Neutral Citation Number: [2014] EWHC 1613 (Ch)

Case No: HC13B01690

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
7 Rolls Building, London, EC4A 1NL

Date: 19/05/2014

Before :

MR JUSTICE MORGAN

- -

Between :

(1) LINDUM CONSTRUCTION CO LTD **(2) LINDUM GROUP LIMITED** **(3) INTERSERVE CONSTRUCTION LTD** **(4) INTERSERVE PLC** **(5) WILLMOTT DIXON CONSTRUCTION LIMITED** **(6) WILLMOTT DIXON HOLDING LTD**	**Claimants**
- and –	
THE OFFICE OF FAIR TRADING	**Defendant**

- -
- -

Mr Thomas De La Mare QC and Mr Andrew Scott (instructed by **Ashurst LLP**) for the Claimants
Mr Daniel Beard QC and Mr Julian Gregory (instructed by **The Office of Fair Trading**) for the Defendant

Hearing dates: 11th, 12th and 13th March 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Morgan :

The issue

1. These proceedings arise out of a decision by the Office of Fair Trading ("the OFT") dated 21 September 2009 ("the Decision"). On 1 April 2014, after I reserved judgment in this case, the functions of the OFT were taken over by the Competition and Markets Authority ("the CMA"). The legislation which is relevant in this case, the Competition Act 1998 ("the 1998 Act"), has been amended to reflect the take over of the OFT's functions by the CMA. As all of the events in this case pre-date 1 April 2014, I will refer only to the OFT and to its position under that legislation and I will ignore the more recent changes. In the future, the position of the CMA, in relation to the issue which arises in this case, will be the same as the position of the OFT.

2. The 1998 Act confers upon the OFT a power to investigate, and to decide, whether a person has committed an infringement of the 1998 Act. If the OFT decides that an infringement has occurred, it has power to impose a monetary penalty on the infringer. The 1998 Act permits the person on whom the penalty has been imposed to appeal to a specialist tribunal against the imposition of the penalty and/or the amount of the penalty. The rules of the specialist tribunal lay down time limits for such an appeal to be brought.

3. What happens if the person on whom the penalty has been imposed does not appeal in relation to the penalty but instead pays the full amount of the penalty? Can such a person, within six years of paying the penalty, bring an ordinary action in the courts to recover the penalty, asserting that the penalty should not have been imposed in the first place? That is the first question raised in these proceedings. If the person on whom the penalty has been imposed does not appeal in relation to the penalty but does not pay the penalty, can it subsequently defend a claim by the OFT to recover the penalty from it on the ground that the penalty should not have been imposed in the first place? That is the second question raised in these proceedings. Both questions raise the issue whether the right of appeal conferred by the 1998 Act is the only permitted method of challenging the imposition of a penalty or the amount of the penalty.

The OFT decision

4. The OFT's Decision was made pursuant to Part I of the 1998 Act. In brief summary, the Decision concluded that a large number of persons (including the present Claimants) had infringed the Chapter I prohibition, imposed by section 2 of the 1998 Act. By the Decision, the OFT required such persons to pay penalties in respect of such infringements.

5. As required by section 31 of the 1998 Act, on 16 April 2008, before the Decision was made, the OFT gave notice of its then proposed decision to all persons who were to be affected by the same, including the present Claimants, and invited their representations. The notice took the form of a Statement of Objections which ran to (at least) 1647 pages. Between pages 1634 and 1647 of the Statement of Objections, the OFT set out the action it proposed to take in relation to the imposition of penalties on the parties found to have infringed the Chapter I prohibition. This description of its

proposed action identified in detail the method by which such penalties were to be calculated, using five specified steps.

6. Each of the present Claimants made detailed written representations in response to the Statement of Objections. Each response addressed in detail the five steps intended to be used by the OFT for the purpose of calculating the penalties which were to be imposed.

7. On 21 September 2009, the OFT made the Decision. For more detail as to the background to, and the scope of, the Decision, I gratefully adopt the following description of the Decision by the Competition Appeal Tribunal ("the Tribunal") in Kier Group plc v Office of Fair Trading [2011] CAT 3 ("Kier"):

> "1 On 21 September 2009 the Office of Fair Trading ("OFT") published a decision under the Competition Act 1998 ("the 1998 Act") entitled "Bid rigging in the construction industry in England" ("the Decision"). The Decision is the longest decision ever adopted by the OFT, running to nearly 2,000 pages. It followed an extensive investigation which took place over some five and a half years between April 2004 and September 2009 which was by far the largest undertaken by the OFT, in terms of the number of parties involved, the number of inspections made and the number of suspected infringements.
>
> 2 In the Decision the OFT found that, in the period 2000 to 2006, 103 undertakings had each committed between one and three infringements of the prohibition contained in section 2 of the 1998 Act ("the Chapter I Prohibition"). That prohibition applies to agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.
>
> 3 By far the majority of those infringements consisted of what can perhaps be referred to as "simple" cover pricing, to distinguish them from the six infringements described at paragraph 21 below. "Simple" cover pricing occurs where one of those invited to tender for a construction contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is tendering for that contract (Company B). Company B will be seeking to win the contract and will have reached a view as to its own tender price. Indeed it may already have submitted its own tender to the client. The cover price which it provides to Company A will be at a level sufficiently high to ensure that Company A does not win. This price is submitted to the client by Company A as though it is a genuine tender. It should be noted that Company B does not reveal its own tender price to Company A – the cover price is an inflated price.

> 4 The OFT imposed penalties totalling approximately £129.2m in respect of 199 infringements."

8. In the Decision, the OFT made findings that each of the present Claimants had infringed the Chapter I prohibition and imposed on each of them a penalty in respect of such infringement. There are six Claimants in these proceedings. The Second Claimant is the ultimate parent of the First Claimant. In this judgment, it is not necessary to distinguish between a parent and a subsidiary company and I will refer to the First and Second Claimants together as "Lindum". The Fourth Claimant is the ultimate parent of the Third Claimant and I will refer to them together as "Interserve". The Sixth Claimant is the ultimate parent of the Fifth Claimant and I will refer to them together as "Willmott Dixon".

9. The penalty imposed by the Decision on Lindum was £496,017, of which £244,770.63 has been paid by instalments. The penalty imposed by the Decision on Interserve was £11,634,750, all of which was paid on 24 November 2009. The penalty imposed by the Decision on Willmott Dixon was £4,534,760, all of which was paid on 19 November 2009.

10. None of the present Claimants sought in any way to challenge the Decision around the time of the Decision. None of them then (nor indeed at any later time) sought to appeal either the findings of infringement or the decision to impose a penalty or the amount of the penalty.

The appeals

11. Other persons affected by the Decision did appeal under section 46 of the 1998 Act. Twenty five companies brought admissible appeals against findings in the Decision. Six of these appeals challenged both the relevant finding of infringement and penalty and the others appealed the amount of the penalty. A further company, Fish Holdings Ltd, wished to appeal findings in the Decision in relation to it. The time for it to bring such an appeal expired on 23 November 2009. Its notice of appeal was received by the Tribunal on 26 November 2009 and was therefore out of time. It applied for an extension of time for appealing. The OFT, as the Respondent to the intended appeal, left the decision as to an extension of time to the Tribunal. The Tribunal directed itself in accordance with its rules that it could only extend the time for appeal if the circumstances were "exceptional" and held that the circumstances were not exceptional and so an extension of time was refused: see Fish Holdings Ltd v Office of Fair Trading [2009] CAT 34.

12. In Kier Group plc v Office of Fair Trading [2011] CAT 3, the Tribunal explained a case management decision, which was made in relation to the 25 appeals, as follows:

> "6. In the light of submissions provided to the Tribunal at a joint CMC held in January 2010 the Tribunal decided that, although there were certain common themes in the penalty appeals, it was not appropriate to determine those separately as preliminary issues, but rather to deal with them at the same time as hearing each appeal as a whole. Separate oral hearings in respect of each appeal were listed. For logistical reasons the penalty appeals were allocated between three panels of the

> Tribunal. The desire on the part of some of the appellants to intervene in other penalty appeals where common issues were perceived to arise was satisfied by permitting the parties to make brief post-hearing written observations on any relevant matter contained in the transcripts of the oral hearings in appeals other than their own. Any such observations were ordered to be provided to the Tribunal by 10 September 2010."

13. The penalty appeals then took their course and resulted in seven separate judgments: Kier Group plc v Office of Fair Trading [2011] CAT 3, GF Tomlinson Group Ltd v Office of Fair Trading [2011] CAT 7, Barrett Estates Services v Office of Fair Trading [2011] CAT 9, Durkan Holdings Ltd v Office of Fair Trading [2011] CAT 6, Quarmby Construciton Co Ltd v Office of Fair Trading [2011] CAT 11, Crest Nicholson plc v Office of Fair Trading [2011] CAT 10 and North Midland Construction plc v Office of Fair Trading [2011] CAT 14. The first of these decisions was given on 11 March 2011 and the last on 27 April 2011. In relation to all of the appeals against the amount of the penalty, the penalty was reduced, sometimes very substantially.

14. On 27 May 2011, the OFT issued a Press Release announcing that it did not intend to appeal the above-mentioned decisions of the Tribunal reducing the penalties it had sought to impose.

15. Following the success of the appellants in relation to these appeal decisions, three other companies (R G Carter Ltd and its associates), which had been adversely affected by the Decision but which had not earlier attempted to appeal, sought (on 23 June 2011) an extension of time in which to bring an appeal to the Tribunal. The Tribunal held that the circumstances of that case were not exceptional and refused to extend the time for an appeal: see R G Carter Ltd v Office of Fair Trading [2011] CAT 25.

16. The decision of the Tribunal in GF Tomlinson Group Ltd v Office of Fair Trading [2011] CAT 7 concerned appeals by a number of different companies. Two of the companies were Interclass Holdings Ltd and Interclass plc. The Tribunal reduced the amount of the penalty which the OFT had sought to impose on these two companies. The two companies appealed this decision to the Court of Appeal and on 31 July 2012 the Court of Appeal allowed the appeal in part and further reduced the amount of the penalty: Interclass Holdings Ltd v Office of Fair Trading [2012] EWCA Civ 1056.

17. As stated earlier, the present Claimants did not seek to appeal within the time permitted following the Decision and they have not at any time since sought an extension of time for such appeals.

The Claim

18. I have already identified the Claimants as Lindum, Interserve and Willmott Dixon. On 15 April 2011, solicitors for Interserve wrote to the OFT asking it to revise the amount of the penalties it had imposed on Interserve by the Decision (£11,634,750) and suggesting that the appropriate penalty should be £2,385,124. On 18 April 2011, Lindum paid an instalment of the penalty imposed on them by the Decision but that was the last instalment which they paid. On 21 April 2011, solicitors for Lindum

wrote to the OFT asking it to re-calculate the penalty imposed on Lindum by the Decision (£496,017) and suggesting that the appropriate penalty should be £16,564.86. On 12 July 2011, solicitors for Willmott Dixon wrote to the OFT asking it to re-assess the penalty imposed on Willmott Dixon by the Decision (£4,534,760) but not suggesting what an appropriate penalty would be. On 25 July 2011, the OFT replied to these requests stating that the Decision remained binding on those parties which had not appealed and it would not be re-opened by the OFT. The OFT told Lindum that it remained liable to pay the outstanding instalments of the penalty imposed on it by the Decision. There was then further correspondence specific to Lindum as to their liability to pay the part of the penalty imposed on them which remained unpaid.

19. On 26 September 2011, solicitors for Interserve wrote again to the OFT, stating that the OFT was obliged to make restitution of the payments of penalty which it had received. On 11 October 2011, solicitors for Willmott Dixon wrote to the OFT in similar terms. On 2 December 2011, the OFT replied to both letters and stated that it was not obliged to repay the penalties as requested. More than a year later, on 13 December 2012, solicitors now acting for all six intended claimants wrote a letter before action to the OFT. Attached to this letter were a draft Part 8 claim form and a draft witness statement in support of the claim. On 13 February 2012, the OFT replied to the letter addressed to it. There was further correspondence and it was agreed that it was appropriate for the intended issues to be raised by a claim form pursuant to CPR Part 8.

20. On 29 April 2013, the Claimants issued the present proceedings. The claim is under CPR Part 8. I can summarise the contentions put forward by the Claimants in their claim form as follows:

(1) in the Decision, the OFT applied a certain methodology as to the determination of the various penalties which were imposed on the persons found to have infringed the Chapter I prohibition;

(2) the methodology which was applied when assessing the penalties payable by the Claimants was the same methodology as was used when assessing the penalties payable by others, including the parties who successfully appealed to the Tribunal against the amount of such penalties;

(3) the methodology used was defined as "the generic methodology";

(4) in the appeals which had been brought by others, the Tribunal held that the generic methodology was erroneous in law;

(5) the OFT has not appealed the decisions of the Tribunal in those other cases;

(6) the Claimants are entitled at common law to restitution of the sums they have paid as penalties in accordance with the Decision on the basis that the OFT was unjustly enriched by the receipt of those sums;

(7) the Claimants' common law entitlement is not affected by the provisions of the 1998 Act dealing with appeals nor by the fact that the Claimants did not appeal the Decision;

(8) it is not an abuse of process for the Claimants to assert their common law entitlement notwithstanding that they are, or are very likely to be, now out of time to appeal the Decision;

(9) in view of the foregoing, Lindum is no longer liable to pay to the OFT the remaining instalments of the penalty imposed on Lindum by the Decision.

The statutory provisions

21. The OFT was established by section 1 of the Enterprise Act 2002 ("the 2002 Act"). At the times relevant to this claim, it was the body which was given various statutory powers, in relation to competition, by the 1998 Act. With effect from 1 April 2014, the OFT was abolished by section 26 of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act"). Section 25 of the 2013 Act established the CMA. The CMA has now replaced the OFT as the relevant body for the purposes of the 1998 Act. The 1998 Act has been amended by the 2013 Act to reflect these changes. In this judgment, I will set out the provisions of the 1998 Act as they were at the time relevant to this claim. As so set out, the provisions of the 1998 refer to the OFT and not to the CMA. The Tribunal which is referred to in the 1998 Act is the Competition Appeal Tribunal (which I have already defined as "the Tribunal") which was established by section 12 of the 2002 Act.

22. Part I of the 1998 Act (Chapters I to V, sections 1 to 60) deals with competition. All references hereafter to section numbers are to the sections of the 1998 Act, save where the contrary is stated.

23. Section 2 prohibits certain agreements, decisions and concerted practices. This prohibition is referred to in the 1998 Act as "the Chapter I prohibition".

24. Chapter III of Part I (sections 25 to 44) confers on the OFT powers of investigation and enforcement. By section 31, if, as a result of an investigation, the OFT proposes to make a decision that the Chapter I prohibition has been infringed, it must give written notice to that effect to the persons likely to be affected and give them an opportunity to make representations.

25. Section 36 confers on the OFT power to impose penalties. Section 36 provides:

> "36 Penalties
>
> (1) On making a decision that an agreement has infringed the Chapter I prohibition … , the OFT may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement.
>
> (2) On making a decision that conduct has infringed the Chapter II prohibition … , the OFT may require the undertaking concerned to pay the OFT a penalty in respect of the infringement.
>
> (3) The OFT may impose a penalty on an undertaking under subsection (1) or (2) only if the OFT is satisfied that the

> infringement has been committed intentionally or negligently by the undertaking.
>
> (4) Subsection (1) is subject to section 39 and does not apply in relation to a decision that an agreement has infringed the Chapter I prohibition if the OFT is satisfied that the undertaking acted on the reasonable assumption that that section gave it immunity in respect of the agreement.
>
> (5) Subsection (2) is subject to section 40 and does not apply in relation to a decision that conduct has infringed the Chapter II prohibition if the OFT is satisfied that the undertaking acted on the reasonable assumption that that section gave it immunity in respect of the conduct.
>
> (6) Notice of a penalty under this section must—
>
> (a) be in writing; and
>
> (b) specify the date before which the penalty is required to be paid.
>
> (7) The date specified must not be earlier than the end of the period within which an appeal against the notice may be brought under section 46.
>
> (8) No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).
>
> (9) Any sums received by the OFT under this section are to be paid into the Consolidated Fund."

26. Section 36(8) refers to a possible order which may be made by the Secretary of State. Such an order has been made. It is the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004, with effect from 1 May 2004. Before the 2004 amendment, the 2000 Order provided that the relevant turnover was that arising in the business year preceding the date on which the infringement ended. As amended in 2004, the 2000 Order provided that the relevant turnover is that arising in the business year preceding the OFT's final decision on infringement.

27. Section 37 deals with recovery of penalties and is in these terms:

> "37 Recovery of penalties.
>
> (1) If the specified date in a penalty notice has passed and—

> (a) the period during which an appeal against the imposition, or amount, of the penalty may be made has expired without an appeal having been made, or
>
> (b) such an appeal has been made and determined,
>
> the OFT may recover from the undertaking, as a civil debt due to the OFT, any amount payable under the penalty notice which remains outstanding.
>
> (2)In this section—
>
> "penalty notice" means a notice given under section 36; and
>
> "specified date" means the date specified in the penalty notice."

28. By section 38, the OFT is required to prepare and publish guidance as to the appropriate level of any penalty under Part I of the 1998 Act. Such guidance is not to be published without the approval of the Secretary of State. At the times relevant to the Decision, the relevant guidance was contained in OFT Guidance 423, published in December 2004.

29. Sections 46, 47 and 49 deal with various matters which may be the subject of an appeal. Section 46 provides:

> "46 Appealable decisions.
>
> (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the OFT—
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> (b) as to whether the prohibition in Article 101(1) has been infringed,
>
> (c) as to whether the Chapter II prohibition has been infringed,
>
> (d) as to whether the prohibition in Article 102 has been infringed,
>
> (e) cancelling a block or parallel exemption,
>
> (f) withdrawing the benefit of a regulation of the Commission pursuant to Article 29(2) of the EC Competition Regulation,

> (g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i),
>
> (h) releasing commitments under section 31A(4)(b)(ii),
>
> (i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,
>
> and includes a direction given under section 32, 33 or 35 and such other decision as may be prescribed.
>
> (4) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates.
>
> (5) Part I of Schedule 8 makes further provision about appeals."

30. Section 47 deals with what are called "third party appeals". Section 47(3) provides that such an appeal does not suspend the effect of the decision to which the appeal relates.

31. Section 46 is supplemented by the provisions of schedule 8. Paragraph 2 of schedule 8 deals with certain matters of procedure in relation to an appeal to the Tribunal, such as the form of the notice of appeal and the possibility of the Tribunal granting leave to amend a notice of appeal.

32. Paragraph 3 of schedule 8 makes further provision as to the nature of, and the possible outcomes following, certain appeals to the Tribunal, including appeals in relation to a decision that the Chapter I prohibition has been infringed or in relation to the imposition of a penalty or the amount of the penalty (i.e. appeals pursuant to sections 46(3)(a) or (i)); it is in these terms:

> "3 …
>
> (1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
>
> (a) remit the matter to the OFT,
>
> (b) impose or revoke, or vary the amount of, a penalty,
>
> (c) …
>
> (d) give such directions, or take such other steps, as the OFT could himself have given or taken, or

> (e) make any other decision which the OFT could itself have made.
>
> (3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.
>
> (4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

33. Paragraph 3A of schedule 8 deals with certain other appeals to the Tribunal where the appeal is not a full appeal on the merits but the Tribunal is to apply the same principles as would be applied by a court on an application for judicial review.

34. The Competition Appeal Tribunal Rules 2003 have been made pursuant to section 15 of, and Part II of schedule 4 to, the 2002 Act. Rule 8 provides for the time and manner of commencing appeals to the Tribunal. By rule 8(1), an appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within 2 months of the date on which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier. By rule 8(2), the Tribunal may not extend the time limit in rule 8(1) unless it is satisfied that the circumstances are exceptional.

35. Section 49 deals with further appeals following a decision by the Tribunal. In particular, there can be an appeal from the Tribunal to the Court of Appeal against a decision of the Tribunal as to the amount of a penalty under section 36.

36. Sections 47A and 47B deal with the bringing of monetary claims before the Tribunal. Section 47A(5) refers to a decision that the Chapter I prohibition has been infringed. Section 47A(7) refers to the period of time when there is a possibility of an appeal against such a decision or where there is an actual appeal against such a decision.

37. Sections 58 and 58A deal with the effect of findings of fact made by the OFT and the effect of findings of infringement made by the OFT. These provisions deal with the position where there is a possibility of an appeal against such a finding or where there is an actual appeal against such a finding. These provisions do not directly apply in this case and while they form relevant background, it is not necessary to set them out.

38. Section 60 directs that questions arising under Part I of the 1998 Act in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union. Section 60 provides:

> "60 Principles to be applied in determining questions
>
> (1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of

> corresponding questions arising in EU law in relation to competition within the European Union.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in EU law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission.
>
> (4) Subsections (2) and (3) also apply to—
>
> (a) the OFT; and
>
> (b) any person acting on behalf of the OFT, in connection with any matter arising under this Part.
>
> (5) In subsections (2) and (3), "court" means any court or tribunal.
>
> (6) In subsections (2)(b) and (3), "decision" includes a decision as to—
>
> (a) the interpretation of any provision of EU law;
>
> (b) the civil liability of an undertaking for harm caused by its infringement of EU law."

The decision of the Tribunal in Kier Group plc v Office of Fair Trading ("Kier")

39. As explained earlier, there are seven decisions of the Tribunal dealing with the appeals which were brought by other parties in relation to the Decision. The first of these decisions was Kier. The later decisions all referred to Kier. It will suffice for the purpose of understanding the submissions made on behalf of the Claimants for me to refer only to the decision in Kier. It is a very lengthy decision. For the purpose of addressing the submissions in this case, I will attempt to summarise the main points in the decision.

40. The Tribunal recorded that, in the Decision, the OFT had applied, or purported to apply, five steps as set out in the Guidance which it had published pursuant to section 38 of the 1998 Act. The Tribunal set out in detail what the OFT did in its Decision in relation to each of these steps.

41. At Step 1, the OFT identified a starting point for the penalty by reference to the nature and seriousness of the infringement and the "relevant turnover" of the undertaking in question. As to "relevant turnover", the published Guidance stated that this was the "turnover of the undertaking in the relevant product market and relevant geographical market affected by the infringement in the undertaking's last business year". The OFT interpreted this as meaning the relevant turnover in the undertaking's last business year *prior to the Decision* i.e. 2008 in the present case.

42. In accordance with its normal practice, the OFT arrived at the Step 1 starting point by applying a percentage figure to each undertaking's relevant turnover. The OFT considered certain factors described in the Guidance, including the nature of the infringement, the nature of the product, structure of the market, and effects on customers, competitors and third parties, together with the submissions of the companies under investigation. In the light of these and other considerations (which were fully set out in the Decision), the OFT set the starting point at 5% of an undertaking's relevant turnover for all infringements involving "simple" cover pricing and 7% for all those involving compensation payments.

43. Step 2 provided for an adjustment upwards or downwards for duration. The OFT made no adjustment of the penalty for duration in respect of any of the infringements.

44. Step 3 provided for the penalty figure reached after the calculations in Steps 1 and 2 to be adjusted as appropriate to achieve the policy objectives outlined in the Guidance. These objectives were (1) to impose condign punishment on the infringer having regard to the seriousness of the particular infringement, and (2) to deter undertakings from engaging in anti-competitive practices. In the Decision, the OFT emphasised that deterrence was an important aspect of its fining policy, and that it took two forms, which were, in summary, specific deterrence and general deterrence.

45. The OFT was concerned that in some cases, where the infringing undertaking's turnover in the relevant market represented a low proportion of its total worldwide turnover, because the economic unit of which the infringing company formed a part may have significant activities in markets other than the relevant market, the penalty reached after Steps 1 and 2 would be small in relation to that total worldwide turnover. In order to ensure what it regarded as appropriate deterrence having regard to the overall size of the economic undertaking, at Step 3 where necessary the OFT increased the penalty to a level equivalent to a specific proportion of the undertaking's total worldwide turnover in the last business year prior to the Decision. This "Minimum Deterrence Threshold" or "MDT", as its name implied, represented the OFT's view of the minimum figure needed to deter the undertaking concerned and other similar sized undertakings (including those in other sectors) from engaging in unlawful behaviour of this kind.

46. In the Decision, two different MDT levels were applied. For all those undertakings whose infringements did not involve compensation payments (i.e. for "simple" cover pricing), the MDT was set at an amount equal to 0.75% of the undertaking's total worldwide turnover in the last business year prior to the Decision. For all those infringing undertakings who had at least one infringement involving a compensation payment, the MDT was 1.05%. These percentages were apparently arrived at by *assuming* that the undertaking's turnover in the relevant market represented at least 15% of its total worldwide turnover.

47. The OFT then applied the relevant Step 1 starting point percentage (5% or 7%, as the case might be) to this assumed 15%, resulting in the 0.75% or 1.05% figures. In other words, the OFT considered that for each infringer one of the penalties should be at least a sum representing 5% (or 7%) of an *assumed* (not actual) relevant turnover. Thus, where the MDT was applied, the penalty for the particular infringement ceased to be related to actual relevant turnover and became instead related to total worldwide turnover.

48. The OFT did not consider it would be appropriate at Step 3 to differentiate between undertakings on the basis of the number of infringements in which an undertaking was involved, given the particular way in which the investigation had been streamlined. Nor did the OFT consider that there were sufficient other differences between the various parties and their infringements to justify its adopting a range of MDT levels.

49. Accordingly, one or other of the two rates of MDT was applied to each infringer, if appropriate. Where the penalty for a particular infringement at the end of Step 2 already exceeded the relevant MDT there was no need to apply the MDT at Step 3. Where this was not the case (i.e. where the relevant threshold was not reached after Step 2), then in the case of multiple infringements, the MDT was applied to the infringement with the highest level of penalty after Step 2. It was not applied in respect of a second and/or third penalty.

50. Step 4 provided a further opportunity for penalty adjustments to take account of aggravating or mitigating features of individual cases. The Guidance contained a non-exhaustive list of such features.

51. Step 5 ensured that the statutory maximum under section 36(8) of the 1998 Act was not exceeded. Step 5 also dealt with the risk of double jeopardy in circumstances where a penalty or fine had been imposed by the European Commission or by a court or other body in another member state for the same agreement or conduct.

52. The Tribunal explained its approach by saying that if it found that the final penalty imposed by the OFT appeared to be excessive, it would be important for the Tribunal to investigate and identify at which stage of the OFT's process error had crept in. Given that the Guidance had not been challenged in the cases before the Tribunal, it would be likely that the imposition of an excessive or unjust penalty reflected some misapplication or misinterpretation of the Guidance.

53. In relation to Step 1, the Tribunal considered that in a case of “simple” cover pricing 5% of relevant turnover was, in principle, too high a starting point where the current maximum for the most heinous infringements of the competition rules was 10%. In the light of a number of factors, it considered that the appropriate level was lower than the mid-point of that range, since the difference between 5% and 10% did not adequately reflect the distinction in culpability between cover pricing as practised in the construction industry in the relevant period and, say, a multi-partite horizontal price fixing or market sharing cartel. Greater head-room was required to accommodate the latter type of offence within the range currently provided by Step 1 of the Guidance. Therefore, approaching these cases on the basis of the OFT's Step 1 procedure, the Tribunal employed a starting point of 3.5% for “simple” cover pricing. In reaching this conclusion it took account of the mitigating effect of the general

uncertainty and ambivalence as to the legitimacy of the practice, which admittedly existed from at least 2000 to 2004.

54. The aim of the Guidance was that the Step 1 penalty was to be assessed by reference to *inter alia* the seriousness of the infringement which, in turn, was very closely related to its harmful effects (actual or potential) on the specific market and on competitors and consumers in that market. The longer the period between the actual infringement and the measurement of "relevant turnover", the more tenuous the connection is likely to be between them. There was a tension between the consideration of circumstances related closely in time to the infringement, and the use of turnover which could be wholly remote from those circumstances, and which could reflect many intervening and unconnected developments and changes in both the infringer's business and the market in question.

55. In the cases before the Tribunal, quite a few of the infringements occurred as long as 8 or 9 years prior to the Decision. Therefore, there was an inconsistency between the OFT's current approach to the year of assessment at Step 1 and the purpose of that Step as expressed in the Guidance, so that the Guidance should be interpreted as being unaltered, namely as referring to the business year preceding the date when the infringement came to an end. To the extent that the OFT wished to change the year of assessment it should first have consulted upon and sought approval for the change, including a corresponding revision of the current text of the Guidance, pursuant to section 38 of the 1998 Act. It followed that the Decision misinterpreted and misapplied the Guidance in that respect.

56. As to Step 3, the Tribunal commented that the MDT had typically produced an enormous uplift from the Step 1 penalty. The scale of this uplift was the product of two factors: first, the MDT was applied to total worldwide turnover; second the MDT was applied at a rate of 0.75% of that turnover. According to the OFT, the latter percentage was the result of applying the 5% used at Step 1 to a figure of 15% and it was based on an assumption that each infringing undertaking generated 15% of its turnover in the "relevant" market i.e. in the market affected by the infringement. It was not entirely clear where the assumption came from.

57. As the OFT itself had pointed out, the scale of its investigation and of the Decision, with so many parties and hundreds of separate infringements, created an enhanced risk of allegations of inconsistency and discrimination and a corresponding desire to apply a consistent set of criteria for the assessment of penalties. The OFT felt it would be less vulnerable to such challenges if the penalties emerged virtually automatically from the application of a formula which was applied universally. The problem with that approach was that it ran counter to the thrust of the Guidance and ordinary penal principles, which require a case-by-case analysis and assessment of the appropriate penalty. It also carried a danger, which had materialised, of excessive and disproportionate fines.

58. The MDT was applied in a manner which was wrong in principle and was inconsistent with the Guidance. In particular the MDT was applied mechanistically and without giving proper consideration to the individual circumstances of each case. Being based exclusively on total worldwide turnover, the MDT automatically excluded any proper consideration of other measures of the size and financial position of the undertaking on which a penalty was being imposed. The assumption on which

the MDT appeared to have been based, namely that the minimum deterrent penalty was 0.75% (or 1.05% as the case may be) of the undertaking's total worldwide turnover, was liable to and did give rise to excessive and disproportionate penalties.

The submissions for the Claimants

59. The Claimants' submissions were presented by Mr de la Mare QC and Mr Scott.

60. The Claimants referred to the five steps identified in the OFT Guidance 423 intended to be used for the purpose of calculating the amount of a penalty in infringement cases and to the comments of the Tribunal in Kier as to how those five steps had been applied in the present cases.

61. The Claimants drew attention to the Tribunal's finding in Kier that the 5% starting point at Step 1 was too high. They also pointed to the Tribunal's finding that the OFT had misinterpreted and misapplied its own Guidance in that it took the relevant turnover year as the business year before the Decision rather than the business year prior to the relevant infringement. For the purpose of Step 1, the OFT should not have relied on the changes made, for the purpose of Step 5, in the turnover year relevant pursuant to the 2000 Order, as amended in 2004, and made pursuant to section 36(8).

62. The Claimants also drew attention to the Tribunal's finding in Kier that the OFT had inflexibly applied its MDT policy which was unsupported by United Kingdom case law, contrary to European authority, took no account of undertaking's relevant turnover and was disproportionate.

63. The Claimants also referred to the decision of the Court of Appeal in Interclass Holdings Ltd v Office of Fair Trading [2012] EWCA Civ 1056 at [65] and [70] where it was said that the Tribunal had to have regard at Step 3 to the overall and cumulative level of penalty imposed on the undertaking when considering whether the Step 1 figure should be increased.

64. The Claimants then submitted that the methodology used by the OFT in the cases that were appealed to the Tribunal, which was essentially the same methodology which was used to calculate the penalties imposed on the Claimants, was bad in law. In particular, it was submitted that the OFT erred in law in not correctly applying its own Guidance, in not having due regard to its own Guidance contrary to section 38(8), in departing from the Guidance without good reason and by imposing penalties which were mechanistic, which fettered its discretion, and which were excessive, disproportionate and irrational. The result was that the penalties were *ultra vires* the statutory powers of the OFT.

65. The Claimants then submitted that it would be wrong to regard the various penalties imposed by the OFT on the various infringers as a series of individual decisions; they were all affected by the same generic methodology which was wrong in law. In general, a decision of a competent court that a public authority had acted unlawfully could benefit persons who were not a party to the proceedings before that court. The Claimants were entitled to rely on the decisions of the Tribunal dealing with the appeals against penalties brought by other parties.

66. Although the Tribunals which heard the appeals "varied" the OFT's decisions as to penalty, those decisions were in effect "void".

67. The present claim was a common law claim based on the Claimants showing that the penalty sums were exacted unlawfully. The Claimants relied on the principle established in Woolwich Equitable Building Society v IRC [1993] AC 70. If no one had appealed any part of the Decision as to any of the penalties, it would still have been open to the Claimants to bring this common law claim and to establish that the penalties were imposed unlawfully. There was no need to challenge the Decision first whether by way of appeal or judicial review. [I will refer to this submission as "the wider submission".] I note that at other times in their submissions, the Claimants asserted that the common law claim could only be put forward because the other parties had successfully appealed the Decision in so far as it related to them and had obtained "generic" findings which applied to the Claimants also. [I will refer to this submission as "the narrower submission".]

68. The Decision was exclusively a matter of English law. English administrative law is not the same as EU administrative law so that decisions as to the effect of not appealing a competition decision by the European Commission were not in point.

69. Section 58A was not material to the present proceedings which are not proceedings of the kind referred to in section 58A.

70. At common law, taxes paid pursuant to a public law unlawful demand are recoverable by the paying party. The common law rule is not confined to taxes but extends to the penalties paid in this case. There does not need to be a formal demand, although there were formal demands in this case.

71. The OFT has no restitution law defence to the claim for repayment of the penalties.

72. The OFT continues to have the power to impose fresh penalties on the Claimants as the earlier penalty decisions were void.

73. There is no express provision of the 1998 Act which overrides the Claimants' common law rights to restitution. Further, those rights are not excluded by necessary implication. The existence of the common law right is needed to deal with a case where a party has paid the penalty and then appeals (perhaps in an appeal out of time, where the time for appeal has been extended by the Tribunal) and the penalty is reduced by the Tribunal on that appeal. In such a case, there is no express statutory power for the Tribunal to order the OFT to repay the amount of the overpayment and the matter needs to be dealt with under the common law.

74. In relation to the outstanding instalments of the penalty imposed on Lindum, as the penalty imposed was unlawful, these instalments are not recoverable by the OFT.

The submissions for the OFT

75. The OFT's submissions were presented by Mr Beard QC and Mr Gregory.

76. The OFT submits that these claims raise three key issues, as follows:

(1) has the Decision, in so far as it imposed penalties on these Claimants, been rendered unlawful by the seven Tribunal decisions dealing with the appeals which were brought by others against the Decision?

(2) does the Claimants' failure to use the system for appeals in the 1998 Act prevent the Claimants bringing the present claims? and

(3) in any event, does this case fall outside the class of case where a common law claim in restitution can be brought?

77. The OFT then developed its case with the following propositions:

(1) when the Tribunal determines a penalty appeal, it has no power to set aside or vary or declare unlawful any penalty decision other than the decision which has been appealed;

(2) the seven decisions of the Tribunal in relation to the appeals which were brought did not render the Decision unlawful in relation to these Claimants;

(3) even if the Tribunal's reasoning in the seven decisions implies that the penalties imposed by the Decision on the Claimants were unlawful, the Claimants are unable to rely on that reasoning in the present claim as they did not appeal the penalties imposed on them;

(4) there was no common law right to recover a penalty which existed before the 1998 Act as that Act created the system of penalties;

(5) Parliament intended the statutory scheme for appeals to be exhaustive; that system means that there is no need for there to be a common law restitutionary claim in parallel and the possibility of such a claim would undermine the scheme and legal certainty;

(6) the Claimants have failed to identify any basis on which the OFT now has power to remake decisions as to the amount of the penalties; and

(7) if the OFT could remake decisions as to the amount of the relevant penalty, the OFT could decide on a penalty which might be same as the first penalty and so the Claimants have not shown that the OFT currently owes anything to the Claimants.

78. The OFT drew attention to various differences in approach between the differently constituted Tribunals which reached the seven decisions in relation to the appeals which were brought by other parties.

79. The OFT pointed out that all of the points which the Claimants now wish to put forward by way of challenge to the amount of the penalties imposed on them by the Decision could have been put forward in timeous appeals to the Tribunal. This was shown by the fact that other parties put forward, in the appeals which they brought, the very points which are now relied upon by the Claimants. Therefore, this is not a case where the right of appeal is limited to narrow grounds only, such that the court should carefully consider whether it can have been intended to be the exclusive remedy.

80. A common law claim for restitution, if available, would undermine the safeguards expressly incorporated into the system for statutory appeals. The claim could be brought within a limitation period of six years from the payment of the penalty, long after the expiry of the permissible time for an appeal, and could be brought before a court different from the specialist Tribunal provided for in the 1998 Act. The extent to which the safeguards would be undermined is demonstrated by the consideration that if the Claimants are right in this case, then two other parties (Fish Holdings Ltd and R G Carter Ltd) who were prevented by the Tribunal from appealing out of time could circumvent the ruling of the Tribunal by bringing a common law claim for restitution.

81. Finally, the OFT submitted that it had a complete defence to any common law claim for restitution on the ground that the payments made by the Claimants were voluntary payments. On the facts, it was said that all of the Claimants had full knowledge that it would have been open to them to challenge the penalties imposed on them and they chose not to do so but to pay the penalties imposed on them.

The Woolwich principle and when it applies

82. Before addressing the issues which I identified at the outset of this judgment, I will give a brief summary, sufficient for present purposes, of the Woolwich principle and when it applies.

83. Woolwich establishes that a person may recover a payment of tax made pursuant to an unlawful demand from the taxing authorities. Indeed, it is not necessary for there to be a demand for its payment; the question is whether the tax has been unlawfully exacted: FII Group Test Claimants v Revenue and Customs Commissioners [2012] 2 AC 337.

84. The principle in Woolwich applies to charges and levies by public bodies and is not restricted to the imposition of a tax: British Steel plc v Customs and Excise Commissioners [1997] 2 All ER 366; Waikato Regional Airport Ltd v Attorney General [2004] 3 NZLR 1 and R (Hemming) v Westminster CC [2013] PTSR 1377.

85. Where the relevant statute does not prevent a challenge being brought otherwise than by way of a statutory appeal, a claim to restitution of the charge or levy, which involves a challenge in public law to the charge or levy, may take the form of a common law claim relying on the principle in Woolwich: British Steel, Waikato and Hemming.

86. In such a case, it is not necessary to bring judicial review proceedings first to obtain an order quashing the charge or levy and the procedural requirements of CPR 54, and in particular the time limit in CPR 54, do not apply to a Woolwich claim: Hemming at [138].

87. I think it is likely that the court which grants relief in a Woolwich claim will need to quash the earlier charge or levy to enable the public body to impose a new charge or levy (if it would be lawful for it to do so); alternatively, it may be sufficient for the court to declare that the earlier charge or levy is void in public law and therefore has no legal effect; one or other of these steps was taken in both Waikato and Hemming.

88. Where it is held that the original charge or levy was not lawfully imposed but the public authority would be able lawfully to impose a lower charge or levy, the court takes the view, in favour of the public authority, that the public authority is not necessarily unjustly enriched to the full extent of the first charge or levy but only to the extent that the first charge or levy exceeds the second possible lawful charge or levy: Waikato and Hemming.

Discussion and conclusions

89. As explained earlier, the issue in this case is whether the statutory appeal under the 1998 Act is the only permitted method of challenging the imposition of a penalty or the amount of a penalty imposed by the OFT. To determine that issue, it is necessary to identify the key features of the statutory scheme created by the 1998 Act. For present purposes, I consider that it is sufficient to identify the following features of that scheme:

(1) the OFT may make a decision that the Chapter I prohibition has been infringed;

(2) on making such a decision, the OFT may require an infringer to pay a penalty in respect of the infringement: section 36(1);

(3) the notice of a penalty under section 36 must be in writing and specify the date before which the penalty is to be paid: section 36(6);

(4) the date specified in the penalty notice must not be earlier than the end of the period within which there may be an appeal against the penalty notice: section 36(7);

(5) when the date specified in the penalty notice has passed (and there is no pending appeal), the OFT may recover the amount of the penalty payable under the penalty notice: section 37(1); that amount can be recovered as a civil debt: section 37(1);

(6) a party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal in relation to the decision, both in relation to a finding of infringement and in relation to the imposition of a penalty or as to the amount of such a penalty: section 46(1), (3);

(7) the Tribunal is a specialist tribunal;

(8) an appeal against the imposition of a penalty or the amount of the penalty suspends the effect of the decision in those respects: section 46(4);

(9) an appeal against the imposition of a penalty or the amount of a penalty is a full appeal on the merits: schedule 8 para. 3(1); the appeal may be based on matters of fact or matters of law; the Tribunal can hear evidence on matters relevant to the appeal;

(10) an appellant's right to a full appeal on the merits depends upon the appellant identifying in its notice of appeal the grounds of appeal which are to be relied

upon: schedule 8 para. 2(1); the grounds of appeal may be amended with the leave of the Tribunal: schedule 8 para. 2(2);

(11) an appellant's right to a full appeal on the merits depends upon the appellant appealing within a time limit: rule 8(1) of the 2003 Rules; the Tribunal may extend the time limit: rule 8(2); the Tribunal may not extend the time limit unless it is satisfied that the circumstances are exceptional: rule 8(2);

(12) the Tribunal may confirm or set aside the decision which is the subject of the appeal; in particular, the Tribunal may impose or revoke or vary the amount of a penalty: schedule 8 para. 3(2);

(13) a decision of the Tribunal has the same effect as the decision of the OFT: schedule 8 para. 3(3);

(14) a decision of the Tribunal may be enforced in the same manner as the decision of the OFT: schedule 8 para. 3(3);

(15) there can be an appeal to the Court of Appeal against a decision of the Tribunal: section 49;

(16) unless the court orders otherwise, a finding by the OFT in a decision under Part I of the 1998 Act, which is relevant to an issue arising in Part I proceedings, is binding on the parties if the time for appealing under section 46 has expired and there is no pending appeal: section 58(1);

(17) a finding by the OFT of an infringement of the Chapter I prohibition is binding in certain specified proceedings before the court where the period for an appeal has elapsed and there is no pending appeal: section 58A.

90. Under this statutory scheme, each Claimant was entitled to appeal the penalty imposed on it by the Decision. In order to appeal, a Claimant had to comply with the time limits for such an appeal. Further, if a Claimant had appealed, its appeal would be decided on the basis of the grounds of appeal which it put forward in its notice of appeal and not on the basis of points which it had not taken in its grounds of appeal. Conversely, if it had appealed, it was entitled to require the Tribunal to decide the case on the merits. An appeal would not be confined to judicial review grounds. Even if the OFT had acted perfectly lawfully in public law, it would have been open to the Tribunal to make its own decision as to the amount of an appropriate penalty and to reduce the amount of the penalty if it thought fit.

91. If a Claimant had appealed, the effect of an appeal would have been to suspend its liability to pay the penalty imposed by the Decision. There would have been no need to pay the penalty and then to ask the Tribunal to make an order for the payment to be refunded by the OFT, following a successful appeal. The statutory provisions are designed to prevent that situation coming about, at least in the vast majority of cases.

92. Both sides proceeded on the basis that the 1998 Act does not contain any provision which expressly states that an appeal against a decision of the OFT, in particular an appeal against a penalty imposed by the OFT, was the only method of challenging the decision, in particular the penalty. At the hearing, I asked for submissions as to the

effect of section 37. The OFT placed no particular reliance on this section. The Claimants made written submissions following the hearing to the effect that section 37 was not an express provision which precluded either of their methods of challenging the Decision.

93. I doubt if the parties' approach to section 37 is correct. Indeed, section 37 might have been argued to be a short answer to the present issue. In the case of Lindum, I consider that there is a strong argument that the case is governed by section 37 so that the OFT may recover the outstanding instalments of the penalty as a civil debt. Section 37 is not restricted to saying that the OFT may bring a civil claim for an alleged debt; it provides that the OFT can "recover" something which is a "debt". It seems to me to be inconsistent with the express terms of section 37 for Lindum to be able to defend such a claim by saying that the penalty should not have been imposed in the first place so that there is no "debt" and nothing for the OFT to "recover". If that were the right construction of section 37, then the implication of it would be that if none of the Claimants, in the absence of an appeal, had a defence to a claim for the penalty, it must follow that they could not claim restitution of the penalty which they have paid.

94. However, in view of the way the case was argued, I consider that I ought to look at the statutory provisions more broadly, not focussing on section 37 alone, to see if the 1998 Act by implication excludes the challenges to the penalties which are now being put forward.

95. It is open to the court to hold in relation to a particular statute that it is implicit in the statutory provisions that a statutory appeal under that statute is the exclusive means of challenging a relevant decision: see Century National Bank Ltd v Davies [1998] AC 628 at 637E-H. Indeed, this has for many years been established in relation to appeals against tax assessments: see IRC v Pearlberg [1953] 1 WLR 331 at 333, IRC v Aken [1990] 1 WLR 1375 at 1380 and Pawlowski v Dunnington [1999] STC 550 at 557g and 559h-j.

96. As already pointed out, no Claimant has sought to appeal to the Tribunal in relation to the penalty imposed on it. In view of the decisions of the Tribunal in Fish Holdings Ltd v Office of Fair Trading [2009] CAT 34 and in R G Carter Ltd v Office of Fair Trading [2011] CAT 25, the Claimants appear to accept that they will not now be given an extension of time to bring such an appeal. The decisions in those two cases were considered by the Court of Appeal in Office of Fair Trading v Somerfield Stores Ltd [2014] EWCA 400, which was decided after I reserved my judgment in this case, and nothing was said to qualify the approach in the earlier two cases.

97. Before giving further attention to the submissions made on behalf of the Claimants, I will indicate my preliminary reaction to the statutory provisions as a whole (and without focussing in particular on section 37) and their application to the events which have happened. The OFT has made the Decision and has imposed penalties on the Claimants. There is now no prospect that the Decision and those penalties will be revoked or varied under the statutory scheme, which allowed for such a possibility only in the event of a successful appeal to the Tribunal. Prima facie, therefore, the Decision and the penalties are binding and enforceable under the statutory scheme as between the OFT and the Claimants. It would therefore seem to be irrelevant to inquire as to what might have happened if a Claimant had appealed.

98. The key features of the statutory scheme provide for appeals to a specialist tribunal on a tight timetable and subject to other procedural safeguards. The policy behind those features is plain. That policy would be undermined if it were possible to ignore the statutory scheme for appeals and challenge the penalty in another way. In these proceedings, the Claimants suggest that it is open to them to challenge the penalties in two ways, other than by way of a statutory appeal. The first suggested way involves a party penalised in a decision of the OFT paying the penalty and then within six years of payment bringing ordinary court proceedings to recover it. The other suggested way involves a party penalised in a decision of the OFT not paying the penalty and when sued for it by the OFT defending that claim on the grounds that the decision in relation to the penalty was unlawful. If either or these methods of challenge were permitted, the statutory scheme would be undermined.

99. One has to ask whether Parliament, when creating a right to a statutory appeal, contemplated that there would be alternative methods of challenging the imposition of a penalty or the amount of a penalty in the ways now contended for by the Claimants. The Claimants might conceivably say that the statutory challenge and the non-statutory challenge are not identical. The statutory challenge permits a full appeal on the merits whereas the Claimants' version of the non-statutory challenge involves the Claimants putting forward narrower grounds of challenge which require them to show that the imposition of the penalty or the amount of the penalty were unlawful, on grounds which it is convenient to call "judicial review grounds". I note that these judicial review grounds are not to be put forward by way of a claim to judicial review. In all but exceptional circumstances, the court will refuse to give permission for a judicial review where the applicant had available to it a right of statutory appeal which, if it had been used, would have been appropriate to deal with the applicant's complaint: see de Smith's Judicial Review 7th ed., at para. 16.018. The judicial review grounds are instead being put forward as the basis of a common law claim for restitution or by way of a defence to a claim for an unpaid penalty.

100. I regard it as highly improbable that, in addition to creating a right to a full merits statutory appeal, subject to controls and limitations, Parliament would have intended to leave open the possibility of: (1) a person defending a claim for the penalty on the ground that the unappealed penalty was not due; and (2) a person who had paid the unappealed penalty later claiming restitution of it. The above remarks apply to a case, like the present, where the 1998 Act permits a full merits appeal. I consider that it would be even more clear that the 1998 Act did not permit two separate methods of challenge (one by way of statutory appeal and the other by way of judicial review grounds outside the statute) where the statutory appeal was only on judicial review grounds: see schedule 8 para. 3A.

101. Prima facie, therefore, the 1998 Act should be construed as implicitly providing that the statutory appeal provided by the 1998 Act is the exclusive remedy by which a penalty may be challenged. In the absence of a successful appeal against a penalty, the party which is subject of the penalty is bound by it. In the absence of such an appeal, the OFT is not acting unlawfully in receiving payment of such a penalty or taking proceedings to recover an unpaid penalty.

102. The Claimants contend that the decision to impose penalties on the Claimants was, and is, "void". In this context, I was referred to the well known remarks of Lord Radcliffe in Smith v East Elloe RDC [1956] AC 736 at 769-770 and of Lord Diplock

in Hoffmann-La Roche v Secretary of State for Trade and Industry [1975] AC 295 at 365-366. It has been pointed out more than once that even in a case where an administrative act is subject to the possibility of judicial review, it is not helpful to talk about it being "void" before it is quashed by a court granting a judicial review. The position is summarised in de Smiths' Judicial Review, 7th ed., at para. 4-059. In this case, the position is even more clear. The statutory scheme provided the means by which a penalty could be revoked or varied. There is now no possibility of that happening. I consider that far from the penalties being "void", the effect of the foregoing is that the penalties now have the status of lawful penalties.

103. I next need to test this prima facie position against the submissions put forward on behalf of the Claimants. I have already referred to "the wider submission" made by them. This was to the effect that, whether or not anyone affected by the Decision had appealed, it remained open to the Claimants at any time, subject only to any relevant limitation period, to bring proceedings for restitution of the penalties imposed and for that purpose to seek to establish that the imposition of the penalties was unlawful. In support of that submission, the Claimants placed particular reliance on R v Wicks [1998] AC 92 and Bunney v Burns Anderson plc [2008] Bus LR 22.

104. In R v Wicks, the House of Lords considered whether it was open to a defendant, who was prosecuted for failure to comply with an enforcement notice under the Town and Country Planning Act 1990, to argue in the criminal proceedings that the enforcement notice was not valid on the grounds that the enforcement notice was unlawful in public law, because the planning authority which served the notice had acted in bad faith and had been motivated by immaterial considerations. The 1990 Act contained provisions allowing a person served with an enforcement notice to appeal on certain grounds. The 1990 Act also contained an ouster provision (section 285(1)) which prevented the validity of the notice being questioned (otherwise than by way of an appeal) on any ground on which an appeal might have been brought. However, the grounds of challenge put forward by Mr Wicks were not matters which could have been raised on such a statutory appeal. The leading speech in the House of Lords was given by Lord Hoffmann. He held that the answer to the question raised in that case depended entirely on the construction of the relevant statute. The question was whether the notice which had been served was "an enforcement notice" within the meaning of the 1990 Act. He held that an "enforcement notice" was a notice which complied with the formal requirements of the 1990 Act and which had not been quashed on appeal or judicial review: see at 119A-C and 122F. He paid close attention to the detailed statutory scheme for appeals in that case.

105. Although R v Wicks was not a case where it was held that a statutory appeal was the exclusive method of challenge, I agree with the Claimants that it is a helpful authority. Applying the approach of Lord Hoffmann in that case to the present case, the question is whether the Decision was a decision by the OFT for the purposes of the 1998 Act and/or whether the parts of the Decision which imposed penalties were penalty notices within sections 36 and 37. I consider that there could not be any challenge to the formal validity of the relevant parts of the Decision; as a matter of form, the relevant parts of the Decision complied with the requirements specified in section 36(6). The fact that they might have been open to revocation or variation if there had been a statutory appeal, is on Lord Hoffmann's approach, irrelevant. The fact is that they have not been revoked or varied.

106. The Claimants suggested that their submissions were advanced by the distinction drawn by Lord Nicholls in R v Wicks between a notice which was in terms which were not authorised by the statute being relied on and a notice which was not validly given, because the public body giving the notice was motivated by immaterial considerations and/or gave the notice for an unauthorised purpose (see at 104D-E). It was accepted in that case that it would have been open to Mr Wicks to challenge the validity of the notice on the ground that it was in terms which were not authorised by the relevant statute. Accordingly, the Claimants submit that there will be certain decisions or notices made or given under the 1998 Act which can be challenged otherwise than by way of a statutory appeal; such a course would be possible where the notice relied upon by the OFT was in terms which were not authorised by the 1998 Act. Although R v Wicks was not a case where the statute allowed for a full merits appeal extending to judicial review grounds, I will assume that even in the context of the 1998 Act there could be a case where a penalty notice could be challenged on such a ground, without the recipient having to appeal the notice. I can see how it might be said that if the penalty notice did not satisfy the formal requirements for such a notice it did not have to be challenged by way of appeal, but it could simply be ignored. However, in the present case, the statutory requirements authorising the imposition of a penalty have been complied with. I have described the Claimants' challenges to the penalty notices in this case. I consider that all of those challenges come within the second category identified by Lord Nicholls. Although Lord Nicholls used the words *ultra vires* to describe his first category and although those words are sometimes used in other contexts to describe any decision which is liable to be set aside on judicial review grounds, that is plainly not what Lord Nicholls meant. Lord Nicholls defined his first category as applying to cases where the notice was "in terms not authorised by the statute": see at 104D. In relation to challenges on other grounds, Lord Nicholls agreed with Lord Hoffmann that they could not be put forward by Mr Wicks in the criminal proceedings; the notice in that case was "an enforcement notice" because it was formally valid and had not been set aside: see 109D-E.

107. The present case is stronger than was the case for the public authority in R v Wicks. In that case, the provisions for a statutory appeal were not exclusive as they did not prevent the bringing of a claim to judicial review. Mr Wicks failed not because he had failed to bring a statutory appeal but because he had failed to seek judicial review.

108. Bunney v Burns Anderson plc is an example of a case which, the judge held, came within Lord Nicholls' first category, in that a direction given by an ombudsman was in terms which were not authorised by the relevant statute. That ground of challenge could not have been made the subject of an appeal. It could have been raised by way of judicial review but it did not have to be so raised.

109. In the alternative to the wider submission, the Claimants put forward what I have called the narrower submission, which relies on the fact that parts of the Decision were successfully appealed by persons other than the Claimants. The short answer to this submission is that the outcome of the appeals by others is at the present time irrelevant to the position as between the Claimants and the OFT.

110. There is no provision in the 1998 Act which has the effect that a decision by the Tribunal in relation to an appeal by another person brought in relation to the Decision of the OFT is of direct application to other addressees of the Decision. Further, there

is no general principle of public or private law which gives the Tribunal's decision that effect.

111. As to the position under the 1998 Act, there is no provision which would have allowed the Tribunal to revoke or vary the penalties imposed on the Claimants when the Claimants did not appeal to the Tribunal against those penalties. The decisions of the Tribunal in relation to the appeals which were brought were necessarily confined to dealing with the position of those persons who appealed in relation to the Decision.

112. The Claimants submitted that in public law, where an act or a decision by a public body is quashed on judicial review, the quashing of the act or the decision can have a direct effect on persons who were not parties to the judicial review proceedings. I can see that it is possibly the case that if an aggrieved person challenged a bye-law and the court quashed the bye-law then the effect of that decision could be for the benefit of others who were later prosecuted under that bye-law; they could point to the fact that the bye-law had been quashed and so could not be relied upon as against them.

113. Whether that is so or not, I cannot accept that every judicial review decision is of direct benefit to everyone else who might have brought (but did not bring) a similar claim to the claim in which the decision to quash is actually made. Take the example of a planning authority which has a policy as to how it approaches applications for the grant of planning permission. The planning authority has consistently applied that policy and has granted, say, five planning permissions. A person aggrieved by one of those permissions challenges that permission and succeeds on the ground that the planning authority's policy is unlawful in public law. The court hearing that challenge will quash that planning permission but will not quash the other four which have not been challenged in those, or any other, court proceedings. Those other four planning permissions remain extant unless there is a later challenge which is permitted to be brought and that later challenge succeeds on the same grounds as the first challenge.

114. Apart from these comments in relation to cases involving judicial review, the general position is that a decision of a court is binding on the parties to the case before the court but not on others who are not parties.

115. Of course, if the Claimants had themselves appealed in time to the Tribunal and their appeals had been heard after the decision of the Tribunal in Kier, then it is to be expected that the Tribunal would have applied the same general principles to the Claimants' appeals as it had done in Kier. Further, after the decision of the Court of Appeal in Interclass Holdings Ltd v Office of Fair Trading [2012] EWCA Civ 1056, the ratio of that decision would have been binding on the Tribunal. Conversely, in a case where the Claimants did not appeal, the decision of the Tribunal in Kier is not relevant in these ways.

116. The present case is not the first case in the competition context where a decision has been made to the effect that a large number of persons have infringed competition law and have been penalised, where some but not all of those persons have appealed, where the appeals have succeeded and the question has been raised as to the status of the decision in relation to those who did not appeal. This was the position in AssiDoman Kraft Products AB v Commission of the European Communities [1999] ECR 1-5363. That case concerned a decision by the European Commission which held that there were infringements by a number of persons on whom penalties were

imposed. Some of those persons, but not others, successfully appealed to the relevant court which set aside the findings of infringement relating to those parties and also the penalties imposed on them. Thereafter, others who had not originally appealed contended that the findings against them should be set aside also. It was held that the successful appeals which had been brought did not affect the position of those who had not appealed. This decision was applied in Galp Energia Espana SA v European Commission, Case T-462/07, unreported and by the Supreme Court in Deustche Bahn AG v Morgan Advanced Materials plc [2014] UKSC 24.

117. The Claimants submitted that these decisions all concerned decisions by the European Commission, followed by appeals to the relevant court, and that the position was different in relation to a decision of the OFT, followed by appeals to the Tribunal. The OFT countered by submitting, amongst other things, that section 60 allowed the court to reach the same conclusion in relation to a decision of the OFT. The Claimants disputed that contention as to the effect of section 60.

118. In my judgment, it is not necessary in the present case to rely on section 60 to reach the conclusion that a successful appeal by one person against a penalty imposed by the Decision has no bearing on the penalty imposed by the Decision on the Claimants who have not appealed. I consider that that proposition is plainly right and is not contradicted by the 1998 Act nor by any principle of public or private law. Even if the three cases to which I have referred do not in terms establish this proposition in relation to a decision of the OFT, they do nothing to contradict it or to cause me to doubt it.

119. I also draw attention to the approach taken in Fish Holdings Ltd v Office of Fair Trading [2009] CAT 34 and in R G Carter Ltd v Office of Fair Trading [2011] CAT 25, now supported by Office of Fair Trading v Somerfield Stores Ltd [2014] EWCA 400. If the Claimants are right that they can in some way take advantage of the successful appeals brought by others against the Decision, even without themselves appealing the Decision, I would have expected that proposition to have been of major significance in relation to those cases also, but the proposition is nowhere mentioned. The assumption in those cases plainly was that (absent a successful appeal by Fish Holdings Ltd and R G Carter Ltd) those parties remained bound by the Decision, even though others had successful appealed it. Indeed, the extent to which the statutory scheme would be undermined is shown by the fact that (if the Claimants were right) Fish Holdings Ltd and R G Carter Ltd would also now be free to claim restitution of the penalties imposed on them, even though the Tribunal held that they should not be allowed to appeal the Decision. Accordingly, I conclude that the narrower submission adds nothing to the wider submission made by the Claimants.

120. Having considered the statutory scheme and the Claimants' submissions I can now reach my conclusion. I conclude that the prima facie position I have described above is indeed the effect of the statutory provisions applied to the facts of this case. A statutory appeal was the exclusive method of challenge available to the Claimants. In the absence of a statutory appeal by them, they remain bound by the Decision and by the penalties imposed on them. Accordingly, those Claimants who have paid the penalty imposed on them are not able to challenge such penalty by bringing a common law claim for its restitution. Lindum, which has not paid the full amount of the penalty imposed on it, remains liable to pay the outstanding amount.

121. My conclusion can also be expressed in the following way. The Claimants cannot, consistently with the statutory scheme, establish the ingredients of a claim in restitution, based on the principle in Woolwich. To bring such a claim, the Claimants would have to establish that the penalties were unlawfully exacted. The Claimants cannot say that the penalties were unlawfully exacted when they were imposed under a statutory scheme which, in the events which have happened, has resulted in those penalties being binding on the Claimants. It is therefore lawful for the OFT to receive payment of those penalties. It is also lawful under the scheme for the OFT, in reliance on section 37 in particular, to recover any unpaid penalty.

122. Further, I do not see how the OFT could (as the Claimants submit), consistently with the statutory scheme, make a second decision imposing another penalty on any of the Claimants. Section 36 allows the OFT to impose a penalty. The OFT has done so by the Decision. That Decision has not been revoked or varied under the only permissible route for a revocation or variation of a penalty. The OFT is therefore *functus officio*. It does not have a statutory power to make a second decision. This reasoning is supported by In re 56 Denton Road, Twickenham [1953] Ch 51 and R v Ministry of Agriculture Fisheries and Food ex p Cox [1993] 2 CMLR 917. The Claimants submit that the OFT has a general power to rescind its decision and make a second different position at any time. The Claimants say that this general power is unfettered save that the OFT may not act contrary to legitimate expectations which it has created. The Claimants say that in this case none of the Claimants could rely upon a legitimate expectation to prevent the OFT making a second decision and imposing a different penalty. I do not accept that submission. It is contrary to the two cases referred to above.

Other matters

123. Earlier in this judgment, I summarised the Woolwich principle and how it applied. The propositions which I have set out may be relevant to one type of case which was identified by the Claimants. The Claimants asked what would happen in a case where a party, upon whom a penalty had been imposed, paid the penalty but then appealed to the Tribunal (possibly having obtained an extension of time for such appeal) and the appeal against the penalty was allowed, so that the original penalty was revoked or reduced? Would that party be entitled to recover the earlier payment (where the original penalty was revoked) or the excess of the original penalty over the reduced penalty (where the penalty was reduced) and, if so, pursuant to what legal mechanism?

124. The first possible answer to the Claimants' question is that the Tribunal may well have an incidental power to order the OFT to repay the appropriate sum to the successful appellant. I recognise however that there is no express provision in schedule 8 which spells this out. If the Tribunal did not have such a power, then the above propositions would seem to allow the successful appellant to claim the appropriate sum under the Woolwich principle. In this hypothetical case, the successful appellant would not be caught by the point which is decisive in the present claims, namely, that the penalty can only be challenged by a statutory appeal. In the hypothetical case, the penalty has been successfully challenged by a statutory appeal.

125. There was extensive argument as to the relevance of the decision in Monro v Revenue and Customs Commissioners [2009] Ch 69. I take the view that that decision

is not directly relevant to the issues in this case. That case, and many others which were discussed in it, had to consider the way in which the Woolwich principle applied, if at all, in a case where the statute under which the public body had unlawfully imposed the charge or levy created a statutory right for the paying party to recover the charge or levy in certain circumstances. It will sometimes be the case that, where the statutory right to recover is subject to limitations, the implied consequence is that the statute does not permit the paying party to bring a Woolwich claim and thereby avoid those limitations. I also consider that the references in Woolwich itself (at 169H-170D, 176G, 177G, 200B and 200E) to the relevance of the underlying statutory scheme were directed to that type of issue, rather than the issues in this case. The point which was considered in those cases is not directly raised in the present case because the 1998 Act does not give to the paying party a statutory right (limited or otherwise) to recover the penalty. However, the decision in Monro may have a less direct relevance in so far as it shows that a particular statutory scheme may by implication exclude other forms of action (in particular a Woolwich claim) where that action would be incompatible with the terms of the scheme. I take the same view as to the relevance of R (Child Poverty Action Group) v SSWP [2011] 2 AC 15.

126. Finally, I do not need to deal with the OFT's suggestion that it would have a defence to any available Woolwich claim on the ground that the payment of the penalties were voluntary payments, save to say that the passages in the speech of Lord Goff in Woolwich on which the OFT relied (see at 165D-G) were statements of the law before the decision in Woolwich and they cannot be regarded as statements of the law after that decision. The relevant legal principles in this area after the decision in Woolwich are those stated by Lord Walker in FII Group Test Claimants v Revenue and Customs Commissioners [2012] 2 AC 337 at [79].

The result

127. In the result, I hold that the Claimants are not entitled at common law to claim restitution from the OFT of the penalties which they earlier paid. In relation to Lindum, where the full amount of the penalty imposed has not been paid, Lindum remains liable to pay the outstanding amount and that amount can be recovered by the OFT pursuant to section 37. In the absence of an appeal by Lindum against the penalty, it is not now open to Lindum to defend such proceedings by raising points which might have been available to Lindum by way of an appeal against such penalty. I will dismiss the claim.