Neutral citation [2017] CAT 8

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1271-1272/4/12/16

Victoria House
Bloomsbury Place
London WC1A 2EB

24 March 2017

Before:

HODGE MALEK QC

(Chairman)

PROFESSOR COLIN MAYER

WILLIAM ALLAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INTERCONTINENTAL EXCHANGE, INC.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

NASDAQ STOCKHOLM AB

Intervener

RULING (PERMISSION TO APPEAL AND COSTS)

I. INTRODUCTION

1. This Ruling, which adopts the same defined terms as the Tribunal's judgment of 6 March 2017 in these proceedings ([2017] CAT 6) (the "Judgment"), concerns applications by:

   (1) ICE, dated 17 March 2017, for permission to appeal the Judgment to the Court of Appeal;

   (2) the CMA that ICE pay 85% of the CMA's costs of and incidental to both of ICE's applications for review; and

   (3) ICE that the CMA pay 25% of the costs incurred by ICE in respect of the two applications.

2. ICE and the CMA filed their costs applications on 10 March 2017 and written reply submissions on 16 March 2017. The CMA filed written observations on ICE's application for permission to appeal on 22 March 2017. None of the parties requested an oral hearing and in light of the helpful written submissions we have received from the parties, the Tribunal is able to deal with both matters on the papers.

3. The Judgment determined two applications brought by ICE under section 120 of the Act challenging the lawfulness of the Report and the Direction. In the Judgment, the Tribunal dismissed Grounds 1 to 4 of NoA1 but upheld Ground 5 of NoA2 and Ground 1 of NoA2. Given the Tribunal's conclusion in relation to Ground 5 of NoA1 and Ground 1 of NoA2, it did not consider it necessary to determine Grounds 2 and 3 of NoA2.

II. PERMISSION TO APPEAL

4. A judgment of the Tribunal in a case such as this can be challenged under subsections 120(6) to (8) of the Act which provide for appeals to (in this case) the Court of Appeal. Any such appeal requires the permission of the Tribunal or the Court of Appeal and, by virtue of subsection 120(6), must raise a point of law.

5. In considering whether to grant permission when, as in this case, sitting in England and Wales, the Tribunal applies the test set out in Civil Procedure Rules rule 52.3(6):

> "Permission to appeal may be given only where –
> (a) the court considers that the appeal would have a real prospect of success; or
> (b) there is some other compelling reason why the appeal should be heard."

6. ICE seeks permission to appeal the Judgment on three grounds. ICE contends that it has a real prospect of success on each of the three grounds. It does not suggest that there is some other compelling reason for permission to appeal. The proposed grounds of appeal have substantially narrowed down the grounds of which the Decision of the CMA was originally challenged before the Tribunal. Thus, for example, it is no longer suggested that ICE had no incentive to follow a partial foreclosure strategy, its ability to do so not being challenged before the Tribunal. We remind ourselves that the appeal before the Tribunal was one which was on judicial review grounds. We do not consider that our Judgment raises any new point of law which requires clarification by the Court of Appeal.

7. We also bear in the mind the statement of Lord Sumption in *SeaFrance SA v CMA* [2015] UKSC 75 at [44]:

> "This court has recently emphasised the caution which is required before an appellate court can be justified in overturning the economic judgments of an expert tribunal such as the [CMA] and the CAT [...]. This is a particularly important consideration in merger cases, where even with expedited hearings successive appeals are a source of additional uncertainty and delay which is liable to unsettle markets and damage the prospects of the businesses involved […]."

Ground 1: Request in relation to sub-Ground 1(a) of NoA1

8. By its first ground, ICE submits that the Tribunal erred in law in its rejection of ICE's sub-Ground 1(a) of NoA1, which was set out at [156] of the Judgment. This ground of review concerned whether the CMA asked itself the wrong question in considering whether the New Agreement was likely to be signed instead of whether ICE would have become one of Trayport's "normal venue customers". The Tribunal rejected ICE's contention and ruled at [167] that

there is no meaningful difference between, on the one hand, ICE entering into an agreement on terms "materially equivalent" to those actually agreed and, on the other hand, entering into a "normal venue customer" relationship.

9. ICE contends that the Tribunal erred at [167] for four reasons:

(1) It was illogical and irrational to find there was no meaningful difference between entering into an agreement on terms materially equivalent to the New Agreement and entering into an agreement as a normal venue customer.

(2) By accepting there was no meaningful difference between entering into the agreement on the same (or materially equivalent) terms to the New Agreement and entering into an agreement as a normal venue customer, the Tribunal reached a view inconsistent with para 6.30 of the Report where the CMA stated:

> "Importantly, we note that the New Agreement was concluded post-Merger, with Trayport already forming part of the ICE Group. As such, it is unclear that the negotiations would have been successfully concluded in circumstances where funds were not being transferred intra-group and/or if Trayport were under alternative ownership, in the absence of the Merger. We note that even if these discussions had been successfully concluded, absent the Merger, it is uncertain whether the final terms would have been materially equivalent to the terms negotiated in the New Agreement." (emphasis added)

(3) The Tribunal erred in finding at [167] that it was "inherently implausible" that, in the absence of the merger, an agreement on terms not materially equivalent to the New Agreement would have been signed.

(4) The Tribunal erroneously dismissed Ground 1(a) of NoA1 in part because it had upheld the CMA's finding that the New Agreement was merger-specific, but this finding did not address the issue of whether the CMA had asked itself the wrong question when assessing the counterfactual.

10. We do not consider that any of ICE's arguments have a real prospect of success:

(1) ICE argues that it likely would have become a "normal venue customer" without necessarily contracting on terms materially equivalent to the New Agreement. In other words, ICE argues that "normal venue customer" is a

broad category of potential agreements and that agreements the same as (or materially equivalent to) the New Agreement are only a narrow subset of possible agreements within this wider category. The CMA submits, and we agree, that this is an appeal on a matter of fact, which is not susceptible to appeal. ICE's argument would have a prospect of success only if we had ruled that "materially equivalent" was synonymous with the word "similar". However, at [167] the Tribunal accepted Ms Demetriou's argument on behalf of the CMA (which is set out at [162]) that the concept of a "normal venue customer" is meaningless in the abstract. It was instead necessary to look at both the range of products and price paid to assess the normality of the relationship between ICE and Trayport. The concept of "material equivalence" was not therefore used as a synonym for "similar".

(2) ICE argues that at para 6.30 of the Report the CMA drew a distinction between whether an agreement would have been reached and, separately, whether the agreement would have been on terms materially equivalent to the New Agreement and that, having drawn that distinction, the Tribunal cannot conclude that there is "no meaningful distinction" between the two cases. This argument is also flawed. There is no inconsistency in stating that the parties may not have entered into any agreement at all (whether that agreement was materially equivalent or not to the agreement actually entered into) and stating that, if an agreement had been entered into, that agreement may not have been materially equivalent to the agreement actually entered into.

(3) ICE notes that the CMA found that at para 6.30 of the Report it was "unclear" whether an agreement would have been reached in the absence of the merger. According to ICE, the Tribunal erred by inserting its own substantive judgment that it was "inherently implausible" that an agreement not materially equivalent would have been signed. This argument goes nowhere. The Tribunal's point in making the statement referred to was that it had no basis to disturb the CMA's finding, especially in view of the Tribunal's unchallenged conclusion at [137]-

[142] that the CMA reached a rational decision in excluding the New Agreement from the counterfactual.

(4) The Tribunal stated at [170] that "for the reasons stated in paragraphs 167 and 168 we dismiss Ground 1(a)" (emphasis added). The Tribunal found at [168] that it did not need to answer the question whether the CMA's assessment of competitive effects depended on whether or not ICE were in a normal venue relationship. According to ICE "this suggests that the Tribunal dismissed ICE's Ground 1(a) in part because it had upheld the CMA's finding that the New Agreement was merger-specific", which it suggests establishes an inconsistency in the Judgment because the question of whether the New Agreement was merger-specific addresses the question whether the New Agreement itself would have been entered into, not whether the CMA had erred by asking itself the wrong question when assessing the counterfactual. This argument is also misplaced. As noted at [165], the Tribunal accepted that the CMA asked itself whether ICE would have entered into an agreement "materially equivalent" to the New Agreement absent the merger. As elaborated at paragraph 10(2) above, we found that this was no different to asking the question that ICE contends the CMA should have asked, i.e. whether the parties would have entered into a 'normal venue relationship'.

Ground 2: Request in relation to sub-Ground 2(d) of NoA1

11. By its second ground, ICE submits that the Tribunal erred in law in its rejection of ICE's sub-Ground 2(d) of NoA1, which was set out at [277] of the Judgment. This sub-Ground concerns ICE's argument that the CMA erred in failing to consider whether the merged entity would be under a duty not to abuse a dominant position and whether such a duty, if it exists, would deter ICE from pursuing a partial foreclosure strategy. The Tribunal held that: (i) the CMA was under no obligation to find that Trayport held a dominant position ([283]); and (ii) it was inevitable that, even if the CMA considered that the Trayport held a dominant position, the existence of the duty not to abuse a dominant position would have been only a minor consideration and would not have led the CMA

to conclude that ICE had no incentive to implement partial foreclosure strategies ([284]).

12. ICE argues that the Tribunal has conflated its assessment of the CMA's views (which it argues gave rise to a duty to investigate) and the views of the Merging Parties (which did not give rise to such a duty). ICE also argues that the Tribunal was wrong to take into account its views of the effectiveness and timeliness of the duty not to abuse a dominant position as this was "unargued and unevidenced".

13. Our view is that, in circumstances such as the present, where the applicant denies that the merged entity would hold a dominant position, an argument that the CMA should have considered whether the merged entity might nevertheless be deterred by a duty not to abuse a dominant position is hopeless and bound to fail. There was no conflation by the Tribunal of the CMA's and of the Merging Parties' views. The Merging Parties' views are relevant to the question as to whether further investigation is required: where Merging Parties deny that they hold a dominant position, it does not follow that the CMA should go on to conclude that the Merging Parties may be dominant and that the prohibition on abuse of dominance is likely to be effective to deter the implementation of partial foreclosure strategies. The position might be different if the CMA were obliged to rule on whether or not the merged entity would actually hold a dominant position because (subject to successfully appealing the point) the merged entity could not then deny it held a dominant position. However, we have ruled that the CMA was under no such obligation to make such a determination (and this ruling is not challenged by ICE). Our observations regarding the enforcement of the abuse of dominance prohibition merely put our findings into context and do not underpin the rationale of the decision. We therefore do not consider this ground to have a real prospect of success.

14. In its Grounds of Appeal ICE refers to the *General Electric Company v Commission* Case T-210/01, [2005] ECR II-5575 which it suggests establishes a principle "that is also good in English law". However, it must be borne in mind that *General Electric* was a case decided under the "old" EC Merger Regulation (4064/89), where a concentration could be prohibited if it created or

strengthened a dominant position. Dominance was thus a mandatory part of the analysis under that regime, unlike both the current Merger Regulation (139/2004) and the Act. *General Electric* does not, therefore, provide any guidance as to the approach to be adopted where dominance is not established or, *a fortiori*, conceded. Accordingly, we do not consider that this judgment takes ICE any further.

Ground 3: Request in relation to Ground 4(b) of NoA1

15. By its third ground, ICE submits that the Tribunal erred in law in its rejection of ICE's sub-Ground 4(b) of NoA1, which was set out at [333] of the Judgment. Sub-Ground 4(b) concerns the duty, arising under section 172 of the Companies Act 2006, of a director to promote the success of the company for the benefit of its members as a whole. ICE contends that the Tribunal erred in failing to find that the CMA erred in not finding that directors' duties meant that ICE's remedies proposal would be effective.

16. ICE's various arguments regarding the Tribunal's alleged error on this sub-Ground are all contingent on the Tribunal having also erred at [328] of the Judgment in finding that it was inevitable that, even if the remedies proposal established autonomy as ICE alleged, the CMA would still have found the monitoring risk unacceptable and rejected it on this alternative basis. ICE draws attention to *Deutsche Börse / Euronext / London Stock Exchange*[1] in which the CMA accepted a remedy which included provisions regarding board composition, subject to monitoring conditions. Relying on *Deutsche Börse*, ICE contends that it cannot be said that it was inevitable that the proposed remedy would have been rejected by the CMA without an express ruling to that effect.

17. We consider that this Ground of Appeal has no real prospect of success. The Tribunal did not rule that a monitoring provision would never be acceptable. Rather, the Tribunal found that the CMA had applied its mind to the facts of this case and decided that in the circumstances a monitoring provision would entail unacceptable compliance difficulties (see the portions of the Report cited at

[1] Report of the Competition Commission of November 2005.

[327] of the Judgment). The fact that in specific context of another case the CMA had reached a different view is irrelevant. Since ICE has no real prospect of disturbing our finding at [328] we need not consider ICE's detailed arguments further.

III. COSTS

18. Before addressing the costs applications made by ICE and the CMA, it is appropriate to set out some general observations regarding the Tribunal's approach to the questions of costs.

19. The Tribunal's jurisdiction to award costs is governed by rule 104 of the Competition Appeal Tribunal Rules 2015 (S.I. 1648) ("Rule 104" and "the Tribunal Rules". Rule 104 replaced rule 55 of the Competition Appeal Tribunal Rules 2003 (S.I. 1372), but is in materially the same terms as old rule 55. The principles stated in those decisions are of equal relevance to the application of Rule 104.

20. Rule 104 provides insofar as material:

> "(1) For the purposes of these rules "costs" means costs and expenses recoverable before the Senior Courts of England and Wales […]
>
> (2) The Tribunal may at its discretion […] at any stage of the proceedings make any order it thinks fit in relation to the payment of costs in respect of the whole or part of the proceedings.
>
> […]
>
> (4) In making an order under paragraph (2) and determining the amount of costs, the Tribunal may take account of—
>
> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> […]
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount.

> (5) The Tribunal may assess the sum to be paid under any order under paragraph (2) or may direct that it be –
>
> (a) assessed by the President, a chairman or the Registrar; or
>
> (b) dealt with by the detailed assessment of a costs officer of the Senior Courts of England and Wales […]"

21. Rule 104 gives the Tribunal a wide and general discretion in relation to costs: see *Quarmby Construction Co Ltd v OFT* [2012] EWCA Civ 1552 at [12] and [37] and *HCA International Ltd v CMA* [2015] EWCA Civ 492 at [101].

22. As the Tribunal noted at [21] of its ruling on costs in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] CAT 19, the "appropriate starting point in section 120 [of the 2002 Act] applications [is] that a successful party would normally obtain a costs award in its favour". The Tribunal also recognised at [19] that it is "axiomatic that all such starting points are just that [...] and there can be no presumption that a starting point will also be the finishing point. All relevant circumstances of each case will need to be considered if the case is to be dealt with justly."

23. This principle was repeated by the Tribunal at [3] in *FIPO v CMA* [2015] CAT 10:

> "Although the Tribunal has a wide discretion in relation to costs under rule 55, the starting point in these circumstances is an expectation that the losing party should pay the costs of the successful party […]. Although there is no general *rule* to this effect, unlike in Civil Procedure Rules rule [44.2(2)(a)], there are strong reasons relating to fairness as between the parties and the need to promote a properly disciplined approach to complex litigation why the wide discretion as to costs should be exercised in this way, absent good reason being made out to justify a departure from that approach on the facts of an individual case."

24. The Tribunal Rules allow the Tribunal to take into account whether a party has succeeded on part of its case, even if it has not been wholly successful (Rule 104(4)(c)).

25. In *Stagecoach v Competition Commission* ([2010] CAT 20), Stagecoach was awarded 54% of its costs. It had succeeded on the main issue at the hearing, namely its argument that the Competition Commission's ("CC") findings of fact

in relation to what had happened in the 18 months prior to the merger were not supported by the evidence. This supports the general proposition that a party that succeeds on the main issues in the case should be the "net" recipient of a costs award.

26. In *BAA Ltd v Competition Commission* ([2010] CAT 11) BAA had succeeded in its challenge to the CC's report based on apparent bias, and the parts of the report addressing the adverse effects of and remedies for BAA's common ownership of various airports were quashed. Other parts of the CC's report were unaffected, and BAA's other ground of challenge was unsuccessful. The Tribunal's summary of the result at [17] was that "*BAA won on its major ground*". BAA was awarded (1) 75% of its solicitors' costs of dealing with the apparent bias issue; and (2) 60% of counsel's costs, to reflect its success on this part of the case. This case is an example of the Tribunal awarding a share, but not 100%, of costs to the party that has been more successful overall, but has not won on every aspect of its case.

27. In *Barclays Bank plc v Competition Commission* ([2009] CAT 31) Barclays did not succeed on all of its grounds of challenge, and did not obtain the full relief sought: "Barclays achieved the primary objective for which it made its application, namely the quashing of the decision to impose the POSP [point of sale prohibition]": see [12]. The Tribunal ordered the CC to pay 50% of Barclays' costs. This costs ruling also reflects the principle that the party that is on balance successful should receive a partial award of its costs. At [13] the Tribunal stated: "we think it preferable if possible to reflect Barclays' lack of success simply in a proportionate reduction of its costs entitlement, rather than in the combination of such a reduction, and an order that it pay a proportion of the Commission's costs".

28. In *Unichem v OFT* ([2005] CAT 31) the applicant succeeded in persuading the Tribunal that the OFT's decision not to refer an anticipated merger should be quashed. The applicant therefore obtained the relief that it sought, and it was awarded half of its costs.

29. Finally, in *Skyscanner v CMA* ([2014] CAT 19) Skyscanner obtained the relief that it sought, namely the quashing of the Office of Fair Trading's decision to

accept commitments. The amount of costs that it recovered was reduced to 95%, to reflect the fact that one of its three grounds (which took up little time at the hearing) had failed.

The parties' submissions

30. Both the CMA and ICE consider that they should receive a payment from the other in respect of the costs that they have incurred.

31. The CMA seeks an order for ICE to pay 85% of its costs of and incidental to both applications. The CMA's total costs of the proceedings before the Tribunal are approximately £213,000.

32. The CMA submits that it has been overall the more successful party and the appropriate order would be for ICE to pay the majority of the CMA's costs, for the following reasons:

    (1) The CMA was successful on almost all of the issues raised in the applications. In particular, each of the various grounds of challenge to the CMA's decision to require the unwinding of the merger has been rejected. The proceedings were commenced by ICE and the CMA was obliged to spend substantial sums defending them (for the most part, successfully). ICE should be ordered to bear the costs consequences of its decision to bring the applications.

    (2) Although it was not legally necessary to determine Grounds 2 and 3 of NoA2 (Judgment [346]), the Tribunal found that if the unwinding of the New Agreement had been properly reasoned, its view would have been that the CMA "was justified and acted wholly rationally" in deciding that an outright unwinding of the New Agreement was required (Judgment [224]).

    (3) The only issue where the CMA was not fully successful is the question relating to whether the New Agreement should be unwound. Although this accounted in formal terms for two grounds of application (Ground 5 of NoA1 and Ground 1 of NoA2), these were treated as raising an

identical issue. Even on this question, ICE did not succeed completely. The Tribunal remitted to the CMA the question of whether the New Agreement should be unwound, rather than quashing this aspect of the Report as ICE had requested.

33. The CMA contends that the authorities cited at paragraphs 25-27 above support its costs application and that the authorities relied on by ICE at paragraphs 28-29 are not comparable to the present case because they are examples of a successful applicant, which (unlike ICE) has obtained the relief that it sought, being awarded its costs.

34. The CMA submits that its costs should be reduced by 15% to reflect ICE's limited success on the New Agreement issue. The CMA has used the parties' written submissions as a proxy for the amount of time taken up by this issue.

35. The CMA further submits that, since ICE appears to accept that the CMA's costs are proportionate, neither a detailed assessment nor a payment on account appears likely to be necessary; the Tribunal should summarily assess the costs and make the appropriate award for immediate payment.

36. ICE applies for 25% of its costs of the two applications. ICE's total costs set out in its costs schedule amounts to just over £1 million. ICE relies on the following factors in support of its application.

    (1) ICE succeeded in both of its applications. The Report is to be quashed in part and the Direction will be reformulated and reissued. Therefore, the normal starting point is that ICE should receive an award of costs. There is good reason for adopting such an approach: it is fair and it promotes a disciplined approach to complex litigation. As the Tribunal put it in Stagecoach, an award to a partially successful applicant "serves the justice of the case by requiring that [...] the party who successfully challenged the Decision, receive its costs less a material discount" ([2010] CAT 20 at [9]).

    (2) ICE's Ground 5 of NoA1/Ground 1 of NoA2 raised an important point of principle about the proper limits of the CMA's remedial powers. ICE was

correct to point out that the CMA had identified no legal basis for its proposed intrusion into the freedom of ICE and Trayport to contract. The Tribunal also emphasised that the absence of any reasoning in the Decision was a significant defect. The CMA avoided a finding that it had made an error of law because of arguments it elucidated only after the Decision, when it served its Defence and Skeleton Argument.

(3) ICE recognises that it lost on Grounds 1 to 4 of NoA1. It accepts that a "material discount" (to quote *Stagecoach*) in its allowable costs is appropriate to reflect the CMA's success across these grounds. ICE therefore proposes that the Tribunal impose a reduction of 75%.

(4) Whilst the relief granted to ICE as a result of its applications concerns only a small part of the Final Report, Stagecoach was awarded 54% of its total costs having obtained no relief, and Unichem was awarded 50% of its costs having struck down four paragraphs out of 50.

(5) ICE did not succeed in having the SLC finding quashed, but the Tribunal found in *Stagecoach* that this should not affect the issue of costs.

(6) Every case turns on its own facts. However, it is noteworthy that the reduction in recoverable costs proposed by ICE is significantly greater than in the other partial success cases under ss.120 or 179 of the Act (i.e. in addition to *Stagecoach* and *Unichem*), namely *Skyscanner* (reduction to 95%), *BAA* (reduction of 25% of the costs of dealing with apparent bias), and *Barclays* (reduction of 50%).

37. In its reply submissions, ICE also drew the Tribunal's attention to the cases of costs in cases of partial success collated by Fordham, "Judicial Review Handbook", 6th ed., at para 18.1.4. It submitted that these cases make clear that an applicant who wins on one ground is normally awarded costs, subject to a reduction, "even if the great majority of the effort, both in financial and legal terms" concerns grounds on which the applicant lost, citing *R (Essex Country Council) v. Secretary of State for Education* [2012] EWHC 1460 (Admin). In that case the applicant local authority applied for judicial review of a decision of the Secretary of State to reduce the funding for certain childcare, quality and

access projects. The challenge was based on three broad grounds, the third ground being a failure to fulfil equalities duties in considering the impact of the decision. The applicant failed in its first and second grounds but succeeded in its third ground. As a result, the Secretary of State's decision was quashed and was to be retaken, but only insofar as he was to give effect to his equalities duties. At [95] Mitting J ruled:

> "The defendant must pay 50 per cent of the claimant's costs, to be the subject of a detailed assessment if not agreed. I reach that proportionate decision fundamentally for two reasons. First, the claimant has won on a significant ground, a ground which the Secretary of State could have conceded at the outset, but the claimant has lost on the grounds which have taken the great majority of effort, both in financial and legal terms, to advance. In those circumstances, a proportionate order is inevitable and 50 per cent is the best figure at which I can arrive."

The Tribunal's conclusion on costs

38. In our view the 'winner' in the sense of the largely, if not predominantly successful party, in this case is clearly the CMA. ICE's principal challenge to the CMA's decision requiring divestment of Trayport failed in every respect (Grounds 1-4 of NoA1). ICE's challenge regarding the New Agreement was successful (Ground 5 of NoA1 and 1 of NoA2), but this was a challenge to a subsidiary aspect of the Report. This case is not like the 'partial success' situation in *R (Essex Country Council) v. Secretary of State for Education*. In that case the applicant had been partially successful against the entirety of authority's decision (the Secretary of State's decision was quashed and to be retaken insofar as to give effect to the relevant equalities duties). By contrast, this case concerned two distinct decisions, with the applicant being wholly unsuccessful against the main decision, but successful in relation to a separate (but much the less important) decision, albeit the Report contained both decisions.

39. We note that the parties have referred us to a large number of cases on the issue of costs of varying relevance, most of which were very fact-specific. To a large degree the award of costs is a case specific exercise involving the exercise of judicial discretion. Given that facts may vary, earlier decisions may have little relevance to the case in hand. Nevertheless, given our view that the CMA was

the ‘winner’ the various cases cited at paragraphs 25 to 29 above do also lend support to an award of costs in favour of the CMA.

40. In the circumstances, our starting point is therefore that ICE should pay the CMA’s costs. Obviously, ICE’s success on the New Agreement issue should be fairly reflected in a reduction in the amount of the costs award the CMA receives. We accept that whilst a subsidiary issue, the question of whether or not the New Agreement should be unwound was an important issue for ICE. The issue could have been avoided had the ICE taken the prudent step of informing the CMA prior to entering into any such agreement (see Judgment [221] and [223]), but on this ground alone we do not consider that we should refuse to take into ICE’s partial success on the issue in determining costs. We must therefore determine the proportion by which the CMA’s costs should be reduced to reflect ICE’s success in relation to the New Agreement issue.

41. In our view, an appropriate reduction is 40%. This reflects the relative importance of the New Agreement compared to the divestment, the amount of time taken up at the hearing on the issue, the fact that the CMA should not be entitled to its costs on that issue and ICE should be given some credit for the costs it has incurred as well. We note that ICE’s costs are very significantly higher than those of the CMA and had ICE been the successful party in the case its costs would have been the subject of a significant deduction on an assessment. We make no criticism of ICE as to the level of its fees, given the importance of the merger to it and the very helpful and professional way the applications were prepared and presented before the Tribunal. We therefore award the CMA 60% of its costs.

42. We have considered whether or not we should assess the costs ourselves or we should refer the costs for a detailed assessment. Given that we have dealt with the matter in a relatively short hearing and that the CMA has provided a sufficiently detailed schedule of costs which are only around 25% of the costs incurred by ICE we consider that we are in a position to assess the costs ourselves on a summary basis.

43. We have no hesitation in concluding that the costs of the CMA were proportionately and reasonably incurred and those costs are proportionate and reasonable in amount. We will therefore order that ICE do pay the CMA the sum of £127,800 being 60% of the costs set out in the CMA's costs schedule, within 28 days.

IV. CONCLUSION

44. For the reasons set out above, our unanimous decision is that:

(1) Permission to appeal be refused.

(2) ICE to pay the CMA the sum of £127,800 in respect of its costs, such payment to be made within 28 days of the date of this ruling.

Hodge Malek QC William Allan Professor Colin Mayer

Charles Dhanowa OBE, QC
(*Hon*)
Registrar

Date: 24 March 2017