Neutral Citation [2009] CAT 33

IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1144/4/8/09 (IR)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

4 December 2009

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

WM MORRISON SUPERMARKETS PLC

Proposed Applicant

- v -

COMPETITION COMMISSION

Proposed Respondent

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JUDGMENT ON INTERIM RELIEF

APPEARANCES

Mr. Michael Fordham QC and Mr. Meredith Pickford (instructed by Gordons LLP) appeared for the proposed Applicant, Wm. Morrison Supermarkets plc.

Mr. Ewan West (instructed by the Treasury Solicitor) appeared for the proposed Respondent, the Competition Commission.

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Linklaters LLP) appeared for J. Sainsbury plc.

Mr. Mark Hoskins QC and Mr. Julian Gregory (instructed by Freshfields Bruckhaus Deringer LLP) appeared for Tesco plc.

THE PRESIDENT:

1 The applicant, Wm. Morrison Supermarkets plc ("Morrisons"), applies *ex parte* on notice for interim relief pursuant to Rule 61 of the Tribunal's Rules. The application was lodged yesterday on 3rd December 2009, but a draft application was faxed to the Tribunal on the afternoon of 2nd December. The Tribunal indicated that it would list a hearing at 3.30 pm on 3rd December and required Morrisons forthwith to notify the proposed Respondent, the Competition Commission, and the interested parties Tesco plc ("Tesco") and J. Sainsbury plc ("Sainsbury"), of that hearing and to supply them with such documents as were being supplied to the Tribunal. All those parties appeared at the hearing through counsel. The hearing lasted until nearly 7 pm, and I take this opportunity to thank the Tribunal's staff for all their assistance in enabling us to sit until then.

2 The application for interim relief is made in support of a proposed application for judicial review under subsection 120(1) of the Enterprise Act 2002. The draft of the proposed application challenges the Commission's decision notified to Morrisons on 20th November 2009 to approve Sainsbury as the purchaser of a site for a supermarket at 78 Uxbridge Road, Slough. That site was acquired by Tesco several years ago, and was the subject of a merger reference made by the OFT to the Competition Commission in April 2007 under the relevant provisions of the 2002 Act. On 28th November 2007 the Commission published its statutory report on that reference, concluding that the acquisition of the site by Tesco was a relevant merger situation under s.23 of the Act and that that situation had resulted, or may be expected to result, in a substantial lessening of competition ("SLC") in the relevant market. The Commission also found that it should take action to remedy the SLC and any adverse effects which it caused, and for that purpose there should be a divestiture remedy as described in the report.

3 On 23rd April 2009 the Commission made an order ("the Order") giving effect to that divestiture remedy. Under the Order the process for identifying a purchaser of the site was conducted in three stages. First, there was an assessment of the suitability of potential purchasers. The factors taken into account were that the candidates should be independent of Tesco, should be free of competition concerns, and should be capable of operating a competitive grocery store so as to restore the level of competition in the Slough area that would have existed absent the merger. The criterion of freedom from competition concerns

is defined in the Order as attributable to a retailer whose operations of a store at the site will not itself significantly lessen competition among large grocery stores in the Slough area. To verify this requires a detailed assessment by the Commission. However, the Order provided that a retailer who is not already present in the Slough area in a very large grocery store would be regarded as "free from competition concerns". If, however, a retailer was already present it could still be regarded as satisfying that criterion depending on the circumstances, which would be examined by the Commission.

4 The first stage assessment took place in July 2009 and three candidates passed the test and were invited to submit bids explaining why each considered its proposal to be such as would effectively remedy the SLC, this being the criterion at the second stage. The three candidates concerned were Asda, Sainsbury and Morrisons. As I have said, the second stage concerned an assessment of how effectively a bidder would remedy the SLC. For this the assessment took account of, for example, the bidder's likely trading success and its preference for certain methods of exploiting the trading opportunities on the site, etc. The Order states that if the Competition Commission considers that two or more bids achieve an equally comprehensive solution to the SLC (a "comprehensive solution", so far as reasonably and practicably possible, is what is required under the statutory provisions), then the Commission will give Tesco the choice of which of the bids to accept.

5 Final bids were submitted on 9th October. The Commission decided that the bids of Morrisons and Sainsbury would provide an equally effective remedy for the SLC and also, this being the notional third stage, that neither the bid of Morrisons nor that of Sainsbury was wholly unreasonable. So, in accordance with the terms of the Order, by letter of 5th November 2009 the Commission offered Tesco the choice of which of the two bids to accept. On 16th November 2009, Tesco notified the Commission that it elected to accept Sainsbury's bid. On 18th November Tesco received a letter from the Commission stating that Sainsbury had been approved as the purchaser and directing Tesco to use its best endeavours to exchange contracts for the sale of the freehold of the site and also for the related sale of certain share capital, within three working days, and to complete the contracts within ten working days after exchange. Three working days after that notification would take one to 23rd November 2009. On that date Tesco and Sainsbury duly exchanged contracts in compliance with the Commission's requirement and in accordance

with an undertaking given by Tesco, Sainsbury and Morrisons to which I will refer again in a moment. Completion is due at 1 p.m. on Monday, 7th December.

6 Mr. Fordham QC, who represents Morrisons, seeks by this application to prevent that completion taking place. He submits that it will be sufficient for this purpose for the Tribunal to grant interim relief suspending the Commission's decision notified to Tesco on 18th November approving Sainsbury as a purchaser. Once that order is suspended, he submits, Sainsbury and Tesco will not be entitled to proceed to completion. Neither Mr. West, who represents the Commission, nor Mr. Hoskins QC, who represents Tesco, nor Miss Rose QC, who represents Sainsbury, suggests otherwise. It therefore appears to be common ground that if I made the order sought no completion could take place. However, none of the parties was sure what would be the position if, after interim relief had been given, either the vendor or the purchaser were to serve a notice to complete on the other pursuant to the standard terms and conditions to which the sale agreement is admittedly subject. The contractual notice period is ten days with the option of recission of the contract on failure to complete. Mr. Fordham's solution to this was to suggest that if a notice was served the Tribunal would just have to decide the case within the ten day period. Just before I began to give this Judgment Miss Rose indicated that her clients would be happy to give an undertaking not to serve such a notice.

7 As I have mentioned, Morrisons have not yet lodged any application for judicial review under s.120 of the 2002 Act. I am told that the application has not been finalised because the reasons for the challenged decision have not yet been provided to Morrisons by the Commission. A reasoned decision was requested by Morrisons, through their solicitors, in a letter before action to the Commission on 27th November 2009, and in that letter the Commission were asked to produce the reasons by 5 p.m. today, 4th December. The Commission have indicated that they will comply with that request. In addition to the draft notice of application, the letter before action of 27th November contains a fairly detailed account of what might well be contained in an actual application if one were to be lodged.

8 There are two strands of argument discernible from those documents: one, which is contained in the summary at the beginning of the draft application, in essence asserts that the Commission has failed to have regard to relevant considerations and has misdirected itself as to its statutory obligations in deciding that a sale to Sainbury achieved an equally

comprehensive solution to the SLC as would a sale to Morrisons. In this regard the draft application points particularly to the fact – if it be fact – that Sainsbury already has two stores in the Slough area, whereas Morrisons has none. Mr. Fordham indicated that this would be the nub of the challenge. I will call this ground "Ground 1". The second discernible strand of argument which actually takes up most of the body of the draft grounds, is not so much a comparative point as between the merits of Sainsbury and Morrisons, as a challenge to the ability of a sale to Sainsbury fully to restore the competition lost as a result of Tesco's original acquisition of the site, and a challenge to the finding by the Commission that the sale to Sainsbury would not raise serious competition concerns. I will call that "Ground 2".

9 Mr. Fordham submits that these grounds are clearly arguable, and he points to the fact that as yet the reasons for the decision of 18th November have not been seen by Morrisons. He submits that without interim relief the sale will complete on this Monday so that if the Tribunal ultimately quashed the Commission's decision there would still be a completed sale transaction. None of the other parties suggested otherwise than that this would cast doubt over the utility of the proposed application for judicial review.

10 It is not disputed that in an appropriate case the Tribunal has the power under Rule 61 to grant the interim relief sought and to do so in advance of the commencement of a substantive challenge. Under that Rule the Tribunal must take account of all relevant circumstances, including the urgency of the matter, the effect on the party concerned if relief is not granted, and the effect on competition if the relief is granted.

11 Morrisons has already indicated in correspondence that it was not prepared voluntarily to offer a cross undertaking in damages to the other parties in respect of the interim relief sought. Before me, Mr. Fordham argued that in the light of *dicta* of the Tribunal in *Genzyme v Office of Fair Trading* [2003] CAT 8, at paragraphs 129 to 130, the Tribunal either had no power to make interim relief conditional on the giving of a cross undertaking or it ought not to exercise any such power. In that the case the Tribunal was dealing not with a judicial review under s.120 of the 2002 Act, but an appeal under the Competition Act 1998. Moreover, as Miss Rose pointed out, in the passages relied upon by Mr. Fordham the Tribunal was indicating that it did not consider it was in a position to order a cross undertaking from the intervener in that case. The intervener there was not the person

seeking interim relief but rather the person who would be adversely affected if the interim relief sought by Genzyme were to be granted. In other words, the Tribunal was indicating that it could not order the intervener to give an undertaking to repay any reduction in price (which price reduction was one of the conditions upon which the Tribunal was prepared to grant Genzyme the interim relief it sought) against the possibility that Genzyme succeeded in its substantive challenge. That situation has no bearing on the one with which the Tribunal is faced here. Neither do the passages in *Napp v Director General of Fair Trading* [2001] CAT 1 shown to us by Mr. Fordham bear on the position here. In that case it was Napp who was seeking an interim suspension of the Director General's decision, therefore the remark at paragraph 39 that the *Director General* was not "obliged to offer any cross undertaking in damages" has no bearing on whether the Tribunal could or should make interim relief conditional on such an undertaking being given by the person seeking the interim relief. In fact the later passage in the *Napp* judgment at paragraph 50 confirms that such a cross undertaking is entirely appropriate, and that in the particular case Napp's offer of a cross undertaking was a decisive factor in the Tribunal agreeing to make an interim order by consent.

12 The grant of interim relief is always a matter of discretion and in the exercise of that discretion the Tribunal must be in a position to take account of all relevant considerations. One such circumstance is likely to be whether or not a cross undertaking in damages has been offered by the party who is seeking the interim relief. This does not mean that interim relief will necessarily be refused where such an undertaking is not offered, nor that the relief will necessarily be granted where it is offered, but the existence or absence of an offer is a factor which should be treated as relevant, and in an appropriate case the Tribunal is entitled to indicate that it will grant the relief sought only if an undertaking is given.

13 It is also pertinent to bear in mind that in applications for review under section 120 of the 2002 Act the Tribunal is required by subsection 120(4) to determine the application by applying the same principles as would be applied by a court on an application for judicial review. Whether or not that should be taken as covering the principles relating to interim relief as well as substantive grounds of review, it seems to me that the Tribunal should certainly have regard to the approach of the courts in the application of judicial review. This approach was explained by Lord Walker of Gestingthorpe in *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment & Anor*

[2003] WLR 2839 at paragraphs 37 to 38, and by Mr. Justice Auld (as he then was) in *R v Darlington Borough Council* (High Court, QBD Crown Office List) 12 January 1994 at page 9. It is to the effect that in public law matters, as in private litigation, where the grant of interim relief may have adverse financial implications for a party – or even for a non-party – consideration should normally be given to making the relief conditional on the offer of a cross undertaking. Later in the hearing yesterday Mr. Fordham modified his argument about a cross undertaking and indicated that if the Tribunal were minded not to grant relief without such an undertaking then his clients were prepared to offer one to the other parties.

14 The Commission, Tesco and Sainsbury took slightly different approaches to the application for interim relief. The Commission, through Mr. West, for whose skeleton argument I am very grateful, opposes the application for relief unless Tesco and Sainsbury were to consent to it. In essence he argues that the draft grounds disclose no reason for the decision in question to be set aside, and that the application for interim measures has been made late in the day and at a time when Tesco and Sainsbury are on the point of completing the sale. Morrisons has known about the timetable for divestiture for a long time, yet has delayed in bringing forward their challenge and their application for interim relief. It is far from clear, he submits, that Morrisons would suffer serious and irreparable damage if interim relief were not granted. The balance lies in favour of denying interim relief, as the potential harm to the interests of Tesco, Sainsbury and the Commission outweighs any that may be caused to Morrisons.

15 Tesco also opposes interim relief. Mr. Hoskins submits that the Tribunal should approach this case as it would a permission hearing on a judicial review in the Administrative Court, and should have regard to the fact that the grounds of challenge are out of time. In his submission they could and should have been brought as long ago as July 2009 when the Commission held that Sainsbury's bid was "free from competition concerns". He argues that everything which is contained in the draft application could have been brought as a challenge at that time. On that basis Morrisons' challenge, if lodged, would be out of time given that any challenge must be brought within four weeks of the grounds arising, and I should so hold. That, he submits, would also dispose of the application for interim relief.

16 In relation to such relief, Mr. Hoskins makes a separate point by a reference to the timing of certain events as follows. On 18th November Morrisons was told that its bid was not

successful. On 20th November it was told that Sainsbury was the successful bidder. Whereas the Order originally provided that Tesco would be required to use best endeavours to exchange contracts for the site within twenty working days of the Commission's approval of the purchaser and to complete within ten days thereafter, there was provision in the Order for a variation of the timescales. Pursuant to that a change was incorporated in the draft sale and purchase agreement submitted and signed by all the potential purchasers who had passed stage 1, including Morrisons. This was done on about 9th October. The change was to the effect that the exchange of contracts was now to be carried out, subject to best endeavours, within three days of notification of approval by the Commission; the completion was still to be within ten days thereafter. It follows that Morrisons knew on 20th November that Tesco and Sainsbury would be proceeding to an exchange of contracts within a very short time. What happened then was that Morrisons did not communicate with any of the interested parties until a week later on 27th November when, through its solicitors, it wrote the letter before action to the Commission to which I have referred. That letter indicated that Morrisons knew well that exchange had taken place by then and that completion was imminent. The letter sought the Commission's views on the correct legal course open to Morrisons, including the option of interim relief. It asked whether the Commission considered the power existed in relation to interim relief. It asked the Commission to provide the reasons for their 18th November decision by 5 p.m. today. It also asked the Commission not to disclose the contents of the letter to Tesco and Sainsbury and, indeed, to keep it entirely confidential, and the Commission complied with this request. As a result the first that Tesco knew of Morrisons' proposed challenge to the Commission's decision, or of its application for interim relief, was when Tesco's employees saw a fax from Morrisons' solicitors on the morning of 2nd December – the day before the hearing in the Tribunal. That fax had been sent to Tesco at about 9.30 p.m. the previous evening and so was not seen until the next morning.

17 In these circumstances Mr. Hoskins argues that Morrisons had stood back and allowed Tesco and Sainsbury to exchange contracts. Morrisons' applications, both substantive and interim, have caused legal uncertainty and prejudice to Tesco and Sainsbury. Mr. Hoskins also submits that Morrisons' delay in bringing forward the substantive challenge would cause prejudice if it proceeded: if Morrisons succeeded in quashing the Commission's decision and excluding Sainsbury from the site ownership, and if there was then a re-run of the bidding process, Asda would no longer be a bidder. It would therefore be a one horse

race to Tesco's obvious prejudice. No cross undertaking could protect Tesco, so Mr. Hoskins submits, from that damage as it pre-supposed a Morrisons' win in the substantive challenge, and the only way to avoid the loss was to preclude such a challenge altogether. All in all Mr. Hoskins opposed the grant of interim relief with or without a cross undertaking.

18 In relation to Mr Hoskins' argument, just before giving this Judgment I was supplied with a copy of a letter written by Morrisons' solicitors to Tesco's solicitors containing confirmation of an assurance apparently given orally after the hearing, that if the substantive application were to be successful and the Commission's decision were quashed, Morrisons would give an undertaking to purchase the site and the share capital at not less than Morrisons' original bid price.

19 Miss Rose for Sainsbury took a different approach. It emerged during oral argument that while entirely supporting Mr. Hoskins' submission that the substantive challenge would be out of time and should be rejected, her client would be content with interim relief being granted if there were a cross undertaking in damages and an expedited hearing of the substantive challenge. Sainsbury was anxious about the uncertainty which would be caused by a substantive challenge going ahead once they had completed the sale; for this reason Miss Rose, whilst not exactly supporting Morrisons' application, leaned towards interim relief which would prevent completion until a substantive challenge had been resolved.

20 I must bear in mind that I have only an interim application before me. Mr. Hoskins' submission alleging delay in bringing a substantive challenge may have some force, particularly in relation to proposed Ground 2 which depends essentially on the unsuitability of Sainsbury rather than on any comparison between Sainsbury and Morrisons. It may be that when all the facts are ascertained it will emerge that that Ground could have been brought at any time after July 2009. However, on the basis of a hastily arranged hearing to deal with interim relief it would be wholly inappropriate for me to attempt to reach any conclusion on that issue, and I am not to be taken as expressing any view, particularly when no grounds have yet been lodged, there is only a draft application, and the Commission's reasons have not yet been seen.

21 The contents of the letter before action and the draft application contain arguments which could conceivably have merit and I therefore approach interim relief on the basis that there is likely to be a ground of challenge which is properly arguable. The normal *Cyanamid* approach (see *American Cyanamid v Ethicon Ltd* [1975] AC 396), which applies with certain modification also in public law cases, would be then to consider whether in the absence of interim relief – and if Morrisons were to succeed in its challenge – Morrisons would suffer loss or damage for which damages would not be an adequate remedy. As to this, it is probably correct that in the absence of interim relief the sale will complete, and that might well have a bearing on the utility of Morrisons' proposed substantive challenge to the Commission's decision. If the Commission's decision were later to be quashed in circumstances where there was already a completed transfer to Sainsbury there might be some uncertainty as to what would then ensue. That would to some extent depend upon the Tribunal's judgment on the substantive issue, since quashing relief is often accompanied by a direction to the decision-maker to make a new decision in accordance with the Tribunal's judgment. Nevertheless, I am prepared to assume for present purposes that without interim relief a win for Morrisons in the substantive application would be less likely to produce a result which would enable Morrisons to have a second bite at the cherry than if interim relief were granted. For example, the Tribunal might, in its discretion, refuse to quash the Commission's decision given that the sale would now be completed. Should that occur Morrisons cannot, I accept, be compensated for any loss resulting. They have no cause of action to obtain financial relief in those circumstances. Of course, it is far from clear that, even if interim relief were granted, Morrisons won the case, the Commission's decision were quashed and the existing contract were somehow rescinded, Morrisons would gain financially. Other purchasers might enter the ring if there were a re-run of the bidding process or Morrisons might make a bad bargain by buying the site; it is all extremely speculative. Nevertheless, I assume again in Morrisons' favour that there may be some loss to Morrisons which would not be recoverable in the absence of interim relief.

22 As against that, as I have already explained, Morrisons is prepared to offer a cross undertaking to the other parties which would be likely to compensate them for losses they might suffer by the delay in completing the purchase pending the resolution of the proposed substantive application. Those considerations militate in favour of the grant of interim relief.

23 However, there are other factors to be considered as well. In particular it is a fundamental principle that an applicant for interim relief should not sit on his rights but should raise his challenge and any application for interim measures as soon as practicable. It is also very important that those who may be affected by such an application should be put on notice so that they can consider their position and take such steps to protect themselves as may be advised. By its application for interim relief Morrisons is seeking to disrupt a property transaction between two private companies who have been subject to, and have complied with, a lengthy regulatory procedure. More importantly, Morrisons has allowed those companies to alter their position by entering into a legally binding contract for the sale of the site. Morrisons has done this by failing to notify Tesco and Sainsbury of its potential challenge at the earliest opportunity. Indeed it went so far as to request the Commission to keep the information from those companies. Moreover, Morrisons was fully aware that unless Tesco and Sainsbury were notified at the earliest opportunity they would almost certainly change their position by exchanging contracts. If Morrisons had notified them that would have given them the option not to proceed to exchange contracts, or to approach the Commission for some change in the mandatory time frame. Morrisons has not really explained why it waited seven days, by which time exchange of contracts would have been virtually bound to have taken place, before even writing to the Commission, or why when it did so it wanted to keep the information secret from the parties most intimately affected by the intended challenge.

24 Mr. Fordham ventured the possibility that Morrisons did not wish to provoke the thing it sought to avoid, namely completion of the sale, but in my view that is not a justification. An interim order can be obtained extremely quickly and even without notice where the circumstances justify such action. Nor, as the present application shows, would it have been necessary to formulate and lodge the substantive application before coming to the Tribunal for such an order. In my view, to leave Sainsbury and Tesco in ignorance of what was intended from 20th November to 2nd December is unacceptable.

25 I am required to consider the effect on competition of making an order, and I assume that I should also consider the converse. In either case I do not consider this factor to be determinative in the present matter. As far as the converse is concerned, which is perhaps the more relevant in the present circumstances, namely the effect on competition of not granting relief, Mr. Fordham urges that if the substantive claim is established the sale to

Sainsbury will be detrimental to competition. Without pre-judging the substantive issue one must bear in mind that after a careful inquiry the Commission identified an SLC caused by Tesco's acquisition of the site in question and considered that divestiture by Tesco was an appropriate remedy to deal with that SLC. That decision has not been challenged by anyone. Morrisons does not suggest that a purchase by Sainsbury would render the SLC worse than before; it would be hard to justify such an assertion given the unchallenged findings of the Commission at a much earlier stage of the process.

26 In these circumstances I do not consider that not to make an order for interim relief, even if that means that a successful substantive challenge by Morrisons is less likely to result in the unscrambling of the sale to Sainsbury, would be so detrimental to competition that its possibility would lead me to make an interim relief order which I would not otherwise make in the exercise my discretion. I have also considered Sainsbury's anxiety about the residual uncertainty which might result from a substantive challenge where there has not been interim relief to prevent completion of the sale, but I cannot see this as a good reason to grant interim relief which is not otherwise appropriate and which is opposed by other affected parties. Accordingly, in my view, interim relief to suspend the Commission's decision is not appropriate and the application is refused.

MR. HOSKINS: It is probably not me next, but I keep tending to jump up. I would like to extend our gratitude obviously to the Tribunal and to you, Sir, for dealing with this in such short order. I would like to apply for my costs as well.

MISS ROSE: We would also like to apply for our costs. Obviously we devoted most of our energy to having to deal with the refusal to offer the cross undertaking which involved considerable work on our part, and was found to be misconceived.

MR. WEST: Sir, and if I may say so, we too would make an application for costs, probably not in the same order as my learned friends.

MR. FORDHAM: We cannot resist those orders.

THE PRESIDENT: I will make an order that the costs of the Commission, Tesco and Sainsbury of and relating to the interim relief application be paid in any event, such costs to be subject to a detailed taxation unless agreed.