Neutral citation [2010] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1145/4/8/09

Victoria House
Bloomsbury Place
London WC1A 2EB

22 January 2010

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
MICHAEL BLAIR QC

Sitting as a Tribunal in England and Wales

BETWEEN:

STAGECOACH GROUP PLC

Applicant

- v -

COMPETITION COMMISSION

Respondent

RULING ON APPLICATION TO REJECT THE NOTICE OF APPLICATION

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1. The Tribunal has before it an application dated 14 December 2009 by the Respondent ("the Commission") asking the Tribunal to reject, in whole or in part, the Notice of Application filed by Stagecoach Group plc ("Stagecoach") on 8 December 2009 ("the Appeal").

2. The Appeal is brought by Stagecoach under section 120(1) of the Enterprise Act 2002 ("the Act"). This section provides that any person aggrieved by a decision of the Commission in connection with a merger reference may apply to the Tribunal for a review of that decision. The decision in issue here is set out in the Commission's Report on the acquisition by Stagecoach of Preston Bus Limited ("PBL") published on 11 November 2009 ("the Report"). The Commission found that the acquisition by Stagecoach may be expected to result in a substantial lessening of competition ("SLC") in the market for the supply of commercial bus services in the Preston area. The Commission further concluded that the only effective remedy for that SLC would be a divestiture by Stagecoach of a reconfigured PBL. In considering this application the Tribunal sits as a Tribunal in England and Wales.

3. The relief sought by Stagecoach in the Appeal is a declaration, a quashing of the decision and a remittal of the decision back to the Commission for further consideration. The Notice of Application states in paragraph 3 that Stagecoach is not seeking interim relief from the Tribunal to suspend the effect of the Report:

> "…. Stagecoach will seek to find a commercial purchaser for the business pending the outcome of this appeal in accordance with the remedy imposed by the Decision. Stagecoach wishes to make it clear that this commercial decision is without prejudice to its fourth ground of challenge [namely that the divestiture remedy imposed was unlawful] and that it reserves its position on this issue in the event that the Decision is quashed and remitted to the [Commission]."

4. At the end of the Notice of Application, Stagecoach states at paragraph 100:

> "As explained in the introduction to this Notice, Stagecoach has decided, as a commercial matter and so as to avoid the considerable expense and delay of a further administrative procedure before the [Commission], to seek to implement the remedy imposed by the [Commission] in the Decision by divesting itself of the reconstituted PBL business. It follows that Stagecoach does not seek an interim order pursuant to section 120(3). Stagecoach will of course keep the CAT fully

> informed of its progress in this respect, and reserves its rights in relation to the remedy in the light of the outcome of this application."

5. Section 120(3) of the Act, referred to in that paragraph provides that:

> "Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application".

6. These indications that Stagecoach is preparing to go ahead with the divestment of the PBL business pending the determination of the Appeal have prompted the Commission's application to reject the Notice. The application is governed by Rule 10 of The Competition Appeal Tribunal Rules 2003 (S.I. No. 2003 of 1372), the relevant part of which provides:

> "**Power to reject**
>
> 10. - (1) The Tribunal may, after giving the parties an opportunity to be heard, reject an appeal in whole or in part at any stage in the proceedings if –
>
> (a) it considers that the notice of appeal discloses no valid ground of appeal;
>
> …"

7. That rule applies to proceedings under section 120 of the Act by virtue of Rule 25. Further, Rule 28(4) provides:

> "The Tribunal's power to reject an appeal under rule 10 includes a power to reject an application for review if it considers that the applicant is not a person aggrieved by the decision in respect of which a review is sought."

8. The Commission argues that because Stagecoach has made it clear that it intends to sell the PBL business for its own commercial reasons, it makes no difference how the Tribunal determines the grounds set out in Stagecoach's Notice. The Appeal is therefore "moot" or hypothetical. Because of this, Stagecoach is not "a person aggrieved" by a decision of the Commission within the meaning of section 120(1) of the Act and Rule 28(4). Forcing the Commission to defend a case where the outcome is "entirely academic" is, the Commission argues, an inappropriate use of public resources.

9. The Commission also relies on two other Rules. It invites the Tribunal to find that there is "no valid ground of appeal" within the meaning of Rule 10(1)(a) of the

Tribunal's Rules and argues that Rule 19(1), which confers broad case management powers, enables the Tribunal to strike out these proceedings. As regards these two additional points, in our judgment, there are clearly valid grounds of appeal in this case in that each of the four grounds put forward by Stagecoach raises a point which is at least arguable. We do not consider that the requirement in Rule 10(1)(a) that a ground of appeal is "valid" requires the applicant to show in addition that the ground has what the Commission describes as a "practical point". We also reject the suggestion that the Tribunal's case management powers under Rule 19 extend to declining to entertain an appeal brought by a person with legal standing where the appeal raises valid grounds of appeal. Rule 19 does not confer a general discretion to strike out an appeal. We do not read the Tribunal's *Guide to Proceedings* or the authorities cited by the Commission in its submissions as containing any indication to the contrary. The sole issue raised by the Commission's current application is, therefore, whether Stagecoach is a "person aggrieved" within the meaning of section 120(1) of the Act and Rule 28(4).

10. The Tribunal's unanimous conclusion is that Stagecoach is a person aggrieved by the Commission's decision. It is clear from the case law of the courts and the Tribunal that that term should be given a broad meaning. Lord Denning, for the Privy Council, in *Attorney-General of the Gambia v N'Jie* [1961] A.C. 617, at 634 said:

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

11. More recently in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36 at [42] the Tribunal said in construing section 120(1) of the Act that:

> "… it would be undesirable to interpret "person aggrieved" in this context in such a way as to limit the possibility of challenge to a merger decision by shutting out those with a less immediate connection to the subject-matter of the dispute than, for example, competitors in the market place but who may well also be adversely affected, albeit in a different way."

12. In our judgment it is difficult to conceive of a situation where the parties to a merger which the Commission has decided results in an anti-competitive outcome (within the meaning of section 35(2) of the Act) would not be persons aggrieved by that decision. In this case we have no doubt that Stagecoach falls within the class of persons entitled to challenge the decision under section 120.

13. During the course of the Commission's investigation, Stagecoach was bound by interim undertakings which it had originally given to the Office of Fair Trading. Under those undertakings, Stagecoach undertook not to integrate any further the PBL business into its own business and not to sell the PBL business without the prior written consent of the Office of Fair Trading. On 2 June 2009, shortly after the merger had been referred to the Commission, the Commission adopted those undertakings as interim undertakings pursuant to section 80(3) of the Act. Those interim undertakings remained in force at the date of the Report and bind Stagecoach, in effect, not to sell the PBL business without the consent of the Commission.

14. Despite the way Stagecoach's Notice of Application has been worded (see paragraphs 3 and 4 above), the Report under section 35(1) of the Act does not itself immediately impose any order prohibiting or requiring any action. According to section 35(3) of the Act once the Commission has arrived at a decision that a merger results in an anti-competitive outcome:

(a) the Commission must go on to consider whether any action should be taken for the purpose of remedying, mitigating or preventing the SLC resulting from the merger: see section 35(3) of the Act;

(b) it must then take such action under sections 82 or 84 as it considers to be reasonable and practicable to remedy the SLC: see section 41 of the Act;

(c) according to section 82, the Commission may accept undertakings from the parties to take action to remedy the SLC, having followed the consultation process prescribed by section 90 of and Schedule 10 to the Act;

(d) according to section 84, the Commission may make final orders restricting conduct in the manner described in Schedule 8 to the Act, again having followed the consultation process prescribed by section 90 and Schedule 10.

15. The Act therefore envisages that an adverse report under section 35(1) will be followed by a lengthy procedure before the appropriate remedy is finally set in place. During that procedure the interim undertakings adopted by the Commission in June 2009 remain in place.

16. As already mentioned, section 120(3) of the Act provides that "the effect of the decision is not suspended by reason of the making of the application" unless the Tribunal otherwise directs. The Commission's submissions amount to an argument that where the Commission concludes that there is an SLC and that action should be taken to remedy this, the parties to the merger are only "aggrieved" if they couple their application for review under section 120(1) with an application under section 120(3). We do not agree that this is the right construction of the section. A party to a merger which has been the subject of an adverse report under section 35(1) does not lose its right to apply for a review simply because it is prepared, pending the determination of that application, to abide by the interim undertakings to which it remains subject and to cooperate with all or part of the post-decision process envisaged by sections 35(3), 41, 82 and 84 of the Act. Similarly it cannot be right that, where an applicant does apply for suspension under section 120(3) and Rule 61, the Tribunal deprives that applicant of its legal standing under section 120(1) if the Tribunal rejects the application for suspension.

17. Further, we accept Stagecoach's submission that it is a person aggrieved because the terms upon which it negotiates the sale of the PBL business are different depending on whether the divestment takes place against the background of the Commission's findings or not. The Commission has recently published a Notice of a proposal to accept final undertakings from Stagecoach under section 82 which will apply to the disposal of the PBL business. They include:

(a) a time limit within which Stagecoach must agree Heads of Terms for an effective disposal of the business and a further time limit within which the disposal must take place;

(b) the requirement that the Commission approve the final reconfiguration of the business to be sold and a list of the elements of the PBL business which must be included in the package;

(c) the requirement that the business is disposed of only to a purchaser approved by the Commission;

(d) provisions for the appointment by Stagecoach of various people to oversee the operation and sale of the PBL business including a Monitoring Trustee, a Hold Separate Manager and, if so directed by the Commission, a Divestiture Trustee; and

(e) a general obligation on Stagecoach to comply with such reasonable directions as the Commission may issue from time to time as regards the disposal.

18. In our judgment the placing of such conditions on Stagecoach as a result of the Commission's Report means that Stagecoach is a person aggrieved. Although it is pursuing the sale "as a commercial matter", Stagecoach's bargaining position as against any potential purchaser is clearly affected by the Commission's adverse decision and the conditions that are proposed for the final undertakings. If Stagecoach had a free hand in deciding how, when and to whom to sell the PBL business, the reconfigured package making up the business might well be different in size and shape from the kind of package that the Commission would be prepared to approve. Not only the process of arriving at the disposal but also the content of the business disposed of and the terms and conditions upon which the sale takes place are likely to be affected by the undertakings accepted or orders made by the Commission.

19. In light of that conclusion, the Tribunal hereby unanimously dismisses the Commission's application.

Vivien Rose Andrew Bain Michael Blair

Charles Dhanowa
Registrar Date: 22 January 2010