

Makers v. OFT: Raising the Roof on Cartel Penalties

By George Peretz
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Makers v. OFT [2007] CAT 11 is another decision of the Competition Appeal Tribunal arising out of the OFT's investigations into bid-rigging in the roofing industry. But the points it raises are of general importance on both liability and penalty.

Cartel law: getting a sub-contract quote from a competitor

The tender at issue in this case was for waterproofing works to the roof of a car park in North West London. Four tenders were invited and four received. The OFT based its finding of collusion against Makers on the fact that Makers' tender exactly reflected a schedule faxed by one of the other bidders, Asphaltic, to a third, Rock, before the tenders were submitted.

Makers' case on appeal was that, since it was unable to carry out the asphaltting element of the work, it had contacted Asphaltic to ask it for a quote for that element. Asphaltic had refused to quote save for the whole job. Makers had therefore taken Asphaltic's quote; it then passed that quote on in its own tender without adding a profit margin.

For various reasons the CAT did not accept Makers' account on the facts. The point of general interest lies in *obiter* remarks by the CAT dealing with what the legal position would have been if it had accepted Makers' case. The CAT held that there was collusion where (a) a tenderer approaches a competing tenderer for a quote for a sub-contract in relation to the tender; (b) both companies know that the other is tendering; (c) the quote accounts for a large proportion of the main contract; and (d) the tenderer that obtains the quote lets it influence its own quote for the main contract. Well-advised tenderers will conclude that *any* contact between competing tenderers is highly risky.

Penalty: the Minimum Deterrence Threshold

One unusual feature of the OFT's penalty decision was that after taking the appropriate percentage of Makers' turnover in the relevant market (applying steps 1 and 2 of the OFT's Guidelines on Penalty), which resulted in an amount of £6,500, the OFT then at step 3 added a sum of £520,000 to that amount (increasing the penalty by around 80 times). The Decision provided no details as

to how that figure had been calculated. But the OFT explained in its Defence that it did not think that a penalty based on turnover in the relevant market provided enough of a deterrent if the undertaking achieved less than 15% of its total turnover in that market; in such a case, the OFT would calculate what the turnover would have been if 15% of its turnover had been achieved in the relevant market and add that amount at stage 3 so as to bring the penalty up to that figure. This was the “Minimum Deterrence Threshold” (MDT).

Those who have a copy of the OFT’s Guidance on Penalty may at this stage be wondering what has happened to the page where the MDT is described. They need not worry; there is no reference at all to the MDT in the Guidance (or indeed anywhere else; it was not, for example, applied to the multi-product retailers in the *Replica Football Kit* and *Toys and Games* cases). None of that, however, concerned the CAT. Moreover, although it accepted that Makers had good grounds for complaint in relation to lack of reasoning, that complaint had no cash value for Makers. The CAT simply accepted that the MDT was a reasonable approach and that the OFT had been entitled to apply it; nor did it consider that the penalty of £526,500 was disproportionate in relation to a single roofing contract worth only some £300,000.

The CAT’s ruling on this point demonstrates that the CAT fully endorses the OFT’s view that cartel violations deserve heavy penalties. It is dangerous for any undertaking facing a cartel allegation – even one relating to a single tender – to proceed on any basis other than that the fine imposed upon it will seriously hurt, even if the Guidance might suggest a bearable fine. Not only is the CAT inclined to give the OFT considerable latitude in how it applies its Guidance so as to achieve deterrence, it also appears to accept minimal reasoning on penalty issues in the OFT’s decisions. Cartelists faced with opaque reasoning in a penalty decision may in future be well advised to try to winkle out the OFT’s reasoning in correspondence before appealing, on the basis that if reasoning is then produced for the first time on appeal, there may at least be a costs point to be taken.

Penalty: reduction because of the OFT’s “mistake” in relation to a third party

Once the OFT’s calculations of the MDT were revealed, it became clear that in calculating the MDT the OFT had, or may have, taken the wrong total turnover figure for one of the other participants in the cartel, Coverite. As a result, Coverite (which had, perhaps unsurprisingly, not appealed) was penalised less than half what it “should” have been had the MDT been correctly applied. Makers argued that the principle of equal treatment meant that it should benefit from the same good luck.

This issue produced a split between the three members of the CAT. The majority thought that Makers should not benefit from an “arithmetical mistake” in setting Coverite’s fine, and on that basis distinguished previous ECJ cases dealing with mistakes in methodology or failure to apply guidelines (although the CAT noted that those cases were in any event somewhat inconsistent on the question of whether, where such a mistake led to unduly lenient treatment of one cartel member, that should lead to a reduction in the fine of other cartel members). The minority did not, however, think that there was any robust distinction between a simple mistake and the cases relied on by Makers, and would have reduced Makers’ penalty accordingly.

The essential difference between the minority and the majority was that the minority regarded the difference in treatment (unjustified in the sense that the difference was due to a mistake) as in itself causing unfairness to Makers. In contrast, the majority’s approach somewhat downplays the importance of the principle of equal treatment as a self-standing ground of appeal; on its approach, an unjustified difference in treatment is not in itself unfair (so as to lead to a reduction in penalty) unless it reveals, or at least suggests, a legal or methodological error in the assessment of penalties. The majority’s approach is perhaps a sign that the CAT is not very sympathetic to penalty appeals of the “we want what they got” variety.

Tim Ward acted for the OFT in this case

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