of its total turnover on the relevant market. The result of this was to increase Maker’s fine from £6,500 to £526,500 (as it made only a very small proportion of its total turnover on the relevant market). In that case, the CAT held as follows

“The adoption of the Minimum Deterrent Threshold is, in our view, an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance.” (at [134])

The OFT relied strongly on this conclusion to support its decision to apply the same 15% methodology at Step 3 to the fines that would otherwise be reached for Randstad and Hays (increasing Hays’s fine by 170%); at the same stage, it reduced, Eden Brown’s fine by 40% to avoid imposing an excessive penalty.

The CAT held that the OFT had, in applying the 15% of worldwide turnover method, taken “an inappropriately mechanistic and narrow approach” in breach of the principles that the calculation of the amount of a fine must not become “a simple calculation based on total turnover” (*Joined Cases 100-103 Musique Diffusion Francaise* [1983] ECR 1825) and that the decision-maker must not, in pursuing the objective of deterrence, “lose sight of the need for the penalty to reflect also the culpability of the undertaking in terms of the seriousness, and hence the scale and effect of the infringement”: see [92] to [99].

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It was, in the CAT's judgment, always necessary to "step back and consider whether the figure involves a fair uplift...to meet the twin objectives of [reflecting] culpability and [ensuring] deterrence". In particular, the CAT held that by focussing solely on the undertaking's worldwide turnover, to the exclusion of gross margin figures and other undertaking-specific considerations, the OFT had fallen into the error of allowing the fine to become a simple calculation based on turnover, rather than reflecting appropriately those twin objectives: see [98] to [100].

The CAT went on to reject at paragraphs 117 to 128 challenges to the OFT's decisions as to aggravating and mitigating factors under Step 4 of the Guidance, and proceeded to re-calculate the penalties in accordance with its conclusions on the issues outlined above.

The resultant penalties

The CAT "punched in" the new figures under Steps 1 and 2 and considered what, if any, uplift for deterrence was necessary in each case (before applying the OFT's leniency percentages)). It concluded that:

- i. Hays calculated fine of £3,775,732 required "a very substantial uplift" to reflect the scale of (a) its group's total turnover; (b) its net fees in the UK and Ireland and (c) its worldwide and UK and Ireland operating profits. The CAT settled upon the figure of £8 million (before leniency).
- ii. Eden Brown's calculated fine of £596,945 required a "much smaller" degree of uplift because of its financial size and the fact the figures used in Steps 1 and 2 related to the whole of its business; the figure of £700,000 was taken to reflect an appropriate uplift.
- iii. CDI's fine (adjusted to take into account also a mistaken inclusion of non-relevant turnover) of £2,142,871 did not, in light of the size of its US parent company require adjustment down to reflect its relatively small UK presence.

COMMENT

The CAT has, in this and the *Construction* cases, made clear that the OFT must calculate fines with more sensitivity to the facts of each undertaking's culpability and scale on the market,

and that the goal of deterrence must not become an overriding consideration permitting of a mechanistic calculation by reference to total turnover.

It remains to be seen whether the more fact-sensitive approach required of the OFT will be reflected in amended guidance and whether it will result in more, or fewer, challenges to its fining decisions. On one view, the CAT's own approach in calculating the appropriate deterrence uplift could be criticised for a want of predictability.

MONCKTON COUNSEL INVOLVED

CONSTRUCTION

- Paul Lasok QC and Josh Holmes for ISG Pearce Limited.
- John Swift QC and Kassie Smith for Galliford Try Plc.
- Christopher Vajda QC and Ronit Kreisberger for Ballast Nedam NV.
- David Unterhalter SC, Daniel Beard QC, Alan Bates and Philip Woolfe for the Office of Fair Trading.
- Paul Harris QC for Corringway Conclusions plc
- George Peretz for Renew Holdings Plc, Allenbuild Limited, Robert Woodhead (Holdings) Limited and Robert Woodhead Limited

CONSTRUCTION RECRUITMENT FINES

- David Unterhalter SC and Alan Bates represented the Office of Fair Trading.
- Paul Harris QC represented Eden Brown Limited and Hays plc, Hays Specialist Recruitment Limited and Hays Specialist Recruitment (Holdings) Limited.
- Ronit Kreisberger and Owain Draper represented CDI AndersElite Limited and CDI Corp
- George Peretz represented Select Holdings/Randstad in its leniency application to the OFT, which resulted in its obtaining a 100% reduction in its penalty