Neutral citation [2009] CAT 32

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1116/4/8/09

Victoria House
Bloomsbury Place
London WC1A 2EB

14 December 2009

Before:

LORD CARLILE OF BERRIEW Q.C. (Chairman)
ANN KELLY
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

SPORTS DIRECT INTERNATIONAL PLC

Applicant

-v-

COMPETITION COMMISSION

Respondent

- supported by -

OFFICE OF FAIR TRADING

JJB SPORTS PLC

Interveners

REPRESENTATION:

Mr. Mark Brealey Q.C. and Ms Maya Lester (instructed by Berwin Leighton Paisner LLP) appeared on behalf of the Applicant.

Mr. John Swift Q.C., Ms Elisa Holmes and Mr. Paul Stuart (instructed by Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Daniel Beard and Ms Fiona Banks (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Office of Fair Trading.

Mr. Paul Harris (instructed by Herbert Smith LLP) appeared on behalf of JJB Sports plc.

Hearing date: 4 December 2009

JUDGMENT (Prematurity)

I INTRODUCTION

1. By a Notice of Application dated 18 November 2009 the Applicant, Sports Direct International plc ("Sports Direct") applied, pursuant to section 120 of the Enterprise Act 2002 ("the Act") for judicial review of the decision of the Respondent, the Competition Commission ("CC"), made on 16 November 2009 ("the Decision") in the course of its investigation into the completed acquisition by Sports Direct of 31 stores from JJB Sports plc ("JJB") ("the Acquisition").

2. Having considered requests by the Office of Fair Trading ("OFT") and JJB to make redactions to "working papers" which would be sent to Sports Direct, the CC concluded in the Decision that certain information should be redacted and that therefore Sports Direct should not be provided with un-redacted versions of those working papers, at least at that stage of the CC's investigation. The question was whether it did so lawfully.

3. The Tribunal's power of review is set out in section 120 of the Act as follows:

> "(1) Any person aggrieved by a decision of the … Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.
>
> …
>
> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may –
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
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> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

4. In the Notice of Application, the Applicant sought an order from the Tribunal under section 120(5) of the Act quashing the Decision and directing the CC to disclose the material redacted from the working papers to Sports Direct and to give it two weeks to

comment on the material, both in writing and at an oral hearing. By the time of the hearing, however, Sports Direct simply requested the Tribunal to quash the Decision and refer the matter back to the CC with a direction to reconsider and make a decision in accordance with the Tribunal's ruling.

5. In view of the urgency of the matter the Tribunal fixed a case management conference ("CMC") on 20 November 2009 to determine the directions for hearing the matter with expedition. A contentious issue ventilated at the CMC concerned whether Sports Direct had brought this Application prematurely. The CC and the OFT each submitted that the Decision was not "ripe" for review under section 120(1) of the Act. The disputed redactions were made to working papers produced by the CC. At the time the Application was lodged, the CC stated that no provisional or final decision had been taken in relation to merits of the Acquisition. The question of whether or not the Application was premature was stood over to be determined prior to the substantive issues at the main hearing.

6. The Notice of Application annexed a witness statement by Mr. Michael Oliver, Company Secretary of Sports Direct, and other supporting materials including Sports Direct's submissions to the CC prior to the making of the Decision. Pursuant to the Tribunal's Order of 20 November 2009, the Defence was filed and served on 30 November 2009, together with a witness statement by Mr. Mark Bethell, an Inquiry Director at the CC who has overall managerial responsibility for the Sports Direct/JJB inquiry ("the Merger Investigation"). The OFT and JJB were granted permission to intervene in Sports Direct's application, and filed statements in intervention in support of the CC's position on 30 November 2009. The OFT's statement of intervention annexed two witness statements by Mr. Stephen Blake, a Director in the Cartels and Criminal Enforcement Group at the OFT. One was provided to all parties; the other was a more detailed and confidential statement which was only provided to the Tribunal in a sealed envelope to remain unread unless and until the OFT was called upon to address it in submissions. Sports Direct did not serve a Reply as such, but lodged evidence on 1 December 2009 in the form of a second witness statement from Mr. Oliver. Skeleton arguments were supplied by all parties except the OFT by 2 December 2009, and the main hearing was held on 4 December 2009.

7. The Tribunal ruled that Sports Direct's application was not premature and stated that the reasons would be provided in writing at a later date. These are the reasons for that decision. As a result of our ruling the CC withdrew the Decision and indicated that it would reconsider the matter in the light of all relevant circumstances available to it at the time of taking a new decision.

8. We are very grateful to all concerned for co-operating with the Tribunal so promptly, and to the parties' legal teams for their helpful written and oral submissions.

II BACKGROUND AND LEGAL FRAMEWORK

9. Before dealing with the parties' contentions in more detail, it is necessary to briefly describe the factual background and legal framework.

10. Both Sports Direct and JJB sell sports clothing, equipment and footwear to consumers in stores located across the UK. Both companies have previously been found to have been involved in price-fixing agreements in breach of the Chapter I prohibition (see *JJB Sports plc & Anor v Office of Fair Trading* [2004] CAT 17, upheld on appeal [2006] EWCA Civ 1318).

11. Sports Direct and JJB are involved in three separate investigations, all of which were relevant to the present Application. They are as follows:

    (a) *The Cartel Investigation*: it is a matter of record that the OFT is conducting an investigation into a suspected unlawful agreement or concerted practice between Sports Direct and JJB to dampen competition in the sports retail market. This is a civil investigation carried out under Part 1 of the Competition Act 1998.

    (b) *The Fraud Investigation*: the Serious Fraud Office ("SFO") is carrying out an investigation into suspected offences under section 188 of the Act, the Fraud Act 2006, and the common law conspiracy to defraud. This is a criminal investigation carried out under the Criminal Justice Act 1987.

(c) *The Merger Investigation*: the CC is currently investigating the completed acquisition by Sports Direct of 31 stores from JJB. This is a civil investigation carried out under Part 3 of the Act.

12. We summarise the Merger Investigation and the events giving rise to the Application below. There is no need for us to say anything more about the pending Cartel or Fraud investigations since the Decision has now been withdrawn.

The Merger Investigation

13. Between 5 November 2007 and 1 December 2008 Sports Direct acquired 31 retail outlets from JJB and thereby completed the Acquisition. The OFT became aware of the Acquisition through an own-initiative investigation by the Mergers Intelligence Unit in December 2008. The OFT subsequently concluded that the Acquisition had resulted, or may be expected to result, in a substantial lessening of competition in markets in the UK. On 1 May 2009 the OFT decided to suspend its duty to refer the Acquisition to the CC while it considered whether to accept undertakings in lieu. However, on 7 August 2009 the OFT found that Sports Direct had been unable to find a suitable purchaser in a timely manner and therefore decided to refer the Acquisition to the CC. On the same day, the OFT published the terms of reference which, so far as material, states:

> "Therefore, in exercise of its duty under section 22(1) of the Act, the OFT hereby refers to the CC, for investigation and report within a period ending on 21 January 2010, on the following questions in accordance with section 35(1) of the Act –
>
> (a) whether a relevant merger situation has been created; and
>
> (b) if so, whether the creation of that situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services."

14. Should it answer the above questions in section 35(1) affirmatively the CC is required by section 35(3) of the Act to decide the following questions:

> "(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition;
>
> (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition

> concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and
>
> (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented."

15. In reaching any conclusions under section 35(3) of the Act, the CC is obliged by section 35(4) "in particular [to] have regard to the need to achieve as comprehensive a solution as is reasonable and practicable" to the substantial lessening of competition and any resulting adverse effects, and to comply with the requirements of section 41. It is clear that the questions to be decided in relation to completed mergers (contained in section 35 of the Act) are the statutory functions which the CC is (and will be) exercising in respect of the Acquisition. It would be vital to have these functions in mind when considering the circumstances in which the CC may disclose 'specified information' where disclosure is otherwise prohibited by the Act.

16. The Merger Investigation formally began on 7 August 2009, when the CC invited evidence and sent standard form questionnaires to Sports Direct and various third parties, including JJB. In his witness statement on behalf of the CC, Mr. Bethell described the three phases of a typical merger reference: (1) investigation, information-gathering and analysis; (2) discussion and agreement by the Group of provisional findings and publication of these provisional findings, on which the CC is statutorily required to consult pursuant to section 104 of the Act; and (3) making final findings, a remedies decision (if necessary) and publication of the report under section 38 of the Act.

17. We were told that the CC is nearing the end of the first phase of the Merger Investigation, i.e. it has gathered evidence from the parties and has begun to analyse that evidence. On 8 September 2009 the CC published an Issues Statement; this document identified the main lines of inquiry which the CC is likely to consider. The first phase typically includes a hearing with each of the main parties. Mr. Bethell explained that hearings are usually held with one party to the investigation at a time and are held in private. The party concerned is given an opportunity to make opening remarks and closing submissions. The hearings are said to be non-adversarial; they are intended to provide an opportunity for the party to answer questions from the Group on the matters contained in the Issues Statement. The CC has published guidance in

accordance with section 106(3) of the Act, entitled *General Advice and Information* (CC4, March 2006) ("CC4"), which describes hearings in the following terms:

> "Hearings provide the members with an opportunity to explore in depth the key issues in an investigation, and to raise questions arising from the party's written submission and answers to the questionnaire. Companies or their representatives are expected to be able to answer the CC's questions about matters arising in the investigation including those raised in the statement of issues. Hearings are not conducted in an adversarial fashion, but rather in the spirit of gaining a sound understanding of the issues raised in the investigation."

18. A hearing was scheduled to take place between the CC and Sports Direct on 24 November 2009. Sports Direct attached great importance to the hearing before the CC issues its provisional findings. In view of the Application, however, the hearing was vacated. There has been intense discussion between Sports Direct and the CC about whether or not a hearing will take place before the CC issues its provisional findings.

19. Prior to any hearing the CC staff normally prepares a series of working papers. An issue that sharply divided the parties was the nature and purpose of these papers. According to Mr. Bethell working papers are "internal papers which analyse the information provided in response to questionnaires and given in hearings." They each consider a different topic of analysis – e.g. rationale for the transaction, market definition – in order to assist the members of the CC Group constituted to decide a merger reference. Mr. Bethell emphasised that the papers do not reach firm findings; the CC Group can "approve, dismiss or ask for further work to be done or modifications to be made" to the papers. The CC's Rules of Procedure 2006 (CC 1) – made pursuant to paragraph 19A of Schedule 7 to the Competition Act 1998 – do not require working papers to be provided to parties during a merger reference.

20. In his second witness statement Mr. Oliver, on behalf of Sports Direct, took issue with Mr. Bethell's characterisation of the working papers. In his view the working papers in respect of the Acquisition are expressed so as to refer to "conclusions" and "views", which are said to be unfavourable to Sports Direct and are likely to be incorporated in the CC's provisional findings. It was for this reason that Sports Direct considered that it is seriously prejudiced by its inability to consider and respond to the redacted information.

21. However both parties appeared to accept that working papers are prepared to assist the members of the CC Group responsible for the merger reference and enable them to make "informed decisions" (CC4, paragraph 6.15). It was also common ground that there are three reasons why the CC habitually 'puts back' the working papers to the parties to an investigation, namely to:

    (a) ask the party to verify the factual accuracy of information being relied upon by the CC;

    (b) ascertain whether the party considers any of the information in the papers is confidential and to provide reasons why it should not be disclosed; and

    (c) invite the party to make any representations on the method and analysis contained in that paper.

22. In this case, the CC also consulted the OFT to see if it wished to make representations on whether information in the working papers should be withheld on 'public interest' grounds.

23. There are six working papers on the Acquisition which are relevant to the present Application and which are summarised below:

    (a) *Transaction working paper* – explains the Acquisition, including its legal aspects, events leading up to and surrounding the Acquisition, the sale process, and each party's rationale for the Acquisition.

    (b) *Counterfactual working paper* – identifies what would likely have happened in the absence of the Acquisition. The competitive effects of the Acquisition are then assessed against this counterfactual.

    (c) *Coordinated Interaction Analysis working paper* – discusses whether the Acquisition led to an increase in the likelihood of coordinated interaction between the merging parties.

(d) *Entry and expansion working paper* – looks at whether entry or expansion could be sufficient to replace any loss of competition arising from the Acquisition.

(e) *Market definition working paper* – looks at the relevant market for the analysis of the competitive effects of the Acquisition.

(f) *Unilateral Effects working paper* – a copy of this paper has not been provided to the Tribunal or Sports Direct, but is likely to discuss the competitive effects which occur when a merger enhances the ability of the merged firm to exercise market power independently (see, to that effect, paragraph 3.28 of the *Merger References: Competition Commission Guidelines* (CC3, June 2003)).

Legal framework

24. Before going any further it is important briefly to set out the legal framework which applies to the way the CC handles and discloses information during a merger reference. The CC is subject to a statutory duty to consult, common law duties of fairness, and a statutory scheme governing the disclosure of information. In addition the CC must have regard to the guidance it has published in accordance with 106 of the Act, in particular CC4.

25. Section 104 imposes a duty on the CC to consult in certain circumstances and, so far as material, provides:

> "(1) Subsection (2) applies where the relevant authority is proposing to make a relevant decision in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party.
>
> (2) The relevant authority shall, so far as practicable, consult that party about what is proposed before making that decision.
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> (3) In consulting the party concerned, the relevant authority shall, so far as practicable, give the reasons of the relevant authority for the proposed decision.
>
> (4) In considering what is practicable for the purposes of this section the relevant authority shall, in particular, have regard to
>
> (a) any restrictions imposed by a timetable for making the decision; and

(b) any need to keep what is proposed, or the reasons for it, confidential.

(5) The duty under the section shall not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of this Part for consultation before the making of that decision."

26. The effect of section 104 is that, if it proposes to decide the questions in section 35(1) or (3) of the Act, the CC is required to consult the party adversely affected, giving the CC's reasons for the proposed decision, so far as practicable. In the context of merger references the duty to consult applies to decisions on the competition and remedies questions. The CC normally consults the parties on its proposed decisions on the competition questions through the publication of provisional findings. A similar consultation process takes place in respect of its proposed decisions on remedies (see CC4, paragraphs 3.6, 6.20 and 6.22).

27. The common law rules of natural justice underpin the above statutory framework. It was not in dispute that the CC is subject to general principles of procedural fairness and that it must act fairly in conducting its inquiries (see e.g. Moses J in *Interbrew SA v Competition Commission* [2001] EWHC 367 (Admin), at [82]-[90]). Given the interests at stake, the fair conduct of a merger reference generally requires a party to know what evidence has been given and what statements have been made affecting it, and then it must be given a fair opportunity to respond or correct them. However, what is fair in relation to a particular process, and to a particular situation which is subject to that process, self-evidently depends on the facts of the case (see Mann J in *R v Monopolies and Mergers Commission ex parte Elders IXL Ltd* [1987] 1 W.L.R. 1221, at 1233).

28. Part 9 of the Act contains restrictions and conditions for disclosure of certain information held by public authorities. Part 9 contains a general restriction on the disclosure of "specified information" which is set forth in section 237(1). Section 238(1) provides that information is specified information for the purposes of section 237 if it comes to a public authority in connection with the exercise of any function it has under or by virtue of, *inter alia*, Part 3 of the Act ('Mergers'). Section 238(3) contains a definition of "public authority"; the CC is a public authority within this definition.

29. Section 245(1) of the Act makes it a criminal offence to disclose information to which section 237 applies (unless permitted by one of the exceptions in Part 9). Sections 239 to 243 of the Act set out various "gateways" through which a public authority may disclose specified information. They include consent of the party concerned (section 239), but of particular relevance to this case is the gateway contained in section 241(1) which provides:

> "A public authority which holds information to which section 237 applies may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of this Act or any other enactment."

30. By section 244 a public authority must have regard to three considerations before disclosing any specified information within the meaning of section 238(1). The first consideration is the need to exclude from disclosure any information whose disclosure the authority thinks is contrary to the public interest. The second consideration is the need to exclude from disclosure: (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests. The third consideration relates to the extent to which the disclosure of the information in these two aforementioned categories is necessary for the purpose for which the authority is permitted to make the disclosure.

31. In the light of that legal framework, it is now necessary to retrace our steps slightly in order to consider in a little more detail the events that led to the Decision.

Events leading to the Decision

32. In his witness statement Mr. Bethell explained that he was contacted by a member of the Cartels branch of the OFT soon after the Acquisition was referred to the CC. This contact, together with publicly available information concerning the OFT's Cartel Investigation and the SFO's Fraud Investigation at the time, led the CC to approach the circulation of information between the parties with caution. As a result, before sending copies of the CC's working papers to Sports Direct, the CC contacted the OFT to discuss the implications of the OFT's Cartel Investigation for the CC's handling of information in the Merger Investigation.

33. On 26 October 2009 before sending copies to Sports Direct, the CC sent the draft versions of the Transaction and Counterfactual working papers to the OFT. This gave the OFT an opportunity to make representations on whether information in those papers should be withheld on 'public interest' grounds, i.e. whether disclosure of that information would create a real risk of prejudicing the ongoing Cartel Investigation. The OFT initially requested that the whole of the Transaction working paper should be redacted, but subsequently agreed with the CC that a partially redacted version could be provided to Sports Direct. Corresponding redactions were then made to the Counterfactual working paper. A similar process was repeated on 12 November 2009 in respect of the Coordinated Interaction Analysis and National Analysis working papers.

34. At the same time as liaising with the OFT, the CC invited JJB to comment on the factual accuracy of the Transaction and Counterfactual working papers and indicate whether they contained any information which should be redacted on the grounds of commercial confidentiality. As explained in its statement of intervention, JJB requested that certain information should be redacted on the basis that disclosure would significantly harm its legitimate commercial interests. The CC acceded to its request.

35. On 30 October 2009 the CC sent the Transaction and Counterfactual working papers to Sports Direct in their redacted form.

36. The legal advisers to Sports Direct promptly objected to the nature and extent of the redactions made to both working papers. Sports Direct was concerned that the redactions meant that it was unable to analyse or challenge the views contained in the working papers. Sports Direct also said that it was unable to assess the accuracy of the information on which those papers were based. Sports Direct therefore asked the CC on several occasions to provide it with un-redacted copies of the Transaction and Counterfactual working papers. It initially asked the CC orally at a meeting on 10 November 2009 and then repeated its request in correspondence, by e-mail, on 13 and 16 November 2009.

37. On 10 November 2009 Sports Direct raised its concerns about the redactions in a meeting with the CC staff. It is common ground that the CC explained that some of the

redactions were to protect the confidentiality of JJB's commercial information, while others were made at the request of the OFT because of the relationship between the Merger Investigation and the Cartel Investigation. Mr. Oliver, in his second witness statement, disputed Mr. Bethell's recollection that the CC had also stated that it was satisfied that no prejudice was caused to Sports Direct by making these redactions since the Merger Investigation was still at its initial phase.

38. Following further written requests by Sports Direct for disclosure of the redacted passages, the CC subsequently provided it with revised versions of the Transaction and Counterfactual working papers (along with four other papers mentioned in 23 above). The revised versions were provided on 16 November 2009 and contained some previously redacted information.

39. In a letter accompanying the enclosed working papers, the CC wrote to Sports Direct and responded to various points it had raised about the CC's procedures. The CC first explained that, at this stage of the Merger Investigation, it had not reached any conclusions on the statutory questions it has to answer. That being so the purpose of a hearing originally fixed for 24 November 2009 was not for Sports Direct to respond to the case against it (as Sports Direct had claimed), but to assist the CC Group to understand the merger and the effects of the merger on competition. The letter then referred to the working papers and stated that they concern various aspects of the ongoing analysis. The CC then emphasised that Sports Direct would have the opportunity to respond in full when the CC publishes its provisional findings; it did not accept Sports Direct's claim that this opportunity would be inadequate.

40. On the contested issue of the redactions made to the working papers, the letter is in the following terms:

> "7. A number of the working papers contain redactions, as shown by the symbol [✂]. This conceals commercially sensitive information (and I understand you are not challenging such redaction at this stage).
>
> 8. In the case of the Transaction working paper and the Counterfactual working paper, it may also be to redact information that the OFT has requested that we do not disclose in the public interest.
>
> 9. We were asked to excise the material by the OFT, which as you know is currently considering allegations of an infringement of the Chapter I prohibition

> contained in the Competition Act 1998. Our understanding is that disclosure of the information will have an adverse effect on the OFT's investigation so that the excisions are made in exercise of the Group's discretion under section 244 (2) of the Act. In particular, the OFT has told us that disclosure of the redacted material could lead to disclosure of matters they are investigating, impeding their ability to gather evidence.
>
> 10. The Transaction paper provides background information to the merger and does not consider the effects of the merger, which is the key focus of our inquiry. Accordingly, we do not consider that this material can affect your clients' rights of defence at this stage. We do not therefore consider that your client needs to have access to it to enable it to comment on the factual circumstances of the transaction (which is what the paper is concerned with). Material redacted from the Counterfactual working paper only reflects or summarises material redacted from the Transaction paper (and is redacted for the same reason)."
>
> 8. For the reasons set out in more detail below, Sports Direct has applied to the Tribunal to review the decision of the CC to redact key information from the Transaction working paper and Counterfactual working paper."

41. This letter therefore contains the Decision which is now being challenged by Sports Direct before us.

42. According to its administrative timetable the CC is due to publish its provisional findings in respect of the Acquisition in early to mid-December. The CC is due to publish its final report no later than 24 February 2010.

III IS THE APPLICATION PREMATURE?

43. Sports Direct's challenge to the lawfulness of the Decision essentially consisted of two grounds of review:

    (a) The Decision is unfair and restricts Sports Direct's ability to comment on the working papers and its rights of defence.

    (b) The CC has failed to apply the correct test in so far as it failed to carry out the analysis which the Act requires it to carry out in considering whether to disclose the excised material.

44. The submissions of the CC and OFT (but not JJB) raised the threshold question whether the Application is premature given the redactions appear in working papers and not in any provisional or final decision. This is the only issue with which this Judgment is concerned. At this stage we have no view on the grounds of review.

Summary of the parties' submissions

45. Mr. Brealey Q.C. submitted, on behalf of Sports Direct, that the Application was not premature for three reasons: first, because the issue of prematurity simply does not arise under section 120; secondly, for reasons of public policy; and thirdly, because the decision adversely affects the ability of Sports Direct to give evidence at a hearing with the CC. Mr. Brealey submitted that the question of prematurity does not arise because Sports Direct is a "person aggrieved" by a self-standing "decision of the CC in connection with a reference in relation to a relevant merger situation" – namely, the Decision to refuse to disclose relevant and material information at a crucial stage of the Merger Investigation. The Application therefore satisfied the requirements of section 120(1). That section is not merely concerned with final decisions under Part 3 of the Act, but encompasses decisions to exercise statutory powers and duties before the decision-maker has reached any firm conclusions. Examples of such decisions include the exercise of investigation powers (section 109) or the statutory duty to consult and give reasons prior to making a final adverse decision (section 104). The requirements of natural justice and procedural fairness apply to *all* stages of a merger investigation.

46. Mr. Brealey submitted that there was a critical window of opportunity for Sports Direct to make known its views on the CC's proposed findings of fact and analysis. That window opens when the CC sends out working papers and is effectively closed (albeit not completely) when the CC publishes its provisional findings. It is therefore vital that Sports Direct is able to challenge the Decision of the CC to redact information now rather than to await a provisional or final decision. Mr. Brealey added that public policy favours transparency and fair procedures. He added that it was preferable for the Tribunal to deal with potential unfairness as and when it arises rather than for a party to wait and challenge the final decision. This is particularly important when, as here, a main party will be expected to answer questions and provide further information at a hearing before the CC.

47. Mr. Swift Q.C., who appeared for the CC, supported by Mr. Beard for the OFT, submitted that Sports Direct's challenge was premature for four main reasons. First, whether or not procedural fairness has been accorded cannot and should not be determined at this pre-provisional stage of the investigation. The CC has not made any

provisional or final findings in respect of the Acquisition: the working papers do not constitute even provisional findings. It follows that the CC has not yet taken a decision which adversely affects Sports Direct's interests, nor is such an outcome certain (since, for example, the Acquisition may be cleared). Second, it is submitted that the rights of defence in merger references are enshrined in section 104 of the Act (above), but this stage of the investigation has not yet been reached. Third, there is a danger in allowing litigious parties to make premature applications which disrupt the CC's timetable and impair its ability to report within the statutory deadline. The CC is required to make countless "decisions" in the course of an investigation, many of which will prove inconsequential, and most of which are self-evidently not of the sort that are amendable to judicial review. Fourth, the CC's powers to disclose information received during a merger reference are governed by Part 9 of the Act. The Tribunal should be slow to interfere, unless the disclosure can be shown to be of sufficient importance and at a sufficiently critical stage of the investigation to merit substantive review by the Tribunal (citing Taylor J in *R v Secretary of State for the Environment ex p Royal Borough of Kensington and Chelsea* (1987) 19 HLR 161, 174). This is manifestly not the case here.

48. JJB made no submissions on the prematurity issue although Mr. Harris emphasised that no inference should be drawn one way or the other from his client's neutrality.

The Tribunal's discussion and conclusions

49. This is the first occasion on which the Tribunal has heard an application for review of a decision of the CC refusing to disclose information to a party to a merger reference.

50. We start with the trite proposition that it is possible to apply for judicial review in respect of a decision that is not absolutely final (see e.g. Fordham, *Judicial Review Handbook*, 5th ed (2008), para 4.7.2). In the context of merger control, where there is a procedure before the CC typically involving preliminary decisions leading to a final decision affecting the parties' legal rights, judicial review under section 120 *may* lie against a preliminary decision not affecting legal rights, but which may lead to final decisions which do. Sports Direct, the CC and the OFT all appeared to accept this proposition (at least in some instances). It was, moreover, recently affirmed by Cranston J in the context of the construction industry investigation under the

Competition Act 1998, *Crest Nicholson Plc v OFT* [2009] EWHC 1875 (Admin) at [47]:

> "If enforcement authorities have wide discretion in conducting an investigation, it hardly needs to be said that they must still act with procedural fairness. It is well established that the constraints of natural justice apply to preliminary steps in an investigation, which in themselves may not involve legal consequences, but which may lead to acts or decisions which do. For example, in *Re Pergamon Press Ltd* [1971] Ch 388, 399C-H it was said that company directors had to be given an adequate opportunity to meet the criticisms of inspectors appointed by the Board of Trade, even though the object of inspection was to issue a report. In *Bushell v Secretary of State for the Environment* [1981] AC 75, 96C-E it was said that fairness required objectors to a draft scheme to be given information and reasons relied upon by the Department, even though a final decision was some way off."

51. Mr. Beard referred us to the countervailing proposition – helpfully summarised by David Elvin Q.C. in an article entitled "Hypothetical, Academic and Premature Challenges" [2006] *Judicial Review* 307 – that it is unnecessary for a party to 'jump the gun' and challenge a decision immediately because the error may be corrected during the investigation or may simply never arise. Such premature challenges would be disruptive of a fair and orderly merger investigation. This accords with the view expressed by McCullough J in *R v Association of Futures Brokers and Dealers Ltd and Another ex parte Mordens Limited* (1991) 3 Admin. L. Rep. 254. In the context of a challenge to a decision refusing disclosure of documents during an appeal against a prior decision refusing membership of the Association the Judge said, at p 264B:

> "…to come to this court too soon is in many cases to come unnecessarily. The party aggrieved by an interlocutory decision may nevertheless be satisfied by the outcome of the proceedings. A decision which, when it was made, was thought to be wrong or likely to have a significant effect on the outcome of the proceedings may, in the end, turn out to have been right or immaterial to the result."

52. These propositions do not, however, resolve the issue now before the Tribunal which is whether in respect of a challenge to a decision by the CC to refuse to disclose certain information from working papers, Sports Direct acted prematurely or whether it should have waited until (at least) the publication of the CC's provisional findings and then challenged that decision.

53. We agree with Mr. Beard that in administrative law there are no bright lines. As he reminded us, in law context is everything. The governing legislation must be the starting point. In our judgment there are three elements to an application under section

120(1) of the Act (cited above). Those elements are: (1) "any person aggrieved" by (2) "a decision of the CC" (3) "in connection with a merger reference". Sports Direct submitted that each of those elements was present: it was "a person aggrieved" by the "decision of the CC" not to disclose the redacted information "in connection with a merger reference" under Part 3 of the Act.

54. There did not appear to be any dispute about the fact that the first element was satisfied and that Sports Direct fell into the category of a "person aggrieved".

55. The meaning of the words "the decision" in section 120(1) was the subject of some argument before us. We consider that the test for what is "a decision" for the purposes of section 120(1) is simply a matter of interpreting the plain statutory wording, taken in context. This straightforward approach should ensure that otiose interlocutory skirmishes on whether there is "a decision" or not are avoided. Section 120 does not exhaustively or illustratively list the types of decision which are subject to challenge. In our judgment a decision will normally be covered by section 120(1) if it is something that could form a ground of challenge in the appeal from the ultimate decision if it were not addressed and, if necessary, remedied on an interlocutory basis. No one argued that Sports Direct could not rely on the plea of non-disclosure as a ground of review when challenging the CC's decision in a final report. However the CC, supported by the OFT, submitted that the challenge was premature and that there were good reasons for the Tribunal not to hear it now. It was said that the Merger Investigation was still at a "pre-provisional stage" and that Sports Direct should (at the very least) wait for the publication of the provisional findings.

56. In our judgment the relevant provisions of the Act do not compel such a result nor do principles of administrative law prevent a challenge to the Decision if the error is such that it would be unfair to allow the procedure to proceed in the manner envisaged. In the context of applications for review of preliminary decisions, the primary concern of the Tribunal is "whether what has happened has resulted in real injustice" (see Lord Woolf M.R. (as he then was) in *R v Lord Saville of Newdigate ex parte A* [2000] 1 W.L.R. 1855, at [43]). The CC must act fairly to the parties affected by the carrying out of their inquisitorial function.

57. We have taken particular note of the fact that the refusal of disclosure in the Decision resulted not only from the exercise of the CC's discretion as to the redaction of commercially sensitive material (something which occurs, as we understand it, fairly frequently in merger cases) but also from the redaction of certain matters on public interest grounds out of deference to the OFT. As is clear from the extract from the Decision quoted in paragraph 40 above, the OFT did not want the CC to reveal certain material because this might lead to the disclosure of matters under investigation by the OFT in its Cartel Investigation and thereby impede the OFT's ability to gather evidence as part of that investigation. This created the risk that Sports Direct might be denied access to information relevant to the Merger Investigation because of the needs of another investigation.

58. The application by Sports Direct is as to the extent of disclosure and redaction prior to a hearing of a non-adversarial kind, but one at which assertions seriously adverse to its interests were to be investigated and inquired into without Sports Direct having full knowledge of the underlying material or issues forming provisional propositions. That inquisition would include questioning of directors founded upon some assertions which they are in no position to answer or comment upon. We were persuaded that Sports Direct was, at least potentially, adversely affected by the suggested findings of fact and conclusions contained in the working papers and that real injustice could have resulted from the CC's decision to withhold material information and/or analysis supporting those findings. Whether the Decision was actually unfair would obviously depend on whether or not the CC lawfully decided that the statutory conditions for the disclosure of specified information were not met. However the CC has withdrawn the Decision so the merits of the case do not arise.

59. The principal thrust of the submissions of the CC was that it (necessarily) takes "countless" decisions in the course of any merger reference. It would be unable to fulfil its statutory duties if parties could opportunistically challenge any or all such decisions. In our judgment this "floodgates" argument was unduly alarmist. We are deciding the present case on its own facts. We are not deciding any other case. The fact that the CC has taken a decision in this case does not mean that judicial review will lie in all cases where, for one reason or another, a decision is disputed. For the avoidance of doubt, our Judgment should not be taken to imply that the substantive content of working

papers, for example, would ordinarily be subject to review. If necessary, the Tribunal will be vigilant to consider its power to reject an application if it considers that a notice of application discloses no valid ground of review or is brought vexatiously (see rule 10 of the Tribunal Rules).

60. As to the third element that the Decision was "in connection with a merger reference", this, too, appeared to be common ground by the time of the hearing. The Decision concerned the disclosure of information and the provisions of Part 9 of the Act, but was clearly made "in connection with" the Merger Investigation under Part 3.

Conclusion and disposal of the Application

61. In light of the above we unanimously decide that Sports Direct's application for review of the Decision is not premature. In view of the CC withdrawing the Decision, there is no need for us to consider Sports Direct's grounds of review.

62. At the hearing we adjourned the proceedings pending the handing down of this Judgment and the matter of costs. The Decision has now been withdrawn. The question arises as to the disposal of the Application. The Tribunal invites the parties to agree the wording of the draft order consequential upon this Judgment within 3 days. In default of such agreement, each party should, within a further period of 2 days, file its own proposed order. Following that, the Tribunal will make an order so as to give effect to the decision set out in this Judgment.

Lord Carlile of Berriew Q.C. Ann Kelly Arthur Pryor

Charles Dhanowa
Registrar

Date: 14 December 2009