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IN THE COMPETITION

Case No. 1107/4/10/08

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

10th December 2008

Before:

THE HON. SIR GERALD BARLING
(President)

MICHAEL BLAIR QC
PETER GRINYER

Sitting as a Tribunal in Scotland

BETWEEN:

MERGER ACTION GROUP

Applicants

and

**THE SECRETARY OF STATE
FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM**

Respondent

Supported by

(1) **HBOS PLC**
(2) **LLOYDS TSB GROUP PLC**

Interveners

*Transcribed from tape by
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737*

**PROCEEDINGS AFTER JUDGMENT
HANDLED DOWN**

APPEARANCES

Mr. Andrew Bowen (instructed by Mr. Walter Semple) appeared for the Applicants.

Mr. Paul Harris, Miss Elisa Holmes and Mr. Gerry Facenna (instructed by the Treasury Solicitor) appeared for the Respondent.

Mr. Nicolas Green QC and Mr. Aidan Robertson (instructed by Allen & Overy LLP) appeared for the Intervener HBOS plc.

Miss Helen Davies QC and Mr. Andrew Hanshaw (instructed by Linklaters LLP) appeared for the Intervener, Lloyds TSB Group plc.

1 THE PRESIDENT: Good afternoon. Can I just say how we are going to proceed? There are
2 copies of the judgment which we are about to hand down available, there are probably only
3 enough available for the lawyers, but for the reasons that I will indicate in a moment we are
4 going to take a short break during which we will make some more copies, and so there will
5 be other copies available after that break.

6 Has anyone any observations to make about the time of closing of the Stock Market? As far
7 as we understand it, it is almost certainly shut now, therefore that is something that is
8 achieved.

9 Before we hand the judgment down we make a direction that any application for permission
10 to appeal should be made to us orally after the short retirement that we propose to make and
11 we will give our decision on that orally straightaway. I think those are all the preliminary
12 matters.

13 For the reasons set out at length in the judgment which is being handed down now, the
14 Tribunal unanimously decides as follows:

15 (a) The Applicants are “persons aggrieved” within the meaning of section 120(1)
16 of the Enterprise Act 2002; and

17 (b) The Applicants’ application under section 120 of the Act is dismissed.

18 Can I just make sure before we do retire that there are going to be some applications for
19 permission because otherwise we do not need to waste time retiring while you read it.

20 MR. BOWEN: Sir, I will use the opportunity to take instructions on whether or not there is to be
21 an application for leave to appeal.

22 THE PRESIDENT: Obviously people need to have a chance to cast their eyes over it and so we
23 will take 15 minutes. I hope that will be long enough for you to read it and also for us to
24 obtain some more copies of it.

25 MR. HARRIS: Sir, there is the issue of costs as well.

26 THE PRESIDENT: We are not minded to deal with the issue of expenses today. I think mainly
27 because of the lateness of the hour and the fact that I assume there are going to be
28 submissions from more than one person on that. What we would propose to do in relation
29 to expenses, if at all possible, is to avoid another hearing and to deal with submissions in
30 writing. Perhaps that is another thing you could just have a think about over the short break
31 we are going to have now, and obviously any observations as to whether there ought to be
32 another short hearing on expenses – we are in Scotland now, remember! (Laughter)

33 MR. HARRIS: It slipped my mind, I am sorry.

34 THE PRESIDENT: Or we can do it in writing so we will just retire for 15 minutes.

1 (Short break)

2 THE PRESIDENT: I am sorry that I have not given you very much reading time. Are we in a
3 position to know whether there are any applications for permission? Mr. Bowen, yes?

4 MR. BOWEN: My instructions are to seek leave to appeal against the Tribunal's decision, but on
5 the very restricted basis that the Tribunal made an error in law in relation to its decision that
6 the Secretary of State was not fettered by the comments made by the Prime Minister. It is
7 simply with reference to the findings in para.73 of the decision where the Tribunal
8 essentially concludes that it is fair to observe that the Government was in favour of the
9 merger.

10 THE PRESIDENT: I do not know whether your microphone is working. I cannot quite hear you,
11 Mr. Bowen.

12 MR. BOWEN: Thank you, Sir. It is simply in the light of the Tribunal's findings in para.73.

13 THE PRESIDENT: Paragraph 73, yes.

14 MR. BOWEN: It is the definition of the real question in para.76 as to whether or not there had
15 been a failure to exercise discretion independently; and then finally the Tribunal's
16 conclusion that there was simply no merit in the point whatsoever.
17 Sir, that is simply the submission in relation to permission to appeal.

18 THE PRESIDENT: Thank you, Mr. Bowen. Any other applications for permission?

19 MR. HARRIS: Sir, the situation is that the Secretary of State would resist that application.

20 THE PRESIDENT: We need not trouble you on that.

21 MR. HARRIS: I am grateful. Depending upon the outcome, if permission were to be granted on
22 that ----

23 THE PRESIDENT: You would like to apply now contingently so that ----

24 MR. HARRIS: I can either apply now contingently or we can await to hear the Tribunal's
25 decision on the application that has just been made, in which case there is no application
26 from the Secretary of State.

27 THE PRESIDENT: Shall I deal with this application first, and then you can make your mind up.

28 MR. HARRIS: I am grateful.

29 (For judgment see separate transcript)

30
31 MR. HARRIS: Sir, I am very much obliged and on behalf of the Secretary of State can I thank
32 the Tribunal most sincerely for the extreme expedition with which it has been able to deliver
33 this decision. It is very much appreciated and I am sure those remarks will be echoed by my
34 learned friends.

1 THE PRESIDENT: We are very grateful to you, Mr. Harris, for those kind words. I think we for
2 our part would like to thank the legal teams and all the parties for the help that you have
3 given us.

4 We would also like to thank the CAT staff who have played a huge role in enabling us to
5 get the judgment out as quickly as it has been got out.

6 Two other points occur to me while you are on your feet, Mr. Harris. You are presumably
7 going to be in a position, should the applicants renew their permission application, to renew
8 your own, are you, in the Court of Session? I have not thought it through. Is it better if you
9 get it dealt with here, so that you are clear of us, as it were?

10 MR. HARRIS: First of all, can I echo as well the thanks to the Tribunal's staff. We are
11 extremely obliged to them as well.

12 There are three matters that I now raise very briefly, and I will take that one first, which is
13 the question of what happens next. The other two are just a short remark about expenses.
14 Sir, my instructions are, for reasons that are not entirely clear to me, I do formally wish to
15 make an application for permission on the question of standing. In that regard, may I just
16 simply invite the Tribunal's attention to the paragraph at the end of that section of the
17 decision, para.46: "... the Applicants' standing is borderline" and on that ground alone I
18 would invite the Tribunal to conclude that there would be a real prospect of success of
19 appealing. Plainly, of course, I pray in aid as well that the Tribunal has found that this is a
20 wholly exceptional case. This, so far as I am aware is the first time that this has been dealt
21 with in great consideration and detail.

22 I would also suggest that it is an odd case and, as the Tribunal itself points out, the
23 applicants have made, and I quote here again from para. 46: "... no real effort ... to
24 confront the evidential task of establishing their standing ..." such that, although it is
25 recorded in the decision at subparagraphs (a) to (f) on para. 44 that there are certain things
26 that are claimed, it would at least be open, in my respectful submission, to the Court of
27 Session to take a different view as to whether or not it had in fact been established. For
28 those reasons briefly I would invite this Tribunal to give permission on the question of
29 locus.

30 THE PRESIDENT: We will just deal with that quickly.

31 (The Tribunal conferred)

32 (For judgment see separate transcript)

33

1 MR. HARRIS: I am much obliged. That just leaves just the short matters: the question of
2 expenses which I ventilated before the short break. I understand from my learned friend for
3 the applicants that he is content for that to be dealt with in writing. The Secretary of State
4 would have preferred, had it been possible, to deal with it today, not least of all because the
5 expenses are fairly substantial – on our side alone they are over £60,000 and no doubt the
6 interveners have some bills as well. It is also true to say that a letter was written on Friday
7 of last week inviting the applicants ----

8 THE PRESIDENT: We heard about that.

9 MR. HARRIS: -- to withdraw.

10 THE PRESIDENT: It was in the newspapers. (Laughter)

11 MR. HARRIS: Again, you are one ahead of me, Sir. But, in any event, those are the sorts of
12 things that will be ventilated, serious and substantial costs, and they ought no doubt to
13 weigh upon the minds of the applicants in considering their next step.

14 That takes me on to the second matter which I may take very briefly subject, of course, to
15 my learned friend clarifying the position. The Secretary of State would welcome in open
16 court a firm and clear indication from the applicants about what they propose to do now. It
17 had been our understanding that they were prepared to take urgent steps tomorrow were
18 they ultimately to take a decision to seek permission – or “leave” I believe it is called – in
19 the Court of Session; indeed, to do so within 24 hours was the message I got shortly before
20 coming into court. For our own part, and whilst we plainly do not invite this Tribunal to
21 give directions in that regard – there is probably no jurisdiction to do so – nevertheless we
22 are all here and in these urgent circumstances it would be welcome opportunity now, I
23 respectfully submit, for my learned friend to explain precisely what this situation is so that
24 there is clarity all around.

25 I say that, not least of all, because one thing that has occurred to the Secretary of State’s
26 team, and those of the interveners, is that a sensible course would be, come what may, to put
27 in papers to the Court of Session tomorrow such that reading-in can begin, because firm
28 indications on this side are that the Friday date remains available and capable of being used
29 for an appeal – should one proceed. Then, if my learned friend ultimately decides later
30 tomorrow that he does not wish to pursue it, or wishes to withdraw from it, then that could
31 be done. But what would be most unfortunate and, with respect I would submit, not
32 consistent with the remarks of Mr. Forrester in the transcript at the end of day one – if I may
33 just briefly remind those present of what they were. I quote here from p.55 at the end of day
34 one that the applicants would:

1 “... fully co-operate in the event that an appeal by either side were to be
2 necessary.”

3 What would be most unfortunate is if a decision were not even taken until so late in the day
4 tomorrow to seek leave that the Friday date goes by the wayside simply because there is not
5 sufficient time.

6 In summary, what I am inviting, subject of course to the Tribunal being willing to make use
7 of this opportunity, is for my learned friend to clarify exactly what it is that he now
8 proposes to do, and to clarify exactly how he intends fully to co-operate in the event that he
9 wishes to make a leave application to the Court of Session.

10 THE PRESIDENT: Mr. Harris, I think, to use a Latin expression, we are *functus officio* of them
11 apart from questions of costs, but if Mr. Bowen is prepared to tell you anything I am sure
12 that we do not object to him telling you at this stage.

13 MR. HARRIS: I raise it partly because the word that was used to me, albeit second or third hand,
14 was an “undertaking”. This would be an appropriate forum in which to give an undertaking.
15 Whether it went via the Tribunal, I am not sure it is technically possible.

16 THE PRESIDENT: I am not sure it is technically possible. Mr. Bowen, is there anything you
17 want to say in the light of what Mr. Harris has said? I am not sure you need to.

18 MR. BOWEN: Sir, we will discuss it with Mr. Harris. There is obviously the issue also of
19 whether the Secretary of State would wish to appeal. Maybe we need to discuss both
20 matters.

21 THE PRESIDENT: I think what you should do is take the opportunity, quite frankly, of having a
22 chat while you are all here. I do not think there is any point in us being involved in it. I
23 think, apart from expenses, we have done our bit now.

24 MR. HARRIS: There is just one other matter that just arises in relation to expenses. In the event
25 that my learned friend is going to take any point as regards expenses that requires evidence
26 – for example, impecuniosity, I merely speculate – then that is the sort of thing, we would
27 submit, that ought to be done pursuant to directions from the Tribunal. I am sure we are
28 capable of reaching agreement, but since we are all here it may be that the Tribunal would
29 wish to give a direction about ----

30 THE PRESIDENT: What I was going to say is, we will give a direction in due course as to how
31 we proceed with the question of expenses and the timetable for any written submissions.
32 One of the things we will ask for is that the parties who want to make submissions say
33 something about the effect of any Scottish rules that might apply in relation to this.

1 Obviously the Tribunal rules apply as well. We have our own rules in relation to costs. It
2 seems appropriate that we should know at any rate what the position in Scottish law is.

3 MR. HARRIS: Sir, in those circumstances perhaps the way forward is we will seek to reach a
4 consensual timetable, urgent timetable no doubt, and inform the Tribunal. If the Tribunal is
5 minded to adopt or direct otherwise then that could be an approach.

6 THE PRESIDENT: We will probably write to the parties suggesting something along those lines
7 and we may make a formal direction, but ideally we will not have to do that.

8 MR. HARRIS: Yes, Sir, thank you.

9 THE PRESIDENT: Mr. Green, is there anything you would like to add?

10 MR. GREEN: Only in relation to expenses. If the Tribunal is going to issue a direction, can I just
11 reiterate the point that the Tribunal has an open discretion as to how to deal with costs,
12 including in relation to interveners. We are minded to make an application for costs. If the
13 applicants are going to say, "We are impecunious", then we would suggest that they would
14 have to establish means, because our researches indicate that there are some substantial
15 businesses supporting the group. If they simply say, "There is no issue, we will pay
16 whatever the Tribunal considers to be appropriate", then of course we do not need to have
17 evidence. It is simply an irrelevant consideration. If you would give some thought to that
18 in terms of directions I think that would be helpful. It may become a non-issue if they
19 simply say, "Impecuniosity is not something we are praying in aid".

20 THE PRESIDENT: You anticipate an application by your clients?

21 MR. GREEN: We do.

22 THE PRESIDENT: Miss Davies, anything you want to say?

23 MISS DAVIES: Only to reiterate the thanks of the parties to the Tribunal and the Tribunal's
24 staff.

25 THE PRESIDENT: Thank you all very much.
26 _____
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